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A Conversation with Judge Jaquith of the United States Court of Appeals for Veterans Claims

March 31, 2022

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Agenda

6:00 p.m.	**Welcome and Introduction** Benjamin Pomerance, Esq. ’13 Hon. Grant C. Jaquith
6:05 p.m.	**Session:** Military service & judging United States Attorney’s Office Service Appointment to Court of Appeals for Veterans Claims History & Role of the Court of Appeals for Veterans Claims Transitioning from advocacy to adjudication Advocacy advice for oral arguments Building a strong record prior to an appeal Use of lay evidence in Veterans’ Law cases Observations from the bench about the trajectory of Veterans’ Law today Benjamin Pomerance, Esq. ’13 Hon. Grant C. Jaquith
7:15 p.m.	**Open Discussion/Questions and Answers** Hon. Grant C. Jaquith
7:30 p.m.	**End of Program** Benjamin Pomerance, Esq. ’13

A Conversation with Judge Jaquith of the United States Court of Appeals for Veterans Claims

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SPEAKER BIOGRPAHIES

HON. GRANT C. JAQUITH was nominated to the United States Court of Appeals for Veterans Claims by the President of the United States on September 19, 2019, confirmed by the United States Senate on July 23, 2020, appointed by the President on September 1, 2020, and took the judicial oath the next day.

Until his judicial appointment, Judge Jaquith had served as the United States Attorney for the Northern District of New York since July 1, 2017, leading the work of 50 lawyers in four offices who prosecuted federal criminal cases and represented the United States in civil litigation. While United States Attorney, Judge Jaquith served as Vice Chair and then Chair of the Servicemembers' and Veterans' Rights Subcommittee of the Attorney General's Advisory Committee. Judge Jaquith became an Assistant U.S. Attorney on August 6, 1989; he served as the NDNY's Narcotics Chief and Chief of the Albany Office from 1998 to 2006, Chief of the Criminal Division from 2006 to 2010, and First Assistant U.S. Attorney from 2010 to 2017. In 2016, Judge Jaquith was honored by the Department of Justice with a national Director's Award for Executive Achievement.

Judge Jaquith was commissioned in the U.S. Army in 1979 and served in the Army Judge Advocate General's Corps from 1982 to 2011, rising to the rank of Colonel in 2004. His military awards include the Legion of Merit. Judge Jaquith was an Army circuit judge from 2001 to 2010, presiding over courts-martial at forts throughout the continental United States and in Alaska, Germany, and Korea. In 2006, he was activated to serve as the trial judge at Fort Bragg, North Carolina. Judge Jaquith's other military assignments, including active duty from 1982 to 1988, involved advising commanders and staff on legal aspects of disciplinary actions and command administration and operations; providing legal assistance to soldiers, veterans, and their families; settling civil claims; providing instruction on legal issues; litigating at administrative boards; and prosecuting criminal cases.

Judge Jaquith received his Juris Doctor from the University of Florida College of Law in 1982 and a Bachelor of Science (cum laude) in business administration and accounting from Presbyterian College, Clinton, South Carolina, in 1979, from which he was a Distinguished Military Graduate

BENJAMIN POMERANCE, ESQ., is the Deputy Director for Program Development & Training for the New York State Division of Veterans' Services. In this role, he leads the agency's Training Unit, supervises the agency's Appellate Unit, serves as the Deputy General Counsel for the agency, and oversees multiple programmatic initiatives, including working with law schools across New York State to amplify their Veterans-focused experiential learning programs focusing on meeting Veterans' legal needs. His

work focuses on advocacy and assistance for Veterans, Service Members, and Military Families on a wide range of federal and state issues.

Law schools across the country have published Benjamin's articles on topics ranging from elder law to the federal judiciary to freedom of speech in post-revolutionary governments, as well as a wide range of Veterans' Law issues. A chapter on Veterans Treatment Courts that he co-authored appeared in a book published in December 2019 about the intersections between Veterans' Law and mental health services, edited by leading academics from Harvard and Yale. His speaking engagements have included panel discussions at multiple Law & Society Association international conferences, as well as the National Association of Consumer Advocates Conference, the Academy of Criminal Justice Services Conference, the International Elder Law & Policy Conference, and the International Conference on Contracts. He has facilitated numerous programs in every region of New York State regarding benefits, programs, and services for Veterans and Military Families. He also teaches a three-credit course at Albany Law School on the subject of Veterans' Law, the first course focusing on this practice area in the school's history.

Benjamin graduated as the salutatorian of his class from Albany Law School in 2013. While at Albany Law School, he founded and directed the law school's Veterans' Rights Pro Bono Project, for which he received the President's Pro Bono Service Award from the New York State Bar Association. He served as the Executive Editor for Symposium for the Albany Law Review, led the school's student chapter of the National Academy of Elder Law Attorneys, and published a report about human rights concerns confronting America's aging prison population as an Edgar & Margaret Sandman Fellow with the Government Law Center.

REMARK: A NEW CHAPTER IN VETERANS LAW

April, 2021

Reporter
70 Am. U.L. Rev. 1257 *

Length: 9130 words

Author: THE HONORABLE MARGARET BARTLEY *

* Chief Judge, U.S. Court of Appeals for Veterans Claims (CAVC). Prior to serving on the Court, Judge Bartley was an advocate for veterans and their families, starting as a student attorney at the American University Washington College of Law (WCL), from which she graduated with honors. Her advocacy included testifying before Congress on veterans' preference laws and serving in a variety of roles, including as a law clerk for Judge Jonathan R. Steinberg of CAVC, a staff and senior staff attorney for the National Veterans Legal Services Program (NVLSP), the editor of NVLSP's quarterly publication The Veterans Advocate, and director of outreach and education for the Veterans Consortium Pro Bono Program. In June 2011, President Barack Obama nominated Judge Bartley to serve on CAVC. Judge Bartley took her seat on June 28, 2012 and became Chief Judge of the Court on December 4, 2019. Judge Bartley would like to thank Daniel DiLuccia (J.D., American University Washington College of Law, 2010), Executive Attorney at the U.S. Court of Appeals for Veterans Claims, for his valuable assistance researching and editing these Symposium remarks.

Highlight

Chief Judge Bartley delivered these remarks on October 2, 2020 at the American University Law Review's *thirty-fifth annual Federal Circuit Symposium. The remarks have been minimally edited based on the event transcript.*

Text

[*1257] It's my honor and my pleasure to be here with all of you today. I really appreciate the kind introduction. One thing I want to do first is add a bit more information about my background, because I know that there are *American University Washington College of Law* (*WCL*) students on board here today, as well as practitioners and members of the Federal Circuit Bar, and I'm going to try and hit some notes that all of you will appreciate. I'll go into a bit of detail about the veterans benefits claims **[*1258]** process that veterans are faced with, just in case listeners don't know much about it, and I'll then review two up-and-coming areas of veterans benefits law that will impact decisions by the U.S. Court of Appeals for Veterans Claims (CAVC, "Veterans Court," or "Court").

I got into veterans law, here at *WCL*, before I graduated from law school. I was part of the public interest law clinic, run at the time by Professor Susan Bennett, who now runs the *WCL* Community and Economic Development Law Clinic. She was a mentor in my last years of law school. I really benefited fromworking with her. The public interest law clinic, where I represented two veterans, was also run by Professor Nancy Polikoff, who I understand is now a Professor of Law Emerita.

I also was a research assistant for Professor Polikoff for a year. That was an amazing experience because, for those of you who might know her, she's very rigorous, dedicated, and energetic, and she was also a mentor to me. So, I want to acknowledge

that I got my start in this area of law handling veterans benefits cases at *WCL* through the clinic--and that, as to those two professors, I was lucky enough to be around, observe, and learn from them.

I was not lucky enough to have Professor Andy Popper, who will be moderating the question-and-answer portion of today's event, as a professor. I was taught administrative law by Professor Thomas Sargentich, who I believe has since passed away. But at any rate, *WCL* really gifted me. I'm not just saying this because the *Law Review* asked me to be a speaker here today; *WCL* gifted me by exposing me to professors who were dedicated to the areas of law that they were involved in. The public interest law clinic at *WCL* served as a good opportunity to learn the basics of veterans law. During the clinic experience, I represented two veterans before the Board of Veterans' Appeals (Board), which is part of VA. I also had a case, with Susan Bennett as my supervising attorney, at the Veterans Court, where I'm now the Chief Judge.

Both of those clinic cases were very enlightening. I participated in a Board hearing. I submitted briefs at the Veterans Court. I also interviewed one of the veterans in person, got to know him, and counseled him on legalmatters. That was a whole new experience forme. I was, at that time, a third-year part-time law student, so those were very valuable experiences. I understand that *WCL* is still known for its clinics, and that reputation is well-deserved. At that time, needless to say, the clinic was an amazing opportunity for me and something I've always been very thankful for.

[*1259] I'm hoping that some of you who are students will be interested enough in what I have to say to take administrative law, if you haven't already, and pursue the area of veterans law. Those of you who are already attorneys and haven't handled a veterans case, I would encourage you to do so. The Veterans Court passes federal funding through to the Veterans Consortium Pro Bono Program, [1]an organization for which I served as training director for many years. That programis always looking for lawyers who are interested in handling cases pro bono at the Veterans Court. So, a little plug there for them. I hope you'll be inspired by what I have to say--or maybe if not inspired, then plain-old interested--and pursue this further on your own.

One other thing I want to mention about my WCL experience is that both of my clinic cases were successful. Because of that success, I was lucky enough to be able to clerk for the judge who handled one of my clinic cases. I applied to all of the judges at the Veterans Court during my last year of law school and basically immediately got the job--which was thrilling because, like many law students, I wasn't sure I would be able to get a job right out of law school, and that's always a worry for law students.

Stacey-Rae Simcox, who teaches at the *Stetson University College of Law* veterans clinic, called veterans law the "Wild West" in a 2019 law review article that your materials reference. [2]And it is the Wild West! Even now, there are only thirty-three volumes of veterans law cases. In the early 1990s, when I first started working in the area, and when I handled a case through the *WCL* public interest law clinic, there were only at most three, maybe two, volumes of veterans law cases.

And so, as you can imagine, sometimes there wasn't a lot of case law to cite to when making an argument. I think that the early practitioners had a lot of fun because they would cite directly to the previously uninterpreted regulation; there was no case law that had interpreted **[*1260]** these statutes and regulations before. It really was very exciting. But even now, with a little over thirty years of veterans law published in West's Veterans Appeals Reporter, and on Westlaw and Lexis, it's exciting. There is still a lot of territory in veterans law that is unexplored, and good advocacy on both sides helps to further our jurisprudence. It's an exciting area of law, even though it is not quite as wide open for advocacy as it once was.

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[1] *See* Angela Drake & Stacey Nicks, *Perspectives on the Veterans Clinic Model at Law Schools: Lessons Learned by an Instructor and a Student*, 45 U. MEM. L. REV. 943, 951 (2015) (describing the Veterans Consortium Pro Bono Program's connection with the CAVC); What We Do, VETERANS CONSORTIUM PRO BONO PROGRAM, https://www.vetsprobono.org/about/item.8161-What_We_Do [https://perma.cc/Z9RE-QCXS] (explaining how federal funding is used to help litigants).

[2] Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 KAN. L. REV. 513, 513-14 (2019) ("The analogy of the Wild West is sometimes used amongst veterans law practitioners and professors . . . to describe [veterans law's] fresh expanse, often devoid of legal precedent, built on shifting ground, and offering a landscape where a true pioneer can both make an impact and see measurable success.").

I took a little detour there; I'll now return to discussing my experience before highlighting some important areas in veterans law. After law school, I was lucky enough to clerk for Judge Jonathan Steinberg. Then, I immediately was hired as a staff attorney at the National Veterans Legal Services Program (NVLSP). After working at NVLSP for eighteen years in various capacities and also being affiliated with the Veterans Consortium, I was nominated and then appointed to the bench. I've been on the bench for eight-and-a-half years now, and in December I'll close up my first year as Chief Judge.

I now want to address two very different areas that are up-and-coming in veterans law--actually, they're already upon us--and generating a lot of very interesting cases. Before I do that, though, I'll explain how the VA claims process is set up. When a veteran files a claim, the case will be decided by the local VA Regional Office. [3]If the veteran is not happy with the decision, he or she will appeal it to the Board of Veterans' Appeals. [4]That's the highest administrative appellate level of VA.

If the veteran is not happy with that decision, he or she can appeal to the Veterans Court. [5]And if the veteran isn't happy with the Veterans Court decision, or if VA is unhappy with the Veterans Court decision, either party can appeal our decision to the Federal Circuit. [6]So we are one of the five areas of law under the Federal Circuit's subject matter jurisdiction. [7]Of course, as you may know, the Federal Circuit's review authority is fairly limited as to veterans benefits cases. The Federal Circuit has authority over constitutional issues and doesn't have authority **[*1261]** to review factual findings or application of law to fact. [8]But they can look at our rules of law--how we interpret statutes and regulations. [9]

Because the Federal Circuit has fairly limited review power, the court dismisses many, many of our cases. The veteran often appeals without counsel and tries to get the Federal Circuit to look at factual matters or the application of law to fact. The Federal Circuit, in my view, has been very helpful in veterans law. There have been some chief judges and other judges on the Veterans Court who have spoken against Federal Circuit review of veterans benefits decisions, arguing that our decisions should be reviewable directly by the Supreme Court via a petition for writ of certiorari. [10]

Specifically, the Federal Circuit has been extremely helpful, as has the Veterans Court, in defining the parameters of veterans benefits law. It's been a very valuable thing, I think, to have the Federal Circuit review our decisions.

Some scholars have said that this setup, with the Federal Circuit reviewing Veterans Court decisions, makes things confusing, [11]because who's the lawgiver? Is it the Federal Circuit? Is it the Veterans Court? In my opinion, that is a semantic or academic issue with having the Federal Circuit review our decisions. Obviously, the Veterans Court is the lawgiver for the most part, and in those few instances where the Federal Circuit reviews our decisions and comes to a different conclusion, the Federal Circuit becomes the lawgiver, so to speak. As I said, veterans in general have benefited by having the Federal Circuit review our cases. To me, that's what's really important.

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3 U.S. DEP'T VETERANS AFFS., HOWDO I APPEAL? 4 (2015).

4 *Id.* at 2, 7.

5 *38 U.S.C. §§ 7252*, *7266*.

6 *Id.* § 7292.

7 Timothy B. Dyk, *Federal Circuit Jurisdiction: Looking Back and Thinking Forward*, *67 AM. U. L. REV. 971, 971-74, 976, 981 (2018)*.

8 *38 U.S.C. § 7292(d)(2)*.

9 *Id.* § 7292(d)(1).

10 Judge Bruce E. Kasold, Remarks at the U.S. Court of Appeals for Veterans Claims Twelfth Judicial Conference, 27 Vet. App. XV, XXIII-XXIV (Apr. 18, 2013).

11 *See, e.g.*, 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, 524 (2007)*.

For example, the Veterans Court early on in the 1990s decided that equitable tolling did not apply in any circumstance to a veteran who filed a late appeal to our Court. [12]The Federal Circuit in the mid-to-late 1990s set us on a different path when they said yes, equitable tolling does apply to veterans who file late appeals with the Veterans Court. [13] **[*1262]** That was very valuable for veterans. Does this appellate system have its downsides? Yes, it does. But I think in general the appeal structure has been helpful to veterans and to the system overall.

I want to move on to two topics in veterans benefits law that are hot at the Veterans Court right now. One is the Appeals Modernization Act [14](AMA) that took effect in February 2019. It was basically a complete overhaul of the VA claims process before the agency.

The other hot topic is the Veterans Court's venture into class actions, which has been underway for only a few years. The Veterans Court back in the early 1990s said that because of prudential measures it would not entertain class actions. [15]The Federal Circuit many, many years later, in a 2017 case called *Monk v. Shulkin*, [16]set the Veterans Court down a different path and encouraged our foray into that area. [17]The Federal Circuit sent the case back to us to decide whether Mr. Monk's class should be certified. [18]I'll get into that case in a minute.

But first, returning to the AMA, which took effect in February 2019 as I said, it's essentially a new procedure for handling and processing veterans claims before VA. [19]What led to passage of this law, funnily enough, are the special procedures that were in place to help veterans, to give them due process and to assist them. As we all know, or as some of you might know, giving full process and assistance can be time-consuming.

The older system that VA was under for many years, and that was in effect for almost all of the Veterans Court's history, required VA at every step of a fairly lengthy appeals procedure to give assistance to the veteran; to interpret the veteran's claim broadly, instead of narrowly; to sympathetically read all of a veteran's pleadings; and to accept new evidence throughout the appeal process. And as I said, that arguably led to some delay in the system.

Unless you had all the necessary evidence up front, or your case was very straightforward, it could easily take years to resolve a veteran's claim. Throughout the time I practiced, it was not unusual for a claim **[*1263]** to take, for example, six years to be resolved. Resolution of veterans claims generally involved a number of remands from the Board of Veterans' Appeals. Again, that's the higher appellate body within VA. Remands could also come from our Court, which is the independent Article I court above the Board, where Board decisions are appealed. The process was generally lengthy and that was, rightly or wrongly,

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12 *See* Dudley v. Derwinski, 2 Vet. App. 602, 603 (1992) (en banc).

13 *See* Bailey v. West, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc), *overruled by* Henderson v. Shinseki, 589 F.3d 1201, 1203 (Fed. Cir. 2009) (en banc), *rev'd sub nom.* Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428 (2011).

14 Veterans Appeals Improvement and Modernization Act of 2017, ***Pub. L. No. 115-55***, ***131 Stat. 1105*** (2017).

15 *See* Harrison v. Derwinski, 1 Vet. App. 438, 438 (1991) (en banc) (per curiam) (finding that the Court of Veterans Appeals lacked the power to adopt a rule for class actions; that "such a procedure . . . would be highly unmanageable;" and that class actions were "unnecessary" because of the Court's ability to establish precedent).

16 855 F.3d 1312 (Fed. Cir. 2017).

17 Id. at 1320-21.

18 Id. at 1322.

19 Veterans Appeals Improvement and Modernization Act, ***131 Stat. 1105***.

many times attributed to the assistance, notice, and process that VA was obligated to give veterans. [20]And, of course, it was partly due to VA errors and delays.,

Another factor that made this process fairly lengthy was that a veteran could add evidence at every step of the way, really, until right before the Board made its decision. So, veterans were obtaining medical opinions and adding them throughout the claim and appeal process, and the process could take several years down below at VA, with veterans continually adding evidence during that time.

Any delay in processing claims is undesirable, but the actual processes--like giving notice, assisting veterans with getting their records, providing medical opinions and other help that was extended to veterans--is exceedingly valuable. The new AMA is intended to streamline and make things faster for veterans who have less complex cases, veterans who do not need VA assistance. Under the AMA, there are lanes that are faster and others that give a veteran a bit more process, although not quite to the same extent as the legacy system. [21]So, the idea of a veteran choosing one of several lanes for his or her claim, conducive to the amount of VA assistance he or she needs, is a linchpin of this new AMA system.

The reason I am talking about the AMA is that it promises to result in a lot of cases before our Court. We are already seeing appeals with issues related to these new provisions. Many VA-related statutes and regulations were essentially completely rewritten.

So, it is a new chapter. Challenges to these new provisions, statutes, and regulations are percolating up through the VA system, since it has been a year-and-a-half now since the new process started. These **[*1264]** challenges are now making their way to our Court, and our judges are being faced with how to interpret the AMA. It is not an easy thing.

But one point I want to make here is that although the processes and the handling of appeals has changed, the statutes and regulations that govern entitlement to benefits have not. I was asked to speak approximately two years ago at a Veterans Day celebration at a law school in the Midwest, and the theme of that event was what impact the AMA was going to have on veterans. Well, as I just described, the AMA will probably allow many veterans to get quicker decisions, especially if the claims are very straightforward. That is a good impact.

But the AMA only affects process. It does not affect entitlement to veterans benefits per se. And it cannot fix VA's difficulties in making accurate benefits decisions.

The decisions that VA makes on veterans appeals generally are very medically intensive. VA requires medical opinions to decide entitlement to benefits. Typical questions that VA adjudicates are: Is this veteran's knee condition due to service? If so, how disabling is it now? What are the veteran's symptoms and can we line them up with the rating schedule that VA has published? [22]

Most times, adjudicating those issues requires specialized medical opinions. Those medical opinions, and the veteran's lay statements about what happened in service and about the severity of a disability, are the things that win or lose a claim. Did the veteran receive a thorough medical examination and opinion? If yes, then the veteran is more likely to have the information necessary to succeed with the claim. If not, then the veteran may lack sufficient information to ensure success.

So although the structure of the claims process has changed because of the AMA, the law about how to interpret medical opinions--what is an adequate medical opinion, what a medical opinion must include, and what paces the Board of Veterans' Appeals must go through with regard to assessing medical opinions--that has not changed. And I did get a little testy, I have to say, at that Veterans Day event--because it seemed as though everyone was thinking that the AMA was going to be a cure-all.

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[20] *See VA's Appeals Modernization Act Takes Effect Today: New Law Streamlines Department's Current Claims and Appeals Process for Veterans*, U.S. DEP'T OF VETERANS AFFS. (Feb. 19, 2019, 12:55 PM), *https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5207* [*https://perma.cc/54KF-WHJ2*] (discussing the VA's goal to complete appeals reviews between 125 and 365 days).

[21] *See id.* (discussing the AMA's new streamlined processes for appealing claims decisions).

[22] *See* 38 C.F.R. pt. 4.

Since the AMA, for example, doesn't ensure that veterans receive thorough medical examinations and opinions, nor does it promise to affect the VA error rate, I do not believe it will change everything for **[*1265]** the better. Will veterans receive quicker decisions? Yes. But VA needs to properly provide and analyze medical examinations and opinions. Whenever VA provides a veteran with a medical opinion, which it is obligated to do in very many cases, it has to do it fairly and analyze that opinion carefully.

I personally believe that VA has to do a better job deciding issues unrelated to procedure, and I think the statistics bear me out. Those issues are things that VA still has many problems with, and they are going to remain untouched by the procedure changes related to the AMA.

Let me just give you a sampling of some of the issues that we either have already seen, or anticipate seeing in the next six months to a year, related to the AMA. How is VA going to handle two claims when they are inextricably intertwined or when one issue, a secondary issue, is reasonably raised from the first claim? Under the AMA and related rules, VA put in place very strict procedures about filing a claim, which were formerly very liberal and loose and allowed claims to be reasonably raised. [23]It is unclear how this new format, which requires a formal application, is going to mesh with the case law on interpreting veterans' claims very sympathetically.

Another issue is what happens when a veteran chooses a different claims processing lane for one of two claims that are closely aligned, like a veteran's claim for an increase in his or her disability evaluation that is very closely intertwined with a request for total disability evaluation based on individual unemployability. Are both of those intertwined issues in the same lane, or could they possibly be in different lanes? We are already seeing some of these issues.

Another example is whether an appellant can submit additional argument and evidence on remand. Formerly, under the pre-AMA process, there was case law holding that a veteran could generally submit additional argument and evidence on remand, but now there may be more restrictions depending on the veteran's appeal lane. We are already seeing cases related to that issue.

Anyway, it is a very exciting time at the Veterans Court. As I mentioned, we still face issues with how VA treats entitlement questions, as well as these new procedurally focused questions. Given all of this, the judges at the Court are very excited about our responsibilities in the area. Of course, the practitioners before the Court are excited as well.

[*1266] Before we get to some questions, let me address the other issue that I mentioned as one of our hot button issues of the last few years. That is, the Veterans Court is now entertaining class actions. In 2019, the Veterans Court certified its first class action case, in *Godsey v. Wilkie*. [24]We certified a class, modified slightly from the class that counsel had requested, and granted the class relief. [25]VA was very quick, I have to say, to implement our decision and give relief to veterans who essentially had appealed and just waited in line with VA doing nothing for 18 months or more.

Right now, we have seven class actions on the Veterans Court's docket. I think that counsel for VA and counsel for veterans probably will continue into the future keeping the Federal Circuit very busy with appeals related to our class action authority and decision-making. In

the next month or two, definitely before the end of 2020, the Veterans Court is going to issue practice and procedure rules relating to class actions in our Court, that will be somewhat similar to *Rule 23 of the Federal Rules of Civil Procedure.*

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[23] *See, e.g.*, *Bailey v. Wilkie, No. 19-2661, 2021 WL 45679, at *7 (Vet. App. Jan. 6, 2021)* (describing VA's informal claims process before March 2015).

[24] *31 Vet. App. 207, 214 (2019)* (per curiam).

[25] *Id. at 221-22, 225, 230*.

[26]For the class actions that we've entertained so far, we've used Rule 23 as guidance. We have worked long and hard for about two years now to come up with rules relating to class actions.

Because we are certifying and hearing these class actions in an appellate context, not in a trial court context, our processes are different from the way things generally work for class actions. We, working with our Rules Advisory Committee, had to adapt some of the usual processes. At any rate, as I said, appeals of our class action decisions are probably going to keep the Federal Circuit very busy. The judges of our Court have had various disagreements, such as whether we can hear a class action only in the context of a petition for extraordinary relief, or whether we can hear a class action in an appeal context--that's one example--and if we can hear them in an appeal context, what classes of veterans could be included.

In *Skaar v. Wilkie*, [27]the veteran was trying to form a class that included veterans who didn't have appealable Board decisions. [28]And **[*1267]** we are facing a lot of other class certification issues that may travel up to the Federal Circuit. I just wanted to mention a few more things about that. In *Godsey*, we certified a class and granted relief. [29]We also certified a class and granted relief in *Wolfe v. Wilkie*, [30]a class action that arose from *Staab v. Shulkin*, [31]a case you might have heard of because it has received a lot of press and affects many, many veterans. [32]

Staab is about reimbursement of non-VA medical expenses and whether VA interpreted a statute correctly. [33]A secondary issue later arose in *Wolfe v. Wilkie*, as to whether VA tried to get around the *Staab* decision. [34]So that's been and continues to be the focus of some press, and the parties have come up with a plan for relief that I believe they are trying to implement.

The class action field in our appellate court really does leave advocates free to, if they can, try to put together a certifiable class and then get widespread relief for a whole group of veterans simultaneously. This is something that, until the Federal Circuit's *Monk v. Shulkin* decision in 2017, was not possible. [35]And so that possibility for class relief provides a potential great benefit to veterans and will be very helpful to them, used appropriately in accordance with our upcoming rules. [36]In conclusion, I hope this talk gives you a taste of the issues that we are encountering now and that we are going to continue to encounter.

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[26] The Court subsequently issued its class action rules in November 2020. *See* Vet. App. R. 22 (filing a request for class certification and class action); Vet. App. R. 23 (action on a request for class certification and class action).

[27] *32 Vet. App. 156 (2019)* (en banc).

[28] *Id. at 179-80*.

[29] *Godsey, 31 Vet. App. at 225*.

[30] *32 Vet. App. 1 (2019)*.

[31] *Wolfe, 32 Vet. App. 1 (2019)*; *Staab v. McDonald, 28 Vet. App. 50 (2016)*, *appeal dismissed sub nom.* Staab v. Shulkin, No. 16-2671, 2017 WL 4317175, at *1 (Fed. Cir. July 17, 2017).

[32] *See, e.g.*, Courtney Kube et al., *Court Rules VA Must Pay for Veterans' Emergency Room Care, a Decision that May Be Worth Billions*, NBC NEWS (Sept. 10, 2019, 7:00 PM), *https://www.nbcnews.com/news/veterans/court-rules-va-must-pay-veterans-emergency-room-care-decision-n1052131*.

[33] *Staab, 28 Vet. App. at 51*.

[34] *Wolfe, 32 Vet. App. 11-12*.

[35] *Monk v. Shulkin, 855 F.3d 1312, 1320-21 (Fed. Cir. 2017)*.

[36] *See supra* note 26.

I am going to close now and see if people have questions. Again, I would encourage you to get to know veterans law. There is a lot happening in our area, and it is like the Wild West still, even though the Court is thirty years old. There is much uncovered ground and many exciting developments. Thank you for inviting me to speak to students, practitioners, and academics about this vibrant area of law that falls under Federal Circuit review.

End of Document

ARTICLE: Thirty Years of Veterans Law: Welcome to the Wild West

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Highlight

"Sometimes it isn't being fast that counts, or even accurate; but willing." [1]

John Wayne

Text

[*513] I. INTRODUCTION

The rise of veterans issues in our local communities since the Global War on Terrorism began in 2001 has seen the phrase "veterans law" grow and surge in a number of different aspects. The term "veterans law" is a relatively recent term in jurisprudence and, over the past decade, has evolved into many different meanings. Among other things, the term could refer to the law issued from the federal appellate court deciding veterans' claims for benefits from the Department of Veterans Affairs (VA). [2] "Veterans law" could also be used to discuss the litigation and legislation regarding the types of discharges veterans face and the implications of these discharges when seeking benefits.

In 1988, when Congress created a new federal appellate court whose sole purpose was to provide oversight to decisions made by the VA, it was the first time that judicial oversight was specifically applied to veterans' claims. As Chief Judge Frank Q.

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[1] John Wayne Enterprises, LLC, *John Wayne Legacy Quotes*, *https://johnwayne.com/quotes* [*https://perma.cc/TX2S-PUKL*] (last visited Nov. 18, 2018).

[2] Stacey-Rae Simcox & John Paul Cimino, *§ 6.03 Sources of Veterans Law*, *in* SERVICEMEMBER AND VETERANS RIGHTS (Brian Clauss & Stacey-Rae Simcox eds., 2017); *id. § 6.04(2) Basic Eligibility Issues*.

Nebeker, the first Chief Judge of the new court phrased the issue, "For the first time, the court **[*514]** brought the principle of stare decisis to the veterans' community." [3] As this court, the United States Court of Appeals for Veterans Claims (CAVC), turned thirty in 2018, it seems an appropriate time to consider the landscape of veterans law since the last articles considering this broad issue were published a decade ago for the twentieth anniversary of the court.

In this past decade, veterans law issues have seen huge growth and public awareness with infusions of new practitioners, new issues of law being decided by the courts, new major Congressional legislation for the first time in decades, and veterans law issues in the news and mainstream culture. Many experienced practitioners in this area are astounded by the movement in this area of law in the past few years, yet they would also note that this movement has been a long time coming. To compare the practice of veterans law to a train gathering momentum as it moves along the tracks would be appropriate. However, another apt comparison is to the undeveloped legal system of old movies in which John Wayne implements justice in a wild and untamed land. The analogy of the Wild West is sometimes used amongst veterans law practitioners and professors who teach in this area to describe its fresh expanse, often devoid of legal precedent, built on shifting ground, and offering a landscape where a true pioneer can both make an impact and see measurable success.

This Article is intended as an overview of three major advancements in veterans law in the past decade: major changes in federal court case law regarding veterans benefits through the prism of the thirtieth anniversary of the CAVC, the most sweeping legislative changes to appeals of veterans benefits decisions in the past thirty years, and the new push to force the Department of Defense to equitably administer the discharges of veterans with post-traumatic stress disorder and traumatic brain injuries. To accomplish this review, Part II will look at the CAVC and its evolution, particularly in the past decade. By examining the roots of the court's creation, the impact it has had and will continue to have on veterans law becomes a richer discussion, particularly as one recognizes that the CAVC is on the burgeoning frontier of veterans benefits jurisprudence. Part III will consider the impact of new legislation shaped during President Obama's administration and signed into law by President Trump in 2017, marking the first major overhaul in the way the VA processes claims since the creation of the CAVC thirty years ago. **[*515]** Part IV will discuss the growing investigation, litigation, and legislative pushes on behalf of veterans whose discharges from military service are characterized in a way that prevents them from re-entering civilian life successfully and seeking medical treatment or benefits related to their service. Part V will offer some thoughts on the future of veterans law in the next decade and things to watch for as it continues to expand and evolve.

Although any one of these topics could serve as an article in itself, the purpose of this Article is to give a broader overview of efforts to work within the law to make changes for our nation's veterans in the past decade. The reason for writing this Article is to give veterans, attorneys, judges, and law students reason to be excited about the real opportunities available to make a difference on a large scale--opportunities that become rarer and rarer in other areas of law where jurisprudence has been established for decades. The examples discussed in this article are just that--examples. So much more can and will be done by those who are motivated. With that, welcome to the Wild West where you can be a true pioneer!

II. THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS (CAVC) TURNS THIRTY AND SAILS INTO "UNCHARTED WATERS."

On November 18, 1988, President Ronald Reagan signed the Veterans' Judicial Review Act (VJRA or "the Act") into law. [4] Title III of this Act created the CAVC. [5] Prior to the establishment of the CAVC, the VA operated as a two-tiered administrative system for adjudicating veterans' [6] claims for the various benefits offered to them by the agency. These benefits include pensions, education funds, disability compensation, guaranteed home loans, and more. [7] As before the Act's passage,

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[3] Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits*, 46 ME. L. REV. 5, 5 (1994).

[4] *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, ***102 Stat. 4105 (1988).***

[5] §§ 301-303, ***102 Stat. at 4113-22.***

[6] The term veteran is used in this article to describe the type of claimant seeking benefits from the VA. While other claimants are permitted, for instance dependent children and widowed spouses, veterans are the overwhelming majority of applicants for benefits and thus that term is used throughout.

the first level of adjudication of a claim occurs at the agency of original jurisdiction, referred to as the VA Regional Office (VARO). [8] The VARO issues a decision on the veteran's claim and if the veteran **[*516]** does not agree with the decision, the veteran can file an appeal to the agency termed a Notice of Disagreement. [9] In response to the Notice of Disagreement, the VARO issues a Statement of the Case, which is a more in-depth explanation of the VARO's decision. [10] Veterans dissatisfied with the ultimate decision of the VARO after receiving a Statement of the Case can appeal to the Board of Veterans' Appeals (BVA or "the Board") by filing what is referred to as a VA Form 9. [11] The Board is part of the VA and ultimately answers to the Secretary of the VA. [12] Before 1988, veterans could file a request for reconsideration with the Board if they were unhappy with the Board's decision, but further appellate review by another body was precluded. [13]

Noticeably absent in the appeals process for veterans prior to the Act's passage was any independent judiciary review. [14] Before the VJRA specifically created judicial review of the VA, the Federal Circuit noted that "the VA stood 'in "splendid isolation as the single federal administrative agency whose major functions were explicitly insulated from judicial review."'" [15] Conversations about creating judicial review of the VA began in Congress in 1952. [16] From then until 1988, there was dispute about whether there should be any judicial review of the VA decision-making process. [17] Before being appointed as a judge on the CAVC's bench in 2003, Lawrence B. Hagel was the Deputy General **[*517]** Counsel for the Paralyzed Veterans of America. [18] In 1994, five years after the passage of the VJRA, then-Deputy General Counsel Hagel co-authored an article that observed "[t]here is complete unanimity of opinion on few issues affecting the veterans community. Judicial review is an

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[7] *Veterans Benefits Administration, About VBA*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/benefits/about.asp [https://perma.cc/U5J5-ZL42] (last visited Nov. 18, 2018).

[8] *See* 38 U.S.C. §§ 5107, 5110(a) (2012); 38 C.F.R. § 19.24 (2016).

[9] *See* 38 U.S.C. § 7105(b)(1). It is important to remember that this system has been radically altered by Congress with the passage of the Appeals Modernization Act discussed in Section III of this article. This original system of appealing VA decisions, referred to as the "legacy system," was the system in place at the time of the VJRA's passage and will continue to exist alongside the new Appeals Modernization Act until all appeals in the legacy system are complete. Right now there are several hundred thousand of these legacy appeals.

[10] 38 C.F.R. §§ 19.26(d), 19.29 (2016).

[11] 38 U.S.C. § 7105(d)(3).

[12] 38 U.S.C. § 7101(a).

[13] 38 U.S.C. § 211(a) (1988) (current version at 38 U.S.C. § 511(a) (2012)).

[14] *Id.*

[15] Gardner v. Brown, 5 F.3d 1456, 1463 (1993) (citing H.R. REP. NO. 100-963, at 10 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5791). The provisions of 38 U.S.C. § 211(a) (1970) read as follows:

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

Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 790.

[16] Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 44 (1994).

[17] Id. at 45.

[18] *Judge Lawrence B. Hagel*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, http://www.uscourts.cavc.gov/hagel.php [https://perma.cc/5ZDQ-CPSC] (last visited Jan. 24, 2019).

example." [19] Reviewing some of the arguments for and against judicial review helps to give context for issues only now being seriously addressed in the courts and via legislation.

There were several considerations that weighed against implementing judicial review. First, Congress believed that the VA was and should remain a non-adversarial system where veterans were assisted along the way by VA employees. The VA's benefits system was specifically crafted by Congress "to function . . . with a high degree of . . . solicitude for the claimant." [20] The VA's resulting veteran-friendly system reflects the "congressional intent to create an Agency environment in which VA is actually engaged in a continuing dialogue with claimants in a paternalistic, collaborative effort to provide every benefit to which the claimant is entitled." [21] The VA was also charged with giving veterans the benefit of the doubt in adjudicating their claims. [22] In upholding its duty to help veterans, the VA was tasked with many other duties, including but not limited to assisting veterans in obtaining medical evaluations and evidence, reviewing veterans' claims sympathetically, and gathering evidence to support a veterans' claims. [23] Adding judicial oversight to the VA seemed unnecessary as the VA was not intended to be an adversary of the veteran, but instead was supposed to be a partner and benevolent provider. [24] Adding judicial review to this system also seemed dangerous because the VA would automatically be put on the defensive with regard to its decisions on a veteran's claim, **[*518]** therefore negating the ostensibly benevolent and non-adversarial system created. [25]

Second, there was concern that adding judicial review would increase the number of attorneys practicing in this area of law at every level. [26] Veterans service organizations (VSOs), such as the American Legion and the Disabled American Veterans, represent their veterans in the VA's system at no cost. [27] The VSOs, who had strong lobbyists in Congress, were opposed to changes to the system that would introduce more lawyers. The VSOs had, and continue to exert, great power within the system as they were certainly the primary providers of assistance to veterans in navigating the VA's complicated benefits system. [28]

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[19] *See* Hagel & Horan, *supra* note 16, at 43-44.

[20] *Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985).*

[21] *Evans v. Shinseki, 25 Vet. App. 7, 16 (2011).*

[22] *38 U.S.C. § 5107*(b) (2012) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."). Congress intended the benefit of the doubt standard to be a valuable tool to continually enforce the VA's non-adversarial and veteran-friendly adjudication of claims. *Hodge v. West, 155 F.3d 1356, 1362-63,* (1998) (citing H.R. REP. NO. 100-963, at 13 (1988), *as* reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95).

[23] These duties to veterans were formalized through the Veterans Claims Assistance Act of 2000, Pub. L. 106-475, ***114 Stat. 2096,*** *38 U.S.C. § 5103A* and § 5107 (2012). *See also* *38 U.S.C. § 5109.*

[24] *S.11, The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act: Hearing Before the S. Comm. on Veterans' Affairs*, 100th Cong. 481 (1988) [hereinafter *Hearings*] (statement of the Veterans Administration (VA)).

[25] *Id.* at 393 (statement of National Vietnam Veterans Coalition); *id.* at 481 (statement of the Veterans Administration (VA)).

[26] *Id.* at 392-93 (statement of National Vietnam Veterans Coalition); *id.* at 500 (statement of Donald L. Ivers, General Counsel, Veterans Administration).

[27] *Id.* at 393 (statement of National Vietnam Veterans Coalition); Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, *25 CONN. L. REV. 155, 159-60 (1992).*

[28] Helfer, *supra* note 27, at 160. It may seem paradoxical that a system designed to be veteran-friendly is rife with complexity. One commenter explained the situation this way:

> In the case of the veterans benefits system, decades of procedural rulings have increased the complexity of adjudication. It has thus become increasingly difficult for non-attorney claimants and adjudicators to understand the system, and it now takes dramatically longer for VA to issue initial decisions and process appeals. Rarely will procedural rulings be abrogated. Rather, the layers accumulate with

They had no desire to forfeit their preeminence to attorneys. [29] Additionally, Congress had long seen attorneys as unscrupulous in the representation of veterans. As far back as the Civil War, Congress had labored under the assumption that most attorneys swindle veterans out of money while doing very little work on behalf of the veteran. [30] For this reason, in 1862, Congress set a limit of $ 5 as the amount of money an attorney could be paid for helping a veteran. [31] In 1864, this fee limit was raised to **[*519]** $ 10. [32] These limited fees were intended to stop what Congress believed to be predatory behavior. [33]

In 1985, the Supreme Court heard a constitutional challenge to the $ 10 limit brought under the Fifth Amendment's procedural Due Process Clause. In holding the limit constitutional, the Court made very clear that in this matter "[a] necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible." [34] As the years wore on, this limit stayed in place and continued to dissuade attorneys from participating in the system because a $ 10 fee for legal work in 1980 was not worth any attorney's time, either to become competent in the area of veterans benefits or to create a practice out of it. [35] It was not until the passage of the VJRA in 1988 that the limitations on attorneys' fees were altered, primarily by permitting attorneys to charge fees when representing veterans on disability claim appeals. [36]

Third, there was widespread concern that introducing judicial review would cause delay in veterans receiving their benefits. The VA was concerned that attorneys would cause delays by advancing the client's cause, as opposed to looking for truth. [37] Others were less generous, asserting that attorneys would purposefully cause delay to increase their fees. [38] Another apprehension regarding delay was that matters would become more complicated and more formalized, requiring the VA to

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predictable, negative consequences for timeliness and flexibility. This buildup of complex procedures has created a paradox inherent in the modern veterans law system: the proliferation of procedures intended to make the system more "veteran friendly" has, in fact, made the system forbidding to claimants and caused increasingly painful delays.

James Ridgway, *Area Summary: Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, *62 AM. U. L. REV. 1037, 1044-1045 (2013)* (footnotes omitted). The CAVC has also commented on this problem. *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.").

[29] Helfer, *supra* note 27; *Hearings*, *supra* note 24, at 421 (statement of Veterans Due Process).

[30] *Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 360 (1985).*

[31] Dennis Whelan, *William Henry Glasson and the First Hundred Years of Federal Compensation for Service Connected Disability in America* 46 (2013) (Villanova Univ., Working Paper, Aug. 31, 2013), *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344337* [*https://perma.cc/9WR4-J2T2*].

[32] *See id.* at 48, 50.

[33] For example, see the comments on the Senate floor of Senator Edward Bragg in 1886: "Mr. Speaker, these [attorneys] that pretend to be 'friends of soldiers' are the friends of soldiers as vultures are the friends of dead bodies--because they feed and fatten on them. . . . They have the voice of Jacob, but their hand has the clutch of Esau." WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 214-15 (David Kinley ed. 1918).

[34] *Walters, 473 U.S. at 323.*

[35] *Hearings*, *supra* note 24, at 56-7 (statement of J. Thomas Burch, Jr., Chairman, National Vietnam Veterans Coalition), 385 (statement of Frank E.G. Weil, American Veterans Committee).

[36] *See* *38 U.S.C. § 7263*(c)-(d) (2012).

[37] *Hearings*, *supra* note 24, at 500 (statement of Donald L. Ivers, General Counsel, Veterans Administration).

[38] *Id.* at 603 (statement of Disabled American Veterans), 568 (statement of Jerry L. Mashaw, Professor of Law at Yale Law School).

spend more time on each claim. [39] Finally, unease that the federal court system was already overwhelmed led to concern that these claims would contribute to an already-taxed judicial system. [40]

[*520] In contrast to the aforementioned arguments, there were many reasons articulated that compelled the implementation of judicial review. One major reason for the Court's creation was a belief that the VA's system (as it was in the 1980s) was malfunctioning. The Chairman of the Senate Committee on Veterans' Affairs at the time, Senator Alan Cranston, commented at the opening of testimony regarding judicial review that: "I have said that the need for judicial review does not depend on whether or not the present system of claims adjudication is broken. . . . In the past year or two, however, it has become increasingly clear that the entire claims adjudication process, including the Board, has some serious problems." [41]

The extent of the problems varied. There were contentions that the Board, the highest level of appeal within the VA for decisions regarding benefits, was failing to consistently uphold its charge to maintain a non-adversarial system. One veterans' group accused the VA of "using deception to deny hearings at crucial and sensitive stages of the adjudication process[,] . . . denying claims for failure of veterans to respond to correspondence never sent[,] . . . [and] (f)raudulently enhancing productivity performance records to achieve merit bonuses and to promote empire building schemes." [42] Another proponent of judicial review testified that:

> [T]he VA system is highly adversarial. It is loaded with lawyers on one side, and it is filled with pitfalls for the unrepresented claimant on the other side. We have, for example, had several clients who were unrepresented at the local level and whose claims have been dismissed by the Board of Veterans' Appeals for the clients' failures to use particular forms or certain magic words or forms of pleading. These dismissals have cost our clients many months of time and potentially many thousands of dollars in lost compensation. [43]

An observer who advocated for judicial review offered one explanation for this observed variance between the required non-adversarial environment and the apparent adversarial behavior--it is unrealistic to believe VA employees can act in the best interests of the government and the veteran at the same time. [44]

[*521] Other complaints regarding the problems in the system revolved around arbitrary decision-making at the agency. One veterans' advocate observed that "(t)he reasonable doubt doctrine . . . is only applied it seems when the overwhelming weight of evidence, in fact, supports the veteran's claim" despite the requirement that when evidence is in equipoise, the decision should go to the veteran. [45] Other groups advocating for judicial review were less aggressive in the necessity for review, but nonetheless advanced the value of court intervention. For example, the Veterans of Foreign Wars remarked upon the fact that the pressure on the Board to move faster coupled with increasingly complicated claims created a system where "human nature being what it is, errors in judgment may occur." [46]

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[39] *Id.* at 493 (statement of Donald L. Ivers, General Counsel, Veterans Administration).

[40] *Id.* at 333-34 (statement of Hon. Morris S. Arnold & Hon. Stephen G. Breyer, on behalf of the Judicial Conference of the United States).

[41] *Hearings*, *supra* note 24, at 2 (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affairs).

[42] *Id.* at 409 (statement of Veterans Due Process).

[43] *Id.* at 6 (statement of Susan D. Bennett, Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, D.C.).

[44] *Id.* at 385 (statement of Frank E.G. Weil, American Veterans Committee); *see* 38 U.S.C. § 5107(b) (2012). This dichotomy has been pointed out as a unique aspect of the VA's procedural adjudication system. *See* James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 126-27 (2009).

[45] *Hearings*, *supra* note 24, at 6 (statement of Susan D. Bennett, Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, D.C.).

[46] *Id.* at 313 (statement of The Veterans of Foreign Wars).

There were also concerns that by prohibiting judicial review of veterans benefits claims, veterans were not being given the same rights to fairness, equity, or due process that other citizens receive. One Senator noted that while felons, the mentally ill, and illegal aliens are afforded judicial review of determinations affecting them, veterans are not. [47] Another commented, "[w]hat an irony that the veterans who have fought to see that we all have these legal rights, are the very ones who are being denied those rights now." [48] One veterans' advocate remarked "if veterans are a special class--I think for some purposes they are and should be viewed as such--it would seem to be that they deserve more rather than less by way of procedural protection." [49]

Finally, scholars and others hoped that creation of judicial review of the VA adjudication process would allow for mass reform of the VA system, as opposed to making decisions in individual cases that would fail to have widespread effect. Many believed that class action suits would be the best vehicle for this type of reform and have advocated for it since debate began. [50]

[*522] *A. "A Ruby in the Dung"*

As the debate drew to a close during the Senate Veterans' Affairs Committee hearing on judicial review in 1988, the following exchange occurred:

> Senator SIMPSON. I will be very interested to see what you and the chairman put together after these hearings. I think very possibly it will be very close to where you want to be.
>
> Senator MURKOWSKI. There won't be too much sausage.
>
> [Laughter.]
>
> Senator SIMPSON. Well, there will be, without question, sausage that is the way our work is; but occasionally, we find a ruby in the dung, and that is what keeps us going. [Laughter.] [51]

The dung in this metaphor could be any multitude of issues. However, the ruby created from decades of wrestling and debate about the issue of judicial review is unquestionably the CAVC. The VJRA created the CAVC as an Article I court. [52] Its judges are appointed to the bench for a term of fifteen years. [53] In the original legislation, the CAVC was authorized one chief judge and at least two but no more than six associate judges. [54] Effective on December 31, 2009, Congress temporarily authorized two more judges to be added to the court, making the total judges on the court nine. [55]

The court has exclusive jurisdiction over final decisions of the Board, and the enacting statute prohibits the Secretary from seeking review of the Board's decisions. [56] Its jurisdiction was constructed from the competing pieces of legislation proposed by the House and Senate, with heavy input from VSOs and other stakeholders. [57] As a result, **[*523]** Congress granted the

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[47] *Id.* at 17 (statement of Sen. John Kerry).

[48] *Id.* at 47 (statement of Sen. Thomas A. Daschle).

[49] *Id.* at 11 (statement of Eugene R. Fidell, Esq., Partner, Klores, Feldesman, & Tucker, Washington, D.C.).

[50] *See, e.g.*, Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361, 404 (2009); Hagel & Horan, *supra* note 16, at 65.

[51] *Hearings*, *supra* note 24, at 10.

[52] *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 4051, ***102 Stat. 4105, 4113 (1988)*** (codified as amended at 38 U.S.C. § 7251 (2012)).

[53] 38 U.S.C. § 7253(c) (2012).

[54] § 4053, ***102 Stat. at 4114.***

[55] 38 U.S.C. § 7253(h)(5)(i)(1) (2012 & Supp. 2017).

[56] 38 U.S.C. § 7252(a) (2012).

CAVC the authority to: (1) decide all relevant questions of law; (2) interpret constitutional, statutory, and regulatory provisions; (3) determine the meaning or applicability of the terms of an action of the Secretary; (4) compel action of the Secretary unlawfully withheld or unreasonably delayed; (5) hold unlawful and set aside decisions, findings, conclusions, rules and regulations adopted by the Secretary or Board that are arbitrary and capricious, an abuse of discretion, contrary to constitutional right, or in excess of statutory authority, among other things; and (6) hold unlawful and set aside or reverse findings of material fact made by the VA that are clearly erroneous. [58]

Proceedings at the court are adversarial, which is a sharp departure from the VA system below. [59] At the CAVC, the interests of the Secretary of the VA are represented by attorneys from VA's Office of General Counsel. [60] The veterans themselves may be *pro se* or represented by agents or attorneys authorized to practice before the court. [61] Veterans or the Secretary may appeal decisions of the CAVC to the United States Court of Appeals for the Federal Circuit. [62] The Federal Circuit's jurisdiction over decisions of the CAVC is limited to appeals involving "the validity of any statute or regulation or any interpretation thereof" or "interpret[ing] constitutional and statutory provisions." [63] After the Federal Circuit, a veteran or the VA may apply for review from the Supreme Court of the United States. [64]

B. An Assessment of the Hopes and Fears

In 2009, a widely recognized and preeminent scholar of the CAVC, then-Professor Michael P. Allen of Stetson University College of Law, **[*524]** wrote an article assessing the first twenty years of the CAVC's successes and tribulations. [65] For a number of years, Judge Allen was the only academician analyzing and advising on the operation of the CAVC. In his 2009 Article, Judge Allen commented on some of the concerns of those advocating for and against the judiciary taking a role in veterans-benefits adjudications. [66] Overall, Judge Allen's assessment of the CAVC's role in the process and the Court's decisions shaping veterans law was a positive one.

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[57] *See generally* Helfer, *supra* note 27 (explaining the different constituent groups involved in the process of advocating for specific aspects of the VCAA); Barton F. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 41 ADMIN. L. REV. 365 (1989) (describing the history and importance of judicial review in the veterans benefits process).

[58] *38 U.S.C. § 7261*(a). The "clearly erroneous" standard differs slightly from the Administrative Procedure Act's "arbitrary and capricious" standard applied to questions of fact. *See* *Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989)* (citing *5 U.S.C. § 706*(2)(A)).

[59] *See* *38 U.S.C. § 7263*(a) (marking the first mention of attorney representation to protect the interests of the Secretary of the VA); *Forshey v. Principi, 284 F.3d 1335, 1355 (Fed. Cir. 2002)* (en banc), *superseded on other grounds* by Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 402(a), ***116 Stat. 2820, 2832.***

[60] *38 U.S.C. § 7263*(a); *see* *Forshey, 284 F.3d at 1355.*

[61] *38 U.S.C. § 5904*(c); *38 C.F.R. §§ 14.628*, *14.629(b)(1)(iii)*-(iv) (2018); *see generally The Role of National, State, and County Veterans Service Officers in Claims Development: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs*, 109th Cong. (2006) (discussing the work of VSOs in the claims process and their interaction with and advocacy on behalf of veterans).

[62] *38 U.S.C. § 7292*(c).

[63] *Id.*

[64] *Id.; see* *28 U.S.C. § 1254*(1) (2012).

[65] *See* Allen, *supra* note 50. In 2017, Professor Allen was appointed and confirmed to the bench of the Court of Appeals for Veterans Claims by President Trump. Therefore, he will be referred to as Judge Allen throughout the rest of this article. *See Judge Michael P. Allen*, U.S. COURT OF APPEALS FOR VETERAN CLAIMS, *https://www.uscourts.cavc.gov/allen.php* [*https://perma.cc/R3T3-LY99*] (last visited Jan. 24, 2019).

[66] Allen, *supra* note 50.

It seems appropriate to take a fresh look at the concerns of stakeholders in 1988 and Judge Allen's article of ten years ago to measure at least some of the clarity and quagmire that judicial review has contributed to the adjudication of veterans' benefits over the last ten years. To do so, this Article will look briefly at three separate hopes and fears expressed in 1988 and, in part, commented on by Judge Allen and others: the effect of judicial review on the quality of decision-making at the VA and the non-adversarial process, the fear that judicial review will cause delay in the system, and the hope that judicial review will bring more due process and equity to the VA's adjudication system.

1. The Effect of Judicial Review on the VA's Decision-Making and the Non-Adversarial Process

One of the major concerns of proponents of judicial review were accusations that the VAROs and the Board were making arbitrary decisions, with no outside and objective body holding them accountable. [67] The concern about the Board's cavalier handling of veterans' claims seems to have been a grounded one. As Senator Cranston remarked in the 1988 hearings, "[t]he Chairman of the BVA commented during a recent House hearing that even the specter of judicial review has made some of the people reviewing BVA claims more careful to see that the board [sic] does everything that it can." [68]

The other major consideration that goes hand-in-hand with arbitrary **[*525]** decision-making involves the non-adversarial nature of the VA system. Opponents of judicial review were afraid that adding legal review to the VA's adjudication system would inherently create adversity. [69] Proponents of review maintained that the system was already adversarial in certain instances. They argued that the VA needed reminding of its role in the system as facilitator, and not bouncer, of claims that may be meritorious if the VA applied the appropriate veteran-friendly legal standards in the adjudication process. [70]

In light of these concerns, it is widely recognized that with the advent of court review the nature of the veterans benefits adjudication has changed. The Federal Circuit remarked ten years after the creation of the CAVC that the non-adversarial nature of the entire benefits process was altered significantly: "[I]t appears the system has changed from 'a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims,' to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review." [71]

In 1996, a Congressionally-convened commission charged with evaluating the VA adjudication process including the effect of the still fairly new judicial review, reported that the creation of judicial review created an "adversarial paternalism." [72] While acknowledging the contradiction in those terms, the commission noted that:

> When an adversarial review is imposed on a paternalistic adjudication and there are no definitive rules that describe the limits of adjudicative paternalism, for all practical purposes the judicial review standard becomes, "Was VA paternalistic

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[67] *Hearings, supra* note 24, at 6 (statement of Susan D. Bennett, Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, D.C.).

[68] *Id.* at 2 (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affairs).

[69] *See, e.g., id.* at 7 (statement of Sen. Simpson), *id.* at 13 (testimony of Eugene R. Fidell, Esq., Partner, Klores, Feldesman, & Tucker, Washington, D.C.), *id.* at 15 (testimony of Keith A. Rosenberg, Esq., Whiteford, Taylor & Preston), *id.* at 481 (statement of the Veterans Administration (VA)), and *id.* at 393 (statement of National Vietnam Veterans Coalition).

[70] *See, e.g., id.* at 409 (statement of Veterans Due Process); *id.* at 6 (statement of Susan D. Bennett, Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, D.C.).

[71] *Bailey v. West, 160 F.3d 1360, 1365 (Fed. Cir. 1998)* (quoting *Collaro v. Dep't of Veterans Affairs, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998)).*

[72] THE VETERAN. VA'S CUSTOMER: WHO CLAIMS BENEFITS AND WHY?, VETERANS' CLAIMS ADJUDICATION COMM'N 160 (1996) [hereinafter THE VETERAN] *http://www.veteranslawlibrary.com/files/Commission_Reports/Melidosian_Commission_Report_Dec_1996.pdf* [*https://perma.cc/Q5LB-5DWZ*].

enough?" As each case presents different circumstances, the boundaries of paternalism can be and are continually extended. [73]

[*526] The commission noted that before judicial review, the VA was only accountable to itself, allowing for cursory decision-making with little or no explanation to veterans concerning the reasons for the outcome. [74] However, to comply with broad legal requirements decided at the court, the VA has had to make more complex and intricate decisions about benefit claims, which take more time to create. [75]

Judge Allen noted that in 2009, the generalized perception of Congress, the CAVC, and other observers was that the decision-making process of the VA had been "improved" overall as a result of judicial review. [76] While the issue of the length of time the VA takes to work on a veteran's claims will be discussed further in this article, it is appropriate to first consider whether over the past decade the overall quality of VA decision-making has been improved and whether the effects of judicial review on the non-adversarial process have created change in the system.

In terms of measuring the effects of judicial review on the quality of VA decisions, it is difficult to agree on a standard of measurement. While the decisions of the VAROs and Board are more complex since the creation of the CAVC, are they actually deciding issues correctly? In 2009, Judge Allen appropriately noted that if one were to measure the quality of administrative opinions in terms of result, there was no baseline before 1988. [77] He also observed that in the second decade of judicial review, the rates of the CAVC's reversal of Board decisions from 1999 to 2009 remained relatively stable. [78] For instance, in 2008 the CAVC made decisions on the merits of approximately 3,480 cases concerning veterans' benefits claims. [79] Approximately 80% of the decisions of the Board were remanded in whole or in part for some failure on the Board's part. [80] Additionally, the court granted 2,433 applications for Equal Access to Justice Act fees (EAJA) in 2008. [81] EAJA is the federal law regarding lawsuits against the United States government that permits a prevailing party's legal counsel to collect fees **[*527]** from the federal government. [82] To collect these fees, the court must find that the government's position in the case was not "substantially justified." [83] The phrase "substantially justified" implies "justified to a degree that could satisfy a reasonable person." [84] This means that in 2008, the Board was unreasonable in its decision-making towards veterans in 70% of the cases the court decided. [85] As a comparison, the CAVC in 1998 decided 1,352 cases on the merits. [86] Of these cases,

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[73] *Id.*

[74] *Id.* at 193.

[75] *Id.* at 114.

[76] *See* Allen, *supra* note 50, at 376.

[77] *Id.*

[78] *Id.*

[79] U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 1 (2000-2008) *https://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf* [*https://perma.cc/8DXD-PUWE*]. This number excludes those decisions made on petitions for extraordinary relief.

[80] *Id.*

[81] *Id.*

[82] *See* *28 U.S.C. § 2412*(d)(1), (d)(2)(F) (2012).

[83] *Id.* § 2412(d)(1)(A)-(B), (d)(3).

[84] *Pierce v. Underwood, 487 U.S. 552, 565 (1988).*

60% were remanded in whole or in part. [87] At that time, because attorney representation had been discouraged for so long by the low fee rate previously discussed, almost half of the veterans in the court were unrepresented. [88] Even so, 380 EAJA applications were granted. [89] Again, while these numbers indicate stability in the court's decisions, they are alarming in their own right that the VA is consistently failing to implement the veteran-friendly system in the manner envisioned by Congress.

In 2010, the Supreme Court also expressed concern about this inconsistency, remarking on the number of veterans' cases heard at the CAVC that were awarded EAJA fees. This exchange occurred during an oral argument regarding EAJA fees at the Social Security Administration:

> CHIEF JUSTICE ROBERTS:--70 percent of the time the government's position is substantially unjustified?
>
> MR. YANG: In cases--in the VA context, the number is not quite that large, but there's a substantial number of cases at the court of appeals --
>
> CHIEF JUSTICE ROBERTS: What number would you accept?
>
> MR. YANG: It was, I believe, in the order of either 50 or maybe slightly more than 50 percent. It might be 60. But the number is substantial that you get a reversal, and in almost all of those cases, EAJA --
>
> **[*528]** CHIEF JUSTICE ROBERTS: Well, that's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?
>
> MR. YANG: It is an unfortunate number, Your Honor. And it is--it's accurate. [90]

In 2017, the most recent year numbers are available, the situation is worse. Of the 3,619 appeals that were decided on the merits at the court, 86% of these decisions remanded in whole or in part the decisions of the Board. [91] In addition, a whopping 80% of the cases decided were awarded EAJA fees. [92] Overall, the decisions being made at the Regional Office level are no more encouraging if one reviews them for compliance with the law. In 2017, the Board remanded or reversed 73% of the appeals of Regional Office decisions. [93]

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[85] This number reflects the number of granted EAJA applications granted in 2008 divided by the total merits decisions in 2008 excluding extraordinary relief claims: 2433/3480 = 69.9%.

[86] U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 1 (1997-2007) *https://www.uscourts.cavc.gov/documents/Annual_Reports_2007.pdf* [*https://perma.cc/D82B-7AYL*]. This number excludes those decisions made on petitions for extraordinary relief.

[87] *Id.* This number excludes those decisions made on petitions for extraordinary relief.

[88] *Id.*

[89] *Id.*

[90] *Transcript of Oral Argument at 52, Astrue v. Ratliff, 560 U.S. 586 (2010) (No. 08-1322), 2010 WL 603696.*

[91] U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 2 (2017) *https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf* [*https://perma.cc/HXX8-5NWV*]. This number is the total number of appeals excluding appeals dismissed voluntarily, for lack of jurisdiction or timeliness, or for default.

[92] *Id.* This number reflects the total number of EAJA appeals divided by the total number of merits appeals excluding voluntary dismissals and dismissals for lack of jurisdiction or timeliness, or for default: 2882/3619 = 79.6%.

[93] U.S. DEP'T OF VETERANS AFFAIRS, BD. OF VETERANS' APPEALS, ANNUAL REPORT FISCAL YEAR (FY) 2017 30 (2017) *https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA* 2017AR.pdf [*https://perma.cc/DY8S-F5K7*]. The Board reports making 52,661 decisions in 2017 of which 73.4% approved the veteran's appeal of the VARO's decision or remanded the decision for further development.

If the quality of Board decisions is measured in terms of content, then these numbers [94] represent a concerning trend that the author has addressed in detail in prior articles. [95] While the number of reversals in 2017 (3,112) is a small fraction of the decisions the Board makes denying a veteran benefits (11,371), the 86% reversal rate of all appeals decided in one year is no less alarming. [96] As one attorney who has been practicing in the veterans law arena for decades noted, "the VA's appeal process . . . has been unable to 'fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits' in 4 out **[*529]** of every 10 cases appealed to the [Board] since 1992 through 2013." [97] Discouragingly, this reversal rate has remained relatively unchanged in the thirty years of judicial review of the VA's adjudication process.

As Judge Allen noted, it is true that the rate of remands is not the only way to examine the impact of judicial review, but it does provide one of the only objective standards available. [98] Taking into consideration the quality of the rationale given for the VA's decisions also raises concerns. One veterans' advocate remarked that the fact that the lack of clear guidance in a number of areas of veterans law has led to the inability of the VA to make consistent and accurate decisions. [99] The Disabled American Veterans expressed concern in 2015 that the rating decisions emanating from the Regional Offices still lack "substantive information for claimants to understand how VA arrived at its decision on a claim for benefits." [100] While these comments are not representative of every decision made at the VARO and Board, they are indicative of the continuing perception among veterans that the VA engages in arbitrary decision-making without explanation, despite judicial review.

In the content of the court's opinions, one can find evidence that the struggle to maintain a non-adversarial system, and yet acknowledge that attorneys are now a larger part of that system, is real. For example, in 2014, the CAVC played referee between the Board and attorneys representing Mr. Nohr, a veteran. [101] The attorneys wanted to ask questions of the medical examiner the VA procured and relied upon when deciding Mr. Nohr's claims. [102] In asking questions, the attorneys referred to the questions as "interrogatories." The Board refused to require the examiner, Dr. Feng, to answer the request. The CAVC suggested in its dicta that:

> the Board's refusal to send Mr. Nohr's questions and request for documents to Dr. Feng and its corresponding statement stressing the nonadversarial nature of the VA benefits system looks like a knee-jerk reaction based upon Mr. Nohr's characterization of his questions as **[*530]** "interrogatories." With the increasing involvement of attorneys at the administrative level and the corresponding complexity that attorney involvement can generate, the veterans bar and VA

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[94] *See id.* For instance, in 2017 the Board decided approximately 52,261 cases and ultimately denied only 11,371 of these. It is this smaller number of cases that represent appealable decisions of the Board.

[95] *See, e.g.*, Stacey-Rae Simcox, *Thirty Years After* Walters *the Mission is Clear, the Execution is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671 (2016).

[96] *See* U.S. DEP'T OF VETERANS AFFAIRS, BD. OF VETERANS' APPEALS, ANNUAL REPORT FISCAL YEAR, *supra* note 93 at 29 and text accompanying note 94.

[97] *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 114 (2015) [hereinafter *Veterans' Dilemma*] (statement of Kenneth M. Carpenter, Esq., Founding Member, National Organization of Veterans Advocates).

[98] *See* Allen, *supra* note 50, at 376.

[99] *Veterans' Dilemma, supra* note 97, at 107 (statement of Barton F. Stichman, Esq., Joint Executive Director, National Veterans Legal Services Program).

[100] *Id.* at 87 (statement of Paul R. Varela, Assistant National Legislative Director, Disabled American Veterans).

[101] *See* *Nohr v. McDonald*, 27 Vet. App. 124 (2014).

[102] *Id. at 125, 127-28.*

> must proceed with caution so as not to unravel Congress's desire to preserve and maintain the unique character and structure of the paternalistic, nonadversarial veterans' benefits system. [103]

The CAVC then ordered the Board to have the examiner answer the questions asked as part of the VA's duty to assist a veteran. [104]

In decision after decision, the CAVC has systematically reminded the Board and VARO of its non-adversarial nature and its duty to assist the veteran. Official statistics on the number of remands of Board decisions due to a failure to adhere to these standards are difficult to obtain. This is partially due to the fact that the court itself decides relatively few of the appeals to the court on the merits due to large numbers of settlements. The CAVC Rules of Court mandate that veterans' counsel and attorneys representing the Secretary from the Office of General Counsel enter into settlement conferences. [105] Large numbers of cases "decided" by the CAVC are actually the result of these settlement conferences. Determining why the cases were settled by joint agreement of the parties to remand is difficult without completely exhuming each and every one of the motions for joint remand on the CAVC docket, which in 2017 alone would equate to approximately 1,940 veterans' cases. [106]

However, while the CAVC does not provide official statistics regarding how many cases are voluntarily remanded by the Office of General Counsel, it is possible to extrapolate approximate numbers from the number of CAVC decisions made on the merits of each case and finding that the VA failed in its duty to assist the veteran. In FY 2017, the CAVC had five full-time judges deciding cases and issuing orders. [107] Those five judges decided approximately 1,180 cases and petitions on **[*531]** the merits. [108] Of those 1,180 cases, approximately 430 of them vacated the decision of the Board and remanded in whole or in part veterans' claims based on a violation of the VA's duty to assist. [109] That equates to approximately 36% of the cases remanded by the CAVC specifically because the Board failed to adhere to the non-adversarial system created by Congress. While admittedly this is an unscientific manner in which to gather statistics, practitioners at the CAVC would argue that in their experience, the number of cases in which the Board failed in its duty to assist is actually much higher. One would have hoped that after three decades of reminders to adhere to the non-adversarial system, the number of times the VA failed to do so would be much lower. [110]

2. The Fear of Delay in the System

The length of time it takes the VA to make decisions on veterans' claims has been a constant source of irritation for veterans and the VA alike. Even before the judicial review of the Board was established, there were complaints that the system just took too long in deciding veteran's claims. [111] By 1993, the VA was able to begin pointing the finger at the CAVC for delays.

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[103] *Id. at 131.*

[104] *Id. at 134-35.*

[105] U.S. COURT OF APPEALS FOR VETERANS CLAIMS, COURT RULES, RULE 33(c).

[106] U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *supra* note 91, at 2. The CAVC received 4,095 total appeals in 2017. Of those 4,095 appeals, 499 were affirmed on the merits, 160 were dismissed for lack of jurisdiction or timeliness, 101 were dismissed for default, and 215 were voluntarily dismissed--leaving 3,120 total cases remanded by the CAVC in FY 2017. Of these, 1,180 were the result of a judge's decisions on the merits leaving 1,940 cases the result of some type of motion for remand.

[107] U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 5 (2016) *https://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf* [*https://perma.cc/UBB3-BYA4*]; *see* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *supra* note 91, at 5 (reporting 4,296 total cases filed in 2017 and 859 filings per active judge).

[108] *Id.*

[109] This number was arrived at by searching for all merit opinions of the CAVC that vacated or remanded the decision of the Board for violations of the Duty to Assist from 10/1/2016 to 9/30/2017.

[110] *See generally* Ridgway, *supra* note 44 (providing an interesting view of the reason for high remands from the VA's perspective).

While testifying before Congress, a VA official warned that an "activist court" had caused their processing times on initial claims to balloon from 120 days in 1990 to 175 days three years later. [112] Congress, the VA, and those who help veterans were already referring to the delays as a backlog. [113] Some pointed to the difficulty the VA was having translating court decisions to lay persons working at the Regional Office level making initial decisions on veterans claims. [114] However, the VA General Counsel office declared that by 1993 the VA had an effective system in place to communicate changes in **[*532]** the law to its employees. [115] Independently, the Veterans Claims Adjudication Commission's 1996 report found that with the creation of the CAVC, the average time it took for the VARO and Board to process claims doubled. [116] By 2012, the average time it took to receive an initial decision from the VA was reported as 260 days. [117] The 2012 numbers showed that there were "856,092 pending compensation rating claims, of which 568,043 (66 percent) were considered backlogged [pending over 125 days]." [118] A push in 2013 to focus on making decisions on initial claims within 125 days to reduce the almost 600,000 waiting claims required mandatory overtime of rank and file VA employees. [119]

This focus on completing initial claims faster forced the backlog on decisions into the appellate side of adjudication at the VA. From 2009-2011, the time it took for the VA to initiate its first response to a veteran's appeal of a decision increased 57% from 293 days to 460 days. [120] In 2015, the average veteran would wait 1,380 days to have their appeal decided by the Board. [121] A 2018 VA Inspector General report found that the average time a veteran now waits to have an appeal favorably decided at the Board and implemented is 2,213 days--a little over six years! [122] If a remand to the VARO is required--which happens in 43% of the cases the Board decides [123]--another 943 days could be added to the process, making the total time a veteran is kept waiting 3,156 days--over eight and a half years. [124]

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[111] *See Hearings*, *supra* note 24, at 225 (statement of Richard O'Dell, Chairman of the Committee on Advocacy, Vietnam Veterans of America).

[112] *S. 616, Veterans' Compensation COLA Act of 1993, and Oversight of VA Claims Processing and Adjudication: Hearing Before the S. Comm. on Veterans' Affairs*, 103d Cong. 20 (1993) (statement of R. John Vogel, Deputy Undersecretary for Benefits, Department of Veterans Affairs).

[113] *See generally id.* at 33-35 (discussing the increasing number of claims awaiting decision for an increasing amount of time).

[114] *Id.* at 2 (statement of Sen. John D. Rockefeller, Chairman, S. Comm. on Veterans' Affairs).

[115] *Id.* at 25 (statement of Mr. Thompson, Assistant General Counsel, Department of Veterans Affairs).

[116] *THE VETERAN, supra* note 72, at 168.

[117] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-89, VETERANS' DISABILITY BENEFITS: TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE 1 (2012).

[118] *Id.* at 9.

[119] David Wood, *VA Backlog Reform is Difficult But on Track, Secretary Eric Shinseki Says*, HUFFINGTON POST (May 22, 2013, 12:07 PM), *https://www.huffingtonpost.com/2013/05/22/vabacklog_n_3312744.html* [*https://perma.cc/EEW5-XW9J*].

[120] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 117, at 10.

[121] Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. MIAMI NAT'L SEC. & ARMED CONF. L. REV. 1, 11-12 (2015).

[122] OFF. OF INSPECTOR GEN., OFF. OF AUDITS & EVALUATIONS, U.S. DEP'T OF VETERANS AFF., REVIEW OF TIMELINESS OF THE APPEALS PROCESS 4 (2018), *https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf* [*https://perma.cc/LN3G-GHCQ*].

[123] U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 93.

[124] OFF. OF INSPECTOR GEN., *supra* note 122.

Were the fears of veterans' advocates that the court would delay benefits to veterans founded? Frankly, it is difficult to say exactly how much impact the CAVC has had on the delays in the system. The issue of delay at the VA is not a new phenomenon. In 1988, before the CAVC **[*533]** was created by passage of the VJRA, the Chief Benefits Director of the VA attempted to explain the problems VA was having with timely processing veterans claims to a frustrated Congress: "There are twentyeight standards in our timeliness measurement system. As of January 31, 1988, we were meeting an acceptable level in only five of them." [125]

The reasons for the current delay and backlog seem to be varied. In 2018, judicial review is no longer viewed as the primary reason for delay in the system. Observers point to the fact that the sheer number of claims the VA has had to process over the past two decades has been on the rise, sparked primarily by Vietnam-era veterans retiring and Iraq, Afghanistan, and Global War on Terrorism veterans leaving the service in large numbers. [126] For instance, in 2008 the VA processed nearly 900,000 claims for disability compensation. [127] In 2011, the VA completed over 1 million claims. [128] At the end of Fiscal Year 2017, the last year for which official numbers are available in VA reports, the VA processed 1.4 million claims. [129] There is no doubt that the workload has increased, but former VA Secretary Eric Shinseki indicated that more VA employees were not necessarily the answer to processing the growing numbers. [130] Despite this admission, Congress increased the VA's budget in 2015 to hire more employees to handle these claims. [131] And while that worked for a brief time, pending claims numbers were **[*534]** steadily increasing again into another backlog by 2017. [132]

Other reasons offered for delay have included changes in the presumptions that allow the VA to provide compensation for veterans suffering from certain health conditions without requiring the veterans to definitively prove the conditions' connection to their service. The Secretary of the VA granted three such presumptions for Vietnam veterans exposed to Agent Orange between 2010 and 2012, which the VA pointed to as a contributing factor in increasing claims-processing times. [133] The

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[125] *See* S. REP. NO. 100-342, at 30-31 (1988).

[126] *See generally* Allen, *supra* note 121, at 10 (Discussing the impact of large numbers of veterans applying for benefits and its impact on the VA's processing of benefits.).

[127] U.S. DEP'T. OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 2 (2008), *https://www.va.gov/finance/afr/index.asp* [*https://perma.cc/Q8VP-HQ6R*] (click "Archive" link under the "Fiscal Year 2008" bullet point in the "Prior Years Published Reports" section).

[128] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 117, at 9.

[129] U.S. DEP'T. OF VETERANS AFFAIRS, FY 2019 / FY 2017 ANNUAL PERFORMANCE PLAN AND REPORT 33 (2018), *https://www.va.gov/oei/docs/VA2019appr.pdf* [*https://perma.cc/93T5-FUMT*].

[130] Secretary Shinseki had this exchange with interviewer Candy Crowley on CNN in 2013:

> CROWLEY: But is there something he can do for you? Does it need more people? Do you need more processors? Do you need more accountability for the processors? What do you need? SHINSEKI: In the past four years, if you look at our budget for V.A., a 40 percent increase our budgets at a time when other departments have gone through belt tightening. Someone once told me that show me your budget and I'll show you what you value. I think very clearly from this president the growth in our budgets reflect where he places his value.

State of the Union with Candy Crowley (CNN television broadcast Mar. 24, 2013), *http://transcripts.cnn.com/TRANSCRIPTS/1303/24/sotu.02.html* [*https://perma.cc/3GD3-MPYX*].

[131] *VA Enters Stretch on Goals for Homelessness, Claims Backlog*, NBC NEWS (Nov. 11, 2015, 10:43 AM), *https://www.nbcnews.com/storyline/va-hospital-scandal/va-enters-stretch-goals-homelessness-claims-backlog-n461511* [*https://perma.cc/25PG-JK3Q*].

[132] Leo Shane III, *Once a Fixed Issue, the VA Disability Claims Backlog is on the Rise Again*, MILITARY TIMES (Mar. 24, 2017), *https://www.militarytimes.com/news/pentagon-congress/2017/03/24/once-a-fixed-issue-the-va-disability-claims-backlog-is-on-the-rise-again/* [*https://perma.cc/XF2V-SGJ2*].

complexity of conditions claimed, such as traumatic brain injuries, and large numbers of untrained and inexperienced claims processers hired to reduce the backlog have also been identified as contributing to the problem. [134] However, it has been argued that the issues seen in the VA are no more complex than those seen in the Social Security Administration where initial decisions also are made by laypersons employed at the agency. [135]

However, in the past decade, the VA's most oft-cited reason for the delays in the system is the non-adversarial nature of the VA itself. The VA has pointed to the codification of this paternalistic system under the Veterans Claims Assistance Act of 2000, [136] which mandates the assistance the VA owes to veterans who file a claim, as the primary "problem" it faces in delivering timely claims decisions in both the original decision and appellate processes. Some statutory duties the VA has to help a veteran through the claims process include requesting federally-held records pertaining to a veteran's claim, requesting privately held medical records on behalf of the veteran, providing the veteran with a medical examination, and imposing the duty to read a veteran's claim sympathetically. [137] Generally, these duties are referred to as the VA's "duty to assist" a veteran.

To be certain, fulfilling the duty to assist takes time. As Judge Allen noted

> **[*535]** with any additional layer of procedure comes a corresponding period of delay. For example, with each additional hearing comes time to prepare, have the hearing, and eventually render a decision. And with the duties of notice and assistance, a finding that such a duty has not been complied with will almost always lead to a remand. Indeed, allowing a veteran to submit additional evidence throughout the appeal process is a benefit to a veteran but also adds delay as the new evidence needs to be processed. [138]

In 2007, an administrator at the VA testified before Congress that the backlog in claims was partially due to the requirements of the VCAA that the VA schedule medical examinations and notify the veteran of the evidence required to prove their claims. [139] The VA has also claimed that it takes 157 days of processing time (in 2011) to request records for veterans when processing initial claims. [140]

The delay issue is front and center not only at Congress, but in jurisprudence as well. Recently, a spate of lawsuits concerning the delays at the VA have come before both the CAVC and the Federal Circuit. [141] These cases have argued that the delays at the VA are a violation of due process, and that the CAVC has a duty to order the Secretary of the VA to act when decisions on claims are "unlawfully withheld or unreasonably delayed." [142] While the due process considerations will be addressed in the

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[133] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 117, at 13.

[134] *Id.* at 11.

[135] Michael J. Wishnie, *"A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1736 (2017).

[136] Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, ***114 Stat. 2096*** (Nov. 9, 2000).

[137] 38 U.S.C. §§ 5103A (2012 & Supp. 2017), 5107 (2012), 5109 (2012 & Supp. 2017); *See* McGee v. Peake, 511 F.3d 1352, 1357 (Fed. Cir. 2008); Cook v. Principi, 318 F.3d 1334, 1337-38 n.4 (Fed. Cir. 2002).

[138] Allen, *supra* note 121, at 18.

[139] *Personal Costs of the US Department of Veterans Affairs Claims Backlog: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm on Veterans' Affairs*, 110th Cong. 1st Sess. 41-42 (2007) (statement of Michael Wolcoff, Associate Deputy Under Secretary for Field Operations, Veterans Benefits Administration, Department of Veterans Affairs).

[140] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 117, at 2.

[141] Rose v. O'Rourke, 891 F.3d 1366, 1367 (Fed. Cir. 2018); Martin v. O'Rourke, 891 F.3d 1338 (Fed. Cir. 2018); Monk v. Shulkin, 855 F.3d 1312, 1314 (Fed. Cir. 2017).

[142] 38 U.S.C. § 7261(a)(2) (2012); *see, e.g.*, Martin, 891 F.3d 1338.

following Section, a discussion of the CAVC's willingness to order the Secretary to move more quickly and cut wait times is well placed here.

In an interesting crossroads of the tensions between providing a veteran-friendly, paternalistic system and acknowledging the VA's assertions that delay in such a system is quite impossible to avoid, the CAVC had created its own standard for determining the requirements for when a writ of mandamus should be issued by the court to order the Secretary to more quickly adjudicate a veteran's claims. [143] The writ of mandamus would require the Secretary to take actions on a veteran's **[*536]** claim when that action is unreasonably delayed. [144] The CAVC referred to the test it used to determine unreasonable delay as the *Costanza* standard and required the veteran to demonstrate that "the delay he complains of is so extraordinary, given the demands and resources of the Secretary, that the delay amounts to an arbitrary refusal to act, and not the product of a burdened system." [145] As the Federal Circuit noted, "[t]here is little to be said about this standard's origin." [146]

The CAVC's choice to apply an arbitrary-refusal-to-act standard was an interesting one in light of the nature of the pro-veteran system. The CAVC was in the minority of courts choosing to use this standard. [147] Additionally, using the *Costanza* standard "inevitably favor(s) the Secretary because the standard considers the 'demands and resources of the Secretary.'" [148] After twenty years of using the *Costanza* standard, a challenge was inevitable.

In 2018, the Federal Circuit heard the consolidated claims of nine individual veterans concerning delay at the VA. The Appellants argued that the CAVC should use the standard that many other federal courts use to determine unreasonable delay, referred to as the *TRAC* standard, as opposed to the less favorable and narrower *Costanza* standard. [149] Under *TRAC*, a claim of unreasonable delay is analyzed to determine "whether the agency's delay is so egregious as to warrant mandamus" [150] using six factors:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find "any impropriety lurking behind agency lassitude" in order to hold that **[*537]** agency action is unreasonably delayed. [151]

The Federal Circuit agreed with Appellants that the *TRAC* standards are "a more balanced approach" because it encompasses a review of both the veterans' interests and the burdens on the VA. [152] The Federal Circuit spent the majority of its discussion on the first elements of the *TRAC* standard, the "rule of reason" analysis. The Federal Circuit explained that while it is reasonable

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143 *Costanza v. West, 12 Vet. App. 133, 134 (1999)* (per curiam), *abrogated by Martin, 891 F.3d at 1348.*

144 *Martin, 891 F.3d at 1344.*

145 *Costanza, 12 Vet. App. at 134.*

146 *Martin, 891 F.3d at 1344.*

147 Brief of Amicus Curiae Nat'l Law Sch. Veterans Clinic Consortium at 5-6, Monk v. Wilkie, (No. 15-1280), Vet. App. (2017).

148 *Id.* at 6 (citing *Costanza, 12 Vet. App. at 134).*

149 *Telecomms. Research & Action Ctr. v. FCC (TRAC), 750 F.2d 70, 76 (D.C. Cir. 1984).*

150 *Id. at 79.*

151 *Martin, 891 F.3d at 1344-45* (quoting *TRAC, 750 F.2d at 80).*

152 *Id.* at 1345.

to expect complex decision-making, such as preparation of a Statement of the Case, to take time, the delay is unexplainable when considering periods of decision-making that are "due to the agency's failure to perform certain ministerial tasks." [153] For instance, the Federal Circuit noted that during several steps of the process of an appeal, the VA could not explain why delay exists:

> Once the veteran files a Form 9 (appeal to the Board), the VA completes a Certification of Appeal. . . it is unclear to us why this two-and-a-half-hour certification process takes an average of 773 days to complete--and the government has not provided an explanation. And the average 321-day delay that occurs when the VA transfers the certified appeal to the BVA is even more mysterious. The government, again, has not explained the cause of this delay, even though the transfer process appears to consist of simply transferring appellate records. [154]

The Federal Circuit also noted that *TRAC* factors three and five allow the CAVC to consider the specific effects of delay on individual veterans, while the fourth factor allows a balancing of the VA's burden under large numbers of claims. [155] The Federal Circuit believed that following the *TRAC* standards will allow the CAVC to evaluate these claims of unreasonable delay in a more balanced manner on a case-by-case basis without setting arbitrary deadlines on the VA to complete actions. [156]

While veterans celebrate the victory in *Martin*, the outcome is yet another demonstration of the Wild West mentality of veterans law. *Martin* shows that well-timed advocacy can overturn law that has been observed by the CAVC for decades. This topic is important and will be discussed further below. Due to the recency of the Federal Circuit's **[*538]** decision that the *TRAC* elements should be used by the CAVC, there are very few decisions implementing the *TRAC* factors in a case of delay at the VA yet, so it is something for observers to carefully watch for in the coming years. Hopefully, the use of this new standard of review regarding delay in VA decision-making will allow the CAVC to make more meaningful decisions on a case-by-case basis to stop the long periods of unexplainable delay in VA decision-making.

Finally, before leaving the topic of delay in the VA adjudication system, it would be wise to remind the reader that the discussion of delay is not merely an academic one. Circuit Judge Moore discussed the importance of delay in his concurring opinion in *Martin*:

> The men and women in these cases protected this country and the freedoms we hold dear; they were disabled in the service of their country; the least we can do is properly resolve their disability claims so that they have the food and shelter necessary for survival. It takes on average six and a half years for a veteran to challenge a VBA determination and get a decision on remand. God help this nation if it took that long for these brave men and women to answer the call to serve and protect. We owe them more. [157]

3. Increased Due Process and "Uncharted Waters"

Veterans' advocates and supporters hoped that with the advent of judicial review, veterans would be afforded more due process in the VA adjudication system and that they would be treated more equitably. [158] In a review of the past decade of veterans law and due process, the most impactful court decision has to be the Federal Circuit's decision in *Cushman v. Shinseki*, which held that a veteran's entitlement to disability benefits is a property interest protected by the Due Process Clause of the Fifth Amendment. [159] However, since *Cushman* was decided in 2009, the Federal Circuit and the CAVC have avoided the

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[153] *Id.* at 1346.

[154] *Id.* at 1341.

[155] *Id.* at 1346-47.

[156] *Id.* at 1345.

[157] *Id.* at 1352 (Moore, J., concurring).

[158] *See, e.g.*, *Hearings*, *supra* note 24, at 17 (statement of Sen. John Kerry).

[159] *576 F.3d 1290, 1298 (Fed. Cir. 2009).*

application of a due process analysis to what are arguably the biggest issues in veterans' benefits in the last decade: the backlog of claims and delay in the system. Perhaps the use of the word "avoid" is too harsh of an assessment on the courts' willingness to intervene. It may be more accurate to say that the courts have been "prevented" from deciding such issues. As CAVC Judges Lance and Hagel noted in 2012:

> **[*539]** It is true that the Court rarely grants a petition for extraordinary relief. However, it should not be assumed from this fact that petitions are an ineffective tool for obtaining relief. The reality is that the Court regularly orders the Secretary to respond to a petition that sets forth a well-pleaded complaint that the processing of a claim has been improperly delayed. When the Court issues such an order, the great majority of the time the Secretary responds by correcting the problem within the short time allotted for a response, and the petition is dismissed as moot because the relief sought has been obtained. [160]

Recently however, a new wave of litigation at the CAVC and Federal Circuit has positioned the issue front and center for the CAVC and offered it another chance to consider the issue decisively. One prime example of this litigation is the case of Mr. Conley Monk. Mr. Monk is a Vietnam veteran who was denied service connection for his Post Traumatic Stress Disorder and filed his Notice of Disagreement with the VARO in July 2013. [161] After twenty months of waiting, Mr. Monk filed a petition with the CAVC for a writ of mandamus ordering the VARO to issue a Statement of the Case and claiming that the VARO's failure to do so was a constructive denial of Mr. Monk's benefits. [162] The CAVC denied his petition in a 2015 decision because Mr. Monk was unable to meet the *Costanza* standard showing that the Secretary's delay was equivalent to an arbitrary refusal to act. [163] Additionally, Mr. Monk asked that the CAVC "compel the Secretary promptly to decide his claim and that of thousands of similarly situated veterans who confront significant financial or medical hardship while awaiting a VA decision." [164] The CAVC rejected this request, [165] citing CAVC decisions reaching back to 1991 holding that class actions at the CAVC were impossible to adjudicate because:

> [the CAVC] lacks the power to adopt a rule of the kind proposed for class actions, . . .and, in any event, that (2) such a procedure in this appellate court would be highly unmanageable, and that (3) such a procedure is unnecessary in light of the binding effect of this Court's

[*540] published opinions as precedent in pending and future cases. [166]

Mr. Monk appealed this decision to the Federal Circuit. [167] By the time the Federal Circuit decided Mr. Monk's case, the VA had awarded him 100% disability for his claimed conditions. [168] The Federal Circuit found that the portion of Mr. Monk's case requesting that a writ of mandamus be issued to force the Secretary to act upon his specific claims was mooted by the

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160 *Young v. Shinseki, 25 Vet. App. 201, 215 (2012)* (Lance, J., dissenting).

