NDNY FEDERAL COURT BAR ASSOCIATION, INC.
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The NDNY-FCBA's CLE Committee

Presents:

"Representing Veterans in the U.S. Court of Appeals for Veterans Claims: Tips on Advocacy"

September 17, 2021

11:00am-12:00pm

R.S.V.P. by September 10, 2021

Because of COVID-19 related restrictions, this CLE will be offered in a virtual setting, via Zoom. A link for the Zoom CLE will be provided to registered attendees.

Program Description: The U.S. Court of Appeals for Veterans Claims (CAVC) provides our veteran community with a critical level of impartial review of final decisions made by the Board of Veterans' Appeals, relating to denials of access to benefits, such as health care, pension, and educational benefits, and disability compensation. Representing clients before CAVC, whether as part of your regular practice or in a pro bono capacity, can be both uniquely rewarding and challenging to navigate from a legal perspective. Whether this is work that you are currently engaged in or something you are interested in pursuing, this program will offer participants invaluable information and tips on how to effectively advocate for those who have sacrificed for our nation.

Presenters:

Hon. Grant C. Jaquith
Judge, U.S. Court of Appeals for Veterans Claims

Elizabeth G. Kubala, Esq.
Syracuse University School of Law
Teaching Professor and Executive Director of the Betty and Michael D. Wohl Veterans Legal Clinic

Christopher Martz
3L, Syracuse College of Law
Veterans Legal Clinic Student-Attorney
Navy Veteran

Agenda:

11:00-11:10: Introduction of Program & Speakers

11:10-11:20: Overview of CAVC and Representative Cases
11:20-11:50: Tips on Advocacy
11:50-12:00: Q&A

"Representing Veterans in the U.S. Court of Appeals for Veterans Claims: Tips on Advocacy" has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **1 Professional Practice credit**.

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

A code will be provided at a particular point in the program, which can be used to claim CLE credit for participation in the webinar.

This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded. This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

PANEL BIOS

Judge 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, from investigation through trial or other resolution and appeal. 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 as 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 was in private practice with Bond Schoeneck & King in Syracuse from 1988 to 1989 and taught Juvenile Law and Federal Income Taxation at Drury College, Fort Leonard Wood, Missouri, in 1984. In 1982, he interned at the Public Defender's Office in Gainesville, Florida, where he represented defendants in misdemeanor trials.

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. He is married to Rosemarie Perez Jaquith, who is a graduate of the Syracuse University College of Law and a member of the NDNY FCBA, and they have six children--Amanda, Larene, Gordon, Olivia, Isabelle, and Colton--and six grandchildren.

Beth Kubala, Teaching Professor and Executive Director of the Syracuse University College of Law Betty and Michael D. Wohl Veterans Legal Clinic (VLC). Kubala supervises student attorneys representing clients before the Department of Veterans Affairs, Discharge Review

Boards, and Boards of Correction for Military Records. Kubala retired from the U.S. Army at the rank of Lieutenant Colonel following
22 years of active service. She served in numerous staff and leadership positions throughout her military service, with her last assignment as a Military Judge while stationed at Fort Drum, NY.

Christopher Martz is a 3L at Syracuse College of Law, spending the past year working as a student attorney with the Veteran's Legal Clinic. Christopher has 6 years of professional experience in various intelligence community roles, including SIGINT team management, analysis, geolocation reporting and operations, Overhead Collection Management, Intelligence Surveillance and Reconnaissance (ISR), Information Operations, and Arabic Language transcription, translation, and analysis. In addition, he has worked this past summer in a private Manhattan-based firm specializing in international commercial and private arbitration, foreign direct investment, and regulatory law. Christopher has a strong passion for military law, veteran health reform, and philanthropy.

FCBA - MATERIALS & REFERENCES

REPRESENTING VETERANS IN THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS: TIPS ON ADVOCACY

CLE PROGRAM – 9/17/2021

I. Court Rules and Procedures

a. Rules of Practice and Procedure for the Court of Appeals for Veterans Claims
    i. *Including sample documents and formatting guidelines for appellate briefs*
b. Additional rules and procedures available at http://www.uscourts.cavc.gov/court_rules_and_procedures.php

II. Resources for Litigants

a. Veterans Benefits Manual, Chapter 15, Court of Review of VA and Decision-Making
b. Veterans' Judicial Review Act of 1988 (Pub. L. No. 100-687)
c. Brief Writing Advice from the US Court of Appeals for Veterans Claims (compiled for the CAVC Bar Association, August 2021)

III. Additional Online Resources

a. United States Court of Appeals for Veterans Claims You Tube Channel, available at https://www.youtube.com/channel/UCkhT0OvwPHFaX-d0ZEFup0g

Rule 1: Scope of Rules

(a) **Scope.** These Rules, as supplemented by the E-Rules specifically applicable to submissions for the Case Management/Electronic Case Filing (CM/ECF) system, govern practice and procedure in the U.S. Court of Appeals for Veterans Claims (the Court), a court of national jurisdiction. The E-Rules are on our website at www.uscourts.cavc.gov/e_filing_rules.php.

(b) **Effect on Court's Jurisdiction.** Neither these Rules nor the E-Rules extend or limit the jurisdiction of the Court.

(c) **CM/ECF / Non-CM/ECF Electronic Filing.** Absent a waiver from the Clerk of the Court (Clerk), filing through the CM/ECF system is mandatory for all representatives (as defined by Rule 46). *See* E-Rules 2 and 3. Represented parties who have registered to participate in filing through CM/ECF are called CM/ECF Users. For CM/ECF Users, if there is any conflict between these Rules and the E-Rules, the E- Rules apply.

Self-represented parties and others exempted by the Court from filing through CM/ECF are called Non-CM/ECF Users. Non-CM/ECF Users may submit documents electronically by email or facsimile, if properly formatted. *See* Rule 25(b) (Method and Timeliness). Where applicable in these Rules, the corresponding E-Rule has been cited.

Rule 2: Suspension of Rules

On its own initiative or on a party's motion, the Court may suspend any provision of these Rules and otherwise order proceedings as it sees fit.

Rule 3: Appellate Procedure

(a) **Filing.** To appeal a Board of Veterans' Appeals (Board) decision, a person adversely affected by the decision must file a Notice of Appeal with the Clerk, within the time allowed by law. See Rule 4(a). Because the Notice of Appeal will likely contain personal identifiers, that electronic record will be locked and accessible through CM/ECF only to CM/ECF Users in that case. See E-Rule 4(b). Failure to file a timely Notice of Appeal in accordance with law will result in dismissal of the appeal, except to the extent an untimely Notice of Appeal satisfies Rule 4(a)(3). *See also* Rule 38(b) (Failure to Act).

(b) **Service.** The appellant shall serve a copy of the Notice of Appeal on any party to the proceedings before the Board other than the Secretary of Veterans Affairs (Secretary), as well as any person whose absence from the appeal may as a practical matter impair or impede that person's ability to protect his or her interest. *See* Rule 25 (Filing and Service).

(c) Content. The Notice of Appeal-

(1) should show the name, address, and telephone number of the person or persons making the appeal, and the appropriate Department of Veterans Affairs (VA) claims file number;

(2) shall reasonably identify the Board decision appealed from and be capable of being reasonably construed, on its face or from the surrounding circumstances, as expressing an intent to seek Court review of that decision; and,

(3) if filed by a representative, must be accompanied by the documents specified in Rule 46(b)(1)(A)(Appellant's Representative).

Form 1 in the Appendix of Forms is the recommended form for a Notice of Appeal.

(d) Joint Appeals. If more than one person is entitled to appeal from a decision of the Board and their interests make joinder practicable, they may file a joint Notice of Appeal and the case shall proceed as a single appeal or, if separate Notices of Appeal have been filed timely, the parties may jointly move to join appeals and, if the motion is granted, the case shall thereafter proceed as a single appeal. *See also* Rule 15 (Intervention).

(e) Consolidated Appeals. Appeals may be consolidated by order of the Court on its own initiative or on a party's motion. Any motion to consolidate must assert why consolidation is appropriate, be served on all involved parties, and comply with the requirements of Rule 27 (Motions).

(f) Payment of Fees. A $50 nonrefundable filing fee, payable to "U.S. Court of Appeals for Veterans Claims," shall be submitted with the filing of the Notice of Appeal or received by the Court not later than 14 days after the filing of the Notice of Appeal. *But see* Rule 24 (Waiver of Filing Fee).

(g) Addresses and Fax Number. The Court's mailing address is: Clerk of the Court, U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950. The Court's fax number is: (202) 501-5848. The Court's website is located at www.uscourts.cavc.gov.

(h) Translations. The Court conducts its reviews and deliberations in English. Any document transmitted to the Court in a language other than English shall be accompanied by an English translation that is certified as true and correct by the translator, pursuant to 28 U.S.C. § 1746.

Rule 4: Filing Appeal; Docketing; Copy of Board Decision

(a) (1) Time for Appeal. A Notice of Appeal must be received by the Clerk not later than 120 days after the date on which the Board mailed notice of the decision to the last known address of

the appellant and the appellant's authorized representative, if any. *See* also Rule 25 (Filing and Service).

(2) Deemed Receipt. A Notice of Appeal is deemed received-

(A) on the date of its legible postmark, affixed by the U.S. Postal Service (not including a postage-metered date imprint other than one affixed by the U.S. Postal Service) on the cover in which the Notice of Appeal is posted, if the mailing is properly addressed to the Court and is mailed; or

(B) on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the U.S. Postal Service, or if it is delivered or sent by means other than U.S. mail. *But see* Rule 25(b)(1)(B) (filing and service for appellant confined in an institution).

(3) Timeliness; Good Cause or Excusable Neglect; Equitable Tolling

(A) If the Secretary does not within 45 days after the filing date of the Board decision (pursuant to Rule 4(c)) file a motion to dismiss an appeal for failure to file a timely Notice of Appeal within the 120-day appeal period, the Notice of Appeal will be treated as timely regardless of the date it was received.

(B) If the Secretary within 45 days after the filing date of the Board decision moves to dismiss an appeal for failure to file a timely Notice of Appeal within the 120-day appeal period, an untimely Notice of Appeal will be treated as timely if

(i) the Notice of Appeal is received within 30 days after the expiration of the filing deadline and the appellant demonstrates good cause or excusable neglect for failure to file the Notice of Appeal within the 120-day period; or

(ii) the Notice of Appeal is received more than 30 days after the expiration of the filing deadline but equitable tolling is warranted because the appellant demonstrates an extraordinary circumstance that prevented filing in a timely manner and the exercise of reasonable due diligence in attempting to file a timely Notice of Appeal.

(b) Docketing.

(1) *Docketing the appeal.* Upon receipt of the Notice of Appeal, the Clerk will docket the appeal, identifying the appellant by name, unless otherwise ordered by the Court.

(2) *Designation of public official.* The Secretary shall be described as the "appellee" by name and official title.

(3) *Notice of docketing*. The Clerk shall send a notice of docketing to all parties advising them of the date the Clerk received the Notice of Appeal.

(c) Copy of Board Decision. Not later than 30 days after the date the Clerk issues a notice of docketing (See subsection (b)(3)), the Secretary shall file with the Clerk under separate docket entries and serve on the appellant a copy of the Board's decision, showing-

(1) the date on which notice of the decision was mailed, with any personal identifiers redacted except the name of the appellant (*See* E-Rule1(a)(10) (definition of "personal identifier"));

(2) a reference transmittal identifying the Board decision with any necessary personal identifiers, which when electronically filed will be locked (*See* E-Rule 4(d)); and

(3) if applicable, the filing date of any motion for reconsideration or vacatur of the Board decision, and the date and nature of any action on such a motion.

Rule 5: Stay of Appellate Proceedings

(a) Grounds. On its own initiative or on a motion by a party or an organization operating under the provisions of Public Law No. 102-229, the Court may stay its proceedings when-

(1) a motion has been filed for the Board to reconsider or vacate its decision, or

(2) an organization operating under the provisions of Public Law No. 102-229 is conducting case evaluation, or

(3) it is otherwise in the interest of judicial efficiency. *See* also Rule 45(g)(5).

(b) Effect of Stay. Unless and until the Court grants a motion under this Rule, such a motion does not suspend proceedings or interrupt preexisting filing schedules. Unless otherwise ordered, when a stay expires or is lifted, the preexisting filing schedule resumes at the point at which it was stayed.

(c) Continuation of Stay. Prior to the expiration of a stay, a party or an organization operating under the provisions of Public Law No. 102-229 may move for continuation of the stay. Such motion shall satisfy the requirements of Rule 27(a) (Content of Motions), but is not governed by Rule 26(b) (Extension of Time).

(d) Combined Motions Prohibited. A motion to stay the Court's proceedings may not be combined with any other motion. The Clerk will return any motion that violates this subsection.

Practitioner's Note: At the time these Rules were promulgated, the organization operating under the provisions of Public Law No. 102-229 was The Veterans Consortium Pro Bono Program.

Rule 6: Protection of Privacy

***See also* Rule 48 (Sealing of Cases)**
and E-Rule 4 (Locked Documents, Redaction)

(a) **Public Records.** Court records are public records and once filed are not protected by Federal privacy statutes or regulations. Pursuant to the Court's E-Rules, certain documents are locked; parties may seek to have additional documents locked (*See* E-Rules 4 and 1(a)(4)) or sealed pursuant to Rule 48 (Sealing of Cases). Therefore, parties shall refrain from putting a VA claims file number or other personal identifier (e.g., Social Security number, date of birth, financial account number, name of minor child) on any filings not locked or sealed; use of the Court's docket number is sufficient identification. In addition, parties shall redact any VA claims file number or other personal identifier from other documents submitted to the Court that are not locked or sealed.

(b) **Uniformity.** For purposes of uniformity, redactions should be made as follows:

(1) for Social Security numbers, use only the last four digits,

(2) for date of birth, use only the year,

(3) for financial account numbers, use only the last four digits or a lesser number if needed to preserve privacy,

(4) for the name of a minor child, use only the initials.

(c) **Challenges.** Parties who wish to challenge a redaction may do so by filing a motion with the Court within 15 days of the redacted document's filing.

Rule 7: Reserved

Rule 8: Suspension of Secretarial Action or Suspension of Precedential Effect of Decision of this Court

(a) **Filing of Motion.** After an appeal or petition has been filed, a party seeking a Court order to suspend action by the Secretary or the Board or the precedential effect of a decision issued by this Court pending its appeal shall submit for filing with the Clerk a motion and serve a copy on all other parties by an expedited method (including express mail, overnight delivery, fax or other electronic transmission, or hand delivery).

(b) Content. The motion shall-

(1) state the reason for the relief requested and the facts relied on; and

(2) be supported by affidavits or other sworn statements addressing any facts in dispute.

Rule 9: Reserved

Rule 10: Record Before the Agency

(a) Record Before the Agency. Not later than 60 days following the notice of docketing, the Secretary shall:

(1) copy all materials that were contained in the claims file on the date the Board issued the decision from which the appeal was taken;

(2) copy any other material from the record before the Secretary and the Board relevant to the Board decision on appeal (Note: material postdating the Board decision on appeal generally will not be included in the record before the agency);

(3) assemble and paginate all documents, keeping attachments with their respective document. The decision of the Board from which the appeal was taken shall be the first document, followed by a list of any record matter that cannot be duplicated. The assembled document is the record before the agency;

(4) serve a copy of the record before the agency on the appellant; and

(5) submit under a separate docket entry a notice with the Clerk certifying that the record before the agency has been served.

(b) Disputes. If any dispute arises as to the preparation or content of the record before the agency, the Court, on motion of any party, will resolve the matter. Any motion shall describe the good faith efforts that the parties have made to resolve the dispute and shall be submitted to the Clerk to be filed within 14 days after the record before the agency has been served. An opposing party may submit to the Clerk for filing a response to such a motion within 7 days after the motion is served.

(c) Filing the Record Before the Agency. The record before the agency may include many documents not relevant to the issues on appeal. It will not be filed with the Court unless the Court so orders.

(d) Access of Parties or Representatives to Original Record. After a Notice of Appeal has been filed, the Secretary shall permit a party or a representative of a party to inspect and to copy, subject to reasonable regulation by the Secretary, any original material in the record before the agency that is not subject to a protective order.

(e) Retention Requirements for Documents. *See* Rule 37 (Retention Requirements for Documents).

Rule 11: Reserved

Rule 12: Reserved

Rule 13: Reserved

Rule 14: Reserved

Rule 15: Intervention

(a) By Right. A person who participated in the proceedings before the Board may intervene in an appeal before the Court by filing with the Clerk a notice of intervention and serving a copy on all parties not later than 60 days after the date of the Clerk's notice of docketing (*see* Rule 4(b)(3) (Notice of Docketing)). *See also* Rule 28(d) (Intervenor's Brief).

(b) With Permission. Any person who did not participate in the proceedings before the Board and who seeks to intervene in an appeal before the Court shall submit for filing with the Clerk a motion for permission to intervene and serve a copy on all parties not later than 60 days after the date of the Clerk's notice of docketing (*see* Rule 4(b)(3) (Notice of Docketing)). The motion shall contain a concise statement of the interest of the moving person or party and the grounds upon which he or she seeks intervention. *See also* Rule 28(d) (Intervenor's Brief); Rule 27(b) (Motions-Response or Opposition).

(c) In Extraordinary Circumstances. After the expiration of the time limit set in subsection (a) or (b), intervention will be permitted only on a finding of extraordinary circumstances.

(d) In Petitions for Writ of Mandamus. A person who seeks to intervene in a petition for writ of mandamus shall submit for filing with the Clerk a motion for permission to intervene and serve a copy on all parties within a reasonable time after the date of the Clerk's notice of docketing (*See* Rule 4(b)(3) (Notice of docketing)). The motion shall contain a concise statement of the interest of the moving person or party and the grounds upon which he or she seeks intervention. *See* also Rule 28(d) (Intervenor's Brief); Rule 27(b) (Motions-Response or Opposition).

(e) In Class Actions. A potential intervenor in a class action shall submit for filing with the Clerk a motion for permission to intervene and serve a copy on all parties within a reasonable period of time after the date of the notice placed by the Clerk on the Court's website (*see*

Rule 22(f)(1) (Public Notice)). The motion shall contain a concise statement of the interest of the moving person or organization and the grounds upon which intervention is sought.

Rule 16: Reserved

Rule 17: Reserved

Rule 18: Reserved

Rule 19: Reserved

Rule 20: Reserved

Rule 21: Extraordinary Relief

(a) Petition: Service, Content, and Filing. Extraordinary relief from the Court may only be sought by filing a petition with the Clerk with proof of service on the respondent(s), the Secretary (if not a respondent), and any other party in interest. The petition shall-

(1) state the precise relief sought;

(2) state the facts necessary to understand the issues presented by the petition;

(3) state the reasons why the Court should grant the petition, including why the petitioner has a clear and indisputable right to the writ and why there are inadequate alternative means to obtain the relief sought;

(4) include an appendix containing copies of any order or decision or any other documents necessary to understand and support the petition; and

(5) describe any public officer who is a respondent by name and official title.

The requirements of Rules 3(f) (Payment of Fees) and 24 (Waiver of Filing Fee) apply to petitions. Upon receipt of the filing fee (unless waived pursuant to Rule 24 (Waiver of Filing Fee)), the Clerk will submit the petition to the Court.

(b) Form and Length of Documents; Translations.

(1) The requirements in Rule 32 (Form of Brief, Appendices, and Other Documents) apply to petitions and answers thereto, except that a petition or answer may not exceed 20 pages. The petition shall be captioned: "[Name of Petitioner], Petitioner, v. [Name and Title of Respondent], Respondent." *See also* Rules 6 (Protection of Privacy) and 48 (Sealing of Cases).

(2) The requirements of Rule 3(h) (Translations) apply to any non-English-language document appended to a petition or an answer.

(c) **Consolidated Petitions.** Petitions may be consolidated by order of the Court on its own initiative or on a party's motion. Any motion to consolidate must contain an assertion of why consolidation is appropriate, be served on all involved parties, and comply with the requirements of Rule 27 (Motions).

(d) **Action on the Petition.** Unless the Court concludes that the petition should be denied, the Court will order the respondent(s) to file an answer to the petition within a fixed time. Two or more respondents may answer jointly. If required, the Clerk will notify the parties of the time limits for the filing of any briefs and of the date of any oral argument.

Rule 22: Filing a Request for Class Certification and Class Action (RCA)

(a) **Relief from the Court on a class action basis** may only be sought by represented parties in an action commenced by the filing of (1) a Notice of Appeal or (2) a petition under the All Writs Act. A party seeking relief on a class wide basis must file a **Request for Class Certification and Class Action (RCA)** with the Clerk with proof of service on the respondent(s) and the Secretary (if not a respondent). The RCA shall:

(1) define the class on whose behalf the RCA is filed;

(2) address with specificity and detail each of the factors in Rule 23(a);

(3) explain the reasons why a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis;

(4) address each of the factors in Rule 23(f)(1)(A);

(5) state the precise relief sought on behalf of the class, the reasons why such relief should be granted, and the legal authorities that support the requested relief;

(6) state the facts, if any, (i) that are relevant to the question whether class certification is warranted or the question whether injunctive or corresponding relief is appropriate respecting the class as a whole; (ii) that are not known to the party seeking relief on a class action basis; and (iii) as to which the Secretary has exclusive knowledge and control; and

(7) include an appendix containing copies of documents necessary to understand and support the RCA.

(b) **Time for Filing RCA.**

(1) For RCAs filed in the context of an appeal of a final decision of the Board of Veterans' Appeals, the RCA must be filed within 45 days after

(i) the Secretary serves a copy of the record before the agency, or (ii) resolution of a dispute as to the preparation or content of the record before the agency, whichever is later.

(2) RCAs filed in the context of a petition must be filed within 30 days after the filing of the petition.

(3) On motion, the Court may extend the deadline for filing an RCA consistent with the requirements established in Rule 26(b).

(c) **Form and Length.** Except by permission of the Court, an RCA may not exceed 30 pages and must comply with the form requirements in Rule 32 (Form of Briefs, Appendices, and Other Documents) for principal briefs.

(d) **Docketing.** Upon receipt of an RCA, the Clerk will note the request on the docket of the underlying appeal or petition and send notice to all parties. A party may move for bifurcation of the RCA matter, or the Court may order bifurcation in the interest of judicial efficiency. If bifurcation is ordered, the RCA will proceed as a separate action with a separate docket number.

(e) **Payment of Fees.** A $400 nonrefundable filing fee, payable to "U.S. Court of Appeals for Veterans Claims," shall be submitted with an RCA or received by the Court not later than 14 days after the filing of the RCA. The requirements of Rule 24 (Waiver of Filing Fee) apply to RCAs filed under this Rule.