161 *See* *Monk v. Shulkin, 855 F.3d 1312, 1314 (Fed. Cir. 2017).* Separately, Mr. Monk was applying to the Board of Corrections of Naval Records for an upgrade of his discharge from service. *Id.*

162 *Id. at 1314-15.*

163 *Id. at 1315.*

164 Monk v. McDonald, No. 15-1280, 2015 WL 3407451, at *2 (Vet. App. May 27, 2015), *rev'd and remanded sub nom.* *Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017).*

165 *Id.* at *3 (first citing *Harrison v. Derwinski, 1 Vet. App. 438 (1991)* (en banc); then citing *Lefkowitz v. Kerwinski, 1 Vet. App. 439, 440 (1991)).*

166 *Harrison, 1 Vet. App. at 438.*

167 *Monk, 855 F.3d at 1315.*

168 *Id. at 1316.*

decision. [169] However, the Federal Circuit found that the question of a class action was not mooted and held that the CAVC does in fact have the authority and jurisdiction to adjudicate class action suits. [170] The Federal Circuit relied in part on the All Writs Act's [171] authority to aggregate claims, which it found applied to the CAVC. [172] Additionally, the Federal Circuit found no inherent prohibition on hearing class action suits in the VJRA, which established the CAVC's jurisdictional authority. [173] The Federal Circuit remanded Mr. Monk's case to the CAVC and allowed the CAVC to determine the appropriateness of aggregation in this instance and the procedures that would best effectuate that type of litigation. [174]

On remand, the CAVC noted that "we are all in uncharted waters." [175] The CAVC acknowledged and noted its insufficient procedures and interest in the participation of a number of stakeholders in the determination of when a class action is appropriate and other issues surrounding Mr. Monk's case. [176] Therefore, the CAVC requested that the parties provide input on twelve questions. [177] The CAVC received **[*541]** seven amici briefs on these twelve questions from various groups

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169 *Id.*

170 *Id. at 1316-18.*

171 *28 U.S.C. § 1651*(a) (2012).

172 *Monk, 855 F.3d at 1318-19.*

173 *Id. at 1319-20.*

174 *Id. at 1321-22.*

175 Monk v. Shulkin, No. 15-1280, 2018 WL 507445, at *2 (Vet. App. Jan. 23, 2018).

176 *Id.* at *2-4.

177 Monk v. Shulkin, No. 15-1280, 2017 WL, at *2 (Vet. App. Oct. 26, 2017). Specifically, the CAVC requested input on these twelve questions:

> 1. What framework should the Court use to determine whether class/aggregate action is warranted (for example, *Federal Rule of Civil Procedure 23*; an omnibus rule (see, e.g., Office of the Special Masters of the U.S. Court of Federal Claims); or another framework) to reflect the unique nature of this appellate court?
>
> 2. Are there likely difficulties in managing the putative class, and, if so, should such difficulties be a factor that the Court considers in certifying a class?
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> 3. If the Court decides to certify a class, how should it select counsel for the class?
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> . . .
>
> 4. How should the Court determine whether a putative class member demonstrates medical or financial hardship, as defined by *38 U.S.C. § 7107*(a)(2)(B) and (C)?
>
> 5. Is this Court able to make the findings necessary to certify a class, given that *38 U.S.C. § 7261*(c) prohibits the Court from making factual findings in the first instance? . . . Assuming the Court would not be barred from making such findings, what mechanism(s) should the Court use to do so (e.g., mandatory disclosures, preliminary record by the Secretary, discovery, etc.)?
>
> 6. If the Court decides to certify a class, should the Court direct any notice to the class members? In answering this question, please also address whether class members should have the right to opt out of the class and, if so, what notice should be provided on that matter. Also, should the Court adopt an opt-in approach instead? . . .
>
> 7. How would a class action be superior to a precedential decision from this Court in fairly and efficiently adjudicating the due process issue raised by the petitioner? Does the type of relief the petitioner seeks from the Court play a role in determining whether the Court should issue a precedential decision or certify a class?
>
> 8. How should the Court define the "extraordinary" circumstances that warrant the issuance of a writ of mandamus when the petitioner seeks aggregate resolution?

including The National Law School Veterans Clinic Consortium, [178] The National Organization of Veterans Advocates, veterans organizations, a group of interested administrative law professors, a group of varied organizations including a homeless advocacy network, and two former General Counsels of the VA. [179]

[*542] Question eight, regarding the circumstances appropriate for a writ of mandamus, was subsequently answered by the Federal Circuit's opinion in *Martin*, already discussed. [180] Regarding questions relating to a due process analysis of the delay in the VA system, the possibility that delay does result in a due process violation is not a new one. The Supreme Court has held that delay can violate a claimant's Fifth Amendment rights. The Court held that due process includes the opportunity to have one's concerns heard "at a meaningful time and in a meaningful manner" [181] and has found that delay of one hundred days in other administrative benefits contexts was too long to satisfy the Fifth Amendment's requirements for procedural due process when withholding a claimant's property rights. [182] Amici and the parties agreed that the balancing test in *Mathews v. Eldridge* [183] should be applied to any due process analysis of delay. [184] The *Mathews* test considers three factors: (1) the nature and weight of the petitioner's private interest, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value of additional safeguards, and (3) the Government's interest in maintaining the existing procedures. [185]

> . . .
>
> 9. How should the Court assess whether VA's delay in adjudicating appeals constitutes a violation of constitutional due process? Does the analysis of whether there has been a deprivation of due process differ from the analysis of whether VA adjudication of appeals has been "unreasonably delayed"?
>
> . . .
>
> 10. How does the absence of congressionally mandated VA deadlines factor into the Court's due process determination of whether delay in VA adjudications constitutes a due process violation?
>
> . . .
>
> 11. If the Court were to certify a class and grant the writ, what is the appropriate remedy? Please identify the sources of law, including specific VA laws, regulations, or policies, if any, that support the grant of the requested relief. Additionally, if the relief requested by the petitioner creates delays for other VA claimants, should this be a factor that the Court considers before granting the requested relief?
>
> 12. Would the administration of the relief requested require individual determinations if the class-wide allegations are proven? If yes, what is the Court's role in monitoring compliance with the writ?

Id. at *2-4.

[178] *See* NATIONAL LAW STUDENTS VETERANS CLINIC CONSORTIUM, *www.nlsvcc.org* [*https://perma.cc/5FZ6-C9GD*] ("The NLSVCC is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis.").

[179] *Monk v. Shulkin, 2017 U.S. App. Vet. Claims LEXIS 1543.* These briefs may be obtained on the CAVC's website. *See* Case Search, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp* [*https://perma.cc/CHR6-FSAR*] (enter "15-1280" in the "Case Number / Range" box, click "Search," then click the "15-1280" hyperlink, click "Full Docket" near the top of the page, and click "Run Docket Report").

[180] *See supra* notes 151-57 and accompanying text.

[181] *Armstrong v. Manzo, 380 U.S. 545, 552 (1965).*

[182] *See Fusari v. Steinberg, 419 U.S. 379, 383-84, 388-90 (1975).*

[183] *424 U.S. 319 (1976).*

[184] *Brief for Petitioners at 54, Monk v. Wilkie, 30 Vet. App. 167* (Aug. 23, 2018) (No. 15-1280); Brief for Respondents at 67, *id.*

[185] *Mathews, 424 U.S. at 335.*

The recommendations for how to create rules and procedures for class action suits, which were the bulk of questions the CAVC posited, resulted in the majority of the amici briefs. [186] In January 2018, the CAVC issued an order acknowledging that there are very few appellate courts in the position of hearing class action suits. [187] The CAVC then announced that it intended to follow the U.S. Supreme Court's procedures for when it has authority to act as a trial court. [188] In those instances, the Court uses the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE). [189]

On August 23, 2018, the CAVC issued an order in which it made no decision on the merits of the contentions in *Monk*. [190] The order merely **[*543]** ruled on the issue of class certification. [191] The court, in a plurality, applied *FRCP 23* and held that the proposed class of "all individuals who applied for and have been denied VA disability compensation benefits and have not received a decision from the Board of Veterans' Appeals (Board) within 12 months of the date of filing a timely NOD" failed to meet the standards required for class certification. [192] In particular, the court in reviewing the four prerequisites under *FRCP 23(a)* for class certification found that the proposed class failed to meet the prerequisite of a common question for the cause of the delay in adjudicating the veterans' appeals. [193] The court's order that the petitioners failed to meet the commonality prerequisite prevented the court's review of any of the other requirements of class certification.

In analyzing the commonality requirement, the court noted that the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* required the proposed class to demonstrate class members suffered the same injury, but in doing so cannot rely merely on the fact that all members suffer from the same violation of law. [194] The requirement is more broadly read to require that the "common contention . . . is capable of classwide resolution . . . in one stroke." [195] Petitioners' theory of commonality rested on the fact that some amount of time, in this instance over one year, is *too* long for the VA to take to decide an appeal. [196] The reasons for the delay are inconsequential because the delay is "both unconstitutional and 'unreasonable' no matter the reason." [197]

In the plurality's reasoning that no commonality exists, the opinion expends a large amount of energy parrying the dissent's contentions that commonality does exist, and in doing so becomes an instructive read in the arguments and counter arguments

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186 *See generally* amicus briefs, *supra* note 179.

187 Monk v. Shulkin, No. 15-1280, 2018 WL 507445, at *2 (Vet. App. Jan. 23, 2018).

188 *Id.*

189 *Id.*

190 *Monk v. Wilkie, 30 Vet. App. 167, 170 (2018)* (plurality opinion).

191 *Id.*

192 *Id. at 181.*

193 *Id. at 175-81; see* id. at 174 (discussing the four requirements of class certification under Rule 23) (citing *FED. R. CIV. P. 23(a)*. "The four prerequisites . . . are . . . 1.) Numerosity: The class is so numerous that joinder of all members is impracticable; 2.) Commonality: There are questions of law or fact common to the class; 3.) Typicality: The claims or defenses of the representative parties are typical of the claims and defenses of the class; and 4.) Adequacy: The representative parties will fairly and adequately protect the interests of the class.").

194 *Id. at 175* (citing *Wal-Mart Stores v. Duke, 564 U.S. 338, 349-50 (2011)).*

195 *Id.* (quoting *Wal-Mart, 564 U.S. at 350)* (internal quotes omitted).

196 *Wal-Mart, 564 U.S. at 350.*

197 *Monk, 30 Vet. App. at 177* (plurality opinion).

to each point of view. [198] Therefore, it seems prudent to consider the dissent and the plurality's response to its specific concerns.

[*544] The dissent notes that class certification is extremely important in regards to resolving the delay issue. In support of this proposition, the dissent cited the Federal Circuit's decision in *Ebanks v. Shulkin*, where the court "commented that it was uncomfortable with granting a writ in an individual case for 'veterans who claim unreasonable delay in VA's first-come-first-served queue . . . without resolving the underlying problem of overall delay.'" [199] The Federal Circuit then went on to suggest addressing the issue of delay by class action with aggregate relief. [200] The dissent, in which two other judges concurred or dissented in part, primarily asserted that the plurality required the petitioners to meet "too high a bar" for certification due to "conflating resolution of the merits of the petitioners' claims with the procedural question of commonality." [201] This conflation occurs because the plurality possess a "flawed understanding of the petitioners' claims . . . not based on the petitioners' theory of the case." [202]

The conflation comment stems from a disagreement regarding how deeply courts must explore the merits of petitioners' claim. If the determination of commonality in this case relies on the assertion of the petitioner that the cause of the unreasonable delay is a systemic problem, the reasons for delay would not matter and the inquiry regarding commonality can end. This was the dissent's position. [203] The dissent asserted that the court can answer the question of whether the delay suffered by the petitioners was too long, either in terms of unreasonableness or resulting in a violation of one's constitutional rights. [204] The answer to either of these questions will affect every one of the petitioners in a similar fashion.

If however the analysis requires a more detailed digging into the reason for each particular delay, a deeper inquiry drawing closer to the heart of the merits of the claim is necessary. [205] The VA asserted that it was impossible to determine the reasonableness of delay without **[*545]** exploring the reason for delay in each appeals adjudication. [206] Some reasons for delay may be due to the veteran's request for a hearing, other adjudications may require the VA to comply with the duty to assist the veteran in obtaining evidence, and in yet others the delay may be caused by the difficulty of the claims on appeal. [207]

The plurality agrees with the VA's position, asserting that "the substantive law underscores that a central inquiry that must be resolved is whether the VA's delay is unreasonable" and that the only way to determine reasonability is to consider the reasons for each individual veterans' delayed adjudication. [208] Because the petitioners could not point to one practice of the VA that

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198 *Id. at 177-78.*

199 *Id. at 187* (Allen, J., dissenting) (citing *Ebanks v. Shulkin, 877 F.3d 1037, 1039-40 (Fed. Cir. 2017)).*

200 *Id.* (citing *Ebanks, 877 F.3d at 1040).*

201 *Id.* at 184.

202 *Id.* at 194.

203 *Id.* at 190-91. The dissent vividly describes the commonality using the imagery of a pool of water, which represents commonality and boats on the water, which represent each individual veteran's claim. The question of commonality should be limited to whether or not there is one common action that will cause the water in the pool to rise, thus causing all boats to rise, or the water to fall, thus causing all boats to fall. *Id.* at 191.

204 *Id.* at 191-92.

205 *Id.* at 190-91.

206 *Id.* at 178-79 (plurality opinion).

207 *Id.*

208 *Id.* at 178.

leads to the delay, the court was left having to weigh individual reasons for the delay, thus negating the ability to rule on a common question that could resolve all cases in "one stroke." [209] "Our insistence that the petitioners identify the reasons for delay is so that we may determine whether commonality exists." [210]

The *Monk* dissent's assessment of the impact of the plurality's decision to avoid the merits of the issues and decline to certify a class in this case is insightful. The dissent notes "[t]he plurality's reading of the commonality requirement makes it functionally impossible to certify a class in many delay claims" and "in so doing . . . has effectively precluded the Court from playing a meaningful role in addressing the systemic deficiencies plaguing the veterans benefits system--at least for today." [211] If a bright light comes out of the court's ultimate brushing aside of one of the most pressing issues of constitutionality regarding veterans' benefits, it is that the entirety of the court agreed the CAVC will in the future consider utilizing class action procedures under the guidance of *FRCP 23*, at least until the court adopts its own aggregate procedures rules. [212]

Other class action suits filed at the CAVC address various aspects of the VA adjudication system. One such case, *Skaar v. Wilkie*, regarding veterans' exposure to radiation, was recently argued *en banc*. [213] In **[*546]** February 2019, the CAVC issued a limited remand back to the Board to clarify an issue on the merits of the case before returning the case to the CAVC for a decision on class certification. [214] The *Skaar* order was a surprise and not because it made no decision on class certification. For years, the CAVC complied with its holding in *Cleary v. Brown* and relinquished jurisdiction of a case back to the Board on remand. [215] By ordering a limited remand in *Skaar* the CAVC has once again changed the landscape of the practice of veterans law and actually overruled "more than 2 decades of Court caselaw and chang[ed] long-established procedural norms" regarding the CAVC's jurisdiction. [216] In a concurrence to the order, Chief Judge Davis encouraged the CAVC to grasp the "broad discretion to define the scope of its remand authority" that other Federal appellate courts exercise. [217] The dissent to this order was concerned about, among other things, the sweeping aside of decades of precedent with little discussion and a potential overreaching of the CAVC's statutory jurisdiction. [218] The import of this sea change in the CAVC's view of its own jurisdictional authority will be an interesting development to watch over time. To be sure, retaining jurisdiction over the class for purposes of class certification will both spur the Board to make a decision on the merits of the case more quickly. It will also avoid a tactic employed by the Secretary and discussed previously in this article--the VA making decisions in favor of veterans in order to prevent them from seeking remedy at the CAVC that may result in precedent.

While the CAVC has not yet explicitly ordered how and when class actions will be utilized in the VA system, the use of this mechanism may finally be coming to fruition for advocates who have long seen this as a possible benefit of judicial review.

4. Final Observations

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[209] *Id.* at 178-79; *Wal-Mart Stores v. Duke, 564 U.S. 338, 350 (2011).*

[210] *Monk, 30 Vet. App. at 178* (plurality opinion).

[211] *Id. at 187, 185* (Allen, J., dissenting).

[212] *Id. at 171* (plurality opinion); *id. at 184* (Allen, J., dissenting).

[213] Skaar v. Wilkie, No. 17-2574 (Vet. App. Argued Sept. 25, 2018); *see also* *Rosinski v. Shulkin, 29 Vet. App. 183, 186 (2018)* (arguing that the VA's policy of allowing VSOs access to claimant decisions harmed those veterans represented by attorneys but dismissing the case for lack of standing).

[214] Skaar v. Wilkie, No. 17-2574, 2019 WL 405679, at *1-2.

[215] *Cleary v. Brown, 8 Vet. App. 305, 308 (1995).*

[216] Skaar, 2019 WL 405679, at *11.

[217] *Id.* at *9.

[218] *Id.* at *25, 29-31.

Judge Allen's article analyzing the growth of the CAVC a decade ago was prescient in many ways. [219] He foresaw that the class action mechanism would be desirous in a system overrun by delay. [220] He also repeatedly commented on the uncertainty of veterans law when appellate **[*547]** judicial decision-making is shared between the Federal Circuit and the CAVC. [221] This tension creates "doctrinal confusion on matters of law" that results in "additional delays for veterans and other claimants." [222] This type of confusion is on full display in *Martin*, a Federal Court decision which changed decades of CAVC precedent relied upon by thousands of veterans and their advocates. Judge Allen also noted that the CAVC tended to limit its own authority to its detriment and was often disrespected in the larger legal system [223]--a position validated by the Federal Circuit's decision in *Monk*.

In 2017, Professor Michael Wishnie of Yale Law School noted that many of Judge Allen's concerns in 2008 were still relevant a decade later. Professor Wishnie argues that the CAVC itself has become "ghettoized"--cordoned off from other areas of law and afforded less status because of the nature of the court's specialization. [224] He suggests that a de-specialized system of judicial review would better serve the needs of veterans and help prevent some of the delay inherent in the CAVC's limited judicial authority. [225] Professor Allen suggested prior to joining the CAVC bench that elevating the CAVC to Article III status might well alleviate many of the concerns. [226]

The observations of Judge Allen and Professor Wishnie are valid ones. Indeed, the conversation regarding changes to judicial review is necessary to ensure that this unique system works to the benefit of the nation as it seeks to care for veterans. However, this author believes that changes to the structure of judicial review are important to discuss but will ultimately amount to nothing if the administrative agency being reviewed is unable to implement the law as decided by any court regardless of its stature. The VA's decision-making process over the past thirty years demonstrates this problem. Changes in the earliest stages of decision-making and appeals at the VA level seem to be the place where pioneers could actually change the system for the better. Others have agreed that changes in the beginning of the appeals process are not only desired, but necessary, thus setting the stage for the recent enactment of the most sweeping legislation to affect the way the VA **[*548]** does business in thirty years. [227]

III. SHIFTING FRONTIERS: THE VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017

In 2016, the VA began efforts to propose legislative changes to its adjudicative system in Congress. [228] The VA's concern was that appeals procedures at the VA were "a collection of process that have accumulated over time, unlike any other appeals

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[219] *See* Allen, *supra* note 50.

[220] *Id.* at 404.

[221] *Id.* at 393-94; 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).*

[222] Allen, *supra* note 50, at 394.

[223] *Id.* at 387.

[224] *See* Wishnie, *supra* note 135, at 1733-37.

[225] *Id.* at 1738-40.

[226] *See* Allen, *supra* note 50, at 399-402.

[227] *Legislative Hearing on: H.R. 3216, H.R. 4150, H.R. 4764, H.R. 5047, H.R. 5083, H.R. 5162, H.R. 5166, H.R. 5392, H.R. 5407, H.R. 5416, H.R. 5420, H.R. 5428: Hearing Before the H. Comm. on Veterans' Affairs*, 114th Cong. 5 (2016) [hereinafter *Legislative Hearing*] (statement of Rep. Dina Titus).

[228] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-349T, VA DISABILITY BENEFITS: OPPORTUNITIES EXIST TO BETTER ENSURE SUCCESSFUL APPEALS REFORM 1 (2018).

process in government. Layers of additions to the process have made it a complicated, opaque, unpredictable, and less veteran-friendly. It makes adversaries out of veterans and VA and it is ridiculously slow . . . ." [229]

To address these concerns, the VA gathered with eleven major stakeholders in the VA process and over the course of several months began to form a plan to reshape the appeals procedures. [230] Those invited to the table included the "Big 6" Veterans Service Organizations [231], National Veterans Legal Services Program, National Organization of Veterans Advocates, and county veterans service organizations. [232] These sometimes all-day, closed-door sessions built upon work begun in 2014 by a similar and smaller working group. [233] In the end, the Veterans Appeals Improvement and Modernization Act of 2017 (Appeals Modernization Act) emerged from Congress and was signed into law by President Trump in August 2017. [234] This legislation is truly a new **[*549]** frontier for those who are willing and able to advance veterans' rights and to shape the future.

A. Major Aspects of the Appeals Modernization Act

1. Multiple Paths

The new legislation picks up in the VA process after the VARO makes its initial decision on a veteran's claim. If the veteran is dissatisfied with the VA decision in the current system of appeals, a period referred to as the "legacy system," the veteran had to file a Notice of Disagreement, [235] wait for the VA to issue a Statement of the Case, [236] and then file a VA Form 9 to appeal to the Board of Veterans' Appeals. [237] After these steps, the veteran had the opportunity to appeal to the Court of Appeals for Veterans Claims. [238]

Under the Appeals Modernization Act, the veteran now has three different paths to appeal a VARO decision. The whole process is very much like a "choose your own adventure" story. There are multiple pathways, each with very different processes and ends. According to the VA, "(t)he essential feature of this newly shaped design would be to step away from an appeals process that tries to do many unrelated things inside a single process and replace that with differentiated lanes, which give Veterans clear options after receiving an initial decision on a claim." [239]

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[229] *Legislative Hearing*, *supra* note 227, at 18 (statement of Sloan Gibson, Deputy Secretary for the Department of Veterans Affairs).

[230] *Id.* at 6 (statement of Rep. Dina Titus); *id.* at 21 (testimony of Paul Varela, Assistant National Legislative Director for the Disabled American Veterans).

[231] The "Big 6" is a term used to refer to the Veterans Service Organizations with the largest membership and includes Vietnam Veterans of America, the American Legion, the Disabled American Veterans, the Veterans of Foreign Wars, AMVETS, and Paralyzed Veterans of America. *See "The Big 6" United Behind Veterans First Act*, DISABLED AMERICAN VETERANS (July 7, 2016), https://www.dav.org/learn-more/news/2016/big-6-united-behind-veterans-first-act/ [https://perma.cc/A99Q-GJQ7].

[232] *Legislative Hearing*, *supra* note 227, at 27 (statement of Rick Weidman, Executive Director for Policy and Government Affairs, Vietnam Veterans of America).

[233] *Id.* at 45 (statement of Paul Varela, Assistant National Legislative Director, Disabled American Veterans).

[234] Veterans Appeals Improvement and Modernization Act of 2017, Pub L. No. 115-55, ***131 Stat. 1105.***

[235] *38 U.S.C. § 7105*(b)(1) (2012 & Supp. 2017).

[236] *38 C.F.R. § 19.26 (2016)*.

[237] *38 U.S.C. § 7104*(a) (2012).

[238] *38 U.S.C. § 7252*(a) (2012).

[239] *Legislative Hearing*, *supra* note 227 at 41 (statement of Sloan Gibson, Deputy Secretary, Department of Veterans Affairs).

The first path allows the veteran to file for a higher level review at the VARO itself. [240] This request must be made within one year of the VARO decision. [241] The review at this level is de novo, as it is in every level of appellate review created in the new legislation, but is limited to the evidence already in the record. [242] The veteran has no opportunity in this review to submit additional evidence. This evidentiary change is a sharp divergence from the legacy system. The higher-level review will sound very similar to those already familiar with the VA adjudication **[*550]** system as the Decision Review Officer (DRO) review. [243] The DRO review in the current system is a supplemental level of review by a more-experienced employee of the VA. The VA's implementation of the Appeals Modernization Act anticipates that the training and experience of the higher-level review will be commensurate with the current DRO positions, and that VAROs will initially fill the higher-level review positions with DROs. [244]

The second path allows the veteran to file what the new legislation refers to as a "supplemental claim." [245] Supplemental claims are filed in two circumstances. The first is when more than a year has passed since the original VARO decision was issued. [246] Those veterans wishing to have the VARO adjudicate the claim again must file their own supplemental statement of the case. In the legacy system, filing a claim with the VARO after a year had passed was referred to as "reopening a claim" and required new and material evidence to effect. The supplemental claim requires "new and relevant evidence" to readjudicate the claim. [247] As discussed in more detail below, this new standard is not intended to construe a higher standard than the previous "new and material" standard in the legacy system. [248] The second circumstance when a supplemental claim may be filed is within a year of a decision by the higher-level authority, the Board, or the CAVC, in order to add new and relevant evidence to the file for further review of the claim. [249] This new mechanism has a tremendous impact on the start date of a veteran's disability award, if granted, (called the "effective date of the claim"), which will be discussed further below.

The third option is to file a Notice of Disagreement, [250] which like its previous incarnation in the legacy system must be filed within one year of the VARO decision and will lead the veteran to the Board for review. [251] However, unlike the legacy system, the Statement of the Case and the VA Form 9 are now removed from the new system. The Notice **[*551]** of Disagreement is the only document the veteran must file to effectuate Board review.

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[240] *38 U.S.C. § 5104B* (Supp. 2017).

[241] *Id.* § 5104B(b)(1)(B).

[242] *Id.* § 5104B(d)-(e).

[243] *See* *38 C.F.R. § 3.2600 (2018)*; *see* U.S. DEP'T OF VETERANS AFF., M21-1, ADJUDICATION PROCEDURE MANUAL, PT. I, CH. 5, § C(2)(a) (2015).

[244] U.S. DEP'T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM 12-13 (2017), *https://benefits.va.gov/benefits/docs/appeals-report-201711.pdf* [*https://perma.cc/FC5G-5QD6*].

[245] *38 U.S.C. § 5104C*(a)(1)(B).

[246] *Id.* § 5104C(b).

[247] *38 U.S.C. § 5108*(a) (Supp. 2017).

[248] *Id.* § 5108 note (Rule of Construction).

[249] *38 U.S.C. § 5110*(a)(2) (2012 & Supp. 2017).

[250] *38 U.S.C. § 5104C*(a)(2)(C) (Supp. 2017).

[251] *38 U.S.C. § 7105*(b)(1)(a) (2012 & Supp. 2017).

Once the claim arrives at the Board, there are three possible paths for the veteran to take. The first path to Board review allows the veteran to have a hearing before the Board and to submit new evidence for the Board's consideration. [252] These hearings will be limited in the future to the Board's primary location in Washington, D.C. or by video-teleconference to a VA facility. [253] The Board will consider evidence available to the VARO in its original decision and any evidence submitted by the veteran at the Board hearing and within ninety days following the hearing. [254] The current option of having a hearing before a live judge who travels to the veteran's local facility, a VA travel board, will no longer be available in the new system. The second route allows the veteran to submit additional evidence to the Board without a hearing. [255] In this instance, the veteran may submit evidence either with the Notice of Disagreement or within ninety days of filing the Notice of Disagreement. [256] The final path is Board review without a hearing or additional evidence being submitted. [257] In this review, the Board's review of the veteran's claim is limited to the evidence of record. [258]

2. Changing Standards

As mentioned, the previous standard of "new and material" evidence necessary to reopen a claim has been replaced with "new and relevant" evidence necessary to file a supplemental claim. [259] Providing material evidence to the VA required a veteran to submit "evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." [260] In contrast, the definition of "relevant" in the new standard can be found in *38 U.S.C. § 101* as "evidence that tends to prove or disprove a matter in issue." [261] The newer standard of relevant appears to be a lower standard as it only needs to prove or disprove the claim at issue, not relate to an **[*552]** unestablished fact that would substantiate the claim. In any event, the VA has acknowledged that this relevant evidence requirement is not intended to "impose a higher evidentiary threshold than the previous new and material evidence standard . . . ." [262]

However, as one commentator noted, the new standard does not appear to make supplemental claims easier to adjudicate than reopened claims. "[M]erely trading 'relevant' for 'material' will not significantly reduce the adjudication burden on VA. Removing 'relevant' allows VA to adjudicate the merits every time and eliminates the need to make a threshold determination." [263] The VA's new regulations on the implementation of the Appeals Modernization Act were issued in January of 2018. The new regulations provide that "relevant" evidence can include evidence that raises a theory of entitlement that was not

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[252] *Id.* § 7105(b)(3)(A).

[253] *Id.* § 7107(c).

[254] *Id.* § 7113(b)(1)-(2).

[255] *Id.* § 7105(b)(3)(B).

[256] *Id.* § 7113(c).

[257] *Id.* § 7105(b)(3)(C).

[258] *Id.* § 7113(a).

[259] *Id.* § 5103A(f)(2).

[260] *38 C.F.R. § 3.156 (2016)*.

[261] *38 U.S.C. § 101*(35) (2012 & Supp. 2017).

[262] *38 C.F.R. § 3.2501(a) (2018)*.

[263] *Pending Legislation: Hearing Before the S. Comm. on Veterans' Affairs*, 114th Cong. 2 (written testimony of Diane Rauber, Exec. Dir. National Organization of Veterans Advocates) (May 24, 2016) [hereinafter *Pending Legislation*], *https://www.veterans.senate.gov/imo/media/doc/NOVA%20Rauber%20Testimony%205.24.16.pdf* [*https://perma.cc/9GQV-WK32*].

previously addressed by the VA. [264] As the regulations are not yet in effect, it remains to be seen how the VAROs will actually apply these standards in the future.

3. Effective Dates

In the legacy system, a veteran can only receive benefits back to the filing date of their most current claim. This start date for the award of benefits is referred to as the effective date of the claim. If the veteran fails to file an appeal within a year or exhausts all avenues of appeal and still finds no relief, the veteran would be forced to file a reopened claim. If the reopened claim were granted, the effective date of the veteran's benefits would be as of the date of the reopened claim. Under the Appeals Modernization Act, a major boon for veterans is a change that now allows veterans to maintain the original effective date of a claim no matter how many times they appeal. [265] All that is required is that the veteran submit new and relevant evidence within a year of the most recent decision made on the claim. [266] If a supplemental claim is filed after a year has passed, the new effective date will be the date of the supplemental claim. [267]

[*553] For example, in the current legacy system a veteran who files a claim, appeals to the Board, then appeals to the CAVC, and fails to do anything else after that has come to the end of the claim. If six months after the CAVC decision the veteran were to find the key medical evidence needed to reopen the claim and subsequently wins an award of benefits, the effective date begins when the claim is reopened.

In the new system, when the veteran finds that key piece of evidence six months after the CAVC opinion or his Board opinion, the veteran can file a supplemental claim and the effective date will be the date of the initial claim (which could have been several years earlier). It is not limited to the date the veteran filed the supplemental claim. However, as mentioned before, to benefit from this new rule, the veteran has to file the supplemental claim within one year of the Board or CAVC decisions.

The VA also noted in testimony to Congress that these new rules regarding effective dates would allow veterans to better understand what evidence was necessary to prove their claims from higher stages of appellate review. The veteran could then come back and file a supplemental claim with that necessary evidence, all "without fearing an effective-date penalty for choosing to go to the Board first." [268]

4. Favorable Findings

Another improvement on the VA adjudication system is that now favorable findings made at any level of adjudication are binding upon all subsequent adjudications with the VARO and Board, unless clear and convincing evidence to rebut the favorable finding is presented. [269] This protection will have a significant impact on the legacy system where every review by the various levels of the VA is de novo.

B. Major Concerns with the Appeals Modernization Act

1. Legacy Claims

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[264] *38 C.F.R. § 3.2501(a)(1) (2018)*.

[265] *38 U.S.C. § 5110*(a)(1)-(2) (2012 & Supp. 2017).

[266] *Id.*

[267] *Id.* § 5110(a)(3).

[268] *Legislative Hearing*, *supra* note 227, at 41 (statement of Sloan Gibson, Deputy Secretary, Department of Veterans Affairs).

[269] *38 U.S.C. § 5104A* (Supp. 2017).

The implementation date of the Appeals Modernization Act will be, at the earliest, February 2019. [270] With some exceptions noted below **[*554]** which are part of a pilot or phased rollout of the Act, claims that are waiting in the system and those claims filed before the official implementation of the Appeals Modernization Act, will be processed under the legacy system. As of September 2018, there were 403,000 legacy appeals pending. [271]

To begin implementing the new system, Congress authorized the VA to start a phased rollout of newly created policies and procedures. [272] This rollout is referred to in the VA as the RAMP program (Rapid Appeals Modernization Program). [273] To begin, in November 2017 the VA mailed invitations to 500 veterans with a currently pending Notices of Disagreement or Form 9, or with cases pending certification to the Board or remand from the Board. [274] The invitations informed the veterans of the RAMP program and asked them to participate by transferring their currently pending appeals to the higher level review or supplemental claim lanes of the new act. [275] The letters also advise

> Participation in RAMP is voluntary; however, taking advantage of this unique opportunity to use several aspects of the new process may help you avoid the delays you are experiencing in the current process. Participation in RAMP requires withdrawing your pending compensation benefit appeal(s) and substituting the review procedures set forth in the Appeals Modernization Act. VA will process all of your eligible appeals under the review lane you select. For the issues addressed under RAMP, you will not be able to request additional review of VA's decision under the current (legacy) appeals process; however, you will have access to all the review options and benefits of the new process. [276]

The VA finalized the regulations necessary to implement the Appeals Modernization Act on January 18, 2019, and the Secretary certified to Congress that the VA is ready to implement the Act. [277] The **[*555]** official implementation date of the Act will be February 19, 2019. [278] After that date, veterans in the legacy system may opt into the new system after they receive a Statement of the Case, or they can remain in the legacy system and continue through that process. [279]

The VA reported to Congress that 10% of eligible veterans would need to opt into the program to make RAMP meaningful as an early trial of the Appeals Modernization Act procedures. [280] As of September 2018, the VA reported that 60,000 legacy appeals had been voluntarily transferred to the RAMP program. [281]

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[270] *Id.* § 101 note (Applicability, In General); *see also* Pub. L. No. 115-55, § 2(x)(1), ***131 Stat. 1105, 1115 (2017)*** (VA must certify to Congress that it has systems in place to process all legacy and new appeals before full implementation.).

[271] U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 244, at 6.

[272] Pub. L. No. 115-55, § 2(x)(4), ***131 Stat. 1105, 1115 (2017).***

[273] U.S. DEP'T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM: NOVEMBER 2018 UPDATE 5 (2018), *https://benefits.va.gov/benefits/docs/appeals-report-201811.pdf* [*https://perma.cc/AN62-6EWF*].

[274] Letter from U.S. Dep't of Veterans Affairs, to Client (June 1, 2018) (on file with author).

[275] U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 244, at 19; Letter from U.S. Dep't of Veterans Affairs, *supra* note 274.

[276] Letter from U.S. Dep't of Veterans Affairs, *supra* note 274.

[277] VA Claims and Appeals Modernization, *84 Fed. Reg. 138-01* (Jan. 18, 2019) (to be codified at 38 C.F.R. pts. 3, 8, 14, 19, 20 and 21). U.S. DEP'T OF VETERANS AFFAIRS, *https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5183* [*https://perma.cc/6MTE-EWVK*] ("VA To Implement Appeals Modernization in February").

[278] *Id.*

[279] Pub. L. No. 115-55, § 2(x)(5), ***131 Stat. 1105, 1115 (2017);*** U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 244, at 24.

[280] U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 244, at 21.

The numbers of veterans voluntarily entering the RAMP program are not encouraging. Neither are the rates of granting a veteran's claims in the Higher Level review path or the Supplemental Claim path, according to numbers currently available. As of September [282] 2018, the total claims approved in the RAMP program was 27% of those considered, with 27.2% of those being a Higher Level review and 28.4% being Supplemental Claims. The rate of approval has steadily been decreasing. In May of 2018, the total RAMP claims approved were 36% and in March 2018 the approved claims were 53%. [283] One veterans' advocate posits that this downturn in approval rates may be because the VA expanded the claims permitted to move into RAMP from veterans targeted specially by the VA to the entirety of the claims in the legacy system. [284]

The Government Accounting Office (GAO) has expressed other concerns with the VA's plans to deal with the 400,000-plus claims currently in the legacy system. For instance, the VA has no estimated time frame for when it will be completely finished with processing legacy claims. [285] The GAO has also expressed concern that the VA's **[*556]** plan to implement the Appeals Modernization Act does not appropriately designate resources to the two parallel systems running side-by-side for an unknown number of years into the future. [286] This failure creates "an appeals plan that does not specifically articulate how VA will manage the two processes in parallel [and] exposes the agency to risk that veterans with appeals in the legacy process may experience significant delays or otherwise poor results relative to those in the new appeals process or vice versa." [287]

2. Duty to Assist

Despite the concern of stakeholders expressed in meeting to discuss the proposed Act, the VA advocated for a limitation in the VA's duty to assist a veteran. The VA argued that this limitation was necessary because in the legacy system "appeals have no defined endpoint and require continuous evidence gathering and re-adjudication." [288]

In the legacy system, as has been previously discussed, [289] under the Veterans Claims Assistance Act and for decades before this codification, the VA has had a duty to help a veteran at all steps in the adjudication process at the VARO and Board. Under the Appeals Modernization Act, the VA's duty to assist will apply only to a claim or to a supplemental claim. After the initial decision at the VARO is made on these claims, the VA's duty to assist ends and the veteran is on his own in the process of appealing the claim. [290] Congress specifically added language to the Appeals Modernization Act to ensure that the duty to assist did not apply in the Board or higher-level review process. [291] While the language of the statute provides for a remand to be ordered by the Board back to the VARO when violations of the duty to assist at the VARO are discovered (for instance, the

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[281] U.S. DEP'T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM: NOVEMBER 2018 UPDATE 5 (2018), *https://benefits.va.gov/benefits/docs/appeals-report-201811.pdf* [*https://perma.cc/F5S2-HDRR*].

[282] *Id.* at 15.

[283] U.S. DEP'T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM: MAY 2018 UPDATE 5 and 17 (2018).

[284] E-mail from Matthew Wilcut, Esq., to Stacey-Rae Simcox, Assoc. Professor of Law, Stetson Univ. Coll. of Law (July 3, 2018, 15:16 CST) (on file with author).

[285] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-352, VA DISABILITY BENEFITS: IMPROVED PLANNING PRACTICES WOULD BETTER ENSURE SUCCESSFUL APPEALS REFORM 17 (2018).

[286] *Id.* at 15.

[287] *Id.*

[288] *Legislative Hearing*, *supra* note 227, at 40 (statement of Sloan Gibson, Deputy Secretary, U.S. Department of Veterans Affairs).

[289] *See supra* Section III.A.1.

[290] *38 U.S.C. § 5103A*(e)(1) (2012 & Supp. 2017).

[291] *Id.* § 5103A(e)(2).

Board is specifically given authority to remand claims regarding the failure to order a medical opinion to the VARO), the concerns still exist regarding this change in the law. [292]

One of the apprehensions with this limitation on the duty to assist is **[*557]** that due to the limitation on when veterans may hire legal counsel, most veterans will not have the benefit of an attorney before choosing the path of appeal. Although the Appeals Modernization Act now permits veterans to hire attorneys after receiving the initial decision of the VARO, most will likely proceed in decision-making without consulting an attorney. [293] Failing to explore the options of presenting new evidence to an appellate adjudicator can affect a veteran's chances of succeeding on her claims. In the author's experience, new evidence, particularly new medical opinions concerning etiology of disabling conditions, has helped the VA change their minds and grant a veteran benefits approximately 84% of the time. [294] This potential for a veteran to fail to consider an appellate option to submit new medical evidence is particularly important in light of the poor medical evaluations provided by the VA that purport to, but do not, comply with the duty to assist standard. The VA has previously admitted that "[t]he adequacy of medical examinations and opinions, such as those with incomplete findings or supporting rationale for an opinion, has remained one of the most frequent reasons for remand." [295] One veterans' advocate has noted that "[w]hile VA often cites the veteran's submission of evidence as triggering the need for additional development, the reality is VA has consistently demonstrated difficulty fulfilling its fundamental obligation to provide veterans with adequate medical examinations and opinions in the first instance." [296] Considering this medical examination and opinion inadequacy problem, in addition to the other problems the VA has at every level that were previously discussed, [297] it seems odd that the VA would receive Congressional authority to eschew the duty to assist veterans with hopes to avoid delay at the expense of aiding veterans.

This legislative advocacy to eliminate the Board's duty to assist in the Appeals Modernization Act was not the first time that the VA has suggested limiting the duty to assist would make adjudicating veterans' **[*558]** claims go more quickly. Recently, the VA has begun to systematically chip away at the duty to assist veterans in order to speed up the processing of claims. In 2009, the VA began a push towards the filing of "Fully Developed Claims" (FDC). [298] The FDC process promised faster results in processing a veteran's claim if the veteran would only shoulder some of the burden the VA faces by retrieving the veteran's own privately held medical records and all other relevant evidence. [299] As of February 2019, alleviating itself of the burden of

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[292] *Legislative Hearing*, *supra* note 227, at 40 (statement of Sloan Gibson, Deputy Secretary, U.S. Department of Veterans Affairs).

[293] *38 U.S.C. § 5904*(c).

[294] Stacey-Rae Simcox, *Lightening the VA's Rucksack: A Proposal for Higher Education Medical-Legal Partnerships to Assist the VA in Efficiently and Accurately Granting Veterans Disability Compensation*, *25 CORNELL J.L. & PUB. POL'Y 141, 180 (2015).*

[295] *Why are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 113th Cong. 26 (2013) (statement of Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals, U.S. Department of Veterans Affairs).

[296] *Hearing on Pending Legislation: Hearing Before the S. Comm. on Veterans' Affairs*, 114th Cong. 104 (2016) (statement of Diane Boyd Rauber, Executive Director, National Organization of Veterans Advocates).

[297] *See supra* Section II.B.1.

[298] *Breaking Through the Backlog: Evaluating the Effectiveness of the New State Strike Force Team: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans' Affairs*, 112th Cong. 29 (2012) (statement of Diana Rubens, Deputy Under Secretary for Field Operations, Veterans Benefits Administration, Department of Veterans Affairs).

[299] *VA Claims System: Review of VA's Transformation Process: Hearing Before the S. Comm. on Veterans' Affairs*, 113th Cong. 17-18 (2013) (statement of Allison A. Hickey, Under Secretary for Benefits, Veterans Benefits Administration); *Fully Developed Claims: Claims and Evidence*, U.S. DEP'T OF VETERAN AFFAIRS, *https://www.benefits.va.gov/FDC/checklist.asp* [*https://perma.cc/E4PC-E6JX*] (last visited Jan. 11, 2019).

requesting veterans' records has sped the process of adjudicating claims up by four days on average, reducing the processing time from 111.4 days on average to 107.2 days. [300]

In 2015, the VA began formalizing the claims process in order to make the VA adjudication process easier for the VA. [301] The end result of this formalization now requires veterans fill out specific VA forms to file claims and notices of disagreement. [302] This change moved the system away from one that complied with the veteran-friendly spirit of the system and considered most communications from the veteran as an intent to file a claim or appeal. Now veterans are required to file formal claims and disagreements with specifications. [303]

Each time the VA chips away at the duty to assist, the VA changes course farther away from its guiding principles "to ensure that claimants are afforded every opportunity to substantiate their claim, with VA **[*559]** liberally construing the claim, providing assistance, generating evidence, developing a claim to its optimum, and granting every benefit that can be supported in law." [304] As the process of VA adjudication becomes less and less veteran-friendly, the effect that these changes have on veterans' due process rights, for instance the right to hire an attorney at the beginning of the VA process, will require further scrutiny in the future. [305]

3. Rating Decision Explanations

Based upon the working group's recommendations, Congress determined "that [VA rating] decision notification letters must be clear, easy to understand and easy to navigate. The notice letter must convey not only VA's rationale for reaching its determination, but also the options available to claimants after receipt of the decision." [306] To accomplish this goal, the Appeals Modernization Act mandates that each decision letter provide the veteran (1) an identification of the issues adjudicated, (2) a summary of the evidence considered, (3) a summary of applicable laws and regulations, (4) identification of findings favorable to the veteran, (5) identification of elements not satisfied that led to a denial, (6) an explanation of how to obtain or access evidence used in decision-making, and (7) identification of criteria that must be satisfied to grant service connection at the next higher level of compensation. [307] While in theory this list sounds like a major benefit of the new system, these things are already required in the legacy system when the VA issues a Statement of the Case. [308] Unfortunately, these

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[300] *Veterans Benefits Administration Reports: Fully Developed Claims*, U.S. DEP'T. OF VETERANS AFFAIRS *https://benefits.va.gov/reports/mmwr_va_claims_online.asp* [*https://perma.cc/8C5K-P9J8*] (last visited Feb. 5, 2019).

[301] Simcox, *supra* note 95, at 718.

[302] Catherine Trombley, *VA taking guesswork out of filing for benefits by requiring forms*, VANTAGE POINT (Mar. 18, 2015, 11:49 AM), *http://www.blogs.va.gov/VAntage/18183/va-taking-guesswork-out-of-filing-for-benefits-by-requiring-forms/* [*https://perma.cc/CMU8-G6HW*]; *see* VA FORM 21-526EZ, NOTICE TO VETERAN/SERVICE MEMBER OF EVIDENCE NECESSARY TO SUBSTANTIATE A CLAIM FOR VETERANS DISABILITY COMPENSATION AND RELATED COMPENSATION BENEFITS, U.S. DEP'T OF VETERAN AFFAIRS (2015), *http://www.vba.va.gov/pubs/forms/VBA-21-526EZ-ARE.pdf* [*https://perma.cc/GM6G-2QAB*]; FORM 21-0958, NOTICE OF DISAGREEMENT, U.S. DEP'T OF VETERAN AFF. (2015)*http://www.vba.va.gov/pubs/forms/VBA-21-0958-ARE.pdf* [*https://perma.cc/YAY9-FJLS*].

[303] Simcox, *supra* note 95, at 717.

[304] *Corrected Brief for Respondent-Appellee at 49, Martin v. O'Rourke, 891 F.3d 1338 (Fed. Cir. 2018) (No. 17-1747), 2017 WL 5127945,* at *49.

[305] *See, e.g.*, Simcox, *supra* note 95.

[306] *Veterans' Dilemma, supra* note 97, at 81 (statement of Paul R. Varela, Assistant National Legislative Director, Disabled American Veterans).

[307] *38 U.S.C. § 5104*(b) (2012 & Supp. 2017).

notifications are notoriously poor, with the VA satisfying its duty to explain its decision-making by copying and pasting dozens of pages worth of single spaced portions of the Code of Federal Regulations and sending them to the veteran. [309] One hopes that this new legislation will remedy the problems **[*560]** that evolved with the Statement of the Case, but it is worth keeping an eye on to see how this portion of the legislation evolves in action.

4. Same Problems, Different Legislation

Other concerns about the Appeals Modernization Act revolve around one basic consideration: without fixing underlying problems within the VA adjudication system the method in which veterans appeal these decisions will not make any appreciable difference. Certainly, these changes may cut the backlog and delay in obtaining decisions, but if these decisions are not adequate or accurate, veterans will also lose in the end.

The Disabled American Veterans spokesperson properly commented during congressional hearings on the new appeals legislation that "the most important principle for reforming the claims process was getting the decision right the first time . . . ." [310] The decision-making must be reformed first and has been laboring in inadequacy for quite a while. In the 1980s the VA indicated that remands of VARO decisions:

> may be an indication of several system wide problems--for example, poor original claims development within the DVA regional offices, inadequate medical examinations conducted by private or VA physicians, overworked adjudications within both DVB [Department of Veterans Benefits of the Veterans Administration] and BVA, [and] uncertainties regarding the resolution of highly complex cases like post-traumatic stress disorder or radiation exposure. [311]

Unfortunately, poor development and inadequate medical examinations are cited as the most common problems in adjudication over thirty years later. [312] The Appeals Modernization Act focuses on process but "is devoid of reform to the foundational underpinning of the claims adjudication and appeals process, i.e., the need for an adequate medical examination and opinion." [313]

Additionally, much of the success of the Appeals Modernization Act **[*561]** depends upon the VA's own proposed implementation schedule. As the National Organization for Veterans Advocates executive director noted:

> Successful execution of VA's proposed process hinges on its ability to consistently meet its goals of adjudicating and issuing decisions in the 125-day window identified in its "middle lane" and deciding appeals within the one-year period before BVA. As demonstrated with the prior backlog of original claims and scheduling of medical appointments, VA often struggles to meet its own internal goals to the detriment of veterans. [314]

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[308] Statements of the case are required to provide the veteran with a summary of the evidence in the case; a summary of the applicable laws and regulations, with appropriate citations, and a discussion of how such laws and regulations affect the determination; and the determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed. *38 C.F.R. § 19.29 (2017)*.

[309] *See* examples of statements of the case on file with author. *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-395, VETERANS BENEFITS ADMINISTRATION: CLARITY OF LETTERS TO CLAIMANTS NEEDS TO BE IMPROVED 8 (2002), *https://www.gao.gov/assets/240/234416.pdf* [*https://perma.cc/85WM-A4HX*].

[310] *Legislative Hearing*, *supra* note 227, at 54 (statement of Paul Varela, Assistant National Legislative Director, Disabled American Veterans).

[311] Hagel & Horan, *supra* note 16, at 54-55.

[312] *See, e.g.*, Stacey-Rae Simcox, *The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships*, *68 S.C. L. REV. 223 (2016).*

[313] *Pending Legislation*, *supra* note 263, at 10.

[314] *Id.* at 9 (emphasis omitted).

The GAO has also expressed concern that the VA discusses measuring progress by the time it takes to process claims, but has no particular plan to measure "accuracy of decision, veteran satisfaction with the process, or cost." [315] By overlooking these basic concerns, "VA could be inadvertently creating skewed incentives by focusing on one area of program performance to the detriment of other areas (e.g., processing claims quickly but inaccurately)." [316]

Unfortunately, one commentator summed up the relationship between the VA and veterans when Congress mandates the VA change this way:

> From the veteran's perspective, it can be put this way: now that the VA is forced to play by the rules, it wants to change them. Consequently, it appears that the veteran's battle for effective judicial review of VA decisions is not over; it has just moved to a new phase: consolidation and preparation for a VA counterattack in both the legislative and regulatory theaters. [317]

Veterans, Congress, and advocates will want to pay particular attention to how the VA measures success in the implementation of this new process to ensure that veterans are actually giving up current benefits, such as the duty to assist throughout the process, for true gains.

IV. A QUESTION OF CHARACTER

America has been conducting two major wartime operations since 2001. Since that time, the military has been faced with the monumental task of taking a servicemember trained for military service and, once that **[*562]** service is completed, reintegrating them back into civilian society. [318] These 2.7 million returning current-conflict veterans exist alongside of the 3.4 million Vietnam veterans, many of whom bear not just physical scars from combat, but psychological scars that have remained undiagnosed and untreated for decades. [319] For many military veterans, the reintegration into civilian society is seamless. For others, particularly those suffering from PTSD, traumatic brain injuries (TBIs), and other "invisible wounds of war," the integration can be more complicated. [320] Some estimates indicate that almost 24% of post-9/11 veterans suffer from a mental health condition. [321] "Both PTSD and mTBI (mild TBI) may result in a series of cognitive, behavioral, and mood changes impacting an individual's ability to function in society. Some of those changes include poor attention, memory difficulties, depressed mood and rapid fluctuations in mood, poor impulse control, and disregard for social norms." [322] For

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[315] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 285, at 13.

[316] *Id.*

[317] *See* Hagel & Horan, *supra* note 16, at 56.

[318] PHILLIP CARTER ET AL., PASSING THE BATON: A BIPARTISAN 2016 AGENDA FOR THE VETERAN AND MILITARY COMMUNITY 14 (2015), *https://s3.amazonaws.com/files.cnas.org/documents/CNASReport_PassingtheBaton_151104_final.pdf?mtime=20160906082231* [*https://perma.cc/57PU-9SWH*].

[319] *Id.* at 9. Post-traumatic stress disorder was not recognized as a mental health condition under the Diagnostic and Statistics Manual until 1980, which left a number of Vietnam veterans who served during the conflict, which officially ended in the 1970s, without a diagnosis for their suffering. *See* Matthew J. Friedman, *PTSD History and Overview*, U.S. DEP'T OF VETERANS AFFAIRS, *https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp* [*https://perma.cc/XU7W-4USJ*] (last visited Jan. 13, 2019).

[320] CARTER ET AL., *supra* note 318, at 18.

[321] *Id.*

[322] Stacey-Rae Simcox et al., *Symposium: Traumatic Brain Injury and the Law: Article: Understanding TBI in Our Nation's Military and Veterans: Its Occurrence, Identification and Treatment, and Legal Ramifications*, ***84 UMKC L. REV. 373, 380 (2015).***

veterans suffering from any of these conditions, there is a higher likelihood of using alcohol, illicit substances, or prescription drugs to ameliorate the symptoms of these illnesses, particularly if they are undiagnosed or untreated. [323]

Oftentimes, the behavior associated with PTSD and TBI is behavior that puts servicemembers directly at odds with their commanders and the larger military culture. Certain symptoms associated with PTSD and TBI, such as poor impulse control, loss of temper, impaired thinking, and poor exercise of judgment, may appear indistinguishable from the behavior of a servicemember who has chosen to rebel against the good order and discipline so necessary to the military's culture. Those who exhibit such symptoms, particularly if the conditions are undiagnosed or **[*563]** untreated, are at risk of being involuntarily separated from the military, or being court-martialed (i.e. criminally prosecuted) for their behavior.

When servicemembers leave active military service, their branch of service assigns a characterization of the discharge to describe their service in the military. Servicemembers leave the military for any number of reasons to include the natural expiration of their contract to serve, involuntarily separation from service, or discharge by sentence of a court-martial. There are primarily five different characterization of service, or discharges: Honorable, General (Under Honorable Conditions), Other Than Honorable, Bad Conduct, and Dishonorable. [324] The first three--Honorable, General, and Other Than Honorable--are assigned during the military's administrative assessment of whether the servicemember should be separated from the service. [325] An Honorable discharge indicates that the servicemember "has met the standards of acceptable conduct and performance of duty for military personnel." [326] These discharges are normally assigned to those servicemembers who have had no significant disciplinary problems during service and are either at the natural expiration of their service commitment or have a need for an administrative separation not due to misconduct, such as a voluntary discharge due to pregnancy. [327] General discharges are assigned to servicemembers who have a disciplinary history, "when the positive aspects of the [s]ervice member's conduct or performance of duty outweigh negative aspects . . . ." [328] A discharge under Other than Honorable conditions is assigned "when the reason for separation is based upon a pattern of behavior" or upon "one or more acts or omissions that constitute a significant departure from the conduct expected . . . ." [329]

Servicemembers court-martialed under the Uniform Code of Military Justice who receive a punitive discharge as a part of their sentence can receive either a Bad Conduct discharge or a Dishonorable discharge. [330] "[The Bad Conduct] discharge is less severe than a [D]ishonorable **[*564]** discharge . . . [i]t is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary." [331] The Dishonorable discharge "should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment." [332]

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[323] *Substance Abuse in the Military: Mental Health Problems in Returning Veterans*, NAT'L INST. ON DRUG ABUSE, *https://www.drugabuse.gov/publications/drugfacts/substance-abuse-in-military* [*https://perma.cc/M662-E454*] (last updated Mar. 2013).

[324] Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from "Veteran" Services*, *122 PENN ST. L. REV. 69, 95-96 (2018).*

[325] *See, e.g.*, Active Duty Enlisted Administrative Separations, AR 635-200 (Dec. 19, 2016) (providing the U.S. Army's policies for administratively separating servicemembers from the Army).

[326] Dep't of Def. Instruction No. 1332.14, Enclosure 4.3b(2)(a) (Aug. 28, 2008) (incorporating Change I, 03/29/2010).

[327] *See* AR 635-200, *supra* note 325, at 73-79.

[328] Dep't of Def. Instruction No. 1332.14, Enclosure 4.3(b)(2)(b) 30.

[329] *Id.* § 4.3(b)(2)(c)(1)(a) 31.

[330] Adams & Montalto, *supra* note 324, at 74.

[331] Rules for Courts-Martial 1003(b)(8)(C) (2016).

[332] *Id.* at (b)(8)(B).

As a practical matter, the standard discharge is an Honorable, and a servicemember is perceived to have been a substandard performer or disciplinary problem to have received any discharge but Honorable. For veterans who receive discharges that are not Honorable or General, the consequences can be severe. These discharges can affect their rights to benefits administered by the VA, such as educational grants, home loans, healthcare, and disability benefits. [333] Veterans with poor discharges also find problems later with securing employment. [334]

Since the Vietnam War, America's military has had a problem determining the character of service for veterans who suffer service-caused injuries that are not physically apparent. For many Vietnam veterans, the primary invisible condition affecting behavior is PTSD. [335] Iraq and Afghanistan veterans find themselves suffering from higher numbers of brain injury in addition to PTSD, a result of the life-saving technologies and body armor, which help to limit the impact of explosions that in previous conflicts would have caused death. [336] While this problem does not affect all of our current-conflict veterans, it is broader than our society would like, and its actual effect on those who have been on the receiving end of these discharge determinations can be devastating. The inability of the military to appropriately diagnose and treat servicemembers, thereby denying them appropriate medical discharges or VA benefits when the leave active service is equally damaging.

[*565] The failure of the United States military to understand the effect that combat had on Vietnam veterans at the time of their service and misconduct is logically understandable because PTSD was not even a recognized mental health condition until years after many Vietnam veterans left service. [337] However, the failure of the military to recognize and treat servicemembers from our current conflicts is inexcusable. There have been several investigative reports and journalistic efforts on whether this failure is nefarious or merely due to incompetence. Either way, the damage to these injured veterans is tremendous. As just one example, Fort Carson, Colorado, is home to a large and storied Army division, the 4th Infantry Division. While the bulk of the division was located at Fort Hood, Texas until 2009, some portions of the division began to relocate to Fort Carson as early as 2006. [338] In addition, Fort Carson was already home to other combat units including the 4th Engineer Battalion (Combat Effects), the 13th Air Support Operations Squadron, an Air Force component--which provides close air support, the 3rd Armored Brigade Combat Team--which deployed to Iraq combat three times from 2003-2008, and the 10th Special Forces Group, consisting of over 2000 special forces soldiers. [339] In the early stages of the wars in the Middle East, Fort Carson had numerous combat troops and was deploying thousands of servicemembers to Iraq and Afghanistan.

However, as early as 2006, reports began circulating that something was amiss in the Army's treatment of soldiers returning to Fort Carson who exhibited symptoms of PTSD. Some of these suffering soldiers were treated as untouchables by friends and military supervisors. [340] One sergeant/supervisor explained that there is contempt for soldiers who develop PTSD because

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[333] *38 U.S.C. § 101*(2) (2012 & Supp. 2017); *38 C.F.R. § 3.12 (2017)*.

[334] Marcy L. Karin, *"Other Than Honorable" Discrimination*, *67 CASE W. RES. L. REV. 135, 165 (2016);* Claire Voegele, *Never Again: Correcting the Administrative Abandonment of Vietnam Veterans with Other Than Honorable Discharges Induced by Post-Traumatic Stress Disorder*, *68 S.C. L. REV. 245, 252 (2016).*

[335] *See generally* RICHARD A. KULKA ET AL., NATIONAL VIETNAM VETERANS READJUSTMENT STUDY: CONTRACTUAL REPORT OF FINDINGS VOLUME I (1988), *https://www.ptsd.va.gov/professional/articles/article-pdf/nvvrs_vol1.pdf* [*https://perma.cc/RYL6-NH69*] (reporting that PTSD affected Vietnam veterans in higher numbers than other disabling conditions).

[336] Simcox et al., *supra* note 322, at 382.

[337] *See* Friedman, *supra* note 319.

[338] *Fort Carson: 2nd Infantry Brigade Combat Team, 4th Infantry Division*, MY BASE GUIDE, *http://www.mybaseguide.com/army/40-658/fort_carson_units* [*https://perma.cc/Y7CF-5GX8*] (last updated Sep. 12, 2018).

[339] *Fort Carson: 3rd Armored Brigade Combat Team, 4th Infantry Division* and *10th Special Forces Group*, MY BASE GUIDE, *http://www.mybaseguide.com/army/40-658/fort_carson_units* [*https://perma.cc/Y7CF-5GX8*] (last updated Sept. 12, 2018).

[340] Daniel Zwerdling, *Soldiers Say Army Ignores, Punishes Mental Anguish*, NAT'L PUB. RADIO, (Dec. 4, 2006), *https://www.npr.org/2006/12/04/6576505/soldiers-say-army-ignores-punishes-mental-anguish* [*https://perma.cc/CF2C-WL85*].

others saw the same "horrors of the war" and are "not falling apart." [341] "People are trying to say they have problems who don't. Just because people are, you know, getting in trouble and they're **[*566]** blaming it on PTSD." [342] These soldiers were described as "weak," "dirt bags," and told that "[t]hey [don't] belong in the Army." [343] Others were shuffled off to other units or punished for PTSD-related behavior because the command had no time to deal with soldiers needing special attention while the units were getting ready to immediately deploy to Iraq. As one sergeant put it "When I'm dealing with [one soldier's] personal problems on a daily basis, I don't have time to train soldiers to fight in Iraq. I have to get rid of him, because he is a detriment to the rest of the soldiers." [344]

Another soldier reported (and his supervisor confirmed) that his chain of command at Fort Carson required him to participate in training exercises that forced him to miss PTSD and family therapy appointments. [345] One soldier in 10th Special Forces Group was court-martialed for cowardice after suffering an involuntary panic attack in Iraq upon seeing a mangled body. [346] It was the first time in thirty-five years that anyone had been charged with the crime of cowardice, which comes with a penalty of death. He was acquitted of the charges four years later. [347] Reports such as this prompted several U.S. Senators to write the Department of Defense in 2006, urging it to launch an investigation into how commanders at Fort Carson treated those suffering from PTSD. [348]

In 2008, more troubling events occurred at Fort Carson, which indicate that it was not just a problem of bad discharges affecting soldiers, but also a problem of inaccurate mental health diagnoses that could affect potential future benefits from the VA and military. In June of that year, a soldier who was suffering from TBI and PTSD surreptitiously recorded a conversation between himself and the Fort Carson psychologist assigned to evaluate him for medical retirement. [349] The soldier recorded the conversation because he was experiencing **[*567]** memory problems and could not remember what the doctors were saying to him--he needed to have the recording to let his wife know the details of the doctor's treatment. [350] The psychologist, Dr. McNinch, was recorded telling the soldier:

> "I will tell you something confidentially that I would have to deny if it were ever public. Not only myself, but all the clinicians up here are being pressured to not diagnose PTSD and diagnose anxiety disorder NOS (not otherwise specified) [instead]." McNinch told him that Army medical boards were "kick[ing] back" his diagnoses of PTSD, saying soldiers had not seen enough trauma to have "serious PTSD issues." [351]

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[341] Daniel Zwerdling, *Soldiers Face Obstacles to Mental Health Services*, NAT'L PUB. RADIO (Dec. 4, 2006), https://www.npr.org/templates/story/story.php?storyId=6575431 [https://perma.cc/AYY5-2BP5].

[342] *Id.*

[343] Zwerdling, *supra* note 341.

[344] Zwerdling, *supra* note 340.

[345] Zwerdling, *supra* note 341.

[346] Joel Warner, *The Good Soldier*, WESTWORD (Mar. 20, 2008) https://www.westword.com/news/the-good-soldier-5098099 [https://perma.cc/9JTP-7KX6].

[347] *Id.*

[348] Letter from Senators Barbara Boxer, Christopher Bond, and Barack Obama to William Winkenwerder, Jr. Assistant Secretary of Defense for Health Affairs (Dec. 7, 2006), https://www.npr.org/documents/2006/dec/letter_to_winkenwerder.pdf [https://perma.cc/3XHK-SCNM].

[349] Mark Benjamin & Michael De Yoanna, *I am Under a Lot of Pressure to Not Diagnose PTSD*, SALON (Apr. 8, 2009), https://www.salon.com/2009/04/08/tape/ [https://perma.cc/3S4P-84FX].

[350] *Id.*

[351] *Id.*

These types of misdiagnoses could result in improper treatment and lower disability payments if the Army discharges a soldier from the military. [352] The Army investigated itself after this incidence and found there was no wrongdoing. [353]

The Fort Carson problems are one example of what injured soldiers in the military, particularly in the early to mid-2000s, were up against when it came to military discharges. These issues were not just limited to Fort Carson. For instance, a government report issued in 2008 revealed that the Department of Defense had erroneously discharged hundreds of veterans between 2001 and 2010 for "personality disorder," a condition not entitled to receive benefits from the VA, when in fact the veterans had been suffering from PTSD or TBI. [354] A few years later, the Army settled a class action suit brought on behalf of 1,029 veterans who were wrongfully denied disability benefits due to the Army's failure to adequately assess the severity of their conditions. [355] The numbers of servicemembers suffering from mental health conditions and brain injuries who are separated from service for misconduct is equally concerning. Between 2011 and 2015, 11% of servicemembers separated for misconduct suffered TBI, and 47% suffered from a mental health **[*568]** condition that shares symptoms with PTSD such as depression and anxiety (8% of these were diagnosed with PTSD). [356] A Government Accountability Office report also found that the branches of the military often were not following their own regulations requiring them to consider PTSD and TBI as mitigating factors before making decisions on the character of a veteran's discharge. [357]

For veterans wishing to request that the military upgrade their discharges or change the reason for discharge after the fact (for example, changing a discharge from personality disorder to a retirement for PTSD) they must apply directly to their former service branch. Each branch (Army, Navy, Air Force, and Coast Guard) has two boards that can review discharges. [358] The first level is referred to as the Discharge Review Board. [359] These boards can change a discharge under the theories of propriety and equity. [360] The second level of review, to which the veteran can appeal from the Discharge Review Board, is called the Board for Correction of Military Records. This Board has much broader authority to correct any "issue involving a veteran's military service that constitute an injustice, including changing and upgrading discharges . . . if there is material error or injustice." [361] Decisions by the boards can be appealed to federal court. [362]

While it seems there is a procedure in place to adequately and fairly fix problems that may occur when a servicemember is discharged from active duty with a bad or inappropriate discharge, the evidence says otherwise. In 2014, an investigative

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[352] *Id.*

[353] *Id.*

[354] MELISSA ADER ET AL., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY'S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM, VETERANS LEGAL SERVICES CLINIC, JEROME N. FRANK LEGAL SERVICES ORGANIZATION, YALE LAW SCHOOL (Mar. 2012), *https://law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf* [*https://perma.cc/VNJ7-YGRB*].

[355] *Sabo v. United States: OIF & OEF Veterans with Post Traumatic Stress Disorder (PTSD)*, NVLSP, *http://www.nvlsp.org/what-we-do/class-actions/sabo-ptsd-lawsuit* [*https://perma.cc/XMX8-4UZ7*] (last visited Jan. 13, 2019).

[356] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-260, ACTIONS NEEDED TO ENSURE POSTTRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS 12-13 (2017).

[357] *Id.* at 9.

[358] Thomas J. Reed & Jason W. Manne, *§ 12.05 Overview of the Current Military Discharge Upgrade Process, in* SERVICEMEMBER AND VETERANS RIGHTS (Brian Clauss & Stacey-Rae Simcox eds., 2017).

[359] *10 U.S.C. § 1553* (2012 & Supp. 2017); *32 C.F.R. § 70.9 (2017)*.

[360] *Id.*

[361] Reed & Manne et al., *supra* note 358; *10 U.S.C. § 1552.*

[362] *Id.*

journalist published an article after she had reviewed over 3,000 applications made to the Army's Board for Correction of Military Records and interviewed veterans and Board members alike. [363] Her article shockingly uncovered that the Board has only three minutes and forty-five seconds on average to review a veteran's application for upgrade, despite the fact that some submit **[*569]** evidence that makes the application several hundred pages long. Between 2009 and 2012, the Board reviewed over 36,000 applications for upgrade, but granted only one veteran's request for a personal appearance with the Board. [364] The reporter, Alissa Figueroa, said that she was stunned after reading the Board's opinions: "[t]hey were filled with derogatory language, denigrating the injured soldiers who were appealing their cases. And so many of the decisions were based on factual errors, crazy mistakes that led to these bizarre conclusions. Other decisions had such mangled logic, they blew my mind." [365] Tom Moore, an advocate with the National Veterans Legal Service Program, remarked that "[t]his is the last chance for these servicemembers to have their records corrected, and when we look through these cases we see these incredible errors that are so blatant." [366] One former Army Board employee chalked the problems up to the fact that "in an effort to decide cases quickly they reject admissible evidence, do not hold hearings, and issue summary denials to applicants that often do not address evidence brought." [367] Low rates of approval for discharge upgrades have been fairly consistent, even before the influx of current conflict veteran applications. Over the last fifteen years, petitions for upgrade based upon PTSD submitted by Vietnam veterans were denied 95% of the time. [368]

To force the Department of Defense to deal with inadequate processes for seeking upgrades, five Vietnam combat veterans filed suit against the Department of Defense in 2014 "seeking relief for tens of thousands of similarly situated veterans who developed PTSD and were subsequently discharged with Other Than Honorable characterization." [369]

Based upon stories like these as well as the tireless advocacy of **[*570]** various Veterans Service Organizations and other stakeholders, the Boards are being forced to consider potential mitigating factors for a veteran's misconduct. In 2014, in an effort to recognize that Vietnam veterans with bad discharges may have committed their misconduct because of undiagnosed PTSD and almost certainly in response to the *Monk v. Mabus* filings, Secretary of Defense Chuck Hagel issued guidance to the Department of Defense on how to handle requests by these veterans for a discharge upgrade. [370] Issuing what is now referred to as "the Hagel Memo," he ordered that for every application of upgrade made by a veteran who claims to have suffered from PTSD, the Boards must give "liberal consideration" to cases where service records document any symptom of PTSD, despite having no diagnosis available, or where a veteran received a subsequent PTSD diagnosis that is deemed to be service-connected. The Boards are then ordered to view these conditions as mitigating factors for the misconduct that occurred during

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[363] Joshua Kors, *Investigative Reporter Alissa Figueroa Exposes Stunning Flaws in Veterans' Benefits System*, HUFFINGTON POST (Dec. 29, 2014, 9:38 AM), *https://www.huffingtonpost.com/joshua-kors/investigative-reporter-al_b_6382880.html* [*https://perma.cc/8PAT-G4MX*].

[364] Alissa Figueroa, *A Losing Battle: How the Army Denies Veterans Justice Without Anyone Knowing*, FUSION (2014) *http://interactive.fusion.net/a-losing-battle/* [*https://perma.cc/UQ67-UN5H*].

[365] Kors, *supra* note 363.

[366] Figueroa, *supra* note 364.

[367] Alissa Figueroa, *Former Army Board Staff Lawyer Speaks Out About Unjust Practices and Calls for Reform*, FUSION (Nov. 24, 2014, 9:22 AM), *https://fusion.tv/story/29474/former-army-board-staff-lawyer-speaks-out-about-unjust-practices-and-calls-for-reform/* [*https://perma.cc/GTE2-MGU7*].

[368] SUNDIATIA SIDIBE & FRANCISCO UNGER, UNFINISHED BUSINESS: CORRECTING "BAD PAPER" FOR VETERANS WITH PTSD 1 (2014).

[369] Claire Voegele, *"Never Again": Correcting the Administrative Abandonment of Vietnam Veterans With Other Than Honorable Discharges Induced by Post-Traumatic Stress Disorder*, *68 S.C. L. REV. 245, 262 (2016).* After issuance of the Hagel Memo, the case was remanded back to the boards by the US District Court of Connecticut for processing under the Memo's provisions. *Id. at 263.* All five plaintiffs had their petitions for upgrade approved. *Id.*

[370] *See* Memorandum from Chuck Hagel, Sec'y of Def., Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (Sept. 3, 2014).

active service. [371] Supplemental guidance expanded these directives to apply to the Discharge Review Boards as well and to veterans from every era of service, not just those who served in Vietnam. [372]

As the Department of Defense began to clean its own house, Congress also got involved. In 2016, Congress passed with bipartisan approval the Fairness for Veterans Act of 2016, which would have required the boards to review veterans' applications for upgrade with "a rebuttable presumption in favor of the former member that posttraumatic stress disorder or traumatic brain injury materially contributed to the circumstances resulting in the discharge of a lesser characterization." [373] While this bill died in Congress, [374] the National Defense Authorization Act of 2017 did include a memorialization of the Hagel Memo along with other guidelines to help the boards improve **[*571]** their processes in reviewing applications for upgrade. [375]

The need for advocacy and expansion of this area of veterans law still exists despite legislation and the Department of Defense's acknowledgement of its problems in the discharge upgrade process. The initial numbers for the Board's review of discharge upgrade cases under the Hagel Memo looked promising. The first year saw 45% of requests for discharge upgrades due to PTSD granted, compared to 3.7% the prior year. [376] More interestingly, due to massive pushes by veterans' advocates in the media and within their own clientele, and on the order of Secretary Hagel that the branches should reach out to potentially affected veterans, applications for upgrade based upon PTSD rose five times in that same year. [377] However, two current-conflict veterans filed suit against the Army in 2016, seeking class-action status because the Army was not implementing the Hagel guidance at the Discharge Review Board level. [378] One plaintiff, when discussing that before he filed his lawsuit his application was denied and yet after he filed suit the same application was approved by the Army's Discharge Review Board, remarked:

> We didn't add anything to what I filed originally and got a completely different result because a judge was watching, . . .[t]o take the exact same case and come to a completely different outcome shows the need for everyone to get a review like this. When no one is watching, they are not doing this properly, ... It shouldn't take a small army of lawyers, a class action lawsuit, and eight years to get the Army to follow their own rules, . . . most veterans with PTSD are in no position to fight the Army like this, and veterans are dying while the Army drags its feet on properly handling these cases. [379]

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[371] *Id.*

[372] Memorandum from Brad Carson, Acting Principle Deputy Under Sec'y of Def., Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Corrections of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) (Feb. 24, 2016).

[373] Fairness for Veterans Act of 2016, H.R. 4683, 114th Cong. § 2(3)(B)(ii) (2016).

[374] While Congress passed the Fairness for Veterans Act and sent it to the President, it was not signed into law and Congress adjourned before the expiration of the ten-day presidential comment period. Therefore, the bill died before becoming law. This is referred to as a "pocket veto." U.S. CONST. art. I, § 7; *How Our Laws are Made--Learn About the Legislative Process*, U.S. CONGRESS, *https://www.congress.gov/resources/display/content/How+Our+Laws+Are+Made+-+Learn+About+the+Legislative+Process#HowOurLawsAreMade-LearnAbouttheLegislativeProcess-PresidentialAction* [*https://perma.cc/6JYU-BS7Q*].

[375] S. 2943, § 535 National Defense Authorization Act of 2017, Pub. L. No. 114-328, § 535, *130 Stat. 2000,* (codified at *10 U.S.C. § 1553*(d) (2012 & Supp. 2017)).

[376] SIDIBE & UNGER, *supra* note 368, at 2.

[377] *Id.* at 8.

[378] *See* Amended Complaint, Kennedy v. Fanning, No. 16-2010 (D. Conn. Apr. 17, 2017), ECF No. 11.

[379] Peggy McCarthy, *Connecticut Army Veteran Gets Discharge Upgrade*, HARTFORD COURANT (Apr. 2, 2018, 11:20 AM), *http://www.courant.com/news/connecticut/hc-veteran-discharge-upgrade-20180402-story.html* [*https://perma.cc/7L9W-D8XL*].

The efforts of veterans advocacy organizations to train attorneys helping veterans navigate the discharge upgrade process, with the efforts of organizations such as the National Veterans Legal Services Program, the Vietnam Veterans of America, law school veterans clinics across the country--in particular Yale Law School's Jerome N. Frank Legal Services Organization--that litigate the Department of Defense's failure **[*572]** to correctly implement its own guidelines, are paving the way for increased efforts on behalf of veterans in this previously-stagnating area of veterans law. The development of discharge upgrades and the Department of Defense's retooling of regulation to prevent unjust discharge from occurring in the first place will be worth tracking in the next few years as these efforts come to fruition and spark new efforts.

V. CONCLUSION

For decades, veterans' advocates have lobbied Congress to do more for our veterans, by filling in the gaps that the VA is unable to fill on its own. Slowly but surely, Congress has listened. From the creation of the CAVC to the Appeals Modernization Act, the law applying to veterans benefits has been forever altered, in ways that are always challenging, but on the whole beneficial for veterans.

The expansion of the CAVC's authority to affect the issue of delay in the VA's adjudication system by allowing class-action lawsuits to be filed could be the most significant change in veterans law in the past thirty years. The qualification "could be" is a telling one. The CAVC must seize their newfound capability to aggregate veterans' claims in order to effectuate major change in a system that continues to have the same problems decade after decade while the agency accusingly points the finger of blame at various foes. The complicated nature of the claims being processed, the increasing numbers of veterans, the recent appearance of judicial review, the changes in the regulations by the Secretary, the VCAA, and the duty to assist have all, at one time or another, been the villain in VA's constant tap-dance before Congress to explain why more money, employees, and years to implement judicial decisions have not made an impact on the VA's ability to keep up. The VA has skirted these issues in court, primarily by mooting lawsuits with quick decisions granting all of the veterans' benefits. As taxpayers, one must question the VA's motives and competency when those decisions are made so much more quickly than other claims and in a manner that seems calculated to protect the VA's bureaucratic interests. The CAVC may finally be able to make decisions that will force the VA to change the way it does business internally. For example, the CVAC could ensure better medical evaluations are sought in the first instances of a claim.

The Appeals Modernization Act's alteration of the appeals process leading to the CAVC brings welcome change to the process, yet it raises some significant concerns. It does not change the underlying systemic problems in the VARO or Board, but does limit the benefits of a veteran-friendly **[*573]** process in a monumental sweeping change of course. The changes appear to value speed of adjudication over accuracy, and the ability of the changes to affect how quickly decisions will be made is questionable--particularly in light of the GAO's concerns regarding implementation of the Act and measurements of success. The new legislation demonstrates that there is an incredible amount of work to do and law to make in the very near future that will affect the millions of veterans and their families in the United States. It is an ever-changing backdrop of legal authority that can be shaped into a tool for veterans or a weapon against their interests, depending on the quality of the advocates and implementers both inside and outside the VA who step into the breach.

The spotlight recently shined upon the labors of veterans struggling with unjust discharges has already made a difference for large numbers of veterans previously denied relief. The job is not over. The military continues to struggle with cultural taboos regarding identification and treatment of PTSD and TBI that must be overcome for our future servicemembers. The rectification of this situation for our current veterans is of paramount importance if we are to continue to reintegrate them into society as a whole.

As veterans advocates know, the content of Congress' answers to veterans' queries is not the final answer. It is in the execution of the resulting programs and laws where one finds the true work that must be done. Each day, veterans and their advocates have the opportunity to change the conversation and alter the legal landscape affecting veterans benefits, discharges, and legal involvement. Veterans law offers unexplored possibilities, beyond the legal boundaries that exists today, much like the Wild West. As these examples demonstrate, change is possible with creativity, work, and an understanding of the most important aspect of this area of law--serving those who have served our nation. Practicing veterans law in the next decade will offer unlimited opportunities for those brave-of-heart who choose to demonstrate the spirit of a true pioneer and look for different

ways to shape the landscape for the benefit of our nation's veterans. As John Wayne said, "[s]ometimes it isn't being fast that counts, or even accurate; but willing." [380] Welcome to the Wild West!

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[380] John Wayne Enterprises, LLC, *supra* note 1.

ARTICLE: THE DOCTOR WILL JUDGE YOU NOW

2021

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Text

[*963] INTRODUCTION

Imagine you are a U.S. Army combat veteran. A few years ago, you left your home, your friends, and your family to risk your life in service to your country. You survived, but your health is not the same as it was before. Now, you are back, and even though you have a job as a civilian, you rely on the U.S. Department of Veterans Affairs ("VA") for cost-free health care. You suffered a knee injury during your active duty service that continues to bother you. Your military records show you received treatment when the injury occurred. Since you have been home, you have discussed your knee injury with your doctor at the local VA medical center. Your doctor has diagnosed you and prescribed treatment, but it still causes you problems, especially since your civilian job requires you to be on your feet most of the day.

You decide to apply for VA disability compensation for your knee condition. The VA sends you to an appointment called a Compensation and Pension Examination ("C&P exam"). A doctor whom you have never met before conducts this exam. This doctor asks you about your knee, performs some tests, and sends you on your way in about thirty minutes. Months later, you receive a letter in the mail from VA. Your claim is denied. In the reasoning for the decision, the adjudicator writes that the Compensation and Pension Examiner found that your condition is not a result of your in-service injury, but from a separate injury in your medical records--an incident about a year ago when you went to the emergency room after slipping on ice while shoveling snow and hurt your knee. The adjudicator's decision makes no mention of the continuous treatment you have received for your knee since the in-service injury, including from your doctors at the VA medical center. The letter says you have the right to appeal, and thanks you for your service.

By adopting the medical opinion as legal reasoning, VA adjudicators rely on Compensation and Pension Examiners ("C&P examiners") to make the ultimate legal decisions on veterans' disability claims, even when the medical opinion is inadequate. Further, a veteran has little **[*964]** ability to challenge an unfavorable medical opinion prior to receiving the decision on the claim. Indeed, as in the hypothetical above, the veteran often does not even know that the examiner rendered an unfavorable medical opinion until they receive the decision denying their benefits--benefits in which they have a constitutionally protected property interest. As a matter of course, VA does not send veterans copies of the C&P examiner's opinion prior to the issuance of the adjudicator's decision, even if the opinion is against the veteran's claim.

This Article argues that the way VA adjudicators use C&P examiners' medical opinions--by essentially adopting their medical opinions as legal reasoning--violates veterans' right to due process in the adjudication of their VA disability compensation

claims. In addition to the adjudicators' adoption of medical opinions as legal reasoning, veterans do not generally receive notice of an unfavorable medical opinion prior to the issuance of a decision on their claim; and therefore, they generally do not have an opportunity to respond to that unfavorable medical opinion prior to the issuance of the decision. While courts and scholars have compared the role of the C&P Examiner in VA adjudication to that of an expert witness in traditional litigation, this Article argues that the role of the C&P Examiner can be more accurately analogized to that of the judge in traditional litigation. [1]

Part I of the Article seeks to understand the reason for the prominent role that C&P examiners' opinions play in VA disability adjudication today by briefly discussing the history of VA disability adjudication and medical evidence. It then explains the current structure of VA and its system of disability adjudication. Part I next takes a close look at the role of the C&P examination within that adjudication system, especially in light of the U.S. Court of Appeals for Veterans Claims' decision in *Colvin v. Derwinski*, [2] which increased VA adjudicators' reliance on C&P examiners' opinions.

Part II of this Article shows how current law limits VA adjudicators' ability to meaningfully evaluate opinions from C&P examiners, which makes C&P examiners different from expert witnesses in traditional litigation in ways that are relevant to a due process analysis. It further shows that the ways in which VA uses C&P examiners' opinions in **[*965]** disability adjudications contributes to significant error and delay in the resolution of veterans' claims.

Part III of this Article discusses veterans' constitutionally protected property interest in their VA disability benefits. It looks to the U.S. Supreme Court's landmark decisions in *Goldberg v. Kelly* and *Richardson v. Perales* to understand what due process requires in the context of administrative adjudication. [3] It compares the facts of these cases to VA's use of C&P examiner opinions in disability adjudication and concludes that VA's adjudication procedures fall short of what procedural due process requires.

Part IV of this Article applies the three-factor test outlined by the Supreme Court in *Mathews v. Eldridge* to determine if VA's current procedures surrounding C&P examinations comply with due process. [4] This Article then uses the *Mathews* factors to propose a new procedure that would bring VA's C&P examination process more in line with due process. It proposes that VA automatically send veterans a copy of the C&P examiner's opinion as soon as it is available, so that veterans are able to review and respond to the medical opinion prior to the issuance of the VA decision. This proposed procedure comports with due process under *Mathews* by reducing the risk of erroneous deprivation of rights without adding significant administrative burden.

PART I

A. History of VA Disability Adjudication

A survey of the history of VA disability adjudication reveals a slow march towards the application of procedural due process to veterans' claims. Scholars have explained the reticence of legislators and courts to apply procedures required by due process to veterans' disability adjudication by pointing to the historic understanding of the VA disability adjudication process as non-adversarial. [5] This Article highlights another explanation for that reticence: the idea that the fundamental questions

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[1] *See, e.g.*, *Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 302 (Vet. App. 2008)* ("Both VA medical examiners and private physicians offering medical opinions in veterans benefits cases are nothing more or less than expert witnesses."); James D. Ridgway, *Mind Reading and the Art of Drafting Medical Opinions in Veterans Benefits Claims*, 5 PSYCHOL. INJ. & L. 72, 73 (2012), *available at https://ssrn.com/abstract=1967508* [hereinafter Ridgway, *Mind Reading*] ("The key to understanding the role of medical evidence in the current adjudication process is realizing that medical opinions in veterans' cases are essentially substitutes for live expert testimony in a trial-like setting. . . . In this analogy, VA adjudicators act much like judges conducting bench trials.").

[2] *Colvin v. Derwinski, 1 Vet. App. 171 (Vet. App. 1991)*.

[3] *Goldberg v. Kelly, 397 U.S. 254 (1970)*; *Richardson v. Perales, 402 U.S. 389 (1971)*.

[4] *Mathews v. Eldridge, 424 U.S. 319 (1976)*.

involved in VA disability adjudication are medical, not legal in nature, which renders procedural due process unnecessary. This understanding of VA disability adjudication is one of the reasons for the prominent role **[*966]** that the medical opinion plays in VA disability adjudication today. In order to understand this prominent role, it is necessary to discuss the history of VA disability adjudication.

Federal government programs for disabled veterans significantly expanded after the Civil War due to the need to care for many war-wounded soldiers. [6]Historian Patrick J. Kelly writes that "[f]ederal allowances to Union soldiers and their widows and children were the single largest expenditure in the federal budget . . . every year between 1885 and 1897." [7]

In 1930, Congress created the Veterans Administration, now known as the Department of Veterans Affairs. Since then, VA has been charged with adjudicating and administering veterans' benefits, including disability compensation. [8]The Board of Veterans' Appeals--the last level of appeal within VA, where Veterans Law Judges adjudicate claims--was founded in 1933. [9]VA, including the Board of Veterans' Appeals, predates the 1946 adoption of the Administrative Procedures Act ("APA"). [10]VA has managed to escape many of the due process requirements that have developed in administrative law since the APA, as well as requirements in the APA itself, including, for example, the merit appointment of independent Administrative Law Judges ("ALJs"). [11]

Congress originally intended for the VA disability adjudication process **[*967]** to be informal, non-adversarial, and "veteran-friendly"; it did not intend for veterans to need to hire attorneys to help them get benefits. [12]Justice Rehnquist

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[5] Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361, 375 (2009) [hereinafter Allen, *CAVC at Twenty*]; *see* Michael Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 507-11 (2011) [hereinafter Allen, *Due Process and the American Veteran*].

[6] PATRICK J. KELLY, CREATING A NATIONAL HOME 3, 52-88 (1997); *see* Stacey-Rae Simcox, *Thirty Years After Walters The Mission is Clear, The Execution is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671, 674-75, 681-85 (2018) [hereinafter Simcox, *Thirty Years After Walters*].

[7] KELLY, *supra* note 6, at 5.

[8] *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985); *see* Michael J. Wishnie, *"A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. Rev. 1709, 1717 (2017) [hereinafter Wishnie, *Boy Gets Into Trouble*]; *see* James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VET. L. REV. 1, 10 (2013) [hereinafter Ridgway, *Origins of the Modern Veterans' Benefits System*].

[9] David Ames, Cassandra Handan-Nader, Daniel E. Ho, & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 15 (2020) [hereinafter Ames et al., *Due Process and Mass Adjudication*].

[10] Ames at al., *Due Process and Mass Adjudication*, *supra* note 9, at 15; Robin J. Artz, *What Veterans Would Gain from Administrative Procedure Act Adjudications*, FED. B. ASS'N VET. L. SEC. (2002), *reprinted in* THE FED. LAW. 14-19 (Aug. 2015), *available at* https://www.fedbar.org/wp-content/uploads/2015/08/Vets-Law-pdf-1.pdf.

[11] *See* James T. O'Reilly, ***Burying Caesar: Replacement of the Veterans Appeal Process Is Needed to Provide Fairness to Claimants, 53 ADMIN. L. REV. 223, 225-26, 229-43 (2001)*** [hereinafter O'Reilly, *Burying Caesar*]; Artz, *supra* note 10; MICHAEL ASIMOV, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 4, 21-24 (2019), *available at* https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf (describing adjudication at VA's Board of Veterans Appeals as "type B adjudication," which includes "systems of federal agency adjudication that employ *evidentiary hearings* that are required by statutes, regulations, or executive orders, but are *not* governed by the formal adjudication provisions of the APA."). (emphasis in original),.

[12] *Walters*, 473 U.S. at 321-26; *see* Allen, *Due Process and the American Veteran*, *supra* note 5, at 507-11; Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. MIAMI NAT'L SEC. & ARMED CONF. L. REV. 1, 10 (2015) [hereinafter Allen, *Justice Delayed*]; Simcox, *Thirty Years After Walters*, *supra* note 6, at 672, 681-85.

discussed this original intention of Congress in the U.S. Supreme Court's 1985 decision in *Walters v. National Association of Radiation Survivors*. [13]He described the VA adjudication process as one that "is designed to function throughout with a high degree of informality and solicitude for the claimant." [14]The Court in *Walters* relied on this idea in its decision to uphold the constitutionality of a statute prohibiting attorneys from charging a veteran more than ten dollars for representing the veteran before VA. [15]Veterans' groups argued that the fee limitation denied them "any realistic opportunity" to obtain legal counsel, thus violating their rights under the Due Process Clause of the Fifth Amendment and under the First Amendment. [16]

In explaining the Court's rationale, Justice Rehnquist described VA's adjudication procedures at the time. He observed that "the process prescribed by Congress . . . does not contemplate the adversary mode of dispute resolution utilized by courts in this country." [17]Veterans' disability claims at the time were initially adjudicated by a "three-person 'rating board,'" at the Regional Office, which included a medical specialist, a legal specialist, and an occupational specialist. [18]Similarly, in the early days of the Board of Veterans Appeals--the highest level of appeal within VA--claims were adjudicated by both attorneys and physicians. [19]Rather than relying on a written opinion from a medical expert, the physicians employed at VA could use their own medical judgment to evaluate veterans' claims. [20]

The Court's decision in *Walters* to limit the right to counsel for veterans can be understood in the context of this unique adjudicative structure. If a medical specialist is using *medical* judgment to make the decision, then how would a *legal* argument help them make that decision? Indeed, as Justice Rehnquist wrote, "Simple factual questions are capable **[*968]** of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment." [21]

Moreover, at the time of Justice Rehnquist's writing, there was no judicial review of VA's decision-making. [22]If a veteran's claim was denied by the Board of Veterans' Appeals, that veteran had no way to seek an independent review of the decision. [23]The lack of a right to appeal for veterans further enshrined the VA adjudication process as a "nonlegal" one.

In 1988, a few years after *Walters*, Congress passed the Veterans' Judicial Review Act ("VJRA"), which significantly changed the process and the nature of VA disability adjudication. [24]The VJRA gave veterans the right to appeal VA decisions to an adversarial court--the U.S. Court of Appeals for Veterans Claims ("CAVC"). [25]The CAVC is an Article I

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13 *Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985)*.

14 *Walters, 473 U.S. at 310*.

15 *Id.*

16 *Id. at 308*.

17 *Id. at 309*.

18 *Id.*

19 Ridgway, *Origins of the Modern Veterans' Benefits System*, *supra* note 8, at 38-40.

20 *See* Charles L. Cragin, *Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, *46 ME. L. REV. 23, 24-25 (1994)* [hereinafter Cragin, *Impact of Judicial Review*].

21 *Walters, 473 U.S. at 330*.

22 Michael E. Serota & Michelle Singer, *Veterans Benefits and Due Process*, *90 NEB. L. REV. 388, 395 (2011)*.

23 *Id.*

24 *See* Jennifer D. Oliva, *Representing Veterans, 73 S.M.U. L. REV. F. 103, 106 (2020)*.

Court that has exclusive jurisdiction over decisions from the Board of Veterans Appeals. [26]CAVC decisions may be reviewed by the U.S. Court of Appeals for the Federal Circuit. [27]Federal Circuit decisions may be reviewed by writ of certiorari to the U.S. Supreme Court. [28]Judge Michael Allen describes the creation of the CAVC as "revolutionary"; he cites the doctrinal development of the law of veterans' benefits as one of the great successes of the CAVC. [29]

The VJRA and the CAVC's early decisions ended the practice of "rating boards" as adjudicative bodies within VA. [30]The adjudication of claims by rating boards made up of doctors and lawyers relying on their own training and experience could not withstand judicial review. [31]For the first time, the VJRA imposed a requirement on adjudicators at the Board of Veterans' Appeals to include in their written decisions the reasons and bases for any findings and conclusions, including any findings and conclusions with respect to medical issues. [32]The reasons and bases requirement enables the Court to meaningfully review VA's **[*969]** decision.

In 1991, the CAVC interpreted this requirement in *Colvin v. Derwinski* to mean that the Board of Veterans' Appeals may not rely on "its own unsubstantiated medical conclusions," but can only consider independent medical evidence to support its findings. [33]In *Colvin*, the Court noted that the Board failed to cite any medical evidence or any medical treatises to support the medical conclusions in its decision. [34]The Court went on to say that if the medical evidence of record is insufficient, the Board is free "to supplement the record by seeking an advisory opinion [or] ordering a medical examination." [35]Therefore, the Board was no longer able to rely on the medical knowledge of its own physician-adjudicators in rendering disability decisions. [36]As a result, doctors and medical specialists are no longer employed as adjudicators at VA. [37] *Colvin* created a demand for medical examinations and opinions that persists today. [38]As this Article will further discuss below, while the decision in *Colvin* served to protect veterans from arbitrary decision-making by VA adjudicators, it may have led to increased reliance by VA adjudicators on arbitrary or inadequate medical opinions from C&P examiners. [39]

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[25] *Id.*; Wishnie, *Boy Gets Into Trouble*, *supra* note 8, at 1722-23; Allen, *Due Process and the American Veteran*, *supra* note 5, at 505-06.

[26] *38 U.S.C. § 7252(a)*.

[27] *38 U.S.C. § 7252(c)*; *38 U.S.C. § 7292*.

[28] Allen, *CAVC at Twenty*, *supra* note 5, at 368; Allen, *Due Process and the American Veteran*, *supra* note 5, at 506.

[29] Allen, *CAVC at Twenty*, *supra* note 5, at 364, 372-73.

[30] *See* Cragin, *Impact of Judicial Review*, *supra* note 20, at 24-25.

[31] *Id.*

[32] *Id.* at 25-26.

[33] *Colvin v. Derwinski, 1 Vet. App. 171, 175 (Vet. App. 1991)*.

[34] *Id.*

[35] *Id.*

[36] Cragin, *Impact of Judicial Review*, *supra* note 20, at 25-26.

[37] *Id.* at 26.

[38] *Id.* at 40.

[39] *See infra pp*. 20-25.

Despite developments like judicial review, VA disability adjudication retains many elements that could be described as non-adversarial, such as a relatively low standard of proof. [40]A veteran must show that it is "as likely as not" that her disability was caused or aggravated by her military service in order to receive disability compensation. [41]If there is an equal amount of evidence for and against the claim, the claim must be resolved in favor of the veteran. [42]Further, it is important to note that Congress has lifted the ten dollar attorney fee limitation after *Walters*. [43]However, veterans are still prohibited by law from hiring an attorney to help them with their disability claim until they have received an initial decision from VA. [44]

[*970] *B. VA Disability Adjudication Procedure Today*

The U.S. Department of Veterans Affairs (VA) is an executive, "Cabinet-level" department. [45]Right now, there are approximately 20 million veterans in the country. [46]VA currently serves approximately 5.2 million veterans and survivors who receive disability compensation or pension benefits. [47]In Fiscal Year 2017, VA processed over 1.35 million compensation claims, which was an increase of nine percent over Fiscal Year 2016. [48]New recipients of VA compensation claims are expected to grow by twenty-five percent by 2022. [49]

VA is composed of three administrations: the Veterans Benefits Administration ("VBA"); the Veterans Health Administration ("VHA"); and the National Cemetery Administration ("NCA"). [50]When Americans think of VA, most of the time they are thinking of the VHA. The VHA is the nation's largest, fully-integrated healthcare system, serving 9 million veterans each year. [51]It is composed of "150 flagship VA Medical Centers, 819 Community-Based Outpatient Clinics, 300 Vet Centers providing readjustment counseling," as well as residential rehabilitation treatment centers, mobile clinics, and telehealth

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[40] Simcox, *Thirty Years After Walters*, *supra* note 6, at 678.

[41] *Id.*

[42] *Id.*; Ridgway, *Mind Reading*, *supra* note 1, at 9.

[43] Simcox, *Thirty Years After Walters*, *supra* note 6, at 672, 689-93, 695-96.

[44] *38 U.S.C. § 5904(c)(1)*.

[45] *5 U.S.C. § 101*; JENNIFER L. SELIN AND DAVID E. LEWIS, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 28 (2d ed. Oct. 2018), *available at* *https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agenices%202d%20ed.%20508%20Compliant.pdf*.

[46] *Improving the Veteran Experience Through VBA Process Improvements and Modernization*, U.S. DEP'T OF VETERANS AFF. (June 4, 2019), *https://www.va.gov/DATA/docs/Improving-the-Veteran-Experience-Through-VBA-Process-Improvements-and-Modernization-data_va_gov.pdf*.

[47] *Veterans Benefits Administration Reports*, U.S. DEP'T OF VETERANS AFF., *https://www.benefits.va.gov/REPORTS/detailed_claims_data.asp* (last updated Mar. 1, 2021).

[48] *Improving the Veteran Experience Through VBA Process Improvements and Modernization*, *supra* note 46.

[49] *Id.*

[50] U.S. DEP'T OF VETERANS AFFAIRS, 2019 VA FUNCTIONAL ORGANIZATION MANUAL 18 (Dec. 21, 2018), *available at* *https://www.va.gov/FOM-5-Final-July-2019.pdf*.

[51] Robert A. McDonald, *VA is Critical to Medicine and Vets*, THE BALT. SUN (Oct. 23, 2014), *https://www.baltimoresun.com/opinion/op-ed/bs-ed-va-secretary-20141023-story.html*.

programs. [52]Therefore, when veterans go to see their primary care provider at their local VA Medical Center, they are interacting with the VHA.

However, when discussing VA benefits, including education benefits, VA home loans, or disability compensation, the relevant administration is the Veterans Benefits Administration ("VBA"). [53]A veteran begins the process of applying for disability compensation from the VBA by either **[*971]** filing an application online, sending a paper application through the mail or facsimile, or applying at her local VA Regional Office. [54]There are more than fifty Regional Offices in the country. [55]All evidence must be considered by the Regional Office in the first instance; therefore, Regional Offices are referred to as "agenc[ies] of original jurisdiction." [56]At this level, VA employees who are generally not lawyers or doctors will make a decision on the claim. [57]

If the veteran disagrees with the Regional Office's decision, the veteran has three options for appeal under the new Veterans Appeals Improvement and Modernization Act of 2017 ("AMA"). [58]The veteran may submit a Supplemental Claim, a request for Higher Level Review, or the veteran may appeal directly to the Board of Veterans' Appeals. [59]

The Board of Veterans' Appeals ("the Board") is the last level of appeal within the Department of Veterans Affairs. The Board is composed of Veterans Law Judges and attorneys and it has one office location in Washington, DC. Board decisions are reviewed by the U.S. Court of Appeals for Veterans Claims. This Article focuses on the adjudication of disability compensation claims within VA at Regional Offices and at the Board of Veterans' Appeals.

This Article discusses C&P examinations, which are involved in the majority of veterans' claims for disability compensation and are often the most critical piece of evidence in a claim. This Article uses the term "VA adjudicators" to refer to those who issue VA decisions. It is used in the Article as a broad term that includes adjudicators at the Regional Office level and at the Board of Veterans' Appeals.

VA describes its disability adjudication process as one in which it *helps* the veteran obtain benefits. [60]As mentioned above, courts, legislators, and scholars have described VA's adjudication process as "non-adversarial" for many reasons, including the relatively low standard of proof, the lack of opposing counsel, the lack of a statute of limitations for filing a claim, and VA's statutorily-imposed duty to assist. [61]Under the duty to assist, **[*972]** once a veteran applies for

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[52] *Id.*

[53] The VBA's mission is to "provide benefits and services to Veterans, their families and survivors in a responsive, timely, and compassionate manner in recognition of their service to the Nation." U.S. DEP'T OF VETERANS AFFAIRS, 2019 VA FUNCTIONAL ORGANIZATION MANUAL 21 (Dec. 21, 2018), *available at* https://www.va.gov/FOM-5-Final-July-2019.pdf.

[54] Wishnie, *Boy Gets Into Trouble*, *supra* note 8, at 1719.

[55] *Id.*

[56] 38 U.S.C. § 7104(a); 38 U.S.C. § 7105(b)(1), (d)(1); Sprinkle v. Shinseki, 733 F.3d 1180, 1184 (Fed. Cir. 2013).

[57] Simcox, *Thirty Years After Walters*, *supra* note 6, at 677; Ridgway, *Mind Reading*, *supra* note 1, at 4 ("First, a claim is decided by an adjudicator at one of fifty-seven Veterans Benefits Administration regional offices (ROs). These adjudicators are not attorneys.").

[58] *See* Veterans Appeals Improvement and Modernization Act of 2017, ***Pub. L. No. 115-55***, § 2 (h)(1)(a), ***131 Stat. 1105*** (2017).

[59] *Id.*

[60] *See* U.S. DEP'T OF VETERANS AFFAIRS, SUMMARY OF VA BENEFITS 1-2 (Sept. 2012), *available at* https://www.benefits.va.gov/BENEFITS/benefits-summary/SummaryofVABenefitsFlyer.pdf ("We are here to help you . . . obtain compensation . . . .").

disability compensation, VA is required to make reasonable efforts to assist a veteran in obtaining the evidence necessary to substantiate the veteran's claims. [62]

This duty not only requires VA to inform the veteran of what evidence is necessary to prove her claim, but also requires VA to assist the veteran in obtaining that evidence. [63]The duty to assist requires VA to obtain the veteran's military service records or any relevant records that are held or maintained by a governmental entity, including relevant post-service medical treatment records from local VA medical centers. [64]It even requires VA to attempt to obtain relevant *private* treatment records that the veteran adequately identifies to VA. [65]

When some minimal evidentiary requirements are met, the duty to assist also includes the duty to provide the veteran with a medical examination and medical opinion. [66]In the majority of service-connected claims, VA will order a C&P examination for the veteran in order to obtain an opinion from a medical professional to help the adjudicator make his or her decision on the claim. [67]VA explains that the C&P exam "helps VA determine if you have a disability related to your military service . . . ." [68]The importance of the C&P examiner's opinion to the outcome of the veteran's disability claim cannot be understated. In many cases, medical opinion evidence is "dispositive" of the claim. [69]

The duty to assist also requires that the C&P examiner's opinion be adequate. However, as will be discussed further below, inadequate opinions are one of the most common reasons for remand from the Board **[*973]** and the CAVC. [70]A thorough medical examination is one that "takes into account the records of prior medical treatment," but the review of a veteran's "claims file by a VA examiner, without more, does not automatically render the examiner's opinion competent or persuasive." [71]Since VA adjudicators are not medical professionals, medical opinions must contain a sufficient

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[61] *See* Wishnie, *supra* note 8, at 1719-20 (describing VA's disability claims adjudication process); James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VET. L. REV., 113, 117-18 (2009).

[62] *38 U.S.C. § 5103A(a)*.

[63] *38 U.S.C. § 5103(a)*; *38 U.S.C. § 5103A(a)*; *38 C.F.R. § 3.159(c)*.

[64] *38 U.S.C. § 5103A(c)(1)*; *Hyatt v. Nicholson, 21 Vet. App. 390, 393-95 (Vet. App. 2007)*.

[65] *38 U.S.C. § 5103A(b)(1)*; *Nicholson, 21 Vet. App. at 393-94, 396-98*.

[66] *38 U.S.C. § 5103A(d)*; *38 U.S.C. 5103(a)*; *38 C.F.R. 3.159(c)(4)*; *McLendon v. Nicholson, 20 Vet. App. 79, 81-86 (Vet. App. 2006)*; *see Waters v. Shinseki, 601 F.3d 1274, 1276-77 (Fed. Cir. 2010)*.

[67] *38 U.S.C.§ 5103A(d)*; *38 C.F.R. § 3.326(a)*; Allen, *Due Process and the American Veteran*, *supra* note 5; Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability System*, *72 SMU L. REV. 277, 291 (2019)* [hereinafter McClean, *Delay, Deny*].

[68] U.S. DEP'T OF VETERANS AFFAIRS, VA CLAIM EXAM: FREQUENTLY ASKED QUESTIONS, *available at https://www.benefits.va.gov/COMPENSATION/docs/claimexam-faq.pdf#*.

[69] Allen, *Due Process and the American Veteran*, *supra* note 5, at 528; Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, *67 U. KAN. L. REV. 513, 557 (2019)* [hereinafter Simcox, *Welcome to the Wild West*] ("In the author's experience, new evidence, particularly new medical opinions concerning etiology of disabling conditions, has helped the VA change their minds and grant a veteran benefits approximately 84% of the time."); McClean, *Delay, Deny*, *supra* note 67, at 291 ("Almost every benefits case relies on expert medical testimony to establish a nexus between a veteran's current injury and his or her military service.").

[70] *Barr v. Nicholson, 21 Vet. App. 303, 311 (Vet. App. 2007)* ("[O]nce the Secretary undertakes to provide an examination when developing a service-connection claim, even if not statutorily obligated to do so, he must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided."); Ridgway, *Mind Reading*, *supra* note 1.

[71] *Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 301 (Vet. App. 2008)*.

explanation of the medical findings so that a layperson can weigh and evaluate the evidence. [72]The CAVC has held that adjudicators at the Board must be able to conclude "that a medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion." [73]The probative value of a VA examiner's medical opinion comes not from the conclusion itself, nor from the fact that it is a "medical conclusion," but from the "factually accurate, fully articulated, sound reasoning" that is used to support the conclusion reached in the opinion. [74]

The evidence from the C&P examiner generally comes on a standardized form with a list of multiple choice and short-answer questions that the examiner completes. The last question on the form asks the examiner whether the veteran's disability is related to their military service. The form, including the medical opinion, is then associated with the veteran's electronic file that will go to the adjudicator. As a matter of course, the veteran does not receive a copy of the completed form--the C&P exam report or opinion. [75]A veteran must request to see the report and opinion. [76]

It is unlikely that veterans who are unrepresented will know that they can and should request the C&P examiner's report and opinion. [77]VA advertises on a webpage about C&P exams that veterans may get a copy of the final report from the C&P exam by "contacting us" with a link for veterans to "contact your nearest VA regional office." [78]The same webpage features a "Helpful Tips" document for veterans to read before the C&P exam. [79]This document advises veterans that their C&P exams **[*974]** may be short because "the examiner may only need to ask a few questions," and it reminds veterans to "be truthful and honest" in their exams. [80]The document does not explain the importance of the C&P examiner's opinion in light of the CAVC's decision in *Colvin* that limits adjudicators' ability to make any medical conclusions. The "Helpful Tips" document does not explain how a veteran can--or why a veteran should--obtain a copy of the C&P examiner's report before the VA decision is issued.

Even if the veteran knows to request a copy of the C&P examiner's report and does so, there is no guarantee that the veteran will receive the copy before the VA issues its decision on the claims. [81]It often takes VA months, sometimes a year, to fulfill a request for a copy of the C&P examiner's report or for a copy of the veteran's "C-file," which is the complete file of documents that adjudicators use to make their decisions. [82]

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[72] McClean, *Delay, Deny*, *supra* note 67, at 291.

[73] *Nieves-Rodriguez, 22 Vet. App. at 304*.

[74] *Id.*

[75] *See Sprinkle v. Shinseki, 733 F.3d 1180, 1186-87 (Fed. Cir. 2013)*.

[76] *Id.*

[77] *See* O'Reilly, ***Burying Caesar, supra note 11, at 238-39***.

[78] *What to Expect at Your VA Claim Exam (C&P Exam)*, U.S. DEP'T OF VETERANS AFF., *https://www.va.gov/disability/va-claim-exam/* (last visited Aug. 10, 2020).

[79] *Id.*; U.S. DEP'T OF VETERANS AFFAIRS, YOUR VA CLAIM EXAM (Jan. 2021), *available at https://www.benefits.va.gov/COMPENSATION/docs/claimexam-tipssheet.pdf*.

[80] YOUR VA CLAIM EXAM, *supra* note 78.

[81] *See* O'Reilly, ***Burying Caesar, supra note 11, at 239***; *see Sprinkle, 733 F.3d at 1186*; *see Young v. Shinseki, 22 Vet. App. 461, 471-72 (Vet. App. 2009)*.

[82] *See* O'Reilly, ***Burying Caesar, supra note 11, at 239***; *see, e.g., Brief for Appellant, Martinez v. Wilkie, 31 Vet. App. 170 (Vet. App. Mar. 2, 2018)*.

Generally, the veteran will find out what the C&P examiner's opinion was when the veteran receives the VA decision either granting or denying their disability claims. [83]Neither Regional Office decisions nor decisions from the Board of Veterans' Appeals contain a copy of the C&P examiner's report, but the narrative section of the decisions will generally describe what the C&P examiner opined in the report.

The U.S. Court of Appeals for Veterans Claims recently held that this type of notice of an adverse C&P examiner's opinion is sufficient under both VA's statutory duty to assist and the Due Process Clause of the Fifth Amendment. [84]The court held that VA is not required--by statute or by due process--to automatically send a veteran a copy of the C&P examiner's report and opinion. [85]In its reasoning, however, the court did not adequately consider three crucial factors that this Article puts forth: (1) VA adjudicators adopt C&P examiners' medical opinions as legal reasoning; (2) C&P examiners' medical opinions are often legally inadequate, but adopted by adjudicators anyway; and (3) C&P examiners' medical opinions not only involve "simple questions of fact" that turn on medical judgment, but also legal questions that require legal judgment. [86]

Because VA adjudicators adopt C&P examiners' medical opinions as legal reasoning, the C&P examiner's opinion is critically important to the outcome of a veteran's claim. Despite this importance, the procedures **[*975]** governing the C&P examination system are riddled with "significant flaws." [87]For example, as in the hypothetical above, if the veteran already receives her medical care at a medical center or clinic operated by the Veterans Health Administration, the medical professional who conducts the C&P exam will *not* be the same person whom the veteran sees at her appointments at that medical center or clinic. [88]As VA explains, the C&P exam "is different from a regular medical appointment." [89]C&P examiners and VHA medical providers serve discreet roles. [90]While the C&P examiner will likely have access to the VHA medical provider's treatment notes, there is little to no interaction between the two with respect to any individual veteran's disability claim. [91]Therefore, someone whom the veteran has never met before is asked to give an opinion on the claimed disabilities, while the veteran's treating VHA medical provider, who has longitudinal knowledge about the veteran's claimed disabilities, is not consulted. Even if the veteran asks her treating medical provider to provide a medical opinion in support of her disability claim, it is not likely that they will do so in light of prior VA policies specifically prohibiting it. [92]

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[83] *See, e.g.*, *Young, 22 Vet. App. at 464*.

[84] *Martinez, 31 Vet. App. at 173*.

[85] *Id.*

[86] *Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985)*.

[87] McClean, *Delay, Deny*, *supra* note 67, at 292.

[88] *Id.*

[89] U.S. DEP'T OF VETERANS AFFAIRS, YOUR VA CLAIM EXAM: KNOW WHAT'S NEXT (Dec. 2016), *available at https://www.benefits.va.gov/COMPENSATION/docs/claimexam-factsheet.pdf*.

[90] *See id.*

[91] McClean, *Delay, Deny*, *supra* note 67, at 292-93.

[92] NAT'L VETERANS LEGAL SERVS. PROGRAM, VETERANS BENEFITS MANUAL § 17.10.5.2 (Barton F. Stichman et al., eds., 2019-2020 ed.); *see Beasley v. Shinseki, 709 F.3d 1154, 1156, 1158-59 (Fed. Cir. 2013)* (holding that a veteran had no right to compel VA to direct his treating medical provider to provide a medical opinion in support of his disability claim after the veteran requested it and VA replied that doing so would be a "conflict of interest" and would violate VA policy).

C&P exams can also be conducted by private medical care providers who are not VA employees, but government contractors. [93]Indeed, in October 2020, members of Congress discovered that VA is in the process of completely eliminating its in-house C&P examinations. [94]Prior to this decision, VA had been increasing its use of contractors to conduct C&P exams. [95]The U.S. Government Accountability Office ("GAO") reported that between fiscal year 2012 through mid-September 2019, the number of exams conducted by contractors more than quadrupled, from "roughly 178,000 to almost 958,000." [96]In fiscal year 2019, "contracted examiners **[*976]** completed more than half of the 1.49 million disability medical exams." [97]

With the increasing use of contractors to conduct C&P exams, GAO has suggested that oversight of contractors should be improved. [98]In 2018 and 2019, GAO found that VA was behind in completing quality reviews for contracted exams and that VA did not have accurate information about whether contractors were completing veterans' exams in a timely manner. [99]Perhaps most alarmingly, GAO found that VA relies on the contractors to self-report that their examiners have completed required VA training. [100]It was the contractors, not VA, who confirmed they completed VA training that allowed them to begin conducting VA disability exams. [101]Moreover, GAO found that VA did not review contractors' self-reports for accuracy or request supporting documentation, which GAO noted "could lead to poor-quality exams that need to be redone and, thus, delays for veterans." [102]

Another example of a systemic flaw in VA's C&P examination process is the presumption of competency for C&P examiners. C&P examiners can be doctors, nurse practitioners, or physician's assistants. [103]They are not required to have experience in the area of medicine that corresponds to the claim for which they are providing an opinion. [104]Any medical provider

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93 McClean, *Delay, Deny*, *supra* note 67, at 291.

94 Nikki Wentling, *VA Plans to Outsource All Compensation and Pension Exams*, STARS & STRIPES (Oct. 21, 2020), https://www.stripes.com/news/us/va-plans-to-outsource-all-compensation-and-pension-exams-1.649356.

95 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-715T, VA DISABILITY EXAMS: OPPORTUNITIES REMAIN TO IMPROVE OVERSIGHT OF CONTRACTED EXAMINERS 1 (Sept. 19, 2019).

96 *Id.*

97 *Id.*

98 *Id.* at 2, 4-8; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-213T, VA DISABILITY EXAMS: IMPROVED OVERSIGHT OF CONTRACTED EXAMINERS NEEDED 1-7 (Nov. 15, 2018); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-13, VA DISABILITY EXAMS: IMPROVED PERFORMANCE ANALYSIS AND TRAINING OVERSIGHT NEEDED FOR CONTRACTED EXAMS 5-8, 11-27 (Oct. 2018).

99 GAO-19-715T, *supra* note 95, at 2, 4-8; GAO-19-213T, *supra* note 98, at 1-7; GAO-19-13, *supra* note 98, at 5-8, 11-27.

100 GAO-19-715T, *supra* note 95, at 7-8.

101 *Id.*

102 *Id.*

103 McClean, *Delay, Deny*, *supra* note 67, at 291.

104 *Id.*; *see* Francway v. Wilkie, 940 F.3d 1304, 1306-09 (Fed. Cir. 2019), *cert. denied*, ***140 S. Ct. 2507 (2020)***. An exception to this rule exists for C&P examiners for traumatic brain injury. VA policy is that C&P examinations for traumatic brain injuries must be conducted by physicians who are specialists in physiatry, neurology, neurosurgery, and psychiatry. *See* DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GEN., VA OIG 16-04558-249, VA POLICY FOR ADMINISTERING TRAUMATIC BRAIN INJURY EXAMINATIONS i-ii (Sept. 10, 2018).

employed by VA for a C&P exam is "deemed qualified" to render an opinion on any claim, regardless of whether the claim involves a disability that is within the provider's area of expertise. [105]

In *Francway v. Wilkie*, a veteran challenged this presumption when VA asked a C&P examiner who was an internist to provide a medical opinion about whether the veteran's current back disability was related to his in-service back injury even after the Board of Veterans' Appeals instructed that the opinion be provided by an "appropriate medical specialist." [106] **[*977]** The Federal Circuit held that, since the veteran did not raise the issue of the examiner's competency before the Board, he could not challenge it on appeal. [107]

Further, the Court explained that "[t]he presumption is that the VA has properly chosen an examiner who is qualified to provide competent medical evidence in a particular case absent a challenge by the veteran." [108]However, since there is no requirement that they be informed, many veterans do not even know that the C&P examiner issued an unfavorable medical opinion in their case until they receive the VA decision--whether from the Regional Office or from the Board of Veterans' Appeals. Therefore, it is unlikely that the veteran will know that they could or should even raise the issue of the examiner's competency before the decision is issued.

Veterans with private health insurance, or with the ability to pay a medical consultant, may ask their private doctors for a medical opinion that they can submit as evidence to support their claims for VA disability compensation. On other hand, veterans without the means to pay a medical professional in private practice for a medical opinion are left without a way to provide VA with their own crucial evidence of a medical opinion. Unfortunately, as discussed above, VHA medical providers generally do not provide medical opinions for veterans to include in their VA disability claims. [109]Further, VA disability adjudicators do not request medical opinions from a veterans' treating VHA medical providers. [110]Therefore, if the veteran does not have the means--financial or otherwise--to obtain and submit a medical opinion of their own, they must rely on the VA C&P examiner's opinion.

This structure has a unique impact on veterans who are eligible for VA health care because they have a sufficiently low income. These veterans are able to get health care through VA before receiving any kind of VA disability compensation. As a result, it is possible that these veterans could establish treating relationships, as well as relationships of trust, with their VHA primary care providers for years before even applying for VA disability compensation. If VA eventually denies disability compensation to a veteran in this situation, it can appear to be a Kafkaesque absurdity. On the one hand, a veteran regularly goes to a VA Medical Center to see their medical provider for treatment of a disability that they believe was sustained during service, but on the other hand, the veteran is told by another provider associated with VA--this time a C&P examiner--that the same disability has nothing to do with their military service.

[*978] Even if the veteran is able to obtain a medical opinion in support of their disability claim from a private medical provider, there is no guarantee that VA will give it probative weight. Many veterans' advocates believe VA generally prefers the opinions of its C&P examiners to those of private medical providers. [111]Further, VA is unlikely to assign probative weight to an opinion from a private medical provider if that provider does not use the correct burden of proof, which is

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105 McClean, *Delay, Deny*, *supra* note 67, at 291.

106 *Francway, 940 F.3d at 1308-09*.

107 *Id. at 1309*.

108 *Id.*

109 McClean, *Delay, Deny*, *supra* note 67, at 292.

110 *Id.*

111 ***Id. at 292-93***; NAT'L VETERANS LEGAL SERVS. PROGRAM, *supra* note 92, at § 17.10.5.3 ("VA adjudicators often find ways to place less weight on a private medical opinion.").

expressed as, "as likely as not." [112]Most private medical providers who do not regularly work with VA are unlikely to be aware of the necessity of this particular phrasing in their medical opinions.

C. Establishing Service Connection

VA disability compensation is a monthly tax-free payment made to a veteran with a disability resulting from an injury or disease incurred in or aggravated by military service. [113]For a veteran to receive VA disability compensation, she must show that she has a service-connected disability. [114]Service connection is generally established when the veteran provides competent and credible evidence that: (1) she has a current disability; (2) there was an in-service event or injury; and (3) there is a nexus between the current disability and the in-service event or injury. [115]

The second element of service connection--that there was an inservice event or injury--can be established through the veteran's military service records, which should include medical records and personnel records. [116]VA employees will examine the service records to find documentation of the event, injury, or circumstances of service that the veteran alleges occurred or existed. [117]For example, if an Army veteran who was a paratrooper is seeking service connection for a knee disability **[*979]** that he alleges is the result of a parachute malfunction in which he fell to the ground and landed on his knees, VA employees will inspect his service records for documentation of that incident. [118]This could take many forms, including documentation that the veteran sought medical attention while in service, documentation placing the veteran on a physical profile, or a notation in the military service records that the accident occurred.

Generally, competent evidence of two of the elements--a current disability, and a nexus between the current disability and the in-service event or injury--will be evidence from a medical professional. VA's regulation defines competent evidence as that which is "provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." [119]Therefore, a veteran submitting a claim for disability compensation will not be able to establish service connection by only submitting a statement that he has a disability that was caused by his military service. The vast majority of the time, the veteran will need a medical opinion from a medical professional that addresses whether a nexus exists. [120]In order to obtain this medical opinion, VA will schedule a C&P examination. Once the C&P examination is

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112 *See* NAT'L VETERANS LEGAL SERVS. PROGRAM, *supra* note 92, at § 17.10.5.3; *see* Ridgway, *Mind Reading*, *supra* note 1, at 9-10 (explaining how a private medical opinion from a psychologist may be rejected by VA if it does not articulate the correct standard of proof).

113 *See* 38 U.S.C. § 1110; 38 U.S.C. § 1131; 38 U.S.C. § 5120; 38 C.F.R. § 3.4(a), (b); 38 C.F.R. § 3.303(a); *VA Disability Compensation*, U.S. DEP'T OF VETERANS AFF., https://www.va.gov/disability/ (last visited Aug. 10, 2020); INTERNAL REVENUE SERV., PUBLICATION 907, TAX HIGHLIGHTS FOR PERSONS WITH DISABILITIES (Dec. 17, 2020), *available at* https://www.irs.gov/publications/p907.

114 38 U.S.C. § 101(2), (13), (16); 38 C.F.R. § 3.4(a).

115 Pond v. West, 12 Vet. App. 341, 346 (Vet. App. 1999) (citing Caluza v. Brown, 7 Vet. App. 498 (Vet. App. 1995)).

116 Lay evidence may also be evidence of an in-service event. *See* Layno v. Brown, 6 Vet. App. 465, 469-70 (Vet. App. 1994).

117 U.S. DEP'T OF VETERANS AFFAIRS, TYPES OF RECORDS INCLUDED IN STRS, III.III.2.A.1.E, M21-1 ADJUDICATION PROCEDURES MANUAL (2021).

118 *See* McLendon v. Nicholson, 20 Vet. App. 79, 83 (Vet. App. 2006).

119 38 C.F.R. § 3.159(a)(1).

120 Allen, *Due Process and the American Veteran*, *supra* note 5, at 528; Simcox, *Welcome to the Wild West*, *supra* note 69, at 557 ("In the author's experience, new evidence, particularly new medical opinions concerning etiology of disabling conditions, has helped the VA change their minds and grant a veteran benefits approximately 84% of the time."); McClean, *Delay, Deny*, *supra* note 67, at 291 ("Almost every benefits case relies on expert medical testimony to establish a nexus between a veteran's current injury and his or her military service.")

completed, a C&P exam report is included in the veteran's file, and the claim will go to a VA adjudicator at the Regional Office for a decision on the claim.

The legal standard that VA adjudicators must use for determining claims is the "benefit of the doubt" standard. [121]VA should find that a nexus exists if it is "as likely as not" that the veteran's current disability was caused by the in-service event. [122]This standard is generally interpreted to mean that there is at least a fifty percent chance that the veteran's disability was caused by the in-service event. [123]On top of a relatively low standard of proof, VA must give a sympathetic reading to each claim. [124]VA's stated policy is to resolve reasonable doubt "regarding service origin, the degree of disability, or any other point" in **[*980]** favor of the veteran. [125]

As mentioned, the importance of a medical opinion that addresses whether there is a nexus--a connection between the current disability and the veteran's service--cannot be understated. [126]In order to establish service connection, the "overwhelming majority of claims" require medical evidence of a nexus between the veteran's current disability and an event, injury, or disease that occurred during service. [127]Indeed--as mentioned above--whether or not there is competent, adequate evidence of a nexus is often "dispositive" of the claim. [128]

The question of whether service connection exists is rarely straightforward. There are a number of different legal theories of service connection that may be supported by the evidence. The different theories of service connection include direct service connection, secondary service connection, service connection through aggravation, and presumptive service connection, of which there are many different sub-types. Direct service connection exists when a veteran's current disability was caused or incurred through an event, injury, or disease during service. [129]Secondary service connection exists where a veteran's current disability is a result of an already service-connected disability. [130]A veteran may also be able to establish service connection on the theory of aggravation if she can show that a condition she had before entering service was worsened by her military service. [131]Another type of service connection through aggravation exists where a veteran's non-service-

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121 *Gilbert v. Derwinski, 1 Vet. App. 49, 53-56 (Vet. App. 1990)*.

122 McClean, *Delay, Deny*, *supra* note 67, at 291; *see, e.g.*, *38 C.F.R. § 3.311(c)(1)(i)*, (2), (3) (using the "at least as likely as not" language as a standard of proof).

123 McClean, *Delay, Deny*, *supra* note 67, at 285-86.

124 Wishnie, *Boy Gets Into Trouble*, *supra* note 8, at 1720; Allen, *Due Process and the American Veteran*, *supra* note 5, at 509.

125 *38 C.F.R. § 3.102*.

126 *See* Allen, *Due Process and the American Veteran*, *supra* note 5, at 527-28; Allen, *Justice Delayed*, *supra* note 12, at 25 ("[T]he coin of the realm in many veterans' benefits matters is medical evidence.").

127 James Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, *18 FED. CIR. B.J. 405, 407 (2009)* [hereinafter Ridgway, *Lessons the Veterans Benefits System Must Learn*]; McClean, *Delay, Deny*, *supra* note 67, at 291 ("Almost every benefits case relies on expert medical testimony to establish a nexus between a veteran's current injury and his or her military service."); Allen, *Justice Delayed*, *supra* note 12, at 25 ("Whether it is establishing a current disability or (more likely) the nexus between an in-service event and a current disability, medical evidence and opinions are often what matters.").

128 *See* Ridgway, *Mind Reading*, *supra* note 1, at 13; Allen, *Due Process and the American Veteran*, *supra* note 5, at 528; Simcox, *Welcome to the Wild West*, *supra* note 69, at 557 ("In the author's experience, new evidence, particularly new medical opinions concerning etiology of disabling conditions, has helped the VA change their minds and grant a veteran benefits approximately 84% of the time.").

129 *38 U.S.C. §§ 1110*, *1131*; *38 C.F.R. § 3.303*.

130 *38 C.F.R. § 3.310(a)*.

131 *38 U.S.C. §§ 1110*, *1131*; *38 C.F.R. § 3.306*.

connected disability increases in severity due to a service-connected disease or injury. [132]In that case, the veteran may be able to claim service connection for that non-service-connected disability if it was worsened by the service-connected disability.

[*981] Presumptive service connection enables veterans in certain circumstances to establish service connection who may otherwise be unable to do so by eliminating or easing the requirements of one of the elements of service connection. There are many different sub-types of presumptive service connection, but a common example of this theory is the presumptive service connection available to most veterans of the Vietnam War. This presumption applies to veterans with certain diseases--including type 2 diabetes, ischemic heart disease, prostate cancer, and others--who served in the Republic of Vietnam between January 9, 1962 and May 7, 1975 because VA acknowledges that these veterans were exposed to a toxic herbicide agent, commonly known as Agent Orange. [133]The presumption of service connection eliminates the requirement for these veterans to demonstrate an in-service event; VA presumes that a veteran with these circumstances of service was exposed to Agent Orange. [134]

Presumptive service connection also exists for specific chronic diseases that manifested within a certain amount of time after the veteran's discharge from service. [135]For example, service connection for multiple sclerosis may be presumed if the disease manifested to a degree of ten percent or more within seven years following a veteran's separation from active duty. [136]The evidence of record for any veteran's case may support one or more theories of service connection for just one disability.

When VA adjudicators adopt C&P examiners' medical opinions as legal reasoning, they often fail to consider whether the veteran may be able to establish service connection through more than one legal theory. For example, in *El-Amin v. Shinseki*, the U.S. Court of Appeals for Veterans Claims found that the Board of Veterans' Appeals erroneously relied on an inadequate C&P examination where the examiner only considered direct service connection and failed to consider service connection on the theory of aggravation. [137]Notably, the court observed that the Board's decision "was based almost exclusively on an October 2008 VA medical opinion." [138]In this case, a deceased veteran's wife appealed the Board's denial of benefits for the cause of her husband's death. [139]At the time of his death, the veteran was receiving VA disability benefits for post-traumatic stress disorder ("PTSD"). [140]The veteran's **[*982]** wife argued that her husband's PTSD either caused or aggravated his alcoholism, which led to the cirrhosis that caused his death. [141]

The C&P examiner's opinion upon which the Board "almost exclusively" based its decision stated that the veteran's PTSD did not cause his alcohol abuse, and that it was "'more likely than not that the veteran's alcohol abuse was *related to* factors other than the veteran's post-traumatic stress disorder.'" [142]The Court found that this opinion did not show that the examiner

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132 *38 C.F.R. § 3.310(b)*.

133 *38 C.F.R. §§ 3.307*, *3.309*; PUBLIC HEALTH, AGENT ORANGE, U.S. DEP'T OF VETERANS AFF., *https://www.publichealth.va.gov/exposures/agentorange/* (last visited May 24, 2021).

134 *See 38 C.F.R. §§ 3.307*, *3.309*.

135 *Id.*

136 *Id.*

137 *El-Amin v. Shinseki, 26 Vet. App. 136, 139-141 (Vet. App. 2013)*.

138 *Id. at 137-38*.

139 *Id. at 137*.

140 *Id.*

141 *Id.*

considered the theory of aggravation; therefore, it held that the Board's conclusion that the C&P examination was adequate was clearly erroneous. [143]

The different theories of service connection and the example in *El-Amin* demonstrate that, contrary to Justice Rehnquist's statement in *Walters*, the issue of service connection is not a "simple factual question" that only involves medical judgment. [144]Rather, service connection often involves complex factual and legal analysis, which necessarily requires legal judgment in addition to medical judgment. As illustrated in *El-Amin*, the VA adjudicator's adoption of a C&P examiner's medical opinion without legal analysis or judgment leads to error, further remands, and additional delay in the resolution of veterans' claims.

PART II

A. Why VA Adjudicators Rely on C&P Examiners' Opinions

As stated, C&P examiners' opinions are often "dispositive" of the outcomes in veterans' disability claims. Despite statutory requirements that VA must consider "all lay and medical evidence of record," VA adjudicators adopt C&P examiners' medical opinions as legal reasoning. [145]This practice essentially places the C&P examiner in the role of adjudicator. One of the reasons for the heavy reliance by VA adjudicators on C&P examiner opinions is the rule that VA adjudicators cannot make their own make medical conclusions. This rule was laid out in the U.S. Court of Appeals of Veterans Claims' ("CAVC") decision in *Colvin v. Derwinski*. [146] *Colvin* was decided in 1991, not long after the establishment of the court itself through the Veterans' Judicial Review Act in 1988. [147]

[*983] In that case, Mr. Colvin, a Vietnam War veteran, sought service connection for multiple sclerosis ("MS") on the theory of presumptive service connection. [148]Medical evidence in the record indicated that Mr. Colvin experienced symptoms that were possible precursors of MS during service *and* that they occurred within the seven-year period after his separation from service. [149]

However, Mr. Colvin's claim was denied at the Regional Office. [150]Mr. Colvin appealed to the highest level of adjudication within VA, the Board of Veterans' Appeals, which affirmed the denial of his claim for MS. [151]In its decision, the Board made many medical conclusions, including that "one episode of burning on urination during service does not represent either the onset of multiple sclerosis or bladder dysfunction often associated with the progression of the disease." [152]

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142 *Id. at 137-38, 140*.

143 *Id. at 140*.

144 *See supra* pp. 18-22; *Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985)*.

145 *38 U.S.C. § 5107(b)*; *38 U.S.C. § 7104(a)*.

146 *Colvin v. Derwinski, 1 Vet. App. 171 (Vet. App.1991)*.

147 Wishnie, *Boy Gets Into Trouble, supra* note 8, at 1722-23; Allen, *Due Process and the American Veteran, supra* note 5, at 505-06.

148 *Colvin, 1 Vet. App. at 172*.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id. at 175*.

The veteran appealed to the CAVC, which reversed the Board's decision and held that the Board may not rely on "its own unsubstantiated medical conclusions." [153]The court stated that the Board can only consider independent medical evidence to support its findings. [154]The CAVC went on to say that if the medical evidence of record is insufficient, the Board is free "to supplement the record by seeking an advisory opinion [or] ordering a medical examination." [155]Therefore, it is because of the *Colvin* decision that VA adjudicators must obtain C&P examinations in almost all veterans' disability claims. [156]

While this rule is favorable to veterans and consistent with due process because it prevents VA adjudicators from making unsubstantiated medical conclusions and arbitrary decisions, it has also allowed VA to shift decision-making from VA adjudicators to C&P examiners. The C&P examiners' decisions have been shrouded in the cloak of "medical conclusions," which shields those decisions from meaningful review by adjudicators. Therefore, if a C&P examiner renders an arbitrary or incorrect opinion, the practical effect of *Colvin* is that it is more difficult for the VA adjudicator to address it because doing so would necessarily involve a "medical conclusion," which adjudicators are prohibited from making.

The question arises that if VA adjudicators cannot meaningfully **[*984]** evaluate medical opinions because doing so would mean reaching "medical conclusions" under *Colvin*, what can they do? Must they simply accept whatever medical opinion they receive? While VA adjudicators are not bound to accept whatever medical opinion they receive, they are limited in terms of the decisions that they can make. It is primarily through the duty to assist that VA adjudicators are empowered to make decisions with respect to medical opinions.

For example, the VA adjudicator can decide whether a C&P examiner's opinion is adequate. [157]The CAVC has held that VA's duty to assist requires VA to obtain not just any medical opinion, but one that is adequate. [158]An adequate medical opinion is one that contains more than just "data and conclusions." [159]Rather, it contains "factually accurate, fully articulated, sound reasoning for the conclusion." [160]An adequate medical opinion is "one which takes into account the records of prior medical treatment, so that the evaluation . . . will be a fully informed one." [161]Therefore, VA "must ensure that the examiner providing the report or opinion is fully cognizant of the claimant's past medical history." [162]Further, VA must be able to conclude that a medical examiner "applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion." [163]

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153 *Id.*

154 *Id.*

155 *Id.*

156 *See* Cragin, *Impact of Judicial Review*, *supra* note 20, at 26.

157 *See* Nieves-Rodriguez v. Peake, 22 Vet. App. 295 (Vet. App. 2008).

158 "It is also well established in this Court's jurisprudence that a thorough and contemporaneous medical examination is 'one which takes into account the records of prior medical treatment, so that the evaluation of the claimed disability will be a fully informed one.'" *Id. at 301* (quoting *Green v. Derwinski, 1 Vet. App. 121, 124 (Vet. App. 1991)*; *Stefl v. Nicholson, 21 Vet. App. 120, 123 (2007)*; *Stegall v. West, 11 Vet. App. 268, 270-71 (Vet. App. 1998)*.

159 *Nieves-Rodriguez, 22 Vet. App. at 304*.

160 *Id.*

161 *Green, 1 Vet. App. at 124*; Ridgway, *Lessons the Veterans Benefits System Must Learn*, *supra* note 127, at 408.

162 *Nieves-Rodriguez, 22 Vet. App. at 301*.

163 *Id. at 304* (citing *Stefl v. Nicholson, 21 Vet. App. 120 (Vet. App. 2007)*).

Another task of the VA adjudicator is to weigh the probative value of medical opinions when there are competing opinions in the record. In deciding how VA should weigh the probative value of a medical opinion, the CAVC in *Nieves-Rodriguez v. Peake* compared VA C&P examiners to expert witnesses. [164]The court borrowed the federal rule of evidence on expert witness testimony [165]to serve as guidance for evaluating medical opinion evidence in veterans' claims. [166]As veterans' law scholar James **[*985]** Ridgway noted, "the key to understanding the role of medical evidence in the current adjudication process is realizing that medical opinions in veterans' cases are essentially substitutes for live expert testimony in a trial-like setting." [167]Citing to *Nieves-Rodriguez*, Ridgway went on to point out that the CAVC has been "fairly explicit on this point." [168]However, the Court in *Nieves-Rodriguez* acknowledged one crucial difference between C&P examiners and traditional expert witnesses: unlike expert witnesses in trial-like settings, "medical professionals offering medical opinions in veterans' benefits cases" are not subject to cross-examination. [169]

As discussed above, since VA adjudicators cannot make their own medical conclusions and veterans cannot cross-examine C&P examiners, the power to enforce the duty to assist--by ensuring medical opinions are obtained when necessary and that, once they are obtained, the opinions are adequate--appears to be the VA adjudicator's primary tool for ensuring a correct decision is made with respect to a veteran's claim. [170]Therefore, within VA, the duty to assist appears to be the only safeguard against an erroneous deprivation of a veteran's benefits.

B. VA Adjudicators' Over-Reliance on C&P Examinations and Opinions Leads to Error and Delay.

Unfortunately, veterans and their advocates know that the duty to assist is not a sufficient safeguard against the erroneous deprivation of a veteran's benefits. The number of appeals of VA disability decisions has been rising in recent years. [171]The Board remands half of the appeals it receives to the Regional Offices for further development. [172]For years, inadequate medical opinions have been one of the most common reasons for remand from the Board. [173]In 2013, the

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164 *Id. at 302*.

165 FED. R. EVID. 702.

166 *Nieves-Rodriguez, 22 Vet. App. at 302*. The important factors from the Federal Rule that the Court identified were that (1) the expert testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert witness has applied the principles and methods reliably to the facts of the case. *Id.*

167 Ridgway, *Mind Reading*, *supra* note 1, at 3.

168 *Id.*

169 *Nieves-Rodriguez, 22 Vet. App. at 302*.

170 *See supra pp*. 6-7, 20-21; Allen, *Due Process and the American Veteran*, *supra* note 12, at 528 ("Before *Cushman*, the way in which the VA adjudicators considered medical evidence, including any rights a veteran had to address that evidence, were the creature of statute and regulation. To be sure, there was judicial review of these medically related matters. But the fundamental reality was that if a veteran received some sort of protection or process, it ultimately came through these regulatory sources."); McClean, *Delay, Deny*, *supra* note 67, at 302 ("[W]hile veterans have a right to the fair adjudication of their claims under the Fifth Amendment of the Due Process Clause, courts have been reluctant to interfere with Congress's statutory scheme. As such, the fair and equitable distribution of benefits is dependent on the protections provided by the VA's regulatory process.").

171 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-358SP, VA PRIORITY RECOMMENDATIONS 4-5 (Mar. 28, 2019), *available at* *https://www.gao.gov/assets/700/698312.pdf*.

172 Ames at al., *Due Process and Mass Adjudication*, *supra* note 9, at 9.

173 *See* Ridgway, *Mind Reading*, *supra* note 1, at 3 (discussing how remands to the ROs by the Board based on inadequate medical opinions are frequent and how inadequate medical opinions are one of the leading bases of remands by the CAVC, despite the lack of official statistics); Ridgway, *Lessons the Veterans Benefits System Must Learn*, *supra* note 127, at 416 n.93; *see* *Veterans for Common Sense v. Shinseki, 644 F.3d 845, 860 (9th Cir. 2011)* (stating "Between 19 and 44 percent of [remands from the Board to the RO] are so-called

Board's then-chairwoman **[*986]** testified before Congress that the adequacy of medical examinations is one of "the most frequent reasons for remand." [174]

With respect to remands of Board decisions from the CAVC, new research examining data from the Board is informative. In 2018, researchers published findings after examining data on all Board decisions from October 1, 1999 to January 31, 2018. [175]Data from July 2013 through January 31, 2018 revealed that the CAVC remanded 2,037 Board decisions for the failure to obtain a medical examination and opinion under the duty to assist. [176]Notably, the data indicates that this was the second most common reason for remand from CAVC. [177]Additionally, the CAVC remanded Board decisions for the failure to adequately state the reasons and bases for the decision by failing to adequately address an inadequate medical opinion 1,819 times, which was the fourth most common reason for remand. [178]

With each remand, a veteran must wait longer for a decision on her claim. A claim can potentially be remanded from the Board to the Regional Office, then sent back from the Regional Office to the Board, and so on for years. [179]Veterans who received a decision from the Board in 2017 waited *an average* of seven years from the filing of the Notice of Disagreement. [180]A high error rate, including "'avoidable remands,'" contributes to the massive VA backlog of cases and ludicrous wait times **[*987]** for decisions. [181]

The fact that inadequate medical examinations are one of the most common reasons for remand from the Board to the Regional Offices, and from the CAVC to the Board, demonstrates that in a significant number of cases, VA adjudicators rely too much on inadequate medical opinions for their decisions. This over-reliance on inadequate opinions leads to excessive remands, which only contributes to the already unconscionable delays that veterans experience while waiting for a fair adjudication of their disability claims.

Medical opinion evidence has a significant impact on both the outcome of a veteran's claim and on how long it takes for the veteran to receive that outcome. If the opinion is both adverse to the veteran's claim and an inadequate one under the law, the veteran has little recourse to attack it aside from hoping for a remand with instructions for a new examination from the Board or the CAVC. [182]Indeed, veterans' law practitioners understand all too well the irony of having to advise their clients to

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'avoidable remands,' defined as occurring when 'an error is made by the [RO] before it certifies the appeal to the B[oard.]' The district court found that almost half of the 'avoidable remands' between January 1, 2008, and March 31, 2008, occurred as a result of violations by VBA employees of their duty to assist veterans."); Michael Serota & Michelle Singer, *Veterans Benefits' and Due Process*, 90 NEB. L. REV. 388, 401 (2011).

174 Simcox, *Welcome to the Wild West*, *supra* note 69, at 557; McClean, *Delay, Deny*, *supra* note 67, at 294.

175 Daniel E. Ho et al., *Quality Review of Mass Adjudication: A Randomized Natural Experiment at the Board of Veterans Appeals, 2013-16*, 35 J.L. ECON. & ORG. 239 (June 2019), *available at* https://dho.stanford.edu/wp-content/uploads/Ho_HandanNader_Ames_Marcus.pdf. For each case, the researchers were able to obtain variables including the Board disposition, issues disputed, whether the case was appealed to the CAVC, CAVC's disposition on each issue, and the Board's coding of the reason for the CAVC remand.

176 The Board coded the reason as: "duty to assist medical examination/opinion required." *Id. at 277*.

177 3,300 cases were remanded for "[o]ther [reasons and bases] deficiency existing case law." *Id. at 276*.

178 *Id.*

179 Ridgway, *Mind Reading*, *supra* note 1, at 2 ("Because VA adjudicators have a duty to secure adequate medical evidence before deciding a claim, problems with medical evidence in the VA system will lead not to dismissal of the claims, but rather to delays, remands, and further development. Unfortunately, this can cause a claim to drag on for a decade or more before it is properly decided.").

180 Daniel E. Ho et al., *supra* note 175, at 245.

181 *See* Wishnie, *Boy Gets Into Trouble*, *supra* note 8, at 1752 (quoting *Veterans for Common Sense v. Shinseki, 644 F.3d 845, 859-90 (9th Cir. 2011)*).

"hope for a remand"; it is essentially asking them to look forward to the addition of months or years to the time they have already been waiting for a fair and proper adjudication of their claim.

C. C&P Examiners Are More Accurately Analogized to Judges Than to Expert Witnesses.

As mentioned, Courts and legal scholars have compared VA C&P examiners to expert witnesses in traditional litigation in order to understand the role of examiners within the disability adjudication process. [183]However, the comparison of a VA C&P examiner to an expert witness is neither accurate nor useful for understanding the role of the C&P examiner in veterans' disability claims. C&P examiners can be more accurately analogized to judges in traditional litigation insofar as the C&P Examiner's opinion is determinative of the claim's success, and the veteran is then is left with an appeal as the only way to challenge it. Also unlike expert witnesses, VA C&P examiners are essentially **[*988]** insulated from meaningful review, which helps explain the high rate of error in decisions discussed in the previous Section.

As a matter of course in VA disability adjudication, veterans do not even receive a copy of the C&P examiner's medical examination and opinion. [184]While veterans may request a copy of the C&P examiner's medical examination or opinion from the VA Regional Office, there is no guarantee that the veteran will receive it before the decision is issued--or receive it at all. [185]Further, the veteran may not even know that she should request a copy of the C&P examiner's medical examination and opinion in the first place. These procedures make the C&P examiner significantly different from an expert witness, as it is impossible to challenge what one cannot review.

Further, unlike expert witnesses in trial-like settings, veterans cannot submit interrogatories to the C&P examiner. [186]Veterans cannot cross-examine VA C&P examiners. [187]Expert witnesses in traditional litigation, however, can be subjected to "vigorous cross-examination," which the U.S. Supreme Court has called a "traditional and appropriate" method of attacking evidence. [188]Cross-examination can reveal biases or prejudices of the witness, which affects the weight of the witness's testimony. [189]According to Professor Wigmore, two core beliefs of the Anglo-American system of evidence are that there is "no safeguard for testing the value of human statements [that is] comparable to that furnished by cross-examination," and that "no statement . . . should be used as testimony until it has been probed and sublimated by that test." [190]Indeed, even the Supreme Court has noted that it holds these beliefs to be so fundamental that it has applied them not only in the criminal context, but in types of cases where administrative and regulatory actions were subject to review. [191]

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182 While the veteran is generally permitted to submit her own medical opinion evidence after a remand, this is only possible if the veteran knows a favorable medical opinion would help her claim, and if the veteran is able to afford to pay a doctor or medical provider for the opinion. Further, doctors and medical providers unfamiliar with VA's disability claims process will most likely be unaware that they need to phrase the opinion in a specific way in order for VA to give their opinion any evidentiary weight.

183 *See generally* Nieves-Rodriguez v. Peake, 22 Vet. App. 295 (Vet. App. 2008); Hilkert v. West, 12 Vet. App. 145, 151 (Vet. App. 1999); Ridgway, *Mind Reading*, *supra* note 1, at 2 ("The key to understanding the role of medical evidence in the current adjudication process is realizing that medical opinions in veterans' cases are essentially substitutes for live expert testimony in a trial-like setting.").

184 *See* Sprinkle v. Shinseki, 733 F.3d 1180 (Fed. Cir. 2013).

185 *See, e.g.*, Young v. Shinseki, 22 Vet. App. 461, 471-72 (Vet. App. 2009).

186 *See* Sprinkle, 733 F.3d 1180; Gambill v. Shinseki, 576 F.3d 1307, 1310-13 (Fed. Cir. 2009); Allen, *Due Process and the American Veteran*, *supra* note 5, at 520, 527-29.

187 Nieves-Rodriguez, 22 Vet. App. at 302.

188 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595-96 (1993).

189 Davis v. Alaska, 415 U.S. 308, 316 (1974) (quoting J. WIGMORE, EVIDENCE § 940, p. 775 (Chadbourn rev. 1970)).

190 Greene v. McElroy, 360 U.S. 497 (1959) (quoting 5 WIGMORE ON EVIDENCE § 1367 (3d ed. 1940)).

191 Id. at 496-97.

To the contrary, the current structure of law, policy, and regulation essentially insulates VA C&P examiners from meaningful review. Veterans cannot confront the examiner in a hearing to cross-examine them, nor can they submit interrogatories to the examiner after an unfavorable opinion. Indeed, the veteran may not even be able to review **[*989]** the C&P examiner's opinion before the VA decision is issued. With such insulation, the comparison of a VA C&P examiner to an expert witness in a traditional trial-like setting is inaccurate.

Expert witnesses in traditional litigation are subject to cross-examination, which allows an opposing party to immediately explore the witness's qualifications, the manner in which the witness reached his or her conclusions, the witness's possible biases or prejudices, as well as their credibility. Moreover, as experienced trial lawyers know, cross-examination can elicit unanticipated but important information that ultimately proves to be fundamental to the fair adjudication of a case. The denial of such a meaningful opportunity for the fair adjudication of claims by a purportedly "veteran-friendly" adjudication process within an agency that claims to have the sacred duty of "car[ing] for [those] who have borne the battle" is an issue that deserves close examination. [192]

Rather than an expert witness in traditional litigation, the role of the VA C&P examiner in the veterans' disability adjudication process can be more closely analogized to that of the judge in traditional litigation. Like a VA C&P examiner, a judge is not subject to cross-examination once she issues a decision. A judge cannot be compelled to answer interrogatories after she has issued her decision. The most common way a party can challenge a judge's decision is by arguing that it is inadequate in some way, that is, by appealing and asking for a new decision. Similarly, the primary way a veteran can challenge a VA C&P examiner's opinion is by appealing and asking for a new opinion based on VA's failure to satisfy the duty to assist.

As discussed above, when presented with an inadequate medical opinion, a VA adjudicator is constrained in terms of how she addresses it because of the limitations of *Colvin v. Derwinski*. [193]Under *Colvin*, the VA adjudicator is not competent to reach medical conclusions; therefore, adjudicators generally do not make judgments about the substance of the medical evidence or of the medical opinion itself. [194]The VA adjudicator is left with the task of ensuring that the medical opinion provided is adequate. However, since inadequate medical opinions remain one of the leading causes of remand, VA adjudicators are relying on the inadequate medical opinions for their decisions in a significant number of veterans' claims. Therefore, within the disability adjudication process, VA adjudicators are often effectively serving as mouthpieces for VA C&P examiners that give the imprimatur of law to inadequate medical opinions.

[*990] PART III

A. Veteran-Applicants Have a Constitutionally Protected Property Interest in VA Disability Benefits.

The U.S. Supreme Court has not explicitly answered the question of whether applicants for VA benefits have a property interest in those benefits that is protected by the Due Process Clause of the *Fifth Amendment to the U.S. Constitution*. [195]However, in 2009, the Federal Circuit held in *Cushman v. Shinseki* that veteran applicants for VA disability benefits do possess such an interest. [196]

In *Cushman*, by analogizing applicants for VA disability benefits to applicants for Social Security disability benefits, the Federal Circuit reasoned that, like the entitlement to Social Security benefits, the entitlement to VA benefits is statutorily

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[192] U.S. DEP'T OF VETERANS AFFAIRS, CELEBRATING AMERICA'S FREEDOMS, THE ORIGIN OF THE VA MOTTO, *available at* https://www.va.gov/opa/publications/celebrate/vamotto.pdf (last visited Aug. 10, 2020).

[193] *See* *Colvin v. Derwinski, 1 Vet. App. 171 (Vet. App. 1991)*.

[194] *See id.*

[195] *Kapps v. Wing, 404 F.3d 105, 115 (2d Cir. 2005)*; *Gambill v. Shinseki, 576 F.3d 1307, 1310-11 (Fed. Cir. 2009)*; *see* Michael Serota & Michelle Singer, *Veterans Benefits and Due Process*, *90 NEB. L. REV. 388, 412 (2011)*.

[196] *Cushman v. Shinseki, 576 F.3d 1290, 1298 (Fed. Cir. 2009)*; Allen, *Due Process and the American Veteran*, *supra* note 5, at 512; Simcox, *Thirty Years After Walters*, *supra* note 6, at 36.

created and therefore "arises from a source that is independent" from VA proceedings, and upon a showing of entitlement, the grant or denial of veterans' benefits is not subject to the discretion of government officials; rather, the statutes provide an absolute right to benefits. [197]Therefore, the Court reasoned, veteran applicants have a property interest in service-connected disability benefits that is protected by the Due Process Clause of the Fifth Amendment. [198]

As Judge Michael Allen points out, while some have argued that *Cushman* is controversial, the Federal Circuit has not revisited the question and it remains law; as such, it is a landmark case for veterans' rights, as well as an important constitutional decision. [199]For the first time, the Federal Circuit recognized that an applicant's property interest in VA disability compensation is protected by the Due Process Clause of the Fifth Amendment. [200]

The question then arises as to what process is due to veterans seeking VA disability compensation, especially when it comes to the over-reliance of VA adjudicators on VA C&P examinations in their decision-making. Judge Allen has noted that "[t]he process by which medical **[*991]** opinions are obtained and evaluated provides fertile ground for arguments that could be framed around the rubric of due process." Indeed, veterans have put forward such arguments, and the Federal Circuit and the CAVC have had the opportunity to explore them in cases since *Cushman*; however, answers remain unclear. [201]

In *Gambill v. Shinseki*, the Federal Circuit addressed an argument from a veteran that VA violated his rights under the Due Process Clause by not allowing him to submit written interrogatories to the VA medical professional who opined that the veteran's disabilities were not connected to his military service. [202]The Court declined to address the argument because it found that "the absence of a right to confrontation" in Mr. Gambill's case was not prejudicial. [203]

It is important to note, however, that the facts of *Gambill* are unique and unlike the majority of veterans' cases in an important way: the medical opinion at issue in Gambill was not from a C&P examiner; rather, the medical opinion at issue was a VHA opinion under *38 C.F.R. § 20.906(a)*. In very narrow circumstances, the Board of Veterans' Appeals can bypass the Regional Office and order a medical opinion on its own from a specialist in VA's Veterans Health Administration when "such medical expertise is needed for equitable disposition." [204]In *Gambill*, the Federal Circuit cited to regulations which require that the veteran be given notice that a VHA opinion has been requested, that the veteran receive a copy of the opinion when it is obtained by the Board, and that the veteran be given 60 days to respond to the medical opinion. [205]

These procedures *only* exist in reference to VHA opinions, which are only obtained in a relatively small amount of veterans' cases. In the vast majority of veterans' cases, C&P exams are scheduled, and adjudicators' decisions are made based on those exam reports and opinions, but veterans are *not* provided with a copy of the exam report and opinion, nor are they given an opportunity to respond to it prior to the issuance of the decision.

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197 *Cushman, 576 F.3d at 1297-98*.

198 *Id. at 1298*.

199 *See* Allen, *Due Process and the American Veteran*, *supra* note 5, at 503. It is not controversial that a constitutionally protected property interest exists in non-discretionary government benefits. *See* MICHAEL ASIMOV, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 27-28 (2019).

200 Simcox, *Welcome to the Wild West*, *supra* note 69, at 538; McClean, *Delay, Deny*, *supra* note 67, at 300-01.

201 Allen, *Due Process and the American Veteran*, *supra* note 5, at 14-18.

202 *Gambill v. Shinseki, 576 F.3d 1307, 1309-10 (Fed. Cir. 2009)*.

203 *Id. at 1311-13*.

204 *Sprinkle v. Shinseki, 733 F.3d 1180, 1183-85 (Fed. Cir. 2013)*; *38 U.S.C. § 5103A(d)*; *38 C.F.R. § 20.901(a) (2019)*, (current version at *38 C.F.R. § 20.906(a) (2019)*); *see Gambill, 576 F.3d at 1309*.

205 *Gambill, 576 F.3d at 1311* (citing regulations).

B. VA Adjudicators' Over-Reliance on C&P Examiners' Opinions Raises Due Process Concerns.

The Due Process Clause of the Fifth Amendment guarantees that an **[*992]** individual will not be deprived of life, liberty, or property without due process of law. [206]Due Process has generally been interpreted to include notice and a fair opportunity to be heard. [207]In his article, *Some Kind of Hearing*, Judge Henry J. Friendly quotes Justice White's comment in *Wolff v. McDonnell*: "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." [208]When it comes to administrative agencies conducting "mass adjudication," the question of what a "hearing" means is a complex one to answer. [209]

The complexity arises out of the reluctance on behalf of Courts and legislators to "judicialize" administrative proceedings. [210]Instead of requiring the same constitutional safeguards that exist in traditional adversarial litigation across administrative agency adjudication, a requirement of "some kind of hearing" has led to a patchwork of different, complex procedures across agencies, many of which are opaque or confusing to claimants. [211]

In order to understand the absence of procedural due process in the way C&P examiner reports and opinions are used in VA disability adjudication, it is necessary to discuss how the U.S. Supreme Court first applied procedural due process in administrative adjudication in its landmark decision of *Goldberg v. Kelly*, and to discuss how it has done so with respect to medical opinions in a context that is somewhat similar to VA disability adjudication: that of Social Security disability adjudication.

The U.S. Supreme Court's 1970 decision in *Goldberg v. Kelly* launched a sprawling "due process explosion" or "revolution" for administrative agency adjudication. [212]In *Goldberg*, the Court faced the issue of whether the Due Process Clause requires that a state welfare recipient be afforded an evidentiary hearing before the state terminates the recipient's benefits. [213]The Court held that due process does require an adequate hearing *before* the termination of welfare benefits. [214]

[*993] The Court explained that such a hearing "need not take the form of a judicial or quasi-judicial trial," and noted that it did not wish to add "procedural requirements beyond those demanded by rudimentary due process." [215]However, the Court did list certain procedures that due process requires, including "an effective opportunity to defend by confronting any adverse witnesses and by presenting . . . arguments and evidence orally." [216]The Court found that a welfare recipient's inability to confront or cross-examine adverse witnesses was "fatal to the constitutional adequacy of the procedures." [217]

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206 *U.S. CONST. amend. V*; *Cushman v. Shinseki, 576 F.3d 1290, 1296 (Fed. Cir. 2009)*.

207 *Cushman v. Shinseki, 576 F.3d 1290, 1296 (Fed. Cir. 2009)*.

208 Henry J. Friendly, " *Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1267 (1975).

209 *Id.*; *see* O'Reilly, ***Burying Caesar, supra note 11, at 244*** (comparing the openness of Administrative Law Judges at the Social Security Administration to the Board of Veterans' Appeals, "which sits like the Wizard of Oz, shrouded in remote mystery.").

210 *See* Friendly, *supra* note 208, at 1269. ("[T]he tendency to judicialize administrative procedures has grown apace in the United States. English judges and scholars consider that we have simply gone mad in this respect.").

211 *See* David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, *72 STAN. L. REV. 1 (2020)*.

212 *Id.* at 9; Friendly, *supra* note 208; Ames et al., *supra* note 211, at 9.

213 *Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970)*.

214 *Id. at 267-68*.

215 *Id. at 266-67*.

216 *Id. at 267-68*.

Further, the ability of the welfare recipient to present his position orally was important to the satisfaction of due process: first, the Court noted that written submissions are an "unrealistic option" for many welfare recipients; second, it stated that written submissions generally do not provide the "flexibility of oral presentations" since the recipient cannot "mold his argument to the issues the decision maker appears to regard as important." [218]

Writing for the majority, Justice Brennan provided some guidance for determining what process is due in the context of administrative agency adjudication: "the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,'" and "upon whether the recipient's interest ... outweighs the governmental interest in summary adjudication." [219]Using this analysis, the Court focused on the nature of welfare benefits, the erroneous termination of which could deprive an eligible recipient of the means to live. [220]It concluded that this interest outweighed the state's interest in avoiding additional administrative burdens. [221]

Shortly after *Goldberg* was decided, the Court had the opportunity to consider what procedural due process requires when it comes to written medical opinions for Social Security disability adjudication. [222]In *Richardson v. Perales*, the Social Security disability applicant's claims were denied based on adverse written reports from doctors, even though the applicant provided live testimony in a hearing in opposition to the doctors' reports, and the applicant did not get to cross-examine the **[*994]** doctors who wrote the reports. [223]The Court held that, despite the applicant's testimony, the lack of cross-examination, and the hearsay character of the doctors' reports, the reports could still be received as evidence in the Social Security disability hearing where the applicant had not exercised his right to subpoena the doctors and avail himself of the opportunity for cross-examination. [224]

In holding that the procedures in *Richardson* were consistent with procedural due process, the Court distinguished the case from *Goldberg* in ways that are relevant for the discussion of procedural due process and medical opinions in VA disability adjudication. [225]First, the Court noted that, unlike the welfare recipients in *Goldberg*, the applicant in *Richardson* had notice: the physicians' reports were on file and available for inspection, the authors of the reports were known and subject to subpoena and cross-examination. [226]Second, the Court pointed to the *medical* questions involved in Social Security disability adjudication, noting that "the specter of questionable credibility and veracity is not present." [227]

While it may be argued that the Court's decision in *Richardson v. Perales* means that VA's practice of obtaining written reports and opinions from C&P examiners for purposes of adjudicating veteran's disability claims complies with procedural due process, VA disability adjudication differs from Social Security adjudication in important ways that raise Due Process concerns.

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217 *Id. at 268*.

218 *Id. at 269*.

219 *Id.*

220 *Id. at 264*.

221 *Id.*

222 *Richardson v. Perales, 402 U.S. 389, 402 (1971)*.

223 *Id.*

224 *Id.*

225 *Id. at 406-407*.

226 *Id.*

227 *Id.*

For example, with regard to the Court's finding that the claimant in *Richardson* had notice, discovery in VA disability adjudication differs significantly from discovery in Social Security adjudication. [228]As discussed above, veterans are not likely to know that they should request a copy of the C&P examiners' written report and opinion, nor are they likely to know why the opinion is so important in light of *Colvin*. [229]Even if the veteran does know and requests a C&P examiners' written report and opinion, the process to obtain it can cause delay. [230]

Further, the Social Security claimant in *Richardson v. Perales* was represented by an attorney. [231]The opportunity to request that a subpoena be issued and the opportunity for cross-examination are most meaningful **[*995]** with attorney representation. In the context of VA disability adjudication, veterans have not historically been represented by attorneys due to the legacy of *Walters* and attorney fee limitations. [232]Indeed, veterans are not even permitted to hire an attorney until they have already received a decision on their claims. [233]Veterans Service Organizations have provided non-lawyer representation to veterans before VA and continue to do so, however, their caseloads can be extraordinarily high. [234]Data on dispositions from the Board of Veterans' Appeals from Fiscal Year 2019 shows that 12.27% of veterans had no representation, 22.76% had attorney representation, and over 50% had representation from a Veterans Service Organization or a State Service Organization. [235]In contrast, data from the Social Security Administration from Fiscal Year 2015 shows that over 70% of Social Security disability claimants had attorney representation at the hearing level. [236]

The Court's rationale in *Richardson v. Perales* that the claimant had notice of the doctors' reports, as well as the opportunity to request subpoenas and conduct cross-examination, makes less sense in the context of disability adjudication before VA in light of the historical exclusion of attorney representation before VA; the current lack of attorney representation before VA; the lack of discovery; and that veterans are not automatically provided with copies of the C&P examiners' reports upon which adjudicators rely. A veteran is not likely to know about the importance of the C&P exam report and opinion to the outcome of the claim, and if that veteran is unrepresented, it will be difficult for her to figure out its importance, request a copy, request a subpoena of the examiner, and then conduct cross-examination.

The Court's second point of reasoning in *Richardson* mentioned above--that Social Security disability adjudication involves medical questions, which renders procedural due process inapplicable--is reminiscent of the Court's reasoning behind limiting veterans' right to counsel in *Walters*. [237]The Court appears to regard it as self-evident that **[*996]** medical evidence is

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228 *See* O'Reilly, ***Burying Caesar, supra note 11, at 238-39***.

229 *Id.*

230 *Id.*

231 *See Richardson, 402 U.S. at 395*.

232 Simcox, *Thirty Years after Walters*, *supra* note 6, at 681-97 (describing the history of VA representatives and attorneys in VA disability adjudication).

233 *38 U.S.C. § 5904(c)(1)*.

234 NAT'L VETERANS LEGAL SERVS. PROGRAM, *supra* note 92, at § 1.1.3.

235 U.S. DEP'T OF VETERANS AFFAIRS, BOARD OF VETERANS APPEALS, ANNUAL REPORT FISCAL YEAR 2019 32 (2019), *available at https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf*.

236 SOCIAL SEC. ADMIN., SOCIAL SECURITY ADMINISTRATION ANNUAL DATA FOR REPRESENTATION AT SOCIAL SECURITY HEARINGS (May 23, 2018), *available at https://www.ssa.gov/open/data/representation-at-ssa-hearings.html* (click preferred format between "CSV" and "XLSX" under "download this dataset", then click the downloaded file and scroll to year 2015 on the left-hand side).

devoid of error and bias simply by virtue of its being medical evidence. This proposition alone requires investigation, which is outside the scope of this Article. If one concedes for the sake of argument that VA disability adjudication turns primarily on medical evidence, which inherently does not carry a risk of error or bias from which procedural due process would protect, it is difficult to understand the remand rates at the CAVC and the Board, or the systemic flaws inherent in the C&P examination process described above, such as the competency of C&P examiners--an issue which the Federal Circuit has ruled the veteran must raise--and the lack of oversight and training of contractors conducting C&P exams, as reported by GAO. [238]

Moreover, despite VA adjudicators' over-reliance on C&P examiners' opinions, the threshold question of service connection in VA disability adjudication does not *only* turn on medical evidence. Indeed, it could be argued that the questions in VA disability adjudication turn less on medical evidence than the questions involved in Social Security disability adjudication because the VA adjudicator must not only ask whether the veteran is *currently* disabled--as the Social Security adjudicator must do--but the VA adjudicator must *also* ask whether the veteran's military service *caused* the veteran's disability. [239]As discussed above, whether the veteran's current disability was caused by the veteran's military service can involve complicated legal analyses, depending on the facts of the case. [240]For example, a veteran can argue different theories of service connection, including direct service connection, secondary service connection, service connection through aggravation, and presumptive service connection, of which there are many different sub-types. [241]For the reasons discussed above, the Court's reasoning that procedures mandated by due process are not necessary where the adjudication turns on simple questions easily answered by medical evidence is inapplicable in the context of VA disability adjudication.

Ironically, despite these different *legal* theories--all of which VA must consider if reasonably raised by the record, regardless of whether the veteran specifically argues it or not--VA adjudicators still rely on C&P **[*997]** examiners' medical opinions most of the time in order to avoid making a " *Colvin* violation." For example, imagine a veteran sustained a head injury while on active-duty service, and that head injury is documented in the veteran's service records. Years after service, this veteran seeks to obtain VA disability compensation for debilitating headaches from which she currently suffers, and which she believes is related to her in-service head injury. Her post-service medical evidence shows that she has continuously been treated for the headaches since her discharge from service. VA will likely schedule this veteran to undergo a C&P examination for the headaches.

Imagine that the C&P examiner examines this veteran, then writes an opinion in which he states that it is less likely than not that the veteran's headaches are connected to her in-service head injury because the veteran denied a history of headaches on her separation examination prior to her discharge. Since the VA adjudicator is prohibited from making her own medical conclusions, and there are no other medical opinions in the record, the VA adjudicator may not be able to issue a decision under *Colvin*, finding that the veteran's headaches are connected to her in-service head injury, even though her post-service medical evidence shows continuous treatment since discharge. Granting the claim under these circumstances would likely constitute an impermissible independent medical conclusion.

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[237] *See* Richardson v. Perales, 402 U.S. 389, 407 (1971); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985) ("Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment.").

[238] McClean, *Delay, Deny*, *supra* note 67, at 291-95.

[239] *See* 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.4; 38 C.F.R. § 3.303.

[240] *See supra* pp. 16-20.

[241] *See, e.g.*, 38 C.F.R. §§ 3.303(b), 3.304 (direct service connection), 3.306 (aggravation), 3.307 (presumptive service connection for chronic, tropical, or prisoner-of-war related disease, disease associated with exposure to certain herbicide agents, or disease associated with exposure to contaminants in the water supply at Camp Lejeune), 3.308 (presumptive service connection), 3.310 (disabilities that are proximately due to, or aggravated by, service-connected injury), 3.311 (claims based on exposure to ionizing radiation), 3.317 (compensation for certain disabilities occurring in Person Gulf veterans).

In contrast, Social Security adjudicators are permitted to analyze medical evidence in the record beyond the opinions from medical experts and examiners. [242]For example, a Social Security adjudicator would be permitted to interpret the evidence of our hypothetical veteran's continuous post-service treatment for headaches since her discharge as evidence of direct service connection to the in-service head injury, despite the examiner's opinion. Indeed, Social Security adjudicators are permitted to consider a number of factors when evaluating medical opinions.

Below is a list of the factors that Social Security provides to adjudicators in its internal Program Operations Manual System to consider when evaluating medical opinions:

> **Supportability**. Supportability means the extent that a medical opinion is supported by the relevant objective medical evidence and the explanations provided by the medical source. The more relevant the objective medical evidence and supporting explanations presented by a medical source are to support his or her medical opinions or prior administrative medical **[*998]** findings, the more persuasive the medical opinions or prior administrative medical finding(s) will be.
>
> **Consistency**. Consistency means the extent a medical opinion is consistent with the evidence from other medical and nonmedical sources. This also includes considering internal conflicts within the evidence from the same source. The more consistent a medical opinion or prior administrative medical finding is with the evidence from other medical and nonmedical sources in the claim, the more persuasive the medical opinion or prior administrative medical finding.
>
> **Relationship with the claimant**. This factor includes the combined consideration of the following five issues:
>
> **Length of the treatment relationship**. The length of time the medical source treated the claimant may help demonstrate whether the medical source has a longitudinal understanding of the claimant's impairments.
>
> **Frequency of examinations**. The frequency of the claimant's visits with the medical source may help demonstrate whether the medical source has a longitudinal understanding of the claimant's impairments.
>
> **Purpose of treatment relationship**. The purpose for treatment the claimant received from the medical source may help demonstrate the level of knowledge the medical source has of the claimant's impairments.
>
> **Extent of the treatment relationship**. The kinds and extent of examinations and testing the medical source has performed or ordered from specialists or independent laboratories may help demonstrate the level of knowledge the medical source has of the claimant's impairments.
>
> **Examining relationship**. A medical source may have a better understanding of the claimant's impairments if he or she examined the claimant than if the medical source only reviewed evidence.
>
> Specialization. The medical opinion or prior administrative medical finding of a medical source who received advanced education and training to become a specialist may be more persuasive about medical issues related to his or her area of specialty than the medical opinion or prior administrative finding of a medical source who is not a specialist.
>
> **Other factors**. Consider any other factors that tend to support or contradict a medical opinion or prior administrative medical finding. This includes, but is not limited to, evidence showing a medical source has:
>
> Familiarity with other evidence in the claim, or
>
> An understanding of our disability program's policies and evidentiary requirements. [243]

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[242] *See Program Operations Manual System (POMS), DI 24503.025*, SOCIAL SEC. ADMIN.,, https://secure.ssa.gov/apps10/poms.nsf/lnx/0424503025; *see also Program Operations Manual System (POMS), DI 24503.035*, SOCIAL SEC. ADMIN., https://secure.ssa.gov/apps10/poms.nsf/lnx/0424503035 (For claims submitted prior to March 27, 2017).

[243] *See supra* note 242.

This list of factors demonstrates how much more adjudicatory capacity Social Security adjudicators have than VA adjudicators. While VA disability adjudicators are constrained to rely on the C&P examiner's opinion by the rule set out in *Colvin v. Derwinski*, Social Security disability adjudicators have the ability to analyze medical opinions in conjunction with the medical evidence of record, which allows them to **[*999]** consider factors such as whether the medical opinions are supported by and consistent with the other medical evidence of record; the nature of the relationship between the medical professional conducting the exam and the claimant; and importantly, whether the medical professional conducting the examination has experience or expertise in the area of medicine relevant to the examination.

When comparing VA disability and Social Security adjudicators, there is yet another important distinction to keep in mind that is relevant to a due process analysis. Social Security adjudicators include Administrative Law Judges as contemplated by the Administrative Procedures Act (APA). [244]APA Administrative Law Judges are independent and impartial adjudicators who "stand[] between the claimant and the whim of agency bias and policy." [245]VA adjudicators, on the other hand--including the Veterans Law Judges at the Board of Veterans' Appeals--are employees of VA, without the independence afforded by the APA. [246]

These factors--the complicated legal and factual questions involved in VA disability adjudication, the limited decision-making ability of VA adjudicators, as well as their questionable independence from agency policy--should all be considered in a due process analysis of any VA procedure. When it comes to the question of whether the way VA uses C&P examiner's opinions in the adjudication of disability claims complies with due process, these factors, as well as those mentioned above, demonstrate that more process may be due in order to reduce excessive error and delay, and to ensure fundamental fairness.

PART IV

A. A New Procedure That Balances Due Process with Administrative Burden

Since veteran applicants for VA disability benefits have a protected property interest in their benefits, the question arises as to what process is due. While the Supreme Court's decision in *Goldberg v. Kelly* may have "judicialized" administrative procedure by setting off a "due process revolution," the Court's decision in *Mathews v. Eldridge* may be said to have reined in that revolution. [247]In *Mathews*, the Court laid out a three-factor **[*1000]** test for determining whether due process exists in a given administrative process. [248]The first factor to be considered is the private interest affected by the government action; the second is the "risk of erroneous deprivation" through the procedures used, and the probative value of additional substitute safeguard; and, the third factor is the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [249]

The issue in *Mathews* was whether due process required that a Social Security disability benefits recipient be afforded a hearing prior to the termination of their benefits. [250]In analyzing the first factor of the test, the Court compared the private interest of the Social Security disability benefits recipient to that of the welfare recipient in *Goldberg*. [251]The

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244 Artz, *supra* note 10, at 14-19.

245 *Id.*

246 *See id.*; Simcox, *Thirty Years after Walters*, *supra* note 6, at 679; *see generally* MICHAEL ASIMOV, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019).

247 *See* Friendly, *supra* note 208, at 1269. ("[T]he tendency to judicialize administrative procedures has grown apace in the United States. English judges and scholars consider that we have simply gone mad in this respect.").

248 *Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)*.

249 *Id.*

250 *Id. at 323*.

Court noted that "the degree of potential deprivation" was likely to be greater for a welfare recipient than for a Social Security disability benefits recipient because welfare "is given to persons on the very margin of subsistence," while eligibility for Social Security disability benefits "is not based upon financial need." [252]The Court acknowledged that a Social Security disability benefits recipient has a disability, and therefore, may have "modest resources," but ultimately concluded that "the disabled worker's need is likely to be less than that of a welfare recipient." [253]

While it could be argued that the Court's distinguishment is essentially sophism, rather than a meaningful analysis based on the realities of daily life for many people with disabilities, the fact remains that like Social Security disability benefits, VA disability benefits are not based upon financial need. Therefore, under *Mathews*, the Court would likely distinguish the private interest of a veteran with a disability from that of the welfare recipient in *Goldberg*.

The second factor to be considered in the due process analysis is the risk of erroneous deprivation. [254]In evaluating this factor, the Court cited to *Richardson v. Perales* to support is conclusion that Social Security disability benefits turn on questions of medical evidence, which involve "'routine, standard, and unbiased medical reports by physician specialists,'" and therefore, do not present the "'specter of questionable credibility and veracity.'" [255]As mentioned above, the assumption that **[*1001]** medical evidence is free from error or bias is deserving of investigation itself, although it is outside the scope of this Article. Nevertheless, veterans' VA disability compensation claims do not turn solely on routine or standard medical reports. Indeed, if that were true, inadequate medical opinions would not be one of the most common reasons for remand at the Board of Veterans' Appeals and the CAVC. [256]Veterans' disability claims involve complicated factual and legal analyses that take into account the different theories of service connection. [257]Instead of exercising independent judgment that takes into account all of the evidence of record and applies possible legal theories, VA adjudicators often adopt the medical opinions of C&P examiners as legal reasoning, which only perpetuates the erroneous deprivation of veterans' disability benefits. Accordingly, veterans applying for VA disability compensation differ from the Social Security disability recipients in *Mathews* with respect to this factor.

The third factor that the Court describes is "the Government's interest, including the function involved and the fiscal and administrative burdens" that the procedural requirement would entail. [258]Because of the high volume of claims and existing delays in processing, these concerns weigh against further "judicialization" of VA disability adjudication, such as the use of interrogatories or routine cross-examination of C&P examiners. [259]Scholars have noted that such adversarial procedures might chip away at some of the more non-adversarial, "veteran-friendly" features of VA disability adjudication. [260]

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251 *Id. at 340-43*.

252 *Id. at 340-41*.

253 *Id. at 342-43*.

254 *Id. at 343*.

255 *Id. at 344* (quoting *Richardson v. Perales, 402 U.S. 389, 404 (1971)*).

256 *See supra* pp. 23-25.

257 *See supra* pp. 16-20.

258 *Mathews, 424 U.S. at 335*.

259 *See* Friendly, *supra* note 208, at 1267.

260 *See, e.g.*, Simcox, *Welcome to the Wild West, supra* note 69, at 572-73; Allen, *Due Process and the American Veteran, supra* note 5, at 529-34.