(f) **Public Notice.** Upon receipt of an RCA, the Clerk shall:

(1) place a notice on the home page of the Court's website providing a link to the docket containing the pending RCA; and

(2) provide notice of each RCA filed at the Court to those organizations, law firms, attorneys, and agents who have informed the Court that they wish to be notified of the filing of such RCAs in a manner determined by the Clerk.

Practitioner's Note: Practitioners may move the Court for a stay of proceedings if they are reviewing a matter to assess whether to file an RCA. Filing an RCA under this Rule does not automatically stay proceedings in any pending appeal or petition.

Rule 23: Action on a Request for Class Certification and Class Action (RCA)

(a) **Prerequisites.** One or more members of a class may submit an RCA as representative parties on behalf of all members only if:

(1) the class is so numerous that consolidating individual actions in the Court is impracticable;

(2) there are questions of law or fact common to the class;

(3) the legal issue or issues being raised by the representative parties on the merits are typical of the legal issues that could be raised by the class;

(4) the representative parties will fairly and adequately protect the interests of the class; and

(5) the Secretary or one or more official(s), agent(s), or employee(s) of the Department of Veterans Affairs has acted or failed to act on grounds that apply generally to the class, so that final injunctive or other appropriate relief is appropriate respecting the class as a whole.

(b) Processing the RCA.

(1) Action on the RCA.

(A) If the RCA lacks sufficient specificity and detail, the Court may order the proponent to provide sufficient specificity and detailed information within a fixed period of time.

(B) Proponent may amend the RCA once as a matter of course within 21 days after serving it, and otherwise only with the Court's leave. The Court should freely give leave when justice so requires.

(2) Staff Conference and Response.

(A) The Court may determine that the RCA should be dismissed or denied without need for either a Rule 33 Staff Conference or a response from the respondent. Alternatively, the Court may order the respondent to serve and file a response to the RCA within a fixed period of time, not to exceed 90 days, and may order the parties to participate in a Rule 33 Staff Conference either before or after a response is filed. In the response, the respondent shall include:

(i) a statement as to whether the respondent opposes class certification and, if so, the reasons for that opposition addressing with specificity the issues raised in the RCA;

(ii) if the Secretary does not concede numerosity, the Secretary's reasons for such opposition and a statement of the actual or estimated number of putative class members, if feasible, or an explanation as to why the number of putative class members cannot be determined or estimated; and

(iii) a statement of the facts necessary to respond to allegations in the RCA that the respondent has acted or failed to act with respect to the putative class and, if ordered by the Court, an appendix containing documents that evidence the foregoing facts.

(B) Form and Length. Except by permission of the Court, the response may not exceed 30 pages and must comply with the form requirements in Rule 32 (Form of Briefs, Appendices, and Other Documents) for principal briefs.

(3) *Reply*. The Court may grant leave for the RCA proponent to file a reply to the response.

(c) Certification Order; Notice to Class Members; Judgment; Issue Classes; Subclasses.

(1) Certification Order.

(A) Action by the Court. At an early practicable time after the RCA and response and reply, if ordered, have been filed, the Court will determine by order whether to certify the action as a class action. Within 14 days after issuance of the Court's order on certification, any party may file a motion to stay proceedings to permit the filing of an appeal of the Court's grant or denial of class certification.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(f). An order certifying a class may serve only to commence the class action proceeding and direct further action of the parties or may address all relief sought and conclude Court action on the RCA.

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice to Class Members. For any class certified under this Rule, the Court need not, but may, direct notice to the class.

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must include and describe those whom the Court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this Rule.

(d) Managing the Action.

(1) *In General*. In managing the litigation of a class action proceeding under this Rule, the Court may issue all orders that it deems necessary and proper.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 33.

(e) Settlement, Voluntary Dismissal, or Compromise. Once a class is certified, the claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the Court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The Court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the Court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) Any class member may object to the proposal if it requires Court approval under this subdivision (e); the objection may be withdrawn only with the Court’s approval.

(f) Class Counsel.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, the Court must appoint class counsel. In appointing class counsel, the Court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney fees or nontaxable costs under Rule 23(g); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the Court may appoint that applicant only if the applicant is adequate under Rule 23(f)(1) and (4). If more than one adequate applicant seeks appointment, the Court must appoint the applicant best able to represent the interests of the class. Class counsel shall be designated as the lead representative under Rule 46(b)(1)(D); additional representatives may appear with approval of the Court and consent of class counsel.

(3) *Interim Counsel.* The Court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.

(5) *Limitation on Role of Class Counsel.*

(A) The role of class counsel is to act as lead counsel on all issues related to the class proceedings before the Court.

(B) Representation of class members before the agency is a matter between class counsel and class members.

(g) Attorney Fees and Nontaxable Costs. In a certified class action, the Court may award reasonable attorney fees and nontaxable costs that are authorized by law or by the parties' agreement. A claim for an award must be made by application under Rule 39, at a time the Court

sets. Notice of the application must be served on all parties.

Rule 24: Waiver of Filing Fee

Payment of the filing fee required by Rule 3(f) (Payment of Fees) or Rule 21(a) (Petition: Service, Content, and Filing) will be waived, based on financial hardship, in any case where the appellant (or petitioner) submits a declaration of financial hardship and that declaration is accepted for filing. The Court may request additional information, as it deems appropriate. The declaration of financial hardship will be subject to the penalty for perjury pursuant to 28 U.S.C. § 1746. The declaration shall either be on Form 4 in the Appendix of Forms or contain the detail called for in that form. If the declaration is found to lack a signature or to be otherwise noncompliant, it will be returned; not later than the time fixed by the notice of returned documents, either the filing fee shall be paid or a new declaration that addresses the deficiencies in the noncompliant declaration shall be submitted.

Rule 25: Filing and Service

(a) Document Submission and Filing.
In General. A document required or permitted to be filed in the Court with regard to an appeal or petition for extraordinary relief shall be submitted to the Clerk with proof of service. *See* E-Rule 1(a)(6) (Notice of Docket Activity). Submitted documents otherwise proper for filing shall generally be filed by the Clerk as of the date of receipt by the Clerk. Parties are responsible for delivery of any document to the Court. Confirmation of receipt or filing may be obtained by accessing the case docket on the Court's website at https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp.

***Notice of Appeal or petition for extraordinary relief*.**
A Notice of Appeal or petition for extraordinary relief may be submitted by mail, personal delivery or other delivery service, or fax, or as an attachment to an email, as designated in subsection (b).

(1) *Document submission and filing by representatives and amici curiae required to use CM/ECF*. Subject to the exceptions in Rules 25(a) (Document Submission and Filing) and 25(b) (Method and Timeliness) for a Notice of Appeal or petition for extraordinary relief, and for a notice of appearance, fee agreement, or declaration of financial hardship emailed concurrently with the Notice of Appeal or petition for extraordinary relief, all submissions by a representative or amicus curiae shall be submitted through the CM/ECF system. *See* Rule 1(c) (CM/ECF/Non-CM/ECF Electronic Filing) and *see generally* E-Rules.

(2) *Document submission and filing by self-represented parties and others exempt from using CM/ECF*. All submissions by self-represented parties and others exempted by the Court from using CM/ECF may be submitted by mail, personal delivery or other delivery service, or fax, or as an attachment to an email to the Clerk. *See* Rule 25(b) (Method and Timeliness).

(b) Method and Timeliness.

(1) *Mail, personal delivery, or other delivery service*. Submissions by mail, personal delivery, or other delivery service shall be mailed or delivered to the Clerk of the Court, U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950.

(A) Submissions through the U.S. Postal Service shall be deemed received by the Clerk as of the date of postmark. Otherwise the Clerk shall use the actual date of receipt for filing purposes.

(B) A document submitted through the U.S. Postal Service by a self-represented party who is an inmate confined in an institution is timely filed if the document is deposited in the institution's internal mail system within the time specified for filing and is accompanied by evidence showing the date of deposit and stating that first-class postage has been prepaid.

(2) *Fax*. Submissions by fax shall be faxed to the Clerk of the Court at (202) 501-5848.

(A) The Clerk shall use the actual date of receipt for filing purposes.

(B) Faxed documents shall be preceded by a cover sheet showing the sender's name, address, and telephone and fax numbers; the Court case number, if one has been assigned, and caption; and the number of pages being sent.

(3) *Email.*

(A) CM/ECF Users. A Notice of Appeal, petition for extraordinary relief, or a notice of appearance, fee agreement, or declaration of financial hardship submitted concurrently therewith, may be submitted as an attachment to an email to the Clerk at esubmission@uscourts.cavc.gov. All documents attached to emails must be in pdf format, have at the top the names of the parties, and bear an electronic signature. Also, the subject line of the email forwarding the document should include the name of the document (e.g., Notice of Appeal) and the names of the parties. *See* E-Rule 1(a)(2) and (9) (Definitions) and E-Rule 10 (Electronic Signatures). No other documents may be submitted by email. The Clerk shall use the actual date of receipt for filing purposes.

(B) Non-CM/ECF Users.

(i) Self-represented parties. Self-represented parties may submit any document as an attachment to an email to the Clerk at self-rep@uscourts.cavc.gov. All documents attached to emails must be in pdf format; have at the top the names of the parties and the docket number of the case, if one has been assigned; and bear an electronic signature. Also, the subject line of the email forwarding the document should include the name of the document (e.g., Motion To Dispute RBA), the names of the parties, and the docket number of the case, if available. *See* E-Rule 1(a)(2) and (9) (Definitions) and E-Rule 10 (Electronic Signatures). The Clerk shall use the actual date of receipt for filing purposes.

(ii) Represented parties exempted by the Court from using CM/ECF. Representatives exempted by the Court from using CM/ECF may submit documents initiating an appeal (i.e., a Notice of Appeal or petition for extraordinary relief), as well as a notice of appearance, fee agreement, or declaration of financial hardship if submitted concurrently therewith, as an attachment to an email to the Clerk at esubmission@uscourts.cavc.gov. Once the case has been docketed, all other documents may be submitted as an attachment to an email to the Clerk at efiling@uscourts.cavc.gov. All documents attached to emails must be in pdf format; have at the top the names of the parties and the docket number of the case, if one has been assigned; and bear an electronic signature. Also, the subject line of the email forwarding the document should include the name of the document (e.g., Motion to Dispute RBA), the names of the parties, and the docket number of the case, if available. *See* E-Rule 1(a)(2) and (9) (Definitions) and E-Rule 10 (Electronic Signatures.) The Clerk shall use the actual date of receipt for filing purposes.

(4) *CM/ECF.* A separate docket entry shall be used for each document submitted using CM/ECF. The Clerk shall consider the actual date of docket entry as the date of receipt for filing purposes and that date shall constitute the date of filing unless the Clerk notes otherwise on the docket.

(c) Manner and Proof of Service. Any document submitted for filing with the Court shall be served on all parties in the case.

(1) *CM/ECF Users.* When a document is submitted through the CM/ECF system, the system will electronically generate a notice of docket activity. That notice shall constitute both service and

proof of service of the submitted document with regard to any party in that case who is also a CM/ECF User.

(2) *Non-CM/ECF Users*. Service by or on a party who is a Non-CM/ECF User shall be accomplished by providing a copy of the document to be filed to a responsible person at the office of the representative of a party, or the office or home of a party, by personal delivery, mail, or private commercial carrier. Proof of service is accomplished by submitting with the document to be filed either:

(A) an acknowledgment by the person served of his or her personal service, or

(B) a statement certified by the person(s) who made service, showing the date and manner of service and the names and addresses of the persons served.

Proof of service may appear on or be attached to the document filed. The Secretary's representative is the General Counsel of the Department of Veterans Affairs, whose address is General Counsel (027), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420-0002.

(d) Identification. All documents submitted for filing with the Court must be submitted under signature of the party submitting the document or of the party's representative of record. When a document is submitted for filing through CM/ECF or email, it shall contain an "electronic signature." *See* E-Rule 1(a)(2)(Definitions); E-Rule10 (Electronic Signatures).

Rule 26: Computation and Extension of Time

(a) Computing Time.

(1) *General rule*. In computing a period of time set by these Rules, or by a Court order, or by a statute, the day of the event that begins the period is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day the Court is closed at the direction of the Chief Judge.

(2) *Legal holidays*. As used in this Rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President or Congress.

(3) *Notices*. Notice that the Court is closed or inaccessible will be posted publicly, on the Court's website, if circumstances permit. *See* www.uscourts.cavc.gov.

(b) Extension of Time. The Court, on its own initiative or on a party's motion for good cause shown, may extend the time set by these Rules for doing any act, or may permit an act to be done after the expiration of such time, but the Court may not extend the time for filing a Notice of Appeal except as provided by Rule 4, or an application for attorney fees and expenses. *See* also

Rule 5(a) (Stay of Appellate Proceedings). The Court may grant an extension of time not to exceed a total of 45 days for any particular filing for good cause. Any motion to extend the time set by these Rules or by an order or notice of the Court beyond a total of 45 days for a particular filing will be granted only for extraordinary circumstances.

(1) *Content of motion*. In addition to the information required by Rule 27(a) (Content of Motions), the motion shall state the following:

(A) the date to be extended;

(B) the revised date sought;

(C) the total number of days of extension previously granted to the movant in the merits or attorney-fee application phase, as applicable, of the case;

(D) the total number of days of extension previously granted to the other party(ies) in the merits or attorney-fee-application phase, as applicable, of the case; and

(E) a statement in compliance with Rule 27(a)(5) (Content of Motions).

(2) *Opposition*. Any opposition shall be filed with the Clerk not later than 5 days after the non-moving party is served with a copy of that motion to extend time. The Court will treat the motion as unopposed if no opposition is filed within this period.

(3) *Effect of motion*. A motion to extend time does not extend the date on which a pleading or other document is due to be filed with the Court unless the Court grants that motion. *See* Rule 5(b) (Effect of Stay).

(4) *Noncompliance*. *See* Rule 45(j) (Noncompliant Submissions).

(c) Additional Time After Service by Mail.

(1) *General rule*. If a party is required or permitted to do an act within a period initiated by service of a document under these Rules on that party by another party and the document is served by mail, 5 days are added to the period for doing that act.

(2) *Service overseas by Secretary*. If a document is served by the Secretary by means other than through CM/ECF on an appellant, petitioner, or representative who is located outside the United States, Puerto Rico, or the Virgin Islands, 30 additional days are added to the applicable period.

(3) *Court orders and notices*. Additional time under this Rule is not added to the periods set in Court orders and notices or in Rules 4 (Filing Appeal; Docketing; Copy of Board Decision), 35 (Motions for Reconsideration, Panel Decision, or Full Court Review), and 39(a) (Attorney Fees and Expenses-Application).

(d) Combined Motions Prohibited. With the exception of a motion for leave to file an out-of-time motion to extend time, a motion to extend time may not be combined with any other motion. The Clerk will return any motion that violates this subsection.

Rule 27: Motions

(a) Content of Motions. Unless another form is required by these Rules, an application for relief shall be made by filing a motion, with proof of service (*See* Rule 25(c) (Manner and Proof of Service)) on all other parties. The motion shall-

(1) contain or be accompanied by any material required by any of the Rules governing such a motion;

(2) state with particularity the specific grounds on which it is based;

(3) describe the relief sought;

(4) *not* be accompanied by a proposed implementing order; and,

(5) if the appellant is represented, indicate whether the motion is opposed and, if so, whether the moving party has been advised that a response in opposition will be filed.

(b) Response or Opposition.

(1) *Time to file*. Unless otherwise prescribed in these Rules (*See*, *e.g.*, Rule 26(b)(2) (Computation and Extension of Time-Opposition)), any party may file a response or opposition to a motion not later than 14 days after service of the motion, however, the Court may act on motions authorized by Rule 8 (Suspension of Secretarial Action Or Suspension of Precedential Effect of Decision of This Court) after reasonable notice of the motion has been provided to all parties. The Court may shorten or extend the time for responding to any motion.

(2) *Form of opposition*. Unless the Court orders otherwise, an opposition to a motion shall be filed by an opposing party in writing, and a motion will be considered unopposed if such an opposition is not filed.

(c) Motions for Procedural Orders. Notwithstanding subsection (a) and except as provided in the next sentence, the Court may act upon motions for procedural orders at any time without awaiting a response, and, by rule or order of the Court, the Clerk may dispose of motions for certain procedural orders. The Clerk may act on motions to extend time for good cause (but not for extraordinary circumstances) if the motion is not opposed within 5 days after service on the other party. *See* Rule 26(b)(2) (Computation and Extension of Time-Opposition). Any party who may be adversely affected by the action may, by motion, request that the Court reconsider, vacate, or modify the action not later than 10 days after the action is announced.

(d) Form and Length. Except by permission of the Court,

(1) a motion or response may not exceed 10 pages, and

(2) the form requirements in Rule 32 (Form of Briefs, Appendices and other Documents) for principal briefs apply to motions and responses. *See also* Rule 6 (Protection of Privacy) and Rule 37 (Retention Requirements for Documents).

(e) Prohibited Nondispositive Motions. Except as permitted by Rules 26(d) (Combined Motions Prohibited) and 35(a)(1) (Motion for Reconsideration, Panel Decision, or Full Court Review-Motion for Reconsideration-Permitted), no more than one subject may be addressed in any nondispositive motion. The Clerk will return any motion that violates this subsection.

(f) Effect of Motions. Filing a motion does not suspend proceedings or otherwise alter the schedule for filing documents unless the Court grants the motion. *See* Rules 5(b) (Effect of Stay) and 26(b)(3) (Effect of Motion).

Rule 28: Briefs

(a) Appellant's Brief. The appellant shall file a brief that, unless the appellant is self-represented and submits an informal brief pursuant to subsection (e), shall contain, in the following order, the appropriate division headings and the following separate divisions:

(1) a table of contents, with page references;

(2) a table of authorities consisting of cases (alphabetically listed), statutes, other authorities cited, and pages of the record before the agency cited (including a title or description for each document) in numerical order by record citation, with references to the page of the brief where they are cited (*see* Form 18 (Sample Format for Table of Authorities) in the Appendix of Forms);

(3) a statement of the issues;

(4) (i) a statement of the case, showing briefly the nature of the case, the course of proceedings, the result below, and the facts relevant to the issues, with appropriate page references to the record before the agency;

(ii) when citing to the record, citations shall include the specific page(s) being cited, followed in parentheses by citation to all pages of the document from which the referenced page is cited. When relevant, specific pages for envelopes and date stamps associated with the document shall be included. Parties shall not cite solely to the Board decision for any factual underlying issues on appeal, unless the source document is unavailable;

Practitioner's Note: Parties are charged with exercising judgment in determining what constitutes the document from which a page is cited. For example, if there is a 3-page Notice of Disagreement (NOD) with 100 pages of attachments and the brief is citing page 2 of the NOD and the attachments are not essential to or referenced in the brief, the party need only cite the 3 pages of the NOD (e.g., R. at 44 (43-45)). As another example, service medical records as a whole would not constitute one document, but an entrance examination report would.

(5) an argument, beginning with a summary and containing the appellant's contentions with respect to the issues and the reasons for those contentions, with citations to the authorities and pages of the record before the agency; and,

(6) a short conclusion stating the precise relief sought.

(b) Secretary's Brief.

(1) *Content*. The Secretary shall file a brief that conforms to the requirements of subsection (a), but a statement of the issues or of the case need not be made unless the Secretary is dissatisfied with the appellant's statement.

(2) *Assertion of Board error*. The Secretary shall include in the argument section of the brief any agreement with the appellant's assertion of Board error, as well as any independent assertion of Board error deemed material and relevant to the matters on appeal.

(3) *Appropriate relief*. For any assertion of Board error by the Secretary, the Secretary shall identify the relief that the Secretary considers appropriate.

(c) Reply Brief. The appellant may file a brief in reply to the Secretary's brief. The reply brief shall contain a table of authorities that conforms to the requirements of subsection (a)(2).

(d) Intervenor's Brief. An intervenor may file a brief not later than 30 days after the appellant's reply brief is filed or due. *See* Rule 31(a) (Filing and Service of Briefs-Time Limits). An intervenor's brief shall conform to the requirements of subsection (a), but a statement of the issues or of the case need not be made if the intervenor adopts either the appellant's or the Secretary's statement.

(e) Self-Represented Party's Brief. Only a self-represented party may submit an informal brief. The informal brief form provided by the Court may be used. Informal briefs are exempt from the requirements of subsection (a) of this Rule and from the requirements of Rule 32 (Forms of Briefs, Appendices, and Other Documents). An informal brief must comply with the Rule 32(f) identification requirement and may not be longer than 30 pages, double-spaced, in at least a 12-point typeface or its equivalent, if handwritten.

(f) Amicus Curiae Brief. *See* Rule 29 (Brief of an Amicus Curiae).

(g) **Motions Prohibited.** After the Court has issued the initial notice to file a brief to the appellant, the Court will not accept a motion, other than a joint motion for remand or termination, from any party in lieu of a brief required by subsections (a) through (c). A motion may not be included as part of any brief; the Court will not act on any motion so included. The Clerk will return any motion that violates this subsection.

(h) **References to the Record Before the Agency.** References in the briefs to the record before the agency shall be to the pages as transmitted by the Secretary, as described in Rule 10(a) (Record Before the Agency). *See also* Rule 28.1(a) (Preparation of the Record of Proceedings). Commonly understood abbreviations may be used.

(i) **Reproduction of Documents.** If determination of the issues requires consideration of superseded statutes, rules, or regulations, or unpublished authorities, relevant parts shall be reproduced in the brief or in an appendix. Documents in the record before the agency may not be reproduced in or attached to the brief.

(j) **Multiple Appellants.** In cases involving more than one appellant, including consolidated cases, any number of appellants may join in a single brief, and any appellant may adopt by reference any part of the brief of another. Appellants may similarly join in reply briefs.

Rule 28.1: Record of Proceedings

(a) **Preparation of the Record of Proceedings.**

(1) *Preparation and contents.* The Secretary shall prepare and file the record of proceedings. The record of proceedings shall contain:

(A) the Board decision(s) being appealed;

(B) any document from the record before the agency cited in a brief, in its entirety, with any associated envelope or date stamp if relevant (*See* Practitioner's Note to Rule 28(a)(4)(ii)); and,

(C) any other documents before the Secretary and the Board that are relevant to the issues before the Board that are on appeal to the Court or relevant to issues otherwise raised in the appeal.

(2) *Arrangement and pagination*. The record of proceedings shall have a cover containing the official caption of the appeal and shall be arranged and paginated in the same order as the documents appeared in the record before the agency. Because certain documents in the record before the agency may not be included in the record of proceedings, this arrangement may result in pages not having consecutive numbers, e.g., page 22 may be followed immediately by page 43.