Importantly, the Court notes in *Mathews* that the "essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." [261]Balancing the risk of significant administrative burden on the one hand with this essence of due process on the other, it seems that--at a minimum--veterans should automatically be sent a copy of the C&P examiner's report and opinion as soon as it is available, whether the veteran requests it or not. It should be accompanied by a form letter that explains how the VA adjudicator will use the C&P examiner's opinion in making the decision.

This additional procedure would satisfy the essence of due process **[*1002]** by--in the case of an unfavorable medical opinion--notifying the veteran of the case against her, thereby giving her an opportunity to respond before the issuance of the decision. Further, it takes into account the third factor identified by the Court in *Mathews* because the procedure would not significantly increase administrative burden since VA already regularly sends mail to veterans in relation to their disability claims. [262]

Finally, by sending veterans copies of the C&P examiners' medical opinions prior to the issuance of any VA decision on a claim and allowing the veteran to respond, the VA adjudicator will be compelled to do more than simply adopt the C&P examiners' medical opinion as legal reasoning. Rather, the VA adjudicator would need to address the veteran's response to the medical opinion. The veteran's response could lead the VA adjudicator to take any number of actions, such as inspecting evidence not inspected before, requesting another medical opinion to address a different theory of service connection, requesting additional medical evidence, requesting additional military records, or simply writing a decision that more accurately addresses the veteran's contentions.

CONCLUSION

In recognition of their extraordinary sacrifice to serve our country, the U.S. Department of Veterans' Affairs exists to "care for him who shall have borne the battle." [263]VA's mission to care for this particular group of people makes it even more important that it do so without error, delay, or unfairness. Unfortunately, many veterans have lost trust in VA and are skeptical that they can receive a fair adjudication of their disability claims from VA.

While recent changes in law may begin to address some of these issues by changing the appeals process, real reductions in error and delay will only be accomplished when VA changes the way it uses C&P examiners' opinions in disability adjudication. At a minimum, due process requires that a veteran be able to see the evidence that the VA adjudicator will be using to decide the claim *before* they decide the claim and that the veteran has an opportunity to respond to evidence against them before the decision is issued.

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261 *Mathews, 424 U.S. at 348* (quoting *Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-172 (1951)* (Frankfurter, J., concurring)).

262 *See, e.g., Martinez v. Wilkie, 31 Vet. App. 170, 180 (Vet. App. 2019)* (acknowledging that the veteran's private interest in receiving service-connected disability compensation is stronger than "the Government's interest in saving the cost of postage.").

263 President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

38 USCS § 5103A

Current through Public Law 117-80, approved December 27, 2021.

United States Code Service > TITLE 38. VETERANS' BENEFITS (§§ 101 — 8528) > Part IV. General Administrative Provisions (Chs. 51 — 63) > CHAPTER 51. Claims, Effective Dates, and Payments (Subchs. I — III) > Subchapter I. Claims (§§ 5100 — 5109B)

§ 5103A. Duty to assist claimants

(a) Duty to assist.

(1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.

(2) The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.

(3) The Secretary may defer providing assistance under this section pending the submission by the claimant of essential information missing from the claimant's application.

(b) Assistance in obtaining private records.

(1) As part of the assistance provided under subsection (a), the Secretary shall make reasonable efforts to obtain relevant private records that the claimant adequately identifies to the Secretary.

(2)

(A) Whenever the Secretary, after making such reasonable efforts, is unable to obtain all of the relevant records sought, the Secretary shall notify the claimant that the Secretary is unable to obtain records with respect to the claim. Such a notification shall—

(i) identify the records the Secretary is unable to obtain;

(ii) briefly explain the efforts that the Secretary made to obtain such records; and

(iii) explain that the Secretary will decide the claim based on the evidence of record but that this section does not prohibit the submission of records at a later date if such submission is otherwise allowed.

(B) The Secretary shall make not less than two requests to a custodian of a private record in order for an effort to obtain relevant private records to be treated as reasonable under this section, unless it is made evident by the first request that a second request would be futile in obtaining such records.

(3)

(A) This section shall not apply if the evidence of record allows for the Secretary to award the maximum benefit in accordance with this title based on the evidence of record.

(B) For purposes of this paragraph, the term "maximum benefit" means the highest evaluation assignable in accordance with the evidence of record, as long as such evidence is adequate for rating purposes and sufficient to grant the earliest possible effective date in accordance with section 5110 of this title [*38 USCS § 5110*].

(4) Under regulations prescribed by the Secretary, the Secretary—

(A) shall encourage claimants to submit relevant private medical records of the claimant to the Secretary if such submission does not burden the claimant; and

(B) in obtaining relevant private records under paragraph (1), may require the claimant to authorize the Secretary to obtain such records if such authorization is required to comply with Federal, State, or local law.

(c) Obtaining records for compensation claims.

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under this section shall include obtaining the following records if relevant to the claim:

(A) The claimant's service medical records and, if the claimant has furnished the Secretary information sufficient to locate such records, other relevant records pertaining to the claimant's active military, naval, air, or space service that are held or maintained by a governmental entity.

(B) Records of relevant medical treatment or examination of the claimant at Department health-care facilities or at the expense of the Department, if the claimant furnishes information sufficient to locate those records.

(C) Any other relevant records held by any Federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain.

(2) Whenever the Secretary attempts to obtain records from a Federal department or agency under this subsection, the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.

(d) Medical examinations for compensation claims.

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.

(2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant)—

(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and

(B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, air, or space service; but

(C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

(e) Applicability of duty to assist.

(1) The Secretary's duty to assist under this section shall apply only to a claim, or supplemental claim, for a benefit under a law administered by the Secretary until the time that a claimant is provided notice of the agency of original jurisdiction's decision with respect to such claim, or supplemental claim, under section 5104 of this title [*38 USCS § 5104*].

(2) The Secretary's duty to assist under this section shall not apply to higher-level review by the agency of original jurisdiction, pursuant to section 5104B of this title [*38 USCS § 5104B*], or to review on appeal by the Board of Veterans' Appeals.

(f) Correction of duty to assist errors.

(1) If, during review of the agency of original jurisdiction decision under section 5104B of this title [*38 USCS § 5104B*], the higher-level adjudicator identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision being reviewed, unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record, the higher-level adjudicator shall return the claim for correction of such error and readjudication.

(2)

(A) If the Board of Veterans' Appeals, during review on appeal of an agency of original jurisdiction decision, identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties

under this section, and that error occurred prior to the agency of original jurisdiction decision on appeal, unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record, the Board shall remand the claim to the agency of original jurisdiction for correction of such error and readjudication.

(B) Remand for correction of such error may include directing the agency of original jurisdiction to obtain an advisory medical opinion under section 5109 of this title [*38 USCS § 5109*].

(3) Nothing in this subsection shall be construed to imply that the Secretary, during the consideration of a claim, does not have a duty to correct an error described in paragraph (1) or (2) that was erroneously not identified during higher-level review or during review on appeal with respect to the claim.

(g) Regulations. The Secretary shall prescribe regulations to carry out this section.

(h) Rule with respect to disallowed claims. Nothing in this section shall be construed to require the Secretary to readjudicate a claim that has been disallowed except when new and relevant evidence is presented or secured, as described in section 5108 of this title [*38 USCS § 5108*].

(i) Other assistance not precluded. Nothing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) to a claimant in substantiating a claim as the Secretary considers appropriate.

History

HISTORY:

Added Nov. 9, 2000, *P. L. 106-475*, § 3(a), *114 Stat. 2097*; Aug. 6, 2012, *P. L. 112-154*, Title V, § 505(a), (b), *126 Stat. 1192*; Aug. 23, 2017, *P. L. 115-55*, § 2(c), (d), *131 Stat. 1105*; Jan. 1, 2021, *P.L. 116-283*, Div A, Title IX, Subtitle C, § 926(a)(51), *134 Stat. 3830*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendment Notes

2012.

2017.

2021.

Other provisions:

Amendment Notes

2012.

Act Aug. 6, 2012 (effective 180 days after enactment and applicable to assistance obligations on or after such date, as provided by § 505(c) of such Act, which appears as a note to this section), substituted subsecs. (b) and (c) for ones which read:

"(b) Assistance in obtaining records.

"(1) As part of the assistance provided under subsection (a), the Secretary shall make reasonable efforts to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain.

"(2) Whenever the Secretary, after making such reasonable efforts, is unable to obtain all of the relevant records sought, the Secretary shall notify the claimant that the Secretary is unable to obtain records with respect to the claim. Such a notification shall—

"(A) identify the records the Secretary is unable to obtain;

"(B) briefly explain the efforts that the Secretary made to obtain those records; and

"(C) describe any further action to be taken by the Secretary with respect to the claim.

"(3) Whenever the Secretary attempts to obtain records from a Federal department or agency under this subsection or subsection (c), the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.

"(c) Obtaining records for compensation claims. In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (b) shall include obtaining the following records if relevant to the claim:

"(1) The claimant's service medical records and, if the claimant has furnished the Secretary information sufficient to locate such records, other relevant records pertaining to the claimant's active military, naval, or air service that are held or maintained by a governmental entity.

"(2) Records of relevant medical treatment or examination of the claimant at Department health-care facilities or at the expense of the Department, if the claimant furnishes information sufficient to locate those records.

"(3) Any other relevant records held by any Federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain.".

2017.

The 2017 amendment by P.L. 115-55 (effective as provided by § 2(x) of Act Aug. 23, 2017, P.L. 115-55, which appears as 38 USCS § 101 note), added (d) and (e); redesignated former (e) through (g) as (g) through (i), respectively; and substituted "readjudicated" for "reopen" and "relevant" for "material" in (h).

2021.

The 2021 amendment by P.L. 116-283 substituted "air, or space service" for "or air service" in (c)(1)(A) and in (d)(2)(B).

Other provisions:

Effective date and application of Aug. 6, 2012 amendments. Act Aug. 6, 2012, *P. L. 112-154*, Title V, § 505(c), *126 Stat. 1193*, provides:

"(1) In general. The amendments made by subsections (a) and (b) [amending subsecs. (b) and (c) of this section] shall take effect on the date that is 180 days after the date of the enactment of this Act and shall apply with respect to assistance obligations of the Secretary of Veterans Affairs on or after such date.

"(2) Construction. Nothing in this section or the amendments made by this section shall be construed to require the Secretary to carry out assistance in accordance with requirements of *section 5103A of title 38, United States Code*, as in effect on the day before the effective date established in paragraph (1) on or after such effective date.".

NOTES TO DECISIONS

1. Applicability

Veterans Claims Assistance Act of 2000, *Pub. L. No. 106-475*, § 3(a), *114 Stat. 2096, 2096–2097*, does not apply retroactively to require that proceedings that were complete before Department of Veterans Affairs and were on appeal to Court of Appeals for Veterans Claims or this court be remanded for readjudication under new statute. *Bernklau v. Principi, 291 F.3d 795, 2002 U.S. App. LEXIS 9516 (Fed. Cir. 2002)*.

Because the VA did not require a claimant to provide any evidence that would establish the competence of a VA' examiner in order to substantiate a claim for benefits, the duty to assist did not come into play in this case. *Rizzo v. Shinseki, 580 F.3d 1288, 2009 U.S. App. LEXIS 20015 (Fed. Cir. 2009)*, overruled in part, *Francway v. Wilkie, 940 F.3d 1304, 2019 U.S. App. LEXIS 30633 (Fed. Cir. 2019)*.

Where veteran's post-traumatic stress disorder claim was on appeal to court at time that Congress enacted Veterans Claims Assistance Act of 2000 (VCAA), *Pub. L. No. 106-475, 114 Stat. 2096* (2000), notice and assistance provisions in *38 USCS §§ 5102*, *5103*, and *5103A* of VCAA were inapplicable to veteran's appeal. *Moran v. Principi, 17 Vet. App. 149, 2003 U.S. App. Vet. Claims LEXIS 479 (U.S. App. Vet. Cl. June 20, 2003)*.

Applicant for restoration of competency was not seeking benefits under chapter 51 of Title 328, but, rather, decision regarding distribution of his benefits under chapter 55 of Title 38; accordingly, notice and assistance provisions of Veterans Claims Assistance Act, in particular *38 USCS §§ 5102* and *5103A*, do not apply to such claims. *Sims v. Nicholson, 19 Vet. App. 453, 2006 U.S. App. Vet. Claims LEXIS 88 (U.S. App. Vet. Cl. Feb. 24, 2006)*.

Unpublished decision: When Social Security Administration (SSA) decision was in veteran's claim record, Board of Veterans' Appeals was put on notice of missing SSA records and had duty to attempt to obtain them under *38 USCS § 5103A(b)*; Secretary of Veterans Affairs contended that records were not relevant to veteran's claim, but court found that duty to assist applied to potentially relevant documents under *Fed. R. Evid. 401*. *Fluellen v. Peake, 2008 U.S. App. Vet. Claims LEXIS 897 (U.S. App. Vet. Cl. July 17, 2008)*.

Unpublished decision: It is no longer prerequisite for duty to assist that claim be well-grounded; that requirement was eliminated with enactment of Veterans Claims Assistance Act of 2000, particularly *38 USCS § 5103A(a)*. *Cunningham v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 1028 (U.S. App. Vet. Cl. May 12, 2011)*.

2. Assistance in obtaining evidence, generally

38 USCS § 5103A(a) cannot be read to require Secretary of Veterans Affairs (VA) to provide medical examination or opinion in connection with claim for dependency and indemnity compensation (DIC) because that reading of *38 USCS § 5103A(a)* would obviate need for *38 USCS § 5103A(d)*; under *38 USCS § 5103(A)(a)*, which applies to DIC claims, VA only needs to make reasonable efforts to assist claimant in obtaining medical opinion when such opinion is necessary to substantiate claimant's claim for benefit; that is, § 5103A(a) does not always require VA to assist claimant in obtaining medical opinion or examination. *Delarosa v. Peake, 515 F.3d 1319, 2008 U.S. App. LEXIS 2056 (Fed. Cir. 2008)*.

VA erred in denying widow's dependency and indemnity claim based on archival 1950 Army report where it obtained no review of subsequent evidence she submitted regarding her husband's military service in Armed Forces of Philippines, as required by *38 USCS §§ 5103A* and *5107(b)* and *38 CFR §§ 3.102* and *3.159*. *Capellan v. Peake, 539 F.3d 1373, 2008 U.S. App. LEXIS 18745 (Fed. Cir. 2008)*.

Despite VA's responsibility to assist applicant in qualifying for VA benefits, *38 USCS § 5107(a)* as amended by Veterans Claims Assistance Act (VCAA), *Pub. L. No. 106-475*, continues to allocate responsibility for claim substantiation to applicant because common meaning of phrase "to support" as used in § 5107(a) strongly suggests existence of such continuing duty. *Skoczen v. Shinseki, 564 F.3d 1319, 2009 U.S. App. LEXIS 9740 (Fed. Cir. 2009)*.

Under plain language of *38 USCS § 5103A*, Secretary of Veterans Affairs' duty-to-assist provisions apply in connection with claimant's attempt to establish entitlement to his or her claim for award of Veterans Administration benefits and not in connection with claimant's attempt to establish mental incapacity for purposes of tolling judicial-appeal period under *38 USCS § 7266(a)* and obtaining Court of Veterans Appeals jurisdiction over appeal of Board of Veterans Appeals' decision. *Jones v. Principi, 18 Vet. App. 500, 2004 U.S. App. Vet. Claims LEXIS 719 (U.S. App. Vet. Cl. Nov. 19, 2004)*.

Remand was required because there was no indication that Board of Veterans' Appeals recognized, much less ensured compliance with, Secretary of Veterans Affairs' heightened duty to assist under *38 USCS § 5103A*; indeed, none of communications from Regional Office to veteran referred to possibility of securing evidence from alternative sources, e.g., buddy statements, and no effort was made to verify his claims of combat service through unit histories or other documents at U.S. Armed Services Center for Research of Unit Records or other official sources; record did not reflect any effort to verify his claim of combat service except for single and largely unsuccessful request for his personnel records. *Daye v. Nicholson, 20 Vet. App. 512, 2006 U.S. App. Vet. Claims LEXIS 1295 (U.S. App. Vet. Cl. Nov. 22, 2006)*.

Remand to Board of Veterans' Appeals of claim for service-connected ailment (varicose veins) was ordered where Secretary of Veterans Affairs erred in discrediting lay testimony of onset of ailment, in failing to provide adequate medical examination, and in failing to provide assistance to claimant under *38 USCS § 5103A*. *Barr v. Nicholson, 21 Vet. App. 303, 2007 U.S. App. Vet. Claims LEXIS 970 (U.S. App. Vet. Cl. June 15, 2007)*, abrogated, *Walker v. Shinseki, 708 F.3d 1331, 2013 U.S. App. LEXIS 3690 (Fed. Cir. 2013)*.

Where claimant alleged in service injury from bayonet, Secretary of Veterans Affairs had duty to attempt to secure court-martial records of person who stabbed claimant, and, if unsuccessful in doing so, to provide claimant with specific notice required by *38 USCS § 5103A(a)(2)*. *Hyatt v. Nicholson, 21 Vet. App. 390, 2007 U.S. App. Vet. Claims LEXIS 1215 (U.S. App. Vet. Cl. Aug. 6, 2007)*.

Unpublished decision: When matter was remanded to Board of Veterans' Appeals for further consideration of lay evidence presented by veteran concerning continuing symptoms that veteran had during service and after service, Board was required to assure that all of notice and assistance requirements of *38 USCS §§ 5103* and *5103A* were fulfilled. *Garlington v. Peake, 2008 U.S. App. Vet. Claims LEXIS 743 (U.S. App. Vet. Cl. June 11, 2008)*.

Unpublished decision: In denying spouse's claim for dependency and indemnity compensation under *38 USCS § 1310*, Board of Veterans' Appeals did not clearly err in finding that VA had done everything reasonably possible to assist spouse under *38 USCS § 5103A(a)*; without objective evidence that veteran's death-causing cancer was related to his service-connected diabetes, medical opinion would not have reasonably aided in substantiating her claim. *Dyer v. Peake, 2008 U.S. App. Vet. Claims LEXIS 757 (U.S. App. Vet. Cl. June 2, 2008)*.

Unpublished decision: It was error for Board of Veterans' Appeals to conclude that veteran's claim for myositis was not service connected when veteran submitted evidence that condition could be caused by chemical exposure and veteran submitted evidence of chemicals that were used at his assigned station during his time in service; Board did not assure that all evidence of chemical usage was obtained and properly considered. *Sinatra v. Peake, 2008 U.S. App. Vet. Claims LEXIS 895 (U.S. App. Vet. Cl. July 16, 2008)*.

Unpublished decision: Veteran was properly denied service connection for PTSD because he did not present evidence to corroborate his alleged stressors, including "buddy statements" or affidavit from brother who allegedly accompanied him on convoy that hit land mine; veteran did not provide dates, names, and locations sufficient to trigger duty of Department of Veterans Affairs to assist in obtaining corroborating documentary evidence under *38 USCS § 5103A*; and his doctor did not relate his PTSD diagnosis to specific stressors other than seeing devastation of combat in Vietnam. *Gaule v. Peake, 2008 U.S. App. Vet. Claims LEXIS 942 (U.S. App. Vet. Cl. July 29, 2008)*, remanded, *2014 U.S. App. Vet. Claims LEXIS 1680 (U.S. App. Vet. Cl. Sept. 30, 2014)*.

Unpublished decision: Board of Veterans' Appeals' decision denying service connection for cause of veteran's death was set aside where autopsy report and death certificate contained conflicting evidence as to whether his service-connected headaches were contributing cause of his death and thus, medical opinion was necessary under *38 USCS § 5103A(a)(1)*. *Wood v. Peake, 2008 U.S. App. Vet. Claims LEXIS 986 (U.S. App. Vet. Cl. Aug. 20, 2008)*.

Unpublished decision: In veteran's claim for post-traumatic stress disorder, VA adequately fulfilled its duty to assist veteran in verifying veteran's in-service stressors because VA regional office sent veteran letter requesting additional information concerning his stressors and veteran did not provide more specific information about his stressors. *Vandewalle v. Peake, 2008 U.S. App. Vet. Claims LEXIS 989 (U.S. App. Vet. Cl. Aug. 29, 2008)*.

Unpublished decision: Where Board of Veterans' Appeals failed to address surviving spouse's claim for entitlement to service connection for cause of veteran's death under *38 CFR § 3.311(a)(2)(iii)*, it was not clear whether VA requested "any available records" concerning veteran's exposure to radiation, or whether VA forwarded any such records for dose estimate, to extent feasible, as was required by *38 CFR § 3.311(a)(2)(iii)*. *Cavanaugh v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1011 (U.S. App. Vet. Cl. Mar. 5, 2008)*.

Unpublished decision: Spouse claiming benefits through deceased Philippine veteran was denied relief on her claim for accrued death benefits pursuant to *38 USCS § 1310*, where assistance given her as to evidence she was required to produce was not presumptively defective under *38 USCS § 5103A(a)*. *Barros v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1153 (U.S. App. Vet. Cl. Nov. 5, 2008)*.

Unpublished decision: VA did not adequately comply with notice and duty requirements of *38 USCS § 5103A* when VA did not advise veteran of evidence that could be submitted to reconstruct service personnel records that were destroyed in fire and improperly relied on VA medical examination that did not adequately consider all of veteran's claimed in-service stressors. *Segovia v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1429 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: VA did not comply with its duty to assist when it failed to make sufficient efforts to obtain veteran's service medical records and VA needed to reconsider veteran's claims for service connection for complications from hernia surgery and for claim of asbestos exposure. *Guthrie v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1671 (U.S. App. Vet. Cl. Sept. 2, 2008)*.

Unpublished decision: Veterans Administration's failure to assist veteran in developing new and material evidence in connection with his effort to reopen previously-denied claim as permitted by *38 USCS § 5108* constituted breach of its duty to assist under *38 USCS § 5103A* because claim for which assistance was sought was within ambit of *38 CFR § 3.159(c)*.

Simmons v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 720 (U.S. App. Vet. Cl. Apr. 27, 2009), app. after remand, *2013 U.S. App. Vet. Claims LEXIS 1766 (U.S. App. Vet. Cl. Oct. 21, 2013)*, remanded, *2015 U.S. App. Vet. Claims LEXIS 757 (U.S. App. Vet. Cl. June 10, 2015)*.

Unpublished decision: Notice that VA provided to veteran that his service medical records were not available was not adequate under *38 USCS § 5103(a)* or *38 CFR § 3.159* and duty to assist under *38 USCS § 5103A* was not fully met, however, veteran was not prejudiced by error when veteran was advised of evidence that veteran could submit to substitute for his missing service medical records, veteran did in fact submit "buddy" statement detailing alleged injury, veteran admitted that he did not have any other evidence to submit, and VA provided veteran with contemporary VA examination to determine if there was any current disability. *Torres v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1269 (U.S. App. Vet. Cl. July 21, 2009)*.

Unpublished decision: Denial of veteran's claim for increased disability rating for back condition was improper since it was unclear whether Secretary of Veterans Affairs satisfied duty to assist veteran by obtaining medical evidence; veteran's historical records were relevant to evaluating veteran's condition and, while multiple records predating rating period were obtained, most were relatively recent and failed to include medical records from physicians. *Gibson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1424 (U.S. App. Vet. Cl. Aug. 12, 2009)*.

Unpublished decision: Board of Veterans' Appeals did not discuss VA' (VA) enhanced duty to assist pursuant to *38 CFR § 3.304(f)(3)* in developing claimant's post-traumatic stress disorder claim stemming from alleged in-service assault; Board provided inadequate reasons or bases for concluding that VA satisfied its enhanced duty to assist him in establishing his claim for benefits stemming from sexual assault, resulting in remand to correct this error. *Enalls v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2024 (U.S. App. Vet. Cl. Nov. 19, 2009)*.

3. Assistance in obtaining records

Unpublished decision: Decision by Court of Appeals for Veterans Claims, which denied service connection claim for gallbladder cancer, was affirmed because decision revealed no misinterpretation of benefit of doubt statute, *38 USCS § 5107(b)*, which did not shift burden to Veterans Administration (VA) as result of service medical records being destroyed; VA did have its usual duty to assist under *38 USCS § 5103A*, as well as heightened duty to explain its findings in case involving lost records. *McFadden v. Shinseki, 412 Fed. Appx. 280, 2011 U.S. App. LEXIS 555 (Fed. Cir. 2011)*.

Department of Veterans Affairs did not fail to comply with its duty under *38 USCS § 5103A* to assist claimant because at no time during pendency of his claim before VA did claimant ever identify any additional medical records or quality-assurance reports, or request VA to provide them, or explain how they might be relevant to his claim. *Loving v. Nicholson, 19 Vet. App. 96, 2005 U.S. App. Vet. Claims LEXIS 131 (U.S. App. Vet. Cl. Mar. 29, 2005)*.

Remand was required because there was no indication that Board of Veterans' Appeals recognized, much less ensured compliance with, Secretary of Veterans Affairs' heightened duty to assist under *38 USCS § 5103A*; indeed, none of communications from Regional Office to veteran referred to possibility of securing evidence from alternative sources, e.g., buddy statements, and no effort was made to verify his claims of combat service through unit histories or other documents at U.S. Armed Services Center for Research of Unit Records or other official sources; record did not reflect any effort to verify his claim of combat service except for single and largely unsuccessful request for his personnel records. *Daye v. Nicholson, 20 Vet. App. 512, 2006 U.S. App. Vet. Claims LEXIS 1295 (U.S. App. Vet. Cl. Nov. 22, 2006)*.

United States Court of Appeals for Veterans Claims holds that duty to assist of Secretary of Veterans Affairs under *38 USCS § 5103A(b)(1)* requires Secretary to obtain records relevant to adjudication of claim, such as claimant's service number where qualifying service is in doubt and claimant adequately identifies such records to Secretary. *Canlas v. Nicholson, 21 Vet. App. 312, 2007 U.S. App. Vet. Claims LEXIS 966 (U.S. App. Vet. Cl. June 15, 2007)*.

Duty-to-assist requirement of Secretary of Veterans Affairs (VA) under *38 USCS § 5103A* did not obligate VA to search for claimant's service number to aid in verifying veteran's service; VA needed only to obtain records that contained information relevant to adjudication of claim that were identified by claimant. *Canlas v. Nicholson, 21 Vet. App. 312, 2007 U.S. App. Vet. Claims LEXIS 966 (U.S. App. Vet. Cl. June 15, 2007)*.

Unpublished decision: It was not error for Board of Veterans' Appeals to conclude that Secretary of Veterans Affairs had complied with notice and assistance requirements of *38 USCS § 5103A* because veteran had not adequately identified any specific records that Secretary needed to obtain and that Secretary failed to do so. *Keeling v. Peake, 2008 U.S. App. Vet. Claims LEXIS 664 (U.S. App. Vet. Cl. May 30, 2008)*.

Unpublished decision: Claimant's arguments that Secretary failed to assist in obtaining documents failed for two reasons: (i), it was unclear what documents he was alleging that Department of Veterans Affairs (VA) failed to obtain; indeed, he pointed to no page in record where he identified documents that VA failed to procure, and (ii) moreover, there was no reasonable possibility that any outstanding documents would have assisted him in substantiating his claim. *Amador v. Peake, 2008 U.S. App. Vet. Claims LEXIS 791 (U.S. App. Vet. Cl. June 24, 2008)*.

Unpublished decision: Where veteran claimed that he suffered from post-traumatic stress disorder because he was on board aircraft carrier and witnessed fatal plane crash, and Board of Veterans' Appeals found that he was not on carrier on day of crash, Secretary of Veterans Affairs did not violate duty to assist under *38 USCS § 5103A(b)* by not obtaining crash records because fact of crash was assumed by Board and only issue was whether veteran was on board carrier day of crash. *Klapsogeorge v. Peake, 2008 U.S. App. Vet. Claims LEXIS 796 (U.S. App. Vet. Cl. June 27, 2008)*.

Unpublished decision: Denial of widow's claim for dependency and indemnity compensation and for compensation under *38 USCS § 1151* in connection with death of her husband, veteran, soon after undergoing surgery in VA hospital was upheld on review because VA had no duty under *38 USCS § 5103A* to seek medical records that predated earliest retention date for particular facility and which widow already understood to be unavailable. *Dellwo v. Peake, 2008 U.S. App. Vet. Claims LEXIS 842 (U.S. App. Vet. Cl. June 30, 2008)*.

Unpublished decision: Denial of widow's claim for dependency and indemnity compensation and for compensation under *38 USCS § 1151* in connection with death of her husband, veteran, soon after undergoing surgery in VA hospital was upheld on review; VA had no duty under *38 USCS § 5103A* to seek medical records reflecting veteran's treatment in non-VA hospitals because such records were not pertinent to widow's claim for § 1151 benefits, which related only to treatment in VA facility. *Dellwo v. Peake, 2008 U.S. App. Vet. Claims LEXIS 842 (U.S. App. Vet. Cl. June 30, 2008)*.

Unpublished decision: Veteran whose service records were destroyed by fire won appellate order vacating claim denial by Board of Veterans' Appeals because Board erred in ruling that Department of Veterans Affairs (VA) had fulfilled duty to assist imposed by *38 USCS § 5103A*; VA had heightened duty to assist given destruction of veteran's records, and Board's failure to require effort to be made to obtain substitute records, coupled with its finding that VA had complied with its duty to assist when it clearly had not, constituted failure to provide adequate reasons and bases for its ruling as required by *38 USCS § 7104(d)(1)* and merited ruling vacating and remanding case. *Smith v. Peake, 2008 U.S. App. Vet. Claims LEXIS 862 (U.S. App. Vet. Cl. July 21, 2008)*.

Unpublished decision: Veteran's failure to identify any potentially relevant treatment records that were not already before Department of Veterans' Affairs meant that no violation of *38 USCS § 5103A(b)(1)* was shown despite veteran's claim that "additional treatment records" bearing on his claim should have been obtained. *Shellabarger v. Peake, 2008 U.S. App. Vet. Claims LEXIS 892 (U.S. App. Vet. Cl. July 28, 2008)*.

Unpublished decision: Because veteran failed to provide specific information requested by regional office (RO) and because National Personnel Records Center had repeatedly assured RO that all available service medical records had been supplied, VA was under no further obligation under *38 USCS § 5103A(b)(1)*, (c)(2) to make additional efforts to obtain such evidence. *Tarkowski v. Peake, 2008 U.S. App. Vet. Claims LEXIS 905 (U.S. App. Vet. Cl. July 29, 2008)*.

Unpublished decision: As to VA's efforts to obtain records from physician as required by *38 USCS § 5103A(b)(1)*, VA made initial request and Board of Veterans' Appeals noted VA's receipt of letter from physician before request for records was made, but it did not discuss whether any records were available or had been received; under *38 CFR § 3.159(c)(1)*, follow-up request was needed to ensure that all alternate records had been obtained. *Pridmore v. Peake, 2008 U.S. App. Vet. Claims LEXIS 909 (U.S. App. Vet. Cl. Aug. 6, 2008)*.

Unpublished decision: Secretary of Veterans Affairs did not violate duty under *38 USCS § 5103A* to assist in obtaining medical records related to stomach disorder because Secretary informed veteran that he had to provide more specific information concerning his battalion and company so that agency could obtain his medical records and veteran repeatedly failed to provide that identifying information pursuant to *38 USCS § 5107(a)*. *Allen v. Peake, 2008 U.S. App. Vet. Claims LEXIS 953 (U.S. App. Vet. Cl. Aug. 15, 2008)*.

Unpublished decision: Where veteran informed VA of stressors involving murder in South Korea in 1982 and provided statement in support of his claim recounting murders he witnessed at shooting range, and Internet search found newspaper article about this event, information provided by veteran adequately identified relevant records that may have helped to substantiate his PTSD claim for purposes of duty to assist under *38 USCS § 5103A*. *Harmon v. Peake, 2008 U.S. App. Vet. Claims LEXIS 959 (U.S. App. Vet. Cl. Aug. 21, 2008)*.

Unpublished decision: Widow lost bid for relief from ruling of Board of Veterans' Appeals based on purported failure of VA to obtain records concerning whether her husband, veteran, had been exposed to pesticides during service; inasmuch as documents of type requested by widow in fact were in record of proceedings and had been considered by Board in its ruling, duty to assist imposed by *38 USCS § 5103A* had been satisfied. *Kiggins v. Peake, 2008 U.S. App. Vet. Claims LEXIS 971 (U.S. App. Vet. Cl. Aug. 21, 2008)*.

Unpublished decision: Claim for service connection for post-traumatic stress disorder (PTSD) failed where claimant had no current diagnosis of PTSD, and could not identify any specific stressors or symptoms from his noncombat service; failure to obtain additional records of Social Security Administration did not violate duty of *38 USCS § 5103A*, where records had no relevance to claimant's mental condition. *Golz v. Peake, 2008 U.S. App. Vet. Claims LEXIS 972 (U.S. App. Vet. Cl. Aug. 15, 2008)*, aff'd, *590 F.3d 1317, 2010 U.S. App. LEXIS 12 (Fed. Cir. 2010)*.

Unpublished decision: Though determination as to whether VA had complied with duty to assist imposed by *38 USCS § 5103A* in connection with veteran's challenge to adequacy of medical examinations that were provided to him in connection with his claim to increased disability rating was deferred pending further proceedings on claims, VA was ordered to obtain certain records already identified by veteran because VA had clearly erred in failing to make effort to obtain those records during course of original adjudication. *Butcher v. Peake, 2008 U.S. App. Vet. Claims LEXIS 981 (U.S. App. Vet. Cl. Aug. 5, 2008)*.

Unpublished decision: Secretary of Veterans Affairs was not required to obtain medical nexus for veteran's claim, particularly when letters sent by VA to veteran could not be construed as indiciating that VA alone would obtain necessary medical nexus evidence. *Trevino v. Peake, 2008 U.S. App. Vet. Claims LEXIS 988 (U.S. App. Vet. Cl. Aug. 29, 2008)*.

Unpublished decision: VA satisfied its duty to assist, under *38 USCS § 5103A*, because there was no indication in record that widow identified any records VA failed to procure, and record showed that VA requested all available medical and clinical records for veteran, and that, in response, VA received letter stating that there were no clinical records. *Coquilla v. Nicholson, 2008 U.S. App. Vet. Claims LEXIS 1060 (U.S. App. Vet. Cl. Sept. 26, 2008)*.

Unpublished decision: VA failed to make reasonable efforts under I.R.C. § 5103A (b) to obtain medical records from VA medical center; Secretary of Veterans Affairs advanced no reason to believe that requested records were not relevant, that VA was not on notice of those records, or that VA satisfied its obligation to request information from veteran identifying records; because records were created by VA medical center, they were within Secretary's control and should have been made part of record reviewed by Board of Veterans' Appeals. *Elliott v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1064 (U.S. App. Vet. Cl. July 30, 2008)*.

Unpublished decision: Secretary of Veterans Affairs did not breach his duty to assist veteran under *38 USCS § 5103A* by failing to obtain in-service medical evaluations at U.S. Naval hospital because veteran failed to demonstrate that Secretary was on notice of any additional records from hospital. *Fulton v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1202 (U.S. App. Vet. Cl. Oct. 16, 2008)*.

Unpublished decision: Secretary of Veterans Affairs did not breach his duty to assist veteran under *38 USCS § 5103A* by failing to obtain medical records at hospital because, although records were potentially relevant and Secretary had duty to

obtain them, veteran failed to submit information necessary for collection of records. *Fulton v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1202 (U.S. App. Vet. Cl. Oct. 16, 2008)*.

Unpublished decision: In denying veteran's service-connection claims, Board of Veterans' Appeals violated its duty to assist veteran under 38 USCS § 5013A by failing to obtain veteran's complete records from Social Security Administration (SSA) because Secretary of Veterans Affairs failed to convince court that veteran's SSA records were not at least potentially relevant to veteran's claims. *Cannon v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1211 (U.S. App. Vet. Cl. Oct. 31, 2008)*.

Unpublished decision: VA's failure to request Social Security Administration (SSA) records was not erroneous where at time he applied for benefits, veteran indicated only that he had applied for SSA disability benefits, not that SSA had reached any decision on his application for benefits. *Cruse v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1216 (U.S. App. Vet. Cl. Oct. 16, 2008)*.

Unpublished decision: Board of Veterans' Appeals did not err in determining that VA had satisfied its duty to assist veteran where VA had attempted to obtain doctor's records, but was informed by doctor that they no longer existed, and Board notified veteran that records no longer existed. *O'Connor v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1256 (U.S. App. Vet. Cl. Oct. 30, 2008)*.

Unpublished decision: Because any records that might have been retrieved, had VA fully demonstrated compliance with its duty to assist under *38 U.S.C. § 5103A(b)*, would not have undermined reasons stated by Board of Veterans' Appeals for its finding that period of veteran's hearing loss had no origin in service, any failure to attempt to obtain documents from 1970 to 2002 from hospital would not have rendered adjudicatory proceedings essentially unfair, *38 USCS § 7261(b)(2)*. *Hill v. Nicholson, 2008 U.S. App. Vet. Claims LEXIS 1378 (U.S. App. Vet. Cl. Mar. 13, 2008)*.

Unpublished decision: Court could not find breach of duty to assist by failing to obtain records where appellant acknowledged their unavailability; because veteran's representative acknowledged unavailability of records from hospital related to treatment in early 1970s, court could not find duty-to-assist error under *38 USCS § 5103A(b)*. *Hill v. Nicholson, 2008 U.S. App. Vet. Claims LEXIS 1378 (U.S. App. Vet. Cl. Mar. 13, 2008)*.

Unpublished decision: Contrary to argument that VA had no duty to assist veteran in reopening his claim, regulations provided specifically that for claims filed on or after August 29, 2001, duty to obtain records applied to claims to reopen, *38 CFR § 3.159(c)*; because his claim to reopen was filed in December 2002, VA had duty to assist him in reopening his claim by obtaining relevant records adequately identified. *Simes v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1444 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Although veteran's spouse alleged that VA failed to discharge its duty to assist her in development of her claims, court found no merit to spouse's argument because Secretary of Veterans Affairs' duty to assist included making reasonable efforts to obtain relevant records, as long as claimant adequately identified those records to Secretary and authorized Secretary to obtain them, *38 USCS § 5103A(b)(1)*; however, spouse had not identified any documents that Secretary should have assisted her in obtaining, and although she pointed to various documents in record, those documents did not identify other documents that VA should have obtained for appellant. *Tan v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1482 (U.S. App. Vet. Cl. Dec. 4, 2008)*.

Unpublished decision: Veteran's claim that Secretary of VA had failed to fulfill duty to assist under *38 USCS § 5103A* was rejected on appeal because veteran had not identified any records that he wanted Secretary to obtain; in absence of "adequate identification " of such records within meaning of § 5103A, determination by Board of Veterans' Appeals that VA had satisfied its statutory duty could not be overturned on appeal. *Toles v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1485 (U.S. App. Vet. Cl. Dec. 4, 2008)*.

Unpublished decision: VA did not violate its *38 USCS § 5103A(b)* duty to assist where it contacted Social Security Administration (SSA) and was informed that veteran's records had been destroyed, there were several SSA documents in record, and veteran failed to identify with any specificity what documents were missing. *Green v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1509 (U.S. App. Vet. Cl. Dec. 18, 2008)*.

Unpublished decision: Medical records and, thus, plausible basis supported finding of Board of Veterans' Appeals that veteran was hospitalized for broken finger suffered while playing softball, not during assault; therefore, VA had no duty to further attempt to verify incident under *38 USCS § 5103A(a)(2)*. *Bishop v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1511 (U.S. App. Vet. Cl. Dec. 11, 2008)*.

Unpublished decision: VA failed in its duty to assist by not seeking to seek obtain veteran's unit records from Joint Services Records Research Center, which could have been relevant in substantiating veteran's stressor allegation that his duties included removing body parts from ships and, thus, that he was entitled to service connection for post-traumatic stress disorder. *Bishop v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1511 (U.S. App. Vet. Cl. Dec. 11, 2008)*.

Unpublished decision: VA did not fulfill its duty to assist under *38 USCS § 5103A(a)(1)* when it failed to obtain copy of veteran's autopsy report because autopsy report had been specifically identified and was fundamentally important document in dispute about facts surrounding veteran's death; in addition, Board of Veterans' Appeals failed to notify father with respect to autopsy report pursuant to *38 USCS § 5103A(b)(2)*. *Tenney v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1641 (U.S. App. Vet. Cl. Sept. 8, 2008)*.

Unpublished decision: Board of Veterans' Appeals failed to provide adequate statement of its reasons or bases for concluding that VA complied with *38 USCS § 5103A(b)* duty to assist where Board did not discuss regional office's failure to obtain ship's logs, which may have corroborated veteran's claimed stressors for post traumatic stress disorder. *Welch v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1666 (U.S. App. Vet. Cl. Aug. 29, 2008)*.

Unpublished decision: It was error for Board of Veterans' Appeals to conclude that VA had satisfied duty to assist because evidence was insufficient to conclude that all of requested records had been obtained when veteran's TDY records were not part of proceedings and veteran had indicated that TDY records would show that veteran had been assigned to periods of duty in Vietnam, so that presumption of exposure to Agent Orange causing veteran's diabetes could be found. *Collins v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1693 (U.S. App. Vet. Cl. June 10, 2008)*.

Unpublished decision: Secretary of Veterans Affairs failed in his duty to assist in corroborating veteran's alleged stressors that would have support his PTSD where there was no indication in record that RO attempted to contact National Archives Records Administration as suggested by service department; nor did it appear that any request for information concerning veteran's unit included expanded time period provided by veteran or that there was any investigation into his assertion that he had been in mortar attack. *Allen v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 64 (U.S. App. Vet. Cl. Jan. 30, 2009)*.

Unpublished decision: Veteran's assertion that United States Board of Veterans' Appeals failed to comply with heightened duty to assist because his separation examination report was missing from his claims file was without merit; it was not clear that this report was missing, but more importantly, veteran failed to respond to inquiry as to what medical facility may have conducted examination. *Maryan v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 69 (U.S. App. Vet. Cl. Jan. 30, 2009)*.

Unpublished decision: VA satisfied its duty to assist widow under *38 USCS § 5103A(b)(1)* because requested service medical records and personnel files were contained in record; there was no indication that any of veteran's records were lost or destroyed in records center fire, so no heightened duty existed with respect to widow's claims. *Moore v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 128 (U.S. App. Vet. Cl. Feb. 20, 2009)*.

Unpublished decision: Board of Veterans' Appeals erred by determining that VA fulfilled its duty to assist veteran's widow because VA failed to retrieve full records from Social Security Administration, justify why that effort would have been futile, or provide statutorily-required notice that it discontinued its retrieval efforts. *Johnson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 132 (U.S. App. Vet. Cl. Feb. 24, 2009)*.

Unpublished decision: Board of Veterans' Appeals was not required to obtain Social Security Administration records and records from vocational rehabilitation because veteran had not shown that records related in any way to veteran's service connected claim for his lower back condition. *Kewanyama v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 170 (U.S. App. Vet. Cl. Feb. 27, 2009)*.

Unpublished decision: Veteran first identified possible existence of treatment records from VA hospital in Charleston in his brief before court; there was no evidence that he adequately identified those records to Secretary and authorized Secretary to obtain them; thus, record did not establish breach of duty to assist. *Boyd v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 210 (U.S. App. Vet. Cl. Mar. 5, 2009)*.

Unpublished decision: VA satisfied its duty to assist veteran in obtaining evidence where it requested documentation from appropriate entity as to use and storage of Agent Orange in Guam during veteran's tour of duty. and regional office followed proper procedure for such requests. *Hime v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 413 (U.S. App. Vet. Cl. Mar. 24, 2009)*.

Unpublished decision: Board of Veterans' Appeals clearly erred in finding that VA satisfied its duty to assist veteran's surviving spouse in obtaining medical records relevant to her claims for service connection and accrued benefits, as required by *38 USCS § 5103A*, because it did not fully inform her that it was unable to secure veteran's medical records from hospice or that hospital responded to its request for records. *Pratt v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 420 (U.S. App. Vet. Cl. Mar. 24, 2009)*.

Unpublished decision: VA erred when it failed to submit, to National Personnel Records Center, additional evidence submitted by widow of deceased member of Philippine Commonwealth Army along with new request for certification of member's status as "veteran" within meaning of *38 USCS § 101(2)* and *38 CFR § 3.1(d) (2008)*; VA breached its duty to assist pursuant to *38 USCS § 5103A* by failing to submit that additional evidence and to consider it in connection with widow's claim, which breach justified order vacating challenged order and remanding case for readjudication. *Cortez v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 463 (U.S. App. Vet. Cl. Mar. 27, 2009)*.

Unpublished decision: Board of veterans' Appeals' finding that VA had satisfied its *38 USCS § 5103A* duty to assist was clearly erroneous where VA had not identified correct period of veteran's hospitalization in its request to medical center. *Antonson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 518 (U.S. App. Vet. Cl. Apr. 1, 2009)*.

Unpublished decision: Matter was remanded to Board of Veterans' Appeals for additional adjudication because Board needed to discuss whether or not additional records of service submitted by veteran required review or verification by appropriate service department. *Elizaga v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 545 (U.S. App. Vet. Cl. Apr. 3, 2009)*.

Unpublished decision: Although veteran contended that Secretary of Veterans Affairs failed to obtain his unit records and that his records were incomplete, he failed, however, to indicate where in record on appeal he notified Secretary that any outstanding records existed that were not obtained. *Sikes v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 589 (U.S. App. Vet. Cl. Apr. 10, 2009)*.

Unpublished decision: Secretary of Veterans Affairs did not breach duty to assist where veteran only vaguely alluded to other medical records during Board of Veterans' Appeals hearing, and he had not identified with specificity any missing medical evidence or what treatment he had received at two VA medical centers. *Monaghan v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 601 (U.S. App. Vet. Cl. Apr. 14, 2009)*.

Unpublished decision: Upon remand, VA was required to make reasonable efforts to obtain all VA treatment records that were relevant to veteran's claim, including records of surgery, because veteran claimed on appeal that VA had failed to obtain relevant hospital records. *Anoai v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 643 (U.S. App. Vet. Cl. Apr. 20, 2009)*, remanded, *2013 U.S. App. Vet. Claims LEXIS 1441 (U.S. App. Vet. Cl. Aug. 28, 2013)*.

Unpublished decision: Pursuant to *38 USCS § 5103A*, Veterans Administration (VA) was required provide veteran with notice of its inability to secure all of veteran's Marine Corps records; notice was to include records VA was unable to obtain, explanation of efforts VA made to obtain those documents, and description of any further action VA would take with respect to veteran's claim. *Richardson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 657 (U.S. App. Vet. Cl. Apr. 22, 2009)*.

Unpublished decision: In January 2006, appellant wrote to VA, stating that she tried to get statement from certain physician, but was unable to locate him; this, however, did not absolve VA of its duty to notify her of its inability to obtain records sought

from certain hospital in October 2001; thus, VA did not comply with requirements imposed by *38 CFR § 3.159(e)(1)* and *38 USCS § 5103A(b)*. *Gayon v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 688 (U.S. App. Vet. Cl. Apr. 23, 2009)*.

Unpublished decision: Veteran failed to show that Veterans Administration failed in its duty to assist him in obtaining records under *38 USCS § 5103A* where veteran did not provide any information that could have been considered useful in adequately identifying missing records, such as when they were created or names of any physicians. *Thompson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 799 (U.S. App. Vet. Cl. May 11, 2009)*.

Unpublished decision: Although veteran testified that, to best of his knowledge, he had never been diagnosed with anything other than periodontitis, if records might have contained diagnosis of some dental condition other than periodontitis for which veteran could have received compensation, Secretary of Veterans Affairs had duty to locate such records. *Neely v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 806 (U.S. App. Vet. Cl. May 11, 2009)*.

Unpublished decision: Board of Veterans' Appeals clearly erred in finding that Secretary of Veterans Affairs fulfilled his duty to assist under *38 USCS § 5103A* because there was no indication that VA sent any evidence submitted by veteran's widow to National Personnel Records Center with its request for service verification or made new request for verification of service from service department after widow's testimony, pursuant to *38 CFR § 3.203(c)*. *Capellan v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 816 (U.S. App. Vet. Cl. May 11, 2009)*.

Unpublished decision: It was not error for Board of Veterans' Appeals to conclude that VA had complied with its duty to assist in claim to reopen, because veteran did not identify any documents that VA failed to obtain. *Heartsill v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1102 (U.S. App. Vet. Cl. June 25, 2009)*.

Unpublished decision: *38 USCS § 5103A* duty to assist veteran's widow was satisfied where medical examiner's opinion had considered veteran's service-connected conditions to conclude that his death was not service-related, examiner was not required to discuss all of record evidence, and private physician's diagnosis of post-traumatic stress disorder and its potential effect on veteran's cause of death was properly considered. *McKinney v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1115 (U.S. App. Vet. Cl. June 30, 2009)*.

Unpublished decision: Where Veterans Affairs failed to assist claimant in obtaining service personnel records prior to his claim actually being reopened, it did not fulfill its duty to assist pursuant to *38 USCS § 5103A*, and did not provide adequate statement of reasons or bases for its determination under *38 USCS § 7104(d)(1)*. *Bryant v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1123 (U.S. App. Vet. Cl. June 30, 2009)*.

Unpublished decision: Secretary of Veterans Affairs had complied with duty to assist under *38 USCS § 5103A* when Secretary had obtained majority of deceased veteran's service medical records and fact that Secretary could not obtain records from 1951 to 1959 did not render Secretary's assistance ineffective when records were not relevant to issue of veteran's Agent Orange exposure that occurred in 1969. *Maddox v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1197 (U.S. App. Vet. Cl. July 10, 2009)*.

Unpublished decision: Board of Veterans' Appeals' finding that United States Secretary of Veterans Affairs had complied with his duty to assist was clearly erroneous where veteran had clearly identified evidence to support his claim, information was gathered regarding whereabouts of alleged evidence, but BVA did not discuss attempts to locate evidence as required under *38 USCS § 5103A*. *Frederick v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1224 (U.S. App. Vet. Cl. July 14, 2009)*.

Unpublished decision: Board of Veterans' Appeals erred in determining that *38 USCS § 5103A* duty to assist had been met where veteran adequately identified accident report that he had filed with his unit, and that evidence could have aided in assessing nature and extent of veteran's injury and any nexus between that injury and veteran's current disability. *Petersen v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1235 (U.S. App. Vet. Cl. July 9, 2009)*.

Unpublished decision: It was error for Board of Veterans' Appeals to conclude that there was no service-connected nexus between deceased veteran's severe head injury sustained from landmine explosion while in service and subsequent development of fatal dementia because there was acknowledged evidence that such nexus could exist and Board did not assist

veteran's spouse in obtaining additional evidence or in obtaining enough evidence to properly apply benefit of doubt rule. *Zima v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1266 (U.S. App. Vet. Cl. July 17, 2009)*.

Unpublished decision: Veterans Affairs had no duty to search for medical records that claimant admitted had been destroyed under *38 USCS § 5103A*. *Humphrey v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1272 (U.S. App. Vet. Cl. July 22, 2009)*.

Unpublished decision: *38 USCS § 5103A* did not require veteran who was requesting VA to obtain service medical records to show that requested records were more probative or accurate than other records that were available and VA's reliance on such basis in failing to obtain records was not grounded in law. *Buford v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1336 (U.S. App. Vet. Cl. July 30, 2009)*.

Unpublished decision: Board of Veterans' Appeals decision that Secretary of Veterans Affairs fulfilled his duty to assist under *38 USCS § 5103A* in veteran's claim for service connection was not clearly erroneous and was supported by adequate statement of reasons or bases under *38 USCS §§ 7104(d)(1)* and *7261(a)(4)*; examiner reviewed veteran's complete file, including claims file, service medical records, private medical records, Social Security Administration records, VA medical records, and lay statements submitted by veteran. *Gray v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1379 (U.S. App. Vet. Cl. July 31, 2009)*.

Unpublished decision: To extent that veteran argued that VA failed in its *38 USCS § 5103A* duty to assist him in obtaining medical records from private physician and from private employers, claim failed where there was no evidence that he requested help in obtaining such records. *Strain v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1390 (U.S. App. Vet. Cl. Aug. 5, 2009)*.

Unpublished decision: There was no clear error in finding that Secretary of Veterans Affairs made reasonable efforts to obtain veteran's records as required under *38 USCS § 5103A(b)* where records were reported as having been destroyed in fire and were reconstructed; veteran's surviving spouse did not establish that records were actually in custody of National Archives and Records Administration. *Toole v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1515 (U.S. App. Vet. Cl. Aug. 27, 2009)*.

Unpublished decision: Without the medical nexus evidence, any failure to obtain documents pertaining to the alleged collision between two U.S. ships (during which the veteran was exposed to asbestos) was at most harmless error; nothing in the record established that the veteran suffered from asbestosis or mesothelioma or any other condition related to asbestos exposure. *Samuel v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1598 (U.S. App. Vet. Cl. Sept. 9, 2009)*.

Unpublished decision: VA fulfilled its duty to assist veteran in obtaining VA medical records, under *38 USCS § 5103A(b)*, because VA was advised that records sought did not exist or were not in possession of medical center, and veteran demonstrated that he had actual knowledge that VA had been unable to obtain requested records, rendering any error in notification harmless. *Deardorf v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2020 (U.S. App. Vet. Cl. Nov. 20, 2009)*.

Unpublished decision: Board of Veterans' Appeals erred in finding that VA had satisfied its duty to assist as to records from veteran's subsequent service in other branches of military and from his confinement because Secretary of Veterans Affairs appeared to concede that VA made no attempts to obtain records, Secretary did not protest potential relevance of records, and relevance of records could not have been determined until after they were obtained. *Deardorf v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2020 (U.S. App. Vet. Cl. Nov. 20, 2009)*.

Unpublished decision: To extent that appellant veteran argued his service hospitalization records were missing and duty to assist under *38 USCS § 5103A(b)*, (c)(1), was not satisfied, argument was without merit, as record did not contain any evidence to suggest that veteran experienced in-service incident for which records, medical or otherwise, were missing. *Sprowl v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2326 (U.S. App. Vet. Cl. May 21, 2009)*.

Unpublished decision: Where claimant sought earlier effective date, under *38 USCS § 5110*, for 70 percent award of disability benefits, Secretary of Veterans Affairs had complied with its duties to assist under *38 USCS § 5103A*, where claimant failed to show mental hygiene records he sought were relevant to his appeal. *Whitley v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 357 (U.S. App. Vet. Cl. Mar. 9, 2010)*.

Unpublished decision: Board of Veterans' Appeals erred in its determination that VA satisfied its duty to assist, under *38 USCS § 5103A*, and failed to ensure compliance with its remand order because it did not appear that Appeals Management Center

requested specific records required by remand orders of court and Board, and evidence of temporary duty (TDY) in performance report, along with lack of requested records and documentation from specific year in question, should have inspired VA to conduct more thorough and specific search for any documentation of veteran's TDY. *MccLamb v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1244 (U.S. App. Vet. Cl. July 9, 2010)*.

Unpublished decision: Board of Veterans' Appeals' denial of veteran's application for VA benefits for dental treatment purposes and vocational rehabilitation services was upheld because VA did not violate its duty to assist since veteran did not specifically identify what documents VA failed to obtain. *Ross v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1340 (U.S. App. Vet. Cl. July 23, 2010)*.

Unpublished decision: Board of Veterans' Appeals' determination that no new and material evidence had been submitted to reopen veteran's claim for service connection for bursitis of left hip was upheld because (1) medical treatment note from 1981 was not material since it did not address medical nexus and did not raise reasonable possibility of substantiating veteran's claim, and (2) VA fulfilled its duty to assist. *Hime v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1401 (U.S. App. Vet. Cl. July 29, 2010)*.

Unpublished decision: Where veteran received bad conduct discharge, Board of Veterans' Appeals' decision denying veteran's request to reopen claim of entitlement to VA benefits based on character of veteran's discharge from service was upheld because VA complied with its duty to assist since (1) there was no reasonable possibility that receipt of Vietnam Service ribbon would help substantiate veteran's request to reopen claim, and (2) initial notice error was harmless because veteran had actual knowledge of evidentiary standards required to reopen claim. *Fernandez v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1528 (U.S. App. Vet. Cl. Aug. 23, 2010)*.

Unpublished decision: Where Board of Veterans' Appeals (BVA) denied entitlement to service connection for gastroesophagael reflux disease (GERD) and irritable bowel syndrome (IBS), remand was warranted because BVA did not address whether veteran was entitled to service connection for GERD and IBS on secondary basis. *Helstedt v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1791 (U.S. App. Vet. Cl. Sept. 30, 2010)*, remanded, *2019 U.S. App. Vet. Claims LEXIS 670 (U.S. App. Vet. Cl. Apr. 29, 2019)*.

Unpublished decision: Board of Veterans' Appeals's decision that determined veteran's service did not cause or contribute to his death and therefore denied entitlement to dependency and indemnity compensation was vacated and remanded because Board's determination that VA satisfied its duty to assist widow, under *38 USCS § 5103A(a)(2)*, in developing this portion of her claim for dependency and indemnity compensation was clearly erroneous because it appeared that VA never requested or obtained veteran's service medical records, records Board's decision purportedly relied on in determining that no service-connected condition caused or contributed to veteran's death. *Bartz v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 24 (U.S. App. Vet. Cl. Jan. 5, 2011)*.

Unpublished decision: U.S. Board of Veterans' Appeals' finding denying service connection was erroneous pursuant to *38 USCS §§ 5103A(b)(1)*, *7104(d)(1)*, because regional office should have forwarded veteran's response to post-traumatic stress disorder questionnaire to U.S. Army & Joint Services Records Research Center, or should have further advised and assisted veteran in narrowing time frame as to alleged stressors. *Harris v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 1095 (U.S. App. Vet. Cl. May 19, 2011)*.

Unpublished decision: Because veteran failed to notify Secretary of Veterans Affairs of availability of treatment records from particular health care provider, there was no duty to assist error under *38 USCS § 5103A(b)(1)*, as to failure to provide assistance in obtaining those records. *Harris v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 1095 (U.S. App. Vet. Cl. May 19, 2011)*.

Unpublished decision: There was no indication that VA failed to fulfill its duty to assist under *38 USCS § 5103A(b)(3)* by not providing additional assistance in collection of records; evidence of record showed that VA complied with appellant veteran's request and further review of record showed that there were no outstanding records requests. *Touron v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 1107 (U.S. App. Vet. Cl. May 20, 2011)*.

Unpublished decision: Where veteran's records were destroyed in fire, and Department of Veterans' Affairs (VA) attempted to obtain medical records from other sources and provided appellant, his surviving spouse, with information about what she needed to submit to substantiate her claim, determination that VA satisfied its *38 USCS § 5103A(a)* heightened duty to assist was not clearly erroneous. *Buquing v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 2389 (U.S. App. Vet. Cl. Oct. 31, 2011)*.

Failure to automatically provide claimant with copy of VA medical examination report does not violate duty to assist provision because plain and unambiguous language of statute generally addresses procurement of evidence under duty to assist and did not require Secretary of Veterans Affairs to automatically send claimant copy of VA medical examination report prior to rendering adverse decision on his claim. *Martinez v. Wilkie, 31 Vet. App. 170, 2019 U.S. App. Vet. Claims LEXIS 808 (U.S. App. Vet. Cl. May 21, 2019)*.

Construction of this statute that would require Secretary of Veterans Affairs to send full copy of medical examination report to claimant whenever that examination would be used to deny claim is inconsistent with overall statutory scheme. *Martinez v. Wilkie, 31 Vet. App. 170, 2019 U.S. App. Vet. Claims LEXIS 808 (U.S. App. Vet. Cl. May 21, 2019)*.

BVA's denial of service connection for lung cancer was erroneous because its inattention to the duty to assist raised doubt on whether VA gathered all the veteran's VA medical records, given that the medical examination was central to BVA's conclusion that the veteran's lung cancer was unrelated to his Persian Gulf service. In addressing whether the veteran's disability qualified for the presumption, VA must have an opinion addressing both its pathophysiology and etiology but it did not happen. *Smith v. Wilkie, 2020 U.S. App. Vet. Claims LEXIS 537 (U.S. App. Vet. Cl. Mar. 30, 2020)*.

BVA's denial of service connection for a thoracolumbar spine disability was not proper because the VA secretary did not attempt to obtain MRI of the veteran a potentially relevant medical record, which showed a bulging disc causing some degree of spinal stenosis and pertinent to his lower back claim. There was no indication that the VA sought to obtain it even though the veteran adequately identified a potentially relevant record. *Sanchez v. Wilkie, 2020 U.S. App. Vet. Claims LEXIS 327 (U.S. App. Vet. Cl. Feb. 24, 2020)*.

4. —Disability compensation claims

Where veteran sought increased disability ratings for psychiatric disability, Secretary of Veterans Affairs improperly failed to comply with affirmative obligation under *38 USCS § 5103A(c)(1)* to obtain and evaluate records of veteran's in-service psychiatric hospitalization prior to assigning disability ratings; even though records predated period for which veteran sought disability compensation, records of veteran's lengthy inpatient stay presumably contained both detailed information regarding veteran's behavior and assessments from physicians regarding severity of veteran's underlying psychiatric disorder. *Moore v. Shinseki, 555 F.3d 1369, 2009 U.S. App. LEXIS 2333 (Fed. Cir. 2009)*.

Service medical records can be relevant within meaning of *38 USCS § 5103A(c)*, and thus implicate duty to assist veteran by obtaining relevant records, even if records pre-date period for which veteran seeks disability compensation. *Moore v. Shinseki, 555 F.3d 1369, 2009 U.S. App. LEXIS 2333 (Fed. Cir. 2009)*.

Veterans court properly determined that statutory duty of Secretary of Veterans Affairs under *38 USCS § 5103A(a)(1)* to assist claimant for benefits, including service connection, did not include sua sponte duty to forward medical evidence regarding veteran, which was available in claims file and in veteran's possession, to veteran's private treating physician. *Walch v. Shinseki, 563 F.3d 1374, 2009 U.S. App. LEXIS 9410 (Fed. Cir. 2009)*.

VA's duty under *38 USCS § 5103A* to assist disability benefits claimant did not require VA to obtain claimant's Social Security disability records where VA had determined that records were not relevant; Social Security disability claim concerned back pain, while VA disability claim was for post-traumatic stress disorder. *Golz v. Shinseki, 590 F.3d 1317, 2010 U.S. App. LEXIS 12 (Fed. Cir. 2010)*.

Legal standard for relevance requires VA to examine information it has related to medical records and, if there exists reasonable possibility that records could help veteran substantiate claim for benefits, duty to assist requires VA to obtain records. When Social Security Administration decision pertains to completely unrelated medical condition and veteran makes

no specific allegations that would give rise to reasonable belief that medical records may nonetheless pertain to injury for which veteran seeks benefits, relevance is not established. *Golz v. Shinseki, 590 F.3d 1317, 2010 U.S. App. LEXIS 12 (Fed. Cir. 2010)*.

Unpublished decision: Duty to assist is not boundless in scope; plain language of statute requires VA to make reasonable efforts to obtain only relevant records that are necessary to and would aid in substantiating veteran's claim; accordingly, Veterans Court did not err when it interpreted *38 USCS § 5103A* not to require VA to obtain original copy of identified record, especially when relevancy, necessity, and availability of record were concerned. *Bailey v. Shinseki, 527 Fed. Appx. 937, 2013 U.S. App. LEXIS 13904 (Fed. Cir. 2013)*.

With respect to claim for disability compensation benefits based on asserted VA service connection hearing loss in connection with active-duty service in U.S. Coast Guard Merchant Marine during World War II, which claim was denied on basis that claimant did not establish active-duty service for status as "veteran", Department of Veterans Affairs erred under *38 USCS § 5103A* because it did not make additional request seeking verification of service following submission of documents by veteran to regional office. *Frasure v. Principi, 18 Vet. App. 379, 2004 U.S. App. Vet. Claims LEXIS 581 (U.S. App. Vet. Cl. Sept. 14, 2004)*.

With respect to claim for service connection for post-traumatic stress disorder, if veteran's assertion regarding deaths of unit members was that his knowledge of deaths was stressor, then VA had duty to assist veteran in attempting to verify deaths; if, however, veteran's assertion was that he witnessed their deaths, then VA had obligation to attempt to verify deaths only if there was evidence that veteran was present when those deaths allegedly occurred. *Sizemore v. Principi, 18 Vet. App. 264, 2004 U.S. App. Vet. Claims LEXIS 555 (U.S. App. Vet. Cl. Sept. 3, 2004)*.

Board of Veterans' Appeals decision denying veteran's service connection claim was clearly erroneous under *38 USCS § 7261(a)(4)* because Board erred in finding that VA fulfilled its duty under *38 USCS § 5103A* to assist veteran in obtaining evidence necessary to substantiate his claim under its heightened duty to assist when veteran's service medical records were lost; VA failed to request relevant morning reports and it did not advise veteran that he could submit "buddy statements" to substantiate his service connection claim. *Washington v. Nicholson, 19 Vet. App. 362, 2005 U.S. App. Vet. Claims LEXIS 669 (U.S. App. Vet. Cl. Nov. 2, 2005)*.

Department of Veterans Affairs did not fail to comply with its duty under *38 USCS § 5103A* to assist claimant because at no time during pendency of his claim before VA did claimant ever identify any additional medical records or quality-assurance reports, or request VA to provide them, or explain how they might be relevant to his claim. *Loving v. Nicholson, 19 Vet. App. 96, 2005 U.S. App. Vet. Claims LEXIS 131 (U.S. App. Vet. Cl. Mar. 29, 2005)*.

Where claimant alleged in service injury from bayonet, Secretary of Veterans Affairs had duty to attempt to secure court-martial records of person who stabbed claimant, and, if unsuccessful in doing so, to provide claimant with specific notice required by *38 USCS § 5103A(a)(2)*. *Hyatt v. Nicholson, 21 Vet. App. 390, 2007 U.S. App. Vet. Claims LEXIS 1215 (U.S. App. Vet. Cl. Aug. 6, 2007)*.

Unpublished decision: There was no showing that Secretary of Veterans Affairs improperly failed to obtain service personnel records and unit records of veteran seeking service connection for post-traumatic stress disorder to corroborate in-service stressors identified by veteran; Secretary obtained veteran's service medical records which were not shown or alleged to be incomplete, and veteran was unable to provide sufficient information concerning occurrences of claimed stressors to trigger Secretary's duty to obtain records under *38 USCS § 5103A(b)(1)*, (c)(2). *Steward v. Peake, 2008 U.S. App. Vet. Claims LEXIS 671 (U.S. App. Vet. Cl. May 30, 2008)*.

Unpublished decision: Veterans Affairs did not violate its duty to assist veteran by failing to obtain records of veteran's employment status at Air Force base because veteran failed to identify how his employment records could have been relevant to his service-connection claim and how he could have been prejudiced by any failure to obtain them. *Merriweather v. Peake, 2008 U.S. App. Vet. Claims LEXIS 744 (U.S. App. Vet. Cl. June 10, 2008)*.

Unpublished decision: Veterans Affairs (VA) did not violate its duty to assist veteran by failing to obtain records of health insurance claims and prescriptions claims because veteran failed to reasonably identify health insurance claims and prescription

claims that VA failed to obtain, nor did he identify how any such records could be relevant to his current hypertension claim or how he could have been prejudiced by any failure to obtain them. *Merriweather v. Peake, 2008 U.S. App. Vet. Claims LEXIS 744 (U.S. App. Vet. Cl. June 10, 2008)*.

Unpublished decision: Department of Veterans Affairs conceded prejudicial error arising from its failure to satisfy *38 USCS § 5103A* duty to assist veteran because it made no effort to obtain hospital records identified by veteran that ostensibly related to his claims for psychiatric disorder and for finding of total disability based on individual unemployability with result that those claims had to be remanded for readjudication. *Figueroa v. Peake, 2008 U.S. App. Vet. Claims LEXIS 906 (U.S. App. Vet. Cl. July 30, 2008)*.

Unpublished decision: That he may have been receiving some kind of disability assistance did not, without more, identify existence of relevant Social Security Administration (SSA) records, further, there was no indication in record that he ever authorized VA to obtain any records pertaining to this matter; additionally, not even in his brief did he contend that SSA records existed or that they might have been relevant to matters in this case; therefore, Board of Veterans' Appeals did not err in finding that VA had fulfilled its duty to assist. *Preece v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1062 (U.S. App. Vet. Cl. Oct. 2, 2008)*.

Unpublished decision: Board of Veterans' Appeals clearly erred in finding that Secretary of Veterans Affairs complied with his duty to assist under *38 USCS § 5103A* because notification that military hospital and base had no medical records relating to veteran did not explain efforts VA made to obtain evidence; what, if any, further actions VA would take, or that veteran was ultimately responsible for obtaining records as required by *38 CFR § 3.159(e)*. *Pickett v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1120 (U.S. App. Vet. Cl. Oct. 10, 2008)*.

Unpublished decision: Board of Veterans' Affairs was required to obtain missing hospital records or provide explanation of their absence, pursuant to *38 USCS § 5103A(b)*, (c), because evidence pertaining to whether veteran's spinal condition was noted during service could not be reasonably evaluated without them. *Harris v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1121 (U.S. App. Vet. Cl. Oct. 10, 2008)*.

Unpublished decision: Despite veteran's claim that Board of Veterans' Appeals erred in failing to explain why Social Security Administration (SSA) documents were not obtained, there was no absolute requirement under *38 USCS § 5103A* that Secretary of Veterans Affairs secure all SSA documents; veteran failed to explain why documents held by SSA in pending claim might be relevant to his claim for VA benefits. *Dion v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1139 (U.S. App. Vet. Cl. Sept. 25, 2008)*.

Unpublished decision: Board of Veterans' Appeals had to provide adequate statement of reasons or bases with respect to VA duty to assist veteran in obtaining Social Security Administration decision(s), including explanation of whether VA complied with Board's March 2005 remand order that instructed VA to obtain complete copies of his SSA records, and to inform him of progress of its search. *Ford v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1228 (U.S. App. Vet. Cl. Nov. 7, 2008)*.

Unpublished decision: In view of veteran's insistence that relevant medical records existed from his May 1960 treatment, his statement of his inability to obtain further evidence was not acceptance of their nonexistence; moreover, Board of Veterans' Appeals could not negate its statutory responsibility to continue discovery of federal records by such admission; further, appearance of completeness was insufficient to satisfy Congressional mandate that VA obtain all relevant records. *Premo v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1232 (U.S. App. Vet. Cl. Nov. 3, 2008)*.

Unpublished decision: Because Board of Veterans' Appeals found no in-service injury, it also found no nexus to service; determination regarding nexus was premature, however, in absence of showing that necessary efforts had been made to obtain relevant records pertaining to occurrence of injury; Secretary had not identified efforts made to obtain records from Luke Air Force Base and had not shown that he advised veteran that documents were unavailable. *Premo v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1232 (U.S. App. Vet. Cl. Nov. 3, 2008)*.

Unpublished decision: Veteran was properly denied benefits for frostbite on veteran's left foot because (1) Board of Veterans' Appeals provided detailed explanation for why it assigned more credibility to VA examiner's opinion than it did to podiatrist's

evaluation, including that VA examination was more current, and (2) veteran was not prejudiced by VA's failure to obtain certain medical records. *Sherman v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1309 (U.S. App. Vet. Cl. Oct. 29, 2008)*.

Unpublished decision: Board of Veterans' Appeals did not err in determining that Veterans Affairs satisfied its duty to assist in veteran's service-connection claims because veteran failed to specifically identify any additional documents that would have been material to his claim. *Tansil v. Nicholson, 2008 U.S. App. Vet. Claims LEXIS 1313 (U.S. App. Vet. Cl. Oct. 31, 2008)*.

Unpublished decision: Secretary of Veterans Affairs failed to comply with duty to assist veteran to substantiate veteran's claim of service connection for post-traumatic stress disorder based on in-service sexual assault, since Secretary's attempt to obtain service records of servicemember who allegedly perpetrated assault failed to include potentially relevant criminal investigation records. *Masse v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1433 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Where veteran sought service connection for post-traumatic stress disorder based on in-service sexual assault by another servicemember, Secretary of Veterans Affairs properly attempted to obtain records from clergymen veteran allegedly contacted after assault, and Secretary was not required to attempt to personally contact clergymen. *Masse v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1433 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Where appellee Secretary of Veterans' Affairs conceded that Board of Veterans' Affairs did not ensure compliance with duty to assist under *38 USCS § 5103A(b)* and conceded that veteran identified to agency that he had sustained injury from parachute jump on July 27, 1967, in Germany, and it was conceded that unit records could contain evidence relevant to claim, remand for agency to try to obtain such records. *Turner v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1443 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Veteran's back, hip, and knee disability claims were improperly denied by Board of Veterans Appeals because Veterans Administration failed its duty under *38 USCS § 5103A(b)* and *38 CFR § 3.159(c)(2) (2008)* to assist veteran in locating his service medical records for 1960-1965 time period during which he claimed he was injured. *Morinville v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1568 (U.S. App. Vet. Cl. Dec. 23, 2008)*.

Unpublished decision: Secretary of Veterans Affairs did not err under *38 USCS § 5103A(b)(1)* by failing to obtain certain hospital records because veteran indicated that she would obtain those records herself; there was no indication in record that veteran authorized Secretary to obtain them. *Balch v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1613 (U.S. App. Vet. Cl. Dec. 31, 2008)*.

Unpublished decision: Given response from Armed Services Center for Research of Unit Records that it did not find any evidence that veteran's squadron dealt with casualties and veteran's service personnel records, which reflected that he was air cargo specialist, neither of which indicated that he loaded coffins, caskets, or bodybags as he claimed, Board of Veterans' Appeals did not clearly err in finding that VA complied with all of requirements, pursuant to *38 CFR § 3.159* and *38 USCS § 5103A*, of providing assistance until evidence obtained indicated that there was no reasonable possibility that further assistance would substantiate post-traumatic stress disorder claim. *Kalayjian v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1626 (U.S. App. Vet. Cl. Dec. 23, 2008)*.

Unpublished decision: VA did not violate its duty under *38 USCS § 5103A* to assist veteran, who was pursuing claim for VA benefits, despite fact that it failed to comply with his request to obtain various private medical records where veteran testified that records at issue were no longer available; because records were unavailable, VA was relieved of duty to try and obtain them on basis that there was no reasonable possibility that its assistance would substantiate veteran's claims. *Thompson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1637 (U.S. App. Vet. Cl. Dec. 23, 2008)*, reh'g denied, *2009 U.S. App. Vet. Claims LEXIS 224 (U.S. App. Vet. Cl. Feb. 26, 2009)*.

Unpublished decision: VA was required to obtain records from U.S.S. Staten Island pursuant to Board of Veterans' Appeals' remand and *38 USCS § 5103A*; Board erred in determining that VA satisfied its duty to assist in connection with its attempts to obtain these documents where there was no indication in record that VA ever followed up with National Archives Records Administration (NARA) in response to NARA's letter which invited VA representative to visit facility to review ships logs and related records; furthermore, this error was prejudicial because documents confirming veteran's testimony regarding in-service

asbestos exposure were relevant to whether he had, or had ever had, asbestosis. *Hale v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1642 (U.S. App. Vet. Cl. Aug. 11, 2008)*.

Unpublished decision: Board of Veterans' Appeals' determination that VA accomplished development necessary to comply with its duty to assist under *38 USCS § 5103A(b)(1)* was supported by plausible basis and was not clearly erroneous; VA notified veteran that it needed additional information and his consent to release records of his hospital treatment; however, he did not provide such information. *Kovacs v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1669 (U.S. App. Vet. Cl. Aug. 15, 2008)*.

Unpublished decision: VA conceded potential relevance of certain records identified by veteran, which may have assisted him in substantiating his claim for service connection for neck injury; VA also conceded that, although it was aware of records' existence, it made no effort to obtain them; accordingly, remand was necessary for VA to make efforts to locate these records in satisfaction of its duty to assist. *Bell v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1699 (U.S. App. Vet. Cl. Aug. 22, 2008)*, remanded, *2011 U.S. App. Vet. Claims LEXIS 2695 (U.S. App. Vet. Cl. Dec. 9, 2011)*.

Unpublished decision: Where veteran's service medical records were presumed to have been destroyed in fire and veteran's claim for service connection was denied, duty to assist was satisfied because, inter alia, (1) Veterans Affairs made numerous attempts to locate evidence, and (2) veteran was not prejudiced since Board of Veterans' Appeals and medical examiner assumed that in-service injury occurred. *Baca v. Peake, 2009 U.S. App. Vet. Claims LEXIS 15 (U.S. App. Vet. Cl. Jan. 6, 2009)*.

Unpublished decision: Secretary of Veterans Affairs did not err under *38 USCS § 5103A(a)(1)* in failing to obtain Social Security Administration records service in veteran's claim for service connection for low back disability because there was no assertion by veteran nor any indication in record that those records were relevant to issue of service connection. *Jackson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 71 (U.S. App. Vet. Cl. Jan. 30, 2009)*.

Unpublished decision: Where veteran sought service connection for heart disability as secondary to veteran's service-connected post-traumatic stress disorder (PTSD), and increased disability rating for PTSD, Secretary of Veterans Affairs was not required to obtain veteran's social security disability records since veteran's disability was based on post-service work-related back injury, and veteran did not demonstrate how records regarding back disability were relevant to veteran's claims. *Hamilton v. Peake, 2009 U.S. App. Vet. Claims LEXIS 96 (U.S. App. Vet. Cl. Feb. 9, 2009)*.

Unpublished decision: Failure by Veterans Administration (VA) to obtain Social Security records that were identified by veteran who had applied for disability benefits constituted breach of VA's duty to assist imposed under *38 USCS § 5103A* and warranted remand for further consistent adjudication. *McGregor v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 130 (U.S. App. Vet. Cl. Feb. 23, 2009)*.

Unpublished decision: Board of Veterans' Appeals failed to provide adequate statement of reasons or bases under *38 USCS § 7104(d)(1)* to support its decision that VA fulfilled its duty to assist under *38 USCS § 5103A(b)(1)* because Board's statement that there was no indication that additional evidence relevant to issue was available and not part of claims file was overly broad; specifically lacked any mention of documents, not contained in record, to which veteran referred on appeal; and did not explain why they were not relevant to question of whether veteran experienced in-service event related to his current diagnosis of depression. *Shivers v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 135 (U.S. App. Vet. Cl. Feb. 25, 2009)*.

Unpublished decision: It was unclear whether VA's duty to assist under *38 USCS § 5103A(b)(1)* extended to Social Security Administration (SSA) disability records because veteran did not state how documents were relevant to his claim, yet record did not clearly support Board of Veterans' Appeals' statement that VA's initial requests for those documents were made in regard to unrelated claims; under *38 USCS § 7104(d)(1)*, Board was obligated on remand to describe why it found that attempts to secure SSA records concerned claims unrelated to veteran's right knee claim. *Thompson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 140 (U.S. App. Vet. Cl. Feb. 25, 2009)*.

Unpublished decision: Board of Veterans' Appeals erred when it found that Secretary of Veterans Affairs was not required under *38 USCS § 5103A(b)* to assist veteran in obtaining medical records from Social Security Administration (SSA) because veteran had not provided necessary contact information; it appeared records were relevant to veteran's claims seeking service connection for right knee disability, right thumb disability, and for residuals of right wrist injury with chronic subluxation,

because SSA had awarded veteran disability benefits, and veteran provided name of treating physician and date of examination report. *Glinsey v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 157 (U.S. App. Vet. Cl. Feb. 26, 2009)*.

Unpublished decision: Board of Veteran's Appeals' conclusion failed to take into account veteran's statement on his post-traumatic stress syndrome questionnaire indicating that October 1979 personal assault aboard USS Killuia was reported to Naval Investigative Service (NIS); further, (1) both parties agreed that VA erred in failing to attempt to obtain this report, (2) veteran also argued that he reported changes in his performance after assault, but regional office did not obtain his personnel records, and (3) Secretary conceded that VA's failure to attempt to obtain veteran's unit records and NIS report in this case warranted remand, and court agreed. *Tobin v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 198 (U.S. App. Vet. Cl. Mar. 6, 2009)*.

Unpublished decision: VA conceded that it had violated its duty to assist imposed by *38 USCS § 5103A* in connection with service-connection claim by veteran for acquired psychiatric disorder by failing to request records from Social Security Administration despite veteran's notification that he had received such benefits, by failing to request service records reflecting veteran's active duty service, and by failing to make adequate effort to obtain veteran's Reserve service records by following up on notice informing it that its request had been filed in wrong office. *Walker v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 472 (U.S. App. Vet. Cl. Mar. 26, 2009)*.

Unpublished decision: VA breached its duty to assist pursuant to *38 USCS § 5103A* as to veteran's service-connection claim for arthritis by failing to search for records identified by veteran relating to medical care that he received on Air Force base during year subsequent to his discharge because VA was obligated to seek records for entire one-year presumptive period, and its effort to identify records reflecting care during six-month period simply was inadequate. *Anderson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 520 (U.S. App. Vet. Cl. Mar. 31, 2009)*.

Unpublished decision: Veteran's argument that Secretary of Veterans Affairs breached his duty to assist under *38 USCS § 5103A* by failing to obtain evidence related to whether veteran was exposed to herbicide through drinking water while aboard ship off coast of Vietnam was unavailing; veteran's request was unreasonable because Board knew of no organization or facility that maintained records that could possibly serve to verify whether veteran was exposed to contaminated drinking water while onboard, and it did not appear as though veteran, at any point during pendency of his claim, ever suggested what evidence might contain information he was seeking or where such evidence might be available. *Lear v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 539 (U.S. App. Vet. Cl. Apr. 2, 2009)*.

Unpublished decision: Veteran's request that Secretary of Veterans Claims obtain evidence pursuant to *38 USCS § 5103A* related to whether planes exposed to herbicide ever landed aboard ship on which he served was unreasonable; given that Board of Veterans' Appeals reviewed evidence of record which included histories of ship's activities and information detailing Agent Orange spraying activities and indicated that it was unaware of information that might substantiate veteran's claim, Board's obligations under § 5103A were satisfied. *Lear v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 539 (U.S. App. Vet. Cl. Apr. 2, 2009)*.

Unpublished decision: Although veteran claimed that Secretary of Veterans Affairs should have obtained records related to whether his ship docked in Vietnam, such as deck logs, crew rosters, and ship station histories, Board of Veterans' Appeals' finding that it had no further obligation to assist veteran under *38 USCS § 5103A* was not in error; veteran did not dispute Board's finding that he has never asserted that he visited landmass of Vietnam; thus, documents requested by veteran were not relevant to substantiating his claim for entitlement to service connection for type II diabetes mellitus. *Lear v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 539 (U.S. App. Vet. Cl. Apr. 2, 2009)*.

Unpublished decision: Board of Veterans' Appeals had abrogated its duty to assist veteran where treating physician statements clearly informed VA that their opinions related to veteran's post traumatic stress disorder were premised on six years of hands-on medical treatment and, as result, Board should have reviewed statements in conjunction with plethora of underlying medical documentation. *Heflin v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 606 (U.S. App. Vet. Cl. Apr. 14, 2009)*.

Unpublished decision: Matter was remanded to Board of Veterans' Appeals for additional adjudication because Secretary of Veterans Affairs did not adequately comply with requirements of *38 USCS § 5103A* when he did not attempt to obtain

veteran's relevant records before Social Security Administration. *Fletcher v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 611 (U.S. App. Vet. Cl. Apr. 16, 2009)*.

Unpublished decision: Under circumstances, where VA medical examiner had opined that veteran did not have diabetes, there was no medical evidence to contrary, and there was nothing to indicate that his Social Security Administration records contained medical evidence that he had diabetes, determination of Board of Veterans' Appeals that records were not needed to decide claim for service connection was plausible and not clearly erroneous. *Robinson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 721 (U.S. App. Vet. Cl. Apr. 28, 2009)*.

Unpublished decision: VA failed to show that it had made reasonable effort to obtain medical records relating to veteran's hip, as required by *38 USCS § 5103A(b)(1)*, where there was no explanation for discrepancies in hospital name and scope of coverage. *Johnson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 800 (U.S. App. Vet. Cl. May 11, 2009)*.

Unpublished decision: Because record reflected that veteran informed VA that his Social Security benefits were based on psychiatric condition and that back problems at issue in this claim developed after entitlement to Social Security benefits had been awarded, VA did not err in failing to obtain those records because records were not potentially relevant to his claim for VA benefits under 11 USCS § 1151 for back disability. *Slye v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 884 (U.S. App. Vet. Cl. May 21, 2009)*.

Unpublished decision: Veteran apparently believed that Secretary of Veterans Affairs failed to obtain certain documents that would help to substantiate his claim, but had not told court what documents those might be; court had been unable to identify any relevant records that he adequately identified, but that Secretary did not obtain; therefore, Board did not clearly err in determining that Secretary complied with duty to assist. *Robinson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 891 (U.S. App. Vet. Cl. May 22, 2009)*.

Unpublished decision: Secretary of Veterans Affairs was obligated to attempt to obtain records from veteran's private treating physician when VA medical reports adequately identified private medical records that could have been relevant. *Lindsey v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 915 (U.S. App. Vet. Cl. May 29, 2009)*.

Unpublished decision: With regard to veteran's total disability based on individual unemployability claim, VA violated its duty to assist under *38 USCS § 5103A(a)(1)* because it did not obtain VA group therapy counseling records from current counselor; veteran had informed VA that he received counseling at veteran's center and named counselor. *Tondalo v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 919 (U.S. App. Vet. Cl. May 29, 2009)*.

Unpublished decision: VA failed to fulfill its duty to assist under *38 USCS § 5103A(b)(1)* because, despite veteran's adequate identification of his treatment, VA seemingly made no attempt to obtain VA medical records; record contained no evidence that VA requested information, nor did it contain records from facility. *Campbell v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 934 (U.S. App. Vet. Cl. May 29, 2009)*.

Unpublished decision: In claim for disability compensation, VA was under no further obligation under *38 USCS § 5103A(b)(3)* to make additional efforts to obtain treatment records from VA medical center because record contained report of VA examination and veteran never indicated what additional records existed or were relevant to his claim. *Carson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 935 (U.S. App. Vet. Cl. May 29, 2009)*.

Unpublished decision: As there was no evidence of any exposure to chemicals during service and veteran had not identified potentially relevant documents that might have indicated such exposure, Secretary of Veterans Affairs did not breach his duty to assist her in obtaining records, and Board of Veterans' Appeals was not clearly erroneous in concluding that she did not suffer in-service injury or event related to chemical exposure. *Sanders v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 986 (U.S. App. Vet. Cl. June 8, 2009)*.

Unpublished decision: Although Veterans Affairs (VA) notice to claimant was based in part on post-decisional documents and was thus erroneous under *38 USCS § 5103(a)*, error was not prejudicial, and claimant failed to identify any of his medical records that VA failed to obtain or consider in record under *38 USCS § 5103A*. *Warhank v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1038 (U.S. App. Vet. Cl. June 16, 2009)*.

Unpublished decision: Court rejected appellant veteran's claim that Board of Veterans Appeals failed to obtain his service medical records (SMRs), and court could not find anything in record that indicates that appellant's SMRs were destroyed (in fact, veteran's SMRs appear to be part of record); thus, court could not agree with veteran's assertion that Board was under "heightened duty" to assist. *Tilton v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1052 (U.S. App. Vet. Cl. June 17, 2009)*.

Unpublished decision: Matter was remanded to Board of Veterans' Appeals for further proceedings because Board did not adequately address whether Board had made adequate effort to obtain veteran's claimed medical records for alleged treatment that he received for claimed head injury at medical center while he was in boot camp in 1971. *Farmer v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1079 (U.S. App. Vet. Cl. June 23, 2009)*.

Unpublished decision: Board of Veterans' Appeals' decision denying veteran entitlement to temporary total evaluations under *38 CFR § 4.30* for periods of convalescence following alleged surgeries pertaining to his service-connected bilateral foot disabilities was remanded where United States Secretary of Veterans Affairs conceded that VA had not adequately assisted veteran in obtaining records as required by *38 USCS § 5103A(a)* and (b). *Conrod v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1113 (U.S. App. Vet. Cl. June 30, 2009)*.

Unpublished decision: Board of Veterans' Appeals' decision denying veteran's claims for diabetes mellitus, hearing loss, and asbestos exposure was affirmed pursuant to *38 USCS § 5103A* where veteran had not alleged how or why his service personnel records were potentially relevant or how, assuming VA erred in failing to obtain them, he was prejudiced by their absence. *Ozbolt v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1144 (U.S. App. Vet. Cl. June 30, 2009)*.

Unpublished decision: Veteran was entitled to remand under *38 USCS § 5103A(a)* after Board of Veterans' Appeals denied his claim for compensable rating for malaria because Board failed to assist in obtaining records from any pharmacists who dispensed quinine to veteran and it failed to assess whether veteran's sister had training that would have allowed her to diagnosis malaria relapse; obtaining this evidence would have assisted in obtaining evidence necessary to substantiate claim for benefits for malaria. *Stanford v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1185 (U.S. App. Vet. Cl. July 8, 2009)*.