(3) *Time for filing*. The Secretary shall file and serve the record of proceedings on all parties not later than 14 days after the reply brief is filed and served, or if no reply brief is filed, not later than 14 days after the reply brief was due in accordance with Rule 31(a)(3) (Time Limits for

Filing and Service of Briefs). *See also* Rule 47(b) (Expedited Proceedings-Filing and Service of Documents), as applicable.

(b) Disputes. If any dispute arises as to the preparation or contents of the record of proceedings, the Court, on its own initiative or on motion of any party, will resolve the matter. Any party's motion shall be filed within 14 days after the record of proceedings has been served and shall describe the good faith efforts that have been made to resolve the dispute. An opposing party may file a response to such a motion not later than 7 days after the motion is served.

(c) Additional Record Material. The Court may direct any party to file additional record material.

Rule 29: Brief of an Amicus Curiae

(a) When Permitted. A brief submitted to the Court by an amicus curiae will be filed by the Clerk only after the Court has granted a motion for leave to file.

(b) Motion for Leave To File. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest and whether all parties consent to the filing of the brief;

(2) why the matters asserted are relevant to the disposition of the case; and

(3) why the Court should grant leave to file the motion.

(c) Time. An amicus curiae must submit the motion for leave to file not later than 7 days after the principal brief of the party being supported is filed unless the Court permits later filing. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed.

(d) Form and Content. An amicus brief must comply with Rules 25 (Filing and Service), 28(a)(1), (2), (5), and (6), 28(h) and (i) (Briefs), 30 (Citation of Certain Authority), and 32 (Form of Briefs, Appendices and Other Documents); state, at the outset of the brief, which party the amicus curiae supports, if any, and the interest of the amicus curiae; and provide a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file. The brief must avoid repeating the parties' briefs and should focus on the points not made or not emphasized in them.

(e) Length. An amicus brief may be no more that one-half the maximum length authorized by these Rules for a party's principal brief. If the Court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(f) Reply Brief. An amicus curiae may not file a reply brief.

Rule 30: Citation of Certain Authority

(a) Citation of Nonprecedential Authority. A party, intervenor, or amicus curiae may not cite as precedent any action designated as nonprecedential by the Court or any other court, or that was withdrawn after having been published in a reporter, except when the cited action has binding or preclusive effect in the case on appeal (such as via the application of the law-of-the-case doctrine). Actions designated as nonprecedential by this Court or any other court may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and the party includes a discussion of the reasoning as applied to the instant case. With the exception of decisions of this Court available electronically, a copy of any unpublished action referred to shall be attached to the document containing the reference.

(b) Citation of Supplemental Authority. When pertinent and significant authority comes to the attention of a party after the party's brief has been filed or after oral argument but before decision, a party shall promptly file notice with the Clerk and serve all other parties. In no case will supplemental authority - pertinent and significant or otherwise - be accepted by the Clerk for filing fewer than 7 days preceding a scheduled oral argument, without leave of the Court. The notice shall set forth the citation(s) to the authority or include a copy of the supplemental authority if it is not readily available in a reporter system. The notice shall refer to the page of the brief or to a point argued orally to which each citation pertains, and shall state without argument the reasons for the supplemental citation(s). Any response shall be made promptly and shall be similarly limited.

Rule 31: Filing and Service of Briefs

(a) Time Limits. Except in cases covered by Rule 47 (Expedited Proceedings),

(1) the appellant shall serve and file a brief not later than

(A) 60 days after the expiration of the 14-day period provided under Rule 10(b) (Record Before the Agency-Disputes) for the parties to notify the Court of any unresolved dispute regarding the Record Before the Agency, or

(B) 30 days after the completion of the Rule 33 staff conference, whichever is later.

Briefing deadlines may be modified by the Court when the Court is required to resolve a dispute in connection with a motion under Rule 10(b);

(2) the Secretary shall serve and file a brief not later than 60 days after service of the appellant's brief; and

(3) the appellant may serve and file a reply brief not later than 14 days after service of the Secretary's brief.

(b) **Effect of Failure to File.** If a party fails to file a brief within the time provided by this Rule or within the time as extended, the Court, on its own initiative or on motion by a party, may take appropriate action, to include dismissal of the appeal or sanctions.

Rule 32: Form of Briefs, Appendices, and Other Documents

(a) **Format.** Briefs, appendices, and other documents shall be printed or typewritten. Pages shall be letter size (8 ½ by 11 inches), with margins at least one-inch wide from all edges, and with type or print on only one side of the page. *See also* Rule 6 (Protection of Privacy).

(b) **Type; Spacing.** If a proportionally spaced typeface is used, it shall be 13-point or larger. If a monospaced typeface is used, it shall not contain more than 10½ characters per inch. Text shall be double spaced (except that motions and responses under Rule 27(c) (Motions for Procedural Orders) may be single spaced). Quotations of 50 words or more must be single spaced. Footnotes must be single spaced and must conform to the typeface requirements. The parties may not use photo reproduction that reduces print size smaller than the size required by this subsection. This subsection does not apply to pages of an appendix that are legible, unreduced photocopies of documents.

(c) **Caption.** A document addressed to the Court shall contain a caption setting forth the name of the Court, the Court's case number when assigned, the title of the case, and a brief heading indicating the purpose of the document. Briefs must begin with a separate caption page; a cover is not required. *See* Form 2 in the Appendix of Forms.

(d) **Page Numbers.** Pages shall be numbered in the center of the bottom margin, using Arabic numerals for the pages subject to the page limitation and lower case Roman numerals for the table of contents, table of authorities, certificate of service, and any appendix containing superseded statutes, rules and regulations, and unpublished authorities.

(e) **Length of Briefs.** Except by permission of the Court or as limited by Rule 47 (Expedited Proceedings), principal briefs may not exceed 30 pages and reply briefs may not exceed 15 pages, not counting the table of contents; the table of authorities; any appendix containing superseded statutes, rules, and regulations, and unpublished authorities; and the certificate of service.

(f) **Identification.** The signature, printed name, address, and telephone number of the representative of record (*see* Rule 46(a)(3) (Practitioner defined)) or of a self-represented party shall appear on a brief or other document submitted for filing to the Clerk.

(g) **Noncompliance.** *See* Rule 45(j) (Noncompliant Submissions).

Rule 33: Staff Conference

(a) Participation. The Court may order the representatives and self-represented parties to participate in a staff conference, in person or by telephone, to consider refinement of the issues and such other matters as may help the Court resolve the case. When necessary, the Court will enter an appropriate order to control future proceedings. Parties are strongly encouraged to discuss settlement or alternative disposition of the matters on appeal.

(b) Pre-Briefing Process. In cases scheduled for pre-briefing staff conferences:

(1) No later than 14 days prior to the staff conference, the appellant shall submit to the Secretary and Central Legal Staff (CLS) a summary of the issues the appellant intends to raise in the appeal, including citations to relevant authorities and submission of pertinent material in the record before the agency;

(2) The summary of issues shall be limited to 10 pages, subject to the requirements of Rule 32(b); the 10-page limit does not include submission of pertinent material in the record before the agency;

(3) Submissions shall be emailed to CLS at CLS-Calendar@uscourts.cavc.gov or faxed to CLS at (202) 585-3951;

(4) The appellant shall also submit for filing with the Court and serve on the Secretary a certificate of service that includes the date of the appellant's submission to the Secretary and to CLS, the specific manner of service (fax or email), and the names and addresses of the persons served.

(c) Consultation. The representatives of the parties must consult with their respective clients in good faith to determine whether joint resolution of the appeal or settlement is possible. At the time of the staff conference, the representative must either possess the authority to enter into a joint resolution of the appeal or settlement to the extent authorized by the client or be in immediate contact with a person having such authority.

(d) Nondisclosure to Judges. Statements made during a conference, including written memoranda submitted for the conference, may not be disclosed to a Judge of the Court unless the parties agree in writing to such disclosure. This subsection does not apply to disciplinary actions or judicial review of a dispute about the content of the record before the agency or record of proceedings or subsequent Equal Access to Justice Act (EAJA) applications, pursuant to 28 U.S.C. § 2412(d).

Practitioner's Note: Absent an order of the Court, the time period for taking any action under the Court's Rules is not tolled for the time required to prepare for the staff conference.

(See also the guidance at http://www.uscourts.cavc.gov/procedural_requirements.php)

Rule 34: Oral Argument

(a) **In General.** The U.S. Court of Appeals for Veterans Claims is a Court of national jurisdiction. Generally, oral argument will be held in Washington, D.C. However, the Court may hold oral argument anywhere in the United States. Oral argument will be allowed only when ordered by the Court and will be held where and when the Court orders.

(b) **Motion for Oral Argument.** Parties seeking oral argument should submit a motion for oral argument not later than 14 days after the reply brief is due or filed, whichever is sooner. Such motion shall specify therein why such argument will aid the Court. A motion for oral argument may not be included in any brief. Oral argument normally is not granted on nondispositive matters or matters being decided by a single Judge.

(c) **Participation by Amicus Curiae in Oral Argument.** An amicus curiae will be permitted to participate in oral argument only at the invitation of the Court.

(d) **Notice of Argument; Postponement; Additional Time.** The Clerk shall advise all parties and issue a public order as to when and where oral argument is to be heard and the time to be allowed each party. A request for postponement of the argument or for the allowance of additional time shall be made by motion filed reasonably in advance of the date fixed for argument and shall contain a showing of good cause.

(e) **Order and Content of Argument.** The appellant will generally open and conclude the argument. In argument on motions, the movant generally will open and conclude the argument.

(f) **Nonappearance of Parties.** If any party fails to appear to present argument, the Court may hear argument by any other party who is present.

(g) **Physical Exhibits.** A party who wishes to use physical exhibits other than documents shall arrange with the Clerk to have them placed in the courtroom on the date of the argument before the Court convenes. After the argument, the party shall remove the exhibits unless the Court otherwise directs. If the exhibits are not reclaimed within a reasonable time after notice is given by the Clerk, they will be disposed of by the Clerk.

Practitioner's Note: The Court's oral argument *Guide for Counsel* is available on the Court's website at www.uscourts.cavc.gov or by request.

Rule 35: Motions for Reconsideration, Panel Decision, or Full Court Review

(a) **Motion for Reconsideration.**

(1) *Permitted*. A party in a case dismissed by the Clerk pursuant to Rule 45(h) (Sua Sponte Dismissal of Cases) may move for reconsideration by the Clerk. If the Clerk denies such reconsideration, the matter will be referred for decision by a Judge. A party in a case decided by a single judge may move (A) for reconsideration by the single Judge, (B) for panel decision, or (A) in a single motion, for reconsideration by a single Judge or for panel decision in the event the single Judge denies reconsideration. A party in a case decided by a panel may move (A) for reconsideration by the panel, (B) for full Court review, or (C) in a single motion, for reconsideration by the panel or for full Court review in the event the panel denies reconsideration. A party in a case decided by the full Court may move for reconsideration by the full Court.

(2) *Prohibited.* A party may not move for reconsideration

(A) of a matter if that party has previously filed a motion for reconsideration of that matter and the Court has denied that motion, or

(B) of the grant of a motion under subsection (b) for a decision by a panel when the panel's decision is that the single-judge decision remains the decision of the Court, or

(C) of the denial of a motion under subsection (c) for full Court review.

(b) Motion for Panel Decision. A party in a case decided by a single Judge may move for a decision by a panel of the Court.

(c) Motion for Full Court Review. Motions for full Court review are not favored. Ordinarily they will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance. Subject to the requirements of subsections (d), (e), and (f), a party may move for a decision by the full Court-

(1) after a panel has decided a case, or

(2) after a panel has denied a motion for reconsideration or granted a motion for a decision by a panel but held that the single-judge decision remains the decision of the Court.

d) Time for Motion. Any motion under this Rule shall be filed not later than 21 days (51 days if the motion is filed by an appellant, petitioner, or representative located outside the United States, Puerto Rico, or the Virgin Islands) after the date of the dispositive action for which reconsideration, panel review, or full Court review is sought.

Practitioner's Note: Because a motion for reconsideration by the single Judge may be combined with a motion for panel decision, the filing of a motion for reconsideration does not toll the running of the time for filing a separate motion for panel decision. Likewise, because a motion for panel reconsideration may be combined with a motion for full Court review, the filing of a motion for panel reconsideration does not toll the running of the time for filing a separate motion for full Court review. Thus, to be timely, any motion for panel or full Court review must be filed within the 21-day filing period.

(e) Content of Motion. A motion under this Rule shall contain a supporting argument. In addition-

(1) a motion for panel decision, or a motion for single-judge, panel, or full Court reconsideration shall state the points of law or fact that the party believes the Court has overlooked or misunderstood;

(2) a motion for panel decision also must state why the resolution of an issue before the Court would establish a new rule of law; modify or clarify an existing rule of law; apply established law to a novel fact situation; constitute the only recent, binding precedent on a particular point of law; involve a legal issue of continuing public interest; or resolve a case in which the outcome is reasonably debatable; and

(3) a motion for full Court review shall state-

(A) how such action will secure or maintain uniformity of the Court's decisions, or

(B) what question of exceptional importance is involved.

(f) Form and Length. Except by the Court's permission, a motion or response (including any supporting memorandum or brief) under this Rule may not exceed 15 pages. The motion shall otherwise comply with Rules 25 (Filing and Service) and 27 (Motions), but it need not indicate whether it is opposed.

(g) Response; Action on the Motion. No response to a motion under this Rule may be filed unless it is requested by the Court, but a motion for full Court review ordinarily will not be granted without such a request. A motion for reconsideration will be decided by the Judge or panel that rendered the decision. A motion for panel decision will be referred to a panel. A motion for full Court review or for reconsideration of a full Court decision will be referred to all of the Judges in regular active service. Consideration by the full Court requires the vote of at least a majority of the eligible Judges in regular active service.

Rule 36: Entry of Judgment

(a) Judgment. Judgment begins the 60-day time period for appealing to the U.S. Court of Appeals for the Federal Circuit.

(b) Date of Judgment.

(1) Judgment is effective on

(A) the date prescribed in a Court order or decision, or

(B) the date of a Court order (i) granting the parties' joint motion to dismiss, terminate, or remand a case, or (ii) granting or dismissing an uncontested application for attorney fees and expenses.

(2) Unless the Court orders otherwise, judgment is effective when entered on the docket, which will be after the later of

(A) the date on which the time allowed in Rule 35(d) (Time for Motion) has expired, or

(B) the date on which the Court renders a decision on any motion(s) filed pursuant to Rule 35 (Motions for Reconsideration, Panel Decision, or Full Court Review) when no further motion under Rule 35 is permitted to be filed.

Practitioner's Note: Judgment is relevant to determining the expiration of time in which to file an appeal of a decision of the Court or file an application pursuant to 28 U.S.C. § 2412(d). Because entry of mandate on the docket is a ministerial act and may not occur on the date of mandate, practitioners are cautioned to use diligence when calculating time periods so as to ensure timely filings. *See* Rule 41.

Rule 37: Retention Requirements for Documents

(a) **Represented Parties.** When the appellant or petitioner is represented, the representative shall retain copies of the record before the agency, all documents filed with the Court by the parties or any intervenor or amicus curiae, and all actions issued by the Court.

(b) **Self-Represented Parties.** When the appellant or petitioner is self-represented, the Secretary shall retain copies of the record before the agency, all documents filed with the Court by the parties or any intervenor or amicus curiae, and all actions issued by the Court.

(c) **Duration of Retention.** Documents described in subsections (a) and (b) shall be retained for not less than one year after all proceedings are concluded, including those concerning attorney fees and expenses.

Rule 38: Frivolous Filings; Failure to Act

(a) **Frivolous Filings.** If the Court determines that an appeal, petition, motion, or other filing is frivolous, it may, after a separately filed motion by a party or notice from the Court and reasonable opportunity to respond, enter such order as it deems appropriate, to include sanctions, dismissal of the appeal, or reduction in any award under 28 U.S.C. § 2412(d).

(b) Failure to Act. Failure to take any step under these Rules, or to comply with an order of the Court, may be grounds for such action as the Court deems appropriate, including dismissal of the appeal or assessment of costs.

Rule 39: Attorney Fees and Expenses

(a) Application. An application pursuant to 28 U.S.C. § 2412(d), the Equal Access to Justice Act (EAJA), for award of attorney fees and/or other expenses shall be submitted for filing with the Clerk not later than 30 days after the Court's judgment becomes final. *See* Rule 36 (Entry of Judgment) and Rule 41 (Mandate). The time for filing an application under this subsection is set by statute. The application shall include the fees and expenses claimed for the submission of that application.

(1) *Response*. Not later than 30 days after the date on which an application described in section (a) is filed, the Secretary shall submit for filing and serve a response to that application. If the Secretary disputes the amount of fees and expenses sought, before the Secretary files a response the parties shall consult in good faith to seek expeditious resolution of the matter. The response shall state which elements of the application are not contested and explain the Secretary's position on those elements that are contested.

(2) *Reply*. Not later than 30 days after service of any response by the Secretary, the applicant may submit for filing and serve a reply addressing those matters contested by the Secretary.

(b) Supplemental Application. Except as provided in paragraph (3) of this section, a party whose application described in section (a) has been granted in whole or in part may, not later than 20 days after the Court action granting such application, file a supplemental application for attorney fees and other expenses in connection with the defense of such application. A supplemental application shall include the fees and expenses claimed for the submission of that supplemental application.

(1) *Response*. Unless unopposed, and except as provided in paragraph (3) of this section, not later than 20 days after the date on which a supplemental application is filed, the Secretary shall submit for filing and serve a response to that supplemental application. If the Secretary disputes the amount of fees and expenses sought, before the Secretary files a response the parties shall consult in good faith to seek expeditious resolution of the matter. The response shall state which elements of the supplemental application are not contested and explain the Secretary's position on those elements that are contested.

(2) *Reply*. Not later than 10 days after service of any response by the Secretary, the applicant may submit for filing and serve a reply addressing those matters contested by the Secretary.

(3) Supplemental Applications for Work Performed Before Other Courts.

(A) Appeals to the Federal Circuit. When an action on an application appealed to the U.S. Court of Appeals for the Federal Circuit is returned to the Court and the application has been granted in whole or in part by any court, any supplemental application (over which the Court has jurisdiction) based on representation provided in that appeal may be filed in the Court not later than 20 days after the mandate is issued by that court. *See* Fed. R. App. P. 41; Fed. Cir. R. 41.

(B) Appeals to the U.S. Supreme Court. When an action on an application appealed to the Supreme Court is returned to the Court and the application has been granted in whole or in part by any court, any supplemental application (over which the Court has jurisdiction) based on representation provided in that appeal may be filed in the Court not later than 20 days after the expiration of the time for filing a petition for a rehearing by the Supreme Court. *See* Sup. Ct. R. 45.

(C) Timing of Supplemental Responses and Replies. When a supplemental application is filed under paragraph (A) or (B) of this section, the Court will issue an order specifying the timing of responses and replies to ensure that all previous applications have been resolved before requiring a response to the next application.

(c) Dispute Resolution. In addition to the good faith resolution requirements of subsections (a)(1) and (b)(1), either party may request or the Court may direct that a staff conference, pursuant to Rule 33, be conducted in person or by telephone to discuss resolution of the contested elements of the application.

(d) Appendices. The parties shall attach as appendices to any pleading submitted for filing under this Rule those documents that are not already before the Court that are necessary to meet the application content requirements of 28 U.S.C. §?2412(d).

(e) Form and Length. All documents submitted for filing under this Rule shall conform to the requirements set forth in Rule 32 (Form of Briefs, Appendices, and Other Documents), except that no submission for filing may exceed 20 pages, not counting any appendix containing pages necessary to meet the application content requirements of 28 U.S.C. § 2412(d).

(f) Multiple Representatives. Applications for EAJA fees in cases in which reimbursement is sought for the work of more than one representative must include a single, consolidated, chronological billing statement for the full fee award requested. That single billing statement shall be in tabular form with entries listed in chronological order and depict the work done on the case on each date, identifying the representative who did the work, and must be signed by the lead representative, who will be responsible for its accuracy and completeness. The lead representative must sign the combined billing statement under a certification that he or she has (1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all representatives and (2) considered and eliminated all time that is excessive or redundant.

(g) Additional Requirements for Non-Attorney Practitioners. A non-attorney practitioner must include in the application for EAJA fees a statement of the non-attorney practitioner's

education and experience in representing claimants before this Court and a justification for the hourly fee sought.

Rule 40: Rules Advisory Committee

(a) **General.** The Court will have a Rules Advisory Committee (Committee) to study and advise the Court on possible changes to Rules of the Court, either sua sponte or at the request of the Court. The Committee will submit its recommendations to the Chief Judge through the Clerk.

(b) **Appointment.** The Chief Judge, with the concurrence of the Board of Judges, will appoint nine members of the Court's bar to serve on the Committee, eight as members and one as the chair. At least two members of the Committee will be attorneys employed by the Department of Veterans Affairs.

(c) **Terms.**

(1) *Length of terms*. Each member and each new chair will be appointed for a term of two years. Notwithstanding the terms provided for in the preceding sentence, the term of any person serving by virtue of employment by the VA will end automatically at such time as the person is no longer so employed.

(2) *Reappointment.* Except as otherwise provided, a member may serve three terms consecutively; a break in service permits a new series of three consecutive terms. A person may be appointed to three consecutive terms as the chair notwithstanding any term or terms as a member; a break in service as the chair permits a new series of such terms or a new series of three terms as a member. There is no limit on the number of nonconsecutive terms to which any person may be appointed as a member or the chair of the Committee. A member or the chair may continue to serve until a successor has been appointed.

(3) *Resignation or removal*. A member or the chair of the Committee may resign from the Committee. The Chief Judge, with the concurrence of the Board of Judges, may, based on the disability of the member or the chair or for other good cause, revoke an appointment at any time.

Rule 41: Mandate

(a) **Mandate.** Mandate is when the Court's judgment becomes final and is effective as a matter of law pursuant to 38 U.S.C. § 7291.

(b) **Date of Mandate: Dispositive Adjudications.** Mandate generally is 60 days after judgment unless-

(1) a timely notice of appeal to the U.S. Court of Appeals for the Federal Circuit is filed with the Clerk, *See* 38 U.S.C. § 7291(a) *et seq.*, or

(2) the Court directs otherwise.

(c) Date of Mandate: Uncontested Dispositions. Mandate generally is 60 days after the date of a Court order (i) granting the parties' joint motion to dismiss, terminate, or remand a case, or (ii) granting or dismissing an uncontested application for attorney fees and expenses unless–

(1) a timely notice of appeal to the U.S. Court of Appeals for the Federal Circuit is filed with the Clerk, *See* 38 U.S.C. § 7291(a) *et seq.*, or

(2) the parties agree in writing to waive further Court review as well as any appeal to the U.S. Court of Appeals for the Federal Circuit, and the parties request that mandate be entered prior to the expiration of the 60 days, or

(3) the Court directs otherwise.

Practitioner's Note: Because entry of mandate on the docket is a ministerial act and may not occur on the date of mandate, practitioners are cautioned to use diligence when calculating time periods so as to ensure timely filings. See Rule 36. Requests to enter mandate prior to the expiration of 60 days pursuant to Rule 41(c)(2) and Rule 42 should be incorporated in the parties' joint motion or set forth in a separate motion.

Rule 42: Voluntary Termination or Dismissal

If the parties file with the Clerk a motion to terminate a matter (other than an application for attorney fees and expenses) based upon a settlement agreement to be effective upon the Court's termination of the case, the Clerk may enter the case terminated. On motion of the appellant or petitioner for dismissal, the Clerk may dismiss an appeal, petition, or application for attorney fees and expenses on terms requested by the appellant or petitioner, agreed upon by the parties, or previously fixed by the Court.

Practitioner's Note: The parties should consider waiving further Court review or appeal to the U.S. Court of Appeals for the Federal Circuit in their joint motion for remand or voluntary dismissal. *See* Rule 41(c)(2).

Rule 43: Substitution of Parties

(a) Death of a Party.

(1) *Before Notice of Appeal.* If a party entitled to appeal dies before filing a Notice of Appeal, any person permitted by law to do so may file the Notice of Appeal within the time limit in Rule 4 (Filing of Appeal; Docketing; Copy of Board Decision).

(2) *After Notice of Appeal.* If a party dies after a Notice of Appeal is filed or while a proceeding is pending in the Court, the personal representative of the deceased party's estate or any other

appropriate person may, to the extent permitted by law, be substituted as a party on motion by such person. Any party or representative who becomes aware of the appellant's death shall notify the Court of the death of an appellant and proceedings will then be as the Court directs.

(b) **Substitution for Other Causes.** If substitution of a party in the Court is necessary for any reason other than death, the Court may order substitution on its own initiative or on a party's motion.

(c) **Death or Separation From Office of Public Officer.** When a public officer is a party in an official capacity and during the proceedings dies, resigns, or otherwise ceases to hold office, the proceedings are not stopped and the public officer's successor is automatically substituted as a party. Proceedings following the substitution will be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties will be disregarded.

Rule 44: Judicial Conference

(a) **Purpose.** Pursuant to 38 U.S.C. § 7286, there shall be convened, at such time and place as the Chief Judge designates, a conference to consider the business of the Court and to recommend means of improving the administration of justice within the Court's jurisdiction.

(b) **Committee.** The Chief Judge will appoint a Judicial Conference Planning Committee to plan and conduct the conference. The Planning Committee may appoint such subcommittees as may be necessary to ensure the efficient operation of the conference.

(c) **Attendance.** The Chief Judge presides at the conference. All persons admitted to practice before the Court, and such other persons as are designated by the Chief Judge, may be members of and participate in the conference.

(d) **Registration Fee.** Each member of the conference other than Judges of the Court shall pay a registration fee in an amount fixed by the Court to defray expenses of the conference. The Chief Judge may excuse the payment of the fee in individual cases. These fees are governed by 38 U.S.C. § 7285.

(e) **Responsibility of the Clerk.** The Clerk is responsible for receipt and disbursement of conference funds, for all conference records and accounts, and for conference staff support, and performs such other duties pertaining to the conference as may be directed by the Chief Judge.

(f) **Delegation.** The Chief Judge may delegate any or all of his or her responsibilities to another Judge of the Court.

Rule 45: Duties of Clerk

(a) **General Provisions.** The Clerk shall take the oath required by law. Neither the Clerk nor any deputy clerk may practice as an attorney or counselor in any court while continuing in office.

The office of the Clerk is open during business hours on all days except Saturdays, Sundays, legal holidays, and other days when the Court is closed (*see* Rule 26(a) (Computing Time)) from 9:00 a.m. to 4:00 p.m. A night box is available at the entrance to the Public Office from 4:00 p.m. to 6:00 p.m. on all days that the Court is open. *But see* Rule 25(a) (Document Submission and Filing); (b)(2), and (b)(3) (Method and Timeliness-Fax and Email) and E-Rule 5(c)(Effects of Filing Through CM/ECF).

(b) The Docket; Calendar; Other Records Required. The Clerk shall-

(1) maintain a docket containing a record of all documents filed with the Clerk, and all process, orders, and judgments;

(2) maintain an index of cases contained in the docket;

(3) prepare, under the direction of the Court, a calendar of cases submitted or waiting argument; and

(4) keep such other books and records as may be required by the Court.

(c) Notice of Court Actions. Immediately upon issuance of an opinion, memorandum decision, or order, or upon entry of judgment or mandate, the Clerk shall send a copy or notification to each party to the proceeding and note in the docket the issuance or entry date. Electronic transmission of the notice of docket activity constitutes such notice for all CM/ECF Users.

(d) Custody of Records and Papers. The Clerk is custodian of the records and documents of the Court. The Clerk shall not permit any original record or document to be taken from the Clerk's custody except as authorized by law. The Clerk shall retain, archive, or otherwise dispose of documents submitted for filing, as required or otherwise permitted by law.

(e) Court Seal. . The Clerk is the custodian of the seal of the Court. The seal will appear as ordered by the Court. The seal is the means of authentication of all records, certificates, and process issued from the Court.

(f) Schedule of Fees. The Clerk shall maintain in the Public Office and on the Court website a schedule of fees approved by the Court.

(g) Motions. Unless a case has been assigned to a Judge or Judges or unless otherwise directed by the Court, the Clerk may act on motions and applications, if joint, consented to, or unopposed, that seek to–

(1) dismiss or terminate an appeal or petition with or without prejudice to reinstate it;

(2) remand a case;

(3) reinstate a case that was dismissed for failure to comply with the Rules;

(4) extend the time for taking any action required or permitted by the Rules or by an order of the Court, unless the motion is made after the time limit has elapsed or unless the basis for the motion is extraordinary circumstances as required by Rule 26(b) (Extension of Time);

(5) stay a case, with the exception that for the purpose of allowing the parties time to negotiate a settlement or other joint resolution, the Clerk may stay a case for only up to a total of 60 days;

(6) consolidate appeals;

(7) withdraw or substitute an appearance;

(8) correct a brief or other document; or

(9) obtain attorney fees and expenses pursuant to 28 U.S.C. § 2412(d).

(h) Sua Sponte Dismissal of Cases. The Clerk may dismiss a case for the appellant's failure to pay the filing fee or to file a brief. *See also* Rule 35(a) (Motion for Reconsideration).

(i) Construction of Rules in Self-Representation Cases. Consistent with the practice of the Court, the Clerk will liberally construe the Rules as they apply to self-represented appellants.

(j) Noncompliant Submissions. Except where return of a document is required by these Rules for a specific reason (*see* Rules 5(d) (Stay of Appellate Proceedings–Combined Motions Prohibited), 24 (Waiver of Filing Fee), 26(d) (Computation and Extension of Time–Combined Motions Prohibited), 27(e) (Prohibited Nondispositive Motions) and 28(g) (Motions Prohibited)), if the Court receives any document that does not conform to these Rules, the Clerk will receive, but not file, the submission; however, if it is a jurisdiction-conferring document, it will be filed notwithstanding any other provision of these Rules. In every case, the Clerk will promptly notify the party of the defect(s) to be corrected and may, in accordance with guidance from the Court, stay proceedings for a reasonable time in order to permit submission of a conforming document. Failure to submit such conforming document in a timely manner may result in the dismissal of the matter.

Rule 46: Practice Before the Court and Representation

(a) Practice Before the Court.

(1) Admission of attorneys to bar of Court.

(A) General. A person of good moral character and repute who has been admitted to practice in the Supreme Court of the United States, or the highest court of any state, the District of Columbia, or a United States territory or commonwealth within the meaning of 48 U.S.C. § 1904(e)(5), and is in good standing therein, may be admitted to the bar of the Court upon application. *See* Rules of Admission and Practice.

(B) Active Status. Practice before the Court requires an attorney to maintain active status in good standing in the highest court of any state, the District of Columbia, or a United States territory or commonwealth within the meaning of 48 U.S.C. § 1904(e)(5).

(C) Application. An attorney at law may be admitted to the bar of the Court upon filing with the Clerk a completed application accompanied by the applicable fee (payable by check or money order) and a current certificate from the clerk of the appropriate court showing that the applicant is a member in good standing of the bar of one of the courts named in paragraph (A) of this subsection. A current court certificate is one executed not earlier than 3 months before the date of the filing of the application.

(2) *Admission of non-attorneys to practice.* A non-attorney of good moral character and repute who is –

(A) under the direct supervision (including presence at any oral argument) of an attorney admitted to the bar of the Court, or

(B) employed by an organization that is chartered by Congress, is recognized by the Secretary of Veterans Affairs for claims representation, and provides a statement signed by the organization's chief executive officer certifying to the employee's –

(i) understanding of the procedures and jurisdiction of the Court and of the nature, scope, and standards of its judicial review; and

(ii) proficiency to represent appellants before the Court

may be admitted to practice before the Court as a non-attorney practitioner upon filing with the Clerk a completed application accompanied by the applicable fee (payable by check or money order). In making the statement under this paragraph, the chief executive officer should be aware that knowledge of and competence in veterans law and the administrative claims process does not in and of itself connote competence in appellate practice and procedure.

(3) *Practitioner defined.* A person who has been admitted under this subsection or has been permitted to appear under subsection (b)(1)(F) is referred to in this Rule as a practitioner.

(4) *Change of address.* Each practitioner shall give the Clerk and all other parties written notice (not included in another filing) of any change of his or her electronic or street address or telephone or fax number. Absent such notice, the delivery of documents to the address most recently provided by that person will be fully effective.

(b) Representation Requirements.

(1) *General appearance.*

(A) Appellants' Representatives. Each practitioner representing an appellant shall submit for filing with the Court and serve on the Secretary, no later than the date of the first filing submitted by the practitioner on behalf of the appellant, a notice of appearance in the detail set out in Form 3 in the Appendix of Forms, and a copy of any retainer agreement and any fee agreement for representation before the Court, which when electronically filed will be locked (*see* E-Rule 4(a)).

A) Secretary's Representatives. Each practitioner representing the Secretary shall submit for filing with the Court and serve on the appellant, no later than the date on which the Secretary files the record before the agency, a notice of appearance. The Secretary may substitute a practitioner of record at any time by submitting for filing with the Court and serving on the appellant a notice of appearance of the new practitioner.

(C) Appearance by a Non-Attorney Practitioner. Each notice of appearance and pleading submitted for filing by a non-attorney practitioner shall include the name, address, and signature of the responsible supervising attorney under subsection (a)(2)(A) or the identification of the employing organization under subsection (a)(2)(B).

(D) Appearance by Multiple Representatives. In cases where multiple representatives submit for filing a notice of appearance, one representative must be designated as lead representative. When an additional representative for appellant or intervenor is not designated as lead representative, that representative may withdraw his or her appearance without obtaining the Court's permission as would otherwise be required by subsection 46(c). The lead representative shall promptly file a notice in each case informing the Clerk's Office that the additional representative is no longer representing the appellant or intervenor, that notice of the withdrawal of the additional representative has been provided to the appellant or intervenor, and that the additional representative's name should be removed from the docket.

(E) Appearance by an Organization Prohibited. With the exception of an organization operating under the provisions of Public Law No. 102-229, *see* Practitioner's Note to Rule 5, an appearance may not be made in the name of a law firm or other organization.

(F) Appearance in a Particular Case. On motion and a showing of good cause, and submission of a completed application, the Court may permit any attorney or non-attorney practitioner not admitted to practice before the Court, or any other person in exceptional circumstances, to appear on behalf of a party or amicus curiae for the purposes of a particular case. Whenever a person makes an appearance under this subsection, the person will be deemed to have conferred disciplinary jurisdiction upon the Court for any alleged misconduct in the course of, in the preparation for, or in connection with any proceeding in that case. Each attorney and non-attorney practitioner generally is limited to one appearance under this subsection. Except as permitted by the Court, any subsequent appearances shall be made under Rule 46(a) (1) (Admission of Attorneys to Bar of Court) or (a)(2) (Admission of Non-Attorneys to Practice).

(G) Appearance by Law Students.

(i) General. An eligible law student, with the written consent of the appellant and the attorney of record, who is a member of the bar of the Court, may appear in the Court as the Court may allow.

(ii) Participation defined. An eligible law student may participate in the preparation of briefs and other documents to be filed in the Court, but such briefs or documents shall be signed by the attorney of record. The student may also participate in oral argument with leave of the Court, but only in the presence of the attorney of record. The attorney of record shall personally assume professional responsibility for the law student's work and for supervising the quality of his or her work. The attorney shall be familiar with the case and prepared to supplement or correct any written or oral statement made by the student.

(iii) Conditions of appearance. In order to make an appearance pursuant to this Rule, the student shall-

(aa) be duly enrolled in a law school approved by the American Bar Association;

(bb) have completed legal studies amounting to at least two semesters or the equivalent if studies are scheduled on other than a semester basis;

(cc) be certified, by the dean of the law school in which the law student is enrolled, as being of good character and competent legal ability (this certification shall be submitted for filing with the Clerk and may be withdrawn at any time by the dean, upon written notice to the Clerk, or by the Court, without notice or hearing and without any showing of cause);

(dd) be introduced by the attorney of record in the case;

(ee) neither ask for nor receive any compensation or remuneration of any kind for his or her services from the person on whose behalf such services are rendered, but this will not prevent an attorney, legal aid bureau, law school, a state, the District of Columbia, or a United States territory or commonwealth within the meaning of 48 U.S.C. § 1904(e)(5), or the United States from paying compensation to the eligible law student, nor will it prevent any agency from making such charges for its services as it may otherwise properly require;

(ff) certify in writing that he or she has read and is familiar with the code of professional responsibility or rules of professional conduct in effect in the state or jurisdiction in which the student's law school is located and with the rules governing practice in the Court (*See* Rule 4 of the Court's Rules of Admission and Practice).

(2) Limited appearance.

(A) Notice of Appeal. Any practitioner appearing for the limited purpose of submitting a Notice of Appeal for filing with the Court shall, when submitting such Notice of Appeal:

(i) provide the appellant's current address and telephone number; and

(ii) aver to the Court that the appellant has been advised, or, alternatively, will be advised, of the 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.

(B) Stay for Case Evaluation. A practitioner representing an organization operating under the provisions of Public Law No. 102-229 may enter a limited appearance to seek a stay in a case for the purpose of case evaluation. *See* Rule 5(a) (Stay of Appellate Proceedings-Grounds) and Practitioner's Note to Rule 5. A limited appearance and stay request may be presented in a single motion for stay.

Practitioner's Note: Any filing for a limited appearance by a non-attorney practitioner must be signed by the supervising attorney.

(c) Withdrawal From Representation. Except as noted in subsection (b)(1)(B), (b)(1)(D), and in subparagraph (2), a practitioner may not withdraw from a case without obtaining the Court's permission. The practitioner's authority and duty continue until the practitioner is relieved by the Court, subject to conditions that the Court considers appropriate.

(1) *General appearances*. Permission to withdraw may be sought by submitting for filing a motion to withdraw that

(A) states the reasons for withdrawal;

(B) lists the client's current address and telephone number;

(C) states whether the client consents to the withdrawal and, if not, the reason or reasons therefore; and

(D) contains a representation by the practitioner that all documents submitted for filing by the parties, all notices and orders accumulated by the practitioner, and all files belonging to the client have been provided to the client or to a named substitute practitioner.

(2) Limited appearances.

(A) Notice of Appeal. If a practitioner has appeared for the limited purpose of submitting for filing a Notice of Appeal and averred at that time that the client had already been advised of the 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, withdrawal is automatic at the time of such submission and a motion to withdraw is not necessary. In instances where the attorney averred that the practitioner would in the future advise the appellant of the 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, withdrawal will be granted only upon averment that the appellant has been so advised. Until such time, the practitioner remains professionally responsible to the Court and to the appellant for compliance with the Court's Rules of Practice and Procedure.

(B) An organization operating under the provisions of Public Law No. 102-229. Withdrawal is automatic upon submission for filing of a notice that an organization operating under the provisions of Public Law No. 102-229 will not take the case. *See* Practitioner's Note to subsection (b)(2)(B).

Rule 47: Expedited Proceedings

(a) **Motion and Order.** On a party's motion for good cause shown, on written agreement of the parties, or on its own initiative, the Court may order that any matter before the Court be expedited with respect to some or all procedural steps. The following may constitute good cause:

(1) a serious health condition that makes the death of the appellant or petitioner imminent, as shown by a physician's statement (including identification of the physician's licensing authority and current license number);

(2) the advanced age (over 75 years) of the appellant or petitioner and a state of failing health due to a nontemporary condition, as shown by a physician's statement (including identification of the physician's licensing authority and current license number), such that expeditious proceedings are necessary to avoid an injustice to the appellant or petitioner; or

(3) any other exceptional circumstances that make expeditious proceedings necessary to avoid an injustice to the appellant or petitioner, as shown by credible evidence.

(b) **Filing and Service of Documents.** Expedited proceedings will be scheduled as directed by the Court. Unless otherwise ordered, the appellant's principal brief shall be served and submitted for filing not later than 20 days after the record before the agency has been served on the appellant; the Secretary's brief shall be served and submitted for filing not later than 20 days after service of the appellant's brief; and any reply brief shall be served and submitted for filing not later than 10 days after filing of the Secretary's brief. Unless otherwise ordered, the time to submit the record of proceedings for filing under Rule 28.1(a)(3) (Record of Proceedings-Time for Filing) is reduced to 7 days.

(c) **Form and Length of Briefs.** Briefs submitted for filing under this Rule shall comply with Rules 25 (Filing and Service), 28 (Briefs), and 32 (Form of Briefs, Appendices, and Other Documents), except that principal briefs shall be limited to 15 pages, reply briefs shall be limited to 7 pages, and a table of authorities is not required.

Rule 48: Sealing of Cases

See also **Rule 6 (Protection of Privacy)**

(a) Cases Involving Protected Records. If, during the time periods set out in Rule 10 (The Record Before the Agency) or at any other time during a proceeding before the Court, the parties identify records protected by 38 U.S.C. § 7332 and at least one of the parties believes that disclosure of such records is required in such proceedings and further, the parties cannot agree with respect to the disclosure of such records, the party requesting disclosure shall make immediate application therefor, pursuant to 38 U.S.C. § 7332(b)(2)(D), caption the case "In re: Sealed Case No. [insert Court docket number]" (not disclosing the identity of any individual), and serve on the protected person or successor in interest a copy of the application. Such application shall include a statement specifying those steps taken by the parties to reach agreement before application was made to the Court. Upon receipt of such application, unless otherwise directed by the Court, the Clerk will enter the case as "withdrawn" on the docket, assign a new docket number and recaption the case using an encoded identifier, and seal the record of proceedings and the file of the Court. Thereafter, any party or representative of a party, unless otherwise ordered by the Court, shall make reference in any subsequent filing only to the new docket number and caption assigned by the Clerk.

(b) Other Cases. The procedures described in this Rule may, in the Court's discretion, be applied to cases that the Court orders sealed but that do not contain records protected by 38
U.S.C § 7332.

Rule 49: Complaints Against Judges

Rules for the processing of complaints of judicial misconduct or disability have been adopted by the Court pursuant to 28 U.S.C. § 372(c) (superseded by §§ 351-64). Copies are available from the Clerk on request.

Effective September 15, 2011, for all business before the Court (Includes adopted revisions as of November 10, 2020)†

† To ensure you are using the correct forms, always refer to the Court Forms page for the most current versions.

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 (BVA) decision.

The BVA'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.)

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 BVA 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. 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
Lawyer & Lawyer
1111 J Street, NW
Washington, DC 20000
(202) 555-1212

Attorney for Appellant

Form 2
(Rev 8/11)

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 01-20)

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DECLARATION OF FINANCIAL HARDSHIP

Docket No. (if assigned) _______________

_____________________________________, Appellant/Petitioner,

v.

Secretary of Veterans Affairs, Appellee/Respondent.

I am the appellant/petitioner. I declare by my signature below that payment of the fifty dollar ($50.00) filing fee referenced in Rule 3(f) and Rule 21(a) of the Court's Rules of Practice and Procedure would be a financial hardship for me.

Pursuant to 28 U.S.C. § 1746, I certify, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

_____________________________________ _________________________
Signature of Appellant/Petitioner* Date

____
Telephone number

(*To be signed by Appellant/Petitioner, NOT Appellant's/Petitioner's representative. You may electronically sign by typing "/s/" and then your name in the signature block above: for example, /s/John Doe.)

INSTRUCTIONS

To file this Declaration, either

(1) Email it to self-rep@uscourts.cavc.gov (if self-represented) or esubmission@uscourts.cavc.gov (if represented), **OR**

(2) Fax it to (202) 501-5848, **OR**

(3) Send it to:

Clerk, US Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

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User Name: Elizabeth Kubala
Date and Time: Thursday, September 16, 2021 1:44:00 PM EDT
Job Number: 153066520

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   Client/Matter: -None-
2. 15.1 INTRODUCTION
   Client/Matter: -None-
3. 15.2 JURISDICTION OF THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS
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4. 15.3 THE POWER OF THE CAVC AND THE SCOPE OF REVIEW IT APPLIES IN REVIEWING BVA DECISIONS
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17. *APPENDIX 15-F Sample Joint Motion to Terminate Appeal and Stipulated Agreement*

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18. *APPENDIX 15-G Sample Motion for Substitution of Parties*

Client/Matter: -None-

1 Veterans Benefits Manual Chapter 15.syn

Veterans Benefits Manual > Part V The VA Claims Adjudication Process > Chapter 15 COURT REVIEW OF VA DECISION-MAKING

Chapter 15 COURT REVIEW OF VA DECISION-MAKING

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15.1 INTRODUCTION

15.1.1 History of the Limits on Judicial Review of VA Decision-Making

During most of the twentieth century, decisions of the U.S. Department of Veterans Affairs (VA) (formerly known as the U.S. Veterans Administration) were exempt from court review. Congress created the VA in 1930, but in 1933, Congress prohibited court review of individual benefits decisions made by the VA.[1]

Limited exceptions to the general ban on court review of VA decision-making evolved during the twentieth century.[2] In *Johnson v. Robison*[3] the Supreme Court held that the judicial review preclusion statute did not bar federal courts from entertaining constitutional challenges to veterans benefits legislation.[4] The Court's reasoning led to the development of lower court case law precedent allowing U.S. district courts to entertain actions brought under the Administrative Procedure Act and challenging a variety of VA actions. For example, lower courts ruled that VA regulations, policies, and other actions affecting the adjudication of claims for benefits were reviewable in district courts to determine whether the action was constitutional.[5] Challenges to VA regulations were also allowed so as to determine whether they were arbitrary and capricious or whether they violated statutory authority.[6] The only lawsuits that were consistently dismissed as barred by statute were nonconstitutional challenges to the VA's decision on an individual's claim for benefits.[7]

15.1.2 The Veterans' Judicial Review Act of 1988

The Veterans' Judicial Review Act of 1988 (VJRA)[8] was the product of intense congressional debate lasting for more than a decade. The VJRA:

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[1] *See* Pub. L. No. 71-536, ch. 863, § 1, 46 Stat. 1016 (1930); *see* Economy Act, Pub. L. No. 73-2, ch. 314, §§ 401–08, ***47 Stat. 382*** (1933).