Unpublished decision: Veteran complained that record on appeal did not contain any evidence that VA attempted to obtain evidence of his medical hold or conditions thereof, allegedly origin of his later psychological difficulties, and asserted that VA breached its duty to assist both in this lack of inquiry and by failing to obtain records regarding his active naval service that were held or maintained by governmental entity; however, Board of Veterans' Appeals did not err in its finding that VA fulfilled its duty to assist where veteran proffered no insight as to how VA was supposed to verify something that allegedly took place for approximately week almost 30 years ago; he submitted neither buddy statements, nor names of Navy personnel who might have been able to verify his allegations, nor any other particulars that might have assisted inquiry. *Smith v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1191 (U.S. App. Vet. Cl. July 9, 2009)*, app. after remand, *2014 U.S. App. Vet. Claims LEXIS 860 (U.S. App. Vet. Cl. May 20, 2014)*.

Unpublished decision: Board of Veterans' Appeals' reasons or bases were inadequate to support its finding that VA complied with its duty to assist where (1) Board specifically acknowledged that veteran's attorney requested that his unit histories be associated with claims file, (2) Board's identification of pertinent documents associated with claims file, however, failed to list unit histories, (3) moreover, Board did not discuss whether his unit histories could be obtained, (4) instead, it merely focused on fact that he never submitted post-traumatic stress disorder questionnaire, (5) although VA letters requested more specific information regarding his stressors, neither letter discussed whether VA was able to comply with his request to associate his unit histories with his claims file, and (6) unit identification appeared to be part of record and could certainly have held key to verifying his stressors. *Mattera v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1316 (U.S. App. Vet. Cl. July 28, 2009)*.

Unpublished decision: Board of Veterans' Appeals did not provide adequate statement of reasons or bases for denying veteran's claim for post-traumatic stress disorder (PTSD) because Board did not obtain records from correctional facility where veteran was treated and did not explain whether or not records were potentially relevant to veteran's claim. *Canty v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1322 (U.S. App. Vet. Cl. July 29, 2009)*.

Unpublished decision: Board of veterans' Appeals provided inadequate reasons or bases for its assignment of disability ratings for service-connected disabilities of residuals of head injury with headaches, right ear scars with partial loss of pinna, and scalp scars where veteran had identified and authorized VA to obtain related medical records dated prior to 1996, but VA had failed

to obtain records or notify veteran of that failure as required by *38 USCS § 5103A*. *Lambert v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1325 (U.S. App. Vet. Cl. July 29, 2009)*.

Unpublished decision: In connection with service-connection and DIC claims filed in 1998 by widow of veteran who had died from lung cancer in 1984, VA had no duty under *38 USCS § 5103A(c)(3)* to obtain records of litigation filed by widow against VA under Federal Tort Claims Act soon after veteran's death because widow had neither adequately identified nor requested that VA obtain those records and knowledge of their existence was not properly imputed to VA. *Farris v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1344 (U.S. App. Vet. Cl. July 30, 2009)*.

Unpublished decision: Veteran had not adequately identified what records, if any, were missing or how VA failed to assist her; moreover, during personal hearing before Board of Veterans' Appeals, she conceded that there were no further records to be obtained; thus, because she failed to identify any specific records that she claimed were missing, VA was under no duty to attempt to obtain further records. *Harrison v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1346 (U.S. App. Vet. Cl. July 30, 2009)*.

Unpublished decision: Board of Veterans' Appeals failed to provide adequate statement of reasons or bases for its determination that VA fulfilled its duty to assist veteran regarding his service-connection claims for tension headaches and swelling of leg, ankle, and foot where it failed to discuss whether veteran was competent to diagnose himself with disability of lower extremities on basis that it was simple condition capable of lay observation, and although Board did find that, as layperson, veteran was not competent to offer medical nexus opinion between any current disability he may have had and his service, such was not required to trigger VA's duty to provide medical examination pursuant to *38 USCS § 5103A(d)*. *Brown v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1356 (U.S. App. Vet. Cl. July 31, 2009)*.

Unpublished decision: Decision of Board of Veterans' Appeals finding that servicemember's lung condition was not service connected was supported by adequate statement of reasons and bases because veteran did not seek medical help for lung condition for almost 28 years after his time in service, VA did adequate job in assisting veteran in obtaining any federal records that were available, and veteran's lay testimony that he was treated for serious lung exposure while in service was contradicted by one service medical record that showed that veteran was treated only for common cold. *Weaver v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1400 (U.S. App. Vet. Cl. Aug. 5, 2009)*.

Unpublished decision: Denial of veteran's claim for increased disability rating for back condition was improper since it was unclear whether Secretary of Veterans Affairs satisfied duty to assist veteran by obtaining medical evidence; Secretary's assertion that medical evidence was requested and received from physicians, including veteran's primary treating physician, was not supported by record, and it could not be determined whether Secretary notified veteran of evidence that could not be obtained. *Gibson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1424 (U.S. App. Vet. Cl. Aug. 12, 2009)*.

Unpublished decision: Board of Veterans' Appeals did not err in finding that Secretary of Veterans Affairs did not cease to assist veteran in obtaining his active duty for training records under *38 USCS § 5103A(c)(1)*; after receiving negative response from National Guard, Secretary forwarded same request to Service Medical Records Center, and documents at issue were located and associated with veteran's claims file. *Salmon v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1440 (U.S. App. Vet. Cl. Aug. 13, 2009)*.

Unpublished decision: Although the attorney stated that her client informed her that the Navy records were not relevant, by conveying this message to the VA in an unsolicited letter when the appeal was remanded by the Board of Veterans' Appeals for the specific purpose of obtaining the records from the veterans' naval service, the attorney was adopting the statement as her own legal opinion; attorney should have been aware of the consequences of stating that the records were not relevant, and an attorney's actions in such maters were considered to be those of the client. *Cope v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1539 (U.S. App. Vet. Cl. Aug. 31, 2009)*.

Unpublished decision: Because the veteran's representative stated that the Navy records were not relevant, and because the Board of Veterans' Appeals relied on this assertion, the veteran waived his right to assistance in obtaining the records and the VA fulfilled its duty to assist in obtaining all relevant service medical records. *Cope v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1539 (U.S. App. Vet. Cl. Aug. 31, 2009)*.

Unpublished decision: Record did not support a veteran's argument that the Board of Veterans' Appeals did not comply with the duty to assist when it did not obtain environmental records in connection with the veteran's claim to reopen a claim for disability compensation for a breast disability, because there was no evidence regarding, inter alia, whether the air station was declared a Superfund site. *Arnone v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1608 (U.S. App. Vet. Cl. Sept. 10, 2009)*.

Unpublished decision: Simply because veteran was unaware of how to obtain records did not eliminate VA' (VA's) duty to attempt to do so on his behalf, especially when he identified location of where records may be held; although it was unclear why VA did not obtain records from chiropractic office before release expired, after he ultimately submitted executed new, albeit insufficient, medical release forms, VA acted unreasonably in failing to advise him that blank releases would be insufficient to obtain records from chiropractic offices. *Adash v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 146 (U.S. App. Vet. Cl. Jan. 29, 2010)*.

Unpublished decision: Where appellant veteran claimed shoulder injury when his Navy ship encountered rogue wave, which could have been reported in ship's log or other reports, Board of Veterans' Appeals clearly erred in not conducting investigation as to whether that incident ever took place, as contemplated in *38 USCS § 5103A(a)(1)*–(2), (c)(3). *Williams v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1194 (U.S. App. Vet. Cl. June 30, 2010)*.

Unpublished decision: In case in which veteran appealed Board of Veterans' Appeals' denial of service connection for eye disorder, to include conjunctivitis and sclerotia, Secretary of VA conceded remand because VA regional officer did not send veteran notice letter that satisfied requirements of *38 USCS § 5103A(b)* and *38 CFR § 3.159(e)*. *Benton v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1391 (U.S. App. Vet. Cl. July 30, 2010)*.

Unpublished decision: Board of Veterans' Appeals did not fulfill its duty to assist veteran, who sought service connection for psychiatric disorder, which was characterized as depression, because record did not contain evidence indicating that regional office sent notice letter to veteran informing him that his social security administration records were unable to be obtained. *Vincent v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1726 (U.S. App. Vet. Cl. Sept. 23, 2010)*.

Unpublished decision: VA satisfied its duty to assist veteran, under *38 USCS § 5103A*, because (1) veteran did not cite to any evidence in record where he ever requested that VA obtain records from his private treating physician; (2) assuming that VA did have duty to fulfill veteran's request for copies of materials in his claims file, veteran had not demonstrated prejudicial error because he had not identified any records that VA considered that he was not aware of, nor did he identify any documents that VA considered that he might have provided to his private physicians to review if VA had provided him with requested copy of his claims file; and (3) doctor's advisory medical opinion was adequate. *Noreen v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2121 (U.S. App. Vet. Cl. Nov. 19, 2010)*.

Unpublished decision: Board of Veterans' Appeals' (BVA) decision denying veteran entitlement to service connection for asbestosis was upheld because BVA did not clearly err in finding duty to assist had been met since environmental records were not relevant, because they would not show that veteran was exposed to asbestos in service, and BVA properly found veteran not credible in regard to veteran's allegations concerning in-service duties and exposure. *Reeves v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2136 (U.S. App. Vet. Cl. Nov. 23, 2010)*.

Unpublished decision: Where veteran was denied service connection for nephrolithiasis and renal insufficiency, VA satisfied its duty to assist because, inter alia, VA requested veteran's records and both facilities indicated negative searches, and distinction that veteran drew between inpatient and outpatient records was not material since record reflected that none of veteran's service treatment records was maintained there. *Arey v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2292 (U.S. App. Vet. Cl. Dec. 6, 2010)*.

Unpublished decision: Veteran had not shown that VA clearly erred by not obtaining additional Social Security Administration records in relation to his claim for benefits for post-traumatic stress disorder, under *38 USCS § 5103A(a)(1)*, because there was no indication that remainder of veteran's Social Security Administration records were relevant to his post-traumatic stress disorder claim. *Hawthorne v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2423 (U.S. App. Vet. Cl. Dec. 22, 2010)*.

Unpublished decision: VA clearly erred by failing to obtain VA medical center treatment records dated prior to June 1999, under *38 USCS § 5103A(a)(1)*, because VA medical center treatment summary contained in record shows that veteran was

treated at facility from September 1997. *Hawthorne v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2423 (U.S. App. Vet. Cl. Dec. 22, 2010)*.

Unpublished decision: Where veteran died from congestive heart failure, Board of Veterans' Appeals' (BVA) decision denying widow entitlement to service connection for cause of veteran's death was upheld because, inter alia, BVA properly concluded that VA had satisfied its duty to assist widow in obtaining certain records, and court was not free to speculate as to content of unavailable medical records. *Waugerman v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 244 (U.S. App. Vet. Cl. Feb. 4, 2011)*.

Unpublished decision: Board of Veterans' Appeals's error in concluding that VA satisfied its duty to assist, under *38 USCS § 5103A(c)(1)*, was harmless because veteran made no argument whatsoever as to how any documents related to denied claim for Social Security benefits would have been relevant to establishing entitlement to earlier effective date for award of total disability rating based on individual unemployability, and another document could not have substantiated earlier effective date for award of total disability rating based on individual unemployability. *McArthur v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 338 (U.S. App. Vet. Cl. Feb. 24, 2011)*.

Unpublished decision: While prior finding that appellant veteran had not served in Korea was error, it was later acknowledged and there was still no evidence to support claim of having suffered frostbite in service, and obtaining records showing service in Korea would make no difference, so failing to obtain such records under *38 USCS § 5103A(a)(1)* was not clear error under *38 USCS § 7261(a)(4)*. *Gjoff v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 576 (U.S. App. Vet. Cl. Mar. 21, 2011)*.

Unpublished decision: In case in which veteran appealed Board of Veterans' Appeals' (BVA) denial of entitlement to VA benefits for throat cancer secondary to in-service exposure to herbicides, BVA's determinations that VA satisfied its duties to notify and assist veteran were not clearly erroneous; there was no evidence that veteran properly identified his Social Security Administration records as being potentially relevant to establishing entitlement to various benefits he sought or that veteran identified two reports to enable VA to assist him in obtaining those reports. *Weppler v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 791 (U.S. App. Vet. Cl. Apr. 13, 2011)*.

Unpublished decision: Board of Veterans Appeals erred when it concluded that VA satisfied its duty to assist because, based on veteran's testimony, VA was on notice that veteran was receiving regular treatment for his service-connected low back disability and his secondary neurological impairments from Dallas VA medical center, but there was no evidence in record that VA made any attempt to obtain outstanding records from that center. *Ransom v. Shinseki, 2013 U.S. App. Vet. Claims LEXIS 1166 (U.S. App. Vet. Cl. July 17, 2013)*.

5. Medical examination or opinion for disability compensation claims

38 USCS § 5103A(a) cannot be read to require Secretary of Veterans Affairs (VA) to provide medical examination or opinion in connection with claim for dependency and indemnity compensation (DIC) because that reading of *38 USCS § 5103A(a)* would obviate need for *38 USCS § 5103A(d)*; under *38 USCS § 5103(A)(a)*, which applies to DIC claims, VA only needs to make reasonable efforts to assist claimant in obtaining medical opinion when such opinion is necessary to substantiate claimant's claim for benefit; that is, § 5103A(a) does not always require VA to assist claimant in obtaining medical opinion or examination. *Delarosa v. Peake, 515 F.3d 1319, 2008 U.S. App. LEXIS 2056 (Fed. Cir. 2008)*.

38 USCS § 5103A(d)(1) is explicitly limited to claims for disability compensation and does not apply to claims for dependency and indemnity compensation. *Delarosa v. Peake, 515 F.3d 1319, 2008 U.S. App. LEXIS 2056 (Fed. Cir. 2008)*.

38 USCS § 105(a) does not compel physician who is supplying medical examination in furtherance of VA's duty in *38 USCS § 5103A* to presume existence of asserted in-service injury when providing medical nexus opinion; in fact, § 105(a) is simply irrelevant to such nexus inquiry. *Holton v. Shinseki, 557 F.3d 1362, 2009 U.S. App. LEXIS 4525 (Fed. Cir. 2009)*.

Since these three subsections, i.e., *38 USCS § 5103A(d)(2)(A)*, (B), (C), of same statutory provision contain different evidentiary standards, i.e., "competent evidence," "evidence indicat(ing)," and "medical evidence," it would seem that Congress intended them to provide for separate, although perhaps related, evidentiary guidelines. *Waters v. Shinseki, 601 F.3d 1274, 2010 U.S. App. LEXIS 7124 (Fed. Cir. 2010)*.

Court rejected theory that medical examinations were to be routinely and virtually automatically provided to all veterans in disability cases involving nexus issues. *Waters v. Shinseki, 601 F.3d 1274, 2010 U.S. App. LEXIS 7124 (Fed. Cir. 2010)*.

Unpublished decision: Where claimant for veterans benefits raised , on appeal, only issues concerning Board of Veterans' Appeals factual findings as to his left spermatocele and duty to assist under *38 USCS § 5103A*, appeal was not reviewable by Federal Circuit, pursuant to *38 U.S.C. § 7292(d)(2)*. *Washington v. Shinseki, 452 Fed. Appx. 983, 2011 U.S. App. LEXIS 25546 (Fed. Cir. 2011)*.

Unpublished decision: Veteran's argument was about application of law to facts of his case, but court had no jurisdiction to reweigh evidence on need for medical examination or to review Veterans Court's assessment of board's case-specific determination that there was no such need here; whether board's explanation was adequate was also outside court's jurisdiction, and appeal was dismissed. *Blashford v. Shinseki, 565 Fed. Appx. 908, 2014 U.S. App. LEXIS 9019 (Fed. Cir. 2014)*.

Duty imposed on Department of Veterans Affairs (VA) by *38 USCS § 5103A(d)(2)(B)* to provide medical examination as to whether particular theory of service connection has merit is explicitly limited to situations where there is already some evidence in record of current disability and some evidence that indicates that disability may be associated with claimant's military service; if Congress had wanted VA to automatically provide examination on all possible theories, then § 5103A would not read way it does. *Robinson v. Peake, 21 Vet. App. 545, 2008 U.S. App. Vet. Claims LEXIS 22 (U.S. App. Vet. Cl. Jan. 29, 2008)*, reh'g, en banc, denied, *22 Vet. App. 381, 2008 U.S. App. Vet. Claims LEXIS 1677 (U.S. App. Vet. Cl. Feb. 25, 2008)*, aff'd, *557 F.3d 1355, 2009 U.S. App. LEXIS 3697 (Fed. Cir. 2009)*.

Review of claims file by VA examiner, without more, does not automatically render examiner's opinion competent or persuasive; moreover, absence of claims file review by private medical expert does not categorically exclude possibility that he is nevertheless informed of relevant facts; in all cases, it is what examiner learns from claims file for use in forming expert opinion, and not just reading of file, that matters; further, when Board of Veterans' Appeals uses facts obtained from review of claims file as basis for crediting one expert opinion over another, it is incumbent upon Board to point out those facts and explain why they were necessary or important in forming appropriate medical judgment. *Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 2008 U.S. App. Vet. Claims LEXIS 1440 (U.S. App. Vet. Cl. Dec. 1, 2008)*.

Claims file review, as it pertains to obtaining overview of claimant's medical history, is not requirement for private medical opinions; therefore, private medical opinion may not be discounted solely because opining physician did not review claims file; likewise, Board of Veterans' Appeals may not prefer VA' (VA) medical opinion over private medical opinion solely because VA examiner reviewed claims file. *Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 2008 U.S. App. Vet. Claims LEXIS 1440 (U.S. App. Vet. Cl. Dec. 1, 2008)*.

Recitation of medical information on which opinion is based can aid Board of Veterans' Appeals' evaluation of sufficiency of opinion; of course, veteran should take care to personally provide those medical facts of which physician should be aware in formulating medical opinion on veteran's behalf. *Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 2008 U.S. App. Vet. Claims LEXIS 1440 (U.S. App. Vet. Cl. Dec. 1, 2008)*.

Duty to assist was not triggered only when the claimant met his burden of demonstrating veteran status; thus, where a claimant had been dishonorably discharged follow a court-martial, a subsequent determination that the claimant was mentally incompetent to serve his sentence triggered the duty by the United States Board of Veterans' Appeals whether a medical opinion may have been necessary to determine the claimant's mental state at the time of the offenses. *Gardner v. Shinseki, 22 Vet. App. 415, 2009 U.S. App. Vet. Claims LEXIS 350 (U.S. App. Vet. Cl. Mar. 13, 2009)*, remanded, *2017 U.S. App. Vet. Claims LEXIS 888 (U.S. App. Vet. Cl. June 19, 2017)*.

Veteran was not entitled to award of attorney's fees and expenses under *28 USCS § 2412(d)* because, in absence of established law in form of statutory or regulatory requirement or guidance from court, Secretary of Veteran Affairs' argument that he did not have duty to provide veteran with retrospective medical evaluation under *38 USCS § 5103A* was reasonable. *Chotta v. Shinseki, 23 Vet. App. 73, 2009 U.S. App. Vet. Claims LEXIS 1000 (U.S. App. Vet. Cl. June 5, 2009)*.

The presumption of regularity attached to computer-generated process of giving notice of VA audiological examination, and veteran, who failed to appear for appointment and failed to rebut presumption, was properly denied service connection; VA complied with *38 USCS § 5103A* duty to assist. *Kyhn v. Shinseki, 23 Vet. App. 335, 2010 U.S. App. Vet. Claims LEXIS 63 (U.S. App. Vet. Cl. Jan. 15, 2010)*, reconsideration granted, *2010 U.S. App. Vet. Claims LEXIS 1487 (U.S. App. Vet. Cl. Aug. 16, 2010)*, superseded, *24 Vet. App. 228, 2011 U.S. App. Vet. Claims LEXIS 84 (U.S. App. Vet. Cl. Jan. 18, 2011)*.

Unpublished decision: Where veteran asserted that his currently-diagnosed GERD was associated with stomach problems he experienced in-service, this satisfied "mere indication of nexus" standard that triggered duty to provide medical examination under *38 USCS § 5103A(d)*; Board of Veterans' Appeals should have obtained medical examination but failed to do so. *Ramos-Rivera v. Peake, 2008 U.S. App. Vet. Claims LEXIS 688 (U.S. App. Vet. Cl. June 4, 2008)*.

Unpublished decision: VA did not substantially comply with Board of Veterans' Appeals' remand instructions where veteran was not provided examination from appropriate medical specialist that commented on severity of veteran's industrial impairment that was directly related to his bilateral dysmorphopsia. *Smith v. Peake, 2008 U.S. App. Vet. Claims LEXIS 690 (U.S. App. Vet. Cl. May 2, 2008)*.

Unpublished decision: Failure of Board of Veterans' Appeals to discuss whether veteran's migraine headaches were aggravated by service rendered inadequate its implied determination that, because there was sufficient evidence in record to decide claim, medical examination or opinion was not needed under *38 USCS § 5103A(d)*. *Underwood v. Peake, 2008 U.S. App. Vet. Claims LEXIS 713 (U.S. App. Vet. Cl. May 28, 2008)*.

Unpublished decision: Because Board of Veterans' Appeals obtained adequate medical opinion on nexus between veteran's current disability and his service as required by *38 USCS § 5103A(d)*, its determination that Secretary of Veterans Affairs fulfilled his duty to assist was not clearly erroneous under *38 USCS § 7261(a)(4)*. *Smith v. Peake, 2008 U.S. App. Vet. Claims LEXIS 741 (U.S. App. Vet. Cl. June 12, 2008)*.

Unpublished decision: Board of Veterans' Appeals was not required to obtain more than one medical opinion when requested "one or more" opinions; after it received opinion, it determined that no further medical opinions were necessary under *38 USCS § 5103A*, and veteran did not show that this determination was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law under *38 USCS § 7261(a)(3)(A)*. *Smith v. Peake, 2008 U.S. App. Vet. Claims LEXIS 741 (U.S. App. Vet. Cl. June 12, 2008)*.

Unpublished decision: Medical examination was adequate under *38 USCS § 5103A(d)* in connection with veteran's claim of service connection for tinnitus even though examiner's opinion did not address evidence from private examinations of veteran, since opinion noted availability of veteran's claims file, there was no indication that evidence from private examination was not included in file, and it was function of Board of Veterans' Appeals rather than medical examiner to address evidence favorable to veteran. *Misuraco v. Peake, 2008 U.S. App. Vet. Claims LEXIS 745 (U.S. App. Vet. Cl. June 12, 2008)*.

Unpublished decision: On remand, after VA assisted veteran in obtaining alternative evidence in lieu of medical records that were destroyed in fire, regional office was ordered to determine whether new medical examination or opinion was necessary under *38 USCS § 5103A* to make decision on veteran's post-traumatic stress disorder claim and, if so, was ordered to provide that examination or opinion. *Crowder v. Peake, 2008 U.S. App. Vet. Claims LEXIS 756 (U.S. App. Vet. Cl. June 2, 2008)*.

Unpublished decision: Veteran was entitled to remand for adequate examination, pursuant to *38 USCS § 5103A*, because Board of Veterans' Appeals erred in relying on Department of Veterans Affairs medical examiner's report to deny service connection for skin disorder when examiner's statement that veteran was not diagnosed with other skin conditions in service was factually incorrect under *38 CFR § 4.1* in light of service medical records, which revealed that he was treated for ulcerous sore on his left elbow. *Ervin v. Peake, 2008 U.S. App. Vet. Claims LEXIS 782 (U.S. App. Vet. Cl. June 27, 2008)*.

Unpublished decision: Veteran was not entitled to medical examination as *38 USCS § 5103A(d)(2)(B)* clearly required "indication" that symptom could be related to service before duty to assist was triggered and veteran failed to show that any of his symptoms were related to service. *Grimes v. Peake, 2008 U.S. App. Vet. Claims LEXIS 819 (U.S. App. Vet. Cl. July 10, 2008)*.

Unpublished decision: In order to trigger duty of Secretary of Veterans Affairs to provide medical examination pursuant to *38 USCS § 5103A(d)(2)* in connection with claim for VA benefits, veteran is required to show some causal connection between his disability and his military service; showing only of disability is not enough. *Dellwo v. Peake, 2008 U.S. App. Vet. Claims LEXIS 842 (U.S. App. Vet. Cl. June 30, 2008)*.

Unpublished decision: Board of Veterans' Appeals did not clearly err when it denied request of veteran who had undergone in-service surgery for gynecomastia for additional medical examination in connection with his claim that he was entitled to rating under diagnostic code 7626 relating to anatomic loss of breast tissue rather than diagnostic code 7819 relating to benign skin neoplasms because medical examination on which Board had relied in making its award described veteran's scar in sufficient detail to allow it to make informed decision on his claim; that being so, Board did not err in ruling that Department of Veterans Affairs had complied with its duty to provide medical examination in *38 USCS § 5103A(d)(1)*. *Hauser v. Peake, 2008 U.S. App. Vet. Claims LEXIS 843 (U.S. App. Vet. Cl. June 30, 2008)*.

Unpublished decision: Veteran's assertion that Board of Veterans' Appeals failed to apply *38 USCS § 5103A* and that veteran did not receive medical examination or opinion was not supported by record because evidence showed that veteran was provided with several medical examinations as his claim was processed. *Davis v. Peake, 2008 U.S. App. Vet. Claims LEXIS 875 (U.S. App. Vet. Cl. July 24, 2008)*.

Unpublished decision: Board of Veterans' Appeals finding that second McLendon element was not satisfied because service medical records contained no abnormal findings indicative of hearing loss and thoracic spine disorder lacked adequate reasons and bases where it had not discussed lay evidence or evaluated its credibility. *Brungardt v. Peake, 2008 U.S. App. Vet. Claims LEXIS 883 (U.S. App. Vet. Cl. July 24, 2008)*.

Unpublished decision: Board of Veterans' Appeals finding that third McLendon element was not satisfied lacked adequate reasons and bases where it should have addressed veteran's evidence relating in-service events to his current disabilities and evaluated whether it met low threshold of third McLendon element. *Brungardt v. Peake, 2008 U.S. App. Vet. Claims LEXIS 883 (U.S. App. Vet. Cl. July 24, 2008)*.

Unpublished decision: Challenge by veteran to finding of Board of Veterans' Appeals (BVA) rejecting his service-connection claim for skin condition was affirmed despite veteran's claim that BVA had provided inadequate reasons or bases as required by *38 USCS § 7104(d)(1)* for its finding that examination under *38 USCS § 5103A(d)(2)(C)* was not necessary to determine etiology of his current skin condition; because veteran offered no evidence to support his claim that his skin allergy was associated with exposure to Agent Orange during military service, absence of any evidence connecting skin condition to in-service Agent Orange exposure meant that BVA had plausible basis for determining that there was no basis for veteran's claim and that finding was supported by adequate statement. *Figueroa v. Peake, 2008 U.S. App. Vet. Claims LEXIS 906 (U.S. App. Vet. Cl. July 30, 2008)*.

Unpublished decision: Board of Veterans Appeals did not abuse its discretion when it determined that additional independent medical examination pursuant to *38 USCS § 7109(a)* was not warranted where sufficient medical exam from six years before addressed etiology of claimant's cerebrovascular accident; Secretary of Veterans Affairs had fulfilled duty to assist. *Lawson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 930 (U.S. App. Vet. Cl. July 30, 2008)*, reh'g, en banc, denied, *2008 U.S. App. Vet. Claims LEXIS 1285 (U.S. App. Vet. Cl. Oct. 22, 2008)*.

Unpublished decision: Duty to assist her under *38 USCS § 5103A* was not triggered where there was no evidence that veteran suffered in-service event, injury, or disease. *Boyd v. Peake, 2008 U.S. App. Vet. Claims LEXIS 987 (U.S. App. Vet. Cl. Aug. 21, 2008)*.

Unpublished decision: Board of Veterans' Appeals erred in determining that new examination was not required under *38 USCS § 5103A(d)(1)* because Secretary of Veterans Affairs improperly placed burden of establishing materiality of evidence of change in veteran's condition on veteran; Board provided no reason for court to suppose that worsening of symptoms could not have yielded higher rating and, thus, Board's inappropriate reliance on existing medical examination was prejudicial under *38 USCS § 7261(b)(2)*. *Irwin v. Peake, 2008 U.S. App. Vet. Claims LEXIS 992 (U.S. App. Vet. Cl. Sept. 10, 2008)*.

Unpublished decision: Board of Veterans' Appeals should have provided veteran with medical examination or explained why no additional nexus opinion was necessary where there was evidence post-dating March 2004 examination which suggested that veteran suffered from bilateral chronic venous insufficiency and there was evidence, in form of veteran's lay testimony as to statements of his physicians, that his venous insufficiency might be related to his in-service surgery. *Cypher v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1018 (U.S. App. Vet. Cl. Sept. 17, 2008)*.

Unpublished decision: Medical examination report was inadequate where it did not consider knee injury that veteran suffered in service. *Martinez-Rodriguez v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1059 (U.S. App. Vet. Cl. Sept. 11, 2008)*.

Unpublished decision: Because there was no objective evidence to support proposition that veteran's cancer was related to Agent Orange exposure, VA medical examiner was not required to consider and discuss all possible etiologies for disability. *Byous v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1099 (U.S. App. Vet. Cl. Sept. 11, 2008)*.

Unpublished decision: VA was not required to provide veteran with medical examination for his back disability and arthritis claims where veteran had no evidence of current diagnosis or in-service treatment or diagnoses pertinent to his back disability and arthritis claims. *Cisneros v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1102 (U.S. App. Vet. Cl. Sept. 17, 2008)*.

Unpublished decision: Board of Veterans' Appeals erred in finding that there was no competent evidence that claimant was exposed to risk factor for hepatitis while in service, given claimant's lay testimony that he was exposed to wounded soldier's blood; Board's finding that VA satisfied its *38 USCS § 5103A* duty to assist was clearly erroneous; new medical examination was required. *Ross v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1262 (U.S. App. Vet. Cl. Oct. 21, 2008)*.

Unpublished decision: Medical examinations obtained in connection with veteran's claim for increased disability ratings for service-connected lower-leg burns were adequate and VA's duty to assist veteran as imposed by *38 USCS § 5103A* was therefore satisfied despite medical examiner's lack of review of earlier materials because exams fully addressed veteran's current claim and contained adequate medical opinion as to effect of allowed conditions on his ability to work. *Thompson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1376 (U.S. App. Vet. Cl. Mar. 26, 2008)*.

Unpublished decision: Veteran's failure to point to specific evidence that VA did not obtain foreclosed his claim for relief on "duty to assist" claim brought under *38 USCS § 5103A* because veteran, by failing to point to any such evidence, did not carry his burden to demonstrate breach of duty on part of VA. *Summerfield v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1387 (U.S. App. Vet. Cl. Oct. 27, 2008)*.

Unpublished decision: There was no duty to provide veteran with medical examination to determine etiology of his back condition because his separation physical and service medical records reflected no complaints of back pain or injury. *Rollins v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1390 (U.S. App. Vet. Cl. Mar. 14, 2008)*.

Unpublished decision: Secretary of Veterans Affairs conceded that Board of Veterans' Appeals's decision with respect to Osgood-Schlatter's disease should be vacated and remanded for adjudication with veteran's claim of chondromalacia patella, and duty to assist under *38 USCS § 5103A* required medical examination of claimant's back on remand. *Burks v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1548 (U.S. App. Vet. Cl. Dec. 9, 2008)*.

Unpublished decision: Veteran's lay evidence that his back pain caused him to lose several jobs following his military service satisfied low "may be associated" evidentiary threshold that triggered duty to provide medical examination under *38 USCS § 5103A*; medical evidence was not required to cross this threshold. *Webber v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1652 (U.S. App. Vet. Cl. Aug. 29, 2008)*.

Unpublished decision: Although veteran argued that VA failed to fulfill its duty to assist because it did not obtain all of her treatment records from VA outpatient clinic, she neither identified nor requested that VA obtain any additional records from clinic. *Kelly v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1672 (U.S. App. Vet. Cl. Aug. 22, 2008)*.

Unpublished decision: Claimant for veterans disability benefits was entitled to new medical examination, under *38 USCS § 5103A*, to determine if she had multiple compensable disorders, and for Board of Veterans' Appeals to submit adequate

statement of reasons or bases for its decision, under *38 USCS § 7104(d)(1)*. *Horsman v. Peake, M.D., 2008 U.S. App. Vet. Claims LEXIS 1685 (U.S. App. Vet. Cl. Sept. 30, 2008)*.

Unpublished decision: Claimant for veterans disability benefits failed to submit sufficient new and material evidence to fulfill requirement of *38 USCS § 5108*, because lay testimony about his symptoms was insufficient to refute medical evidence in record of etiology of condition and lack of aggravation of condition by his service; new medical examination under *38 USCS § 5103A* was not required. *Chavis v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1686 (U.S. App. Vet. Cl. May 22, 2008)*.

Unpublished decision: Where claimant for veterans benefits presented lay testimony as to his symptoms of multiple sclerosis during service, Board of Veterans' Appeals committed error when it failed to acknowledge that lay person was competent to provide evidence, and by failing to require medical examination or opinion pursuant to *38 USCS § 5103A(d)*. *Roberts v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1712 (U.S. App. Vet. Cl. Oct. 8, 2008)*.

Unpublished decision: VA medical examination was not necessary where there was no evidence of in-service incurrence or any relationship between veteran's current hypertension and his active military service and record did not suggest any relationship between hypertension and active military service. *Kennon v. Peake, 2009 U.S. App. Vet. Claims LEXIS 23 (U.S. App. Vet. Cl. Jan. 15, 2009)*.

Unpublished decision: Requirements of benefit of doubt doctrine did not require Board of Veterans' Appeals to ignore competent evidence presented, in part, from veteran's service medical records, that supported finding that veteran did not have alleged service-connected disability; benefit of doubt doctrine was not modified by assistance requirements set forth in Veterans Claims Assistance Act of 2000, *Pub. L. No. 106-475, 114 Stat. 2096*. *Perez-Burgos v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 55 (U.S. App. Vet. Cl. Jan. 28, 2009)*, aff'd, *374 Fed. Appx. 40, 2010 U.S. App. LEXIS 9125 (Fed. Cir. 2010)*.

Unpublished decision: Remand was warranted on several of veteran's claims for service connected disabilities because there was evidence, and on some issues Secretary of Veterans Affairs conceded, that VA did not provide veteran with adequate medical examinations, in part, because examiners did not review all of service records, or did not take veteran's complaints into account. *Stibor v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 59 (U.S. App. Vet. Cl. Jan. 28, 2009)*.

Unpublished decision: VA properly scheduled veteran for medical examination where report from veteran's treating physician did not point to any specific evidence of thrombophlebitis in service, other than advancing assumption based on veteran's history of recurring problems with leg swelling. *Temps v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 63 (U.S. App. Vet. Cl. Jan. 30, 2009)*.

Unpublished decision: VA medical examiner was not required to address all particular pieces of evidence in order to render examination adequate. *Maryan v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 69 (U.S. App. Vet. Cl. Jan. 30, 2009)*.

Unpublished decision: VA medical examiner's statement that he had no current evidence to give opinion without resorting to speculation did not render examination inadequate; rather, it demonstrated refusal by examiner to speculate and make vague and equivocal findings regarding service connection. *Maryan v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 69 (U.S. App. Vet. Cl. Jan. 30, 2009)*.

Unpublished decision: United States Board of Veterans' Appeals erred in deciding her claim before ensuring that medical opinion that was obtained considered relevant records and addressed etiology of veteran's psychiatric conditions, especially since examiner believed claim was for increased rating when it was for service connection. *Klein v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 326 (U.S. App. Vet. Cl. Mar. 12, 2009)*.

Unpublished decision: Diagnosis of medical condition was not required to trigger Secretary of Veterans Affairs's duty to provide medical examination; rather, all that was needed was competent evidence of current disability or persistent or recurrent symptoms of disability. *Baker v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 341 (U.S. App. Vet. Cl. Mar. 13, 2009)*.

Unpublished decision: Veteran's medical examinations were inadequate where, although examiner acknowledged veteran's complaints of pain in his left wrist in 1970, examiner did not appear to consider his lay statements that he had suffered

symptoms of pain since that time in joints of his upper extremities. *Walton v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 473 (U.S. App. Vet. Cl. Mar. 26, 2009)*.

Unpublished decision: Veteran failed to show that his flat feet condition increased in severity during service where evidence established that his flat feet condition was asymptomatic when he was discharged and there was no evidence that veteran received treatment for flat feet for more than 40 years after he left service; in absence of any evidence indicating increase in severity of veteran's condition, United States Board of Veterans' Appeals properly determined that medical nexus examination was not necessary. *Fleming v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 511 (U.S. App. Vet. Cl. Apr. 1, 2009)*.

Unpublished decision: Veterans Administration medical report was inadequate where examiner addressed only whether it was at least as likely as not (at least 50 percent probable) that veteran's knee condition preexisted and was aggravated by service, rather than addressing standard approximating clear and unmistakable evidence standard required to rebut presumption of soundness. *Gaines v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 522 (U.S. App. Vet. Cl. Apr. 1, 2009)*, remanded, *2012 U.S. App. Vet. Claims LEXIS 1588 (U.S. App. Vet. Cl. July 26, 2012)*.

Unpublished decision: In denying increased disability ratings for service-connected torn meniscus of right knee and bilateral plantar fasciitis, United States Board of Veterans' Appeals failed to discuss whether new examination was warranted based on veteran's complaints of pain in his right knee, falling down as result of his knee condition, and pain and swelling associated with his bilateral plantar fasciitis. *Hegerfeld v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 557 (U.S. App. Vet. Cl. Apr. 7, 2009)*.

Unpublished decision: Although Board of Veterans' Appeals may have applied incorrect legal standard for determining whether Veterans Administration medical examination or opinion was warranted, error was not prejudicial because Board found that, with regard to veteran's tinnitus and peripheral vascular disease claims, record did not contain evidence of current disability, and there was no competent evidence of in-service event that would have caused veteran's bilateral hearing loss. *Sikes v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 589 (U.S. App. Vet. Cl. Apr. 10, 2009)*.

Unpublished decision: Medical examination for hypertension was inadequate where examiner did not consider evidence of elevated blood pressure readings during service. *Letavish v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 593 (U.S. App. Vet. Cl. Apr. 10, 2009)*.

Unpublished decision: Duty to assist veteran that was imposed upon VA by *38 USCS § 5103A(d)(1)* required VA medical examiner to consider all of evidence that was relevant to veteran's disability claim; veteran did not establish violation of this duty by mere showing that there was evidence that examiner did not actually discuss when it was established that all such evidence was considered. *Jarosz v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 631 (U.S. App. Vet. Cl. Apr. 1, 2009)*.

Unpublished decision: Medical examination was inadequate under *38 USCS § 5103A* where medical examiner incorrectly stated that veteran suffered from neck pain on single occasion when records showed two instances where veteran reported neck pain; examination was also inadequate because it appeared to rely on absence of corroborating evidence in contemporaneous service records to find no service connection. *Macias v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 749 (U.S. App. Vet. Cl. Apr. 30, 2009)*.

Unpublished decision: VA did not have duty to seek opinion from veteran's treating physician, even though that physician was employed by VA; nothing in *38 USCS § 5103A(d)(2)* or *38 CFR § 3.159(c)(4)(i)* required VA to seek opinion from particular doctor; indeed, U.S. Court of Appeals for Veterans Claims had repeatedly rejected argument that opinion from treating physician should be afforded more weight than medical opinion from another physician, and, consequently, VA fulfilled its duty to assist by seeking medical opinion. *Slye v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 884 (U.S. App. Vet. Cl. May 21, 2009)*.

Unpublished decision: *38 USCS § 5103A(d)(2)* does not require that examination by afforded to veteran in every case. On contrary, under statute and *38 CFR § 3.159(c)(4)(i)*, examination or opinion may be provided by VA. *Slye v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 884 (U.S. App. Vet. Cl. May 21, 2009)*.

Unpublished decision: Fact that audiologist could not comment on whether veteran's hearing loss and tinnitus were secondarily related to her chemotherapy treatment for leukemia without resort to speculation did not render examination inadequate. *Cunningham v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 899 (U.S. App. Vet. Cl. May 27, 2009)*.

Unpublished decision: Where veteran did not allege that his service-connected conditions had worsened since his last examination, two-year old examination on which United States Board of Veterans' Appeals relied was sufficiently contemporaneous at time of Board decision. *Gamboa v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 979 (U.S. App. Vet. Cl. June 5, 2009)*.

Unpublished decision: Where claimant for veterans benefits met low threshold and Secretary of Veterans Affairs (VA) was required to provide thorough and contemporaneous medical examination under *38 USCS § 5103A(d)* and *38 CFR § 3.159(c)(4)*, that considered all prior medical examinations and treatment. *Ramos v. Peake, 2009 U.S. App. Vet. Claims LEXIS 1003 (U.S. App. Vet. Cl. June 11, 2009)*, amended, *2009 U.S. App. Vet. Claims LEXIS 1173 (U.S. App. Vet. Cl. June 30, 2009)*, remanded, *2019 U.S. App. Vet. Claims LEXIS 597 (U.S. App. Vet. Cl. Apr. 17, 2019)*.

Unpublished decision: Medical examination was inadequate where examiner appeared to ignore veteran's lay statements regarding onset and continuity of his bilateral knee symptoms; examination also inadequate impermissibly relied on absence of corroborating evidence in contemporaneous service records to rationalize its opinion that there was no connection between veteran's current condition and service. *Owens v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1021 (U.S. App. Vet. Cl. June 15, 2009)*.

Unpublished decision: Veterans Affairs fully complied with its duty to assist under *38 USCS § 5103A(d)*, where claimant was given two comprehensive medical examinations that thoroughly discussed his reported history and testimony of his heart and joint diseases, and Board of Veterans' Appeals did not err in relying on them. *Sheeler v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1321 (U.S. App. Vet. Cl. July 27, 2009)*.

Unpublished decision: Where Secretary of Veterans Affairs agreed that Board of Veterans' Appeals provided inadequate statement of reasons or bases, as required under *38 USCS § 7104(d)(1)*, and failed to adequately assess whether medical examination was necessary as to several ailments under *38 USCS § 5103A* duty to assist, remand was required. *Cavallaro v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1380 (U.S. App. Vet. Cl. July 31, 2009)*.

Unpublished decision: In widow's claim for dependency and indemnity compensation under *38 USCS § 1310*, Secretary of Veterans Affairs did not have duty to obtain medical opinion under *38 USCS § 5103A(d)* as matter of law because claim was not for disability compensation; in addition, Board of Veterans' Appeals' factual finding that medical opinion was not necessary to decide claim was not clearly erroneous because record contained numerous service records, service medical records, and VA and non-VA medical reports. *Martin v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1439 (U.S. App. Vet. Cl. Aug. 14, 2009)*.

Unpublished decision: Veterans Affairs was required to provide new audiological examination for claimant for bilateral hearing loss, that was thorough and contemporaneous and that considered prior medical examinations and treatment to complete record, under *38 USCS § 5103A(d)(1)*. *Daily v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1900 (U.S. App. Vet. Cl. Oct. 30, 2009)*.

Unpublished decision: Although Board of Veterans' Appeals' notice error under *38 USCS § 5103* was not prejudicial where claimant was aware of requirements to reopen, its error in failing to presume credibility of his hearing testimony and to provide medical nexus examination for his cervical spine disability was arbitrary and did not comply with *38 USCS § 5103A(d)(2)*. *Hernandez v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2297 (U.S. App. Vet. Cl. Dec. 30, 2009)*.

Unpublished decision: Requiring that evidence be uncontradicted to even suggest that condition may be associated with service is much higher bar than that contemplated by VA' regulations; indeed, types of evidence that "indicate" that current disability "may be associated" with military service include medical evidence that suggests nexus but is too equivocal or lacking in specificity to support decision on merits. *Gozum v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 282 (U.S. App. Vet. Cl. Feb. 26, 2010)*.

Unpublished decision: Pursuant to *38 USCS § 5103A(d)*, when veteran definitively stated that his condition had increased in severity since last VA examination in November 2007, VA's duty to provide contemporaneous medical examination was triggered by veteran's statements. *Cunningham v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 1028 (U.S. App. Vet. Cl. May 12, 2011)*.

Unpublished decision: Veterans Affairs failed to meet its required duties where claimant established her entitlement to medical examination for current disability pursuant to *38 USCS § 5103A(d)(2)*, and failed to make reasonable efforts to obtain her service medical records. *McBee v. Shinseki, 2012 U.S. App. Vet. Claims LEXIS 132 (U.S. App. Vet. Cl. Jan. 31, 2012)*.

Unpublished decision: Board of Veterans' Appeals failed to provide adequate statement of reasons and bases for its determination that appellant was not entitled to VA examination, and thus did not comply with *38 USCS §§ 5103A(d)(2)* and *7104(d)(1)*; it was to act expeditiously on remand, under *38 USCS § 7112*. *Konek v. Shinseki, 2012 U.S. App. Vet. Claims LEXIS 824 (U.S. App. Vet. Cl. Apr. 24, 2012)*.

6. —Particular cases

Veteran had to show some causal connection between disability and military service, disability alone was not enough; Board of Veterans Appeals had no duty to obtain medical opinion absent evidence disability was service related. *Wells v. Principi, 326 F.3d 1381, 2003 U.S. App. LEXIS 8073 (Fed. Cir. 2003)*, reh'g, en banc, denied, *2003 U.S. App. LEXIS 19512 (Fed. Cir. Aug. 27, 2003)*.

On face of *38 CFR § 3.304(f)(3)*, VA medical examination was not necessary to address proviso that claimed stressor must be consistent with places, types, and circumstances of veteran's service, but if that proviso were met, then VA would be obligated to provide veteran with VA medical examination because examination would be necessary to make decision on his PTSD claim; as Veterans Court did not address proviso, remand was necessary to determine whether proviso was satisfied and if so, to provide veteran with medical examination. *Sanchez-Navarro v. McDonald, 774 F.3d 1380, 2014 U.S. App. LEXIS 24420 (Fed. Cir. 2014)*.

Although statute imposed affirmative requirement on Secretary of Veterans Affairs to provide medical examinations under certain circumstances, it did not state that Secretary could not order examination in any other circumstance and thus, Veterans Court did not legally err in not requiring BVA to make adequately explained finding about insufficiency of existing medical evidence before ordering new examination; further, court lacked jurisdiction to review Veterans Court's as-applied determination that BVA properly ordered medical examination here because record contained conflicting medical evidence pre-dating ordered examination. *Herbert v. McDonald, 791 F.3d 1364, 2015 U.S. App. LEXIS 11412 (Fed. Cir. 2015)*.

Because claimant for disability compensation did not challenge qualifications of medical examiner for United States Department of Veterans Affairs before U.S. Board of Veterans' Appeals, which was all that presumption of competency of medical examiner required, appellate court did not find legal error with decision of Court of Appeals for Veterans Claims to deny compensation. *Francway v. Wilkie, 940 F.3d 1304, 2019 U.S. App. LEXIS 30633 (Fed. Cir. 2019)*, cert. denied, *140 S. Ct. 2507, 206 L. Ed. 2d 462, 2020 U.S. LEXIS 1840 (2020)*.

Where veteran provided some evidence that hearing loss and tinnitus may have been service-related, Secretary of Veterans Affairs had duty to assist veteran in obtaining medical nexus opinion to show service connection in veteran's claim for benefits. *Charles v. Principi, 16 Vet. App. 370, 2002 U.S. App. Vet. Claims LEXIS 703 (U.S. App. Vet. Cl. Oct. 3, 2002)*.

Where record before Board of Veterans' Appeals contained: (1) veteran's statement that he experienced difficulty in breathing, easy fatigability, and recurring rapid heartbeat, (2) veteran's assertion that those symptoms were symptoms of his claimed disabilities and that he had experienced them since his separation from service, and (3) discharge examination report that included notation of tachycardia, which was abnormality of cardiovascular system, Board did not comply with *38 USCS § 7104(d)(1)* in that it failed to support its conclusion that Department of Veterans Affairs was not required under *38 USCS § 5103A(d)* to provide veteran with medical examination with respect to his claim for service connection for heart disease; matter was remanded so that Board could properly address whether record: (1) contained competent evidence that veteran had

recurrent symptoms of heart disease, and (2) indicated that those symptoms might be associated with his active military service. *Duenas v. Principi, 18 Vet. App. 512, 2004 U.S. App. Vet. Claims LEXIS 798 (U.S. App. Vet. Cl. Dec. 15, 2004)*.

Where medical examiners' opinions that veteran needed regular aid and assistance and was housebound only based on combination of disabilities, not on his service-connected disability, alone, lacked proper foundation, they did not satisfy Secretary of Veterans Affairs' duty to obtain medical examination for veteran in case where exam was needed to determine whether veteran was entitled to disability benefits under 38 USCS § 11114(I) and (s); thus, Secretary failed to satisfy his *38 USCS § 5103A* duty to assist veteran in developing his claim. *Howell v. Nicholson, 19 Vet. App. 535, 2006 U.S. App. Vet. Claims LEXIS 106 (U.S. App. Vet. Cl. Mar. 23, 2006)*.

Board of Veterans Appeals committed clear error when it rejected veteran's claim for service connection for chronic low-back disability without fully analyzing whether VA medical exam should be required under *38 USCS § 5103A(d)* since (1) Board had found that veteran suffered both in-service injury and chronic low-back disability, (2) although Board was free to discount medical opinions offered by veteran, there was no other competent, independent medical evidence in record concerning causal connection, or lack of causal connection, between injury and disability, (3) pursuant to § 5103A(d)(2), VA medical examination was required if three preconditions existed and there was insufficient competent medical evidence on file from which Secretary of Veterans Affairs could make decision on claim, (4) because of lack of competent medical evidence, Board should have conducted full analysis as to whether three other preconditions for requiring exam existed, and (5) first two preconditions were established, based on Board's findings as to existence of in-service injury and disability, but Board had not analyzed or determined whether third precondition existed, namely whether evidence indicated that two may have been causally connected. *McLendon v. Nicholson, 20 Vet. App. 79, 2006 U.S. App. Vet. Claims LEXIS 355 (U.S. App. Vet. Cl. June 5, 2006)*.

As to veteran's claim of chest disability, Board of Veterans' Appeals, in concluding that veteran was not entitled to VA medical examination under *38 USCS § 5103A(d)(2)*, failed to explain why his lung scarring and symptoms of chest pain could not have been associated with his in-service exposure to tear gas, thereby warranting remand. *Locklear v. Nicholson, 20 Vet. App. 410, 2006 U.S. App. Vet. Claims LEXIS 918 (U.S. App. Vet. Cl. Sept. 19, 2006)*.

Department of Veterans Affairs (VA) could satisfy its duty to assist by providing medical examination conducted by one able to provide "competent medical evidence" under *38 C.F.R. § 3.159(a)(1) (2006)*; accordingly, VA satisfied its duty to assist when it provided medical examination performed by one able to provide competent medical evidence, here, nurse practitioner, although that was not to say that all medical examinations conducted by healthcare providers were sufficient. *Cox v Nicholson, 20 Vet. App. 5, 2007 U.S. App. Vet. Claims LEXIS 5 (2007)*.

Remand to Board of Veterans' Appeals of claim for service-connected ailment (varicose veins) was ordered where Secretary of Veterans Affairs erred in discrediting lay testimony of onset of ailment, in failing to provide adequate medical examination, and in failing to provide assistance to claimant under *38 USCS § 5103A*. *Barr v. Nicholson, 21 Vet. App. 303, 2007 U.S. App. Vet. Claims LEXIS 970 (U.S. App. Vet. Cl. June 15, 2007)*, abrogated, *Walker v. Shinseki, 708 F.3d 1331, 2013 U.S. App. LEXIS 3690 (Fed. Cir. 2013)*.

Because record showed lay evidence of tinnitus during service and evidence of current symptoms of tinnitus, which entitled veteran to medical examination, and because Secretary of Veterans Affairs conceded that Board of Veterans' Appeals erred by not providing veteran VA medical examination with respect to his claim for tinnitus, veteran's claim for entitlement to VA benefits for tinnitus was vacated and remanded for additional development. *Medrano v. Nicholson, 21 Vet. App. 165, 2007 U.S. App. Vet. Claims LEXIS 598 (U.S. App. Vet. Cl. Apr. 23, 2007)*.

Claimant for veterans benefits was not entitled to challenge adequacy of new Veterans Affairs medical examination, pursuant to *38 USCS § 5103A(d)*, where Board of Veterans' Appeals found that no new and material evidence had been submitted to require reopening of claim, and such finding was not clearly erroneous. *Woehlaert v. Nicholson, 21 Vet. App. 456, 2007 U.S. App. Vet. Claims LEXIS 1292 (U.S. App. Vet. Cl. Aug. 24, 2007)*.

Unpublished decision: Secretary of Veterans Affairs' failure to provide medical opinion under *38 USCS § 5103A(d)* was not erroneous because lay testimony of veteran's wife was not competent evidence of connection between veteran's death and service. *Tagaro v. Nicholson, 21 Vet. App. 96, 2006 U.S. App. Vet. Claims LEXIS 627 (U.S. App. Vet. Cl. June 29, 2006)*.

Where claim for veterans benefits was revised after final decision, Secretary of Veterans Affairs was to solicit appropriate medical and lay evidence, determine if appropriate rating could then be granted, and if not, obtain appropriate medical opinion if warranted under duty to assist, under *38 USCS § 5103A*. *Chotta v. Peake, 22 Vet. App. 80, 2008 U.S. App. Vet. Claims LEXIS 260 (U.S. App. Vet. Cl. Mar. 11, 2008)*, aff'd, *418 Fed. Appx. 913, 2011 U.S. App. LEXIS 8267 (Fed. Cir. 2011)*.

Board of Veterans' Appeals did not commit clear error by accepting one medical opinion that unrelated neuroma, rather than residuals of surgery to remove claimant's testicles was cause of his ongoing pain; Secretary of Veterans Affairs had no duty to request nonexistent quality assurance reports under *38 USCS § 5103A(a)*. *Norvell v. Peake, 22 Vet. App. 194, 2008 U.S. App. Vet. Claims LEXIS 809 (U.S. App. Vet. Cl. July 14, 2008)*, aff'd, *333 Fed. Appx. 571, 2009 U.S. App. LEXIS 21903 (Fed. Cir. 2009)*.

VA fulfilled its duty to assist where VA provided two medical examinations, veteran did not argue that either VA examination was inadequate in any respect, nor did he argue that VA's intention in ordering examinations was to develop negative evidence, and, further, Board of Veterans' Appeals stated that VA medical examinations were persuasive for multiple reasons, none of which he challenged. *Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 2008 U.S. App. Vet. Claims LEXIS 1440 (U.S. App. Vet. Cl. Dec. 1, 2008)*.

Physician's private medical opinion was improperly rejected by Board of Veterans' Appeals solely because he did not review veteran's claims file and, by extension, concluded that he was not familiar with veterans' medical history. *Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 2008 U.S. App. Vet. Claims LEXIS 1440 (U.S. App. Vet. Cl. Dec. 1, 2008)*.

Unpublished decision: Turning to McLendon factors, Board of Veterans' Appeals acknowledged that veteran had current diagnosis of diabetes; "in-service event" was, as conceded by Secretary, veteran's service medical records that included October 1967 medical report showing "abnormal glucose tolerance test" and August 1968 provisional diagnosis of "R/O (rule out) diabetes mellitus"; this was sufficient to satisfy second McLendon prong. *Haas v. Shinseki, 22 Vet. App. 385, 2009 U.S. App. Vet. Claims LEXIS 315 (U.S. App. Vet. Cl. Mar. 10, 2009)*.

Unpublished decision: There was no competent medical evidence on issue whether veteran's current disability was more likely than not caused by service, and despite overlooked service medical records, Board of Veterans' Appeals concluded that duty to assist did not require Department of Veterans' Affairs to obtain medical examination; Board's ultimate conclusion that medical examination was not necessary pursuant to *38 USCS § 5103A(d)* was arbitrary and capricious. *Haas v. Shinseki, 22 Vet. App. 385, 2009 U.S. App. Vet. Claims LEXIS 315 (U.S. App. Vet. Cl. Mar. 10, 2009)*.

Unpublished decision: In case in which veteran appealed Board of Veteran's Appeals' (BVA) denial of entitlement to VA benefits for in-service injury to his eyes, Secretary of VA found that his assertion that he was exposed to gas or chemical in service lacked credibility; BVA considered circumstances of veteran's service, and, because BVA did not err in finding that veteran's eyes did not undergo event, injury, or disease in service, it was not obligated to consider whether he was entitled to medical examination. *Bardwell v. Shinseki, 24 Vet. App. 36, 2010 U.S. App. Vet. Claims LEXIS 1494 (U.S. App. Vet. Cl. Aug. 17, 2010)*.

Unpublished decision: Medical examination was inadequate concerning veteran's claim of service connection for knee disability, since scope of examination was improperly confined to selective background information and specific dates and diagnoses when veteran experienced knee pain, and new examination was required to consider veteran's prior medical history and veteran's entire disability picture. *Dooley v. Mansfield, 2007 U.S. App. Vet. Claims LEXIS 1950 (U.S. App. Vet. Cl. Dec. 10, 2007)*.

Unpublished decision: Mere passage of time, without something more, did not obligate VA to provide appellant veteran with new medical examination, and veteran did not allege that there was deficiency in prior examination, which had occurred three and half years earlier, or that his condition had worsened since prior examination. *Acree v. Mansfield, 2007 U.S. App. Vet. Claims LEXIS 2103 (U.S. App. Vet. Cl. Oct. 17, 2007)*.

Unpublished decision: Regardless of whether VA substantially complied with Board of Veterans' Appeals' remand instruction to provide veteran with neurological exam and tests under *38 USCS § 5103A(d)(1)*, veteran submitted evidence of private neurological examination and tests; thus, he did not show prejudice under *38 USCS § 7261(b)(2)*. *Moss v. Peake, 2008 U.S.*

App. Vet. Claims LEXIS 670 (U.S. App. Vet. Cl. May 29, 2008), remanded, *2016 U.S. App. Vet. Claims LEXIS 1020 (U.S. App. Vet. Cl. July 6, 2016)*.

Unpublished decision: To extent that physician opined on disability rating to be assigned, that portion of his opinion was outside bounds of medical opinion necessary to adequately reveal current state of veteran's disability; thus, medical examination report was sufficient under *38 USCS § 5103A(d)* because veteran did not establish any of report's medical examination failed to contain sufficient detail. *Moss v. Peake, 2008 U.S. App. Vet. Claims LEXIS 670 (U.S. App. Vet. Cl. May 29, 2008)*, remanded, *2016 U.S. App. Vet. Claims LEXIS 1020 (U.S. App. Vet. Cl. July 6, 2016)*.

Unpublished decision: There was no adequate explanation of why veteran seeking service connection for various conditions was not provided with etiology examinations under *38 USCS § 5103A(d)(2)* with regard to hip and neck pain, skin condition, bilateral foot disorder, and hypertension, since there was no assessment of credibility of veteran's complaints of pain, and evidence indicated that other conditions were supported by current diagnoses and records of treatment in service. *Steward v. Peake, 2008 U.S. App. Vet. Claims LEXIS 671 (U.S. App. Vet. Cl. May 30, 2008)*.

Unpublished decision: Board of Veterans' Appeals was not clearly erroneous in finding that Secretary had satisfied his duty to assist where it found that February 2001 VA examination and May 2005 VA opinion were adequate and answered in sufficient detail pertinent question of possible nexus between knife stab scar wound and cancer; May 2005 VA opinion, specifically, discussed in detail medical literature, including medical treatises submitted by veteran, and evaluated his medical condition. *Patterson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 766 (U.S. App. Vet. Cl. June 26, 2008)*.

Unpublished decision: Where veteran stated that veteran was told by parent that veteran suffered rheumatic fever as child, medical examination which concluded that veteran's valvular heart disease was not service connected was not inadequate for relying upon veteran's self-reported medical history; veteran was competent to testify concerning prior diagnosis, and veteran's rheumatic fever had little bearing on examiner's opinion concerning veteran's heart problem. *Johnson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 828 (U.S. App. Vet. Cl. July 9, 2008)*.

Unpublished decision: Where medical examiner stated that veteran's post-service employer would have required frequent physical examinations, and it is as least as likely as not that employer would not have hired veteran knowing that veteran had heart murmur, examiner's speculation did not render medical examination inadequate which concluded that veteran's valvular heart disease was not service connected, since speculation did not invalidate examiner's conclusion which relied upon veteran's clinical data and medical history. *Johnson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 828 (U.S. App. Vet. Cl. July 9, 2008)*.

Unpublished decision: Where veteran contended that medical examiner failed to discuss evidence favorable to veteran, medical examination was not inadequate since examiner was only required to consider such evidence, and examiner specifically noted that examiner reviewed veteran's medical records which included medical opinions that veteran maintained were favorable to veteran's claim. *Johnson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 828 (U.S. App. Vet. Cl. July 9, 2008)*.

Unpublished decision: Board of Veterans' Appeals needed to provide medical examination or opinion regarding whether veteran's throat cancer was related to his military service and, upon completion of such development, readjudicate claim for service connection for cause of his death. *Worm v. Peake, 2008 U.S. App. Vet. Claims LEXIS 945 (U.S. App. Vet. Cl. July 23, 2008)*.

Unpublished decision: Service-connection claim by veteran that his infertility resulted from in-service administration of sulfa to treat gonococcus infection was rejected because opinion of medical examiner for Department of Veteran Affairs that it was more likely than not that veteran's infertility was caused by his childhood cryptorchidism constituted competent medical evidence for purposes of *38 USCS § 5103A* affording sufficient basis for denial of veteran's claim; moreover, because weighing of evidence undertaken by Board of Veterans' Appeals supported its conclusion that evidence was not in equipoise, veteran's claim that Board should have applied "benefit of doubt" doctrine in *38 USCS § 5107(b)* lacked merit. *Gross v. Peake, 2008 U.S. App. Vet. Claims LEXIS 977 (U.S. App. Vet. Cl. Aug. 5, 2008)*.

Unpublished decision: Board of Veterans' Affairs' decision that medical examination was not needed to decide veteran's claims for disability compensation for hearing loss, shoulder disability, big toe disability, and left elbow disability was affirmed

where veteran's service medical records, including his separation examination, provided sufficient evidence from which to decide claims. *Wilken v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1006 (U.S. App. Vet. Cl. Sept. 25, 2008)*.

Unpublished decision: Denial of appellant veteran's claims for entitlement to service connection for acquired psychiatric disorder was affirmed because veteran had cited no evidence to persuade court that evidence of disciplinary problems in service was relevant to his claim, much less that it was error for VA medical examiner not to discuss it. *Williams v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1036 (U.S. App. Vet. Cl. Aug. 27, 2008)*.

Unpublished decision: Matter was remanded to Board of Veterans' Appeals for further proceedings because it was error for Board to rely upon opinion of VA medical examiner when examiner's conclusions were based on inaccurate factual premise. *Cairo v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1041 (U.S. App. Vet. Cl. July 11, 2008)*.

Unpublished decision: Secretary of Veterans Affairs provided veteran with adequate medical opinion as required by *38 USCS § 5103A(d)* because physician reviewed veteran's claim file, discussed veteran's medical history and lay assertions regarding exposure to Agent Orange, and concluded that it was unlikely that veteran's cysts in liver and kidney had their onset in service. *Ruiz-Rojas v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1046 (U.S. App. Vet. Cl. Sept. 16, 2008)*.

Unpublished decision: Secretary of Veterans Affairs did not his fulfill duty to provide adequate medical examination under *38 USCS § 5103A(d)(2)* and Board of Veterans' Appeals' statement of reasons and bases was insufficient under *38 USCS § 7104(d)(1)* because medical opinion relied upon by Board in denying veteran's claim for service connection included virtually no analysis or explanation of any conclusion reached by examiner. *Elliott v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1064 (U.S. App. Vet. Cl. July 30, 2008)*.

Unpublished decision: It was error for Board of Veterans' Appeals to conclude that duty to assist under *38 USCS § 5103A* had been satisfied because Secretary of Veterans Affairs failed to obtain VA medical records that had been identified by veteran and records were potentially relevant to veteran's claim. *Shakir v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1122 (U.S. App. Vet. Cl. Oct. 7, 2008)*.

Unpublished decision: Because Board of Veterans Appeals found that there was no evidence of current diagnosis of shoulder disability or of chronic headache condition with dizziness, statutory mandate that VA provide medical examination had not been met and Board did not err in concluding that Veteran was not entitled to VA examination to determine etiologies of his claimed shoulder and head conditions. *Frazier v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1163 (U.S. App. Vet. Cl. May 2, 2008)*.

Unpublished decision: Denial of veteran's claim of service connection for back injury was improper since medical examination was required based on evidence of prior back surgery, numerous reports for sick call, and assertion of in-service diagnosis of back disorder which indicated that veteran's current back condition might be associated with veteran's service. *Godsey v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1187 (U.S. App. Vet. Cl. Nov. 3, 2008)*.

Unpublished decision: Retrospective medical examination was not required to support earlier effective date for veteran's rating of total disability based on individual unemployability due to schizophrenia, since there was no evidence of treatment of veteran during year prior to date veteran applied for increased rating to establish factually ascertainable increase in disability. *Hunt v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1199 (U.S. App. Vet. Cl. Oct. 31, 2008)*.

Unpublished decision: Veteran provided examiner with information examiner allegedly would have found had veteran's medical records been available. His complaints of giving way were clearly consistent with Board of Veterans' Appeals' award of separate 10 percent disability rating for instability of right knee; therefore, Board must have found his assertions of giving way to be probative, and it was not erroneous for examiner to rely on them in lieu of cited medical records. *Frye v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1203 (U.S. App. Vet. Cl. Oct. 29, 2008)*.

Unpublished decision: Board of Veterans' Appeals clearly erred in denying veteran increased disability rating for hemorrhoids, warranting remand, because Board failed to provide veteran with contemporaneous hemorrhoid examination pursuant to *38 USCS § 5103A* to determine current state of disability after veteran put Board on notice of worsening of his condition. *Lipps v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1212 (U.S. App. Vet. Cl. Oct. 27, 2008)*.

Unpublished decision: Board of Veterans' Appeals' decision not to request medical examination as to veteran's lumbar spine disability claim was arbitrary and capricious where BVA found that he had not mentioned his back during examination conducted one year after his discharge, despite his specific statement during that examination that he had experienced back pains, and evidence suggested that veteran had raised same complaint while in service. *Cruse v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1216 (U.S. App. Vet. Cl. Oct. 16, 2008)*.

Unpublished decision: Veteran's hypertension claim was remanded where Board of Veterans' Appeals relied on VA medical examination that regional office had deemed insufficient for rating purposes. *Cruse v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1216 (U.S. App. Vet. Cl. Oct. 16, 2008)*.

Unpublished decision: Examination report with no rationale for its conclusion as to post-service noise exposure was insufficient for Board of Veterans' Appeals to make fully informed decision; examination was especially lacking given that examiner attributed veteran's hearing loss to noise exposure; however, other than veteran's assertions of noise exposure during service, examiner did not note or opine as to post-service activity that could have led to even inference of noise exposure sufficient to cause hearing loss. *Premo v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1232 (U.S. App. Vet. Cl. Nov. 3, 2008)*.

Unpublished decision: Board of Veterans' Appeals erred in failing to address veteran's testimony at 2006 hearing that his knee had gotten worse, his knee buckled, and he was very careful based on that instability because statements indicated that veteran's condition had changed after his 2003 medical examination and could have been sufficient to trigger duty of VA under *38 USCS § 5103A(d)(2)* to provide new medical examination. *Roberson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1238 (U.S. App. Vet. Cl. Oct. 27, 2008)*.

Unpublished decision: Reasons and bases of Board of Veterans' Appeals were inadequate under *38 USCS § 7104(d)(1)* to support denial of service connection for back disability and warranted remand for examination under *38 USCS § 5103A(d)(2)* because it failed to discuss whether medical examination was necessary to decide claim for back disability, erroneously relied on its own unsubstantiated medical opinion and no medical evidence to support its medical conclusion that in-service incurrence of back disability was acute in nature, and erroneously rejected VA medical opinion that it found to be mere recitation of veteran's self-reported lay history without finding that such history was inaccurate or contradicted by other facts present in record. *Pate v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1244 (U.S. App. Vet. Cl. Oct. 15, 2008)*.

Unpublished decision: Board of Veterans' Appeals did not err in determining that new medical examination for veteran in his service-connection claim for compensable disability ratings for service-connected right ear hearing loss was unnecessary because there were no other statements or documents in record that indicated that veteran's hearing had worsened beyond what was shown in his last examination. *Tansil v. Nicholson, 2008 U.S. App. Vet. Claims LEXIS 1313 (U.S. App. Vet. Cl. Oct. 31, 2008)*.

Unpublished decision: Board of Veterans' Appeals did not err in relying on Veterans Affairs audiology examiner's opinion to deny veteran's tinnitus claim because opinion was based upon all of pertinent service records and contained supporting rationale, including that onset of veteran's tinnitus after service and its mildness weighed against finding that it was related to service. *Smeth v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1335 (U.S. App. Vet. Cl. Nov. 12, 2008)*.

Unpublished decision: Veteran had not satisfied low threshold for proof of nexus that would have mandated VA medical examination where there was no evidence of nexus between sleep apnea and Agent Orange, medical opinion that veteran's myasthenia gravis could have been result of toxic or chemical exposure was too speculative and nonspecific, medical opinion provided no references to literature, research, or any other basis for its tentative assertion that veteran's myasthenia gravis could be result of Agent Orange exposure, and veteran's Internet material suggested only that dioxins, impurity in Agent Orange, could cause problems with immune system. *Rodrigue v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1355 (U.S. App. Vet. Cl. Nov. 20, 2008)*.

Unpublished decision: Veteran was properly denied entitlement to service connection for degenerative joint disease because (1) physician's opinion was of little probative value since it was based on veteran's statements that veteran injured veteran's back in service, which Board of Veterans' Appeals determined were not credible, and (2) veteran did not establish any duty to seek clarification. *Roche v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1361 (U.S. App. Vet. Cl. Nov. 12, 2008)*.

Unpublished decision: Veteran was properly denied entitlement to service connection for residuals of carcinoma of left kidney, status post-nephrectomy, because Board of Veterans' Appeals did not err in relying on medical examination since veteran was afforded adequate examination because examiner clearly stated that veteran's claims file was reviewed in rendering opinion. *Massicci v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1372 (U.S. App. Vet. Cl. Mar. 17, 2008)*.

Unpublished decision: Where veteran was in airplane crash in 1961 and was denied service connection for lower spine disability, remand was required because Board of Veterans' Appeals (VA) and VA orthopedic surgeon failed to account for favorable evidence that supported veteran's claim; Board needed to consider and discuss on remand whether VA was to provide assistance in form of additional medical examination. *Miller v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1383 (U.S. App. Vet. Cl. Feb. 8, 2008)*.

Unpublished decision: Board of Veterans' Appeals did not err in not discussing entitlement to another VA examination to determine relationship between veteran's headaches and his service-connected sinusitis where there were VA opinions in record finding that his headaches were not caused by his sinusitis. *Breyer v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1398 (U.S. App. Vet. Cl. May 21, 2008)*.

Unpublished decision: Board of Veterans' Appeals' finding that VA examination was adequate was not clearly erroneous where opinion that it was unlikely that veteran's hearing loss or tinnitus was related to service was based on audiology examination, medical history provided by veteran, and review of claims file. *Quintanilla v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1404 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Board of Veterans' Appeals' failure to specifically discuss whether VA examination was needed on veteran's right arm disability claim was harmless error where veteran's record did not contain any basis for concluding that he had current right forearm or upper arm disability that may have been associated with service. *Quintanilla v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1404 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Remand was required for Board of Veterans' Appeals, in compliance with its *38 USCS § 5103A(a)* duty, to obtain doctor's opinion concerning medical etiology of veteran's cirrhosis where widow had testified that one of veteran's physicians told her that medication he was taking for his service-connected disabilities caused liver damage and that he was prescribing different medication because he saw signs of liver damage, that type of testimony did not require medical knowledge, medical record of that doctor's visit was consistent with widow's account, and thus, Board's finding concerning widow's testimony was erroneous. *Marshall v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1418 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Board of Veterans' Appeals' failure to explain why more contemporaneous medical evidence was not required in light of veteran's statements concerning his worsening condition frustrated judicial review; it therefore failed to provide adequate statement of reasons or bases as required by *38 USCS § 7104(d)(1)* for its determination that VA had complied with duty to assist under *38 USCS § 5103A(d)(1)*. *Hoke v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1422 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Board of Veterans' Appeals' decision denying veteran's claim for service connection for low back pain and right lumbosacral radiculopathy was vacated because VA did not provide veteran with medical examination to evaluate his claim seeking disability benefits; veteran's claim that he was required to perform heavy lifting while he was on active duty during Korean War, suffered back pain since that time. and received treatment from private physician after he left Air Force was sufficient under *38 USCS § 1154* to establish service-connected injury, and met threshhold established by *38 USCS § 5103A(d)(2)* and *38 CFR § 3.159(c)(4)(i)* for providing veteran with medical evaluation. *Blake v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1432 (U.S. App. Vet. Cl. Dec. 2, 2008)*.

Unpublished decision: Board of Veteran's Appeals' statement that service and other medical records and lay statements were associated with file, that it was not aware more evidence was needed, and that appellant veteran had provided all evidence he could find, did not establish that Board satisfied *38 USCS § 5103A*'s duty to assist, and on remand under *38 USCS § 7104*, Board was to either afford veteran, for each of his claimed conditions, VA medical examination or opinion by qualified expert, or explain adequately why he was not entitled to such assistance. *Sims v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1470 (U.S. App. Vet. Cl. Apr. 8, 2008)*.

Unpublished decision: Veteran's claim for compensation for post-traumatic stress disorder (PTSD) based on alleged rape was properly denied because Board of Veterans' Appeals did not err in not ordering medical nexus opinion since there was no established in-service event as required by *38 USCS § 5103A(d)(2)(B)* because there was no corroboration of alleged assault. *Johnson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1473 (U.S. App. Vet. Cl. Apr. 1, 2008)*.

Unpublished decision: Secretary of Veterans Affairs was not required to provide veteran with any additional medical examinations for his claimed back condition because veteran had not established continuity of symptoms for back condition from his time in service from 1955 to 1957 and current back condition, and requirements of *38 CFR § 3.159(c)(4)(i)* had not been met. *Gusdorf v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1512 (U.S. App. Vet. Cl. Dec. 9, 2008)*.

Unpublished decision: In denying veteran's claim for service connection for peripheral neuropathy, Board of Veterans' Appeals' conclusion that medical examination was not necessary pursuant to *38 USCS § 5103A(d)(2)* was not erroneous because Board had sufficient grounds upon which to make decision on claim without obtaining medical examination, including that veteran's peripheral neuropathy was not clinically manifested until decades post service, and not within much shorter presumptive period provided by *38 CFR § 3.309(e)*. *Carver v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1547 (U.S. App. Vet. Cl. Nov. 11, 2008)*.

Unpublished decision: Because VA provided claimant with several thorough and contemporaneous medical examinations which took into account records of prior medical treatment, Board of Veterans' Appeals did not commit clear error in determining that VA had complied with its duty to assist him in developing his increased disability rating claim. Multiple VA examinations discussed how his service-connected shoulder disability affected his ability to work and his day-to-day life, and considered endurance, functional loss, and pain on use. *Johnson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1558 (U.S. App. Vet. Cl. Dec. 22, 2008)*.

Unpublished decision: Claimant argued there was evidence he suffered from runny nose while in service, and that this indicated his current disability may have been associated with service; this evidence may have been sufficient to establish in-service event, injury or disease, under prong two of McLendon test, but he had not demonstrated that it bore on anything after service, including his current sinus disability; determination that he was not entitled to medical examination for his sinus disability was not arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. *Johnson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1558 (U.S. App. Vet. Cl. Dec. 22, 2008)*.

Unpublished decision: Because medical record dated September 10, 2003 was present in record, appellant veteran's argument that Board of Veterans Appeals failed to assist him in obtaining record was without merit. *Laketa v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1585 (U.S. App. Vet. Cl. Dec. 30, 2008)*.

Unpublished decision: Because records of treatments related to appellant veteran's severe headaches, nerves and excessive drinking, and to concussion he suffered in 1940s were not potentially relevant to veteran's claim for increased rating for pes planus, or for his claims for secondary service connection for low back disability and foot fracture, and court found no error in failure to obtain those records. *Laketa v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1585 (U.S. App. Vet. Cl. Dec. 30, 2008)*.

Unpublished decision: Taking account rule of prejudicial error under *38 USCS § 7261(b)*, any error pursuant to *38 USCS § 7104(d)(1)* in Board of Veterans' Appeals' failure to specifically explain why VA provided no medical examination for veteran's arthritis claims was harmless because evidence did not trigger VA's duty to provide that examination under *38 USCS § 5103A(d)*; there was no medical evidence indicating nexus or lay or medical evidence showing continuity of symptomotology. *Simundson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1601 (U.S. App. Vet. Cl. Dec. 31, 2008)*.

Unpublished decision: Secretary of Veterans Affairs erred in his *38 USCS § 5103A* duty to38/5103 assist by unfairly limiting field of inquiry in VA medical examination; scope of examiner's review was limited to matter of whether veteran's headaches were caused by wearing hard hats while in service, rather than whether there was aggravation of his preexisting headache condition. *Bracey v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1604 (U.S. App. Vet. Cl. Dec. 31, 2008)*.

Unpublished decision: Board of Veterans' Appeals erred in its determination that medical examination was not necessary under *38 USCS § 7261(a)(3)(A)* because evidence indicating that veteran's scoliosis could have been aggravated by basic training was

sufficient to cause VA to provide veteran with medical examination under *38 USCS § 5103A(d)(2)*. *Reliford v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1610 (U.S. App. Vet. Cl. Dec. 31, 2008)*.

Unpublished decision: Veterans Affairs (VA) was properly found to have complied with its duty to assist under *38 USCS § 5103A(d)(1)* because veteran's evidence that his post-traumatic stress disorder had worsened after his last VA examination did not demonstrate that veteran had persistent thoughts of harming others, and was consistent with examiner's report of no sustained homicidal ideation, especially given that examiner noted veteran's propensity towards anger. *Mayfield v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1614 (U.S. App. Vet. Cl. Dec. 31, 2008)*.

Unpublished decision: VA examination was inadequate under *38 USCS § 5103A* as to veteran's back claim because there was no indication that examiner reviewed claims file and examiner failed to provide rationale for his conclusion where examiner did not explain why he was unable to determine whether it was as likely as not any current back condition was caused by veteran's service-connected disability. *Clark v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1628 (U.S. App. Vet. Cl. Dec. 23, 2008)*.

Unpublished decision: VA examination was inadequate under *38 USCS § 5103A* as to veteran's claim for entitlement to compensable initial disability rating for scars because although veteran told examiner that he had pain, examiner, without further discussion, indicated that scars were non tender; in addition, examiner did not have veteran's claims file. *Clark v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1628 (U.S. App. Vet. Cl. Dec. 23, 2008)*.

Unpublished decision: Veteran's failure to adduce any evidence that his current hypertension and depression conditions were associated with his military service afforded adequate basis for decision by Board of Veterans' Appeals that VA did not breach its duty pursuant to *38 USCS § 5103A* to assist veteran by providing medical nexus examination. *Griffith v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1632 (U.S. App. Vet. Cl. Dec. 23, 2008)*, remanded, *2009 U.S. App. Vet. Claims LEXIS 1112 (U.S. App. Vet. Cl. June 25, 2009)*.

Unpublished decision: Board of Veterans' Appeals denial of benefits was proper where claimant was provided notice of evidence needed to substantiate his claim pursuant to *38 USCS § 5103(a)*, or alternatively, any notice error was harmless, and where Veterans Affairs complied with its duty to assist claimant and need not provide current medical examination, under *38 USCS § 5103A*. *Felder v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1634 (U.S. App. Vet. Cl. Dec. 23, 2008)*.

Unpublished decision: Board of Veterans' Appeals erred under *38 USCS § 5103A* in relying on medical opinion, which stated that there was no factual evidence in veteran's service medical records to support diagnosis of acute rheumatic fever during his period of military service, to deny veteran's widow service connection for cause of his death because opinion was based on inaccurate factual premise that veteran never suffered from both fever and tiredness or fatigue at same time. *Stout v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1645 (U.S. App. Vet. Cl. Aug. 28, 2008)*.

Unpublished decision: There is no requirement in *38 USCS § 5103A(d)* that medical examination must necessarily be obtained when medical opinion would provide Secretary of Veterans Affairs with sufficient information to decide claim; therefore, Board of Veterans' Appeals was not "arbitrary or capricious" in determining that medical opinion was sufficient to satisfy duty to assist because veteran did not explain how opinion was insufficient to provide Secretary with enough information to make decision on his neck and back claims. *Orena v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1648 (U.S. App. Vet. Cl. Aug. 26, 2008)*, aff'd, *356 Fed. Appx. 396, 2009 U.S. App. LEXIS 27079 (Fed. Cir. 2009)*.

Unpublished decision: Board of Veterans' Appeals was not arbitrary and capricious in concluding that Secretary of Veterans Affairs had no duty to obtain medical examination or opinion as to veteran's shoulder claim because there was no evidence of persistent or recurrent pain specific to shoulder or diagnosis of should disability. *Orena v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1648 (U.S. App. Vet. Cl. Aug. 26, 2008)*, aff'd, *356 Fed. Appx. 396, 2009 U.S. App. LEXIS 27079 (Fed. Cir. 2009)*.

Unpublished decision: Additional medical examination was not required because veteran had undergone complete evaluation for his claimed sinusitis condition in October 2001 and there was no evidence that veteran had current diagnosis of sinusitis or other reason for additional evaluation. *Dunaway v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1664 (U.S. App. Vet. Cl. Aug. 29, 2008)*.

Unpublished decision: Board of Veterans' Appeals erred in finding that medical examination was adequate under *38 USCS § 5103A*; although examiner attempted to provide answer, no clear meaning was discernable in his stated conclusion; furthermore, inasmuch as examiner stated that he was unable to determine whether veteran's paraplegia was caused by his service-connected knee disability, he did not provide sufficient support for this conclusion. *Diederich v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1670 (U.S. App. Vet. Cl. Aug. 21, 2008)*.

Unpublished decision: With respect to veteran's hip disability claim, VA failed to fulfill its duty to assist where it did not obtain examination that adequately accounted for pain on motion; when Board of veterans' Appeals recognized that there was no evidence of record discussing effect of pain on motion, it should have sought medical opinion that adequately considered provisions of *38 CFR §§ 4.40* and *4.45 (2007)* and case law. *Reynolds v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1687 (U.S. App. Vet. Cl. June 24, 2008)*.

Unpublished decision: With respect to veteran's dysthymic disorder disability claim, VA failed to fulfill its duty to obtain all relevant records where even if veteran had suggested that he had no additional evidence to submit in earlier assertion, his later testimony identifying additional evidence that might have supported his claim superseded that earlier assertion. *Reynolds v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1687 (U.S. App. Vet. Cl. June 24, 2008)*.

Unpublished decision: Board of Veterans' Appeals' discussion of its finding that VA complied with its duty to assist by declining to provide medical examination under *38 USCS § 5103A(d)* was inadequate pursuant to *38 USCS § 7104(d)(1)* because Board rejected veteran's lay evidence regarding etiology of his hand scar without assessing its credibility or probative value; Board improperly disregarded veteran's statements based on absence of corroborating medical evidence, and its reasoning was incorrect as matter of law. *Gustavis v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1689 (U.S. App. Vet. Cl. May 22, 2008)*.

Unpublished decision: Veteran was not entitled to medical examination under *38 USCS § 5103A(d)* for cervical spine disability because Board of Veterans' Appeals adequately addressed credibility of veteran's testimony and determined that it was not credible; thus, testimony was not sufficient to establish that injury might have been associated with service; Board provided adequate reasons or bases to support its conclusion under *38 USCS § 7104(d)*. *Johnston v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1698 (U.S. App. Vet. Cl. Sept. 23, 2008)*.

Unpublished decision: It was simply not plausible that examination performed 17 years ago could adequately have assessed present level of veteran's disability, particularly in light of his assertions that his headaches had increased to level where they were no longer relieved by medication and had required him to withdraw from graduate school; although he presently received total disability rating due to unemployability benefits, he was also entitled to contemporaneous medical examination to assess current effect of his migraine headaches upon employability, *38 USCS § 5103A(d)(1)*. *Bell v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1699 (U.S. App. Vet. Cl. Aug. 22, 2008)*, remanded, *2011 U.S. App. Vet. Claims LEXIS 2695 (U.S. App. Vet. Cl. Dec. 9, 2011)*.

Unpublished decision: Board of Veterans' Appeals erred in failing to explain why claimant was not entitled to medical opinion where, first, contrary to Board's conclusion, he had been diagnosed with tinnitus, and, second, there seemed to be some evidence to suggest that his tinnitus may have been associated with in-service event; specifically, throughout his appeal, he asserted that his symptoms of tinnitus began in service after various explosions; however, Board failed to consider whether his assertions were adequate under low threshold articulated in *McLendon v. Nicholson, 20 Vet.App. 79 (2006)* to trigger duty to perform additional medical examination. *Sola v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1701 (U.S. App. Vet. Cl. Aug. 20, 2008)*.

Unpublished decision: Examiner concluded that based on veteran's record, military history and evaluations, he could find no stressors nor any reason to diagnose post-traumatic stress disorder (PTSD); furthermore, examiner did not explain whether his findings were based on lack of verification of stressors, or on other criteria of Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994); moreover, it was unclear whether examiner considered veteran's September 2001 statement attesting to his PTSD stressors, given that examiner did not discuss several stressors mentioned by veteran; such deficiencies rendered examination inadequate. *Sola v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1701 (U.S. App. Vet. Cl. Aug. 20, 2008)*.

Unpublished decision: VA medical examination was adequate where examiner considered possibility that veteran's current shoulder condition was related to his inservice accident, but rejected connection based on likelihood that it was more likely result of his postal worker job, and examiner described veteran's disability in sufficient detail so that Board of Veterans' Appeals' evaluation was fully informed. *Gomez v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1710 (U.S. App. Vet. Cl. Oct. 9, 2008)*, remanded, *2012 U.S. App. Vet. Claims LEXIS 746 (U.S. App. Vet. Cl. Apr. 18, 2012)*.

Unpublished decision: Because appellant veteran's medical report on follow-up examination did not indicate his back and leg symptoms were materially worse than those noted in earlier 2004 VA medical examination, appellee Board of Veterans' Appeals did not fail to comply with *38 USCS § 5103A* by not providing new examination for request for increased disability benefits. *Daniels v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1718 (U.S. App. Vet. Cl. Nov. 24, 2008)*.

Unpublished decision: January 1999 medical opinion was inadequate because examiner did not discuss any information from veteran's claims file relating to whether his non-Hodgkin's lymphoma was principal or contributory cause of death, did not account for evidence that seems to contradict January 1999 opinion, and inaccurately stated that there were no current findings or evidence of recurrence of his lymphoma; further, examiner did not explain his conclusion that veteran's non-Hodgkin's lymphoma or its treatment was not principal or contributory cause of his death nor adenocarcinoma of cecum, despite potentially contradictory medical evidence. *Travis v. Peake, 2009 U.S. App. Vet. Claims LEXIS 28 (U.S. App. Vet. Cl. Jan. 15, 2009)*.

Unpublished decision: It was not error for Board of Veterans' Appeals to rely on 2002 medical examination when determining whether or not veteran's psychiatric condition was service connected because VA examiner reviewed service records, correctly concluded that veteran did not report depression symptoms while in service, and veteran's in-service diagnosis of paranoid schizophrenia was probably not related to his current claim for depression. *Taylor v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 48 (U.S. App. Vet. Cl. Jan. 26, 2009)*.

Unpublished decision: Veteran was not entitled to new medical examination under *38 USCS § 5103A(d)(2)* for irritable bowel syndrome with gastroesophageal reflux disease after being awarded service connection for diabetes milletus, since there was no evidence that veteran's condition worsened since prior examination or that condition was related to service-connected diabetes. *Altwine v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 52 (U.S. App. Vet. Cl. Jan. 26, 2009)*.

Unpublished decision: Determination by Board of Veterans' Appeals that Secretary of Veterans Affairs fulfilled his duty to assist by providing adequate medical examination under *38 USCS § 5103A* was not clearly erroneous under *38 USCS § 7261(a)(4)*; VA medical examiner did provide diagnosis of chronic low back pain, however, neither he nor independent medical examiner was able to determine etiology of that pain nor could either examiner relate pain to veteran's service without resorting to speculation. *Jackson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 71 (U.S. App. Vet. Cl. Jan. 30, 2009)*.