[2] *See generally* Kramer, *Judicial Review of the Theoretically Non Reviewable: An Overview of Pre COVA Court Action on Claims for Veterans Benefits*, 17 OHIO NORTHERN U. L. REV. 99 (1990).

[3] *415 U.S. 361 (1974)*.

[4] 38 U.S.C.S. § 211(a).

[5] *See, e.g.*, *Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988)* (en banc); *Devine v. Cleland, 616 F.2d 1080, 1083–85 (9th Cir. 1980)*; *Zayas v. Veterans Admin., 666 F. Supp. 361 (D.P.R. 1987)*; ***Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975)***.

[6] *See, e.g.*, *Evergreen State Coll. v. Cleland, 621 F.2d 1002, 1007–08 (9th Cir. 1980)*; *Univ. of Maryland v. Cleland, 621 F.2d 98, 100–01 (4th Cir. 1980)*; *Merged Area X (Education) v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979)*; ***Wayne State Univ. v. Cleland, 590 F.2d 627, 631–32*** (6th Cir. 1978). *Contra* *Roberts v. Walters, 792 F.2d 1109 (Fed. Cir. 1986)*.

[7] *See, e.g.*, ***Wickline v. Brooks, 446 F.2d 1391 (4th Cir. 1971)***, *cert. denied*, ***404 U.S. 1061 (1972)***; *Fritz v. Dir. of Veterans Admin., 427 F.2d 154 (9th Cir. 1970)*; *Redfield v. Driver, 364 F.2d 812 (9th Cir. 1966)*; *Barefield v. Byrd, 320 F.2d 455 (5th Cir. 1963)*.

- Essentially retained intact the VA's existing two-tier administrative process for adjudicating claims for benefits, in which a VA regional office (RO) renders an initial decision appealable by the claimant to the Board of Veterans' Appeals (BVA or Board), and codified some existing administrative practices and changed others;
- Allowed attorneys and "agents" retained within one year of the first final BVA decision to charge a "reasonable fee" to reopen the claim before the VA or to move the BVA to reconsider its denial;[9]
  - Authorized review of BVA denials of individual claims for benefits in a newly created Article I court[10] (originally named the U.S. Court of Veterans Appeals, but later renamed the U.S. Court of Appeals for Veterans Claims (CAVC or Court)), with further limited review in the U.S. Court of Appeals for the Federal Circuit (Federal Circuit);[11]
  - Allowed attorneys and others authorized to practice before the new Court to charge a "reasonable fee" for representation;[12] and
- Transferred jurisdiction from U.S. district courts to the Federal Circuit over challenges to VA regulations and other policies of general applicability.[13]

The VJRA not only opened the federal courts to many more types of lawsuits challenging VA decision-making, but also changed the rules governing where these lawsuits must be filed. The CAVC is the court in which most disputes between a veteran or veteran's dependent and the VA must be litigated. The CAVC's jurisdiction is essentially to review final BVA decisions. The CAVC's decisions are appealable to the Federal Circuit.

The VJRA also provides the Federal Circuit with exclusive jurisdiction to review direct challenges to VA regulations, rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability, including opinions and interpretations of the VA Office of the General Counsel (OGC) that fit this description.[14] The VJRA therefore contemplates that claimants may challenge VA regulations and general policies that affect their cases through two judicial paths.[15] They may file a direct challenge in the Federal Circuit. Alternatively, they may appeal their case to the BVA (which is bound by VA regulations, "instructions" of the Secretary of Veterans Affairs (Secretary), and VA OGC "precedent opinions")[16] and if they lose at the BVA, challenge the VA regulation or policy at the CAVC as part of an appeal of a BVA denial, with subsequent review available in the Federal Circuit.

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[8] *See* ***Pub. L. No. 100-687, 102 Stat. 4105*** (1988). For additional overviews and analyses of this legislation, see Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans Benefits Proceedings*, 41 ADMIN. L. REV. 365 (1989) and Olsen, *Veterans Judicial Review: Long Overdue Reforms*, 36 FED. B. NEWS & REV. 249 (1989).

[9] *38 U.S.C.S. § 5904(c)*. Effective in 2007, the law was amended so that attorneys and agents can charge a reasonable fee to represent a claimant before VA after the claimant files a notice of disagreement (NOD) with the initial decision of the RO. *See* Sections 19.2.1.4 and 19.2.1.5 of this Manual.

[10] *38 U.S.C.S. § 7252*.

[11] *38 U.S.C.S. § 7292*.

[12] *38 U.S.C.S. § 7263*.

[13] *38 U.S.C.S. § 502*.

[14] *38 U.S.C.S. § 502*; *see, e.g.*, *Veterans Justice Grp. v. Sec'y of Veterans Affairs, 818 F.3d 1336 (Fed. Cir. 2016)*; *but see* *Gray v. Sec'y of Veterans Affairs, 875 F.3d 1102 (Fed. Cir. 2017)* (holding that the Federal Circuit does not have jurisdiction to review the VA Adjudication Procedures Manual (M21-1)), *rehearing denied*, *884 F.3d 1379, 1380–82 (Fed. Cir. 2018)*.

[15] *See* 134 CONG. REC. S16, 647–48 (daily ed. Oct. 18, 1988) (remarks of Sen. Cranston); 134 CONG. REC. H10, 359–60 (daily ed. Oct. 19, 1988) (remarks of Rep. Edwards).

[16] *38 U.S.C.S. § 7104(c)*.

The U.S. district courts, which had jurisdiction to resolve direct challenges to VA regulations and policies before the VJRA, retain jurisdiction over a variety of subject matters including disputes with the VA involving the Loan Guarantee Program or a claim under the National Service Life Insurance Program, facial challenges to the constitutionality of title 38 statutes,[17] and lawsuits brought against the VA under the Federal Tort Claims Act.

This Chapter explores the current system of judicial review of VA decisions. Sections 15.2, 15.3, 15.4, and 15.6 describe in detail the jurisdiction, authority, scope of review, organization, and rules of practice and procedure of the CAVC. Section 15.5 provides an overview of the bar of attorneys and nonattorneys who represent appellants before the CAVC, along with the rules governing admission to practice. Section 15.7 discusses common issues faced by counsel for appellants in exploring settlement with counsel for the Secretary. The jurisdiction, authority, and scope of review of the Federal Circuit over veterans benefits cases is *covered in Section 15.8*. The limited remaining jurisdiction of the U.S. district courts is explained in Section 15.9.

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[17] *See Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012)*, *cert. denied*, ***133 S. Ct. 840 (2013)***; *Disabled Am. Veterans v. Dep't of Veterans Affairs, 962 F.2d 136, 140–41 (2d Cir. 1992)*.

15.2 JURISDICTION OF THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

The Veterans' Judicial Review Act (VJRA) gives the U.S. Court of Appeals for Veterans Claims (CAVC or Court) "exclusive jurisdiction to review decisions of the Board of Veterans Appeals."[18] An individual who files a lawsuit in the Court is called the "appellant" and the individual who is sued in the Court is called the "appellee" and is normally the Secretary of Veterans Affairs (as of the date of publication of the 2020–2021 edition of this Manual, Robert Wilkie is the Secretary of Veterans Affairs (Secretary)).[19]

15.2.1 The BVA's Duty to Notify Appellants of Their Appeal Rights

The Board of Veterans' Appeals (BVA or Board) has a duty to notify claimants of their appeal rights.[20] This notice must accompany each Board decision. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has indicated that the Board's failure to provide such notice may be grounds to excuse the failure of a claimant to file their notice of appeal (NOA or notice of appeal) within the 120-day appeal period.[21]

Veterans have argued that the standard notice of appellate rights that has long been included at the end of a Board decision is inadequate for a variety of reasons. One veteran argued that the notice is too terse and fails to provide more detailed information, including the phone number of the Court.[22] Another veteran complained that the notice was inadequate because it did not explain that if a claimant files a motion for reconsideration with the Board, this must be done within 120 days of the mailing of the Board decision in order to toll the 120-day time limit for the filing of a notice of appeal.[23] The Courts rejected both of these challenges.

The Federal Circuit has held that the BVA only needs to provide "a general outline of the available procedures for obtaining review of a final Board decision."[24] The CAVC has held that the standard notice is adequate because it informs claimants of the right to judicial review, identifies the CAVC as the forum for appeal, provides the Court's address, and notifies claimants that the notice of appeal must be filed within a specified period of time.[25]

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[18] *38 U.S.C.S. § 7252(a)*.

[19] Effective July 30, 2018, Robert Wilkie became the tenth Secretary of Veterans Affairs.

[20] *See 38 U.S.C.S. § 5104(a)*; *Thompson v. Brown, 8 Vet. App. 169, 177 (1995)*; *Smith v. Brown, 8 Vet. App. 546, 551 (1996)*.

[21] *See Machado v. Derwinski, 928 F.2d 389, 392 (Fed. Cir. 1991)*.

[22] *See Pittman v. Brown, 9 Vet. App. 60, 64 (1996)*.

[23] *See Cummings v. West, 136 F.3d 1468, 1471 (Fed. Cir. 1998)*, *cert. denied*, ***524 U.S. 954 (1998)***; *see also Palomer v. McDonald, 27 Vet. App. 245, 254 (2015)* (rejecting appellant's argument that equitable tolling was warranted based on the BVA's confusing "Notice of Appellate Rights" when the Notice contained the same information as the notice in *Cummings*); *Pogue v. West, 13 Vet. App. 368, 375 (2000)* (rejecting appellant's argument that notice is defective because it does not inform veterans that a motion for reconsideration of a BVA decision must be filed with the BVA and not the regional office (RO)).

[24] *Cummings, 136 F.3d at 1472*.

[25] *Pittman, 9 Vet. App. at 64–65*.

15.2.2 Who May Appeal a BVA Decision to the CAVC

Only a person[26] or class of persons[27] "adversely affected" by a final BVA decision may seek review by the CAVC.[28] A claimant is "adversely affected" by a BVA decision if he or she receives from the BVA less than the full benefits to which he or she is, or may be, entitled.[29] If, for example, the BVA rules that a veteran's service-connected disability rating should be increased from 30 percent to 70 percent, but not to 100 percent, the veteran may appeal that part of the BVA decision denying an increase to 100 percent. Thus, a claimant who receives some relief from the BVA may nevertheless appeal to the CAVC the decision to deny complete relief.

In a case in which the Secretary and the claimant entered into a settlement agreement that by its terms disposes of the entire appeal, the Court has held that "it necessarily follows that the decision of the BVA giving rise to the appeal, to the extent that the decision was adverse to the claimant, is overridden," and that "such action effectively moots the case or controversy."[30]

Neither the Secretary nor any other VA official may appeal a BVA decision to the CAVC.[31] What logically follows from this is that the CAVC has no authority to lower the benefits to which the BVA has already decided the claimant is entitled.[32] Thus, a claimant should not end up worse off by appealing to the CAVC. If, for

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[26] It appears that a veterans organization or a governmental entity does not have authority to challenge a BVA decision on behalf of an adversely affected individual.

[27] *Monk v. Shulkin (Monk II), 855 F.3d 1312 (Fed. Cir. 2017)*.

[28] *38 U.S.C.S. § 7266(a)*. In *Mokal v. Derwinski, 1 Vet. App. 12, 14 (1990)*, the Court held that an appeal can validly be filed by a custodian of a claimant, on behalf of the claimant, if the custodian has a recognized fiduciary relationship created by virtue of state law or the Secretary. However, in *Belton v. Principi, 17 Vet. App. 209 (2003)*, the Court dismissed a petition for extraordinary relief in which an incarcerated veteran challenged a termination of the apportionment of benefits on behalf of his mother. The Court held that the veteran had no standing to bring a claim on behalf of his mother as he had no "legally significant connection to the apportionment benefits;" he was not his mother's legal guardian; he had not shown a "personal stake in the outcome;" and he was not "adversely affected by the termination of his mother's apportionment award." *Belton, 17 Vet. App. at 211*. *See also* *Braan v. McDonald, 28 Vet. App. 232 (2016)*.

[29] *See* *Holland (Sterling) v. Brown, 9 Vet. App. 324, 329 (1996)*; *AB v. Brown, 6 Vet. App. 35, 38 (1993)*; *Corchado v. Derwinski, 1 Vet. App. 160, 164 (1991)*.

[30] *Bond v. Derwinski, 2 Vet. App. 376, 377 (1992)* (per curiam). In *Herlehy v. Principi, 15 Vet. App. 33, 35 (2001)*, the CAVC held that the issue of the veteran's entitlement to a TDIU rating for all periods after July 1989 was moot since the veteran had already been awarded a schedular 100 percent rating for heart disease for this time period. Because there was no additional benefit available to the veteran, the CAVC dismissed this issue stating that "when a once live case or controversy becomes moot, the CAVC lacks jurisdiction." See *Section 15.2*.3.4 for a discussion of the "case or controversy" requirement.

[31] *38 U.S.C.S. § 5107(a)*; *see generally* *Green v. Derwinski, 1 Vet. App. 121 (1991)*; *Littke v. Derwinski, 1 Vet. App. 90 (1990)*; *Murphy v. Derwinski, 1 Vet. App. 78 (1990)*; *Jolley v. Derwinski, 1 Vet. App. 37 (1990)*.

[32] For example, in *Floyd v. Brown, 9 Vet. App. 88 (1996)*, the Board granted the appellant an additional 10 percent rating on an extraschedular basis pursuant to *38 C.F.R. § 3.321(b)(1)*. The CAVC held that the Board was precluded from assigning such a rating in the first instance. Rather, the regulation requires consideration in the first instance by the Under Secretary for Benefits (formerly the Chief Benefits Director) or the Director of the Compensation and Pension Service. *Floyd, 9 Vet. App. at 95*. Nonetheless, the CAVC upheld the Board decision, even though in granting additional benefits to the claimant the Board exceeded its authority, because the CAVC determined that "the Board's action here resulted in the granting of an extraschedular rating and thus did not result in prejudice to the veteran." Therefore, "[t]aking 'due account of the rule of prejudicial error,' *38 U.S.C.S. § 7261(b)*," the CAVC affirmed the Board's grant of an extraschedular rating in this case. *Floyd, 9 Vet. App. at 96*. *See also* *Medrano v. Nicholson, 21 Vet. App. 165, 170–71 (2007)* ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority"); *Hines v. Principi, 18 Vet. App. 227, 239 (2004)* (citing *38 U.S.C.S. § 7261(a)(4)*, which provides that the CAVC may reverse or set aside only findings of fact "adverse to the claimant"); *Cantu v. Principi, 18 Vet. App. 92 (2004)* (holding that the CAVC may not disturb favorable findings made by the BVA); *Williams*

example, the BVA finds that a veteran's service-connected disability rating should be increased from 10 percent to 30 percent, but not to 100 percent, the CAVC has the authority to reverse that part of the BVA decision denying an increase to 100 percent, but it cannot reverse the grant of a 30 percent rating.

15.2.3 Jurisdictional Requirements in Appealing a BVA Decision to the CAVC

There are essentially four requirements that must be satisfied in order for the CAVC to have jurisdiction to review a BVA decision: (1) the BVA decision on the claim for benefits must be final; (2) the notice of appeal must be received or mailed using the U.S. Postal Service within 120 days of the BVA decision; (3) the notice of appeal must meet the Court's requirements; and (4) there must be a case or controversy. The four requirements are discussed separately below in Sections 15.2.3.1, 15.2.3.2, 15.2.3.3, and 15.2.3.4, respectively. The appellant has the burden of proof to establish that the Court has jurisdiction,[33] and the preponderance of the evidence must support jurisdiction.[34] Based upon this evidence, the Court will decide in the first instance if it has jurisdiction. The statute and regulation requiring that the benefit of the doubt be given to the veteran does not apply to the Court's determination regarding the factual predicates to its jurisdiction.[35]

15.2.3.1 The Requirement That the BVA Decision on the Claim for Benefits Must Be Final

Only "final" Board decisions on a claim[36] for benefits may be appealed to the Court.[37] The Federal Circuit has defined a "decision" of the Board as "the decision with respect to the benefit sought by the veteran: those benefits are either granted … , or they are denied."[38] For example, in *Hibbard v. West*,[39] the veteran appealed a Board decision denying his claim for a compensable rating for hearing loss; however, after the Board issued its decision but prior to the veteran's appeal to Court, the VA regional office (RO) issued a rating decision granting a 10 percent rating. The veteran was not satisfied with the effective date of the 10 percent rating, but the Court declined to hear an appeal on the effective date issue because the Board had not yet rendered a final decision on that issue. The Court held that it had no jurisdiction to hear an appeal of the effective date for the 10 percent rating because there was no final Board decision on that particular issue.[40]

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v. Principi, 15 Vet. App. 189, 198 (2001) (holding that because the Secretary could not seek review of a BVA decision pursuant to 38 U.S.C.S. § 7252(a), the CAVC did not have authority to decide the Secretary's challenge to a favorable BVA finding).

[33] Reed v. Principi, 17 Vet. App. 380, 382 (2003); Clark v. Principi, 15 Vet. App. 61, 63 (2001).

[34] *See* McNaron v. Brown, 10 Vet. App. 61, 64 (1997); Bethea v. Derwinski, 2 Vet. App. 252, 255 (1992).

[35] *See* Bethea, 2 Vet. App. at 255.

[36] A "claim," as we use this word here, refers to a request for a particular benefit administered by VA. For example, for service-connected disability compensation, each type of disability for which a claimant may seek disability compensation is a different claim. Thus, a claim for service-connected disability compensation for a back disorder is a different claim from one for service-connected disability compensation for a neck disorder. See the discussion of the term "claim" in Section 15.2.6.

[37] 38 U.S.C.S. § 7266(a).

[38] Maggitt v. West, 202 F.3d 1370, 1376 (Fed. Cir. 2000); *see also* Breeden v. Principi, 17 Vet. App. 475, 478 (2004) ("Because the Board's remand here does not make a final determination with respect to the benefits sought by the veteran, i.e., service connection for PTSD, the Board's remand does not represent a final decision over which this Court has jurisdiction"); Matthews v. Principi, 15 Vet. App. 138, 139 (2001).

[39] 13 Vet. App. 546, 549 (2000).

[40] Hibbard, 13 Vet. App. at 548–49.

In many cases, the Board will decline to adjudicate the merits of a claim that is not yet ripe for final adjudication. If the RO has not yet taken any action on the claim, the Board will "refer" the claim for RO adjudication.[41] Where the RO has already adjudicated the claim, and the claimant took the proper steps to appeal the RO's decision to the Board, the Board may remand the claim to the RO for further evidentiary development,[42] issuance of a statement of the case (SOC) for a legacy appeal,[43] or for compliance with some other procedural requirement. As discussed in *Sections 15.2*.3.1.1 and 15.2.3.1.2, while the CAVC has jurisdiction to review the Board's decision to refer a claim to the RO, it generally lacks jurisdiction to review the Board's remand orders.

15.2.3.1.1 The CAVC's Jurisdiction to Review BVA Remand Orders

Generally, if the Board remands a claim for benefits to the RO, the claimant may not appeal the decision to remand.[44] Since the Board's decision to remand the claim is not a "final decision" under *38 U.S.C.S. § 7266(a)*, the Court does not have jurisdiction to review that decision. Instead, the claimant must wait until the RO acts on the remanded claim, the case is returned to the Board, and the Board issues a decision on that remanded claim before an appeal can be taken to the Court.[45] When the Board issues a decision following a prior remand, it is incumbent upon the Board to include the reasons or bases for any unfavorable findings made in its prior remand orders, if applicable, so that those findings become part of the final Board decision and subject to appellate review.[46] Similarly, where the Board's prior remand language leads a claimant to reasonably believe, albeit mistakenly, that an issue has been resolved favorably, but on further de novo review the Board changes its finding, fair process dictates that the claimant be given notice of the proposed factual finding and the opportunity to submit evidence on that issue.[47]

If the Board grants a claim, it typically remands the claim for the RO to decide a "downstream" part of the claim in the first instance. For example, if the Board awards service connection, the "downstream" issues of the appropriate disability rating and effective date are matters left for the RO to address in the first instance. The Court has held that it has no jurisdiction to review a "downstream" issue where the Board decision granted service connection or an increase in disability rating, but fails to determine, or

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[41] *See* *38 C.F.R. § 20.904(b) (2020)*.

[42] *38 C.F.R. § 20.904(a) (2020)*; ***see*** Disabled Am. Veterans v. Sec'y of *Veterans Affairs, 327 F.3d 1339, 1345–46 (Fed. Cir. 2003)*.

[43] *See* *38 C.F.R. § 20.904(c) (2020)*.

[44] *Breeden, 17 Vet. App. at 478*; *Brambley v. Principi, 17 Vet. App. 20, 22 (2003)*; *Howard v. Gober, 220 F.3d 1341, 1344 (Fed. Cir. 2000)*; *Neumann v. West, 14 Vet. App. 12, 19 (2000)*; *Tetro v. Gober, 14 Vet. App. 100, 104 (2000)*.

[45] The inability to appeal a BVA remand can be particularly frustrating to a claimant because of the length of time it takes from the filing of the claim to the date of the BVA remand. The claimant's frustration can be exacerbated by the length of time it takes for the RO to act on the case after the BVA remands it. Unfortunately, the BVA takes the position that it does not have legal authority to compel the RO to act on a remand within a particular length of time. If the RO unreasonably delays in acting on a remand, the claimant can seek an order from the CAVC under the All Writs Act to force the RO to take action. *See* *Section 15.2.5* of this Manual. Indeed, the CAVC has previously advised some claimants who have prematurely sought review of a BVA remand that if the remand "is not resolved in a timely fashion, [the claimant] would be free to pursue an extraordinary writ in this Court." ***Harris v. Derwinski, 1 Vet. App. 180, 184 (1991)***. Unfortunately for claimants, however, when those experiencing long delays have pursued such a writ, the CAVC has been extremely reluctant to exercise this authority to order VA to act. *See* *Section 15.2*.5.1.

[46] *Mathews v. McDonald, 28 Vet. App. 309, 315–16 (2016)* (holding that "the Board is not permitted to sub silentio incorporate its reasons or bases from a prior remand order into a later decision").

[47] *Smith v. Wilkie, 32 Vet. App. 332, 338–339 (2020)*.

order the RO to determine, a "downstream" issue; this is because such a Board decision is not final or adverse to the claimant on the downstream issue, and the claimant never filed a notice of disagreement (NOD) as to the downstream issue.[48]

It is also common for the Board to issue a decision that denies entitlement to service connection for one claim, but remands other claims for further evidentiary development or for compliance with VCAA notice provisions.

Notably, even when the Court has jurisdiction to review a denied claim, if that claim is inextricably intertwined with a claim that was remanded or remained pending before the agency, the Court may decline to review the merits of the claim and will instead remand the claim for adjudication with the pending inextricably intertwined claims.[49] Thus, the Court may either exercise jurisdiction over the appeal of a denied claim that is inextricably intertwined with other claims that remain pending before the agency, or, for reasons of judicial economy, it may remand the denied claim for further adjudication with the inextricably intertwined matters.[50]

A different situation arises when the veteran has claimed entitlement to service connection for one disability based on more than one theory of entitlement. The Court held in *Tyrues* that when the Board issues a decision that denies a claim on a direct service connection theory, but remands the claim on a presumptive service connection theory, the decision is final as to the denial on the direct service connection theory, and the claimant must submit a notice of appeal to the Court within 120 days of the date of the Board decision to preserve his or her rights to appeal that determination.[51] In that case, the Board issued a decision in 1998 that denied entitlement to service connection for a lung disorder on a direct service connection basis. However, in the same decision, the Board remanded the issue of presumptive service connection for an undiagnosed illness manifested by shortness of breath.[52] The veteran did not submit a notice of appeal to the 1998 decision, and after further evidentiary development, the Board issued another decision in 2004 denying entitlement to presumptive service connection for a lung disorder due to an undiagnosed illness. The veteran submitted a notice of appeal within 120 days of the date of the 2004 Board decision, but the Court held that it only had jurisdiction to review the Board's decision as to entitlement to presumptive service connection. The Court explained that because the 1998 Board decision specifically denied benefits for a lung disorder under a direct service connection theory of entitlement, that decision had become final as to that matter when the veteran failed to submit a notice of appeal within 120 days of the date of the decision. It held that "a final Board decision denying VA disability compensation based upon direct service connection, while

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[48] *Urban v. Principi, 18 Vet. App. 143 (2004)*; *38 C.F.R. § 20.202 (2020)*.

[49] *Tyrues v. Shinseki, 23 Vet. App. 166, 177–78 (2009)* (en banc), *aff'd*, *631 F.3d 1380 (Fed. Cir. 2011)*, *cert. granted* ***565 U.S. 802 (2011)*** (vacated and remanded on other grounds), *remanded to* *26 Vet. App. 31 (2012)*, *aff'd*, *732 F.3d 1351 (Fed. Cir. 2013)*, *cert. denied*, ***134 S. Ct. 1789 (2014)***.

[50] *See* *El-Amin v. Shinseki, 26 Vet. App. 136, 141 (2013)* (finding that a claim for burial benefits is inextricably intertwined with a claim for service connection for veteran's cause of death and must be remanded together).

[51] *23 Vet. App. at 176*. In October 2011, the United States Supreme Court vacated the Federal Circuit's decision affirming the CAVC's holding. ***Tyrues, 565 U.S. at 802***. The Supreme Court remanded the case for the Federal Circuit to consider the Supreme Court's holding in *Henderson v. Shinseki, 562 U.S. 428, 440–41 (2011)*, that the statute setting forth the 120-day deadline for filing a notice of appeal to the CAVC is not jurisdictional in nature. As explained in Section 15.2.3.2, the Supreme Court's decision in *Henderson* and the CAVC's subsequent decision in *Bove v. Shinseki, 25 Vet. App. 136, 140 (2011)* have revived the doctrine of equitable tolling as it applies to the 120-day period for submitting a notice of appeal. The Federal Circuit then remanded the case to the CAVC for consideration. 467 F. App'x. 889 (Fed. Cir. 2012). On remand, the CAVC reaffirmed its earlier decision, finding that "the appellant (1) did not file a NOA within 120 days after VA mailed the Board's September 1998 decision, (2) filed no asserted appeal for more than 5 years thereafter, and (3) did not assert that the time to file his appeal should be equitably tolled … ." *26 Vet. App. 31, 34 (2012)*.

[52] *Tyrues, 23 Vet. App. at 169*.

consideration of benefits based on presumptive service connection is still under adjudication, constitutes a final decision subject to separate appeal to the Court." The Court pointed out that a different result could lead to a veteran having to wait years for the VA to finally adjudicate the claim on a presumptive service connection theory of entitlement before the Court would have jurisdiction to review the adverse Board decision on the direct service connection theory of entitlement.[53]

There is one very rare exception to the rule set forth in *Tyrues*: when the Board identifies several distinct theories of entitlement to service connection, but issues separate decisions as to each theory, the time to submit a notice of appeal does not begin to run until the Board has issued final decisions on *all* theories of entitlement.[54]

15.2.3.1.2 The CAVC's Jurisdiction to Review the BVA's Referral of a Claim

The Court has held that it has jurisdiction to review the Board's decision to refer a claim *if* the Board had jurisdiction over the claim it referred at the time it decided to refer it.[55] For example, in *Young*, the Court held that it had jurisdiction to review the Board's decision to refer, rather than remand, a claim for service connection for a generalized anxiety disorder because the claim before the Board at the time of referral encompassed the generalized anxiety disorder diagnosis. In that case, the veteran identified posttraumatic stress disorder (PTSD) as the condition for which he sought service connection, but the evidence developed during the processing of the claim indicated that the veteran's symptoms were caused by a generalized anxiety disorder rather than PTSD.[56] The Court noted that pursuant to its holding in *Clemons v. Shinseki*,[57] the claim before the Board necessarily encompassed the diagnosis of generalized anxiety disorder. The Court pointed out that "referral of a matter is appropriate only when the Board lacks jurisdiction over the matter being referred," and concluded that because the claim before the Board encompassed the veteran's generalized anxiety disorder, the Board erred in referring, rather than remanding, that part of the claim.[58]

In addressing its jurisdiction, the Court noted that "[b]ecause [it] has jurisdiction over the Board decision denying a part of the claim for benefits for a mental disability, the Court has the authority to 'decide all relevant questions of law' that arise with regard to the denied claim, including the propriety of referring rather than remanding, another part of the claim to the RO."[59] The Court further noted that "[i]t is well settled that this Court has jurisdiction to determine whether the Board had jurisdiction to take the action

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[53] *Tyrues, 23 Vet. App. at 170, 176*.

[54] *Roebuck v. Nicholson, 20 Vet. App. 307, 315–16 (2006)*; *see also* *Tyrues, 23 Vet. App. at 173–75* (distinguishing facts from the facts in *Roebuck*).

[55] The Board may refer a matter when the Board lacks jurisdiction, whereas remand is the appropriate action when the Board has jurisdiction over the matter. *Young v. Shinseki, 25 Vet. App. 201, 202–03 (2012)* (en banc); *Narron v. West, 13 Vet. App. 223, 229 (1999)* (holding that the Board erred in referring the issue of entitlement to waiver of an overpayment when the claim before it encompassed a dispute as to both the amount of the overpayment and whether waiver was warranted); *Manlincon v. West, 12 Vet. App. 238, 240–41 (1999)*; *cf.* *Godfrey v. Brown, 7 Vet. App. 398, 409 (1995)* (holding that the Board did not err in referring, rather than remanding, a claim for service connection over which it did not have jurisdiction). *See* Section 13.1.1 of this Manual for more details about the Board's jurisdiction.

[56] *Young, 25 Vet. App. at 202*.

[57] *23 Vet. App. at 5–6* (holding that a claim for service-connected disability benefits is not limited to a diagnosis specifically identified by a claimant). *See* Section 15.2.6.

[58] *Young, 25 Vet. App. at 203*.

[59] *Young, 25 Vet. App. at 202–03* (citing *38 U.S.C.S. §§ 7252*, *7261(a)(1)*; *Manlincon, 12 Vet. App. at 240–41*).

it takes in a decision."[60] However, the Court was careful to limit its holding to situations where the Board *denied* part of the claim and *referred* the other. The Court noted that Mr. Young had argued that the Court would have jurisdiction over *any* Board decision to refer a claim, even if no part was denied, but declined to decide the issue.[61]

Another example of a situation where the Court has jurisdiction to review the Board's decision to refer, rather than remand, a claim is found in *Manlincon*. In that case, the Court concluded that the appellant's claim for Dependency and Indemnity Compensation was properly before the Board at the time the Board referred the claim to the RO, because the appellant had submitted a sufficient NOD with the RO's decision denying the claim. The Court therefore vacated and remanded the Board's decision referring the claim for the Board to remand the issue for a SOC.[62]

15.2.3.2 The Requirement That the Notice of Appeal Must Be Received or Mailed Using the U.S. Postal Service Within 120 Days of the Mailing of the BVA Decision

Once the advocate has determined that the Board has issued an appealable decision (or at least that there is reason to believe so), the next step is to file a notice of appeal. The mechanics of filing a notice of appeal are discussed in detail in Section 15.6.5.

For the Court to have jurisdiction over the appeal, the individual seeking Court review must file a notice of appeal with the Court within 120 days of the date on which the Board mailed notice of its decision.[63] Section 15.2.4 contains discussion of special rules that apply to this filing deadline when a veteran files a motion for reconsideration or vacatur of the Board decision within the 120-day deadline.

In most cases, the 120-day period does not begin to run until both of the following conditions are met: (1) the Board mails its decision to the last known address of the claimant; and (2) if the claimant has a representative, the Board sends a copy of the decision to the representative "by any means reasonably likely to reach the representative within the same time a copy would be expected to reach the representative if sent by first-class mail."[64]

A special exception to this rule exists for appellants who are called to active duty during the 120-day appeal period. In *Ausmer v. Shinseki*,[65] the Court held that the Servicemembers Civil Relief Act of 2003

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[60] *Young, 25 Vet. App. at 203* (citing *King v. Nicholson, 19 Vet. App. 406, 409 (2006)*); ***see also*** *Harper v. Wilkie, 30 Vet. App. 356, 359 (2018)* (holding that "[w]hether the Board has jurisdiction over a matter, including whether an issue is properly bifurcated, is a question of law that this Court reviews de novo").

[61] *Young, 25 Vet. App. at 202*.

[62] *Manlincon, 12 Vet. App. at 240–41*.

[63] ***See*** *38 U.S.C.S. § 7266(a)*; ***but see*** U.S. VET. APP. R. 4(a)(3) (An untimely notice of appeal may be treated as timely if the Secretary does not file a motion to dismiss within 45 days after the filing date of the Board decision or if the exceptions set forth in U.S. VET. APP. R. 4(a)(3)(b) apply) and U.S. VET. APP. R. 26(a) (In computing the deadline for submission of the notice of appeal, the Court's rules say that if the deadline falls on a Saturday, Sunday, legal holiday, or day the Court is closed at the direction of the chief judge, the notice of appeal deadline will be the following day the Court is open). There is no requirement that a claimant file any earlier than the 120-day deadline. *James v. Wilkie, 917 F.3d 1368, 1375 (Fed. Cir. 2019)*. If a veteran files a claim alleging that a particular BVA decision contains clear and unmistakable error (CUE) and this CUE claim is subsequently denied by the Board, he or she may wish to appeal the Board decision denying the CUE claim to the CAVC. If the veteran wishes to file an appeal, the time period in which to appeal runs from the date of the Board decision that denies the CUE claim, rather than the earlier BVA decision that the veteran alleges contains CUE.

[64] *38 U.S.C.S. § 7104(e)(2)*. ***See*** Veterans' Benefits Improvement Act of 1996, ***Pub. L. No. 104-275*** (1996). This amendment to the statute went into effect in Oct. 1996. ***See*** *Ryan v. West, 13 Vet. App. 151, 157 (1999)* (section of the new law that allows BVA to provide copies of its decisions to claimants via delivery systems other than the U.S. mail is not retroactive).

applies to proceedings before the Court, and that "a servicemember's period of [active] military service … may not be included in computing the 120-day period in which a service member adversely affected by a Board decision must file a NOA at the Court."[66] The Court further held that in certain circumstances, an appellant who has been called to active duty may be granted an additional 90-day extension of time to file a notice of appeal.[67] Applying this exception, the Court found in *Ausmer* that because the appellant was on active duty from May 16, 2011 until June 29, 2012, the 120-day period to appeal an October 25, 2011 Board decision did not begin until June 29, 2012, the date he was released from active duty. The Court further found that because the appellant had been deployed to Afghanistan during his period of active duty, and in "recognition of the difficulties that a servicemember faces upon returning from deployment in a combat zone," the appellant was entitled to an additional 90 days to file his notice of appeal. Therefore, the appellant had until September 27, 2012 (120 plus 90 days from June 29, 2012) to file his notice of appeal.[68]

The law is well settled that there is a presumption that the Secretary and the Board properly discharge their official duties by mailing a copy of the Board decision to the claimant on the date the Board decision is issued.[69] This is known as the "presumption of regularity."[70] However, an appellant can overcome this presumption by submitting "clear evidence" that the Board's regular mailing practices are shown to be irregular.[71] For example, in *Clark v. Principi*,[72] the CAVC held that an appellant successfully overcame the presumption of regularity when he proved that the Board mailed the Board decision to him at an incorrect address. When the decision is not properly addressed, the presumption of regularity will not apply, even if the decision is not returned as undeliverable by the U.S. Postal Service.[73] Where a decision *was* properly addressed, evidence that a decision was returned as

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[65] *26 Vet. App. 392 (2013)*.

[66] *Ausmer, 26 Vet. App. at 398* (citing *50 U.S.C.S §§ 511*, 526). Since the Servicemembers Civil Relief Act defines "military service" as "active duty," periods of active duty for training or inactive duty for training do not appear to fall under this special exception to the 120-day rule. *See* *Ausmer, 26 Vet. App. at 397*. The Federal Circuit has held that periods during which a service member is placed on the Temporary Disability Retirement List do not constitute periods of "military service" under the Servicemembers Civil Relief Act because they are not on "active duty." *Cronin v. United States, 765 F.3d 1331, 1335–36 (Fed. Cir. 2014)*.

[67] *Ausmer, 26 Vet. App. at 399* (citing *50 U.S.C.S §§ 524*, 525).

[68] *Ausmer, 26 Vet. App. at 402*.

[69] *Toomer v. McDonald, 783 F.3d 1229, 1234–37 (Fed. Cir. 2015)*; *Sthele v. Principi, 19 Vet. App. 11, 16–17 (2004)*; *but see* *Posey v. Shinseki, 23 Vet. App. 406, 410 (2010)* (discussing VA's failure to demonstrate the existence of a consistent and regular procedure that VA follows in cases in which the Board decision is returned as undeliverable and remailed to the claimant at a different address).

[70] *Clark v. Principi, 15 Vet. App. 61, 63 (2001)*; *Davis v. Brown, 7 Vet. App. 298, 300 (1994)*; *but see* *Mathis v. McDonald, No. 2015-7094, 2016 U.S. App. LEXIS 5968 (Fed. Cir. Apr. 1, 2016)* (discussing the application of the "presumption of regularity" in contexts other than mailing procedures), *aff'g* *No. 13-3410, 2015 U.S. App. Vet. Claims LEXIS 654 (May 21, 2015)*.

[71] *Thompson, 8 Vet. App. at 178–79*; *Clark, 15 Vet. App. at 63*; *see also* *Posey, 23 Vet. App. at 410*. In *Toomer, 783 F.3d at 1236*, the Federal Circuit agreed with the CAVC that evidence that the appellant notifed VA during the 120-day appeal period that he had not received the BVA decision did not alone rise to the level of clear evidence sufficient to rebut the presumption of regularity.

[72] *15 Vet. App. at 61*.

[73] *Boyd v. McDonald, 27 Vet. App. 63, 73 (2014)*.

undeliverable may also be sufficient to overcome the presumption of regularity, but only if there were "other possible and plausible addresses available to the Secretary at the time of the BVA decision."[74]

The CAVC may still dismiss an appeal as being untimely even if the veteran has successfully overcome the presumption of regularity by demonstrating that the Board did not properly mail the Board decision. This may occur if the VA's mailing defect was cured by the veteran's **actual** receipt of the Board decision, and the claimant failed to file a notice of appeal within 120 days of the veteran's **actual** receipt of the Board decision.[75] The VA bears the burden of showing that the mailing defect was cured by the appellant's actual receipt of the Board's decision, and the Court "will not assume actual receipt of that decision until there is evidence of actual receipt."[76] However, if the VA satisfies this burden and establishes that the mailing defect was cured by actual receipt, the 120-day period to file an appeal begins to run on the date that the defect was cured by actual receipt.[77]

In most cases where the appellant is represented by counsel at the time the notice of appeal is filed, the notice of appeal can be filed electronically by attaching the document to an email and sending it to the Court's esubmission email address.[78] If the notice of appeal is submitted electronically, it must be received by the Court no later than 11:59 P.M. on the 120th day from the date of the Board's decision.[79]

An alternative method for submitting the notice of appeal that is available to both represented and unrepresented parties is submission via the U.S. Postal Service.[80] There are two special rules that affect notices of appeal that are submitted via the U.S. Postal Service: the statutory mailbox rule and the common law mailbox rule. The statutory mailbox rule is found in *38 U.S.C.S. § 7266(a)* itself, which provides that if a notice of appeal is properly addressed to the Court and mailed on or before the 120th day, it is deemed to be received by the Court on the date of the U.S. Postal Service postmark.[81] The common law mailbox rule provides that if it is proved that a properly addressed letter was delivered to

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[74] *Davis v. Principi, 17 Vet. App. 29 (2003)*. In *Davis*, the Court held that the appellant had not overcome the presumption of regularity because even though the BVA decision was returned as undeliverable, there was no other "possible and plausible address" for him in the claims file at the time of the Board decision. *17 Vet. App. at 38*. In these circumstances, advocates should consider requesting equitable tolling of the 120-day period due to extraordinary circumstances. See *Section 15.2*.3.2.1 for more information regarding the doctrine of equitable tolling.

[75] *See* *Hampton v. Nicholson, 20 Vet. App. 459 (2006)* (per curiam order). In *Hampton*, the appellant called the Board's chief counsel for policy to "express his displeasure with [a May 20, 2002 BVA] decision," who in turn memorialized the conversation in a Report of Contact. The Court found that the unrebutted Report of Contact dated within weeks of the issuance of the decision showed appellant's actual knowledge of the Board decision and its timely receipt. Likewise, in *Clark, 15 Vet. App. at 64*, there was evidence that the veteran had actually received the May 1999 BVA decision in 2000, even though the BVA had not properly mailed the Board decision to the veteran. The Court held that the mailing defect was cured by the appellant's actual receipt of a copy of the Board decision in Jan. 2000, thereby causing the 120-day period to file a notice of appeal to begin to run at that time.

[76] *Boyd, 27 Vet. App. at 73*.

[77] *See* *Clark, 15 Vet. App. at 64*; *Davis, 7 Vet. App. at 303*; *Fluker v. Brown, 5 Vet. App. 296, 298 (1993)*.

[78] *See* U.S. VET. APP. E-RULE 3(c). The filing rules for represented and unrepresented parties are discussed in detail in *Section 15.6*.2.

[79] *See* *Bove, 25 Vet. App. at 145*.

[80] *See* U.S. VET. APP. R. 3–4; U.S. VET. APP. E-RULE 2(c).

[81] *See* Veterans' Benefits Improvement Act of 1994, ***Pub. L. No. 103-446***, § 511, ***108 Stat. 4645***, 4670 (1994); *Evans v. Principi, 17 Vet. App. 41 (2003)*. The mailbox rule only applies if the U.S. Postal Service is used. If private commercial carriers such as Federal Express are used, the notice of appeal must be received by the Court on or before the 120th day, regardless of when the notice of appeal is delivered to the private commercial carrier. *See* *Mapu v. Nicholson, 397 F.3d 1375, 1381 (Fed. Cir. 2005)*; *see also* *James v. Wilkie, 917 F.3d 1368, 1372 (Fed. Cir. 2019)*.

the post office, then it is presumed that the letter reached its destination at the regular time. In order to trigger the common law mailbox rule, the claimant must provide evidence demonstrating that the notice of appeal was properly addressed, stamped, and mailed in time to reach the Court in the normal course of post office business before the 120-day deadline elapsed. In lieu of "direct" proof of mailing, a claimant may prove the fact of mailing through evidence of mailing custom or routine practice. The common law mailbox rule is a rebuttable presumption of fact and may be overcome. In *Rios v. Nicholson*, the Federal Circuit declined to delineate what evidence would be sufficient to overcome the presumption, but it explicitly held that the mere fact that the Court did not have any evidence that it ever received the notice of appeal is not enough to rebut the presumption.[82]

In some cases, a notice of appeal may be "properly addressed to the Court" even if the appellant makes an error in addressing the notice of appeal. In *Santoro v. Principi*,[83] the Federal Circuit reversed a decision by the Court dismissing an appeal on the ground that it was not "properly addressed to the Court." Although the appellant used the correct street address when mailing his notice of appeal to the Court, he used an incorrect zip code. The Federal Circuit held that the postmark rule applied since the appellant's use "of an incorrect zip code was an inconsequential error that did not prevent his notice of appeal from being properly addressed within the meaning of *38 U.S.C. § 7266(a)(3)(b)*."[84] On the other hand, in *Reed v. Principi*,[85] the Court held that the postmark rule did not apply when the appellant improperly addressed his notice of appeal to the VA's Office of the General Counsel (OGC) rather than to the Court. The veteran's error in misaddressing his notice of appeal to the OGC's office "did not 'enable delivery to the intended destination of the Court.' "[86]

Advocacy Tip

*While it is always advisable to file an appeal with the Court before the 120-day filing deadline expires, advocates should become very familiar with the Court's Rule 4(a)(3) addressing the timeliness of appeals. The Court has recently changed how it treats appeals received after the 120-day filing deadline, putting the burden on the VA to file a motion to dismiss an untimely appeal. If a motion to dismiss is filed, advocates should be prepared to respond by either showing excusable neglect (if the appeal is received within 30 days after the expiration of the filing deadline), or by showing that equitable tolling is warranted (if the appeal is received more than 30 days after the expiration of the filing deadline).***

15.2.3.2.1 The Availability of Equitable Tolling of the 120-Day Deadline

Over the years, there have been a number of changes in the law controlling whether there are circumstances in which the Court has jurisdiction over a notice of appeal filed after the 120-day statutory period has expired.[87] In *Bove v. Shinseki*,[88] the Court explicitly held that the 120-day period for

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[82] *Rios v. Nicholson, 490 F.3d 928, 931–33 (Fed. Cir. 2007)*.

[83] *274 F.3d 1366 (Fed. Cir. 2001)*.