Unpublished decision: Taken together, independent medical examiner's opinions were adequate, if inconclusive, and rationale for his failing to conclusively identify etiology of veteran's liver conditions was clear, i.e., there simply was no extant evidence that would have allowed for such determination; Board of Veterans' Appeals, therefore, was correct in noting that any further development in nature of additional medical opinion would have served no useful purpose; Secretary of Veterans Affairs complied with his duty to provide medical opinion that was adequate for rating purposes. *Daino v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 81 (U.S. App. Vet. Cl. Feb. 2, 2009)*.

Unpublished decision: Medical examination was warranted directed toward classifying and evaluating frequency of veteran's seizures, since finding that veteran experienced no seizures in period prior to assigned effective date of disability was based on inconclusive or even speculative medical reports, and there was no medical evidence concerning whether veteran's seizures were major or minor for rating purposes. *Mynhier v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 82 (U.S. App. Vet. Cl. Feb. 2, 2009)*.

Unpublished decision: Secretary of Veterans Affairs had not violated duty to assist by failing to provide veteran with compensation and pension examination where Board of Veterans' Appeals had considered veteran's statements and determined that there was no credible evidence that he was actually exposed to Agent Orange while offshore, and veteran had not articulated any inservice injury that required medical nexus opinion under *38 USCS § 5103A(d)*. *Holliday v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 93 (U.S. App. Vet. Cl. Feb. 9, 2009)*.

Unpublished decision: Medical examinations were not adequate for purposes of *38 USCS § 5103A* because they did not discuss veteran's disabilities in sufficient detail so that determination could be made whether his tinnitus and vertigo were related to his service-connected ear disabilities. *Silva v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 97 (U.S. App. Vet. Cl. Feb. 9, 2009)*.

Unpublished decision: VA examinations on which Board of Veterans' Appeals relied were inadequate for rating purposes, pursuant to *38 USCS § 5103(A)* and *38 CFR § 3.159(c)*, because examiners failed to elicit any information or make any determinations concerning functional effects of veteran's disability on his daily activities, particularly his ability to work. *Lamprey v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 107 (U.S. App. Vet. Cl. Feb. 13, 2009)*.

Unpublished decision: Board of Veterans' Appeals did not comply with duty to assist veteran in obtaining evidence necessary to substantiate his claims, pursuant to *38 USCS § 5103A(d)*, because, although it concluded that assistance obligations of VA were not met, Board erred by not discussing whether VA medical examination or opinion was necessary to adjudicate claim for compensable rating for hearing loss and service connection for degenerative joint disease. *Mitchell v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 114 (U.S. App. Vet. Cl. Feb. 13, 2009)*.

Unpublished decision: Disregarding medical examination which was not preceded by review of veteran's claims file or service medical records was inappropriate response to inadequate medical examination in denying veteran's claim of service connection for diabetes mellitus from claimed exposure to Agent Orange in Vietnam, since duty to assist veteran required thorough and contemporaneous medical examination. *Fleischer v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 115 (U.S. App. Vet. Cl. Feb. 13, 2009)*.

Unpublished decision: Board of Veterans' Appeals provided adequate reasons or bases under *38 USCS § 7104(d)(1)* for relying on opinions of VA, which stated that it was unlikely that veteran's cataract and glaucoma could be attributed to exposure to ionizing radiation in service, over opinion of another doctor that radiation exposure could impair eyes' ocular structure because physical examination of veteran was not required under *38 USCS § 5103A(d)*, examiners based their analyses on radiation dose assessment and established medical principles, and other doctor provided no rationale for his opinion. *Pritchett v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 119 (U.S. App. Vet. Cl. Feb. 13, 2009)*.

Unpublished decision: While no single VA examination report might have been model of completeness with respect to regulatory requirements, three medical examinations collectively gave clear picture of veteran's disabilities and therefore satisfied duty to assist under *38 USCS § 5103A*. *Cox v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 176 (U.S. App. Vet. Cl. Feb. 27, 2009)*.

Unpublished decision: Board of Veterans' Appeals erred in failing to ensure that VA complied with its duty to assist under *38 USCS § 5103A*; while VA provided hepatitis examination, examiner failed to review veteran's medical records and was unable to opine as to whether veteran's hepatitis was related to service; thus, examination was inadequate. *Ali v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 185 (U.S. App. Vet. Cl. Mar. 2, 2009)*.

Unpublished decision: Veteran was properly denied new VA hearing examination because factor of exposure to acoustic trauma in service already had been considered by VA examiner and Board of Veterans' Appeals discussed veteran's assertions that he suffered hearing loss shortly after his service from 1944 to 1946, but noted that his separation physical examination report showed that his hearing was 15/15, bilaterally, based on whispered and spoken voice tests, and that earliest and only objective evidence of hearing disability was recorded in 2005. *Singer v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 192 (U.S. App. Vet. Cl. Mar. 6, 2009)*.

Unpublished decision: Board of Veterans' Appeals did not err in relying on adequate VA hearing examination because it was based on findings that veteran had normal hearing upon separation from service, hearing loss and tinnitus were not recorded in his military records, he engaged in recreational hunting, and lack of objective evidence of hearing loss until many years after service was probative evidence regarding onset. *Singer v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 192 (U.S. App. Vet. Cl. Mar. 6, 2009)*.

Unpublished decision: Secretary of Veterans' Affairs had satisfied his duty to provide veteran with medical examination when he provided two audiological evaluations with VA examiners and evidence was sufficient so that Board could apply

impairment rating tables set forth in *38 CFR § 4.85*. *Dees v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 194 (U.S. App. Vet. Cl. Mar. 6, 2009)*.

Unpublished decision: VA breached its duty to assist under *38 USCS § 5103A* because veteran had adequately identified certain records including records of private medical treatment that he believed were relevant to VA's consideration of his disability claims, with result that VA was obligated to make effort to obtain records and to advise veteran accordingly if they could not be obtained so that efforts to obtain other evidence could be made. *Taylor v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 197 (U.S. App. Vet. Cl. Mar. 6, 2009)*.

Unpublished decision: Board of Veterans' Appeals was not clearly erroneous in finding that duty of Secretary of Veterans Affairs to assist was satisfied, absent VA medical examination, because, since medical evidence indicated that he was not currently prescribed insulin, his service-connected diabetes did not require it and sufficient medical evidence existed to make decision as to correct disability rating under *38 USCS § 5103A(d)(2)*. *Moore v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 202 (U.S. App. Vet. Cl. Mar. 4, 2009)*.

Unpublished decision: Assertion that veteran did not complain that back condition had worsened to warrant new medical examination to support claim for higher disability rating was insufficient to support finding of compliance with duty to assist veteran under *38 USCS § 5103A(d)(1)*; reliance on three-year-old examination was not warranted in view of veteran's statement that back condition impacted veteran's day-to-day life more than disability rating reflected, and statement revealed more severe symptomatology than that reported in prior examination. *Lesmeister v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 213 (U.S. App. Vet. Cl. Mar. 5, 2009)*.

Unpublished decision: Finding that veteran's cause of death from liver disease was related to noncompensable alcohol abuse relied upon inadequate medical opinion, since opinion stated that possibilities other than alcohol abuse could have caused veteran's death, but failed to provide any explanation for conclusory statement that other possibilities could not be service-related. *Traeg v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 269 (U.S. App. Vet. Cl. Mar. 10, 2009)*.

Unpublished decision: Board of Veterans' Appeals failed to provide adequate statement of reasons or bases under *38 USCS § 7104(d)(1)* to support its finding that VA examination was unnecessary and should have addressed whether etiological opinion was required, especially in light of veteran's testimony that he experienced tingling since service and medical reports relating his peripheral neuropathy to exposure to chemicals. *Clark v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 320 (U.S. App. Vet. Cl. Mar. 10, 2009)*.

Unpublished decision: VA medical examination was not required for pneumonia where there was no competent evidence of record that demonstrated that veteran currently suffered from symptoms or residuals of pneumonia and her medical records did not reveal any treatment for pneumonia during her periods of active duty or Reserve service. *Klein v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 326 (U.S. App. Vet. Cl. Mar. 12, 2009)*.

Unpublished decision: VA medical examination of veteran's right knee was inadequate where examiner failed to opine whether veteran's right knee strain was aggravated by his service-connected ankle conditions. *DuHart v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 334 (U.S. App. Vet. Cl. Mar. 13, 2009)*.

Unpublished decision: VA medical opinion that Board of Veterans' Appeals relied upon to deny veteran's claim for service connection for hepatitis C was inadequate where it did not address veteran's risk factors and behaviors in relation to etiology of his hepatitis C. *Doerschlag v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 358 (U.S. App. Vet. Cl. Mar. 16, 2009)*.

Unpublished decision: Board of Veterans' Appeals was required on remand to consider whether another VA medical opinion was required to determine etiology of veteran's delusional disorder and depression in light of first VA medical opinion that it was "possible" they began in service under *38 USCS § 5103A(d)*. *Chadwick v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 379 (U.S. App. Vet. Cl. Mar. 18, 2009)*, remanded, *2011 U.S. App. Vet. Claims LEXIS 1878 (U.S. App. Vet. Cl. Sept. 6, 2011)*.

Unpublished decision: Pursuant to *38 USCS § 5103A*, Board of Veterans' Appeals did not err in relying upon VA medical examination where it was unclear what veteran asserted as his current neurologic dysfunction, but examiner opined as to exacerbation of radiculopathy and residuals in shoulder, back, arms, and lower extremities and recorded that veteran's

symptoms did not change after he bumped his head while in training. *Lemon v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 404 (U.S. App. Vet. Cl. Mar. 23, 2009)*.

Unpublished decision: Board of Veterans' Appeals did not err in finding VA medical opinions more probative than private medical opinions where VA medical examiner took into account veteran's reported history of noise exposure and use of protective equipment both during and after his service, but private opinions did not address his audiograms showing normal hearing following report of hearing loss, and as result, Board found that VA opinions considered veteran's complete and accurate history and were accompanied by detailed rationales. *Helmer v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 411 (U.S. App. Vet. Cl. Mar. 24, 2009)*.

Unpublished decision: Veteran's claims of emphysema and pulmonary fibrosis were to be remanded for additional development where Board of Veterans' Appeals did not address whether those conditions could have been associated with veteran's nicotine addiction, as one medical examination indicated, thereby failing to address need for medical nexus examination in regard to service connection. *Maida v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 455 (U.S. App. Vet. Cl. Mar. 27, 2009)*.

Unpublished decision: There was no merit to veteran's claims that VA mental disorders examination he received to determine extent of his service-connected panic disorder was inadequate because it was conducted during inactive phase of his disorder, or that Board of Veterans' Appeals' decision upholding VA's award of 50% disability rating was deficient because it failed to consider whether veteran was entitled to extraschedular consideration; veteran had not pointed to any evidence in record that suggested his panic disorder had history of remission and recurrence, such that duty to assist under *38 USCS § 5103A* required VA to conduct examination during active, as opposed to inactive, phase. *Christopher v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 456 (U.S. App. Vet. Cl. Mar. 27, 2009)*.

Unpublished decision: Current diagnosis was not only way to establish first McLendon element and in this regard Board of Veterans' Appeals imposed wrong standard for evaluation of medical examination; Board failed to discuss symptoms that veteran reported as recurrent and ongoing and failed to assess whether those symptoms were evidence of current disability and, absent discussion of this evidence, its decision to deny medical examination was not supported by adequate statement of its reasons or bases and frustrated judicial review. *Tardy-Zimmerman v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 466 (U.S. App. Vet. Cl. Mar. 27, 2009)*.

Unpublished decision: Veteran did not state any event or injury in service to which migraine headaches or tinnitus could be related; evidence did show treatment for migraines and stress headaches, as well as lay assertions of hearing problem, but there was no indication of cause related to service and she did not offer theory of causation; thus, there was no basis to find that Board of Veterans' Appeals' decision was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law in relation to finding no examination was warranted for these claims. *Tardy-Zimmerman v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 466 (U.S. App. Vet. Cl. Mar. 27, 2009)*.

Unpublished decision: Because medical examiner failed to consider veteran's lay statements regarding his continuity of symptomatology when providing rationale behind his opinion, examination was inadequate; in addition, February 2006 medical examination was inadequate because it appeared to rely on absence of corroborating evidence in contemporaneous service records to rationalize its opinion that there was no connection between veteran's current condition and service. *Reaves v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 468 (U.S. App. Vet. Cl. Mar. 26, 2009)*.

Unpublished decision: Where claimant for veterans disability benefits presented lay statements describing his stomach condition in terms other than stating it was hernia, Board of Veterans' Appeals erred when it failed to find there was insufficient competent medical evidence to decide claim, and duty to assist under *38 USCS § 5103A* was implicated. *Van Wey v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 471 (U.S. App. Vet. Cl. Mar. 26, 2009)*.

Unpublished decision: Medical examination under *38 USCS § 5103A(d)(2)* was not necessary in veteran's claim for VA benefits for emphysema because there was no evidence tending to show that his current disability might have been linked to in-service event. *Maier v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 548 (U.S. App. Vet. Cl. Apr. 2, 2009)*.

Unpublished decision: Conclusion that medical examination to determine onset of diabetes was not necessary under *38 USCS § 5103A(d)* was not arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law because, assuming arguendo, that onset date was 1966 and not 1971, it did not help veteran's claim when he left service in 1963, three years before potential 1966 onset date, and Board of Veterans' Appeals did not clearly err in finding that evidence indicating that diabetes began before he left service in 1963 was not credible. *Gardin v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 603 (U.S. App. Vet. Cl. Apr. 14, 2009)*, remanded, *613 F.3d 1374, 2010 U.S. App. LEXIS 14670 (Fed. Cir. 2010)*.

Unpublished decision: It was error for Board of Veterans' Appeals to deny veteran's claim for tinnitus based on VA medical examination because examiner did not offer opinion concerning cause of veteran's tinnitus. *Glew v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 616 (U.S. App. Vet. Cl. Apr. 16, 2009)*.

Unpublished decision: VA failed to fulfill its duty to assist under *38 USCS § 5103A(d)(1)* because examiner's failure to address issue of whether veteran's condition developed to compensable degree within presumptive period of *38 CFR §§ 3.307* and *3.309* rendered opinion inadequate, and Board of Veterans' Appeals erred in relying on it. *Blackwell v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 634 (U.S. App. Vet. Cl. Apr. 20, 2009)*.

Unpublished decision: Board of Veterans' Appeals did not adequately address whether or not medical examination was needed for veteran's complaints of back and neck pain that veteran claimed were aggravated in service. *Anoai v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 643 (U.S. App. Vet. Cl. Apr. 20, 2009)*, remanded, *2013 U.S. App. Vet. Claims LEXIS 1441 (U.S. App. Vet. Cl. Aug. 28, 2013)*.

Unpublished decision: Contrary to requirements of *38 USCS § 7104(d)(1)*, Board of Veterans' Appeals improperly failed to discuss whether medical examination was warranted under *38 USCS § 5103A(d)(2)* for veteran's claims for service connection for rectal bleeding, prostatitis, and gastroesophageal reflux disease (GERD); his service medical records reflected complaints of those conditions, while post-service medical records reflected diagnosis of rectal bleeding, GERD, and prostate condition. *Allen v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 684 (U.S. App. Vet. Cl. Apr. 23, 2009)*.

Unpublished decision: Given that eye examiner conducted physical examination of veteran's eyes, there was no merit in veteran's argument that examination was limited to testing for residuals of conjunctivitis that affected his vision; court was simply not persuaded that eye examiner's conclusion was meant only to encompass visual measurements she recorded, and it was satisfied that examiner considered his complaints in reaching her conclusion that he was not currently suffering from any visual condition related to service. *Figueroa-Sanchez v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 687 (U.S. App. Vet. Cl. Apr. 23, 2009)*.

Unpublished decision: It appeared as though medical examiner relied on absence of corroborating evidence to discount any link between veteran's skin condition and service; thus, it was necessary for VA to furnish adequate medical examination. *Figueroa-Sanchez v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 687 (U.S. App. Vet. Cl. Apr. 23, 2009)*.

Unpublished decision: Decision of Board of Veterans' Appeals was adequate when Board had noted that portion of 2002 VA medical examination report was missing, Board thus ordered new examination in 2005, and Board relied on 2005 decision in making its decision that veteran was not entitled to compensable disability rating for his hearing loss. *Molignaro v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 702 (U.S. App. Vet. Cl. Apr. 24, 2009)*.

Unpublished decision: *38 USCS § 5103A(d)* did not require Board of Veterans' Appeals to obtain another medical examination of veteran in connection with his service-connection claim based on veteran's post-hearing submission of photographs and personal narrative relating to his in-service motor vehicle accident because veteran did not show why such items should have been reviewed by medical examiner or why failure to obtain such review rendered earlier examination inadequate. *Gebhardt v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 733 (U.S. App. Vet. Cl. Apr. 29, 2009)*.

Unpublished decision: It was not error for Board of Veterans' Appeals to conclude that Secretary of Veterans Affairs did not need to provide additional medical examination to veteran because Board concluded that veteran's evidence presented concerning service connected neck injury was not credible. *Kennedy v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 779 (U.S. App. Vet. Cl. May 4, 2009)*.

Unpublished decision: Because examination report relied upon by Board of Veterans' Appeals in veteran's lead-based paint claim did not mention confusion problems reported on hospital records and did not even consider hypothesis that veteran's mental and physical problems might have had their etiology in exposure to lead-based paint, Board failed to adequately support under *38 USCS § 7104(d)*1) its conclusion that medical examination was not required pursuant to *38 USCS § 5103A(d)(2)*. *Powers v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 788 (U.S. App. Vet. Cl. May 1, 2009)*.

Unpublished decision: May 2003 medical examination provided to veteran was to determine nature and severity of his service-connected facial scars; however, examiner focused only on scar on his left forehead and did not examine service-connected scar on his lower right lip; Secretary of Veterans Affairs conceded that examination was therefore inadequate for Board of Veterans' Appeals to use to rate both of his service-connected scars, which resulted in remand. *Gober v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 797 (U.S. App. Vet. Cl. May 8, 2009)*.

Unpublished decision: Board of Veterans' Appeals correctly determined that examination was unnecessary where there was no evidence of current diagnoses or persistent symptoms for hip pain, sleep difficulty, or alcoholism, and without any indication of inservice injury or current disability, VA was not obligated to obtain medical examination of veteran. *Johnson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 800 (U.S. App. Vet. Cl. May 11, 2009)*.

Unpublished decision: Board of Veterans' Appeals failed to provide adequate statement of its reasons or bases for failing to obtain physical examination to determine if veteran's current arteriovenous malformation could have been incurred in or aggravated by service where veteran had reported headaches in service, and there was some evidence that he continued to experience brain problems. *Johnson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 800 (U.S. App. Vet. Cl. May 11, 2009)*.

Unpublished decision: Inasmuch as possibility that veteran husband's soft tissue sarcoma could encompass glioblastoma multiforme was not reasonably raised below by surviving spouse, it was not error for Board of Veterans' Appeals to not seek medical examination with regard to that issue. *Pacheco v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 821 (U.S. App. Vet. Cl. May 12, 2009)*.

Unpublished decision: Although veteran appeared to argue that May 23, 1990, VA psychiatric examination was inadequate for rating purposes, it was this examination that led to current effective date for his 100 percent post-traumatic stress disorder (PTSD) rating; because this examination was favorably construed as claim for increased rating and Board found that it was report from this examination that established that his PTSD warranted 100 percent rating, it was unclear how any inadequacy in this examination was unfavorable to his claim or could have led to earlier effective date for his 100 percent PTSD rating. *Warren v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 843 (U.S. App. Vet. Cl. May 18, 2009)*.

Unpublished decision: On remand, regional office had determine whether appellant veteran was entitled to Veterans Administration (VA) medical examination or opinion with respect to her claim for service connection for right ankle disability, as determination of whether veteran's lay evidence was competent was question of fact to be decided by VA in first instance. *Smith v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 881 (U.S. App. Vet. Cl. May 26, 2009)*, reh'g denied, *2009 U.S. App. Vet. Claims LEXIS 1769 (U.S. App. Vet. Cl. Oct. 7, 2009)*, aff'd, *422 Fed. Appx. 888, 2011 U.S. App. LEXIS 10058 (Fed. Cir. 2011)*.

Unpublished decision: Board of Veterans' Appeals relied on inadequate medical examination to deny entitlement to benefits for hearing loss and tinnitus because (1) report was speculative in nature and provided absolutely no authority for its conclusion that noise exposure did not cause low frequency hearing loss; (2) court could not see how Board could have relied on conclusion from medical examiner when examiner did not explain how veteran's demonstrated hearing loss in service was unrelated to his current sensorineural hearing loss; (3) because conclusion reached by VA examiner was conclusory and unsupported, examination report was inadequate and Board erred in relying on it; and (4) examiner rested his conclusion that veteran's tinnitus was not related to service on his inadequate conclusion that veteran's hearing loss was not related to service. *Palmer v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 887 (U.S. App. Vet. Cl. May 22, 2009)*.

Unpublished decision: Board of Veterans' Appeals' determination that VA had satisfied its duty to assist with respect to veteran's claim for benefits for diabetes mellitus was not clearly erroneous because Board's determination that no medical examination was warranted for diabetes mellitus was not clearly erroneous because there was no evidence of connection between veteran's current diagnosis of diabetes and sugar found in his urine in March 1968. *Palmer v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 887 (U.S. App. Vet. Cl. May 22, 2009)*.

Unpublished decision: Board of Veterans' Appeals erred in not returning VA examination as inadequate with respect to its findings regarding asthmatic bronchitis because VA examination was clearly inadequate as it related to veteran's claim for asthmatic bronchitis because it did not contain test results, and Board's reliance on that examination to determine that compensable disability rating for that condition was not warranted was clearly erroneous. *Donaldson v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 897 (U.S. App. Vet. Cl. May 26, 2009)*.

Unpublished decision: Medical evaluation was adequate and provided sufficient basis to support findings of Board of Veterans' Appeals because audiologist reviewed claims file, noted veteran's complaints, noted medical history and history of exposure, and conducted diagnostic and clinical tests and concluded that hearing dysfunction was related to lifelong history with Eustachian tube difficulty. *Cunningham v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 903 (U.S. App. Vet. Cl. May 26, 2009)*.

Unpublished decision: With regard to veteran's total disability based on individual unemployability (TDIU) claim, VA did not comply with its duty to assist under *38 USCS § 5103A* because it failed provide adequate medical examination that accounted for effects of veteran's service-connected post-traumatic stress disorder (PTSD) on his employability; VA's request for PTSD examination ordered examiner to report current level of functional impairment due to service-connected PTSD, but examiner's conclusion failed to comment on how veteran's PTSD alone impacted his employment prospects. *Tondalo v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 919 (U.S. App. Vet. Cl. May 29, 2009)*.

Unpublished decision: Most significantly, independent medical examination (IME) opined that likelihood that veteran's hepatitis C was incurred during service was less than 20 percent; Board of Veterans' Appeals did not err in relying on this opinion to determine that it was less likely than not that his hepatitis was incurred in service; IME opinion was supported with sufficient rationale and explanation to be adequate for Board's conclusion, and therefore, determination that VA satisfied duty to assist was not clearly erroneous. *Galbraith v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 931 (U.S. App. Vet. Cl. May 29, 2009)*.

Unpublished decision: In widow's claim for dependency and indemnity compensation under *38 USCS § 1310*, Board of Veterans' Appeals did not err in determining that medical opinion was not required under *38 USCS § 5103A* because there was no competent evidence that veteran was diagnosed with post-traumatic stress disorder. *Luciano v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 933 (U.S. App. Vet. Cl. Feb. 27, 2009)*.

Unpublished decision: Although Board of Veterans' Appeals found that *38 USCS § 5103A* duty to assist had been satisfied, its statement of reasons or bases was inadequate to support that determination; with findings that there were competent lay statements in record that may have indicated that veteran's condition was worse than 10 percent rating assigned, Board should have considered whether retrospective medical examination was necessary. *Nickell v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 941 (U.S. App. Vet. Cl. May 29, 2009)*.

Unpublished decision: Veteran's contentions that VA' (VA) examiner failed to recognize that he was living in nursing care facility, had marital difficulties, and minimized his other health conditions were not supported by record; examiner specifically referenced May 2002 hospitalization in May 2003 examination report; accordingly, Board of Veterans' Appeals' reliance on May 2003 and May 2006 VA psychiatric examinations, and determination that that evidence satisfied *38 USCS § 5103A* duty to assist, were not clearly erroneous and its statement of reasons or bases was adequate. *Crawford v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 942 (U.S. App. Vet. Cl. May 29, 2009)*.

Unpublished decision: There was no evidence of asserted event in service and, even assuming, arguendo, in-service exposure to chemicals, there was no indication of medical nexus between any chemical exposure and veteran's current gastroesophageal reflux disease (GERD) condition; Board of Veterans' Appeals' findings of fact were supported by record and clearly explained; Board was not, therefore, arbitrary and capricious in its decision that no medical examination as to etiology of her GERD had to be obtained. *Sanders v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 986 (U.S. App. Vet. Cl. June 8, 2009)*.

Unpublished decision: Court agreed with veteran as to inadequacy of medical opinion; because examiner provided no rationale for its conclusion that veteran's current disability did not originate in service, Board of Veterans Appeals erred in failing to return examination as inadequate for rating purposes. *Smith v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1049 (U.S. App. Vet. Cl. June 18, 2009)*.

Unpublished decision: It was not error for Board of Veterans' Appeals to rely on findings of VA medical examiner and to conclude that veteran did not have service connected post-traumatic stress disorder (PTSD) because VA examiner did not improperly question veteran's combat history but instead concluded that veteran's symptoms did not meet diagnostic criteria for PTSD. *Adolf v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1085 (U.S. App. Vet. Cl. June 24, 2009)*.

Unpublished decision: Facts satisfied low threshold requiring medical examination where (1) there was no dispute that veteran had current diagnosis of hypertension, (2) anomalous blood pressure reading on discharge was in-service event, (3) Board of Veterans' Appeals noted that record was negative for medical opinion linking any current disorder to service, (4) nevertheless, anomalous blood pressure reading could have been symptom indicating that his current symptoms of hypertension were linked with service, and (5) Board did not discuss this evidence and court was unequipped to evaluate potential medical significance of blood pressure reading. *Griffith v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1112 (U.S. App. Vet. Cl. June 25, 2009)*.

Unpublished decision: Facts satisfied low threshold indication of nexus to require medical nexus opinion where (1) none of court's precedents precluded possibility that recollections of claimant could establish that condition was "noted" during service, (2) moreover, court's precedents did not require that condition noted in claimant's lay statements must be exactly same condition for which he has current diagnosis; especially in psychological diseases, symptoms of first indications of mental deterioration might be related to later symptoms, and (4) court was unequipped to exclude possibility that symptoms described in veteran's lay statements may not signal beginnings of mental disturbance that eventuated in presently diagnosed depression. *Griffith v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1112 (U.S. App. Vet. Cl. June 25, 2009)*.

Unpublished decision: Board of Veterans' Appeals' decision denying veteran entitlement to service connection for gastroesophageal reflux disease on secondary basis was vacated pursuant to *38 USCS § 5103A(d)(1)* where medical examination was inadequate and Board had relied solely on that examination to find no medical nexus between veteran's condition and his use of Synthroid. *Sysouvanh v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1136 (U.S. App. Vet. Cl. June 30, 2009)*.

Unpublished decision: Board of Veterans' Appeals' decision denying veteran's claim for service connection for hearing loss was clearly erroneous under *38 USCS § 5103A* where Board's remand decision had expressly directed examiner to consider and discuss service medical records, including undated audiogram, and subsequent medical examination report provided no explanation as to why audiogram was inadequate for interpretation. *Ehasz v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1155 (U.S. App. Vet. Cl. June 30, 2009)*.

Unpublished decision: Board of Veterans' Appeals erred in concluding that veteran was not entitled to medical examination under *38 USCS § 5103A(d)* because its statement was unclear as to whether veteran had current skin disability, although it noted medical reports of melanoma and basal cell carcinoma; if veteran had current skin disability, his statements of exposure to tropical sun and record of in-service skin ulcers were sufficient to satisfy low threshold needed to indicate possible nexus between skin disability and service, and his statements could not be rejected simply because there was no report of sunburn or other effects of heat exposure in his service medical records. *Kiernan v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1166 (U.S. App. Vet. Cl. July 2, 2009)*.

Unpublished decision: Veteran was not entitled to medical examination under *38 USCS § 5103A(d)(2)* because there was no evidence of association between his depression and his military service; Board noted that veteran was not diagnosed with depression until years after his discharge and that evidence indicated that his depression was associated with accident; thus, it did not err in concluding that Secretary of Veterans Affairs had fulfilled his duty to assist. *Daniels v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1186 (U.S. App. Vet. Cl. July 8, 2009)*.

Unpublished decision: Medical examination reports were inadequate to support use Board of Veterans' Appeals made of them, because opinions were defective in multiple dimensions, not least of which was that they did not render opinion that Board twice requested; more important, opinion lacked supporting rationale that was required of any medical opinion; in particular, (1) it was matter of record that veteran twice sought medical attention in service complaining of pain in right eye, (2) examiner offered no medical analysis to explain his apparent conclusion that these visits constituted no evidence of aggravation, and (3) he offered no analysis of either in-service or postservice medical reports in claims file that might have entered into medical

assessment of whether there was any aggravation during service. *Smith v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1191 (U.S. App. Vet. Cl. July 9, 2009)*, app. after remand, *2014 U.S. App. Vet. Claims LEXIS 860 (U.S. App. Vet. Cl. May 20, 2014)*.

Unpublished decision: VA audiological examination was adequate for purposes of *38 USCS § 5103A(d)(1)* where it noted that veteran's greatest hearing difficulty was "in noise," and veteran did not elaborate on any other functional impairment caused by his hearing loss. *Morris v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1214 (U.S. App. Vet. Cl. July 13, 2009)*, reh'g, en banc, denied, *2009 U.S. App. Vet. Claims LEXIS 1605 (U.S. App. Vet. Cl. Sept. 3, 2009)*.

Unpublished decision: Veteran's speculative hearing testimony did not overcome presumption that VA speech recognition test was conducted in accordance with VA regulations. *Morris v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1214 (U.S. App. Vet. Cl. July 13, 2009)*, reh'g, en banc, denied, *2009 U.S. App. Vet. Claims LEXIS 1605 (U.S. App. Vet. Cl. Sept. 3, 2009)*.

Unpublished decision: March 2006 VA medical examinations were inadequate where Board of Veterans' Appeals provided no discussion as to adequacy of examinations and failed to acknowledge that neither of examinations obtained opined as to nature and etiology of veteran's conditions. *Lawrence v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1239 (U.S. App. Vet. Cl. July 15, 2009)*.

Unpublished decision: Medical examiner specifically stated that he based his medical opinion on lack of treatment records during veteran's service, but failed to acknowledge or consider that it had been determined that veteran's service medical records were unobtainable; therefore, medical examiner's opinion presumed that service medical records revealed no treatment for ankle condition during service when indeed such records did not exist, thereby making it based on inaccurate factual premise; moreover, although there was no dispute that veteran injured his right ankle in service, examiner appeared to conclude that no such injury occurred; as such, that opinion was inadequate for Board of Veterans' Appeals to rely on to conclude that right-ankle condition was not related to service. *Dent v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1297 (U.S. App. Vet. Cl. July 27, 2009)*.

Unpublished decision: To extent that Secretary of Veterans Affairs contended that there was alternate "fair reading" of October 2007 examiner's statement, even assuming that were case, Board of Veterans' Appeals erred in not seeking clarification of which meaning examiner intended; therefore, Board's finding that Secretary had fulfilled *38 USCS § 5103A* duty to assist was clearly erroneous. *Dent v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1297 (U.S. App. Vet. Cl. July 27, 2009)*.

Unpublished decision: Board of Veterans' Appeals failed to provide adequate explanation for why widow was not entitled to medical opinion regarding whether her husband's lung cancer contributed to his cause of death and whether, under *38 CFR § 3.307(a)(6)(iii)*, his lung and colon cancer were related to his presumed herbicide exposure while serving in Vietnam, particularly in light of fact that lung cancer was disease entitled to presumptive service connection for veterans exposed to herbicides; indeed, Board provided no explanation regarding whether she was entitled to medical opinion under McLendon criteria and failed to provide any explanation for rejection of private medical opinion which opined that veteran had metastatic lung cancer that had metastasized in lung, liver, and colon. *Hollingsworth v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1309 (U.S. App. Vet. Cl. July 27, 2009)*, remanded, *2012 U.S. App. Vet. Claims LEXIS 1720 (U.S. App. Vet. Cl. Aug. 10, 2012)*.

Unpublished decision: Board of Veterans' Appeals did not violate *38 USCS § 5103A* because it did not order VA to conduct separate medical examination to evaluate degree of disability veteran had due to radiculopathy of his left leg; law did not require VA to provide specific medical examination for each claim asserted in veteran's application for disability benefits, and Board did not err when it used findings from VA medical examination of veteran's spine because that examination contained information about veteran's complaint of radicular pain. *Rust v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1329 (U.S. App. Vet. Cl. July 29, 2009)*, remanded, *2017 U.S. App. Vet. Claims LEXIS 854 (U.S. App. Vet. Cl. June 7, 2017)*.

Unpublished decision: Veteran's argument that she was merely testifying as to matters that she observed during service was not persuasive; lay statement contained in her notice of disagreement that she believed she incurred her foot condition in service was expression that she believed she was entitled to VA benefits for foot condition; therefore, that statement did not meet threshold showing for warranting VA medical examination in light of evidence already of record and not testimony regarding her lay observations as she suggested. *Harrison v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1346 (U.S. App. Vet. Cl. July 30, 2009)*.

Unpublished decision: VA examination was inadequate where examiner opined that there was no causal relationship between veteran's Persian Gulf service and his ganglion cysts or headaches because he had reported them after he returned, but veteran had alleged that his cysts began during his service in Persian Gulf, and parties agreed that he had never alleged that his headaches began after his service. *Brand v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1375 (U.S. App. Vet. Cl. July 31, 2009)*.

Unpublished decision: Matter was remanded to Board of Veterans' Appeals for further adjudication because Board did not adequately address why additional VA examination was not warranted, and improperly disregarded lay evidence that showed that veteran had schizophrenia and Crohn's disease that was potentially service connected. *Calhoun v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1383 (U.S. App. Vet. Cl. Aug. 3, 2009)*, remanded, *2019 U.S. App. Vet. Claims LEXIS 1282 (U.S. App. Vet. Cl. July 24, 2019)*, remanded, *2021 U.S. App. Vet. Claims LEXIS 1315 (U.S. App. Vet. Cl. July 26, 2021)*.

Unpublished decision: VA medical examination was adequate under *38 USCS § 5103A(d)(1)* based on court's review of documents, including treatment reports for alcoholism, erectile dysfunction, and mental distress; dental examination reports; medical report noting no changes with respect to veteran's neck condition; opinion regarding screw that became loose following his initial surgery, and some documents from VA, including Statement of Case; in his brief, veteran merely included citations to record on appeal and did not make any argument as to how these documents were relevant to his claims for benefits under *38 USCS § 1151* or why, based on these documents, he was entitled to new examination. *Cory v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1443 (U.S. App. Vet. Cl. Aug. 14, 2009)*.

Unpublished decision: Medical examination report was inadequate to support finding that veteran's conditions were not caused by or secondary to in-service electrical shock, since report's mere recitation of veteran's conditions and bare conclusions of lack of service connection were inadequate without any rationale or analysis to support its conclusions. *Brockhouse v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1462 (U.S. App. Vet. Cl. Aug. 18, 2009)*.

Unpublished decision: Medical examinations with respect to veteran's post-traumatic stress disorder (PTSD) were adequate under *38 USCS § 5103A*; there was medical evidence in record specifically discussing veteran's ability to work, and examinations were adequate for purposes of determining disability rating for PTSD. *Clark v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1506 (U.S. App. Vet. Cl. Aug. 26, 2009)*.

Unpublished decision: Report from VA medical examination conducted in 2000 was inadequate under *38 USCS § 5103A* because report contained insufficient detail to satisfy *38 CFR § 4.2*; report did not sufficiently discuss extent to which veteran's depression affected unemployability; however, subsequent examination report, which offered explanation as to why veteran's unemployability was not caused solely by depression, was adequate and remedied earlier report's deficiency. *Rosario v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1514 (U.S. App. Vet. Cl. Aug. 27, 2009)*, remanded, *2009 U.S. App. Vet. Claims LEXIS 1878 (U.S. App. Vet. Cl. Oct. 29, 2009)*.

Unpublished decision: VA was not required under *38 USCS § 5103A* and *38 CFR § 3.159(c)(4)(i)* to provide additional medical examination after veteran submitted private medical report that supported veteran's claim for disability benefits; VA had already provided examination, and it found that private report was of little probative value. *Rivera-Vazquez v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1516 (U.S. App. Vet. Cl. Aug. 27, 2009)*.

Unpublished decision: Medical examination provided to veteran by VA in connection with claim for disability benefits was adequate under *38 USCS § 5103A*, as examiner was not required to refer to each piece of evidence in claims file; examiner reviewed veteran's record, noted relevant events and diagnoses, and fully explained reason for resulting opinion. *Rivera-Vazquez v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1516 (U.S. App. Vet. Cl. Aug. 27, 2009)*.

Unpublished decision: VA medical examination was inadequate to satisfy duty to assist under *38 USCS § 5103A* where examiner concluded that veteran's migraine headaches did not produce severe economic inadaptability, but noted that magnetic resonance imaging report was unreadable and that prior medical evaluation was incomplete record. *38 CFR § 4.1* required veteran's disability to be evaluated in light of its whole recorded history. *Lockett v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1523 (U.S. App. Vet. Cl. Aug. 27, 2009)*.

Unpublished decision: There was no clear error in finding that VA satisfied its duty under *38 USCS § 5103A* to assist deceased veteran's surviving spouse with claim for death benefits; VA requested independent medical expert's (IME's) opinion under *38 USCS § 5109(a)* in light of conflicting evidence in record as to whether veteran's death resulted from post-traumatic stress disorder, and IME opinion clearly considered medical opinions that were favorable to spouse's claim. *Corn v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1529 (U.S. App. Vet. Cl. Aug. 28, 2009)*.

Unpublished decision: Contrary to appellant widow's assertion, the medical examiner provided a clear rationale for his opinion based upon a thorough review of the record; the examiner noted the potential sedative effects of the veteran's medications, but found that, based on the evidence in the veteran's medical records, the length of time he had been taking the medications, and the progress notes in the record that the medications he was taking did not assist him in sleeping, it was not likely that the medications contributed to the motor vehicle accident in which the veteran was killed. *Vaughn v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1552 (U.S. App. Vet. Cl. Aug. 31, 2009)*.

Unpublished decision: Where the Board of Veterans' Appeals denied a veteran's claim for service-connection for a left knee disorder, remand was warranted because the Board failed to meet its duty to assist by improperly relying on a medical report that did not support its conclusions with analysis; the report gave no rationale for concluding that the veteran's 1968 injury was only a ligament strain when the service medical records conflicted on whether it was a tear or strain and when other reports indicated that it was a tear. *Hamilton v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1580 (U.S. App. Vet. Cl. Sept. 4, 2009)*.

Unpublished decision: Secretary of Veterans Affairs properly determined that medical examination was not necessary in connection with veterans' claim of service connection for hepatitis C since available medical evidence was sufficient to establish lack of service connection; veteran's diagnosis of hepatitis was nearly 12 years after service, diagnosis of hepatitis C was nearly 23 years after service, and only evidence of record suggesting that veteran's hepatitis C was linked to service was veteran's statements indicating events in service that could have caused veteran to contract disease. *Caughman v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1590 (U.S. App. Vet. Cl. Sept. 3, 2009)*.

Unpublished decision: Record did not support a veteran's argument that the Board of Veterans' Appeals erred by not obtaining a medical examination that addressed whether the veteran's in-service personal assault could have caused the veteran's depression, because the doctrine of issue preclusion bound the veteran to the Board's prior determination that the in-service assault did not occur. *Arnone v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1608 (U.S. App. Vet. Cl. Sept. 10, 2009)*.

Unpublished decision: Secretary of Veterans Affairs complied with its duty to provide assistance in form of current medical examination, under *38 USCS § 5103A(d)(1)*, in its provision of complete audiological examination in 2003; Board of Veterans' Appeals did not commit clear error in so ruling, under *38 USCS § 7104(a)*. *Speeney v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1704 (U.S. App. Vet. Cl. Sept. 28, 2009)*.

Unpublished decision: Duty to provide veteran adequate medical examination was satisfied since issue of whether constant, rather than normal, dose parameter was appropriate was raised only by veteran's representative who lacked scientific expertise to question examiner's conclusion that veteran's skin cancer was not caused by ionizing radiation in service, in absence of any showing of inaccuracy or error in parameter. *Hannis v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1714 (U.S. App. Vet. Cl. Sept. 29, 2009)*.

Unpublished decision: Where appellant veteran's mother testified veteran's stomach problems were caused by stress associated with constant pain resulting from his other disabilities and were otherwise related to his service, and Board of Veterans' Appeals failed to first determine if gastrointestinal disability was type of disability for which lay person was competent to provide etiology or nexus evidence, Board failed to discuss applicable law as to entitlement to Department of Veterans' Affairs medical examination under *38 USCS § 5103A(d)* as required by *38 USCS § 7104(d)(1)*. *Venard v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1721 (U.S. App. Vet. Cl. Sept. 30, 2009)*.

Unpublished decision: Because lay evidence of appellant veteran's suffering Lyme disease symptoms since being in service was extensive and medical opinions stated it was more likely than not that he contracted it in service and that disease was undiagnosed for 12 years, Department of Veterans' Affairs medical examination was indicated under *38 USCS § 5103A(d)(1)*, (2). *Burns v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1722 (U.S. App. Vet. Cl. Sept. 30, 2009)*.

Unpublished decision: Board of Veterans' Appeals erred when it found that veteran was not entitled to medical examination under *38 USCS § 5103A(a)(1)* to determine validity of her claim that her service-connected right hip arthroplasty precluded her from having children; veteran raised issue several times and advised VA that she had conducted research into how her hip condition affected her ability to have children and was told by physician that she should not become pregnant, her testimony was entitled to some weight, and BVA's statement that medical evidence of record did not support veteran's claim failed to take into account low threshold that existed with regard to whether veteran was entitled to medical exam. *Koperski v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2017 (U.S. App. Vet. Cl. Nov. 19, 2009)*, remanded, *2011 U.S. App. Vet. Claims LEXIS 2666 (U.S. App. Vet. Cl. Dec. 7, 2011)*.

Unpublished decision: Law does not require evidence to preponderate in favor of claim in order to trigger VA' duty to provide claimant with medical examination or opinion; requiring evidence to preponderate in favor of claim applies much higher standard than "low threshold" articulated in *McLendon v. Nicholson, 20 Vet.App. 79 (2006)*; Board should have analyzed evidence of record, taking into consideration all information and lay or medical evidence to determine whether evidence indicated that disability or symptoms may have been associated with claimant's military service. *Crace v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2019 (U.S. App. Vet. Cl. Nov. 18, 2009)*.

Unpublished decision: Veteran's argument that Board of Veterans' Appeals erred in relying on inadequate VA medical examinations and that, therefore, Board erred in finding that VA had satisfied its duty to assist, under *38 USCS § 5103A(a)(1)*, failed because medical examinations were adequate because each examiner stated that he reviewed veteran's voluminous claims file thoroughly, each examiner fully described veteran's mental condition and provided diagnoses of various mental disorders, and each examiner opined that veteran's mental conditions were not result of his military service and each provided supporting rationale for those conclusions. *Deardorf v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2020 (U.S. App. Vet. Cl. Nov. 20, 2009)*.

Unpublished decision: VA medical opinion was inadequate because it failed to support its conclusions with sufficient analysis and it failed to consider whether veteran's malaria contributed to cause of death. *Wellborn v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2081 (U.S. App. Vet. Cl. Nov. 30, 2009)*.

Unpublished decision: Court could not have concluded that VA eye examination was adequate because there was earlier VA eye examination that determined that it was as likely as not that veteran's inservice trauma was cause of his deteriorating visual acuity, and there was no indication that examiner was familiar with history of veteran's eye condition. *Miller v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2161 (U.S. App. Vet. Cl. Dec. 11, 2009)*.

Unpublished decision: Board of Veterans Appeals determination that neither examination, nor referral of appellant veteran's claim for extraschedular determination, was warranted was not arbitrary or capricious because evidence clearly demonstrated that veteran ceased working due to his non-service-connected disabilities, and that while his service-connected disabilities may have restricted his activity to mild to moderate degree, it had not been shown that they precluded his employment. *Hayward v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2199 (U.S. App. Vet. Cl. Dec. 18, 2009)*.

Unpublished decision: Third McLendon element establishes low threshold; types of evidence that "indicate" that current disability "may be associated" with military service include, but are not limited to, medical evidence that suggests nexus but is too equivocal or lacking in specificity to support decision on merits, or credible evidence of continuity of symptomatology such as pain or other symptoms capable of lay observation. Here, 1973 examiner's finding of back pain with unknown cause, which was made less than year after claimant's discharge from service, satisfies this low threshold. *Foster v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2264 (U.S. App. Vet. Cl. Dec. 29, 2009)*.

Unpublished decision: Because physician's opinion was based on statements from veteran that Board of Veterans' Appeals determined lacked credibility, doctor's opinion could not satisfy *38 USCS § 5103A(d)(2)* requirements; accordingly, Board did not err by failing to address private physician's opinion and VA was not obligated to provide examination for his cervical spine claim. *Boykin v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 2267 (U.S. App. Vet. Cl. Dec. 29, 2009)*.

Unpublished decision: Board of Veterans' Appeals did not properly analyze third prong of *38 USCS § 5103A(d)*, when it determined that VA medical examination was not warranted based primarily on lay evidence that his current conditions were

related to his service in early 1960's. *Whitehead v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 130 (U.S. App. Vet. Cl. Jan. 29, 2010)*.

Unpublished decision: Board of Veterans' Appeals did not provide adequate reasons or bases for its decision to favor March 2007 VA examination report over veteran's private medical evidence and relied on inadequate VA medical examination because VA examiner failed to account for statements of continuous symptoms contained in two private opinions, both of which were in claims file at time it was reviewed. *Van Hook v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 307 (U.S. App. Vet. Cl. Mar. 1, 2010)*.

Unpublished decision: Veteran's VA medical examinations were adequate for rating purposes, under *38 USCS § 5103A(d)(1)*, because (1) VA examiners all reviewed veteran's claims file, noted his medical history, thoroughly reviewed his prior treatment records, conducted various clinical and diagnostic tests, and performed physical examination; and (2) examiners provided sufficient explanations for conclusions reached. *Meddles v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 824 (U.S. App. Vet. Cl. Apr. 30, 2010)*.

Unpublished decision: Medical examination was not adequate to determine whether veteran's back disability was service-connected since examiner did not discuss effect, if any, that veteran's in-service back injury had on veteran's degenerative back condition, and it was unclear whether examiner properly applied standard for determining whether veteran's disability was at least as likely as not etiologically related to injury. *Lykins v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 894 (U.S. App. Vet. Cl. May 14, 2010)*.

Unpublished decision: Where veteran had no symptoms of diabetes during service, there was no evidence of continuity of symptomatology, and there was no other evidence linking veteran's diabetes to military service or to any other service-connected disability, veteran failed to meet low threshold of indication of service connection to warrant medical examination. *Masek v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 901 (U.S. App. Vet. Cl. May 17, 2010)*.

Unpublished decision: Because Veterans' Affairs examiner's report stated appellant veteran did not report any functional effects of tinnitus, but report did not indicate that examiner elicited any information from veteran on functional effects of his bilateral hearing loss, and did not discuss any functional effects of veteran's bilateral hearing loss, requirements of *38 USCS § 5103A(a)(1)*, (d)(1), were not complied with and it was clear error under *38 USCS § 7261(a)(4)* for Board of Veterans' Appeals to have relied on that examination. *Box v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1179 (U.S. App. Vet. Cl. June 30, 2010)*.

Unpublished decision: Because Veterans Affairs examiner explained how he arrived at conclusion that appellant veteran's claims were "unsubstantiated," in that he reviewed inconsistencies in record and appellant's statements, and court had no reason not to accept Board of Veterans' Appeals interpretation of examiner's statements as to what veteran told him and that examiner determined veteran's elbow was not dislocated during service, Board's determination that medical examination report was adequate was not clearly erroneous under *38 USCS § 7261(a)(4)* and, thus, no duty to assist with another examination under *38 USCS § 5103A(d)(1)* was involved and Board's reliance on medical examination report was also not clearly erroneous. *Gage v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1186 (U.S. App. Vet. Cl. June 30, 2010)*.

Unpublished decision: Where later medical report seemed to reinforce appellant veteran's claim that he was told by doctor shortly after discharge that he had nerve damage related to hip disability that was conceded, Veterans' Affairs medical examination should have been ordered for tail bone and hip disabilities, as provided in *38 USCS § 5103A(d)(2)*. *Williams v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1194 (U.S. App. Vet. Cl. June 30, 2010)*.

Unpublished decision: Board of Veterans' Appeals' denial of veteran's application for VA benefits for dental treatment purposes and vocational rehabilitation services was upheld because VA medical examination report was thorough and examiner provided adequate rationale for findings. *Ross v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1340 (U.S. App. Vet. Cl. July 23, 2010)*.

Unpublished decision: Board of Veterans' Appeals' (BVA) decision denying veteran's claim for service connection for residuals of head injury to include depression and anxiety was upheld because, inter alia, (1) BVA did not violate duty to assist since BVA's presentation of factual background of case in engagement letter did not constitute directive to independent

medical expert to arrive at particular opinion, and (2) BVA provided sufficient explanation for its decision to obtain independent medical opinion. *Hughs v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1476 (U.S. App. Vet. Cl. Aug. 13, 2010)*.

Unpublished decision: Board of Veterans' Appeals' determination that VA satisfied its duty to assist was not clearly erroneous because letter contained simple statement of law and did not in any way prevent or prohibit veteran from submitting any additional evidence in support of his claim, and no medical examination was required in claim to reopen where no new and material evidence was submitted. *Bergh v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1646 (U.S. App. Vet. Cl. Sept. 3, 2010)*.

Unpublished decision: In action that denied widow entitlement to VA benefits for cause of death of her husband, veteran, Board of Veterans' Appeals' findings regarding weight of evidence were not clearly erroneous, under *38 USCS § 7261(a)(4)*, and Board provided adequate reasons or bases for its decision, under *38 USCS § 7104(d)(1)*, because (1) Board acknowledged all of medical opinions of record and discussed them in its report, but found opinions from VA panel of three physicians to be most probative because panel reviewed veteran's entire medical records and provided opinion that was clearly reflective of all evidence of record; and (2) Board provided thorough discussion of evidence that private examiners failed to consider and how that evidence was pertinent to veteran's overall disability picture and explained that this was reason that those opinions were of less probative value. *Thompson v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1662 (U.S. App. Vet. Cl. Sept. 9, 2010)*.

Unpublished decision: Board of Veterans' Appeals (BVA) properly denied veteran entitlement to service connection for hearing loss because BVA made valid finding that veteran's testimony concerning origin of veteran's hearing loss was not credible, and agency thus had no obligation to obtain medical nexus opinion. *Razo v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1679 (U.S. App. Vet. Cl. Sept. 13, 2010)*.

Unpublished decision: Where Board of Veterans' Appeals (BVA) denied veteran's claims for entitlement to service connection for hearing loss, tinnitus, arthritis of bilateral hips and knees, neuropathy of right and left hands, sleep apnea, and post-traumatic stress disorder, remand was required because (1) BVA improperly dismissed veteran's lay statements, and (2) had BVA properly considered lay assertions, it may have deemed it necessary to obtain medical opinion. *Lee v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1682 (U.S. App. Vet. Cl. Sept. 14, 2010)*.

Unpublished decision: Where Board of Veterans' Appeals (BVA) denied service connection for tinnitus, BVA did not err in determining that veteran was not entitled to additional medical examination, because record did not contain any evidence indicating that veteran's tinnitus began in or was otherwise related to veteran's active service. *Cowan v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1694 (U.S. App. Vet. Cl. Sept. 16, 2010)*.

Unpublished decision: Where Board of Veterans' Appeals (BVA) denied veteran entitlement to service connection for diabetes mellitus (DM), remand was warranted because BVA erroneously asked independent medical examination examiner to opine as to whether it was at least as likely as not that veteran incurred onset of clinical manifestations specific for DM, and answer to that question had already been judicially decided in prior decision. *Beebe v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1720 (U.S. App. Vet. Cl. Sept. 21, 2010)*.

Unpublished decision: Board of Veterans' Appeals did not fulfill its duty to assist veteran, who sought service connection for psychiatric disorder, which was characterized as depression, because there was lay evidence in record indicating that veteran's condition was service connected, which warranted obtaining medical examination. *Vincent v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1726 (U.S. App. Vet. Cl. Sept. 23, 2010)*.

Unpublished decision: Examination was adequate, where examiner obtained medical history from veteran and reviewed accompanying claims file, including veteran's statement that his dyspnea upon exertion had persisted since service. *Straube v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1794 (U.S. App. Vet. Cl. Sept. 30, 2010)*.

Unpublished decision: Board of Veterans' Appeals erred in relying on VA audiological examination to deny veteran's claim for benefits for right ear hearing loss because examination offered clearly insufficient rationale for its conclusions and therefore lacked sufficient detail to allow Board to make informed decision regarding veteran's claim, under *38 USCS § 5103A(d)(1)*, and Board failed to comply with its duty to ensure that VA examination provided was adequate and that medical examination report provided sufficient detail and explanation to assist Board in reaching its conclusion. *Lillie v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1825 (U.S. App. Vet. Cl. Oct. 5, 2010)*.

Unpublished decision: Record did not support veteran's argument that U.S. Secretary of Veterans Affairs was required to provide medical examination to opine whether veteran's adult daughter was permanently incapable of self-support prior to age 18; although veteran noted that evidence indicated that his daughter's mental health issues could actually have started before she turned 18—and thus began when she was "child" pursuant *38 USCS § 101(4)(A)(ii)*—Board found that totality of evidence failed to demonstrate that she actually was rendered permanently incapable of self-support based upon those symptoms; record on appeal did not show that Board's finding was clearly erroneous; accordingly, Board's finding that duty to assist under *38 USCS § 5103A(a)* was fulfilled without provision of medical examination was not clearly erroneous. *James v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1857 (U.S. App. Vet. Cl. Oct. 13, 2010)*.

Unpublished decision: Where Board of Veterans' Appeals (BVA) denied veteran entitlement to service connection for chronic arthritis of feet, ankles, legs, knees, shoulders, and hips, remand was warranted because BVA's categorical exclusion of lay evidence of record in case necessarily indicated that BVA did not properly analyze third prong of McLendon when it determined that VA medical examination was not warranted. *Brown v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1927 (U.S. App. Vet. Cl. Oct. 21, 2010)*.

Unpublished decision: Where Board of Veterans Appeals (BVA) denied veteran service connection for post-traumatic stress disorder, remand was warranted because BVA's statement of reasons or bases for finding more probative opinion of August 2004 medical examiner over opinion of February 2004 VA medical examiner was inadequate since, inter alia, there was nothing in August 2004 opinion that suggested reliance on particular point in veteran's history would have changed February 2004 opinion letter. *Taylor v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1987 (U.S. App. Vet. Cl. Oct. 29, 2010)*.

Unpublished decision: Veteran's argument that, by failing to provide adequate medical examination, Secretary of Veterans Affairs violated his duty to assist under *38 USCS § 5103A*, failed because there was no clear error in Board of Veterans' Appeals' reliance on VA medical examiner's report because examiner noted exposure to noise during service and sufficiently detailed veteran's many years of post-service noise exposure while working with machinery. *Easter v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1990 (U.S. App. Vet. Cl. Oct. 29, 2010)*.

Unpublished decision: Board of Veterans' Appeals's implicit finding that VA examination, under *38 USCS § 5103A(d)(1)*, was adequate was not clearly erroneous, under *38 USCS § 7261(a)(4)*, because VA examiner did consider continuous nature of symptoms of veteran's low back condition, and VA examiner's opinion contained sufficient rationale for its conclusion that veteran's current back disability was unrelated to his inservice back condition. *Lincoln v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2000 (U.S. App. Vet. Cl. Nov. 3, 2010)*.

Unpublished decision: Doctor's advisory medical opinion was adequate because (1) veteran had not offered any evidence that reports of scans and x-rays on which doctor relied were in any way inaccurate or insufficient; (2) VA made clear in its opinion request that this was to be records review only, and nowhere in his opinion did doctor state or even imply that he could not competently provide requested opinion in absence of physical examination; and (3) examiner's examination report made clear that he had access to veteran's claims file and did review it. *Noreen v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2121 (U.S. App. Vet. Cl. Nov. 19, 2010)*.

Unpublished decision: Where veteran was denied service connection for nephrolithiasis and renal insufficiency, VA satisfied its duty to assist because (1) veteran's argument, that examination was inadequate because examiner was unable to review veteran's full medical record, was contingent on finding that Board of Veterans' Appeals did not fulfill its obligation to obtain veteran's records, and (2) VA requested veteran's records and both facilities indicated negative searches. *Arey v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2292 (U.S. App. Vet. Cl. Dec. 6, 2010)*.

Unpublished decision: Where Board of Veterans' Appeals (BVA) denied veteran's claim for entitlement to service connection for various conditions, remand was warranted because BVA provided generic explanation of treatment of lay statements, but failed to assess veteran's assertions in context of individual claims, and this impacted duty to assist since BVA did not adequately explain why it was not necessary for VA to provide veteran with medical examinations to evaluate various conditions. *Sadler v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2295 (U.S. App. Vet. Cl. Dec. 6, 2010)*.

Unpublished decision: Retrospective medical opinion was not needed, under *38 USCS § 5103A*, because there was sufficient evidence to decide claim because record contained medical evidence predating May 9, 2004, and lay observations by veteran,

veteran testified that he spoke to his doctor about his urinary problems, and treatment records documented statements made by veteran regarding his urinary problems. *Hendrix v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2298 (U.S. App. Vet. Cl. Dec. 6, 2010)*.

Unpublished decision: Should Board of Veterans' Appeals find that veteran received anthrax vaccine, VA medical examination was in order, under *38 USCS § 5103A*, because (1) veteran underwent series of inoculations and these inoculations and vaccinations constituted event in service; (2) Board did not challenge veteran's reported symptoms, which appeared in multiple VA medical records; (3) whether there was medical evidence indicating link between veteran's recurrent symptoms and service depended on factual question whether she ever received anthrax vaccine in service; and (4) there was indication that recurrent symptoms may have been associated with veteran's service. *Ireland v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2401 (U.S. App. Vet. Cl. May 24, 2010)*.

Unpublished decision: Because, if veteran could show presence of squalene antibodies in her blood, this evidence would have been relevant to substantiating her claim that her illnesses resulted from in-service inoculations and vaccinations, furnishing medical assistance to test for substance was part of VA's duty to assist under *38 USCS § 5103A*. *Ireland v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2401 (U.S. App. Vet. Cl. May 24, 2010)*.

Unpublished decision: July 2005 VA examination was adequate and therefore Board of Veterans' Appeals did not clearly err in relying on examination report in reaching its decision, under *38 USCS § 5103A(d)(1)*, because July 2005 VA examination report was extremely thorough in that it detailed veteran's medical and psychological history and included detailed rationale for diagnosis provided. *Hawthorne v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 2423 (U.S. App. Vet. Cl. Dec. 22, 2010)*.

Unpublished decision: Board of Veterans Appeals found that there was sufficient competent evidence of record on which appellant veterans' claim for increased disability rating could be rated (record contained numerous VA examinations that were provided in 1994, 1998, 2001, 2004, and 2006, as well as various VA and non-VA treatment records obtained during appeal period); thus, court could not find clear error in Board's finding of sufficient evidence to decide veteran's claim or its determination that retrospective medical opinion was not necessary. *Fitz v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 103 (U.S. App. Vet. Cl. Jan. 21, 2011)*.

Unpublished decision: Board of Veterans' Appeals relied on adequate medical opinion and provided sufficient statement of its reasons or bases, under *38 USCS § 7104(d)(1)*, for its decision that denied entitlement to VA benefits for basal cell carcinoma of nose because, while Board clearly erred in relying on July 2003 VA medical examiner's opinion because reasoning employed by examiner was undermined to some degree and opinion was no longer based on veteran's known and complete medical history, error did not prejudice veteran, under *38 USCS § 7261(b)*, because Board also relied on April 2007 VA medical examiner's opinion, which took into consideration medical records indicating December 1982 diagnosis. *Crump v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 284 (U.S. App. Vet. Cl. Feb. 10, 2011)*.

Unpublished decision: VA complied with duty to assist, under *38 USCS § 5103A*, in obtaining adequate medical opinion because (1) veteran had not shown that report, which opined that veteran's migraines were not likely related to service, lacked rationale; (2) although veteran did not agree with opinion, physician did provide factual predicate in his analysis and explained reasoning behind his conclusion; (3) there was nothing to suggest that physician did not fully evaluate claimed disability; and (4) physician did not find causal link between headaches that assertedly had onset in 1965 and service because of one-year period of asserted delayed onset. *Rice v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 289 (U.S. App. Vet. Cl. Feb. 11, 2011)*.

Unpublished decision: VA examiner failed to provide any adequate rationale as to why appellant veteran's exposure to jet fuel, as likely as not, would have caused veteran's fibromyalgia and psoriasis; court remanded claims for entitlement to service connection for VA to comply with its duty to assist in obtaining adequate medical examination that provided opinion consistent with medical evidence of record and was supported by reasoned analysis. *Tennison v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 302 (U.S. App. Vet. Cl. Feb. 15, 2011)*, remanded, *2013 U.S. App. Vet. Claims LEXIS 1889 (U.S. App. Vet. Cl. Nov. 15, 2013)*.

Unpublished decision: In appeal from Board of Veterans' Appeals decision that denied entitlement to service connection for skin disorders, VA medical examination was inadequate because VA medical examiner based his opinion on inaccurate factual premise that veteran was not severely sunburned in service, and examiner failed to consider veteran's lay statements that he

was severely sunburned during combat service, as required by *38 USCS § 1154(b)*. *Romine v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 303 (U.S. App. Vet. Cl. Feb. 16, 2011)*.

Unpublished decision: In appeal from Board of Veterans' Appeals decision that denied veteran entitlement to initial disability rating greater than 10% for post traumatic stress disorder (PTSD), Board's determination that VA medical opinion was adequate was not clearly erroneous, under *38 USCS § 7261(a)(4)*, because examiner considered veteran's prior medical history and examinations and described disability with such specificity that Board was able to form fully informed opinion about veteran's PTSD, and conclusions of examiner were well supported, and allowed Board to weigh examination against contrary opinions. *Askew v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 308 (U.S. App. Vet. Cl. Feb. 22, 2011)*.

Unpublished decision: VA examination was inadequate, under *38 USCS § 5103A(d)*, because it lacked any information about whether examiner reviewed veteran's stressors. *Hurston v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 344 (U.S. App. Vet. Cl. Feb. 25, 2011)*.

Unpublished decision: Secretary of Veterans Affairs did not fulfill his duty to assist, under *38 USCS § 5103A* because Secretary was required to provide medical examination, and examination was inadequate because examiner failed to note two of three facts relevant to veteran's potential inservice injuries, and wholly failed to discuss in his opinion how any of them might have been related to current diagnosis. *Goshorn v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 346 (U.S. App. Vet. Cl. Feb. 25, 2011)*.

Unpublished decision: The Board of Veterans' Appeals' improper dismissal of veteran's lay statements cast doubt over its determination that VA need not have obtained medical examination, under *38 USCS § 5103A*, because Board failed to consider whether veteran's statements indicated association between his condition and his service, and, given impact veteran's lay statements might have had on consideration of veteran's medical records from 1970s, Board may have found that record did not contain sufficient medical evidence for it to make decision. *Thompson v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 362 (U.S. App. Vet. Cl. Feb. 24, 2011)*.

Unpublished decision: Decision of Board of Veterans' Appeals denying entitlement to dependency and indemnity compensation benefits under *38 USCS § 1151* was vacated and remanded because (1) Board failed to ensure compliance with court's prior remand and did not obtain adequate independent medical opinion (IMO); (2) IMO should have addressed whether there may have been connection between inservice and post-service conditions and bladder cancer diagnosed in 1995; and (3) Board failed to address all possible bases that could have led to service connection for cause of veteran's death. *Bragg v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 402 (U.S. App. Vet. Cl. Feb. 28, 2011)*.

Unpublished decision: Denial of medical examination for veteran's joint and back conditions based on lack of any suggestion of possible relationship between current disability and veteran's time in service was improper, since there was no discussion of whether testimony concerning veteran's history of complaints since leaving service was sufficient to satisfy low threshold that veteran's conditions might be related to service. *Brown v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 404 (U.S. App. Vet. Cl. Feb. 28, 2011)*.

Unpublished decision: Board of Veterans' Appeals did not clearly err, under *38 USCS § 7261(a)(4)*, by relying on VA examination because examination report was adequate because veteran did not point to any specific documents in claims file that were necessary to render adequate medical opinion, and veteran failed to acknowledge that examiner indicated that she reviewed computerized patient records system prior to examination. *Cory v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 408 (U.S. App. Vet. Cl. Feb. 28, 2011)*.

Unpublished decision: While appellant veteran argued that when regional office (RO), in 2005, reopened his claim, medical examination should have been provided, Board of Veterans Appeals determined that RO's decision was not binding and did not reopen claim, as Board did not have jurisdiction to consider claim which it previously adjudicated unless new and material evidence was presented, and before Board could reopen claim, it had to so find, and what RO may have determined in that regard was irrelevant, thus, Board acted within its powers when it decided not to reopen case because of lack of new and material evidence and once that decision was made, there was no requirement that Board provide veteran with medical examination. *Gjoff v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 576 (U.S. App. Vet. Cl. Mar. 21, 2011)*.

Unpublished decision: Examination was adequate for purpose of determining whether veteran's heart disease was proximately due to or result of veteran's service-connected diabetes because examiner reviewed claims folder, private medical records, service medical records, and other VA records, and examiner knew facts and medical theory underlying veteran's argument but ultimately found theory unavailing, stating that veteran's cardiovascular disease was not caused by his diabetes because he did not meet criteria for diagnosis of diabetes set forth by American Diabetes Association before 1995. *Dice v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 682 (U.S. App. Vet. Cl. Mar. 30, 2011)*.

Unpublished decision: Record did not demonstrate adequate basis for Board of Veterans' Appeals' adjudication of veteran's claim for aggravation of his non-service-connected heart disease by his service-connected diabetes because two medical opinions were inadequate concerning whether veteran's service-connected diabetes aggravated his non-service-connected heart disease; Board failed to provide adequate medical examination, under *38 USCS § 5103A(d)(1)*, to obtain information regarding asserted effect of diabetes on veteran's heart disease. *Dice v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 682 (U.S. App. Vet. Cl. Mar. 30, 2011)*.

Unpublished decision: In case in which veteran appealed Board of Veterans' Appeals' (BVA) denial of entitlement to VA benefits for throat cancer secondary to in-service exposure to herbicides, BVA's determinations that medical examination was not warranted with respect to veteran's claim for benefits for throat cancer was supported by adequate reasons or bases and was not arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. *Weppler v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 791 (U.S. App. Vet. Cl. Apr. 13, 2011)*.

Unpublished decision: Board of Veterans' Appeals' determination that VA medical examinations were provided pursuant to VA's duty to assist, under *38 USCS § 5103A(d)*, was supported by record and was not clearly erroneous because court could not have concluded that VA acted impermissibly in scheduling veteran for VA examinations because regional office determined that there was no medical evidence to support private physician's favorable opinion and that doctor rendered his opinion without reviewing veteran's claims file, which showed that his hearing was normal at separation. *Smith v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 1225 (U.S. App. Vet. Cl. June 3, 2011)*.

Unpublished decision: Veteran's claim of service connection for unexplained multi-symptom illness from veteran's service in Persian Gulf War was improperly denied based on inadequate medical examination, since examiner failed to determine nature and etiology of veteran's numerous conditions as potentially related to inservice exposure to chemicals. *Soto-Encavnacion v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 1910 (U.S. App. Vet. Cl. Sept. 13, 2011)*.

Unpublished decision: Because Veterans' Affairs examiner considered only if chronic fatigue syndrome existed and thus did not assess if appellant veteran had undiagnosed illness manifested by fatigue or any other medically unexplained chronic multisymptom illness, examination was in adequate under *38 USCS § 5103A(d)*. *Bozeman v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 2049 (U.S. App. Vet. Cl. Sept. 29, 2011)*.

Unpublished decision: Because examiner explained appellant veteran reported in-service back injury and had episodes of muscle strain, but then opined current condition was not due to muscle strain, it was unclear if she was referring to back strain or in-service injury and examination was inadequate under *38 USCS § 5103A(d)(1)*, so finding that opinion was adequate was clearly erroneous under *38 USCS § 7261(a)(4)*. *Leak v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 2386 (U.S. App. Vet. Cl. Oct. 31, 2011)*.

Unpublished decision: Department of Veterans' Affairs' (VA) duty to seek medical opinion under *38 USCS § 5103A(d)* only applied to disability claims, and with no evidence to review due to destruction of veteran's records in records center fire, no reasonable possibility existed that obtaining VA medical opinion would assist in substantiating appellant surviving spouse's *38 USCS § 1310* claim that service-connected disability caused veteran's death. *Buquing v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 2389 (U.S. App. Vet. Cl. Oct. 31, 2011)*.

Unpublished decision: Veterans Affairs examiner's report that no evidence of degenerative disk disease or degenerative joint disease was inadequate, as it failed to discuss objective medical evidence of injury to claimant's back, failed to comply with duty to assist by providing medical examination or obtaining medical opinion under *38 USCS § 5103A(d)(1)*. *Lingner v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 2750 (U.S. App. Vet. Cl. Dec. 21, 2011)*.

Unpublished decision: Where Veterans Affairs provided Board of Veterans' Appeals (Board) sufficient medical examination, under *38 USCS § 5103A*, which provided plausible basis in record for Board's factual findings, Board's award of 20 percent disability rating was not clearly erroneous under *38 USCS § 7261(a)(4)*. *Williamson v. Shinseki, 2013 U.S. App. Vet. Claims LEXIS 446 (U.S. App. Vet. Cl. Mar. 26, 2013)*.

Unpublished decision: Because evidence of record was insufficient to rise to even "low threshold" level of indicating nexus between veteran's stomach cancer and in-service exposure to herbicide, Board of Veterans Appeals' determination that medical opinion was unwarranted was not arbitrary or capricious. *Hernandez v. Shinseki, 2013 U.S. App. Vet. Claims LEXIS 1057 (U.S. App. Vet. Cl. June 28, 2013)*.

Unpublished decision: Remand was necessary for adequate statement of reasons or bases because U.S. Board of Veterans' Appeals misapplied presumption of soundness and neglected to address facts relevant to veteran's psychiatric history when it concluded veteran was not entitled to medical examination regarding whether veteran's schizophrenia was linked to his service; moreover, audiologist's opinion that veteran's hearing loss was not service-related was inadequate, and claim for tinnitus should have been considered. *Finley v. Shinseki, 2014 U.S. App. Vet. Claims LEXIS 276 (U.S. App. Vet. Cl. Feb. 27, 2014)*.

Unpublished decision: Because previous report was insufficient, U.S. Board of Veterans' Appeals did not act arbitrarily in ordering another independent medical examiner's report to provide opinion on whether veteran's symptoms during and after service were related to his chronic prostatitis; moreover, previous remand did not preclude additional medical examination, any failure to discuss continuity of symptomatology was harmless, and both additional report and Board's statement of reasons were adequate. *Koski v. Shinseki, 2014 U.S. App. Vet. Claims LEXIS 312 (U.S. App. Vet. Cl. Feb. 28, 2014)*.

In denying a veteran's service connection claim for frostbite of the hands, the Board of Veterans' Appeals failed to provide an adequate statement of reasons for discounting the veteran's report of an in-service frostbite diagnosis and erred in failing to return a Veterans' Administration examination report for clarification. The VA examiner failed to explain why the veteran's symptom of numbness was attributed to his diagnosed osteoarthritis. *Stewart v. Tran, 2021 U.S. App. Vet. Claims LEXIS 121 (U.S. App. Vet. Cl. Jan. 29, 2021)*.

7. Other assistance

With respect to claim for disability compensation benefits based on asserted VA service connection hearing loss in connection with active-duty service in U.S. Coast Guard Merchant Marine during World War II, which claim was denied on basis that claimant did not establish active-duty service for status as "veteran", Department of Veterans Affairs erred under *38 USCS § 5103A* because it did not make additional request seeking verification of service following submission of documents by veteran to regional office. *Frasure v. Principi, 18 Vet. App. 379, 2004 U.S. App. Vet. Claims LEXIS 581 (U.S. App. Vet. Cl. Sept. 14, 2004)*.

Unpublished decision: Secretary of Veterans Affairs had obligated himself to take certain steps to verify whether exposure to herbicides occurred in locations other than in Republic of Vietnam during Vietnam era or along DMZ in Korea by submitting request to U.S. Army Joint Services Records Research Center for verification of exposure to herbicides. *Siewert v. Peake, 2008 U.S. App. Vet. Claims LEXIS 742 (U.S. App. Vet. Cl. June 16, 2008)*.

Unpublished decision: Board of Veterans' Appeals committed error where it failed to develop veteran's claim for stomach condition as related to his claim for post-traumatic stress disorder, as required by *38 USCS § 5103A*. *Rivera-Estrella v. Peake, 2008 U.S. App. Vet. Claims LEXIS 835 (U.S. App. Vet. Cl. June 23, 2008)*.

Unpublished decision: Where veteran was denied entitlement to benefits for bilateral knee condition and residuals of decompression sickness, Board of Veterans' Appeals' determination that VA satisfied its duty to notify was not clearly erroneous because veteran was informed of so-called "Caluza elements" in VA notice letter. *Snyder v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1338 (U.S. App. Vet. Cl. Nov. 12, 2008)*.

Unpublished decision: VA did not violate Veterans Claims Assistance Act of 2000, *Pub. L. No. 106-475, 114 Stat. 2096*, because it refused to locate servicemembers who were assigned with veteran who claimed he injured his back in 1954 when he

fell while on board ship; VA's duty to assist veteran did not extend to locating witnesses who could provide testimony to substantiate veteran's claim, and even if VA knew where individuals lived, it was prohibited by *38 USCS § 5701(a)* from releasing that information to veteran. *Delorge v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 474 (U.S. App. Vet. Cl. Mar. 26, 2009)*.

Unpublished decision: Despite Board of Veterans' Appeals' heightened duty to consider and discuss evidence due to loss of veteran's records, Board provided no explanation as to why it took no action in response to veteran's submission of list of buddies who he indicated might have had evidence relevant to his claim; matter was remanded. *Owens v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 668 (U.S. App. Vet. Cl. Apr. 21, 2009)*.

Unpublished decision: *38 USCS § 5103A* did not impose upon Department of Veterans' Affairs duty to inquire into veteran's statement that he had obtained in-home hospital bed ostensibly needed by veteran to address back condition for which he had been awarded 20% disability rating because veteran never showed that his doctor had prescribed bed-rest as part of treatment. *Brown v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1032 (U.S. App. Vet. Cl. June 16, 2009)*.

Unpublished decision: VA's duty to assist under *38 USCS § 5103A(a)* required Secretary of Veterans Affairs to make reasonable efforts to assist claimant in obtaining evidence necessary to substantiate her claim for benefit under law administered by Secretary; thus, because relief under Federal Tort Claims Act (FTCA), *28 USCS §§ 2671–2680*, was not benefit under law administered by Secretary, VA did not breach its duty to assist in development of her claim when VA liaison failed to inform her that she needed to file Standard Form 95 to give notice to government of intent to file claim under FTCA. *Trusty v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 683 (U.S. App. Vet. Cl. Mar. 30, 2011)*, remanded, *2014 U.S. App. Vet. Claims LEXIS 269 (U.S. App. Vet. Cl. Feb. 26, 2014)*.

Considering the TRAC case law factors, the veteran had not demonstrated entitlement to mandamus relief because the Veterans Court did not find VA's time in deciding this case so far to be unreasonable. Some of the delay that he had experienced was due to VA's compliance with its legal duties and the difficulties in working with his correctional facility. Thus, his experience was not like complete inaction by the VA. *Babb v. Wilkie, 2020 U.S. App. Vet. Claims LEXIS 565 (U.S. App. Vet. Cl. Mar. 31, 2020)*.

8. Judicial review

Unpublished decision: Court lacked jurisdiction under *38 USCS § 7292(d)(2)* to review denial of claim for service connection for hypertension because determinations by U.S. Court of Appeals for Veterans Claims did not involve interpretation of *38 USCS § 5103A*; veteran was challenging unreviewable factual determination, or at most application of law to facts. *Cole v. Shinseki, 309 Fed. Appx. 399, 2009 U.S. App. LEXIS 2143 (Fed. Cir. 2009)*.

Unpublished decision: Federal Circuit lacked jurisdiction under *38 USCS § 7292(d)(2)* over claimant's appeal from denial under *38 USCS § 5110(a)* of earlier effective date for claimant's 100% disability rating; factual determinations that claimant had not filed earlier informal claim, that claimant was not entitled to "benefit of doubt," and that any alleged failure to comply with duty to assist would not have resulted in earlier effective date were unreviewable. *Warren v. Shinseki, 360 Fed. Appx. 136, 2010 U.S. App. LEXIS 305 (Fed. Cir. 2010)*.

Unpublished decision: Because Board of Veterans Appeals' determination that claimant veteran's treatment notes, including statements that he received physical therapy for his shoulder, failed to establish nexus element for his claim relating to hip bursitis, and absent such nexus, there was no relevance, were factual determinations, there was no jurisdiction under 38 USCS § 7202(c), (d)(2), to review Veterans Claims' holding that VA had fulfilled its *38 USCS § 5103A(c)* duty to assist and its affirmance of denial of his request to reopen his claim for entitlement to service connection for his hip bursitis as secondary to his service-connected right shoulder disability. *Hime v. Shinseki, 439 Fed. Appx. 895, 2011 U.S. App. LEXIS 19070 (Fed. Cir. 2011)*.

Unpublished decision: Court lacked jurisdiction to review affirmance of finding by U.S. Court of Appeals for Veterans Claims (Veterans Court) that character of veteran's other-than-honorable (OTH) discharge barred entitlement to benefits, as his arguments challenged only factual findings and application of law to fact. Allegations that he should not be precluded from

eligibility because he was insane at time he committed offenses that led to his OTH discharge, that VA regional office failed to comply with joint motion for remand by not obtaining records that veteran alleged supported his contention, and that Veterans Court erred in its application of statutes to facts of his case were matters outside of court's jurisdiction. *Anderson v. Shinseki, 561 Fed. Appx. 932, 2014 U.S. App. LEXIS 6557 (Fed. Cir.)*, cert. denied, *574 U.S. 843, 135 S. Ct. 337, 190 L. Ed. 2d 81, 2014 U.S. LEXIS 6496 (2014)*.

Unpublished decision: Court lacked jurisdiction to review veteran's allegations that VA did not fulfill its duty to assist and that BVA did not adequately explain reasons and bases for its decision, as those arguments concerned application of fact to law. *Allen v. McDonald, 652 Fed. Appx. 983, 2016 U.S. App. LEXIS 11058 (Fed. Cir. 2016)*.

Federal Circuit lacked jurisdiction to review Board of Veterans' Appeals' determination that VA fulfilled its duty to assist, as this was factual determination. *Arroyo-Jusino v. McDonald, 664 Fed. Appx. 953, 2016 U.S. App. LEXIS 20346 (Fed. Cir. 2016)*, cert. denied, *138 S. Ct. 406, 199 L. Ed. 2d 299, 2017 U.S. LEXIS 6501 (2017)*.

Appellant represented by counsel presumed to be versed in facts and applicable law may waive consideration on appeal of any notice and duty-to-assist rights pursuant to *38 USCS §§ 5103* and *5103A*. *Janssen v. Principi, 15 Vet. App. 370, 2001 U.S. App. Vet. Claims LEXIS 1557 (U.S. App. Vet. Cl. Dec. 27, 2001)*.

Under plain language of *38 USCS § 5103A*, Secretary of Veterans Affairs' duty-to-assist provisions apply in connection with claimant's attempt to establish entitlement to his or her claim for award of Veterans Administration benefits and not in connection with claimant's attempt to establish mental incapacity for purposes of tolling judicial-appeal period under *38 USCS § 7266(a)* and obtaining Court of Veterans Appeals jurisdiction over appeal of Board of Veterans Appeals' decision. *Jones v. Principi, 18 Vet. App. 500, 2004 U.S. App. Vet. Claims LEXIS 719 (U.S. App. Vet. Cl. Nov. 19, 2004)*.

United States Court of Appeals for Veterans Claims had jurisdiction to address veteran's challenge to VA examination that veteran received for hearing loss because veteran's challenge addressed propriety of VA examination, as regulated by Secretary of Veterans Affairs, and was not challenge to established rating schedules; rather, veteran's challenge was directed more toward Secretary's duty to assist under *38 USCS § 5103A*, issue that could be reviewed by court. *Martinak v. Nicholson, 21 Vet. App. 447, 2007 U.S. App. Vet. Claims LEXIS 1286 (U.S. App. Vet. Cl. Aug. 23, 2007)*.

Unpublished decision: Although duty-to-assist issue under *38 USCS § 5103A* was not specifically raised by appellant surviving spouse, Court of Appeals for Veterans Claims addressed it because surviving spouse was pro se, her arguments were sparse, and error was fundamental. *Medford v. Nicholson, 21 Vet. App. 422, 2006 U.S. App. Vet. Claims LEXIS 1144 (U.S. App. Vet. Cl. Oct. 31, 2006)*.

Unpublished decision: Decision by Board of Veterans' Appeals finding that deceased veteran's spouse had received adequate notice and assistance under *38 USCS §§ 5103(a)* and *5103A* was supported by plausible basis, and if spouse thought that additional assistance was required spouse could pursue request for further assistance with VA regional office. *Sibug v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1083 (U.S. App. Vet. Cl. Sept. 30, 2008)*.

Unpublished decision: To extent that veteran argued that Secretary of Veterans Affairs breached his *38 USCS § 5103A* duty to assist, veteran's failure to identify with any specificity any error on part of Secretary in that regard was fatal to claim. U.S. Ct. Vet. App. R. 28(a)(5) required veteran's brief to contain his contentions with respect to issues and reasons for his contentions, including citations to authorities and parts of record on which he relied. *Talley v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1105 (U.S. App. Vet. Cl. Sept. 26, 2008)*.

Unpublished decision: Board of Veterans' Appeals clearly erred in finding that VA satisfied duty to assist appellant; duty to assist required that Board attempt to obtain all potentially relevant records adequately identified by appellant. *Nelson v. Shinseki, 2014 U.S. App. Vet. Claims LEXIS 470 (U.S. App. Vet. Cl. Mar. 27, 2014)*.

9. —Finality requirement

Breach of duty to assist veteran does not vitiate finality of Veterans' Administration (VA) Regional Office's decision; Court of Appeals for Federal Circuit therefore overrules *Hayre v. West, 188 F.3d 1327 (Fed. Cir. 1999)* to extent that it created additional exception to rule of finality applicable to VA decisions by reason of "grave procedural error." *Cook v. Principi, 318 F.3d 1334, 2002 U.S. App. LEXIS 26434 (Fed. Cir. 2002)*, cert. denied, *539 U.S. 926, 123 S. Ct. 2574, 156 L. Ed. 2d 603, 2003 U.S. LEXIS 4613 (2003)*, reh'g, en banc, denied, *56 Fed. Appx. 496, 2003 U.S. App. LEXIS 3404 (Fed. Cir. 2003)*.

Williams test with respect to exception to finality requirement did not depend on whether Veterans Court's interpretation of *38 USCS § 5103A* would be applied in Veterans Court's final decision, but whether there was substantial risk that this interpretation would not survive non-final order. *Jones v. Nicholson, 431 F.3d 1353, 2005 U.S. App. LEXIS 27245 (Fed. Cir. 2005)*.

10. —Nonprejudicial error

Federal Circuit applied improper harmless-error framework in concluding that VA's notice errors in disability benefit proceedings under *38 USCS §§ 5103* and *5103A* were not harmless; framework was inconsistent with statutory requirement under *38 USCS § 7261(b)(2)* that Court of Appeals for Veterans Claims take due account of rule of prejudicial error, and framework differed significantly from approach normally taken under *5 USCS § 706* in civil cases. *Shinseki v. Sanders, 556 U.S. 396, 129 S. Ct. 1696, 173 L. Ed. 2d 532, 2009 U.S. LEXIS 3119 (2009)*.

Court of Appeals for Veterans Claims (CAVC) erred when it applied *38 USCS § 5103A(d)* instead of *38 USCS § 5103A(a)* to find that U.S. Department of Veterans Affairs was not required to assist widow who applied for dependency and indemnity compensation in obtaining medical records she claimed she needed to prove her claim; however, Court of Appeals for Federal Circuit was unable to determine if CAVC's error was harmless because doing so required determination of whether autopsy report or coroner's report had greater probative value, and it did not have jurisdiction under *38 USCS § 7292* to make that determination. *Wood v. Peake, 520 F.3d 1345, 2008 U.S. App. LEXIS 6473 (Fed. Cir. 2008)*.

Although Board of Veterans' Appeals did not comply with *38 USCS § 7104(d)(1)* when it failed to support its conclusion that Department of Veterans Affairs was not required under *38 USCS § 5103A(d)* to provide veteran with medical examination with respect to veteran's claims for service connection for poor vision and hearing-loss disability, error was nonprejudicial under *38 USCS § 7261(b)* because there was no evidence in record reflecting that veteran suffered event, injury, or disease in service that could be associated with those symptoms. *Duenas v. Principi, 18 Vet. App. 512, 2004 U.S. App. Vet. Claims LEXIS 798 (U.S. App. Vet. Cl. Dec. 15, 2004)*.

Decision of Board of Veterans' Appeals finding that veteran had service-connected disability, but denying veteran higher rating for specific time periods was affirmed; although it was arguably error for Secretary of Veterans Affairs to fail to obtain some of veteran's service medical records (SMRs) error was not prejudicial because SMRs would not have provided evidence to address veteran's current disability rating. *Moore v. Nicholson, 21 Vet. App. 211, 2007 U.S. App. Vet. Claims LEXIS 697 (U.S. App. Vet. Cl. May 15, 2007)*, remanded, *555 F.3d 1369, 2009 U.S. App. LEXIS 2333 (Fed. Cir. 2009)*.

If evidence adduced by claimant who is seeking benefits from Department of Veterans Affairs (VA) is insufficient to reach low threshold necessary to trigger VA's duty to assist pursuant to *38 USCS § 5103A*, then any failure by Board of Veterans' Appeals to discuss theory underlying that claim is necessarily not prejudicial. *Robinson v. Peake, 21 Vet. App. 545, 2008 U.S. App. Vet. Claims LEXIS 22 (U.S. App. Vet. Cl. Jan. 29, 2008)*, reh'g, en banc, denied, *22 Vet. App. 381, 2008 U.S. App. Vet. Claims LEXIS 1677 (U.S. App. Vet. Cl. Feb. 25, 2008)*, aff'd, *557 F.3d 1355, 2009 U.S. App. LEXIS 3697 (Fed. Cir. 2009)*.

Unpublished decision: Where veteran sought service connection for hearing loss and asserted that Secretary of Veterans Affairs failed to assist veteran by failing to obtain medical records for period in which veteran was initially treated for hearing loss, any error in failing to obtain records of veteran's initial treatment was harmless, since such treatment occurred at earliest six years after veteran's service and thus could not substantiate veteran's claim of in-service event. *Hill v. Nicholson, 2007 U.S. App. Vet. Claims LEXIS 1557 (U.S. App. Vet. Cl. Aug. 20, 2007)*.

Unpublished decision: It was not error for Board of Veterans' Appeals to issue disability rating decision on veteran's claims for liver disability and diabetes based on three examinations that took place in 2000, 2001, and 2002 because there was no

evidence that examiners did not discuss relevant information and fact that examiners did not review all of past medical records was not error; to extent that Board erred in relying on medical examinations that did not consider all of past treatment, error was non-prejudicial. *Maldonado v. Mansfield, 2007 U.S. App. Vet. Claims LEXIS 1773 (U.S. App. Vet. Cl. Nov. 15, 2007)*.