[84] *Santoro, 274 F.3d at 1370*.

[85] *17 Vet. App. at 380, 383*; *see also* *Rickett v. Shinseki, 23 Vet. App. 366, 369 (2010)*, *withdrawn*, *27 Vet. App. 240 (2015)*.

[86] *Reed, 17 Vet. App. at 383* (quoting *Santoro, 274 F.3d at 1370*). However, as explained in *Section 15.2.3.2.1 of this Manual*, the misfiling of the notice of appeal may provide the basis for equitably tolling the 120-day time limit for filing the notice of appeal. *See* *Rickett v. Shinseki, 26 Vet. App. 210 (2013)* (en banc), *withdrawn*, *27 Vet. App. 240 (2015)*; *Santana-Venegas v. Principi, 314 F.3d 1293 (Fed. Cir. 2003)*.

filing a notice of appeal is non-jurisdictional and, thus, *is* subject to equitable tolling.[89] Although the Court in *Bove*, held that it may address whether the deadline to file an appeal should be equitably tolled, even if VA never raises any objection as to the timeliness of the notice of appeal,[90] this holding was limited by the Federal Circuit in *Dixon v. McDonald*.[91] In *Dixon*, the Federal Circuit overturned the Court's holding, finding that when the Secretary waives the non-jurisdictional timeliness defense, the Court does not have the authority on its own to grant the Secretary relief as to that defense.[92]

The Federal Circuit's holding in *Dixon*, was implemented by the Court in an Order issued on December 20, 2017.[93] In that Order, the Court reported that it will discontinue its practice of *sua sponte* raising the untimeliness issue of any NOA filed. Instead, the Court will only act on matters of the timeliness of an appeal if the Secretary raises the issue in a motion. If the Secretary intends to raise the issue that a NOA is untimely, the Secretary must file a motion to dismiss not later than 45 days after the Secretary files the Board decision. Pursuant to Rule 4 of the Court's Rules of Practice and Procedure,[94] if the Secretary does not file the motion to dismiss for failure to file a timely notice of appeal within 45 days after the filing date, the notice of appeal will be treated as timely regardless of the date it was received. If the Secretary does file a timely motion to dismiss, an untimely notice of appeal will be treated as timely if the notice of appeal is received (1) within 30 days after the expiration of the filing deadline and the appellant demonstrates good cause or excusable neglect for failure to file the notice of appeal

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[87] *See* Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) (en banc) (holding that under the equitable tolling doctrine, there are some circumstances in which the Court can excuse a failure to file the notice of appeal within the 120-day appeal period); *but see* Bowles v. Russell, 551 U.S. 205, 214 (2007) (holding that filing of a notice of appeal in a civil case is a jurisdictional requirement that is not subject to equitable tolling, prompting lower court's to rule that the failure to submit a notice of appeal to the Court within 120 days of the date of the mailing of the Board's decision could not be excused on the basis of equitable tolling); Jones v. Peake, 22 Vet. App. 247 (2008) (dismissing an appeal for lack of jurisdiction where a notice of appeal was not filed with the Court and a motion for reconsideration was not filed with the BVA within the 120-day appeal period); *see also* Henderson v. Peake, 22 Vet. App. 217 (2008), *aff'd sub nom.* Henderson v. Shinseki, 589 F.3d 1201 (Fed. Cir. 2009), *rev'd*, 562 U.S. 428, 441–42 (2011) (holding that that the 120-day deadline for filing a notice of appeal with the Court is not jurisdictional in nature); Barrett v. Shinseki, 22 Vet. App. 457 (2009).

[88] 25 Vet. App. 136 (2011).

[89] Henderson, 562 U.S. at 431. The Court has held that equitable tolling is limited to circumstances in which a statute of limitations exists. Edwards v. Peake, 22 Vet. App. 29, 36 (2008) (holding that the period for submitting evidence is not subject to equitable tolling); Holle v. McDonald, 28 Vet. App. 112, 119 (2016) (holding that "CHAMPVA's enrollment requirements cannot be construed as a statute of limitations and, therefore, are not subject to equitable tolling").

[90] Bove, 25 Vet. App. at 143. The Federal Circuit previously agreed that the Court may address the timeliness of a notice of appeal on its own. Checo v. Shinseki, 748 F.3d 1373, 1378 (Fed. Cir. 2014); *but see* Checo, 748 F.3d at 1382 (Mayer, J., dissenting) ("The Veterans Court's regular practice of addressing, *sua sponte*, the question of whether a veteran's appeal is timely filed is contrary to the Supreme Court's admonition that a court should independently consider a statute of limitations defense only 'in exceptional cases.' Regularly raising an affirmative defense on behalf of the Secretary creates the appearance that the court functions not as a 'neutral arbiter,' but instead as a mere appendage of the Department of Veterans Affairs ('VA'), as even the Veterans Court once recognized." (internal citations omitted)).

[91] 815 F.3d 799 (Fed. Cir. 2016) (holding that the CAVC is not an exception to the general rule that "a court does not have the sua sponte authority to grant a party relief on a non-jurisdictional timeliness defense that the party has waived." Dixon, 815 F.3d at 805).

[92] Dixon, 815 F.3d at 803.

[93] Order *In re*: Timeliness of Appeals, CAVC Misc. Order No. 15-17 (2017).

[94] McGee v. Wilkie, 31 Vet. App. 368, 372 (2019) (holding that revisions to Rule 4 of the Court's Rules of Practice and Procedure apply to all appeals pending at the Court as of June 21, 2019, regardless of when the NOA itself was filed).

within the 120-day period; or (2) more than 30 days after the expiration of the filing deadline but equitable tolling is warranted because the appellant demonstrates an extraordinary circumstance that prevented filing in a timely manner and the exercise of reasonable due diligence in attempting to file a timely notice of appeal.[95]

The Federal Circuit has held that the doctrine of equitable tolling is available to appellants in at least the following three situations:[96] (1) the appellant has been misled or induced by the VA into missing the deadline for filing the notice of appeal; (2) the appellant has actively pursued his judicial remedies but misfiled the pleading by sending it to the wrong location within the deadline for filing the notice of appeal;[97] or (3) the appellant's failure to file timely was the direct result of a physical or mental illness that prevented the appellant from engaging in rational thought or deliberate decision-making or rendered the claimant incapable of handling his or her own affairs or unable to function in society.[98] The Court has also held that the doctrine of equitable tolling is available in a fourth situation: where appellant's failure to file timely was due directly to extraordinary circumstances beyond the appellant's control, as long as appellant exercised due diligence in preserving his or her right to appeal.[99] These four categories are not exclusive, but rather the Court is required to conduct a case-by-case analysis regarding whether equitable tolling is warranted.[100] However, the courts have held that equitable tolling does not apply when the claimant has missed the filing deadline through his or her own negligence or the negligence of the claimant's attorney.[101]

The first situation in which equitable tolling applies—when the appellant is misled or induced by VA into missing the filing deadline—is illustrated by *Bailey*. In *Bailey,* the veteran visited a RO and met with a Veterans Benefits Counselor (a VA employee) within the 120-day period. The counselor assisted the veteran in preparing a notice of appeal and the veteran stated that the counselor indicated that he would mail the form to the Court. After the 120-day period expired, the RO wrote to the veteran and indicated that the RO had mistakenly retained the notice of appeal and it was not mailed timely to the Court. The Federal Circuit held that because of the unique relationship between veterans and the VA, the veteran was misled by the conduct of the VA into allowing the deadline to pass. Although there was

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[95] R. 4(a)(3) of the Court's Rules of Practice and Procedure.

[96] Bove, 25 Vet. App. at 139–40; Bailey, 160 F.3d at 1360. As explained in Section 15.3.2.4, although the Court generally lacks the power to review facts that were not before the Board at the time of the decision on appeal, an exception to this general rule arises when the Court is resolving the issue of whether it possesses jurisdiction over a matter.

[97] Bailey, 160 F.3d at 1360; Jaquay v. Principi, 304 F.3d 1276, 1282–83 (Fed. Cir. 2002); *see also* Santana-Venegas, 314 F.3d at 1298; Rickett v. Shinseki, 26 Vet. App. 210 (2013) (en banc), *withdrawn*, 27 Vet. App. 240 (2015); Bove, 25 Vet. App. at 143–44, 145.

[98] Bailey, 160 F.3d at 1360; Arbas v. Nicholson, 403 F.3d 1379, 1381 (Fed. Cir. 2005); Barrett, 363 F.3d at 1321.

[99] Toomer, 783 F.3d at 1239; McCreary v. Nicholson, 19 Vet. App. 324, 324 (2005); *but see* Aldridge v. McDonald, 27 Vet. App. 392 (2015), *aff'd*, 837 F.3d 1261 (Fed. Cir. 2016) (Newman, J., dissenting).

[100] James, 917 F.3d at 1373 (vacating the Court's holding that a fallen mailbox flag is not an extraordinary circumstance beyond the veteran's control as the extraordinary circumstance element requires a case-by-case analysis, rather than a categorical determination, and the Court failed to provide such an analysis).

[101] McCreary, 19 Vet. App. at 324. In Davis v. Principi, 17 Vet. App. 29, 38 (2003), the Court held that equitable tolling was not available to an appellant who did not receive a copy of the BVA decision until after the filing deadline for his appeal had expired. The Court held that "by failing to keep VA apprised of his current address," appellant did not exercise due diligence in pursuing his judicial remedies. *See also* Nelson v. Nicholson, 19 Vet. App. 548 (2006) (quoting Gilbert by Gilbert v. Sec'y of HHS, 51 F.3d 254, 257 (Fed. Cir. 1995) that "[t]he negligence of [the claimant's] attorney does not justify equitable tolling"), *aff'd*, 489 F.3d 1380 (Fed. Cir. 2007).

no evidence of trickery on the part of the VA, the Court concluded that because of the VA's conduct, the filing deadline was tolled.[102]

The second situation in which equitable tolling applies—when the appellant misfiles the notice of appeal—is illustrated by *Rickett v. Shinseki*.[103] In that case, the appellant had submitted a document that he claimed to be a notice of appeal to the OGC within the 120-day period. The OGC then forwarded the document to the RO, which stamped it "appeals" and placed it in a locked cabinet where Board decision files are held for 150 days following the Board's decision.[104] After the 120-day period for filing the notice of appeal had passed, the appellant contacted the Court to inquire as to the status of his appeal, and at that time realized that he had misfiled the notice of appeal. The same day, he mailed a second notice of appeal to the Court, attached a copy of the notice of appeal he had mailed to the OGC, and explained this error.[105]

The Court has held that in order to demonstrate that equitable tolling should be applied in a case where the appellant misfiles the notice of appeal, four criteria must be met: (1) the appellant must demonstrate with independent proof (i.e., evidence beyond his or her bare assertion) that the notice of appeal was misfiled within the 120-days following the Board's decision; (2) the misfiled document must reflect a clear intent to appeal to the Court; (3) the purported notice of appeal must put VA on notice of the individual's intent to seek further review of his or her claim; and (4) the appellant must have exercised due diligence in preserving his or her legal rights with respect to the appeal. The Court further explained that the determination of whether an appellant exercised due diligence will be based on a "totality of circumstances" test, and the reasonableness of the location of the filing and the actions taken after learning of the misfiling are relevant factors.[106]

In applying the four criteria to the facts before it, the Court held in *Rickett* that equitable tolling was appropriate. First, there was no dispute that the appellant had misfiled his notice of appeal with the

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[102] Bailey, 160 F.3d at 1365. *Cf.* Thornhill v. Principi, 17 Vet. App. 480, 485 (2004) (equitable tolling does not apply where the veteran did not establish that any VA employee misled him into allowing the notice of appeal filing deadline to expire); Tavares v. Principi, 18 Vet. App. 131 (2004) (Court held equitable tolling did not apply because despite appellant's allegation that he was misled by VA employee, there was not a preponderance of evidence that appellant was misled or induced into missing filing deadline where VA employee denied appellant's allegations); Lariosa v. Principi, 16 Vet. App. 323, 327–28 (2002) (there is no basis for equitable tolling where claimant did not allege that VA misled or induced her into allowing filing deadline to pass and claimant's residence in a foreign country is not a basis for equitable tolling); Smith v. West, 13 Vet. App. 525 (2000) (where veteran missed filing deadline because he relied upon erroneous advice from a Volusia County veterans service officer, equitable tolling did not apply as the veterans service officer was not a VA employee and therefore veteran was not induced into missing the filing deadline by an "adversary's conduct," which is a prerequisite for equitable tolling); Chastain v. West, 13 Vet. App. 296, 300 (2000) (holding that the doctrine of equitable tolling would not be applied because the veteran was properly notified of the time limit within which to file his appeal, and the veteran did not demonstrate that any "VA adjudicative conduct" led to the veteran's failure to file a timely appeal).

[103] 26 Vet. App. at 210, *withdrawn*, 27 Vet. App. 240; *see also* Brandenburg v. Principi, 371 F.3d 1362, 1364 (Fed. Cir. 2004); Santana-Venegas, 314 F.3d at 1293; Bove, 25 Vet. App. at 143–45; *cf.* Thornhill, 17 Vet. App. at 485 (equitable tolling does not apply where the veteran did not establish that he had filed a defective pleading within the statutory time period in which to file an appeal).

[104] The Court explained that the purpose behind VA's practice of holding documents received after the date of a Board decision in a locked cabinet for 150 days is "to maintain the[] integrity [of Board decision files] pending possible appeal. …" Rickett, 26 Vet. App. at 210, *withdrawn*, 27 Vet. App. 240.

[105] Rickett, 26 Vet. App. at 213, *withdrawn*, 27 Vet. App. 240.

[106] Rickett, 26 Vet. App. at 218–23, *withdrawn*, 27 Vet. App. 240. The Court withdrew the decision and dismissed the appeal after learning in 2015 that the veteran had died in 2011. *See* Rickett, 27 Vet. App. 240. See Section 15.2.3.4.1 for a discussion of the circumstances in which the Court will dismiss an appeal following the death of the appellant.

OGC within the 120-day period for appealing the Board's decision. Second, by invoking the words "appeal" and "Courts" in his letter and submitting it two months after an adverse Board decision, the appellant clearly expressed his intent to appeal to the Court. Since the letter was filed with the OGC, the third criterion was satisfied because VA was clearly on notice of the appellant's intent to appeal within the 120-day period. Finally, because the "Notice of Appeal Rights", that was attached to the Board's decision, provided the address for the OGC with an explanation that that office handles fee agreements, it was reasonable for the appellant to file the notice of appeal at that location. Furthermore, because the appellant contacted the Court to inquire about the status of his appeal and filed a new notice of appeal with the Court promptly upon learning of the initial misfiling, his actions after the misfiling satisfied the fourth criterion.[107]

Equitable tolling may also be available when an appellant misfiles a notice of appeal with a RO or the Board; however, in most cases, equitable tolling will not be necessary because the Court will find that the 120-day period to file a notice of appeal does not begin to run unless and until the Board issues a decision as to whether the misfiled notice of appeal is actually a motion for Board reconsideration.[108] This is because VA's policy is to treat *any* written communication expressing disagreement with a Board decision as a possible motion for reconsideration that must be promptly forwarded to the Board for a determination as to whether the document is a true motion for Board reconsideration or a misfiled notice of appeal.[109] As discussed in *Section 15.2*.4, the finality of a Board decision is abated when a motion for reconsideration or vacatur is filed with the Board, and the 120-day period for filing a notice of appeal with the Court does not begin until the Board issues an unfavorable decision on the motion for reconsideration. However, a misfiled notice of appeal that fulfills the content requirements discussed in *Section 15.2*.3.3 will not be construed as a motion for reconsideration.[110] Accordingly, the Court has held that when the RO receives a written expression of disagreement with a Board decision within the 120-day period for filing a notice of appeal, the time period for filing the notice of appeal does not begin until (1) the VA determines that the written disagreement is a notice of appeal and returns it to the claimant with information as to how to properly file a notice of appeal or VA forwards the notice of appeal to the Court and so notifies the claimant; (2) the Board issues a determination of whether the document constitutes a notice of appeal or motion for Board reconsideration and notifies the claimant of the determination; or (3) the claimant files a notice of appeal with the Court and the Court determines that the document received by the RO was a notice of appeal and not a motion for Board reconsideration.[111]

The third situation in which equitable tolling applies—when an appellant is prevented from filing a timely notice of appeal due to mental or physical illness—is illustrated by *Barrett v. Principi*.[112] In *Barrett*, the

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[107] *Rickett, 26 Vet. App. at 223–25*, *withdrawn*, *27 Vet. App. 240*.

[108] *See* *Ratliff v. Shinseki, 26 Vet. App. 356, 360–61 (2013)*; *see also* *Gomez v. McDonald, 28 Vet. App. 39 (2015)* (expanding *Ratliff* to written expressions of disagreement filed at the Board); *Threatt v. McDonald, 28 Vet. App. 56 (2016)* ("Given that the appellant filed the NOA at the RO from which his claim originated within the new 120-day judicial appeal period, the Court finds that the appellant has satisfied all the requirements of circumstance and diligence to warrant the application of equitable tolling.").

[109] *Ratliff, 26 Vet. App. at 358*. The Court noted that prior to *Ratliff*, the Secretary had not cited this policy in other cases involving filings at the RO, such as *Fithian v. Shinseki, 24 Vet. App. 146, 157 (2010)*. *Ratliff, 26 Vet. App. at 359–60*.

[110] *See* *Threatt, 28 Vet. App. 56*; *Irwin v. Shinseki, 23 Vet. App. 128, 132 (2009)* (finding that a document submitted to the BVA within 120-day period for submitting a notice of appeal did not constitute a motion for BVA reconsideration because it clearly expressed an intent to seek judicial review); *see also* *Rickett, 23 Vet. App. at 369*, *withdrawn, 27 Vet. App. 240* (refusing to construe a notice of appeal submitted to the BVA as a motion for reconsideration).

[111] *Ratliff, 26 Vet. App. at 360–61*.

Federal Circuit held that a veteran's illness may be a basis for tolling the filing deadline if the veteran is able to establish that the failure to timely file a notice of appeal "was the direct result" of the veteran's illness "that rendered him incapable of 'rational thought or deliberate decision making' … or 'incapable of handling [his] own affairs or unable to function [in] society.'"[113] The Court made clear that "a medical diagnosis alone or vague assertions of [health] problems will not suffice."[114] Accordingly, in order to succeed on an argument that equitable tolling applies on this basis, the burden is on the appellant to submit to the Court specific medical evidence that persuasively demonstrates both that the physical or mental illness meets this standard and that the failure to file timely was a direct result of the illness.[115] This is a very difficult showing. In *Bove*, the Court rejected an appellant's argument that equitable tolling was warranted because he suffered from psychiatric disabilities that prevented him from filing a timely notice of appeal. The Court held that the evidence did not demonstrate that the appellant was *incapable* of functioning or decision-making due to mental illness despite the letters from the appellant's treating psychiatrist that the appellant's psychiatric disorders caused "difficulty in making every day decisions without an excessive amount of advice and reassurance from others" and "caused him to over-think and procrastinate until this deadline was passed."[116]

The fourth situation in which equitable tolling may be applied—when there are extraordinary circumstances—is suggested in *McCreary v. Nicholson.*[117] In *McCreary*, the Court expressed a willingness to apply equitable tolling when "extraordinary circumstances" are shown, the untimely filing was a direct result of the extraordinary circumstances, and due diligence is shown throughout the entire 120-day appeal period. This inquiry must be conducted on a case-by-case basis.[118] For example, the Court indicated it would be inclined to extend equitable tolling where it could be demonstrated that the fallout from a major weather event, in that case Hurricane Ivan, prevented timely filing of a notice of appeal.[119] In addition, homelessness may constitute an extraordinary circumstance warranting equitable tolling, so long as an appellant can demonstrate that the homelessness was the direct cause of the failure to file the notice of appeal and he or she exercised due diligence *during the time that he or she was homeless*.[120] For example, an appellant who was homeless for only 91 days of the 120 days she had to appeal the Board's decision was required only to show that her homelessness was the direct cause of her failure to file the notice of appeal and that she exercised due diligence during that 91-day period—not the full 120-day appeal period.[121] Having made such a showing, the 120-day appeal clock was stopped during the period of homelessness and not restarted again until the period of

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[112] *363 F.3d 1316 (Fed. Cir. 2004)*.

[113] *Barrett, 363 F.3d at 1321* (citations omitted).

[114] *Barrett, 363 F.3d at 1321*; *see also* *Mead v. Shulkin, 29 Vet. App. 159, 161 (2017)* ("a diagnosis alone does not warrant equitable tolling; rather, a claimant must demonstrate that an untimely filing was the direct result of an illness").

[115] *See* *Claiborne v. Nicholson, 19 Vet. App. 181 (2005)*; *Jones v. Principi, 18 Vet. App. 500 (2004)*.

[116] *Bove, 25 Vet. App. at 144–45*; *see also* *Palomer, 27 Vet. App. at 253–54*.

[117] *19 Vet. App. at 332*.

[118] *James, 917 F.3d at 1373*.

[119] *McCreary, 19 Vet. App. at 332*; *see also* *Toomer, 783 F.3d at 1238–39* (emphasizing that an appellant must show *both* extraordinary circumstances *and* due diligence).

[120] *See* *Checo v. Shinseki, 748 F.3d 1373 (Fed. Cir. 2014)*.

[121] *Checo, 748 F.3d at 1380–81*; *see also* *Checo v. McDonald, 27 Vet. App. 105, 106–08 (2014)*.

homelessness ended. This approach to equitable tolling has been fittingly termed the "stop-clock" approach.[122]

Contrastingly, the Court has held that although an appellant suffered three deaths in his family at the time of the appeal, evidence of his depression did not warrant equitable tolling as he was still able to maintain employment and manage his affairs and his family's estates.[123] Additionally, the Court has held that incarceration does not warrant equitable tolling where the claimant was able to communicate with the VA and a DAV service officer while incarcerated.[124] The courts have also made clear that "attorney neglect, such as missing a filing deadline, does not rise to the level of an extraordinary circumstance, and thus does not warrant equitable tolling."[125] However, the Federal Circuit has distinguished between attorney neglect and attorney *abandonment*, and has held that the latter is indeed a basis for equitable tolling.[126] In addition, the Court has held that the "inefficiencies in the delivery of mail between the United States and the Philippines" is not an extraordinary circumstance warranting equitable tolling, even though it is a circumstance beyond an appellant's control.[127]

15.2.3.3 The Required Contents of a Notice of Appeal

In addition to satisfying the requirement that the claimant file a notice of appeal within 120 days after the date on which the notice of the BVA decision is mailed, the document that the claimant files must meet certain additional requirements.[128] Failure to file an adequate notice of appeal within the 120-day time limit will result in the claimant losing his right to appeal the Board decision to the Court.[129]

In order to qualify as a notice of appeal, a document must comply with Rule 3(c) of the Court's Rules of Practice and Procedure, entitled "Content." This rule specifies that a notice of appeal shall:

(1) show the most recent name, address, and telephone number of the person or persons taking the appeal and the appropriate VA claims file number;[130]

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[122] Checo, 748 F.3d at 1379–80. It is noteworthy, that in adopting the "stop-clock" approach, the Federal Circuit appeared to endorse the notion that the *McCreary* standard of requiring diligence for the entire 120-day appeal period was a fallback approach to be used only when there was no end date to the extraordinary circumstance giving rise to the need for equitable tolling.