Unpublished decision: Veteran failed to rebut presumption of regularity; because he failed to allege nonreceipt of August 2004 letter and, further, because information contained in that letter had been provided to him in 2001, his argument that August 2004 letter requesting that medical records release authorization form be completed was sent to wrong address lacked merit. *Frazier v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1163 (U.S. App. Vet. Cl. May 2, 2008)*.

Unpublished decision: Board of Veterans' Appeals' determination that VA fulfilled its *38 USCS § 5103A* duty to assist was not clearly erroneous where court had determined that Board's error in determining that VA had fulfilled its *38 USCS § 5103(a)* duty to notify was non-prejudicial. *Welga v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1394 (U.S. App. Vet. Cl. May 21, 2008)*.

Unpublished decision: To extent that veteran argued that VA committed prejudicial error by failing to obtain U.S.S. Cromwell's "medical log or its equivalent recording," Secretary countered that any error in that regard was nonprejudicial because Board of Veterans Appeals previously denied service connection based on lack of nexus medical evidence, and court agreed; in-service occurrence of back injury was not at issue, and, as such, veteran's argument that he was prejudiced by VA's failure to obtain those records in connection with his appeal failed. *Simes v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1444 (U.S. App. Vet. Cl. Nov. 26, 2008)*.

Unpublished decision: Veteran's claim for VA benefits for hypertension and bipolar disorder was properly denied because, although Board of Veterans' Appeals erred by relying on combination of pre- and postdecisional documents in determining that veteran received adequate notice, any notice error was not prejudicial since, inter alia, veteran received notice of requirements that had to be met to trigger VA's statutory obligation to provide VA medical examination under *38 USCS § 5103A(d)(1)*. *Bretthauer v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1469 (U.S. App. Vet. Cl. Apr. 4, 2008)*.

Unpublished decision: Board of Veterans' Appeals' decision contained no discussion pertaining to veteran's entitlement to VA' medical examination for his back condition and, as such, it erred by neglecting to provide adequate statement of reasons or bases to support its conclusion that he was not entitled to medical examination in conjunction with his back condition claim; however, error was nonprejudicial because record did not contain evidence that suggested relationship between his current back problems and those he experienced during service. *Wilson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1616 (U.S. App. Vet. Cl. Dec. 31, 2008)*.

Unpublished decision: With respect to veteran's arthritis of left foot claim, veteran failed to show that board of Veterans' Appeals had clearly erred in denying service connection where Board's reliance on x-ray findings to conclude that veteran did not have arthritis was implicit finding that no additional examination was necessary, veteran failed to explain how earlier records might have show that he presently had arthritis or how such records could have aided physician's interpretation of x-ray, and Board's reference to later, nonexistent x-rays was nonprejudicial error because only x-ray findings of record supported ultimate factual conclusion that there was no evidence of left foot arthritis *Reynolds v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1687 (U.S. App. Vet. Cl. June 24, 2008)*.

Unpublished decision: Veteran's statements did not speak to matters that were capable of lay observation, but rather opined on etiology of his left eye condition; moreover, his June 2003 statement that his eye problem had only worsened in past eight years undermined possibility of continuity of symptomatology, matter about which lay person was competent to testify; absent other evidence indicating that his left eye disability may have been associated with event, injury, or disease occurring in service, Board of Veterans' Appeals' failure to provide adequate statement of reasons or bases relating to his entitlement to medical examination or opinion was nonprejudicial. *McGimpsey v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1697 (U.S. App. Vet. Cl. June 23, 2008)*.

Unpublished decision: Veteran made no argument that she suffered current persistent abdominal symptoms and, accordingly, even though Board of Veterans' Appeals may have stated that current diagnosis was required to necessitate VA medical examination, this error was not prejudicial to her as there was no other evidence of persistent or recurrent symptoms that indicated current disability; although Board erroneously stated that current diagnosis was required to trigger duty to provide

medical examination, this was not prejudicial to her. *Tardy-Zimmerman v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 466 (U.S. App. Vet. Cl. Mar. 27, 2009)*.

Unpublished decision: Any purported error in failure to provide veteran medical examination under *38 USCS § 5103A(d)(1)* was non-prejudicial under *38 USCS § 7261(b)(2)* because he was already receiving highest schedular evaluation permitted by law for his bilateral tinnitus and otitis externa and there was no evidence showing that current ratings were incorrect. *Prezioso v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 499 (U.S. App. Vet. Cl. Mar. 31, 2009)*.

Unpublished decision: To date, veteran had not received letter regarding VA failure to obtain treatment records from Professional Psychological Services (PSS) that met requirements of *38 CFR § 3.159(e)*, and VA's failure to notify her violated its duty to assist her; however, based on October 2005 Board of Veterans' Appeals decision and June 2007 letter from VA, failure to adequately notify her pursuant to § 3.159(e) was not prejudicial because reasonable person would have been expected to have had knowledge that VA attempted to obtain her records from PSS but was unsuccessful, that VA would proceed with adjudicating her claim, and that ultimate responsibility for providing private medical records was her own, *38 CFR § 3.159(e)*. *Knizekewich v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 704 (U.S. App. Vet. Cl. Apr. 24, 2009)*.

Unpublished decision: Claim on appeal that Board of Veterans' Appeals erred by not ensuring that VA satisfied its *38 USCS § 5103A* duty to assist veteran was rejected; because claim was denied on ground that veteran had not established current diagnosis of condition for which service-connection was claimed, any failure by Board to obtain records from veteran's military service more than 50 years earlier was nonprejudicial as matter of law. *Espenida v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1367 (U.S. App. Vet. Cl. July 31, 2009)*.

Unpublished decision: Board of Veterans Appeals decision which, inter alia, denied increased rating for service-connected residuals of fractured right ankle, evaluated as 10 percent disabling, was affirmed because VA's error in not notifying veteran of unavailability of his Social Security Administration records was harmless because records had been destroyed and veteran had not demonstrated how he was prejudiced by VA's failure to notify him of that fact. *Willis v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 174 (U.S. App. Vet. Cl. Jan. 26, 2011)*.

11. —Remand

Where proceeding was complete before agency, but was on appeal at time Veterans Claims Assistance Act of 2000 (VCAA), *Pub. L. No. 106-475*, § 3(a), *114 Stat. 2096, 2096–2097*, was enacted, court found that case should not be remanded to Court of Appeals for Veterans Claims (or, in turn, Board of Veterans' Appeals) for further proceedings under § 3(a) of VCAA. *Bernklau v. Principi, 291 F.3d 795, 2002 U.S. App. LEXIS 9516 (Fed. Cir. 2002)*.

Remand was required because there was no indication that Board of Veterans' Appeals recognized, much less ensured compliance with, Secretary of Veterans Affairs' heightened duty to assist under *38 USCS § 5103A*; indeed, none of communications from Regional Office to veteran referred to possibility of securing evidence from alternative sources, e.g., buddy statements, and no effort was made to verify his claims of combat service through unit histories or other documents at U.S. Armed Services Center for Research of Unit Records or other official sources; record did not reflect any effort to verify his claim of combat service except for single and largely unsuccessful request for his personnel records. *Daye v. Nicholson, 20 Vet. App. 512, 2006 U.S. App. Vet. Claims LEXIS 1295 (U.S. App. Vet. Cl. Nov. 22, 2006)*.

Remand to Board of Veterans' Appeals of claim for service-connected ailment (varicose veins) was ordered where Secretary of Veterans Affairs erred in discrediting lay testimony of onset of ailment, in failing to provide adequate medical examination, and in failing to comply with his notification duties pursuant to *38 USCS § 5103A*. *Barr v. Nicholson, 21 Vet. App. 303, 2007 U.S. App. Vet. Claims LEXIS 970 (U.S. App. Vet. Cl. June 15, 2007)*, abrogated, *Walker v. Shinseki, 708 F.3d 1331, 2013 U.S. App. LEXIS 3690 (Fed. Cir. 2013)*.

Unpublished decision: Remand of veteran's claim to Board of Veterans' Appeals was required, where Secretary of Veterans Affairs failed in its duty to assist under *38 USCS § 5103A(d)* by not providing thorough and contemporaneous medical examination as to veteran's left knee, and adequate statement of reasons or bases. *Trischetta v. Nicholson, 21 Vet. App. 98, 2006 U.S. App. Vet. Claims LEXIS 648 (U.S. App. Vet. Cl. June 27, 2006)*.

Unpublished decision: Letter did not provide adequate notice pursuant to Veterans Claims Assistance Act of 2000 where it failed to provide any information regarding evidence necessary to substantiate veteran's claims and merely informed veteran of evidence that Department of Veterans Affairs regional office had not yet received. *Levins v. Nicholson, 2005 U.S. App. Vet. Claims LEXIS 985 (U.S. App. Vet. Cl. Dec. 22, 2005)*.

Unpublished decision: Matter was remanded to Board of Veterans' Appeals for additional adjudication because it was error for Board to conclude that Secretary of Veterans Affairs complied with duty to assist when Secretary did not obtain records from Social Security Administration and records could have potentially assisted with assigning effective date for veteran's service-connected post-traumatic stress disorder. *Jones v. Mansfield, 2007 U.S. App. Vet. Claims LEXIS 1600 (U.S. App. Vet. Cl. Oct. 22, 2007)*.

Unpublished decision: Matter was remanded to Board of Veterans' Appeals for further adjudication because Secretary of Veterans Affairs failed to comply with requirements of *38 USCS § 5103A(b)* because VA did not follow up with therapist that had treated veteran for post-traumatic stress disorder to obtain all of records of treatment. *Jones v. Peake, 2008 U.S. App. Vet. Claims LEXIS 812 (U.S. App. Vet. Cl. July 9, 2008)*.

Unpublished decision: Matter was remanded to Board of Veterans' Appeals for readjudication because it was error for Board to conclude that there was no medical nexus between veteran's current diagnosis of chronic obstructive pulmonary disease and bronchitis that veteran had in-service when there was no medical evidence that supported Board's conclusion and veteran had offered lay evidence that his current breathing difficulties originated from his time in service. *Lee v. Peake, 2008 U.S. App. Vet. Claims LEXIS 878 (U.S. App. Vet. Cl. July 18, 2008)*.

Unpublished decision: Board of Veterans' Appeals (Board) erred by failing to consider potentially applicable regulatory provisions when it rendered determination as to adequacy of June 2001 examination report, so Board did not provide adequate statement of reasons or bases for its finding that VA satisfied duty to assist under *38 USCS § 5103A*. *Homme v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1066 (U.S. App. Vet. Cl. Sept. 15, 2008)*.

Unpublished decision: Matter needed to be remanded to Board of Veterans' Appeals because it did not appear as if VA had attempted to obtain medical records from veteran's treating physician, and if VA was unable to obtain those records, it should have provided notice to veteran as required by *38 USCS § 5103A*; further, remand was required because VA did not provide notice of its inability to obtain veteran's records from Social Security Administration and Board failed to provide adequate reasons or bases for determination that VA's duty to notify was adequately discharged, and court could not conclude that error was not prejudicial. *Craig v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1220 (U.S. App. Vet. Cl. Nov. 6, 2008)*.

Unpublished decision: Remand of denial of veteran's claims for increased ratings for several service-connected conditions was warranted because Veterans Affairs failed in its duty pursuant to *38 USCS § 5103A(a)(2)* to obtain veteran's vocational rehabilitation records after being made aware that veteran was attending vocational rehabilitation therapy for his conditions. *Ward v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1515 (U.S. App. Vet. Cl. Dec. 15, 2008)*.

Unpublished decision: Because Board of Veterans' Appeals did not support its credibility assessment of veteran's testimony with adequate statement of reasons or bases, court could not find as matter of law that medical examination was unwarranted under *McLendon v. Nicholson, 20 Vet.App. 79 (2006)*; thus, by neglecting to assess his entitlement to medical examinations for hypertension and asthma, Board committed remandable error, *38 USCS § 7104(a)*. *Wilson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1616 (U.S. App. Vet. Cl. Dec. 31, 2008)*.

Unpublished decision: Where Secretary of Veterans Affairs had, based on claimant's apparent lack of credibility, not obtained claimant's Social Security records concerning his mental health, Secretary failed to comply with duty to assist claimant under *38 USCS § 5103*, and remand to Board of Veterans' Appeals was necessary; on remand new medical examination should also be considered. *Basilio v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1674 (U.S. App. Vet. Cl. Sept. 2, 2008)*.

Unpublished decision: With regard to veteran's claim for right shoulder disability, Board of Veterans' Appeals did not indicate whether there was any evidence damaging credibility of veteran's testimony and did not specifically assess this testimony under "low threshold" established to determine whether VA medical examination was required under *38 USCS § 5103A(d)*; thus, remand was required. *Johnston v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1698 (U.S. App. Vet. Cl. Sept. 23, 2008)*.

Unpublished decision: Court accepted concession that remand was required for VA to provide adequate medical examination or opinion that fulfilled its duty to assist; reversal was not appropriate because record lacked medical evidence of nexus between veterans' neck condition and in-service injury. *Bell v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1699 (U.S. App. Vet. Cl. Aug. 22, 2008)*, remanded, *2011 U.S. App. Vet. Claims LEXIS 2695 (U.S. App. Vet. Cl. Dec. 9, 2011)*.

Unpublished decision: There was merit in veteran's argument that March 2006 VA examination was inadequate because examiner failed to provide any explanation of why veteran's impaired range of motion was normal based on his age, body characteristics, and other factors not related to his disability; remand was appropriate because March 2006 VA examiner failed to provide any explanation for his conclusion that veterans' range of motion was normal despite limitation. *Aponte-Rivera v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 118 (U.S. App. Vet. Cl. Feb. 13, 2009)*.

Unpublished decision: Veteran's DD Form 214 demonstrated that he had active duty service in U.S. Navy from August 1979 to April 1981; accordingly, *Biggins v. Derwinski, 1 Vet.App. 474 (1991)*, was inapposite and Board of Veterans' Appeals erred in finding that he was not entitled to application of one-year presumption of *38 CFR §§ 3.307*, *3.309*, and remand was required for readjudication of his heart condition claim on that basis. *Tobin v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 198 (U.S. App. Vet. Cl. Mar. 6, 2009)*.

Unpublished decision: Where Board of Veterans' Appeals failed to consider treatment record for skin condition, duty to assist veteran by providing medical examination to determine whether there was current disability or persistent or recurrent symptoms of disability must be considered on remand, under *38 USCS § 5103A(d)(2)*. *Parry v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 434 (U.S. App. Vet. Cl. Mar. 25, 2009)*.

Unpublished decision: VA medical examination that Board of Veterans' Appeals had relied on to deny veteran VA benefits for left shoulder disorder was inadequate where examiner did not have access to any previous records regarding shoulder condition, and thus, remand was required to provide veteran with new examination that considered prior medical examinations and treatment to complete record. *Norris v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 458 (U.S. App. Vet. Cl. Mar. 27, 2009)*.

Unpublished decision: Board of Veterans' Appeals' (BVA's) decision denying veteran's claim for service connection for low back condition was remanded because BVA's statement of reasons for its decision was insufficient and hindered judicial review; BVA did not make finding as to whether veteran was credible witness when he claimed he was injured while he was in U.S. Navy in 1954, when he fell while he was on ship, and it was not clear why BVA determined there was no need for VA medical examination. *Delorge v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 474 (U.S. App. Vet. Cl. Mar. 26, 2009)*.

Unpublished decision: Where Secretary of Veterans Affairs failed to meet his duty to assist claimant in obtaining his records in support of his claim that in service stressor caused his post traumatic stress disorder, under *38 USCS § 5103A(c)(1)*, further substantiation of record was necessary. *Craig v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1124 (U.S. App. Vet. Cl. June 29, 2009)*.

Unpublished decision: Veteran's case asking VA to reopen decision it made in September 1985, which denied his claim for disability benefits due to injuries he sustained when he received electrical shock and shoulder burn while he was in U.S. Navy, was remanded because VA had not fulfilled its obligation under *38 USCS § 5103A(a)* to provide veteran with assistance in substantiating his claim; although VA was informed that veteran filed workers' compensation claim with Social Security Administration (SSA) for work-related back injury he sustained after he left Navy, it did not obtain SSA records or review them to determine if they contained information that related veteran's back condition to electrocution incident. *Prather v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1204 (U.S. App. Vet. Cl. July 9, 2009)*.

Unpublished decision: Where the Board of Veterans' Appeals failed to provide an adequate statement of reasons or bases for its determination that a VA medical opinion, pursuant to *38 USCS § 5103A(d)(2)*, was not necessary for bilateral hearing loss, a right-ankle disability, and headache and low-back disabilities, and those matters were remanded for readjudication. *Burns v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 1540 (U.S. App. Vet. Cl. Aug. 31, 2009)*.

Unpublished decision: In case in which veteran appealed Board of Veterans' Appeals' (BVA) denial of entitlement to service connection for right and left leg disabilities, BVA inadequately explained its determination that VA satisfied its duty to assist;

BVA's failure to mention destruction of appellant's service records cast doubt over its determination that VA satisfied its duty to assist, and BVA never discussed need to obtain medical opinion to address etiology of condition. *Crawford v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1497 (U.S. App. Vet. Cl. Aug. 18, 2010)*.

Unpublished decision: Judicial review was frustrated and remand was warranted because U.S. Board of Veterans' Appeals failed to determine credibility of veteran's testimony as to lipoma and, if his testimony was credible, to consider whether onset of his symptoms at time near his inservice Agent Orange exposure met low threshold of nexus evidence for medical examination in accordance with *38 USCS § 5103A(d)*. *James v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1857 (U.S. App. Vet. Cl. Oct. 13, 2010)*.

Unpublished decision: Where Board of Veterans' Appeals denied veteran entitlement to service connection for headaches and memory loss, remand was warranted as to memory loss claim because there was evidence that veteran's potential memory loss could be attributed to particular causes, and record was inadequate according to veteran's own hearing testimony. *Quinones v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1995 (U.S. App. Vet. Cl. Oct. 29, 2010)*.

Unpublished decision: Board of Veterans' Appeals' decision that new and material evidence had not been presented to warrant reopening veteran's previously disallowed claim for entitlement to service connection for acquired psychiatric disorder other than post-traumatic stress disorder was remanded because Board failed to address whether new and additional medical evidence had been sought by VA, under *38 USCS § 5103A*, and court was precluded from properly reviewing Board's decision due to its inadequate reasons or bases, under *38 USCS § 7104(d)(1)*. *Gray v. Shinseki, 2011 U.S. App. Vet. Claims LEXIS 124 (U.S. App. Vet. Cl. Jan. 24, 2011)*.

Board of Veterans' Appeals erred in denying veteran a service connection for sleep apnea and acquired psychiatric disorder, including PTSD. because Board and/or VA examiners provided inadequate reasons for their determinations or sufficient rationale for their conclusions that VA examination for sleep apnea was unnecessary or was caused or aggravated by his service-connected disabilities, that veteran did not have acquired psychiatric disorder, never had mental disorder diagnosis, or explain how ongoing mental health treatment and medication did not support current acquired psychiatric disorder diagnosis, veteran was entitled to further development of matters, if necessary, and readjudication. *Foster v. McDonough, 2021 U.S. App. Vet. Claims LEXIS 589 (U.S. App. Vet. Cl. Apr. 2, 2021)*.

12. Miscellaneous

Correct interpretation of *38 USCS § 5103A* and *38 CFR § 3.159* requires that claimant's new evidence be submitted and considered in connection with request for verification of service from service department pursuant to *38 CFR § 3.203(c)*. *Capellan v. Peake, 539 F.3d 1373, 2008 U.S. App. LEXIS 18745 (Fed. Cir. 2008)*.

Non-adversarial procedures for adjudicating benefits claims at VA Regional Office level are sufficient to satisfy dictates of due process; instead of allowing for paid attorneys to represent claimants and for formal discovery, Congress has imposed on VA duty to assist claimants in substantiating their claims for benefits. *Veterans for Common Sense v. Shinseki, 644 F.3d 845, 2011 U.S. App. LEXIS 9542 (9th Cir.)*, reh'g, en banc, granted, *663 F.3d 1033, 2011 U.S. App. LEXIS 22934 (9th Cir. 2011)*.

Applicant for restoration of competency was not seeking benefits under chapter 51 of Title 328, but, rather, decision regarding distribution of his benefits under chapter 55 of Title 38; accordingly, notice and assistance provisions of Veterans Claims Assistance Act, in particular *38 USCS §§ 5102* and *5103A*, do not apply to such claims. *Sims v. Nicholson, 19 Vet. App. 453, 2006 U.S. App. Vet. Claims LEXIS 88 (U.S. App. Vet. Cl. Feb. 24, 2006)*.

Alleged breach by VA of its duty to assist veterans which is imposed by Veterans Claims Assistance Act of 2000, *Pub. L. No. 106-475*, § 3, *114 Stat. 2096, 2096–97*, cannot constitute "clear and unmistakable error" for purposes of *38 USCS § 5109A(a)*. *Rudd v. Nicholson, 20 Vet. App. 296, 2006 U.S. App. Vet. Claims LEXIS 750 (U.S. App. Vet. Cl. Aug. 18, 2006)*.

Unpublished decision: Because there was no competent evidence of record that suggested relationship between veteran's service-connected disabilities and cause of his death, Board of Veterans' Appeals determination that VA satisfied its duty to assist under *38 USCS § 5103A(a)* was not clearly erroneous; thus, veteran's surviving spouse was not entitled to dependency

and indemnity compensation benefits under *38 USCS § 1310*. *Basso v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1080 (U.S. App. Vet. Cl. Sept. 30, 2008)*.

Unpublished decision: Veteran's claim for compensation for post-traumatic stress disorder (PTSD) was properly denied because VA had no further duty to assist veteran in obtaining statement from sister in order to corroborate veteran's claim that in-service rape occurred, since veteran provided VA with no information about sister and did not complete PTSD questionnaires. *Johnson v. Peake, 2008 U.S. App. Vet. Claims LEXIS 1473 (U.S. App. Vet. Cl. Apr. 1, 2008)*.

Unpublished decision: Board of Veterans' Appeals correctly found that VA satisfied *38 USCS § 5103A* duty to assist veteran in substantiating his claim to reopen his previously denied claim for service connection for brain trauma residuals because evidence showed that accident in which veteran had concussion did not occur when he was driving directly to or from National Guard INACTDUTRA and, thus, confirmation of exact dates of INACDUTRA was not necessary. *Katzenmeier v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 890 (U.S. App. Vet. Cl. May 22, 2009)*.

Unpublished decision: Regarding failure to obtain medical opinion, denial of widow's claim for entitlement to service connection for cause of veteran's death was upheld because widow's claim was one for dependency and indemnity compensation, not disability compensation, applicable standard was set forth under *38 USCS § 5103A(a)*, and Board of Veterans' Appeals specifically discussed applicability of § 5103A(a) to claim. *Beasley v. Shinseki, 2010 U.S. App. Vet. Claims LEXIS 1365 (U.S. App. Vet. Cl. July 29, 2010)*.

Unpublished decision: Because medical examiners were not required to discuss all medical evidence favorable to claimant veteran, veteran's contention that examiner did not account for all medical opinions of record was without merit. *Anderson v. Shinseki, 2013 U.S. App. Vet. Claims LEXIS 1171 (U.S. App. Vet. Cl. July 17, 2013)*.

Research References & Practice Aids

Cross References:

This section is referred to in *38 USCS § 5103*.

Am Jur:

77 Am Jur 2d, Veterans and Veterans' Laws § 150.

Am Jur Trials:

121 Am Jur Trials, Litigation Before Department of Veterans Affairs, p. 357.

Hierarchy Notes:

38 USCS, Pt. IV

38 USCS, Pt. IV, Ch. 51

38 USCS, Pt. IV, Ch. 51, Subch. I

Fiscal Year 2020 Annual Report
October 1, 2019, to September 30, 2020
United States Court of Appeals for Veterans Claims

1. ***The number of appeals filed with the Court:***[1]

   8,954 appeals (23% pro se at the time of filing)

2. ***The number of petitions filed with the Court:***

   297 petitions (41% pro se at the time of filing)

3. ***The number of applications filed with the Court under the Equal Access to Justice Act (EAJA), section 2412 of title 28:***

   6,512 EAJA applications

4. ***The total number of dispositions[2] by each of the following for FY 2020:***

   (A) The Court as a whole

   8,430 appeals (12% pro se at time of disposition)
   309 petitions (37% pro se at time of disposition)
   6,744 EAJA applications
   246 requests for reconsideration/panel decision[3]
   179 appeals
   67 petitions
   15,729 total dispositions

[1] Under 38 U.S.C. § 7288, the United States Court of Appeals for Veterans Claims (Court) is required to submit an annual report to the U.S. Senate Committee on Veterans' Affairs and the U.S. House of Representatives Committee on Veterans' Affairs that includes the elements enumerated in this report.

[2] "Dispositions" include each resolution of a matter, including decisions on appeals, petitions, EAJA applications, and requests for reconsideration/panel decision.

[3] The number of requests for reconsideration by the Court as a whole, including a single judge of the Court, a multi-judge panel of the Court, and the full Court.

4. The total number of dispositions by each of the following for FY 2020 (continued):

(B) The Clerk of the Court[4]

6,423 appeals
9 petitions
6,716 EAJA applications
There were no requests for reconsideration of the Clerk's orders
13,148 total dispositions

(C) A single judge of the Court

1,960 appeals
298 petitions
26 EAJA applications
149 requests for reconsideration
109 appeals
40 petitions
2,433 total dispositions

(D) A multi-judge panel of the Court

46 appeals
1 petition
2 EAJA applications
79 requests for panel decision following a single-judge decision/panel reconsideration
57 appeals
22 petitions
128 total dispositions

(E) The full Court

1 appeal
1 petition
0 EAJA applications
18 requests for a full court decision following a panel decision
13 appeals
5 petitions
20 total dispositions

[4] This number generally includes matters resolved through agreement of the parties, often with the aid of staff mediation conferencing.

5. The number of each type of disposition by the Court, including settlement, affirmance, remand, vacation, dismissal, reversal, grant, and denial:

APPEALS

TYPE OF DISPOSITION	CLERK[5]	SINGLE JUDGE	THREE-JUDGE PANEL	FULL COURT	TOTAL
Affirmed	0	540	11	0	**551**
Affirmed or dismissed in part, reversed or vacated and remanded in part	3,374	186	2	0	**3,562**
Reversed or vacated and remanded in whole or in part	0	978	12	0	**990**
Remanded	2,246	7	6	0	**2,259**
Dismissed for lack of jurisdiction or timeliness	5	229	7	0	**241**
Dismissed for default	329	6	0	0	**335**
Dismissed voluntarily	469	14	8	1	**492**
TOTAL	**6,423**	**1,960**	**46**	**1**	**8,430**

PETITIONS

TYPE OF DISPOSITION	CLERK	SINGLE JUDGE	THREE-JUDGE PANEL	FULL COURT	TOTAL
Extraordinary relief granted	0	0	0	0	**0**
Extraordinary relief denied	0	103	1	1	**105**
Extraordinary relief dismissed	0	111	0	0	**111**
Dismissed for default	2	0	0	0	**2**
Dismissed voluntarily	7	84	0	0	**91**
TOTAL	**9**	**298**	**1**	**1**	**309**

[5] Please see footnote 4.

5. The number of each type of disposition by the Court, including settlement, affirmance, remand, vacation, dismissal, reversal, grant, and denial (continued):

EAJA

TYPE OF DISPOSITION	CLERK	SINGLE JUDGE	THREE-JUDGE PANEL	FULL COURT	TOTAL
Applications after decisions in appeals	6,715	24	2	0	**6,741**
Granted	6,715	13	1	0	**6,729**
Denied	0	3	0	0	**3**
Dismissed	0	8	1	0	**9**
Applications after decisions in petitions	1	2	0	0	**3**
Granted	1	0	0	0	**1**
Denied	0	2	0	0	**2**
Dismissed	0	0	0	0	**0**
TOTAL	**6,716**	**26**	**2**	**0**	**6,744**

6. The median time from filing an appeal to disposition (i.e., time from the veteran filing an appeal until initial dispositive action of the Court) by each of the following:

(A) **The Court as a whole:** The median time from filing an appeal to disposition of the case by the Court, as a whole, is **265 days (8.8 months)**. This involves pre-chambers procedural activity (including record dispute resolution, staff mediation conferencing, briefing, screening, time for pro se appellants to seek counsel, and requests for additional time from the parties) and then disposition by a judge or a panel of judges (including consideration of any requests for class certification and class action) or by the Clerk of the Court.

(B) **The Clerk of the Court:** The median time from filing an appeal to disposition of the case by the Clerk is **238 days (7.9 months).** This involves pre-chambers procedural activity (including record dispute resolution, staff mediation conferencing, briefing, screening, time for pro se appellants to seek counsel, and requests for additional time from the parties) and then disposition by the Clerk.

(C) **A single judge of the Court:** The median time for disposition of a single-judge decision once it has been assigned to chambers is **56 days (1.9 months)**. Activity once a matter is

6. ***The median time from filing an appeal to disposition (i.e., time from the veteran filing an appeal until initial dispositive action of the Court) by each of the following (continued):***

assigned to chambers includes judges and law clerks collaborating to draft a decision and circulating all draft decisions to all judges for a one-week comment period. The median time from filing an appeal to disposition by a single judge, which includes pre-chambers procedural activity, is **428 days (14.3 months).** Pre-chambers procedural activity includes record dispute resolution, staff mediation conferencing, briefing, screening, time for pro se appellants to seek counsel, and requests for additional time from the parties.

(D) **Multiple judges of the Court** (including a multi-judge panel of the Court or the full Court): The median time for disposition of a multi-judge panel decision once it has been assigned to a panel is **169 days (5.6 months).** Activity once a matter is assigned to a panel includes judges collaborating with each other to determine the disposition and assign writing responsibilities; considering any requests for class certification and class action; possible orders for additional briefing; drafting the decision; circulating it to the panel for concurrence or the opportunity to write separately; and circulating all draft decisions to all judges for a one-week comment period. If oral argument is held, scheduling the argument adds a minimum of 45 days to the case-processing time. The median time from filing an appeal to disposition by a multi-judge panel, which includes pre-chambers procedural activity, is **647 days (21.6 months).** Pre-chambers procedural activity includes record dispute resolution, staff mediation conferencing, briefing, screening, time for pro se appellants to seek counsel, and requests for additional time from the parties. In addition, scheduling a case for oral argument, which adds a minimum of 45 days, and additional time for supplemental briefing, contributes to the time for panel case disposition.

7. ***The median time from filing a petition to disposition by the Court:***

50 days (1.7 months)

8. ***The median time from filing an EAJA application under section 2412 of title 28 to disposition by the Court:***

32 days (1.1 months)

9. ***The median time from the completion of briefing requirements by the parties to disposition by the Court:***

106 days (3.5 months)

Note: This time includes approximately two weeks to raise issues relating to finalizing the Record of Proceedings (a compilation of all documents relevant to the appeal) in every case. If an objection to the Record of Proceedings is filed, resolution can take several more weeks.

10. The number of oral arguments before the Court:

31 held *(62 scheduled, 16 settled, 15 cancelled)*[6]

11. The number of cases appealed to the United States Court of Appeals for the Federal Circuit:

144 total cases
119 appeals
22 petitions
3 EAJA applications

12. The approximate number and status of appeals and petitions and EAJA applications pending with the Court as of the end of the fiscal year:

	APPEALS & PETITIONS	EAJA APPLICATIONS	TOTAL
Pre-chambers procedural activity[7]	7,037	867	**7,904**
Pending decision by a judge or panel	365	4	**369**
Post decision[8]	817	4	**821**
Pending a motion for reconsideration or panel	14	0	**14**
Pending entry of judgment	186	2	**188**
Pending entry of mandate	482	0	**482**
On appeal before the Federal Circuit[9]	135	2	**137**
TOTAL	**8,219**	**875**	**9,094**

[6] Due to the onset of the COVID-19 pandemic, the Court was forced to reschedule six arguments. Three of those arguments had been scheduled at law schools as part of the Court's educational outreach program and the other three were scheduled to be held in-person at the Court. All six arguments were eventually held virtually via teleconference. Between April 2020 and the end of the fiscal year, the Court conducted 22 arguments via teleconference. In November 2020 the Court transitioned to videoconference arguments.

[7] Pre-chambers procedural activity, the period of time from filing an appeal to assignment of the appeal to chambers, includes record dispute resolution, staff mediation conferencing, briefing, screening, time for pro se appellants to seek counsel, and requests for additional time from the parties.

[8] This number reflects cases pending during the time required for judgment, mandate, and EAJA (if applicable) as well as cases on appeal to the Federal Circuit.

[9] This represents the number of cases pending on appeal to the Federal Circuit at the end of FY 2020, which is different than the number of notices of appeal filed during FY 2020 reported in element 11.

13. The number of cases pending with the Court more than 18 months as of the end of the fiscal year:

572 total cases
567 appeals
5 petitions

Pre-chambers procedural activity[10]	201
Pending decision by a judge or panel	55
Post decision	316

14. A summary of any service performed for the Court by a recalled retired judge of the Court:

Four retired judges were recalled to service as Senior Judges in FY 2020. Senior Judges issued 179 single-judge decisions. In addition, Senior Judges participated in several panel decisions including two three-judge panels and two en banc panels. They also participated in 10 three-judge panels reconsidering single-judge decisions and two en banc panels reconsidering three-judge panel decisions. Three Senior Judges were also involved in committee work for the Court.

15. An assessment of the workload of each judge of the Court, including consideration of the following:

(A) The time required of each judge for disposition of each type of case.

(B) The number of cases reviewed by the Court.

(C) The average workload of other Federal appellate judges.

As reflected in the responses to elements 1-13 above, each active judge[11] on the Court carries a substantial workload. The judges' primary responsibilities are rendering decisions on appeals, petitions, related motions (e.g., procedural motions and motions for reconsideration or for panel review), applications filed pursuant to 28 U.S.C. § 2412 (EAJA), and a new and growing class action caseload. The judges are also responsible for the general direction and oversight of the operations of the Court and serve on various committees in furtherance of those obligations.

The number of new cases filed at the Court in FY 2020 again increased dramatically over the previous year, likely due in large part to the substantial increase in final decisions issued by the Board of Veterans' Appeals (Board). In FY 2020, the Board increased production of final decisions from 95,000 to more than 102,000.

Over the course of FY 2020, the Court averaged 748 appeals filed per month, and reached a high of 841 appeals filed in January 2020. These numbers are the highest in the 30-year history of the Court. In addition, the Court received four requests for class certification and class action, and certified two classes. The Court has kept pace with this historic increase in the number of appeals in large part due to the significant percentage of cases that are resolved through the mandatory pre-briefing mediation conferences conducted by Court staff attorneys.

[10] Delays associated with these cases are due primarily to parties' requests for stays, requests for additional time from the parties, or the complexity of the case.

[11] Consistent with calculations of data performed by the Administrative Office of the United States Courts, "active judge" refers only to a judge who has been active for the entire fiscal year.

In FY 2020, the Court averaged 234 cases (appeals and petitions) decided on the merits per active judge. For that same time period, the average number of merits decisions decided per active judge in the 13 Circuit Courts of Appeals ranged from 36 to 210. The Court received 1,322 filings per active judge, based on the 9,251 cases (8,954 and 297 petitions) filed in FY 2020. The number of filings per active judge for the Circuit Courts of appeals ranged from 81 to 443.

Congress recently renewed the Court's temporary authority for nine active judges. The Court's current workload justifies making the temporary expansion to nine judges permanent.

VETERANS' JUDICIAL REVIEW ACT, 1988 Enacted S. 11, 100 Enacted S. 11

Enacted, November 18, 1988

Reporter
102 Stat. 4105 *; 100 P.L. 687; 1988 Enacted S. 11; 100 Enacted S. 11

UNITED STATES PUBLIC LAWS > 100th Congress -- 2nd Session > PUBLIC LAW 100-687 > [S. 11]

Synopsis

An Act

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of *section 553 of title 5, United States Code*, to rulemaking procedures of the Veterans' Administration; to establish a Court of Veterans' Appeals and to provide for judicial review of certain final decisions of the Board of Veterans" Appeals; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; to increase the rates of compensation payable to veterans with service-connected disabilities; and to make various improvements in veterans' health, rehabilitation, and memorial affairs programs; and for other purposes.

Text

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A -- VETERANS' JUDICIAL REVIEW

SECTION 1. <<Notes>>

SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

(a) SHORT TITLE. -- This division may be cited as the "Veterans' Judicial Review Act".

(b) REFERENCES. -- Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I -- ADJUDICATIVE AND RULEMAKING AUTHORITY OF THE VETERANS'

ADMINISTRATION

SEC. 101. DECISIONS BY ADMINISTRATOR.

(a) MATTERS TO BE DECIDED BY ADMINISTRATOR. -- Subsection (a) of section 211 is amended to read as follows:

"(a)(1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to

paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

"(2) The second sentence of paragraph (1) of this subsection does not apply to --

"(A) matters subject to section 223 of this title;

"(B) matters covered by sections 775 and 784 of this title;

"(C) matters arising under chapter 37 of this title; and

[*4106] "(D) matters covered by chapter 72 of this title.".

(b) CONFORMING AMENDMENT. -- Section 4004(a) is amended by striking out "All questions on claims involving benefits under laws administered by the Veterans' Administration" and inserting in lieu thereof "All questions in a matter which under section 211(a) of this title is subject to decision by the Administrator".

SEC. 102. VETERANS' ADMINISTRATION RULEMAKING.

(a) APA PROCEDURES. -- (1) Chapter 3 is amended by inserting after section 222 the following new section:

"§ 223. Rulemaking: procedures and judicial review

"(a) In applying section 552(a)(1) of title 5 to the Veterans' Administration, the Administrator shall ensure that subparagraphs (C), (D), and (E) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel.

"(b) The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Administrator.

"(c) An action of the Administrator to which section 552(a)(1) or 553 of title 5 (or both) refers (other than an action relating to the adoption or revision of the schedule of ratings for disabilities adopted under section 355 of this title) is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 222 the following new item:

"223. Rulemaking: procedures and judicial review.".

(b) REPORT ON IMPLEMENTATION. -- Not later than May 1, 1989, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the implementation of section 223(a) of title 38, United States Code, as added by subsection (a)(1). Such report shall set forth the actions the Administrator is taking to ensure that such section is carried out.

SEC. 103. VETERANS' ADMINISTRATION ADJUDICATION PROCEDURES.

(a) IN GENERAL. -- (1) Chapter 51 is amended by adding at the end of subchapter I the following new sections:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 3006 of this title.

"(b) When, after consideration of all evidence and material of record in a case before the Veterans' Administration with respect to

[*4107] benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Administrator the burden specified in subsection (a) of this section.

"§ 3008. Reopening disallowed claims

"If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Administrator shall reopen the claim and review the former disposition of the claim.".

"§ 3009. Independent medical opinions

"(a) When, in the judgment of the Administrator, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in a case being considered by the Veterans' Administration, the Administrator may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

"(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions. Any such arrangement shall provide that the actual selection of the expert or experts to give the advisory opinion in an individual case shall be made by an appropriate official of such institution.

"(c) The Administrator shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Administrator.".

(2) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new items:

"3007. Burden of proof; benefit of the doubt.

"3008. Reopening disallowed claims.

"3009. Independent medical opinions.".

(b) CONFORMING AMENDMENTS. -- Section 4009 is amended --

(1) in subsection (a), by striking out "is authorized to" and inserting in lieu thereof "may";

(2) in subsection (b) --

(A) by striking out "Such arrangement will" and inserting in lieu thereof "Any such arrangement shall"; and

(B) by striking out "any individual case will" and inserting in lieu thereof "an individual case shall"; and

(3) by adding at the end the following new subsection:

"(c) The Board shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Board.".

(c) TECHNICAL AMENDMENTS. -- (1) The items relating to chapter 51 in the table of chapters before part I, and in the table of chapters at the beginning of part IV, are amended by striking out "Applications" and inserting in lieu thereof "Claims".

(2) The heading of chapter 51 is amended to read as follows:

[*4108] "CHAPTER 51 -- CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(3) The item relating to subchapter I in the table of sections at the beginning of chapter 51 is amended by striking out "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(4) The heading of subchapter I of chapter 51 is amended to read as follows:

"SUBCHAPTER I -- CLAIMS".

SEC. 104. ATTORNEYS FEES.

(a) REVISION OF ATTORNEY FEE LIMITATION. -- Section 3404 of title 38, United States Code, is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c)(1) In connection with a proceeding before the Veterans' Administration with respect to benefits under laws administered by the Veterans' Administration, a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case. Such a fee may be charged, allowed, or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. The limitation in the preceding sentence does not apply to services provided with respect to proceedings before a court.

"(2) A person who, acting as agent or attorney in a case referred to in paragraph (1) of this subsection, represents a person before the Veterans' Administration or the Board of Veterans' Appeals after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board at such time as may be specified by the Board. The Board, upon its own motion or the request of either party, may review such a fee agreement and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the United States Court of Veterans Appeals under section 4063(d) of this title.

"(d)(1) When a claimant and an attorney have entered into a fee agreement described in paragraph (2) of this subsection, the total fee payable to the attorney may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(2)(A) A fee agreement referred to in paragraph (1) of this subsection is one under which (i) the amount of the fee payable to the attorney is to be paid to the attorney by the Administrator directly from any past-due benefits awarded on the basis of the claim, and (ii) the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant.

"(B) For purposes of subparagraph (A) of this paragraph, a claim shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted.

"(3) To the extent that past-due benefits are awarded in any proceeding before the Administrator, the Board of Veterans' Appeals, or the United States Court of Veterans Appeals, the Administrator may direct that payment of any attorneys' fee under a fee arrangement described in paragraph (1) of this subsection be made out of such past-due benefits. In no event may the Administrator

[*4109] withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Administrator, the Board of Veterans' Appeals, or Court of Veterans Appeals making (or ordering the making of) the award.".

(b) VIOLATION TO BE A MISDEMEANOR. -- Section 3405 of such title is amended by striking out "shall be fined not more than $ 500 or imprisoned at hard labor for not more than two years, or both" and inserting in lieu thereof "shall be fined as provided in title 18, or imprisoned not more than one year, or both".

TITLE II -- BOARD OF VETERANS' APPEALS

SEC. 201. APPOINTMENT AND REMOVAL OF THE CHAIRMAN AND MEMBERS.

(a) IN GENERAL. -- Subsection (b) of section 4001 is amended to read as follows:

"(b)(1) The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of six years. The Chairman may be removed by the President for misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the

Chairman's duties. The Chairman may not be removed from office by the President on any other grounds. Any such removal may only be made after notice and opportunity for hearing.

"(2)(A) The other members of the Board (including the Vice Chairman) shall be appointed by the Administrator, with the approval of the President, based upon recommendations of the Chairman. Each such member shall be appointed for a term of nine years.

"(B) A member of the Board (other than the Chairman) may be removed by the Administrator upon the recommendation of the Chairman. In the case of a removal that would be covered by section 7521 of title 5 in the case of an administrative law judge, a removal of a member of the Board under this paragraph shall be carried out subject to the same requirements as apply to removal of an administrative law judge under that section. Section 554(a)(2) of title 5 shall not apply to a removal action under this subparagraph. In such a removal action, a member shall have the rights set out in section 7513(b) of such title.

"(3) Members (including the Chairman) may be appointed under this subsection to more than one term.

"(4) The Administrator shall designate one member of the Board as Vice Chairman. The Vice Chairman shall perform such functions as the Chairman may specify. Such member shall serve as Vice Chairman at the pleasure of the Administrator.".

(b) SALARY OF CHAIRMAN. -- (1) *Section 5315 of title 5, United States Code*, is amended by adding at the end the following:

"Chairman, Board of Veterans' Appeals.".

(2) The amendment made by paragraph (1) shall take effect when the President first appoints an individual as Chairman of the Board of Veterans' Appeals under section 4001(b)(1) <<Notes>>

of title 38, United States Code (as amended by subsection (a)).

(c) <<Notes>>

TRANSITION TO NEW BOARD. -- (1) Appointments of members of the Board of Veterans' Appeals under subsection (b)(2) of section **[*4110]** 4001 of title 38, United States Code (as amended by subsection (a)) may not be made until a Chairman is appointed under subsection (b)(1) of that section.

(2) An individual who is serving as a member of the Board on the date of the enactment of this Act may continue to serve as a member until the earlier of --

(A) the date on which the individual's successor (as designated by the Administrator) is appointed under subsection (b)(2) of that section, or

(B) the end of the 180-day period beginning on the day after the date on which the Chairman is appointed under subsection (b)(1) of such section.

(d) <<Notes>>

INITIAL TERMS OF OFFICE. -- Notwithstanding the second sentence of section 4001(b)(2) of title 38, United States Code (as amended by subsection (a)), specifying the term for which members of the Board of Veterans' Appeals shall be appointed, of the members first appointed under that section --

(A) 22 shall be appointed for a term of three years;

(B) 22 shall be appointed for a term of six years; and

(C) 22 shall be appointed for a term of nine years,

as determined by the Administrator at the time of the initial appointments.

SEC. 202. DETERMINATIONS BY THE BOARD.

(a) MAJORITY VOTE IN SECTIONS. -- Section 4003 is amended to read as follows:

"§ 4003. Determinations by the Board

"(a) Decisions by a section of the Board shall be made by a majority of the members of the section. The decision of the section is final unless the Chairman orders reconsideration of the case.

"(b) If the Chairman orders reconsideration in a case, the case shall upon reconsideration be heard by an expanded section of the Board. When a case is heard by an expanded section of the Board after such a motion for reconsideration, the decision of a majority of the members of the expanded section shall constitute the final decision of the Board.

"(c) Notwithstanding subsections (a) and (b) of this section, the Board on its own motion may correct an obvious error in the record.".

(b) RESOURCES TO DISPOSE OF APPEALS IN A TIMELY MANNER. -- Section 4001(a) is amended --

(1) by inserting "and" after "Vice Chairman,";

(2) by striking out "necessary, and" and inserting in lieu thereof "necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner. The Board shall have"; and

(3) by adding at the end the following new sentence: "The Board shall have sufficient personnel under the preceding sentence to enable the Board to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner.".

SEC. 203. DECISIONS OF THE BOARD.

(a) DECISIONS BASED ON THE RECORD. -- Section 4004(a) is amended by adding at the end the following new sentences: "The Board shall decide any such appeal only after affording the claimant an opportunity

[*4111] for a hearing. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.".

(b) CONFORMING AMENDMENT. -- Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

SEC. 204. REOPENING OF DISALLOWED CLAIMS.

Subsection (b) of section 4004 is amended to read as follows:

"(b) Except as provided in section 3008 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.".

SEC. 205. NOTICE AND CONTENT OF DECISIONS.

Section 4004 is amended by striking out subsection (d) and inserting in lieu thereof the following:

"(d) Each decision of the Board shall include --

"(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and

"(2) an order granting appropriate relief or denying relief.

"(e) After reaching a decision in a case, the Board shall promptly mail a copy of its written decision to the claimant and the claimant's authorized representative (if any) at the last known address of the claimant and at the last known address of such representative (if any).".

SEC. 206. STATEMENT OF THE CASE.

(a) MATTERS TO BE INCLUDED. -- Paragraph (1) of section 4005(d) is amended in the second sentence by striking out "will prepare" and all that follows and inserting in lieu thereof the following: "shall prepare a statement of the case. A statement of the case shall include the following:

"(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

"(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

"(C) The decision on each issue and a summary of the reasons for such decision.".

(b) PROHIBITION AGAINST PRESUMPTION OF AGREEMENT. -- Paragraph (4) of such section is amended to read as follows:

"(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.".

SEC. 207. TRAVELING SECTIONS OF THE BOARD.

(a) IN GENERAL. -- Chapter 71 is further amended by adding at the end the following new section:

"§ 4010. Traveling sections

"A claimant may request a hearing before a traveling section of the Board. Any such hearing shall be scheduled for hearing before such a section within the area served by a regional office of the Veterans' Administration in the order in which the requests for

[*4112] hearing are received by the Veterans' Administration with respect to hearings in that area.".

(b) CLERICAL AMENDMENT. -- The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"4010. Traveling sections.".

SEC. 208. ANNUAL REPORT ON BOARD ACTIVITIES AND RESOURCES.

Section 4001 is amended by adding at the end the following new subsection:

"(d)(1) After the end of each fiscal year, the Chairman shall prepare a report on the activities of the Board during that fiscal year and the projected activities of the Board for the fiscal year during which the report is prepared and the next fiscal year. Such report shall be included in the documents providing detailed information on the budget for the Veterans' Administration that the Administrator submits to the Congress in conjunction with the President's budget submission for any fiscal year pursuant to section 1105 of title 31.

"(2) Each such report shall include, with respect to the preceding fiscal year, information specifying --

"(A) the number of cases appealed to the Board during that year;

"(B) the number of cases pending before the Board at the beginning and at the end of that year;

"(C) the number of such cases which were filed during each of the 36 months preceding the current fiscal year;

"(D) the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year; and

"(E) the number of members of the Board at the end of the year and the number of professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the preceding fiscal year.

"(3) The projections in each such report for the current fiscal year and for the next fiscal year shall include (for each such year) --

"(A) an estimate of the number of cases to be appealed to the Board; and

"(B) an evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by section 4003(d) of this title.".

SEC. 209. LIMITATIONS ON AWARDING PERFORMANCE INCENTIVES TO BOARD MEMBERS.

Section 4001 (as amended by section 208) is further amended by adding at the end the following new subsection:

"(e) A performance incentive that is authorized by law for officers and employees of the Federal Government may be awarded to a member of the Board (including a temporary or acting member) by reason of that member's service on the Board only if the Chairman of the Board determines that such member should be awarded that incentive. A determination by the Chairman for such purpose shall be made taking into consideration the quality of performance of the Board member.".

[*4113] TITLE III -- UNITED STATES COURT OF VETERANS APPEALS

SEC. 301. UNITED STATES COURT OF VETERANS APPEALS.

(a) ESTABLISHMENT OF COURT. -- Part V is amended by inserting after chapter 71 the following new chapter:

"CHAPTER 72 -- UNITED STATES COURT OF VETERANS APPEALS

"SUBCHAPTER I -- ORGANIZATION AND JURISDICTION

"Sec.

"SUBCHAPTER I -- ORGANIZATION AND JURISDICTION

"§ 4051. Status

"There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals.

"§ 4052. Jurisdiction; finality of decisions

"(a) The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Administrator may not seek review of any such decision. The court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

"(b) Review in the Court shall be on the record of proceedings before the Administrator and the Board. The extent of the review shall be limited to the scope provided in section 4061 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 355 of this title or any action of the Administrator in adopting or revising that schedule.

[*4114] "(c) Decisions by the Court are subject to review as provided in section 4092 of this title.

"§ 4053. Composition

"(a) The Court of Veterans Appeals shall be composed of a chief judge and at least two and not more than six associate judges.

"(b) The judges of the Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. A person may not be appointed to the Court who is not a member in good standing of the bar of a Federal court or of the highest court of a State. Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.

"(c) The term of office of the judges of the Court of Veterans Appeals shall be 15 years.

"(d) The chief judge is the head of the Court.

"(e)(1) The chief judge of the Court shall receive a salary at the same rate as is received by judges of the United States Courts of Appeals.

"(2) Each judge of the Court, other than the chief judge, shall receive a salary at the same rate as is received by judges of the United States district courts.

"(f)(1) A judge of the Court may be removed from office by the President on grounds of misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability which, in the opinion of the President, prevents the proper execution of the judge's duties. A judge of the Court may not be removed from office by the President on any other ground.

"(2) Before a judge may be removed from office under this subsection, the judge shall be provided with a full specification of the reasons for the removal and an opportunity to be heard.

"§ 4054. Organization

"(a) The Court of Veterans Appeals shall have a seal which shall be judicially noticed.

"(b) The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court. Any such panel shall have not less than three judges. The Court shall establish procedures for the assignment of the judges of the Court to such panels and for the designation of the chief of each such panel.

"(c)(1) A majority of the judges of the Court shall constitute a quorum for the transaction of the business of the Court. A vacancy in the Court shall not impair the powers or affect the duties of the Court or of the remaining judges of the Court.

"(2) A majority of the judges of a panel of the Court shall constitute a quorum for the transaction of the business of the panel. A vacancy in a panel of the Court shall not impair the powers or affect the duties of the panel or of the remaining judges of the panel.

"§ 4055. Offices

"The principal office of the Court of Veterans Appeals shall be in the District of Columbia, but the Court may sit at any place within the United States.

[*4115] "§ 4056. Times and places of sessions

"The times and places of sessions of the Court of Veterans Appeals shall be prescribed by the chief judge.

"SUBCHAPTER II -- PROCEDURE

"§ 4061. Scope of review

"(a) In any action brought under this chapter, the Court of Veterans Appeals, to the extent necessary to its decision and when presented, shall --

"(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(2) compel action of the Administrator unlawfully withheld;

"(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Administrator, the Board of Veterans' Appeals, or the Chairman of the Board found to be --

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law; and

"(4) in the case of a finding of material fact made in reaching a decision in a case before the Veterans' Administration with respect to benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding if the finding is clearly erroneous.

"(b) In making the determinations under subsection (a) of this section, the Court shall take due account of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator or the Board of Veterans' Appeals be subject to trial de novo by the court.

"(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Administrator, the Court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4062. Fee for filing appeals

"(a) The Court of Veterans Appeals may impose a fee of not more than $ 50 for the filing of any appeal with the Court. The Court shall establish procedures under which such a fee may be waived in the case of an appeal filed by or on behalf of a person who demonstrates that the requirement that such fee be paid will impose a hardship on that person. A decision as to such a waiver is final and may not be reviewed in any other court.

"(b) The Court may from time to time adjust the maximum amount permitted for a fee imposed under subsection (a) of this

[*4116] section based upon inflation and similar fees charged by other courts established under Article I of the Constitution.

"§ 4063. Representation of parties; fee agreements

"(a) The Administrator shall be represented before the Court of Veterans Appeals by the General Counsel of the Veterans' Administration.

"(b) Representation of appellants shall be in accordance with the rules of practice prescribed by the Court under section 4064 of this title. In addition to members of the bar admitted to practice before the Court in accordance with such rules of practice, the Court may allow other persons to practice before the Court who meet standards of proficiency prescribed in such rules of practice.

"(c) A person who represents an appellant before the Court shall file a copy of any fee agreement between the appellant and that person with the Court at the time the appeal is filed. The Court, on its own motion or the motion of any party, may review such a fee agreement.

"(d) In reviewing a fee agreement under subsection (c) of this section or under section 3404(c)(2) of this title, the Court may affirm the finding or order of the Board and may order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable. An order of the Court under this subsection is final and may not be reviewed in any other court.

"§ 4064. Rules of practice and procedure

"(a) The proceedings of the Court of Veterans Appeals shall be conducted in accordance with such rules of practice and procedure as the Court prescribes.

"(b) The mailing of a pleading, decision, order, notice, or process in respect of proceedings before the Court shall be held sufficient service of such pleading, decision, order, notice, or process if it is properly addressed to the address furnished by the appellant on the notice of appeal filed under section 4066 of this title.

"§ 4065. Contempt authority; assistance to the Court

"(a) The Court shall have power to punish by fine or imprisonment such contempt of its authority as --

"(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) misbehavior of any of its officers in their official transactions; or

"(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

"(b) The Court shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for a district in which the Court is sitting shall, if requested by the chief judge of the Court, attend any session of the Court in that district.

"§ 4066. Notice of appeal

"(a) In order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date on which notice of the decision is mailed pursuant to section 4004(e) of this title.

[*4117] "(b) The appellant shall also furnish the Administrator with a copy of such notice, but a failure to do so shall not constitute a failure of timely compliance with subsection (a) of this section.

"§ 4067. Decisions

"(a) A decision upon a proceeding before the Court of Veterans Appeals shall be made as quickly as practicable. In a case heard by a panel of the Court, the decision shall be made by a majority vote of the panel in accordance with the rules of the Court. The decision of the judge or panel hearing the case so made shall be the decision of the Court except as provided in subsection (d) of this section.

"(b) The Court shall include in its decision a statement of its conclusions of law and determinations as to factual matters.

"(c) A judge or panel shall make a determination upon any proceeding before the Court, and any motion in connection with such a proceeding, that is assigned to the judge or panel. The judge or panel shall make a report of any such determination which constitutes the judge or panel's final disposition of the proceeding.

"(d)(1) In the case of a proceeding determined by a single judge of the Court, the decision of the judge shall become the decision of the Court unless before the end of the 30-day period beginning on the date of the decision by the judge the Court, upon the motion of either party or on its own initiative, directs that the decision be reviewed by a panel of the Court. In such a case, the decision of the judge initially deciding the case shall not be a part of the record.

"(2) In the case of a proceeding determined by a panel of the Court, the decision of the panel shall become the decision of the Court unless before the end of the 30-day period beginning on the date of the decision by the panel the Court, upon the motion of either party or on its own initiative, directs that the decision be reviewed by an expanded panel of the Court (or the Court en banc). In such a case, the decision of the panel initially deciding the case shall not be a part of the record.

"(e) The Court shall designate in its decision in any case those specific records of the Government on which it relied (if any) in making its decision. The Administrator shall preserve records so designated for not less than the period of time designated by the Administrator of the National Archives and Records Administration.

"§ 4068. Availability of proceedings

"(a) Except as provided in subsection (b) of this section, all decisions of the Court of Veterans Appeals and all briefs, motions, documents, and exhibits received by the Court (including a transcript of the stenographic report of the hearings) shall be public records open to the inspection of the public.

"(b)(1) The Court may make any provision which is necessary to prevent the disclosure of confidential information, including a provision that any such document or information be placed under seal to be opened only as directed by the Court.

"(2) After the decision of the Court in a proceeding becomes final, the Court shall permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, submitted to the Court before the Court may, on its own motion, make such other disposition thereof as it considers advisable.

[*4118] "§ 4069. Publication of decisions

"(a) The Court of Veterans Appeals shall provide for the publication of decisions of the Court in such form and manner as may be best adapted for public information and use. The Court may make such exceptions, or may authorize the chief judge to make such exceptions, to the requirement for publication in the preceding sentence as may be appropriate.

"(b) Such authorized publication shall be competent evidence of the decisions of the Court of Veterans Appeals therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

"(c) Such publications shall be subject to sale in the same manner and upon the same terms as other public documents.

"SUBCHAPTER III -- MISCELLANEOUS PROVISIONS

"§ 4081. Employees

"The Court of Veterans Appeals may appoint such employees as may be necessary to execute the functions vested in the Court. Such appointments shall be made in accordance with the provisions of title 5 governing appointment in the competitive service, except that the Court may classify such positions based upon the classification of comparable positions in the judicial branch. The basic pay of such employees shall be fixed in accordance with subchapter III of chapter 53 of title 5.

"§ 4082. Budget and expenditures

"(a) The budget of the Court of Veterans Appeals as submitted by the Court for inclusion in the budget of the President for any fiscal year shall be included in that budget without review within the executive branch.

"(b) The Court may make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodicals) as may be necessary to execute efficiently the functions vested in the Court.

"(c) All expenditures of the Court shall be allowed and paid upon presentation of itemized vouchers signed by the certifying officer designated by the chief judge. Except as provided in section 4085 of this title, all such expenditures shall be paid out of moneys appropriated for purposes of the Court.

"§ 4083. Disposition of fees

"Except for amounts received pursuant to section 4085 of this title, all fees received by the Court of Veterans Appeals shall be covered into the Treasury as miscellaneous receipts.

"§ 4084. Fee for transcript of record

"The Court of Veterans Appeals may fix a fee, not in excess of the fee authorized by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record of any proceeding before the Court, or for copying any record, entry, or other paper and the comparison and certification thereof.

[*4119] "§ 4085. Practice fee

"(a) The Court of Veterans Appeals may impose a periodic registration fee on persons admitted to practice before the Court. The frequency and amount of such fee shall be determined by the Court, except that such amount may not exceed $ 30 per year.

"(b) Amounts received by the Court under subsection (a) of this section shall be available to the Court for the purposes of (1) employing independent counsel to pursue disciplinary matters, and (2) defraying administrative costs for the implementation of the standards of proficiency prescribed for practice before the Court.

"SUBCHAPTER IV -- DECISIONS AND REVIEW

"§ 4091. Date when United States Court of Veterans Appeals decision becomes final

"(a) A decision of the United States Court of Veterans Appeals shall become final upon the expiration of the time allowed for filing, under section 4092 of this title, a notice of appeal from such decision, if no such notice is duly filed within such time. If such a notice is filed within such time, such a decision shall become final --

"(1) upon the expiration of the time allowed for filing a petition for certiorari with the Supreme Court of the United States, if the decision of the Court of Veterans Appeals is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit and no petition for certiorari is duly filed;

"(2) upon the denial of a petition for certiorari, if the decision of the Court of Veterans Appeals is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit; or

"(3) upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if that Court directs that the decision of the Court of Veterans Appeals be affirmed or the appeal dismissed.

"(b)(1) If the Supreme Court directs that the decision of the Court of Veterans Appeals be modified or reversed, the decision of the Court of Veterans Appeals rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Administrator or the petitioner has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Court of Veterans Appeals shall become final when so corrected.

"(2) If the decision of the Court of Veterans Appeals is modified or reversed by the United States Court of Appeals for the Federal Circuit and if --

"(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

"(B) the petition for certiorari has been denied, or

"(C) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,

then the decision of the Court of Veterans Appeals rendered in accordance with the mandate of the United States Court of Appeals for the Federal Circuit shall become final upon the expiration of 30 days from the time such decision of the Court of Veterans Appeals was rendered, unless within such 30 days either the Administrator

[*4120] or the petitioner has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Court of Veterans Appeals shall become final when so corrected.

(c) If the Supreme Court orders a rehearing, or if the case is remanded by the United States Court of Appeals for the Federal Circuit to the Court of Veterans Appeals for a rehearing, and if --

"(1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

"(2) the petition for certiorari has been denied, or

"(3) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,

then the decision of the Court of Veterans Appeals rendered upon such rehearing shall become final in the same manner as though no prior decision of the Court of Veterans Appeals had been rendered.

"(d) As used in this section, the term 'mandate', in case a mandate has been recalled before the expiration of 30 days from the date of issuance thereof, means the final mandate.

"§ 4092. Review by United States Court of Appeals for the Federal Circuit

"(a) After a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 355 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Veterans Appeals within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

"(b)(1) When a judge or panel of the Court of Veterans Appeals, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Administrator with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Veterans Appeals. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Veterans Appeals, unless a stay is ordered by a judge of the Court of Veterans Appeals or by the Court of Appeals for the Federal Circuit.

"(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Veterans Appeals.

"(c) The United States Courts of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation

[*4121] thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

"(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any statute or regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be --

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law.

"(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

"(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Veterans Appeals is not in accordance with law, to modify or reverse the decision of the Court of Veterans Appeals or to remand the matter, as appropriate.

"(2) Rules for review of decisions of the Court of Veterans Appeals shall be those prescribed by the Supreme Court under section 2072 of title 28.".

(b) CLERICAL AMENDMENT. -- The tables of chapters before part I and at the beginning of part V are each amended by inserting after the item relating to chapter 71 the following new item:

"72. Court of Veterans Appeals.....… 4051".

SEC. 302. <<Notes>>

INITIAL APPOINTMENT OF JUDGES TO COURT OF VETERANS APPEALS.

(a) CHIEF JUDGE TO BE APPOINTED FIRST. -- The President may not appoint an individual to be an associate judge of the United States Court of Veterans Appeals under section 4053(b) of title 38, United States Code, as added by section 301, until the chief judge of such Court has been appointed. The President shall, during the period beginning on January 21, 1989, and ending on April 1, 1989, nominate an individual for appointment to the position of chief judge of such Court.

(b) JUDGES. -- Subject to subsection (a), judges of the Court of Veterans Appeals may be appointed after February 1, 1989.

SEC. 303. <<Notes>>

FACILITY FOR PRINCIPAL OFFICE OF COURT.

In the implementation of section 4055 of title 38, United States Code (as added by section 301), the principal office of the Court of Veterans Appeals shall initially be located, if practicable, in a facility existing on the date of the enactment of this Act that, as determined by the Administrative Office of the United States Courts, would facilitate maximum efficiency and economy in the operation of the Court. The Administrative Office of the United

[*4122] States Courts shall take into consideration the convenience of the location of such facility to needed library resources, clerical and administrative support equipment and personnel, and other resources available for shared use by the Court and other courts or agencies of the Federal Government.

TITLE IV -- EFFECTIVE DATES AND APPLICABILITY

SEC. 401. <<Notes>>

EFFECTIVE DATES.

(a) GENERAL EFFECTIVE DATE. -- Except as otherwise provided in this section, this division (and the amendments made by this Act) shall take effect on September 1, 1989.

(b) EFFECTIVE DATE FOR CERTAIN TRANSITION PROVISIONS. -- The amendment made by section 201(a) shall take effect on February 1, 1989.

(c) DATE OF ENACTMENT. -- Sections 201 (other than subsection (a)), 208, 209, 302, and 303, and the amendments made by those sections, shall take effect on the date of the enactment of this Act.

(d) BOARD OF VETERANS' APPEALS. -- Sections 202 through 207 shall take effect on January 1, 1989.

(e) COMMENCEMENT OF OPERATION OF COURT OF VETERANS APPEALS. -- Notwithstanding subsection (a), the United States Court of Veterans Appeals established pursuant to chapter 72 of title 38, United States Code (as added by section 301) shall not begin to operate until at least three judges have been appointed to the court.

SEC. 402. <<Notes>>

APPLICABILITY TO CASES AFTER DATE OF ENACTMENT.

Chapter 72 of title 38, United States Code, as added by section 301, shall apply with respect to any case in which a notice of disagreement is filed under section 4005 of title 38, United States Code, on or after the date of the enactment of this Act.

SEC. 403. <<Notes>>

APPLICABILITY TO ATTORNEYS FEES.

The amendment to section 3404(c) of title 38, United States Code, made by section 104(a) shall apply only with respect to services of agents and attorneys in cases in which a notice of disagreement is filed with the Veterans' Administration on or after the date of the enactment of this division.

DIVISION B -- VETERANS' BENEFITS IMPROVEMENT

SEC. 1001. <<Notes>>

SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

(a) SHORT TITLE. -- This division may be cited as the "Veterans' Benefits Improvement Act of 1988".

(b) REFERENCES. -- Except as otherwise expressly provided, whenever in this division an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

SEC. 1002. <<Notes>>

DEFINITION OF ADMINISTRATOR.

For purposes of this division, the term "Administrator" means the Administrator of Veterans' Affairs.

[*4123] TITLE XI -- COMPENSATION RATE INCREASES

SEC. 1101. DISABILITY COMPENSATION.

(a) IN GENERAL. -- Section 314 is amended --

(1) by striking out "$ 71" in subsection (a) and inserting in lieu thereof "$ 73";

(2) by striking out "$ 133" in subsection (b) and inserting in lieu thereof "$ 138";

(3) by striking out "$ 202" in subsection (c) and inserting in lieu thereof "$ 210";

(4) by striking out "$ 289" in subsection (d) and inserting in lieu thereof "$ 300";

(5) by striking out "$ 410" in subsection (e) and inserting in lieu thereof "$ 426";

(6) by striking out "$ 516" in subsection (f) and inserting in lieu thereof "$ 537";

(7) by striking out "$ 652" in subsection (g) and inserting in lieu thereof "$ 678";

(8) by striking out "$ 754" in subsection (h) and inserting in lieu thereof "$ 784";

(9) by striking out "$ 849" in subsection (i) and inserting in lieu thereof "$ 883";

(10) by striking out "$ 1,411" in subsection (j) and inserting in lieu thereof "$ 1,468";

(11) by striking out "$ 1,754" and "$ 2,459" in subsection (k) and inserting in lieu thereof "$ 1,825" and "$ 2,559", respectively;

(12) by striking out "$ 1,754" in subsection (l) and inserting in lieu thereof "$ 1,825";

(13) by striking out "$ 1,933" in subsection (m) and inserting in lieu thereof "$ 2,012";

(14) by striking out "$ 2,199" in subsection (n) and inserting in lieu thereof "$ 2,289";

(15) by striking out "$ 2,459" each place it appears in subsections (o) and (p) and inserting in lieu thereof "$ 2,559";

(16) by striking out "$ 1,055" and "$ 1,572" in subsection (r) and inserting in lieu thereof "$ 1,098" and "$ 1,636", respectively; and

(17) by striking out "$ 1,579" in subsection (s) and inserting in lieu thereof "$ 1,643".

(b) <<Notes>>

SPECIAL RULE. -- The Administrator may adjust administratively, consistent with the increases authorized by this section, the rates of disability compensation payable to persons within the purview of section 10 of Public Law 85-857 who are not in receipt of compensation payable pursuant to chapter 11 of title 38, United States Code.

SEC. 1102. ADDITIONAL COMPENSATION FOR DEPENDENTS.

Section 315(1) is amended --

(1) by striking out "$ 85" in clause (A) and inserting in lieu thereof "$ 88";

(2) by striking out "$ 143" and "$ 45" in clause (B) and inserting in lieu thereof "$ 148" and "$ 46", respectively;

[*4124] (3) by striking out "$ 59" and "$ 45" in clause (C) and inserting in lieu thereof "$ 61" and "$ 46", respectively;

(4) by striking out "$ 69" in clause (D) and inserting in lieu thereof "$ 71";

(5) by striking out "$ 155" in clause (E) and inserting in lieu thereof "$ 161"; and

(6) by striking out "$ 131" in clause (F) and inserting in lieu thereof "$ 136".

SEC. 1103. CLOTHING ALLOWANCE FOR CERTAIN DISABLED VETERANS.

Section 362 is amended by striking out "$ 380" and inserting in lieu thereof "$ 395".

SEC. 1104. DEPENDENCY AND INDEMNITY COMPENSATION FOR SURVIVING SPOUSES.

Section 411 is amended --

(1) by striking out the table in subsection (a) and inserting in lieu thereof the following:

EDITORIAL-TABULAR MATERIAL APPEARS HERE-SEE ADVANCE

"1 If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $ 794.

"2 If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $ 1,480.";

(2) by striking out "$ 60" in subsection (b) and inserting in lieu thereof "$ 62";

(3) by striking out "$ 155" in subsection (c) and inserting in lieu thereof "$ 161"; and

(4) by striking out "$ 76" in subsection (d) and inserting in lieu thereof "$ 79".

SEC. 1105. DEPENDENCY AND INDEMNITY COMPENSATION FOR CHILDREN.

(a) DIC FOR ORPHAN CHILDREN. -- Section 413(a) is amended --

(1) by striking out "$ 261" in clause (1) and inserting in lieu thereof "$ 271";

(2) by striking out "$ 376" in clause (2) and inserting in lieu thereof "$ 391";

(3) by striking out "$ 486" in clause (3) and inserting in lieu thereof "$ 505"; and

(4) by striking out "$ 486" and "$ 97" in clause (4) and inserting in lieu thereof "$ 505" and "$ 100", respectively.

(b) SUPPLEMENTAL DIC FOR DISABLED ADULT CHILDREN. -- Section 414 is amended --

[*4125] (1) by striking out "$ 155" in subsection (a) and inserting in lieu thereof "$ 161";

(2) by striking out "$ 261" in subsection (b) and inserting in lieu thereof "$ 271"; and

(3) by striking out "$ 133" in subsection (c) and inserting in lieu thereof "$ 138".

SEC. 1106. <<Notes>>

EFFECTIVE DATE FOR RATE INCREASES.

The amendments made by this title shall take effect on December 1, 1988.

TITLE XII -- AGENT ORANGE AND RELATED PROVISIONS

SEC. 1201. FUNDING FOR AGENT ORANGE BLOOD TESTING.

Funds appropriated to the Veterans' Administration in Public Law 98-181 for medical and prosthetic research and obligated through the Centers for Disease Control for a contract for the conduct of an epidemiological study relating to exposure of veterans to the herbicide known as Agent Orange shall, upon the cancellation of that contract, be available for obligation until September 30, 1989, in the amounts of --

(1) $ 3,000,000 for payment of expenses of the Department of the Air Force in connection with blood tests of individuals who, while serving in the Air Force, participated in the spraying of Agent Orange in Vietnam during the Vietnam era; and

(2) $ 1,000,000 for payment of expenses of a survey of scientific evidence, studies, and literature relating to health effects of possible exposure to toxic chemicals contained in herbicides used in the Republic of Vietnam during the Vietnam era, which

survey shall be conducted by an independent scientific entity under contract to the Veterans Administration pursuant to a law enacted after the date of the enactment of this Act.

SEC. 1202. EXTENSION OF HEALTH-CARE ELIGIBILITY BASED ON AGENT ORANGE OR IONIZING RADIATION EXPOSURE.

Section 610(e)(3) is amended by striking out "September 30, 1989" and inserting in lieu thereof "December 31, 1990".

SEC. 1203. TREATMENT FOR NEEDS-BASED BENEFITS PURPOSES OF AMOUNTS RECEIVED UNDER AGENT ORANGE LITIGATION SETTLEMENT.

Any payment received by any person pursuant to the settlement in the case of In re Agent Orange Product Liability Litigation in the United States District Court for the Eastern District of New York (MDL No. 381) shall be treated for purposes of laws administered by the Veterans' Administration as reimbursement for prior unreimbursed medical expenses, and no such payment shall be countable as income for any such purpose.

SEC. 1204. <<Notes>>

OUTREACH SERVICES.

(a) ONGOING OUTREACH PROGRAM. -- The Administrator shall conduct an active, continuous outreach program for furnishing to veterans of active military, naval, or air service who served in the Republic of Vietnam during the Vietnam era information relating to --

[*4126] (1) the health risks (if any) resulting from exposure during that service to dioxin or any other toxic agent in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era, as such information on health risks becomes known; and

(2) services and benefits available to such veterans with respect to such health risks.

(b) INFORMATION IN AGENT ORANGE REGISTRY. -- The Administrator shall take reasonable actions to organize and update the information contained in the Veterans' Administration Agent Orange Registry in a manner that enables the Administrator promptly to notify a veteran of any increased health risk for such veteran resulting from exposure of such veteran to dioxin or any other toxic agent referred to in subsection (a) during Vietnam-era service in the Republic of Vietnam whenever the Administrator determines, on the basis of physical examination or other pertinent information, that such veteran is subject to such an increased health risk.

SEC. 1205. RANCH HAND STUDY.

(a) ADVISORY COMMITTEE PERSONNEL AND SUPPORT. -- (1) After February 28, 1989, not less than one-third of the total number of members of the Ranch Hand Advisory Committee shall be individuals selected by the Secretary of Health and Human Services from among scientists who are recommended by veterans' organizations for membership on the committee and are determined by the Secretary to be qualified for service on the committee.

(2) A scientist shall be considered to be qualified for service on the Ranch Hand Advisory Committee if (A) the scientist has earned a doctor of medicine degree or a doctorate or other advanced degree from an institution of higher education in a field relevant to the responsibilities of the Advisory Committee and has written one or more articles relevant to those responsibilities which have appeared in scientific publications following a peer-review process, or (B) the scientist has qualifications equivalent to those set forth in clause (A).

(b) CHAIRMAN. -- After February 28, 1989, the Chairman of the Ranch Hand Advisory Committee may be an officer or employee of the Federal Government (other than by reason of service as a member of the Advisory Committee) only if the Secretary of Health and Human Services determines, after affirmatively seeking to recruit a chairman who is not an officer or employee of the Federal Government, that there is no individual qualified and available to serve as Chairman who is not an

officer or employee of the Federal Government. The Secretary shall report any such determination to the Committees on Veterans' Affairs of the Senate and the House of Representatives.

(c) SCHEDULE OF REPORTS. -- (1) Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Veterans' Affairs and the Committees on Armed Services of the Senate and the House of Representatives a schedule of reports to be prepared by the Secretary of the Air Force or the Secretary of Defense on the progress and findings of the Ranch Hand Study.

(2) Each report referred to in paragraph (1) shall include the following:

[*4127] (A) A discussion of the progress made in the Ranch Hand Study during the period covered by the report.

(B) A summary of the scientific activities conducted during that period and the findings resulting from those activities, to be prepared by the scientists conducting those activities.

(3) Such a report need not contain (A) a discussion of progress discussed in any other report prepared by the Department of Defense (under this section or otherwise) regarding the Ranch Hand Study, or (B) a scientific summary included in any other such report, unless modification of such discussion or summary is appropriate for completeness, accuracy, and currency.

(4) The Secretary of Defense shall submit to the committees referred to in paragraph (1) a copy of each report referred to that paragraph.

(d) DEFINITIONS. -- For purposes of this section:

(1) The term "Ranch Hand Advisory Committee" means the committee known as the "Advisory Committee on Special Studies Relating to the Possible Long-term Health Effects of Phenoxy Herbicides and Contaminants" established by the Secretary of Defense to monitor the conduct of the Ranch Hand Study.

(2) The term "Ranch Hand Study" means the special study conducted by the Secretary of the Air Force relating to the possible long-term health effects of phenoxy herbicides and contaminants on Air Force personnel who participated in Operation Ranch Hand in the Republic of Vietnam during the Vietnam era.

TITLE XIII -- REHABILITATION PROVISIONS

SEC. 1301. TEMPORARY PROGRAMS OF TRIAL WORK PERIODS AND VOCATIONAL-REHABILITATION EVALUATIONS.

(a) THREE-YEAR EXTENSION. -- Subsection (a)(2)(B) of section 363 is amended by striking out "January 31, 1989" and inserting in lieu thereof "January 31, 1992".

(b) VOLUNTARY PARTICIPATION. -- Subsection (c) of such section is amended --

(1) by striking out paragraphs (2), (3), and (4);

(2) by striking out "(1)(A) Except as provided in paragraph (4) of this subsection, in" and inserting in lieu thereof "(1) In"; and

(3) in paragraph (1) --

(A) by redesignating clauses (i), (ii), and (iii) as clauses (A), (B), and (C), respectively; and

(B) by striking out subparagraph (B) and inserting in lieu thereof the following:

"(2) After providing the notice required under paragraph (1) of this subsection, the Administrator shall offer the veteran the opportunity for an evaluation under section 1506(a) of this title.".

SEC. 1302. FUNDING OF EDUCATIONAL AND VOCATIONAL COUNSELING SERVICES.

(a) IN GENERAL. -- Subchapter II of chapter 36 is amended by adding at the end the following new section:

[*4128] "§ 1797. Funding of contract educational and vocational counseling

"(a) Subject to subsection (b) of this section, educational or vocational counseling services obtained by the Veterans' Administration by contract and provided to an individual applying for or receiving benefits under section 524 or chapter 30, 32, 34, or 35 of this title, or chapter 106 of title 10, shall be paid for out of funds appropriated, or otherwise available, to the Veterans' Administration for payment of readjustment benefits.

"(b) Payments under this section shall not exceed $ 5,000,000 in any fiscal year.".

(b) CLERICAL AMENDMENT. -- The table of sections at the beginning of chapter 36 is amended by inserting after the item relating to section 1796 the following new item:

"1797. Funding of contract educational and vocational counseling.".

SEC. 1303. VOCATIONAL TRAINING FOR PENSION RECIPIENTS.

(a) ELIGIBILITY. -- Subsection (a)(2) of section 524 is amended by striking out "who is awarded pension during the program period" and inserting in lieu thereof "is awarded pension during the program period, or a veteran who was awarded pension before the beginning of the program period,".

(b) EXTENSION OF PROGRAM PERIOD. -- Subsections (a)(4) and (b)(4)(A) of such section are each amended by striking out "January 31, 1989" and inserting in lieu thereof "January 31, 1992".

(c) HEALTH-CARE ELIGIBILITY. -- Section 525(b)(2) is amended by striking out "January 31, 1989" and inserting in lieu thereof "January 31, 1992".

TITLE XIV -- MISCELLANEOUS BENEFIT PROVISIONS

SEC. 1401. LIFE INSURANCE PROGRAMS.

(a) AUTHORITY FOR PAYMENT OF INTEREST ON INSURANCE SETTLEMENTS. -- (1) Subchapter I of chapter 19 is amended by adding at the end the following new section:

"§ 728. Authority for payment of interest on settlements

"(a) Subject to subsection (b) of this section, the Administrator may pay interest on the proceeds of a participating National Service Life Insurance, Veterans' Special Life Insurance, and Veterans Reopened Insurance policy from the date the policy matures to the date of payment of the proceeds to the beneficiary or, in the case of an endowment policy, to the policyholder.

"(b)(1) The Administrator may pay interest under subsection (a) of this section only if the Administrator determines that the payment of such interest is administratively and actuarially sound for the settlement option involved.

"(2) Interest paid under subsection (a) of this section shall be at the rate that is established by the Administrator for dividends held on credit or deposit in policyholders' accounts under the insurance program involved.".

(2) Subchapter II of chapter 19 is amended by adding at the end the following new section:

[*4129] "§ 763. Authority for payment of interest on settlements

"(a) Subject to subsection (b) of this section, the Administrator may pay interest on the proceeds of a United States Government Life Insurance policy from the date the policy matures to the date of payment of the proceeds to the beneficiary or, in the case of an endowment policy, to the policyholder.

"(b)(1) The Administrator may pay interest under subsection (a) of this section only if the Administrator determines that the payment of such interest is administratively and actuarially sound for the settlement option involved.

"(2) Interest paid under subsection (a) shall be at the rate that is established by the Administrator for dividends held on credit or deposit in policyholders' accounts.".

(3) <<Notes>>

The amendments made by this subsection shall take effect with respect to insurance policies maturing after the date of the enactment of this Act.

(b) AUTHORITY TO ADJUST DISCOUNT RATES FOR ADVANCE PAYMENT OF PREMIUMS. -- (1) Subchapter I of chapter 19, as amended by subsection (a)(1), is further amended by adding at the end the following new section:

"§ 729. Authority to adjust premium discount rates

"(a) Notwithstanding sections 702, 723, and 725 of this title and subject to subsection (b) of this section, the Administrator may from time to time adjust the discount rates for premiums paid in advance on National Service Life Insurance, Veterans' Special Life Insurance, and Veterans Reopened Insurance.

"(b)(1) In adjusting a discount rate pursuant to subsection (a) of this section, the Administrator may not set such rate at a rate lower than the rate authorized for the program of insurance involved under section 702, 723, or 725 of this title.

"(2) The Administrator may make an adjustment under subsection (a) of this section only if the Administrator determines that the adjustment is administratively and actuarially sound for the program of insurance involved.".

(2) <<Notes>>

The amendment made by paragraph (1) shall take effect with respect to premiums paid after the date of the enactment of this Act.

(c) CLERICAL AMENDMENTS. -- The table of sections at the beginning of chapter 19 is amended --

(1) by inserting after the item relating to section 727 the following new items:

"728. Authority for payment of interest on settlements.

"729. Authority to adjust premium discount rates.";

and

(2) by inserting after the item relating to section 762 the following new item:

"763. Authority for payment of interest on settlements.".

SEC. 1402. INCOME EXCLUSION FOR CASUALTY LOSS REIMBURSEMENTS.

(a) PARENTS DIC. -- Clause (I) of section 415(f)(1) is amended to read as follows:

"(I) reimbursements of any kind for any casualty loss (as defined in regulations which the Administrator shall prescribe), but the amount excluded under this clause may not exceed the greater of the fair market value or the reasonable replacement

[*4130] value of the property involved at the time immediately preceding the loss;".

(b) PENSION. -- Clause (5) of section 503(a) is amended to read as follows:

"(5) reimbursements of any kind for any casualty loss (as defined in regulations which the Administrator shall prescribe), but the amount excluded under this clause may not exceed the greater of the fair market value or reasonable replacement value of the property involved at the time immediately preceding the loss;".

SEC. 1403. RECODIFICATION OF PROVISIONS RELATING TO CERTAIN BENEFITS FOR SURVIVORS OF CERTAIN VETERANS.

(a) IN GENERAL. -- (1) Subchapter II of chapter 13 is amended by adding at the end the following new section:

"§ 418. Benefits for survivors of certain veterans rated totally disabled at time of death

"(a) The Administrator shall pay benefits under this chapter to the surviving spouse and to the children of a deceased veteran described in subsection (b) of this section in the same manner as if the veteran's death were service connected.

"(b) A deceased veteran referred to in subsection (a) of this section is a veteran who dies, not as the result of the veteran's own willful misconduct, and who was in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive) compensation at the time of death for a service-connected disability that either --

"(1) was continuously rated totally disabling for a period of 10 or more years immediately preceding death; or

"(2) if so rated for a lesser period, was so rated continuously for a period of not less than five years from the date of such veteran's discharge or other release from active duty.

"(c) Benefits may not be paid under this chapter by reason of this section to a surviving spouse of a veteran unless --

"(1) the surviving spouse was married to the veteran for two years or more immediately preceding the veteran's death; or

"(2) a child was born of the marriage or was born to them before the marriage.

"(d) If a surviving spouse or a child receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the death of a veteran described in subsection (a) of this section, benefits under this chapter payable to such surviving spouse or child by virtue of this section shall not be paid for any month following a month in which any such money or property is received until such time as the total amount of such benefits that would otherwise have been payable equals the total of the amount of the money received and the fair market value of the property received.

"(e) For purposes of sections 1448(d) and 1450(c) of title 10, eligibility for benefits under this chapter by virtue of this section shall be deemed eligibility for dependency and indemnity compensation under section 411(a) of this title.".

(2) The table of sections at the beginning of chapter 13 is amended by inserting after the item relating to section 417 the following new item:

[*4131] "418. Benefits for survivors of certain veterans rated totally disabled at time of death.".

(b) CONFORMING AMENDMENTS. -- Section 410 is amended by striking out subsection (b) and redesignating subsection (c) as subsection (b).

SEC. 1404. <<Notes>>

SPECIFICATION IN BUDGET SUBMISSIONS OF FUNDS FOR CERTAIN VETERANS BENEFITS.

(a) BUDGET INFORMATION. -- In the documentation providing detailed information on the budgets for the Veterans' Administration and the Department of Labor that the Administrator and the Secretary of Labor, respectively, submit to the Congress in conjunction with the President's budget submission for each fiscal year pursuant to *section 1105 of title 31, United States Code*, the Administrator and the Secretary shall identify, to the maximum extent feasible, the estimated amount in each of the appropriation requests for Veterans' Administration accounts and Department of Labor accounts, respectively, that is to be obligated for the furnishing of each of the following services or benefits only to, or with respect to, veterans who performed active military, naval, or air service in combat with the enemy or in a theatre of combat operations during a period of war or other hostilities:

(1) Employment services and other employment benefits under programs administered by the Secretary of Labor.

(2) Compensation under chapter 11 of title 38, United States Code.

(3) Dependency and Indemnity Compensation under chapter 13 of such title.

(4) Pension under chapter 15 of such title.

(5) Inpatient hospital care under chapter 17 of such title.

(6) Outpatient medical care under chapter 17 of such title.

(7) Nursing home care under chapter 17 of such title.

(8) Domiciliary care under chapter 17 of such title.

(9) Readjustment counseling services under section 612A of such title.

(10) Insurance under chapter 19 of such title.

(11) Specially adapted housing for disabled veterans under chapter 21 of such title.

(12) Burial benefits under chapter 23 of such title.

(13) Educational assistance under chapters 30, 32, and 34 of such title and chapter 106 of title 10, United States Code.

(14) Vocational rehabilitation services under chapter 31 of title 38, United States Code.

(15) Survivors' and dependents' educational assistance under chapter 35 of such title.

(16) Home loan benefits under chapter 37 of such title.

(17) Automobiles and adaptive equipment under chapter 39 of such title.

(b) REPORT ON FEASIBILITY. -- If the Administrator or the Secretary of Labor determines that, with respect to any services or benefits referred to in subsection (a), it is not feasible to identify an estimated dollar amount to be obligated for furnishing such services or benefits only to veterans described in that subsection for any fiscal year, the Administrator and the Secretary shall, with respect to an appropriation request for such fiscal year relating to such services or benefits, report to the Committees on Veterans' Affairs of the Senate and the House of Representatives the reasons for the infeasibility.

[*4132] The report shall be submitted contemporaneously with the budget submission for such fiscal year. The report shall specify (1) the information, systems, equipment, or personnel that would be required in order for it to be feasible for the Administrator or the Secretary to identify such amount, and (2) the actions to be taken in order to ensure that it will be feasible to make such an estimate in connection with the submission of the budget request for the next fiscal year.

TITLE XV -- HEALTH CARE

SEC. 1501. READJUSTMENT COUNSELING FACILITIES.

(a) RELOCATIONS FOR CIRCUMSTANCES BEYOND CONTROL OF VETERANS' ADMINISTRATION. -- Section 612A(g)(1) is amended --

(1) in subparagraph (A), by striking out "The" and inserting in lieu thereof "Except as provided in subparagraph (C) of this paragraph, the"; and

(2) by adding at the end the following new subparagraph:

"(C) The Administrator may relocate a center in existence on January 1, 1988, without regard to the national plan (including any revision to such plan) if such relocation is to a new location away from a Veterans' Administration general health-care facility when such relocation is necessitated by circumstances beyond the control of the Veterans' Administration. Such a relocation may be carried out only after the end of the 30-day period beginning on the date on which the Administrator notifies the Committees on Veterans' Affairs of the Senate and the House of Representatives of the proposed relocation, of the circumstances making it necessary, and of the reason for the selection of the new site for the center.".

(b) <<Notes>>

AUTHORIZATION FOR RELOCATION OF CERTAIN FACILITIES. -- The requirements of section 612A(g)(1) of title 38, United States Code, shall not apply with respect to the relocation of 17 Veterans' Administration Readjustment Counseling Service Vet Centers from their locations away from general Veterans' Administration health-care facilities to other such locations, as described in letters dated July 25, 1988, from the Chief Medical Director of the Veterans' Administration to the Chairmen of the Committees on Veterans' Affairs of the Senate and the House of Representatives.

SEC. 1502. CONTRACTS AND GRANTS FOR MEDICAL CARE FOR VETERANS IN THE PHILIPPINES.

(a) ONE-YEAR EXTENSION. -- Subsections (a) and (b)(1) of section 632 are each amended by striking out "September 30, 1989" and inserting in lieu thereof "September 30, 1990".

(b) INCREASE IN ANNUAL AUTHORIZATION. -- Subsection (b)(1) of such section is further amended by striking out "$ 500,000" and inserting in lieu thereof "$ 1,000,000,".

(c) REPORTS. -- (1) Not later than February 1, 1989, and not later than February 1, 1990, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing detailed information describing the use of funds provided to the Republic of the Philippines under section 632(b) of title 38, United States Code, during the preceding fiscal year.

(2) Not later than May 1, 1989, the Administrator shall submit to those committees a report with respect to the furnishing of health-care

[*4133] services to United States veterans in the Republic of the Philippines. That report shall include the following:

(A) Information for each of fiscal years 1986, 1987, and 1988 (shown in total and separately for veterans being furnished care or treatment for service-connected disabilities and veterans being furnished care or treatment for non-service-connected disabilities) as to --

(i) the number of United States veterans furnished care at Veterans' Administration expense pursuant to sections 624 and 632(a) of title 38, United States Code;

(ii) the numbers of inpatient days of care and outpatient visits so furnished for United States veterans; and

(iii) the amounts of such care and visits so furnished at the Veterans Memorial Medical Center or at other facilities in the Republic of the Philippines.

(B) An analysis comparing (i) the cost-effectiveness of furnishing care and treatment to such veterans through the Veterans Memorial Medical Center or other facilities in the Republic of the Philippines, and (ii) the quality of care available at the Center and such other facilities.

(C) A projection of the needs for care and treatment of United States veterans in the Republic of the Philippines during each of fiscal years 1990, 1991, 1992, and 1993.

(D) A projection of the needs of the Veterans Memorial Medical Center for each of those fiscal years for the replacement and upgrading of equipment and the rehabilitation of the physical plant and facilities in order to maintain the provision of an appropriate quality of care for United States veterans at the Veterans Memorial Medical Center.

(E) The plans of the Veterans' Administration for meeting the needs for care and treatment of United States veterans residing in the Philippines.

(F) Any planned administrative action, and any recommendation for legislation, that the Administrator considers appropriate.

(3) The report under paragraph (2) shall include any comment the Secretary of State may wish to make on the contents of the report.

SEC. 1503. TECHNICAL CORRECTIONS.

(a) CORRECTIONS NECESSITATED BY AMENDMENTS MADE BY PUBLIC LAW 100-322. -- (1) Section 603(a)(2)(B) is amended --

(A) by striking out "612(a)(4)" and inserting in lieu thereof "paragraph (2), (3), or (4) of section 612(a)"; and

(B) by striking out "612(a)(5)" and inserting in lieu thereof "612(a)(5)(B)".

(2) Section 4114(a) is amended --

(A) in paragraph (1) --

(i) in clause (A), by inserting "pharmacists, occupational therapists," after "vocational nurses,"; and

(ii) in clause (B), by inserting "pharmacists and occupational therapists," after "vocational nurses,"; and

(B) in paragraph (3)(D), by striking out "the category" and all that follows through "vocational nurses" and inserting in lieu thereof "a category of personnel described in such section 4104(3)".

[*4134] (3) Subsections (c) and (d) of section 4323 are each amended by striking out "section 4322(f)" and inserting in lieu thereof "section 4322(e)".

(4) Section 4324 is amended --

(A) in subsection (a)(2) --

(i) by striking out "completion" and all that follows through "quarter" and inserting in lieu thereof "participation in the program";

(ii) by inserting "or is payable" after "paid"; and

(iii) by inserting before the period at the end the following: ", reduced by the proportion that the number of days served for completion of the service obligation bears to the total number of days in the participant's period of obligated service"; and

(B) in subsection (b) --

(i) by striking out paragraph (1); and

(ii) by striking out "(2)".

(b) <<Notes>>

EFFECTIVE DATE. -- The amendments made by subsection (a)(1) shall apply with respect to the furnishing of medical services by contract to veterans who apply to the Veterans' Administration for medical services after June 30, 1988.

(c) <<Notes>>

RATIFICATION. -- Any action of the Administrator in contracting with facilities other than Veterans' Administration facilities for the furnishing of medical services (as defined in section 601(6) of title 38, United States Code), for the purpose described in section 612(a)(5)(B) of such title, to an individual described in paragraph (2) or (3) of section 612 of title 38, United States Code, who applied to the Veterans' Administration for such services during the period beginning on July 1, 1988, and ending on the date of enactment of this Act is hereby ratified.

SEC. 1504. LAND TRANSFER, RUTHERFORD, TENNESSEE.

(a) AUTHORITY. -- Subject to subsections (b) and (c) and any conditions required by the Administrator under subsection (d), the Administrator shall transfer all right, title, and interest of the United States in and to a tract of land consisting of (not to exceed) seven acres, together with improvements thereon, in the Southeast corner of the Alvin C. York Veterans' Administration Medical Center in Rutherford County, Tennessee. Such transfer shall be made without consideration. Such transfer shall be made without regard to section 5022(a)(2)(A) of title 38, United States Code.

(b) PERMITTED USE. -- The transfer under subsection (a) may be made only if it is subject to the condition that the property transferred be used by the State of Tennessee for a nursing care facility in accordance with the conditions and limitations applicable to State home facilities constructed with assistance under subchapter III of chapter 81 of title 38, United States Code, and that if such property is used at any time for any other purpose, all right, title, and interest in the property shall revert to the United States.

(c) AVAILABILITY OF RESOURCES. -- The transfer under subsection (a) may be made only if the Administrator has determined that the State of Tennessee has provided sufficient assurance that it has the resources (including any resources which are reasonably likely to be available to the State under subchapter III of chapter 81 of title 38, United States Code and section 641 of such title) necessary to construct and operate a State home nursing facility.

[*4135] (d) ADDITIONAL CONDITIONS. -- The transfer under subsection (a) shall be made under such additional terms and conditions as the Administrator considers appropriate to protect the interests of the United States.

SEC. 1505. TRANSFERS OF EXCESS PROPERTIES FOR STATE HOME FACILITY USES.

Section 5022(a) is amended --

(1) in paragraph (2)(A), by striking out "The" and inserting in lieu thereof "Except as provided in paragraph (3) of this subsection, the"; and

(2) by adding at the end the following new paragraph:

"(3)(A) Subject to subparagraph (B) of this paragraph, the Administrator may, without regard to paragraph (2) of this subsection or any other provision of law relating to the disposition of real property by the United States, transfer to a State for use as the site of a State home nursing-home or domiciliary facility real property described in subparagraph (E) of the paragraph which the Administrator determines to be excess to the needs of the Veterans' Administration.

"(B) A transfer of real property may not be made under this paragraph unless --

"(i) the Administrator has determined that the State has provided sufficient assurance that it has the resources (including any resources which are reasonably likely to be available to the State under subchapter III of chapter 81 of this title and section 641 of this title) necessary to construct and operate a State home nursing or domiciliary care facility; and

"(ii) the transfer is made subject to the conditions (I) that the property be used by the State for a nursing-home or domiciliary care facility in accordance with the conditions and limitations applicable to State home facilities constructed with assistance under subchapter III of chapter 81 of this title, and (II) that, if the property is used at any time for any other purpose, all right, title, and interest in and to the property shall revert to the United States.

"(C) A transfer of real property may not be made under this paragraph until --

"(i) the Administrator submits to the Committees on Veterans' Affairs of the Senate and House of Representatives, not later than June 1 of the year in which the transfer is proposed to be made (or the year preceding that year), a report providing notice of the proposed transfer; and

"(ii) a period of 90 consecutive days elapses after the report is received by those committees.

"(D) A transfer under this paragraph shall be made under such additional terms and conditions as the Administrator considers appropriate to protect the interests of the United States.

"(E) Real property described in this subparagraph is real property that is owned by the United States and administered by the Veterans' Administration.".

SEC. 1506. CONVERSION OF NON-PHYSICIAN MEDICAL CENTER DIRECTORS TO SENIOR EXECUTIVE SERVICE.

(a) CONVERSION. -- Section 4101(e) is amended by striking out "and persons appointed under section 4103(a)(8) of this title".

(b) CONFORMING AMENDMENTS. -- (1) Section 4103(a) is amended --

[*4136] (A) by striking out paragraph (8); and

(B) by redesignating paragraph (9) as paragraph (8).

(2) Section 4107(c) is amended to read as follows:

"(c) Notwithstanding the provisions of section 4101(e) of this title, any person appointed under section 4103 of this title who is not eligible for special pay under section 4118 of this title shall be deemed to be a career appointee for the purposes of sections 4507 and 5384 of title 5.".

(c) <<Notes>>

APPLICABILITY TO CURRENT DIRECTORS. -- (1) Except as provided in paragraph (2), each person who, on the day before the date of enactment of this Act, holds an appointment as a director under *section 4103(a)(8) of title 38, United States Code*, shall, on such date of enactment, become a career appointee in the Senior Executive Service established pursuant to chapter 31 of title 5, United States Code. The preceding sentence applies without regard to the provisions of subsections (b), (c), and (e) of *section 3393 of title 5, United States Code*, or any other provision of law. The provisions of section 3393(d) of such title shall not apply to a director who becomes a career appointee pursuant to this paragraph.

(2) Any person who, on the day before the date of the enactment of this Act, holds an appointment as such a director may, not later than 60 days after such enactment date, elect to retain the terms and conditions of that appointment for as long as that person continues to serve as such a director.

(d) <<Notes>>

PRESERVATION OF PAY. -- This section and the amendments made by this section shall not result in a reduction in the rate of pay payable to any person.

SEC. 1507. PROCUREMENT THROUGH LOCAL CONTRACTS.

(a) EFFECTIVE DATES OF PROVISIONS ENACTED IN PUBLIC LAW 100-322. -- Section 403(b)(1) of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; *102 Stat. 545*) <<Notes>>

is amended by striking out "Subsection (b)(1)" and inserting in lieu thereof "Subsections (a), (b)(1), and (b)(2)".

(b) TRANSITION TO CERTAIN REPORT REQUIREMENTS. -- Section 5025(d) is amended --

(1) in paragraph (1), by inserting "(beginning in 1992)" after "of each year";

(2) in paragraph (2), by inserting "(beginning in 1993)" after "of each year"; and

(3) by adding at the end the following new paragraph:

"(3) Not later than February 1 of each year from 1989 through 1992, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the experience in carrying out this section during the preceding fiscal year. The first such report shall contain information showing the percentage (measured by cost) of the total of all health-care items procured by the Veterans' Administration during fiscal year 1988 that were procured through local contracts. The other reports under this paragraph shall contain information showing the percentage (measured by cost) of the total of all health-care items procured by the Veterans' Administration, and by each Veterans' Administration medical center, during the fiscal year covered by the report that were purchased through local contracts and, in the case of each medical center at which the percentage was greater than 20 percent, an explanation of the reasons why that occurred.".

[*4137] (c) DEFINITION OF HEALTH-CARE ITEM. -- Section 5025(e)(1) is amended --

(1) by striking out "65, 66, or 73" and inserting in lieu thereof "65 or 66"; and

(2) by inserting after the first sentence the following new sentence: "Effective December 1, 1992, such term also includes any item listed in, or (as determined by the Administrator) of the same nature as an item listed in, Federal Supply Classification (FSC) Group 73.".

SEC. 1508. STANDARDIZATION OF COVERAGE OF MEDICAL AND PHARMACEUTICAL ITEMS.

Section 402 of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; *102 Stat. 543*) <<Notes>>

is amended in the first sentence by striking out "medical and pharmaceutical items" and inserting in lieu thereof "health-care items (as defined in section 5025(e)(1) of title 38, United States Code)".

SEC. 1509. TECHNICAL CLARIFICATION OF PERIOD OF CLINICAL EVALUATION OF ALCOHOL AND DRUG ABUSE PROGRAM.

Section 620A(f)(1) (as amended by section 502 of the Veterans' Benefits and Programs Improvement Act of 1988) is amended by striking out "before October 1, 1997" and inserting in lieu thereof "during the period beginning on December 1, 1988, and ending on October 1, 1997".

TITLE XVI -- CEMETERY AND MEMORIAL PROVISIONS

SEC. 1601. EXTENSION OF AUTHORIZATION OF APPROPRIATIONS FOR STATE CEMETERY GRANT PROGRAM.

Paragraph (2) of section 1008(a) is amended by striking out "four", the second place it appears and inserting in lieu thereof "nine".

SEC. 1602. <<Notes>>

PACIFIC WAR MEMORIAL AND OTHER HISTORICAL AND MEMORIAL SITES ON CORREGIDOR IN THE REPUBLIC OF THE PHILLIPPINES.

(a) OPERATION BY ABMC. -- Subject to subsection (b) and to the agreement referred to in such subsection, the American Battle Monuments Commission shall restore, operate, and maintain the Pacific War Memorial and other historical and memorial sites on Corregidor in the Republic of the Philippines.

(b) CONDITION. -- The Commission may carry out this section only after an agreement has been entered into between the Republic of the Philippines and the United States with respect to the restoration, operation, and maintenance of the Memorial and other historical and memorial sites referred to in subsection (a).

(c) PERSONNEL. -- The Commission may employ personnel as may be necessary to carry out this section.

(d) USE OF OTHER AGENCIES. -- Departments, agencies, and other instrumentalities of the United States are authorized to assist the Commission, on a reimbursable basis, in carrying out this section.

(e) FUNDING. -- The American Battle Monuments Commission shall carry out this section with private funds except to the extent funds are appropriated pursuant to subsection (h).

[*4138] (f) AUTHORITY TO SOLICIT FUNDS. -- For the purpose of carrying out this section, the Commission may solicit and accept private contributions and shall deposit such contributions in the fund established by subsection (g).

(g) FUND. -- (1) There is hereby established in the Treasury a fund which shall be available to the American Battle Monuments Commission only for carrying out this section. The fund shall consist of --

(A) amounts deposited into, and interest and proceeds credited to, the fund under paragraph (2); and

(B) obligations obtained under paragraph (3).

(2) The Chairman of the Commission shall deposit into the fund the amounts that are accepted under subsection (f). The Secretary of the Treasury shall credit to the fund the interest on, and the proceeds from sale or redemption of, obligations held in the fund.

(3) The Secretary of the Treasury shall invest any portion of the fund that, as determined by the Chairman of the Commission, is not required to meet current expenses. Each investment shall be made in an interest-bearing obligation of the United States or an obligation guaranteed as to principal and interest by the United States that, as determined by the Chairman of the Commission, has a maturity suitable for the fund.

(4) Amounts in the fund that are in excess of the costs of carrying out this section, as determined by the Chairman of the Commission, shall be deposited in the Treasury as miscellaneous receipts to reimburse the United States for funds appropriated pursuant to subsection (h).

(h) AUTHORIZATION OF FUNDING. -- There are hereby authorized to be appropriated --

(1) $ 6,000,000 for site preparation, design, planning, construction, and associated administrative costs for the restoration of the Memorial and other historical and memorial sites referred to in subsection (a); and

(2) such sums as may be necessary for the operation and maintenance of such Memorial and other historical and memorial sites.

Descriptors

VETERANS ADMINISTRATION; CLAIMS; HANDICAPPED; VETERANS BENEFITS AND PENSIONS; ADMINISTRATIVE LAW AND PROCEDURE; JUDICIAL REFORM; APPELLATE PROCEDURE; PHYSICIANS;

EVIDENCE; FEDERAL EMPLOYEES; PRESIDENTIAL APPOINTMENTS; PROFESSIONALS' FEES; LAWYERS; COURT OF VETERANS APPEALS; COURT REORGANIZATION; BOARD OF VETERANS' APPEALS; GOVERNMENT REORGANIZATION; VETERANS BENEFITS AND PENSIONS; HANDICAPPED; FAMILIES; VETERANS REHABILITATION; DEATH AND DYING; COST OF LIVING; RADIATION; AGENT ORANGE; VIETNAM WAR; CHEMICALS AND CHEMICAL INDUSTRY; MEDICAL EXAMINATIONS AND TESTS; MEDICAL RESEARCH; MILITARY PERSONNEL; BLOOD; AIR FORCE; VETERANS REHABILITATION; COUNSELING; LIFE INSURANCE; VETERANS HEALTH FACILITIES AND SERVICES; PHILIPPINES; MANILA, PHILIPPINES; GOVERNMENT CONTRACTS AND PROCUREMENT; GOVERNMENT PROPERTY; RUTHERFORD COUNTY, TENN.; TENNESSEE; STATE VETERANS HOMES; FEDERAL AID TO STATES: PUBLIC LAND TRANSFERS; AMERICAN BATTLE MONUMENTS COMMISSION; MONUMENTS AND MEMORIALS; CORREGIDOR, PHILIPPINES; HISTORIC SITES; WORLD WAR II; PHILIPPINES; VETERANS ADMINISTRATION; FEDERAL AID TO STATES; MILITARY CEMETERIES AND FUNERALS

Margin Notes

1 NOTE: *38 USC 101* note

2 NOTE: *5 USC 5315* note

3 NOTE: 38 USC 4001 note

4 NOTE: 38 USC 4001 note

5 NOTE: 38 USC 4053 note

6 NOTE: 38 USC 4055 note

7 NOTE: 38 USC 4051 note

8 NOTE: 38 USC 4051 note

9 NOTE: 38 USC 3404 note

10 NOTE: *38 USC 101* note

11 NOTE: *38 USC 101* note

12 NOTE: *38 USC 314* note

13 NOTE: *38 USC 314* note

14 NOTE: 38 USC 241 note

15 NOTE: *38 USC 728* note

16 NOTE: 38 USC 729 note

17 NOTE: *38 USC 210* note

18 NOTE: 38 USC 612A note

19 NOTE: 38 USC 603 note

20 NOTE: 38 USC 603 note

21 NOTE: 38 USC 4013 note

22 NOTE: *38 USC 4103* note

23 NOTE: 38 USC 5025 note

24 NOTE: 38 USC 5025 note

25 NOTE: 36 USC 125b

End of Document

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
Notice of Appeal (NOA)

The following named Appellant appeals to the Court from a final Board of Veterans' Appeals (Board) decision.

The Board's decision was dated _____.

Appellant's printed name

VA claims file number

Appellant's telephone number

Appellant's address

Appellant's email address

If other than Appellant, your name/relationship to Appellant

By initialing here, Appellant requests that the Court send all appeal-related documents by email instead of mail.	(initial)

Signature* of person filing this notice

(*You may electronically sign by typing "/s/" and then your name in the signature block above: for example, /s/John Doe, or you may sign with an electronic signature from a commercial provider such as DocuSign, Adobe Sign, SignRequest,etc.)

Only if this NOA is filed by a representative, check one of the following:

☐ My Notice of Appearance is attached.

☐ My representation is limited to the filing of this NOA, and I aver to the Court, in accordance with Rule 46(b)(2), that Appellant has been advised, or alternatively will be advised, of Appellant's responsibility to abide by the Court's Rules of Practice and Procedure, including the need to timely serve and submit for filing a brief. (Complete items below).

Representative's printed name

Representative's telephone number

Representative's fax number

Representative's address

Representative's email address

INSTRUCTIONS

The NOA must be received by the Court, or properly addressed and postmarked by the U.S. Postal Service, not later than 120 days after the date on which the Board mailed notice of the decision being appealed. The Court may accept an NOA filed after that date as timely in limited circumstances. *See* Court Rules of Practice and Procedure 4 and 25.

You may file an NOA by either (1) emailing it to self-rep@uscourts.cavc.gov for self-represented parties, or esubmission@uscourts.cavc.gov for represented parties, **OR** (2) faxing it to (202) 501-5848, **OR** (3) mailing it to: Clerk, US Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950.

There is a $50 filing fee for an appeal. Please wait to pay until you have received your USCAVC case number. You may pay through pay.gov (http://www.uscourts.cavc.gov/fee_filingfee.php) or you may send a check or money order, payable to "US Court of Appeals for Veterans Claims." **DO NOT SEND CASH**. To request a waiver of the filing fee, email, fax, or mail the Court a completed Form 4 (Declaration of Financial Hardship).

[S-A-M-P-L-E]

APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 00-0000

JOHN Q. VETERAN,

Appellant

v.

_____,

SECRETARY OF VETERANS AFFAIRS,

Appellee

Oliver W. Counsel
Lawyr & Lawyr
1111 J Street, NW
Washington, DC 20000
(202) 555-1212

Attorney for Appellant

Form 2
(Rev 5/99)

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NOTICE OF APPEARANCE

_____, ☐ Appellant,
☐ Petitioner,

v. Docket No. _____

Secretary of Veterans Affairs, Appellee / Respondent.

1. Please enter my appearance for ☐ the appellant or petitioner
☐ the Secretary
☐ the intervenor
☐ amicus curiae: _____.

2. I am:
☐ admitted to practice before this Court as: ☐ attorney ☐ non-attorney practitioner
☐ seeking to appear in this case only, under Rule 46(b)(1)(F); my motion is attached.

3. I am:
☐ the lead representative of record. I will accept service for the party and will inform all of the party's co-representatives of matters served upon me.
☐ not the lead representative of record, but am joining as co-representative.
☐ replacing the lead representative of record, who:
☐ has been permitted or is seeking to withdraw.
☐ remains as co-representative.

4. If I am representing the appellant, petitioner, or intervenor, my representation is:
☐ pursuant to the attached fee agreement. If the fee agreement provides for direct payment out of past-due benefits under 38 U.S.C. § 5904, a copy has been served on counsel for the Secretary. If the fee agreement provides for a contingent fee, it also provides for an offset of any fees and expenses awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) in the event the Court awards VA benefits on the claim.
☐ without charge to the appellant, petitioner, or intervenor; however it is subject to the attached retainer agreement.
☐ pursuant to the fee/retainer agreement already on record in this case.

/s/ _____ _____
Signature Date

_____ _____
Printed name Veterans Service Org., if R. 46(a)(2)(B) applies.

_____ _____

_____ _____
Signature and printed name and address of Supervising attorney, if R. 46(a)(2)(A) applies.

_____
Address

_____ _____
Telephone number Email address

Attachments: ☐ Application and motion to appear under Rule 46(b)(1)(F)
☐ Fee agreement ☐ Retainer agreement

Form 3
(Rev 02-20)

SAMPLE FORMAT FOR TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Glossary

United States Department of Veterans Affairs (VA) Structure

3 Branches:

National Cemetery Administration: Honors Veterans and their eligible family members with final resting places in national shrines and with lasting tributes commemorating military service. VA maintains more than 130 national cemeteries that honor Veterans and their eligible family members.

Veterans Health Administration: Integrated health system providing care to eligible Veterans and their dependents. Consists of medical centers, community-based outpatient clinics, community living centers, Vet Centers, and Domiciliaries.

- *Medical Centers (VAMCs)* = Largest VA healthcare facilities, frequently called "VA Hospitals," provided a wide range of inpatient and outpatient healthcare services for Veterans and their dependents. Typically, VAMCs are located in urban areas (e.g., New York City, Albany, Syracuse, Buffalo) or near urban areas (e.g., Canandaigua, which is close to Rochester).

- *Community-Based Outpatient Clinics (CBOCs)* = Smaller than a VAMC, these satellite clinics provide the most common outpatient services, including health and wellness visits, to Veterans and their family members. Often, CBOCs lack the advanced medical technology that a VAMC will provide, but offer a good "first step" site for medical screenings, check-ups, etc. Commonly, CBOCs are located in rural areas to accommodate the Veterans and dependents who cannot easily access a VAMC. The Veterans Health Administration also offers a widely used "telemedicine" program to connect patients visiting a CBOC with specialists who examine the patient from a remote location.

- *Community Living Centers (CLCs)* = Facilities offering a "nursing home level of care" to Veterans who need assistance with activities of daily living and/or skilled nursing care (and, when necessary, palliative care). Typically, Veterans remain in a CLC for a relatively short-term stay. However, a Veteran can (if medically necessary) continue to reside in a CLC for the remainder of his or her life.

- *Vet Center* = Facilities providing a broad range of counseling, outreach, and referral services to Veterans and their families. Services for a Veteran may include individual and group counseling in areas such as Post-Traumatic Stress Disorder (PTSD), alcohol and drug assessment, and suicide prevention referrals. All services are free and confidential. Eligibility requires that the Veteran either served in a combat theater, or is a survivor of military sexual trauma, or served as a member of an unmanned aerial vehicle crew that provided direct support to operations in a combat zone or area of hostilities, or provided direct emergency medical care or mortuary services to casualties of war. Members of the National Guard or Reserves who served during emergency situations in the wake of a national emergency, major disaster, civil disorder, or drug interdiction operation are also eligible for Vet Center services.

- *Domiciliaries* = Residential facilities offering residential rehabilitation and treatment services for Veterans with multiple and severe medical conditions, mental illness, addiction, or psychosocial deficits. Treatment intensity, environmental structures, and type of supervision vary based on population served.

***Veterans Benefits Administration (VBA)*:** The entity rresponsible for administering the Department's programs that provide financial and other forms of assistance to Veterans, their dependents, and survivors.

- *Regional Office (VARO)* = The most localized office level within the VBA. New York State has VAROs in New York City and Buffalo.

Common VA Benefits

Disability Compensation = Tax-free monetary benefit paid to Veterans with disabilities incurred or aggravated during active duty military service. The Veteran must prove a nexus between a current disability and the Veteran's military service, demonstrating that the disability was "as likely as not" caused by military service.

The VA bases amount of money that the Veteran receives upon the degree of the Veteran's disability. VA employees review evidence that the Veteran submits in support

of their claim and, based on this evidence, awards the Veteran a disability compensation rating on a scale from 10% ("least severe") to 100% ("most severe").

The VA awards ratings in 10% increments. Chapter 38 of the Code of Federal Regulations contains the specific medical criteria for each rating level of each disability.

A Veteran who receives a 0% rating for a disability receives free VA medical care for that disability, but no financial compensation. Generally, a Veteran will use a VA Form 21-526EZ to file for disability compensation.

Dependency and Indemnity Compensation (DIC) = Tax-free monetary benefit payable to surviving spouses and other dependents of Veterans who died from their "service-connected disabilities" (disabilities for which the Veteran received a rating from the VA), as well as surviving spouses of a Veteran who had a 100% permanent and total disability compensation rating for a specific time period (usually 10 years) before the Veteran passed away.

Non-Service-Connected Pension = Tax-free benefit for Veterans who served during a period of war for a non-service-connected disability. The Veteran does not need to serve in a combat zone to qualify. Service for at least one day during a period when the United States was at war (not limited to combat service) is enough to satisfy the "wartime service" requirement for this benefit. To qualify, the Veteran's countable income must fall below a specific dollar amount set by Congress. Additionally, a Veteran cannot have household assets above a threshold set by Congress to qualify for a VA pension. All asset transfers are subject to a three-year lookback provision, with potential penalties for transfers that are not for fair market value. The VA automatically deems a Veteran who is age 65 or older "totally and permanently disabled" for pension eligibility. Typically, a Veteran uses a VA Form 21P-527EZ to apply for a non-service-connected pension.

"Special" Pension = A Veteran or a surviving spouse who meets all of the criteria for a "regular" VA non-service-connected pension *and* requires another person's assistance with two or more activities of daily living (washing, dressing, eating, toileting, etc.) can receive a larger financial benefit known as the "Aid & Attendance Special Pension."

A Veteran or a surviving spouse who meets all of the criteria for a "regular" VA non-service-connected pension *and* is "substantially confined to your immediate premises because of permanent disability" can receive a larger financial benefit known as the "Housebound Special Pension."

A Veteran or a surviving spouse cannot receive both Aid & Attendance and Housebound simultaneously.

Survivors Pension ("Death Pension") = Tax-free monetary benefit payable to a low-income, un-remarried surviving spouse and/or unmarried children of a deceased Veteran who served during a period of war. The claimant's countable household income must fall below a threshold that Congress establishes annually. Typically, a surviving spouse or dependent child uses a VA Form 21-534EZ to apply for a Survivors Pension.

Veteran Readiness & Employment ("VR&E") = Program assisting Veterans with service-connected disabilities prepare for, find, and maintain employment. Services include evaluations to determine employable skills, vocational counseling, job training programs, assistance finding and keeping a job, post-secondary training opportunities, and Independent living services for Veterans unable to work due to the severity of their disabilities. See Title 38, Chapter 31, of the U.S. Code for full range of services.

Post-9/11 Educational Assistance Program ("Post-9/11 G.I. Bill) = Educational benefit available only to honorably discharged Veterans with a qualifying period of active duty service after September 10, 2001, and their qualifying dependents. Recipients are eligible for financial assistance for up to 36 months when pursuing their education at qualifying institutions of higher education and vocational training programs in the form of tuition and fees, a monthly housing allowance, and a books and supplies stipend. The program also provides certain recipients the opportunity to transfer unused post-9/11 G.I. Bill educational benefits to their spouses and children.

For all fully eligible recipients attending a public college, university, or other public school, the VA pays full tuition and fees directly to the school. For recipients attending a private school, tuition and fees are capped at a national maximum rate. Post-9-/11 G.I. Bill benefits are payable for 15 years following the Veteran's discharge from military service. If the Veteran left the military after January 1, 2013, there is no deadline for using the G.I. Bill benefits.

Full criteria for post-9/11 G.I. Bill eligibility are found in Title 38, Chapter 33, of the United States Code.

Montgomery G.I. Bill = Educational benefits program that was the most widely used program prior to the post-9/11 G.I. Bill's implementation. Under the Active Duty Component of the Montgomery G.I. Bill (Title 38, Chapter 30, of the United States Code), honorably discharged Veterans and active duty Servicemembers with at least two years of active duty military service may receive up to 36 months of education benefits. Benefits are generally payable for 10 years following separation from military service.

Under the Selected Reserve Component of the Montgomery G.I. Bill, eligible members of Reserve units may receive up to 36 months of education benefits. Generally, a Reservist

in good standing must have a six-year service obligation to qualify for this benefit. Typically, eligibility under the Selected Reserve Component ends on the date of separation from the Reserves. However, the VA may extend eligibility if the Reservist was discharged due to a disability not caused by the Reservist's own willful misconduct, or if the Reservist is mobilized from his or her Reserve status to active duty military service.

Specially Adapted Housing Grant = Available funding to help Veterans with certain severe service-connected disabilities purchase or construct an adapted home, or modify an existing home to accommodate a disability. Among the most common eligible service-connected disabilities are: loss of the use of both legs or both arms, loss of the use of one leg and one arm, severe burns, blindness in both eyes, and the loss of the use a lower extremity on or after September 11, 2001, that prevents the Veteran from moving without the aid of braces, crutches, canes, or a wheelchair. Typically, a Veteran will use a VA Form 26-4555 to apply for a Specially Adapted Housing Grant.

Burial Benefits = VA burial benefits include a gravesite in any of the National Cemetery Administration's 133 national cemeteries with available space, opening and closing of the grave, perpetual care, a Government headstone or marker, a burial flag, and a Presidential Memorial Certificate, at no cost to the deceased Veteran's family. Typically, a claimant uses VA Form 21P-530 to apply for burial benefits.

Burial benefits available for Veterans' spouses and dependents buried in a national cemetery include burial with the Veteran, perpetual care of the gravesite, and the spouse's or dependent's name and date of birth and death inscribed on the Veteran's headstone, at no cost to the family. Spouses and dependents receive these burial benefits even if they predecease the Veteran.

If a Veteran is buried in a private cemetery, available burial benefits include a government-issued headstone, marker or medallion, a burial flag, and a Presidential Memorial Certificate, at no cost to the family. However, no burial benefits are available for Veterans' spouses or dependents buried in private cemeteries.

Additionally, a Veteran's surviving spouse (or the Veteran's surviving dependent children if no spouse survives the Veteran) may be eligible for a burial allowance to help offset funeral costs. If the Veteran died from a service-connected disability on or after September 1, 2001, the maximum burial allowance is $2,000. If the Veteran died from a service-connected disability before September 11, 2001, the maximum burial allowance is $1,500.

If the Veteran's death was not service-connected, the maximum burial allowance today is $300, along with a payment of approximately $700 (varies by the year of the Veteran's

death) to pay for the plot of land on which the Veteran is interred. If the Veteran dies while under the care of a Veterans Health Administration facility, then the maximum amount of money in the burial allowance payout increases.

Common VA Benefits Procedural Terms

Accreditation = Under federal law, any individual representing a party in the preparation, presentation, and prosecution of a claim for VA benefits must first receive accreditation from the VA as a claims agent, attorney, or representative of a VA-recognized Veterans Service Organization (VSO). Individuals seeking accreditation as a VSO representative apply by filing VA Form 21; individuals seeking accreditation as a claims agent or as an attorney apply by filing VA Form 21a.

Maintaining accreditation includes, but is not limited to, certain requirements regarding reimbursement for assisting claimants. No person or organization may charge claimants a fee for assistance in preparing applications for VA benefits or presenting claims to VA. Accredited agents and attorneys may charge fees for assistance on a claim for VA benefits only after VA issues a decision on a claim and the claimant files a Notice of Disagreement initiating an appeal of that decision. If a party ever charges a Veteran a fee at any stage in the process, that party must file the fee agreement with the VA for the VA's review and approval.

Title 38, Chapter 59, of the United States Code, and Title 38, Sections 14.626 through 14.637 of the Code of Federal Regulations, provide the majority of the legal provisions regarding obtaining and maintaining accreditation through the VA.

Appeal = Any claimant who receives a decision on a VA claim has the right to appeal that decision. To initiate the appellate process, the claimant must utilize one of the three administrative appeal lanes within the VA. (See "Board of Veterans' Appeals," "Higher-Level Review," and "Supplemental Claim" below). If the claimant is still not satisfied with the outcome after filing an administrative appeal within the VA, then the claimant can file another administrative appeal using a different VA appeal lane or the claimant can file an appeal with the United States Court of Appeals for Veterans Claims. The filing deadline for any of the VA's administrative appellate lanes is one year from the date of the decision that the claimant is appealing. The deadline for the Court of Appeals for Veterans Claims is 120 days from the date of the decision that the claimant is appealing.

Board of Veterans' Appeals (BVA) = One of the three options of appellate review within the VA's administrative review process. The BVA's Veterans Law Judges, all of whom are attorneys experienced in Veterans' Law and in reviewing VA benefits claims, issue

written decisions for each appeal. Staff attorneys, also trained in Veterans' Law, review each appeal and assist the BVA's Law Judges in reaching their final conclusions.

Appellants can choose to appeal directly to the BVA, or to seek review from a VA personnel in other "lanes" of the appellate process first. The appellant has the right to request an in-person hearing or a hearing via videoconference before a Veterans Law Judge, but such a hearing is not required if the appellant wants strictly a documentary review of the case without appearing before a judge.

Claim = The initial filing for any variety of VA benefits. All VA claims go to a VARO for initial handling and processing. There are no time limits regarding filing a claim. For instance, a World War II Veteran could file a disability compensation claim tomorrow for a service-connected disability incurred or exacerbated in 1942 without facing any prejudice from the VA's reviewers for "waiting" so long.

Clear and Unmistakable Error (CUE) = A collateral attack on a final VA rating decision. To prevail, the Veteran must prove three elements: (1) the facts known at the time of the decision being attacked on the basis for CUE were not before the adjudicator *or* the VA incorrectly applied the law then in effect; (2) an error occurred based on the record and the law that existed at the time; and (3) had the VA not made the error, the outcome would have been manifestly different. A successful CUE petition forces the VA to revise its previously final decision, even if the customary appeals deadline has expired.

Effective Date = The date on which VA benefits payments begin. Sometimes, a Veteran's effective date allows for retroactive payments from the VA that pre-date the actual submission of the claim to the VA. Generally, an effective date for service-connection for a disability that is directly linked to an injury or disease incurred or exacerbated by military service is the date VA receives a claim or the date entitlement arose, whichever is later. However, if the claimant files the claim within one year of separating from active duty military service, then the effective date is the day after separation from service.

Fully Developed Claim (FDC) = Optional VA initiative providing a pathway for faster claims processing if the claimant submits all relevant evidence in the initial claims filing. If the claimant subsequently submits additional evidence regarding a claim that was initially filed as a FDC, the VA will remove the claim from the FDC program and process it through the traditional claims process. Generally, a claimant uses a VA Form 21-526EZ to file a FDC for disability compensation benefits (or a Form 21-527EZ for pension benefits, or a Form 21-534EZ for survivors' benefits).

Higher-Level Review = A fast-tracked appeal of an initial decision by the VA in which the claimant cannot add any new evidence into the record. The appellant may have an

informal phone conference with an employee of the Veterans Benefits Administration, but the appellant has no rights to receive a formal hearing if choosing this method of appeal. The VA has a goal of resolving all higher-level review appeals within 125 days of receiving the appeals package from the appellant.

New and Relevant Evidence = Information that a claimant submits to the VA to supplement a request to re-open a claim. This evidence must be relevant and relate to an unestablished fact necessary to prove the claim. It has to have a legitimate influence or bearing on the decision, and cannot be cumulative or redundant. It cannot be information that the claimant previously provided to the VA.

Ninety-Day Notice = A request from the BVA asking the appellant to submit any additional evidence before the BVA renders a final decision regarding the appeal. The appellant has 90 days from the date of this request to provide this evidence to the BVA. If the BVA does not receive any new evidence during this 90-day period, then the BVA will proceed on the record without any additional materials.

Supplemental Claim = An appeal in which the appellant may submit new evidence into the record, but the appellant is not entitled to an in-person hearing or a video hearing to present the appeal. This appeals lane is designed for faster processing and resolution than the appeal to the Board of Veterans' Appeals.

Common New York State Veterans' Benefits

Blind Annuity = Monthly payment from New York State to legally blind wartime Veterans and to the unremarried surviving spouses of legally blind wartime Veterans who reside and are domiciled in New York State. Blindness *does not* need to be service-connected for the Veteran or the spouse to qualify. Military service needs to occur during a time of war, but does not necessarily need to occur in a combat zone. Eligibility depends on the Veteran's blindness, so the legally blind non-Veteran spouse of a non-blind Veteran would not qualify.

Experience Counts = Governor Cuomo's multi-faceted initiative to help Veterans utilize skills learned in the military to transition into New York's workforce. For example, Veterans who gained military training and experience as a medic can use this experience to count toward certification as a civilian paramedic, home health aide, or nursing home aide in New York State. The Department of Motor Vehicles waives the road test for a Commercial Driver's License for Veterans with experience driving trucks and heavy equipment during military service. Veterans with other Military Occupational Specialties can transfer these skills into careers in New York ranging from working as a Licensed Radiological Technologist to working as a security guard.

In addition, recognizing the frequency at which military families move from place to place, the Experience Counts program also includes pathways for military spouses in certain licensed professions to transfer their careers into New York State with greater ease. For example, New York recognizes out-of-state licenses for military spouses who are real estate brokers, cosmetologists, barbers, and other careers requiring a license from the New York State Department of State.

Gold Star Parent Annuity = Authorizes an annuity payment of up to $500 per Gold Star Parent of a Servicemember who was killed in combat. Recipients must be residents and domiciliaries of New York State. Payments are disbursed in semi-annual installments (March and September). Controlling definition of "Gold Star Parent" appears in federal law (10 USC 1126). Definitions that privately run "Gold Star organizations" use may not necessarily match the controlling definition in federal law.

Hire-A-Vet Credit = A statewide tax incentive for businesses hiring post-9/11 Veterans to full-time jobs. To qualify, the business must employ a post-9/11 Veteran with an Honorable or General discharge for no less than 35 hours per week for one calendar year. The Veteran must attest that he or she was not employed for 35 or more hours in the previous 180 days for the business to qualify for the tax exemption. Businesses may earn up to $5,000 for hiring a qualified Veteran, and up to $15,000 for hiring a qualifying Veteran who is disabled.

Lifetime Liberty Pass = Pass from the New York State Department of Parks, Recreation, and Historic Preservation granting the holder free access to state parks, boat launch sites, historic sites, and park preserves throughout New York State, as well as free entry to 28 New York State golf courses. Veterans with a VA-rated disability of 40% or higher who are New York State residents qualify for this pass.

Supplemental Burial Allowance = A payment of up to $6,000 from New York State to immediate family members of Servicemembers killed in combat zones or dying from wounds incurred in combat to offset funeral and interment expenses.

State Veterans Homes = The New York State Department of Health operates four state Veterans homes for Veterans, spouses and Gold Star Parents: a 242-bed Veterans home at Oxford, Chenango County, a 250-bed Home at St. Albans, Queens; a 126-bed Home in Batavia, Genesee County; and a 250-bed home at Montrose, Westchester County. A 350-bed Veterans Home on the campus of SUNY Stony Brook in Long Island is operated by the University's Health Sciences Center. Health care and skilled nursing services are available at all facilities.

To be eligible for care in a State Veterans Home, a Veteran must have received an honorable discharge from military service, served for at least 30 days on active duty, and either entered active duty military service from New York State or resided in New York for at least one year to applying for admission to the State Veterans Home. Veterans with a disability compensation rating of at least 70%, and the spouses of such Veterans, receive skilled nursing care free of charge at all State Veterans Homes.

Troops To Energy = National employment initiative for Veterans seeking careers in the energy industry. New York became part of this program in 2014. Available jobs are listed through a Troops To Energy clearinghouse website.

Veterans Distinguishing Mark = Honorably discharged Veterans (including members of the National Guard and Reserves) can receive the word "Veteran" printed on their driver's license, learner's permit, or non-driver's ID at any local New York State Department of Motor Vehicles office. There is no charge for this printing service. This designation gives Veterans a far more convenient alternative to carrying around their discharge paperwork as proof of military service.

Veterans Tuition Award = Scholarship from the New York State Higher Education Services Corporation to combat Veterans entering a higher education course of study as a matriculated student. The financial award per semester equals to the lesser amount of either the undergraduate tuition that the State University of New York (SUNY) charges New York State residents or the actual tuition of the combat Veteran's program of study.

Veterans With Disabilities Employment Program (55-c or "55 Charlie") = Section 55-c of New York State's Civil Service Law authorizes 500 entry-level public sector positions to be filled with qualified wartime Veterans with disabilities. Applicants must meet the minimum qualifications for the position, but are not required to take a Civil Service examination.

Any Veteran who has received the Purple Heart or has a VA disability rating of at least 10% is automatically eligible for this program.

Other Commonly Used Veterans' Terms

Active Duty = A Servicemember is on Active Duty is he or she works for the military full-time and can be deployed at any time. Individuals serving in the Reserve or in the National Guard are not full-time active duty military personnel, although they can be activated to active duty status at any time should the need arise. Also frequently referenced as "Title 10 Status."

DD214 = A Veteran's Certificate of Release or Discharge from Active Duty issued by the United States Department of Defense. This is the most important single record that a Veteran can possess to prove that he or she served in the Armed Forces.

National Personnel Records Center = Agency of the National Archives and Records Administration that serves as a repository for military records. Based in St. Louis, this is the entity to which a Veteran submits a Standard Form 180 (SF 180) when seeking copies of his or her DD214, military medical records, records necessary to substantiate an application for a lost or destroyed military medal or decoration, or other records pertaining to that Veteran's military personnel file.

Operation Enduring Freedom (OEF) = Military operation that began on October 7, 2001 with allied air strikes on Taliban and al Qaeda targets.

Operation Iraqi Freedom (OIF)/Operation New Dawn (OND) = Military operation that began in March 2003 with the American-led coalition's invasion of Iraq. Labeled Operation Iraqi Freedom until 2010, when it was re-named Operation New Dawn.

Power of Attorney (POA) = A Veteran or dependent must grant Power of Attorney to a VA-accredited representative before that representative can represent the Veteran or dependent in a claim or appeal for VA benefits. To appoint an accredited representative of a Veterans Service Organization, the Veteran or dependent must first file VA Form 21-22 with the VA. To appoint a VA-accredited attorney, the Veteran or dependent must first file VA Form 21-22a with the VA.

Servicemembers Civil Relief Act (SCRA) = A powerful yet often-underutilized set of equity-based consumer protection statutes for Servicemembers on active duty, recently discharged Veterans, and their dependents. Provisions include the ability to stay civil actions during the duration of an individual's military service, the ability to avoid certain civil fines and penalties during the duration of an individual's military service, and the implementation of a 6% interest rate cap for all obligations entered into before beginning active duty if the military service materially affects their ability to meet the obligations.

Standard Form 180 (SF 180) = The form used to request military records, including but not limited to a Veteran's DD214, from the National Personnel Records Center in St. Louis and from that Veteran's branch of the military.

Uniformed Services Employment and Re-employment Rights Act (USERRA) — A set of statutes protecting Servicemembers' re-employment rights when returning from a period of military service (including activation to Title 10 status from the National Guard or Reserves) and guarding against employer-based discrimination due to past, present, or

future military service. If an employee notifies his or her employer in advance about upcoming military service obligations, and returns to that job in a timely manner after serving in the military for five years or less, that employee receives several protections under USERRA, including the right to be re-employed with all of the job-based benefits the Veteran would have attained if he or she had not been absent due to military service.

Commonly Seen Military Discharge Classifications

- **Honorable.** This is the highest classification of discharge. It means that the Veteran completed his or her service obligation at or above the level required by that branch of service. An individual with this classification meets the discharge classification requirements for all Veterans' benefits that the United States Department of Veterans Affairs oversees.

- **General Discharge Under Honorable Conditions.** This classification means that the Veteran provided satisfactory service in the estimation of his or her branch of the military, but the Veteran's conduct was in some way not meritorious enough to deserve an Honorable discharge. Individuals with this discharge classification can receive most VA benefits, but cannot receive education benefits under the G.I. Bill.

- **Discharge Under Other Than Honorable Conditions.** This classification, usually called "an OTH" in conversation among military members and Veterans, means that the Veteran engaged in a "pattern of behavior that constitutes a significant departure from the conduct expected" of an individual in military service. Receiving this level of discharge can (but does not always) deprive Veterans of many Veterans' benefits. Additionally, individuals who receive an OTH classification are usually barred from re-enlisting into any branch of the military.

- **Bad Conduct Discharge (BCD).** An individual can receive this discharge only if a military court-martial finds them guilty of certain particularly serious offenses under the Uniform Code of Military Justice (UCMJ).

- **Dishonorable Discharge.** An individual can receive this discharge only if a General Court-Martial finds that person guilty of "serious offenses of a civil or military nature." (NOTE: If a commissioned officer is convicted at a General Court-Martial, then the officer's paperwork will list that they received a "Dismissal," which carries the same negative consequences as a Dishonorable Discharge).

Caselaw -- Quick Reference Guide

Analogous Ratings

Case Name	Citation	Key Concept	Key Quote
Lendenmann v. Principi	3 Vet. App. 345, 351 (1992)	If there is no diagnostic code that exactly matches a claimant's symptoms, the VA may rate the disability using the diagnostic code for an analogous condition. If you want to convince the VA to use a certain analogous rating for your claimant's service-connected condition, then you need to persuade the VA that your client's disability causes the same general type of impairment, appears in the same general area of the body, and has similar symptoms to the disability discussed in the rating schedule that you want the VA to use.	"[The VA is allowed] to rate an unlisted ailment under the criteria provided for 'a closely related disease or injury' that is listed. In deciding whether a listed disease or injury is 'closely related' to the veteran's ailment, the VA may take into consideration three factors: (1) whether the 'functions affected' by the ailments are analogous; (2) whether the 'anatomical localization' of the ailments is analogous; and (3) whether the 'symptomatology' of the ailments is analogous."
Stankevich v. Nicholson	19 Vet. App. 470, 472 (2006)	In deciding which analogous diagnostic code to use, the VA must "show its work" by explaining in writing *why* it chose this particular diagnostic code.	"The Board provided no analysis to support its conclusion [of selecting a particular analogous diagnostic code for an unlisted condition] and failed to explain why other DCs were not reasonably analogous. . . . In any event, the Board must provide an adequate statement of reasons or bases for its selection of a DC."

Benefit of the Doubt

Case Name	Citation	Key Concept	Key Quote

Gilbert v. Derwinski	1 Vet. App. 49, 54 (1990)	A claimant does not need to prove beyond a reasonable doubt that a disability was caused by or worsened by military service. All the claimant needs to show is that the disability in question was at least as likely as not caused by or worsened by military service.	"[A] Veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail; entitlement need not be established 'beyond a reasonable doubt,' by 'clear and convincing evidence,' or by a 'fair preponderance of evidence.' . . . By tradition and by statute, the benefit of the doubt belongs to the veteran."
Mittleider v. West	11 Vet.App. 181, 182 (1998)	When it is impossible to distinguish the health impacts of a non-service-connected condition from the health impacts of a service-connected condition, the benefit of the doubt goes to the Veteran so that all symptoms that the Veteran is experiencing are considered during the rating process.	"[W]hen it is not possible to separate the effects of the [service-connected condition and the non-service-connected condition], VA regulations at 38 C.F.R. § 3.102, which require that reasonable doubt on any issue be resolved in the [claimant's] favor, clearly dictate that such signs and symptoms be attributed to the service-connected condition."
Ortiz v. Principi	274 F.3d 1361, 1365 (Fed. Cir. 2001)	As long as the VA has equal evidence for and against the claimant, the VA must resolve the claim in the claimant's favor.	"The statutory benefit of the doubt rule [applies] . . . when the factfinder determines that the positive and negative evidence relating to the Veteran's claim are 'nearly equal.'"

Compensation and Pension Examinations

Case Name	Citation	Key Concept	Key Quote

Green v. Derwinski	1 Vet.App. 121,124 (1991)	The VA is obligated to provide a thorough medical examination by a competent medical expert, and to provide an adequate report that evaluates the C&P exam results within the context of the claimant's total medical history.	"[F]ulfillment of the statutory duty to assist here includes the conduct of a thorough and contemporaneous medical examination, one which takes into account the records of prior medical treatment, so that the evaluation of the claimed disability will be a fully informed one."
Nieves-Rodriguez v. Peake	22 Vet. App. 295, 301 (2008)	A C&P exam is legally inadequate unless the exam report provides a solid medical rationale for each conclusion that the examiner reached	"[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."
Stefl v. Nicholson	21 Vet.App. 120, 124 (2007)	If a C&P exam determines that a Veteran's disability is not linked to military service solely because the disability is not on a list of presumptive conditions for that Veteran's era of service, and the examiner fails to conduct any inquiry about direct service connection, then the C&P exam is legally inadequate.	"A medical nexus opinion [from a C&P examiner] finding a condition is not related to service because the condition is not entitled to presumptive service connection, without clearly considering direct service connection, is inadequate on its face. Without a medical opinion that clearly addresses the relevant facts and medical science, the [BVA] is left to rely on its own lay opinion, which it is forbidden from doing."
Acevedo v. Shinseki	25 Vet.App. 286, 293 (2012)	To be legally acceptable, a C&P exam report cannot contain only conclusions from the examiner. The report must specifically describe *why* the examiner reached each conclusion, based on accurate facts and scientifically solid rationales	"An adequate medical report must rest on correct facts and reasoned medical judgment so as to inform the [VA] on a medical question and facilitate the [VA's] consideration and weighing of the report against any contrary reports."

Parks v. Shinseki	716 F.3d 581, 585 (Fed. Cir. 2013)	The Veteran has the legal right to challenge the competency of a C&P examiner. (For example, an orthopedic surgeon is probably not competent to opine on a Veteran's mental health conditions).	“Even though the law presumes the VA has selected a qualified person [to perform a C&P examination], that presumption is rebuttable.”
Francway v. Wilkie	No. 2018-2136, slip opinion at 7-8 (Fed. Cir. 2019)	A Veteran may request any reasonable information regarding a C&P examiner's credentials, including the examiner's resume, board certifications, work history, etc.	“Once the request is made [by the Veteran] for information as to the competency of the examiner, the Veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about the qualifications of a medical examiner.”
Colvin v. Derwinski	1 Vet.App. 171, 175 (1991)	The Board of Veterans' Appeals (and, by extension, all entities of the VA) must not substitute their own medical theories for the judgments made by qualified medical practitioners.	“BVA panels may consider only independent medical evidence to support their findings [and may not substitute their own medical judgments for the findings of outside medical experts].”
Sharp v. Shulkin	29 Vet.App. 26, 35 (2017)	A C&P examiner is obligated to determine the impact of a service-connected condition at its highest level of severity. The examiner cannot avoid this obligation by saying that it would be "too speculative" to determine how severe a Veteran's condition would be during a flare-up. A C&P exam that fails to take severity during flare-ups into account is a legally inadequate exam.	“Because the VA examiner did not elicit relevant information as to the Veteran's flares or ask him to describe the additional functional loss, if any, he suffered during flares and then estimate the Veteran's functional loss due to flares based on all the evidence of record — including the veteran's lay information — or explain why she could not do so, the [C&P] examination was inadequate for evaluation purposes and the Board's finding to the contrary was clearly erroneous”

Wise v. Shinseki	26 Vet. App. 517, 527 (2014)	When a C&P examiner lacks sufficient expertise to opine about a particular disability -- and especially when the examiner notes this lack of expertise in the C&P exam report -- the presumption of competence for the VA's examiner no longer applies. In such a situation, the VA must explain *why* the C&P examiner possessed sufficient expertise to opine on the Veteran's condition(s). Failure for the VA to provide such an explanation is legally inadequate.	"[W]where, as here, a medical professional admits that he or she lacks the expertise necessary to provide the opinion requested by the [VA] -- in this case, expressly deeming her view of the matter as that of a non-expert layperson -- the opinion itself creates the appearance of irregularity in the process resulting in the selection of that medical professional that prevents the presumption of competence from attaching, and the [VA] must therefore address the medical professional's competence before relying on his or her opinion. The [VA's] failure to do so here renders inadequate its statement of reasons or bases for its decision."
Nohr v. McDonald	27 Vet. App. 124, 133 (2014)	A claimant has the legal right to obtain records from the VA concerning a C&P examiner's competence to opine on the medical condition(s) for which the examiner evaluated the claimant.	"In the face of a request for documents — here, [the C&P examiner's] curriculum vitae — and a potentially ambiguous statement by [the C&P examiner], the [VA] cannot hide behind the presumption of regularity and ignore [the Veteran's] request for assistance in obtaining documents necessary to rebut the presumption. Indeed, it is unclear how [the Veteran] is expected to evaluate and effectively challenge [the C&P examiner's] presumed expertise unless he is provided with the requested information."

Case Name	Citation	Key Concept	Key Quote
Stegall v. West	11 Vet. App. 268, 271 (1998)	When the CAVC remands a case to the BVA, or the BVA remands a case back to the lower levels of the VA, the entity receiving the remanded case must issue a new decision in accordance with every legal finding made by the party remanding the case. (For instance, if the CAVC finds a Veteran to be unemployable and remands the case back to the BVA for a final decision, the BVA cannot decide that the Veteran is employable).	"[A] remand by this Court or the Board imposes upon the Secretary of Veterans Affairs a concomitant duty to ensure compliance with the terms of the remand."

Effective Dates Of Decisions

Case Name	Citation	Key Concept	Key Quote
Emerson v. McDonald	28 Vet.App. 200, 211 (2016)	If a Veteran's original claim is denied and becomes finalized, and then the Veteran obtains new military records that leads to the VA granting the claim, 38 C.F.R. 3.156(c)(1) requires that the effective date on which payments from the VA begin is the original date of claim.	"[U]pon receiving official [military] service department records in 2012, and notwithstanding the fact that service connection for PTSD was granted in 2011, VA was required pursuant to 38 C.F.R. 3.156 (c)(1) to "reconsider the claim" for service connection for PTSD that was denied in February 2003, and the Board erred in failing to ensure that VA complied with this obligation."

Stowers v. Shinseki	26 Vet. App. 550, 554 (2014)	If the VA denies a Veteran's claim, and then re-opens and grants the claim based on military records that the VA did not consider when initially denying the claim, the proper effective date pursuant to 38 C.F.R. 3.156(c)(1) is the original date of claim.	"If at any time after a claim is denied VA receives or associates with the claims file service department records that existed but had not been associated with the claims file at the time VA first decided the claim, VA will reconsider the claim. If VA thereafter makes an award based in whole or in part on these newly associated service department records, the assigned effective date will be the date entitlement arose or the date VA received the previously decided claim, whichever is later."
Rice v. Shinseki	22 Vet. App. 447, 454-455 (2009)	When a Veteran receives a service-connected rating for a disability, and then files and wins an appeal seeking Total Disability based on Individual Unemployability (TDIU) because of that service-connected disability, the proper effective date for the award of TDIU is the date of the original claim, even though the Veteran did not seek TDIU in the original claim.	"[The Veteran] submitted evidence of unemployability at the same time he appealed the initial disability rating assigned for PTSD. Because [the Veteran] was challenging the initial disability rating assigned for the disability upon which he based his assertion of unemployability (i.e., he claimed he was unemployable because of his service-connected PTSD), in this case, the determination of whether he is entitled to TDIU, including the effective date for that award, is part and parcel of the determination of the initial rating for that disability."

Fiduciary Determinations

Case Name	Citation	Key Concept	Key Quote

Freeman v. Shinseki	24 Vet.App. 404, 417 (2011)	When the VA proposes to appoint a fiduciary to manage the VA benefits awarded to an allegedly incompetent claimant, the claimant has the right to challenge the VA's finding of the claimant's incompetency or the VA's appointment of an individual whom the claimant does not want to serve as the fiduciary.	"As all parties agree that the statutory framework authorizing the [VA] to appoint a fiduciary to handle VA benefits for an incompetent veteran falls within the purview of section 511(a) [of Title 38 of the United States Code], the Court concludes that the petitioner is clearly and indisputably entitled to appeal to the Board the decision of the VSCM to appoint a paid federal fiduciary."
Evans v. Shinseki	2011 U.S. App. Vet. Claims LEXIS 1506, at *5 (2011)	Claimants for whom the VA proposes to appoint a fiduciary to manage their VA benefits on the basis of the claimant's alleged incompetence can challenge the appointment of a fiduciary throughout any level of the appellate process.	"The Court rejected the Secretary's contention that because it was a matter committed to his sole discretion his execution of the obligation to select a fiduciary was not reviewable by this Court, or by any court. Consequently, "if [a] veteran disagrees with the Secretary's manner of selecting a fiduciary, the veteran may appeal that decision to the Board."

Gulf War Illness

Case Name	Citation	Key Concept	Key Quote

Stewart v. Wilkie	No. 15-4458, slip opinion at 7 (2018).	For Gulf War Veterans exposed to toxic fumes from burn pits, an illness that defies medical diagnosis can still be service-connected as a Medically Unexplained Chronic Multisymptom Illness (MUCMI) if either the etiology or pathophysiology of the illness is not conclusive. (Previously, the VA had required both the etiology and the pathophysiology of the illness to be inconclusive).	"Under the proper interpretation of the law, an illness is a MUCMI where either the etiology or pathophysiology of the illness is inconclusive. Conversely, a multisymptom illness is not a MUCMI where both the etiology and the pathophysiology of the illness are partially understood. "
Joyner v. McDonald	766 F.3d 1393, 1395 (Fed. Cir. 2014)	An in-country Gulf War Veteran does not have to undergo every imaginable medical test before the VA will concede that the Veteran has a service-connected Medically Unexplained Chronic Multisymptom Illness (MUCMI). Federal regulations (particularly 38 CFR § 3.317(a)(1)(ii)) calls for the finding of a MUCMI after a reasonable amount of testing shows that the condition defies a named diagnosis	"We are cognizant of the fact that a 'qualifying chronic disability' is one that '[b]y history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.' 38 CFR § 3.317(a)(1)(ii). However, this *does not*, as the government contends, compel the conclusion that a veteran must be subjected to all possible medical testing available and then 'diagnosed' with an 'undiagnosed illness' after all possible medical conditions have been ruled out."

Lay Evidence

Case Name	Citation	Key Concept	Key Quote

Buchanan v. Nicholson	451 F.3d 1331, 1337 (Fed. Cir. 2006)	The VA cannot reject lay evidence solely because there is no medical evidence to substantiate it. Lay statements about a Veteran's medical symptoms can be creditable even without medical evidence verifying that the Veteran experienced those particular symptoms.	"[The VA] cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence. If the [VA] concludes that the lay evidence presented by a veteran is credible and ultimately competent, the lack of contemporaneous medical evidence should not be an absolute bar to the veteran's ability to prove his claim of entitlement to disability benefits based on that competent lay evidence."
Jandreau v. Nicholson	492 F.3d 1372, 1377 (Fed. Cir. 2007)	Lay evidence can establish the diagnosis of a medical condition, particularly under the three conditions described in this case.	"Lay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional."
English v. Wilkie	30 Vet. App. 347, 353 (2018)	If the VA deems that medical evidence holds greater probative value than lay evidence when deciding a claim, the VA must describe precisely why the medical evidence is more valuable than the lay evidence.	"[T]he Board didn't explain on what basis it may have implicitly concluded that, on the question of lateral instability, medical evidence is categorically more probative than lay evidence or that lay evidence is not competent at all. If the Board decides that lay evidence isn't competent on this question, it must do so clearly and with an appropriate supporting rationale."

Tedesco v. Wilkie	No. 18-1805, slip op. at 8 (2019)	Medical evidence is not automatically more valuable than lay evidence. If the VA is going to determine that lay evidence in a particular case is subordinate to medical evidence, the VA needs to explain why this is so.	"The Board fails to explain why the medical findings are more probative, other than to assert that the 'specific medical tests . . . are designed to reveal instability . . . of the joints.' Thus, the Board's explanation appears to rely on an understanding that medical evidence is inherently more probative . . . which this Court has rejected."

Orthopedic Conditions

Case Name	Citation	Key Concept	Key Quote
DeLuca v. Brown	8 Vet. App. 202, 208 (1995)	A VA orthopedic examination is <u>inadequate</u> when the exam does not account for additional limitation of function due to pain on movement, weakness, excess fatigability, or incoordination. Four additional factors must be considered for each joint examined to ensure that functional impairment is not underestimated: (1) Pain on movement that limits function, including during repetitive use and flare-ups (2)Weakness (3)Excess fatigability (4) Incoordination	"The Board's statement of the reasons or bases for its decision was not adequate under 38 U.S.C. § 7104(d)(1). The Board did not explain how pain on use was factored into its evaluation of the veteran's disability in terms of limitation-of-motion equivalency under Diagnostic Code (DC) 5201. For example, the Board found that the veteran's testimony was credible that in the winter months his shoulder condition caused him to miss '2 or 3 days of work a week'. Yet, the Board did not explain how this impairment of the veteran's employment was evaluated under DC 5201 and § 4.40"

Mitchell v. Shinseki	25 Vet.App. 32, 44 (2011)	In evaluating an orthopedic disability, the VA must take into consideration the factors listed in *DeLuca.* If the claimant reports flare-ups of a joint or limb condition, the VA needs to evaluate the duration, frequency, and severity of the flare-ups	"Because the examiner failed to address any range-of-motion loss specifically due to pain and any functional loss during flareups, the examination lacks sufficient detail necessary for a disability rating, and it should have been returned for the required detail to be provided, or the [VA] should have explained why such action was not necessary."
Sharp v. Shulkin	29 Vet.App. 26, 32 (2017)	A C&P examiner is obligated to determine the impact of a service-connected condition at its highest level of severity. The examiner cannot avoid this obligation by saying that it would be "too speculative" to determine how severe a Veteran's condition would be during a flare-up. A C&P exam that fails to take severity during flare-ups into account is a legally inadequate exam.	"Flareups, in other words, must be factored into an examiner's assessment of functional loss."
Saunders v. Wilkie	886 F.3d 1356, 1368 (Fed. Cir. 2018)	A Veteran can receive disability compensation for pain that was caused or exacerbated by military service, even if that pain is not accompanied by an underlying medical diagnosis.	"We hold that the Veterans Court erred as a matter of law in holding that pain alone, without an accompanying diagnosis or identifiable condition, cannot constitute a "disability" under 38 U.S.C. § 1110, because pain in the absence of a presently-diagnosed condition can cause functional impairment."

Post-Traumatic
Stress Disorder

Case Name	Citation	Key Concept	Key Quote
Cohen v. Brown	10 Vet.App. 128, 144 (1997)	Establishing service connection for PTSD requires: (1) a current, clear medical diagnosis of PTSD in accordance with 38 C.F.R. § 4.125(a); (2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a causal nexus between current symptomatology and the specific claimed in-service stressor. When there is "unequivocal" diagnosis of PTSD rendered by mental health professionals, the VA cannot substitute its own judgment for that of mental health professionals by calling into question the validity of their medical judgments.	"Because there are undisputed, unequivocal current diagnoses of PTSD and the [VA] did not make a finding that the reports were incomplete under the applicable [mental health standards] and then follow the regulation by returning them for clarification, the sufficiency of the stressor, as a component of a diagnosis of PTSD, was established as a matter of law in this case."

Sizemore v. Principi	18 Vet.App. 264, 272 (2004)	The VA cannot require that a claimant "receive fire from the enemy" to prove a stressor for service-connected PTSD. Such a requirement would be far more limiting than what the VA requires for proof of a service-connected stressor.	"The Court concludes that the Board erred to the extent that its determination that the appellant had not engaged in combat was based on the sole criterion of the appellant's not having received fire from the enemy. The Board erred insofar as it based that determination on G.C. Prec. 12-99. That opinion does not state that the meaning of the phrase 'engaged in combat with the enemy' requires that a veteran have received fire."
Bankhead v. Shulkin	29 Vet.App. 10, 22 (2017)	VA evaluations of service-connected PTSD need to be thorough and holistic. If the VA fails to adequately assess evidence of a symptom experienced by the Veteran, misrepresents the meaning of a symptom, or fails to consider the impact of the Veteran's symptoms as a whole, then the VA's rationale for denying a higher PTSD rating is legally inadequate.	"VA must engage in a holistic analysis in which it assesses the severity, frequency, and duration of the signs and symptoms of the veteran's service-connected mental disorder; quantifies the level of occupational and social impairment caused by those signs and symptoms; and assigns an evaluation that most nearly approximates that level of occupational and social impairment. Where, as here, the Board fails to adequately assess evidence of a sign or symptom experienced by the veteran, misrepresents the meaning of a symptom, or fails to consider the impact of the veteran's symptoms as a whole, its reasons or bases for its denial of a higher evaluation are inadequate. "

Pro-Claimant System

Case Name	Citation	Key Concept	Key Quote
United States v. Oregon	366 U.S. 643, 647 (1961)	Lawmakers intended for the VA to resolve disputes whenever possible in favor of the Veteran or the Veteran's family member.	"The solicitude of Congress for Veterans is of long standing."
Hodge v. West	155 F.3d 1356, 1362 (Fed. Cir. 1998)	Decades of Supreme Court and Federal Circuit cases affirm the principle that the entire VA system is designed to assist Veterans and to provide them with benefits whenever possible.	"[The Supreme Court and the Federal Circuit] both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."
Majeed v. Principi	16 Vet. App. 421, 433 (2002)	Everything that the VA does is designed to reward claimants for their military service whenever it is possible to do so. Each action that the VA takes is meant to be taken with the claimant's well-being, not the agency's convenience, in mind.	"It is well-settled that the Veterans' benefits system is a pro-claimant system."
Little v. Derwinski	1 Vet. App. 90, 91 (1990)	The VA's system is non-adversarial in character. As soon as the VA has enough evidence to grant a claim, development of the claim needs to end. The VA should never "develop to deny" a claim.	"The VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and non-adversarial."

Pyramiding

Case Name	Citation	Key Concept	Key Quote

Fanning v. Brown	4 Vet. App. 225, 230 (1993)	The VA will not compensate a Veteran twice for the same symptomatology. HOWEVER, it is possible for a Veteran to have two or more separate and distinct manifestations of effects from the same injury, permitting two different disability ratings without violating the VA's "anti-pyramiding" rule.	"Of course, it is possible for a Veteran to have separate and distinct manifestations attributable to two different disability ratings, and, in such a case, the Veteran should be compensated under different diagnoses."
Esteban v. Brown	6 Vet. App. 259, 262 (1994)	If a Veteran has different manifestations from the same disability, the Veteran can receive separate disability ratings for each manifestation without violating the VA's rule against "pyramiding." Even if the Veteran's symptoms are all concentrated in the same body area, the rule against "pyramiding" is not breached as long as different manifestations exist that warrant their own individual ratings.	"The critical element is that none of the symptomatology for any one of these three conditions is duplicative of or overlapping with the symptomatology of the other two conditions. Appellant's symptomatology is distinct and separate: disfigurement; painful scars; and facial muscle damage resulting in problems with mastication. Thus, as a matter of law, appellant is entitled to combine his 10% rating for disfigurement under Diagnostic Code [DC] 7800 with an additional 10% rating for tender and painful scars under DC 7804 and a third 10% rating for facial muscle injury interfering with mastication under DC 5325."

Soundness
(Presumption Of)

Case Name	Citation	Key Concept	Key Quote

Crowe v. Brown	7 Vet. App. 238, 245 (1994)	Under 38 USC 1111 and 38 CFR 3.304(b), a Veteran is presumed to have been in sound health when entering the military unless the VA can provide "clear and unmistakable evidence" proving that the disability in question pre-dated the Veteran's entry into the military AND that this pre-existing condition was not aggravated by military service.	"The burden of proof is on VA to rebut the presumption by producing clear and unmistakable evidence that the veteran's asthma existed prior to service and . . . if the government meets this requirement, that the condition was not aggravated in service. The burden [on the VA] is a formidable one."
Wagner v. Principi	370 F.3d 1089, 1096 (Fed.Cir. 2004)	If the Veteran's induction physical(s) did not list a medical condition as pre-dating the Veteran's entrance into the military, then the Veteran is presumed to be physically and/or mentally sound with regard to that condition. The VA can rebut this presumption only through "clear and unmistakable" evidence that the condition pre-existed military service and that any aggravation of the condition was "due to the natural progress" of the disability, not due to any events that occurred in the military.	"When no preexisting condition is noted upon entry into service, the Veteran is presumed to have been sound upon entry. The burden then falls on the government to rebut the presumption of soundness by clear and unmistakable evidence that the veteran's disability was both preexisting and not aggravated by service. The government may show a lack of aggravation by establishing that there was no increase in disability during service or that any 'increase in disability [was] due to the natural progress of the preexisting condition. 38 USC § 1153. If this burden is met, then the veteran is not entitled to service-connected benefits. However, if the government fails to rebut the presumption of soundness under [38 USC 1111], the veteran's claim is one for service connection. "

Horn v. Shinseki	25 Vet. App. 231, 239 (2012)	The VA cannot use the lack of a specific in-service event or trauma to deny a claim that a pre-existing disability was aggravated during military service. If a pre-existing condition grew worse in military service, then disability compensation is owed to the Veteran unless the VA provides "clear and unmistakable evidence" that the worsening of the condition was due only to the natural progression of the injury or disease.	"[T]here is no requirement of a specific injury or trauma in order for the preexisting condition to have been aggravated. Rather, service connection may be awarded for any aggravation of a preexisting disease or injury during service. See 38 C.F.R. § 3.303(a) (2011). It is lack of aggravation that the [VA] must prove, not lack of an injury."

Substance Abuse/Alcoholism

Case Name	Citation	Key Concept	Key Quote
Allen v. Principi	237 F.3d 1368, 1370 (Fed. Cir. 2001)	The law barring disability compensation for "willful misconduct" (38 USC 1110) DOES NOT PREVENT a claimant from receiving disability compensation for substance abuse or alcoholism that is a secondary condition to a service-connected injury or illness. In addition, a claimant can use evidence of substance abuse or alcoholism as proof of the severity of a service-connected disability.	"[38 USC 1110] does not preclude a Veteran from receiving compensation for alcohol or drug-related disabilities arising secondarily from a service-connected disability, or from using alcohol or drug-related disabilities as evidence of the increased severity of a service-connected disability."

Jaquez v. Shulkin	2017 U.S. App. Vet. Claims LEXIS 629, at *5 (2017)	The VA must evaluate all possible ways that a claimant can receive VA benefits, even if the claimant does not specifically list a particular medical condition in a claim for benefits. If a claimant has a history of substance abuse and/or alcoholism, then the VA must evaluate whether this substance abuse and/or alcoholism is a secondary condition to a service-connected disability or whether it is a symptom of a service-connected injury or illness.	"The Board [of Veterans' Appeals] is required to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record. Here, the Board repeatedly notes the appellant's history of alcohol abuse. Nevertheless, the Board failed to discuss whether the record reflected that the appellant's alcoholism was secondary to or a symptom of his service-connected PTSD, as is required by *Allen*."

Substitution Claims

Case Name	Citation	Key Concept	Key Quote
Todd v. McDonald	27 Vet.App. 79, 85 n.5 (2014)	An eligible survivor who files to become a substitute claimant within one year of the original claimant's death is not bound solely by the evidence in the claims file at the time of the original claimant's death. The substitute claimant may add new evidence to the record in support of the claim, and the VA is obligated to consider that new evidence.	"Under 38 USC 5121A, a decision as to entitlement to accrued benefits is not restricted to consideration of the evidence contained in the claims file at the time of the deceased VA claimant's death."

Breedlove v. Shinseki	24 Vet.App. 7, 20 (2010)	A Veteran's claim does not die completely with the death of the Veteran. Instead, an eligible survivor may file under 38 USC 5121A to serve as a substitute claimant, provided that the claimant files the request to substitute within one year of the Veteran's date of death. The substitute claimant may add new evidence to the claims file and possesses virtually all of the legal rights that the Veteran would have possessed if the Veteran were still alive to pursue the claim.	"[A] Veteran's disability benefits claim survives the death of the veteran, not for the purpose of providing VA benefits to a Veteran, but for the purpose of furthering the claim of an eligible accrued-benefits claimant."
Reliford v. McDonald	27 Vet.App. 297, 303-304 (2015)	A VA Form 21-534EZ must be accepted by the VA as both a claim for accrued benefits (based solely on the evidence in the claims file at the time of the original claimant's death) and a request to serve as a substitute (allowing the eligible survivor to adding new evidence to the claims file). After a receiving a VA Form 21-534EZ, the VA must notify the survivor claimant of the claimant's ability to serve as a substitute claimant, as well as the survivor claimant's ability to waive substitution and proceed under an accrued benefits framework.	"Nevertheless, although the [VA] Secretary notified Mrs. Reliford that she could waive the right to submit additional evidence, he did not notify her that she could waive substitution, in contravention of his policy. Thus, the Court holds that the [VA] erred by failing to follow the Secretary's own established procedures."

Total Disability Based On Individual Unemployability (TDIU)

Case Name	Citation	Key Concept	Key Quote
Ray v. Wilkie	31 Vet. App. 58, 72 (2019)	When determining whether a Veteran is able to "secure and follow substantial gainful employment," the VA cannot stop the analysis with a determination on whether the Veteran's income is lower than the Federal poverty threshold. The VA must also look at non-economic factors, evaluating the Veteran's education, training, and work record, as well as the Veteran's physical and mental abilities to perform the tasks required by substantial gainful employment. This includes a determination about whether the Veteran is adversely impacted by limitations on memory, concentration, ability to be socially appropriate, etc.	"We recognize, as both the Secretary [of the VA] and the Veteran agree, that with respect to 'substantially gainful employment,' 38 CFR 4.16(b) includes an economic component: a veteran's income must be lower than the Federal poverty threshold. But there's also no question that being 'unable to secure and follow a substantially gainful employment' includes a non-economic component. When the Board conducts a TDIU analysis, it must take into account the individual veteran's education, training, and work history. The question is whether the Veteran is capable of performing the physical and mental acts required by employment, not whether the veteran can find employment. As to mental abilities in particular, the Court has cited specific examples, such as a lack of social skills and workplace stress."

Moore v. Derwinski	1 Vet.App. 356, 359 (1991)	The proper test for the VA to apply in a TDIU determination is not whether the Veteran may theoretically be able to work in some profession somewhere in the universe. Instead, the proper test for the VA to apply is whether the Veteran is realistically able to secure and maintain substantial gainful employment.	"It is clear that the claimant need not be a total 'basket case' before the courts find that there is an inability to engage in substantial gainful activity. The question must be looked at in a practical manner, and mere theoretical ability to engage in substantial gainful employment is not a sufficient basis to deny benefits. The test is whether a particular job is *realistically* within the physical and mental capabilities of the claimant."
Cantrell v. Shulkin	28 Vet. App. 382, 392 (2017)	An employed Veteran is not considered "substantially and gainfully employed" if the Veteran is working in a "protected work environment" (a job where the Veteran receives extremely special workplace accommodations from the Veteran's employer that allow the Veteran to continue working). The VA does not clearly define the term "protected work environment. However, the VA cannot hold that a Veteran is *not* working in a protected work environment without a clear description of *why* the Veteran's job does not qualify as a protected work environment	"Although the magnitude of a Veteran's job responsibilities and the degree of accommodation necessary for successful, full-time work might be appropriate factors to consider in determining whether a Veteran is employed in a protected environment, VA's failure to define employment 'in a protected environment' or to otherwise specify the factors that adjudicators should consider in making that determination frustrates judicial review . . . The Court simply cannot sanction a statement [from the VA] of reasons or bases that amounts to finding that Mr. Cantrell was not employed in a protected environment 'because I say so.'"

Withers v. Wilkie	30 Vet. App. 139, 148 (2018)	The VA cannot deny TDIU to a Veteran based wholly or partially on the Veteran's alleged ability to do "sedentary work" unless the VA explains precisely what type of sedentary work this specific Veteran could reasonably do, based on this Veteran's educational and occupational history.	"[I]f the [VA] bases its denial of TDIU in part on the conclusion that a Veteran is capable of sedentary work, then [the VA] must explain how it interprets that concept in the context of that case. This includes, where necessary, an explanation of how a finding that a Veteran is capable of sedentary employment squares with the Veteran's educational and occupational history."
Floore v. Shinseki	26 Vet. App. 376, 382 (2013)	When a Veteran has multiple service-connected disabilities, the VA cannot deny TDIU because each individual disability by itself does not appear to be severe enough to prevent the Veteran from "securing and maintaining substantial gainful employment." Instead, the VA can deny TDIU only if the impact of each disability individually and the total impact of all of the Veteran's disabilities cumulatively is not severe enough to prevent the Veteran from securing and maintaining substantial gainful employment.	"Although the [VA] recognized that the cumulative effects of service-connected disabilities can prevent substantially gainful employment, the [VA] addressed the effects of [the Veteran's] disabilities individually, and never explained what the cumulative functional impairment of all [the Veteran's] service-connected disabilities might be and why they do not prevent substantially gainful employment."

Writing A Medical Nexus Letter To The U.S. Department of Veterans Affairs

Benjamin Pomerance, Esq.

Thank you for your willingness to write a medical nexus letter on behalf of a Veteran whose medical history is familiar to you. By doing so, you are providing a crucial service. Your letter will help the United States Department of Veterans Affairs understand the connection that exists between this Veteran's current disabling condition(s) and this Veteran's military service. This information is necessary for this Veteran to receive the compensation payments that this Veteran has earned.

Frequently Asked Questions:

Q: What must a Veteran prove to the United States Department of Veterans Affairs (VA) in a claim for disability compensation?

A: A Veteran must demonstrate that he or she has a disability that was at least as likely as not caused or worsened in the course of that Veteran's military service.

Q: What is the point of a medical nexus letter?

A: A medical nexus letter explains to the VA why a connection exists between the Veteran's disability and the Veteran's military service.

Q: Who reads a medical nexus letter?

A: VA employees who determine whether events that occurred during the Veteran's military service are at least as likely as not the reason why the Veteran's disability was caused or exacerbated.

Q: Are these VA employees medical professionals?

A: No. The VA employees who read these letters are trained as claims reviewers, not as medical professionals. No prior medical experience or knowledge is required for these individuals to obtain these jobs.

Q: What are these VA employees looking for?

A: VA employees look for four basic categories of information when they review a nexus letter:

a. Does the Veteran currently have a disability? If yes, what is that disability? What evidence proves that disability's existence?

b. Was this disability at least as likely as not caused by or exacerbated by the Veteran's military service? If yes, what medical evidence proves the likelihood of this connection between the disability and the Veteran's military service?

c. What is the severity of the Veteran's disability? In what way(s) does this disability impact the Veteran's quality of life?

d. What makes the author of this letter qualified to offer these opinions? What is the author's education, training, experience, length of time providing medical care to the Veteran, etc.?

Q: Does the VA require a finding of medical certainty that the Veteran's disability was caused or worsened by that Veteran's military service?

A: No. Medical certainty is not required. Instead, the VA uses a significantly lower standard: whether the condition under review was at least as likely as not caused or worsened by military service.

Q: What does "at least as likely as not" mean?

A: If there is at least a 50% probability that a Veteran's disability was caused or worsened by that Veteran's military service, then this Veteran's disability is at least as likely as not connected to that Veteran's military service.

Q: What are the most important things to remember when writing a nexus letter for a Veteran?

A: The most important things to remember are:

a. *Be clear*. Remember that the VA employees reading these letters are not medical professionals. Avoid using medical jargon. Use common terms whenever possible while describing the disability and its connection to military service.

b. *Be detailed.* Show, don't tell. Avoid vague descriptions. Rather than merely listing the Veteran's disability, state the specific symptoms that the Veteran is experiencing and their severity.

c. *Be alert*. Know what language the VA wants to see and then use it. Remember that the VA wants to know whether each disability under review is "at least as likely as not" connected to that Veteran's military service. Use that specific language when stating your conclusions about the Veteran's disabilities.

d. *Be authoritative.* At the outset of your letter, describe your expertise. Mention all relevant board certifications, peer-reviewed journal articles, length of time treating the Veteran, etc. Include a copy of your resume or C.V. with the letter.

Q: Must I write a separate nexus letter for every disability that I believe to be caused or worsened by the Veteran's military service?

A: No. You may analyze each disability in a single nexus letter. If you do so, however, please organize the letter in a logical manner. Do not provide analysis for two or more disabilities in a single paragraph, as this can confuse the VA employees who are reading and interpreting this letter.

Q: If I write a nexus letter, am I going to have to go to court and testify about what I wrote?

A: No. A claim for VA benefits is an administrative matter, not a courtroom proceeding. There is no trial. You will not be called to appear before a judge as a medical expert. You will not have to travel to a VA office to testify. The nexus letter that you write will speak for itself. Once you write the letter and provide it to the Veteran, no further actions pertaining to the letter will be required of you.

Thank you for taking the time to draft a nexus letter on behalf of a Veteran. Your assistance and attention to detail with this matter will make a significant difference in this Veteran's life.

Writing A Layperson's Nexus Letter To The U.S. Department of Veterans Affairs

Benjamin Pomerance, Esq.

Thank you for your willingness to write a nexus letter on behalf of a Veteran whose life experiences are familiar to you. By doing so, you are providing a crucial service. Your letter will help the United States Department of Veterans Affairs understand the connection that exists between this Veteran's current disabling condition(s) and this Veteran's military service. This information is necessary for this Veteran to receive the disability compensation payments that this Veteran has earned.

Frequently Asked Questions:

Q: What must a Veteran prove to the United States Department of Veterans Affairs (VA) in a claim for disability compensation?

A: A Veteran must demonstrate that the Veteran has a disability that was at least as likely as not caused by or worsened during that Veteran's military service.

Q: What is the point of a nexus letter?

A: A nexus letter explains to the VA why a connection exists between the Veteran's disability and the Veteran's military service.

Q: Who reads a nexus letter?

A: VA employees who determine whether events that occurred during the Veteran's military service are at least as likely as not the reason why the Veteran's disability was caused or worsened.

Q: I'm not a doctor. How can my letter possibly be of any value to this Veteran's disability compensation case?

A: Because you know the Veteran and have shared life experiences with the Veteran. You can attest to the Veteran's disabilities on a personal level that goes beyond what a medical professional can offer.

Q: What does that mean? I still don't understand how I can help.

A: Maybe you knew the Veteran before the Veteran's military service, and can describe how disabilities caused by or worsened by military service changed that Veteran's life. Or, perhaps you served alongside the Veteran in the military and can describe the conditions that you endured together. Or, perhaps you befriended the Veteran after the Veteran's military service ended, and are witnessing the adverse effect of the Veteran's disabilities on the Veteran's daily life.

You may be a family member or a friend of the Veteran. You may be a member of the clergy who has helped this Veteran. You may be one of the Veteran's colleagues at a current or prior job. You may be a person who served with the Veteran in the military. You may be a peer mentor who has worked with this Veteran. You may be a casual acquaintance who has observed the impact of the Veteran's disabilities.

You are fully qualified to write this letter if you can:

(a) Truthfully affirm that the Veteran's disability was <u>at least as likely as not</u> caused by or worsened by military service, and/or

(b) Truthfully describe the impact of the Veteran's service-connected disability on the Veteran's life

Q: Does the VA require a finding of medical certainty that the Veteran's disability was caused or worsened by that Veteran's military service?

A: No. Medical certainty is not required. Instead, the VA uses a significantly lower standard: whether the condition under review was at least as likely as not caused or worsened by military service.

Q: What does "at least as likely as not" mean?

A: If there is at least a 50% probability that a Veteran's disability was caused or worsened by that Veteran's military service, then this Veteran's disability is at least as likely as not connected to that Veteran's military service.

Q: What are the most important things to remember when writing a nexus letter for a Veteran?

A: The most important things to remember are:

a. *Be clear*. Remember that the VA employees reading these letters may not be Veterans and are not medical or legal professionals. Avoid using military acronyms or slang expressions. Avoid using medical and legal jargon.

b. *Be detailed.* Show, don't tell. Avoid vague descriptions. Rather than merely listing the Veteran's disability, state the specific symptoms that the Veteran is experiencing and their severity.

c. *Be alert*. Remember that the VA wants to know whether each disability under review is "at least as likely as not" connected to that Veteran's military service. Use that specific language when stating your conclusions about the Veteran's disabilities.

d. *Be authoritative.* Describe your relationship with the Veteran. Tell the VA how closely you know the Veteran. If you have known the Veteran for a long time, tell the VA how long. If you served with the Veteran, share details of that service. Establish that you know the Veteran well enough to describe what happened to the Veteran in the military, and/or what has changed in this Veteran's life because of his or her service.

   For example:

   "I am the older sister of Veteran X. I have known Veteran X for his entire life. Prior to being sent to Afghanistan, Veteran X was a calm, quiet individual who rarely became angry and usually enjoyed the company of other people. After Veteran X came home, however, I observed the following changes in Veteran X's personality . . . "

   "I have worked with Veteran Y in the delivery department at Acme Department Store for six years. Prior to entering the Navy, Veteran Y was one of the most efficient and reliable employees in the entire department. After leaving the military, Veteran Y returned to Acme's delivery department. Now, however, Veteran Y's work is constantly slowed by why she describes as 'stabbing pain' in her left leg, knee, and hip. She has a bad limp now, and has a hard time bending down and lifting packages that she used to lift easily. . ."

“I met Veteran Z two years before he joined the Air Force. He was one of the most sociable people I have ever known, and enjoyed going to clubs and concerts. Since he came back, however, he refuses to go anywhere that is crowded. Loud noises bother him. He stays at home most of the time now, and often won’t even answer calls or texts . . . “

“I served with Veteran A in the United States Army from March 1970 to March 1974. Twice, we stood next to each other in line while we received shots that were designed to protect us from getting certain diseases. Someone would then come down the line and rapidly inject each person. The needle was never changed or cleaned from one person to another. Once, in September 1971, the Soldier standing next to Veteran Z began bleeding from his arm as soon as he was injected. I remember that the person giving the shots never changed or cleaned the needle. The person simply used the same needle and gave Veteran Z the shot in his arm. . . “

“Veteran B is my daughter. She was an honors student all the way through college. She had an extraordinary memory. After she joined the Coast Guard, I remember her calling me and telling me that she had fallen during a drill and hit her head. She said that she had blacked out momentarily, but when she came to, she didn’t want to tell anyone because she didn’t want to appear ‘weak.’ Now, she has a hard time remembering anything, even things that someone said to her only a day or two earlier . . . “

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