[123] Aldridge, 27 Vet. App. 392, *aff'd*, 837 F.3d at 1266.

[124] Smith v. Wilkie, 30 Vet. App. 205, 209 (2018).

[125] Nelson, 19 Vet. App. at 548, *aff'd*, 489 F.3d 1380 (Fed. Cir. 2007); *see also* Mead, 29 Vet. App. at 159 (holding that a filing deadline was not subject to equitable tolling despite counsel for the appellant's treatment for a medical condition during the relevant filing period).

[126] Sneed v. McDonald, 819 F.3d 1347, 1351–52 (Fed. Cir. 2016) (affirming the CAVC's holding that where an attorney-client relationship did not exist, attorney abandonment sufficient to require equitable tolling was not established and, even if attorney abandonment had occurred, appellant did not "satisfy the diligence prong"), *but see* Wallach. C.J., concurring (noting that an implied-in-fact attorney-client relationship may trigger equitable tolling principles).

[127] Palomer, 27 Vet. App. at 252–53.

[128] *See* Lariosa, 16 Vet. App. at 326–27; Perez v. Brown, 9 Vet. App. 452, 454–55 (1996). See Section 15.6.2 for a discussion of how to file case-initiating documents.

[129] Lariosa, 16 Vet. App. at 330; Perez, 9 Vet. App. at 456.

[130] The Court has held that when a veteran dies after a Board decision is issued but before the NOA has been filed, an individual claiming to be an eligible accrued-benefits claimant should, within the 120-day appeal period, "file an NOA in the accrued-benefits claimant's name and a separate statement providing the veteran's name, the date of the veteran's death,

(2) reasonably identify the Board decision being appealed and be able to be reasonably construed, on its face or from the surrounding circumstances, as expressing an intent to seek Court review of that decision; and

(3) if filed by a representative, other than one making a limited appearance, be accompanied by a notice of appearance and its attachments.[131]

A valid notice of appeal does not have to be on any particular form, but it must contain this essential information.[132] While a notice of appeal need not literally state that a Board decision is being appealed to the Court, it must be clear from the document and the circumstances of the filing that the claimant is seeking Court review of a Board decision.[133] The Court must interpret a notice of appeal liberally.

15.2.3.4 The Requirement That There Be a Case or Controversy

The Court adheres to the "case or controversy" requirement of *Article III, § 2 of the United States Constitution*.[134] Under the "case or controversy" doctrine, a federal court is prohibited from rendering advisory opinions; rather, "federal courts are to decide only actual controversies by judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in the case before it."[135] As part of a case or controversy, an appellant must also have standing to bring the appeal.[136] The Court has held that the "case or controversy" requirement is jurisdictional in nature and "must be present at the commencement of the appeal and must continue throughout the appeal."[137] Accordingly, if the VA pays

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and a request that the Secretary address the person's accrued-benefits status" with a copy of the veteran's death certificate or a statement of why the death certificate is not yet available. *Demery v. Wilkie, 30 Vet. App. 430, 439 (2019)*.

[131] U.S. VET. APP. R. 3(c). The Court has held that correspondence received from a claimant within the 120-day period will not count as a notice of appeal unless the correspondence contains these basic attributes. *See* *Garillos v. Derwinski, 2 Vet. App. 238 (1992)*.

[132] The Court's Form 1 may be used as a notice of appeal and appears on the Court's website at *http://www.uscourts.cavc.gov/documents/Form_1.pdf* (last visited April 22, 2020). *See* *Chadwick v. Derwinski, 1 Vet. App. 74, 76 (1990)* (Court held that a document submitted on a VA form not intended for use as a notice of appeal was nonetheless a valid notice of appeal because it "was filed by the appellant; it requested review by the Court; and was received by the Court within the requisite 120-day period"); *cf.* *Posey, 23 Vet. App. at 408–09* (finding that the document submitted to the Board on a VA form not intended for use as a notice of appeal was not a valid notice of appeal because it contained no mention of the Court or indication that the veteran was seeking judicial review).

[133] *Durr v. Nicholson, 400 F.3d 1375, 1380–81 (Fed. Cir. 2005)*; *see* *Boyd, 27 Vet. App. at 70 (2014)* (holding that a document stating that appellant "disagree[d] with the [Board] and [was] appealing to the Court of Appeal[s] to overturn the Board's decision" constituted a valid notice of appeal even though the veteran did not identify the Board decision by date). *Cf.* *Martin v. Brown, 10 Vet. App. 100 (1997)* (holding that even though the veteran's letter to the Court identified the party taking the appeal, designated the BVA decision being appealed, and included the address of the appellant, it did not constitute a notice of appeal because the veteran did not make clear his intent that he was seeking Court review); *Perez, 9 Vet. App. at 454–55* (finding that the veteran's mere references to his health before and after service did not constitute a valid notice of appeal because the Court could not discern an intent to appeal from a specific BVA decision).

[134] *Mendoza v. Shinseki, 25 Vet. App. 189, 190 (2012)*; *Padgett v. Peake, 22 Vet. App. 159, 162 (2008)* (citing *Mokal, 1 Vet. App. at 15*).

[135] *Norvell v. Peake, 22 Vet. App. 194, 200 (2008)* (quoting *Teva Pharms. USA, Inc. v. Novartis Pharms. Corp., 482 F.3d 1330, 1337–38 (Fed. Cir. 2007)* (internal quotations omitted).

[136] *Braan, 28 Vet. App. at 238* (holding that a veteran lacked standing to bring an appeal where his wife filed the initial claim). See *Section 15.2*.2 for a discussion on who has standing to bring an appeal before the Court.

[137] *Norvell, 22 Vet. App. at 201* (citing *U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980))*.

the benefits sought by the claimant during the course of the appeal, there is no case or controversy and the case will generally be dismissed as moot.[138] The exception to this rule applies when a case is capable of repetition yet evading review. This doctrine applies in exceptional situations, where (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and (2) "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again."[139]

The Court invoked the "case or controversy" doctrine in *Norvell v. Peake*,[140] and refused to resolve the issue of whether the VA violated its duty to assist in obtaining federal records by failing to request VAMC quality assurance records relating to the appellant's surgery in a claim under *38 U.S.C.S § 1151*. The Court found that, based on the Secretary's submissions and arguments during the pendency of the appeal, such records did not exist, and any opinion by the Court regarding the VA's statutory duty to obtain the records would not affect the appellant and would therefore constitute a prohibited advisory opinion.[141]

Because the "case or controversy" requirement is jurisdictional in nature, both the appellant and the VA attorney are under an affirmative duty to "notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision."[142] The Court has explained that "[t]his duty is vital to ensure that the Court does not issue a decision absent a live case or controversy."[143]

In *Monk*,[144] the Federal Circuit established that in the context of a class action case where the class representative's own substantive claim has been satisfied, a case may still be ripe for review.[145] The Federal Circuit held that a case may still meet the "case or controversy" requirement despite the resolution of the named plaintiff's claim where the issue on appeal is "capable of repetition, yet evad[ing] review."[146] The Federal Circuit relied on the Supreme Court's holding in *Genesis HealthCare Corp. v. Symczyk*,[147] that "a class-action claim is not necessarily moot upon the termination of the named plaintiff's claim in circumstances in which other persons similarly situated will continue to be

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[138] *Cardona v. Shinseki, 26 Vet. App. 472, 474 (2014)* (citing *Padgett v. Peake, 22 Vet. App. 159, 164 (2008)*; *Donovan v. West, 13 Vet. App. 489, 490 (2000)* (en banc); ***MacWhorter v. Derwinski, 3 Vet. App. 223, 223 (1992))***.

[139] *Ebanks v. Shulkin, 877 F.3d 1037, 1038 (Fed. Cir. 2017)* (holding a veteran's petition for a writ of mandamus to compel the Board to schedule a hearing was moot after he received a hearing and the issue was not capable of repetition yet evading review).

[140] *22 Vet. App. at 200*.

[141] *Norvell, 22 Vet. App. at 201*. See *Section 15.3*.2.4 regarding the Court's ability to make factual findings in the first instance when determining its own jurisdiction.

[142] *Solze v. Shinseki, 26 Vet. App. 299, 301 (2013)* (citing *Fusari v. Steinberg, 419 U.S. 379, 391 (1975)* (Burger, C.J. concurring); *Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.23 (1997))*.

[143] *Solze, 26 Vet. App. at 301* (citing *Aronson v. Brown, 7 Vet. App. 153, 155 (1994)*; *Bond, 2 Vet. App. at 377*).

[144] *855 F.3d 1312, 1318 (Fed. Cir. 2017)*.

[145] See *Section 15.2*.7 regarding the Court's jurisdiction to certify and adjudicate class actions.

[146] *Monk II, 855 F.3d at 1318* (quoting *Geraghty, 445 U.S. at 398* ("[W]here the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake."); *appeal dismissed as moot*, *Monk v. Wilkie (Monk IV), 32 Vet. App. 87 (2019)* (dismissing the remaining petitions as moot where petitioners received the relief they sought).

[147] *Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)*.

subject to the challenged conduct, but the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course."[148] In *Monk*, the case was capable of repetition, yet evading review, because where the issue relates to VA's delay in adjudicating appeals, the VA often acts promptly to resolve the particular appeal before the Court issues a decision or a writ and the case before the Court is then dismissed as moot.[149] Notably, in *Rosinski v. Shulkin*, the Court held that aggregate action was not appropriate where the class representative lacked standing to bring the claim in the first place, and, thus, his claim was not typical of the class.[150] Thus, as long as the class representative can establish standing upon filing the appeal and that his or her claim is typical of the class, even when the "case or controversy" as to the named plaintiff's claim is resolved, the remaining members of a class may still have standing to pursue a judicial remedy before the Court.[151]

15.2.3.4.1 The Case or Controversy Requirement When an Appellant Dies Before Judgment Is Entered

The case or controversy requirement becomes especially relevant when the appellant dies after a Board decision is issued but before the notice of appeal is filed or before the Court enters its judgment in an appeal. Because of the delay involved in the VA adjudication process, some veterans die before receiving a favorable decision either from the VA or the Court. It is understandable that the veteran's survivors would like to continue the appeal on behalf of the deceased veteran since there may have been thousands of dollars in retroactive benefits to which the veteran would have been entitled had the claim been resolved properly prior to the veteran's death.

Prior to the Court's decision in *Breedlove v. Shinseki*,[152] the general rule was that when a veteran died while the veteran's case was pending on appeal in court, the appeal would be dismissed as moot and the underlying Board and RO decisions vacated.[153] In 2007, the Federal Circuit carved out a narrow exception to the general rule, allowing a survivor to substitute for the veteran in the appeal before the Court when: (a) the veteran's death occurred after the case has been submitted to the Court; (b) the Court issued its decision or judgment without knowledge of the death; (c) the "case or controversy" requirement under Article III of the Constitution was satisfied; (d) the party seeking substitution had

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[148] *Monk II, 855 F.3d at 1317* (quoting *Genesis HealthCare, 133 S. Ct. at 1530–31* (internal quotations omitted)).

[149] *Monk II, 855 F.3d at 1317–18, 1319*.

[150] *29 Vet. App. 183, 192 (2018)*.

[151] *See Godsey v. Wilkie, 31 Vet. App. 207 (2019)*.

[152] *24 Vet. App. 7, 7 (2010)*.

[153] *See, e.g.*, *Richard on Behalf of Richard v. West, 161 F.3d 719, 723 (Fed. Cir 1998)*; *Zevalkink v. Brown, 102 F.3d 1236, 1243–44 (Fed. Cir. 1996)*; *Brown v. Principi, 16 Vet. App. 487, 488 (2002)*; *Haines v. West, 154 F.3d 1298, 1301 (Fed. Cir. 1998)*; *Kessel v. Gober, 14 Vet. App. 185, 186 (2000)* (per curiam); *Morton v. Gober, 14 Vet. App. 174, 175 (2000)*; *Keen v. West, 13 Vet. App. 29, 30 (1999)*; ***Keel v. Brown, 9 Vet. App. 124, 124 (1996)***; *Landicho v. Brown, 7 Vet. App. 42, 54 (1994)*. Likewise, if a veteran appealed a CAVC decision to the Federal Circuit and the veteran died while his appeal was pending before the Federal Circuit, the Federal Circuit could dismiss the appeal as moot. *See Newman v. Shinseki, 23 Vet. App. 96, 98 (2009)* (recalling mandate where the veteran died while the case was pending with the Federal Circuit but the latter was never informed of the veteran's death); *Kessel, 14 Vet. App. at 185*. Thereafter, the CAVC would recall its mandate, vacate its judgment, and dismiss the appeal as moot since the veteran's appeal was still pending before a Court and was therefore not final at the time of his death. *See Newman, 23 Vet. App. at 98*; *Kessel, 14 Vet. App. at 186*; *Morton, 14 Vet. App. at 174*.

standing under 38 U.S.C.S. § 7266(a); and (e) considerations of justice and fairness to the parties were satisfied.[154]

However, in 2008, Congress enacted 38 U.S.C.S. § 5121A, which provides that if a claimant dies while the claim is pending before a RO or the Board, a person who would be eligible for accrued benefits under 38 U.S.C.S. § 5121 may step in at the RO or Board level and substitute for the deceased claimant "for purposes of processing the claim to completion."[155] In *Breedlove*, the Court found that while 38 U.S.C.S. § 5121A does not apply to appeals before the Court, Congress' enactment of the new law "indicated that the congressional intent to treat a veteran's claim as an entirely separate statutory entity from a survivor's accrued-benefits claim no longer exists." The Court therefore held that "no rationale now exists for foreclosing the opportunity for substitution on appeal at this Court based on the timing of the death of the veteran," and announced that it "henceforth will consider substitution, if requested, in all cases pending before the Court regardless of the stage of briefing at the time of the veteran's death."[156]

The Court went on to state that with the enactment of 38 U.S.C.S. § 5121A, an eligible accrued-benefits claimant would generally have standing because the statute allows the claimant to pursue the claim to completion; therefore "he or she is affected by the VA adjudications on the veteran's claim in the same way the veteran was affected at the time he filed his Notice of Appeal."[157] In addition, the "case or controversy" requirement will generally be satisfied even though the evidence in the claims file did not establish entitlement to benefits at the time of the veteran's death, because under 38 U.S.C.S. § 5121A, the accrued-benefits claimant can "process[] the claim to completion."[158] However, substitution is available only if there is an eligible accrued-benefits claimant. If no such person exists, the Court will vacate the Board's decision and dismiss the appeal.[159]

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[154] Padgett v. Nicholson, 473 F.3d 1364, 1368–72 (Fed. Cir. 2007); *see also* Hyatt v. Shinseki, 566 F.3d 1364 (Fed. Cir. 2009); Pekular v. Mansfield, 21 Vet. App. 495 (2007). *Cf.* Phillips v. Shinseki, 581 F.3d 1358, 1365 (Fed. Cir. 2009) (holding that the CAVC erred in denying substitution because the CAVC's decision on the merits did not require further evidentiary development on remand); Pekular, 21 Vet. App. at 502–05.

[155] Veterans Benefits Improvement Act of 2008, ***Pub. L. No. 110-389***, § 212, ***122 Stat. 4145*** (2008) (codified at 38 U.S.C.S. § 5121A); *see also* 38 C.F.R. §§ 3.1010, 20.1302 (2020); Sucic v. Wilkie, 921 F.3d 1095, 1100 (Fed. Cir. 2019) ("[a]lthough we acknowledge that the 2008 Act allowed the substitution of accrued benefits beneficiaries into the proceedings of the deceased veteran from whom their claims are derived, the 2008 Act did not change which individuals are eligible in the first place, as defined in 38 U.S.C. § 5121(a)(2)").

[156] Breedlove, 24 Vet. App. at 19, 20. In Reeves v. Shinseki, 682 F.3d 988, 994–98 (Fed. Cir. 2012), the Federal Circuit affirmed the CAVC's holding in *Breedlove.*

[157] Breedlove, 24 Vet. App. at 20. However, the authors of this Manual know of at least one case where VA paid accrued benefits to an eligible accrued-benefits claimant on a claim that was pending before the agency while a motion to substitute was pending before the CAVC. In that case, the party requesting substitution was an accrued-benefits recipient under 38 U.S.C.S. § 5121(a)(6), which allows payment of accrued benefits only up to the amount necessary to reimburse a person for expenses related to the last sickness and burial. Because VA paid the full amount available under 38 U.S.C.S. § 5121(a)(6) based on the claim that was pending before the agency, the party requesting substitution no longer had standing since she would not be affected by the resolution of the appeal before the CAVC as she was not entitled to any more benefits under the statute. In this respect, the situation in that case was similar to the situation in Padgett, 22 Vet. App. at 164–65.

[158] Breedlove, 24 Vet. App. at 20; *cf.* Briley v. Shinseki, 25 Vet. App. 196 (2012) (holding that there is no case or controversy where the appellant dies during the pendency of the appeal and no motion to substitute is filed).

[159] *See, e.g.*, Rickett v. McDonald, 27 Vet. App. 240, 242–43 (2015); Suguitan v. McDonald, 27 Vet. App. 114, 121 (2014); Fabio v. Shinseki, 26 Vet. App. 404, 405–06 (2013).

More recently, in *Demery v. Wilkie*,[160] the Court expanded its holding in *Breedlove* to encompass the period between the issuance of a Board decision and the initiation of judicial proceedings. In *Demery*, the veteran passed away after the Board decision was issued, but before the notice of appeal was filed. The Court held that "an eligible accrued-benefits claimant has standing, both as a statutory and as a constitutional matter, to file an appeal on his or her own behalf when a veteran dies during the time permitted to file an NOA."[161]

Thus, it is now much easier for survivors who are eligible to apply for accrued benefits[162] to substitute for a deceased veteran in an appeal before the Court. An eligible accrued-benefits claimant now has two options when the veteran dies while the case is pending before the Court. First, the claimant can choose not to request substitution and allow the deceased veteran's Board decision to be vacated and pursue an accrued-benefits claim at the RO level. Second, the claimant can request substitution and pursue the pending appeal.[163] In *Reliford v. McDonald*, the Secretary argued that *38 U.S.C. § 5121A* and *§ 5121(a)* allow the Secretary to unilaterally process an accrued-benefits claim as a request for substitution instead.[164] Although the Court did not rule on whether the Secretary erred in making this interpretation, it did note that it is "the accrued-benefits beneficiaries' procedural right under VA procedures to choose the path by which their claims are adjudicated" and thus the Secretary erred by not providing notice to the claimant of her right to waive substitution.[165]

The Court will grant substitution where two requirements are met. First, the VA must determine whether the person seeking substitution is an eligible accrued-benefits claimant under *38 U.S.C.S. § 5121*.[166] The VA must either concede this fact on appeal or make the finding in the first instance at the RO level. The Court has indicated that it will either remand the question of whether a person qualifies as an accrued-benefits claimant, stay the appeal proceedings until VA makes the determination at the RO level, or direct the Secretary to inform the Court of his determination within a set time period.[167] However, the Federal Circuit has held that where there is no dispute that the party seeking substitution is an accrued-benefits beneficiary, remand is unnecessary. For example, when the party seeking substitution is the deceased veteran's surviving spouse, there can be no dispute that the spouse is

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[160] *30 Vet. App. at 435, 438* (2019) ("If we held that there were no means to advance her own interest in her husband's claim simply because he died between these two points in time, that is, between the issuance of the Board decision and the filing of the NOA, we would adopt the functional equivalent of the zone of no substitution *Breedlove* rejected").

[161] *Demery, 30 Vet. App. at 438*. See *Section 15.2*.3.3 regarding the required contents of a notice of appeal when a veteran dies after the Board issues an adverse decision and a person claiming to be an eligible accrued-benefits claimant wishes to appeal to the Court.

[162] Whether a survivor is eligible to apply for accrued benefits is discussed in *Section 7.3*.1.1.2 of this Manual.

[163] *Breedlove, 24 Vet. App. at 20*. In Leavey v. McDonald, Judge Greenberg noted that in some cases, dismissal of the appeal and vacatur of the Board's decision may be the most desirable option because doing so "potentially … prevent[s] the underlying Board decision … from acting as a barrier to an accrued benefits claim." *27 Vet. App. 226, 230 (2015)* (Greenberg, J., dissenting).

[164] *27 Vet. App. 297, 300–01 (2015)*.

[165] *Reliford, 27 Vet. App. at 304–05*.

[166] *Breedlove, 24 Vet. App. at 20–21*. Under *38 U.S.C.S. § 5121(c)*, a potential accrued-benefits beneficiary must submit a claim for accrued benefits within one year of the death of the veteran or claimant whose claim was pending at the time of his or her death. In *Reeves, 682 F.3d at 993*, the Federal Circuit held that the submission of a motion to substitute the deceased veteran or claimant in Court qualifies as an informal claim for accrued benefits and therefore satisfies *38 U.S.C.S. § 5121(c)*.

[167] *Breedlove, 24 Vet. App. at 20–21*.

entitled to accrued benefits pursuant to 38 U.S.C.S. § 5121(a)(2)(A), and remand for VA to address that question in the first instance is unnecessary.[168]

Once it has been shown that the person seeking substitution is an eligible accrued-benefits claimant, or if accrued-benefits eligibility is in legitimate dispute, the Court will determine whether considerations of delay, unfairness, and inefficiency weigh in favor of substitution or in favor of dismissing the appeal and vacating the Board decision.[169] If the Court concludes that those considerations weigh in favor of allowing substitution, the caption of the case will be changed to reflect that the movant is the appellant, and the appeal will proceed.

*****Advocacy Tip*****

As soon as possible after the advocate has learned that an appellant has died, the advocate should file a Notice of Death with the Court. In many cases, the individual who notified the advocate of the appellant's death will be an eligible accrued-benefits beneficiary. However, if the advocate is not able to identify an eligible accrued-benefits beneficiary at the same time that he or she is made aware of the appellant's death, the advocate should file a motion to stay the proceedings along with the Notice of Death, and explain that additional time is needed to determine whether a motion to substitute the appellant is appropriate. Once the advocate has determined that a person is an eligible accrued-benefits claimant, the advocate should advise the claimant to submit an accrued benefits application to a RO, even though a motion to substitute filed with the Court constitutes an informal claim for accrued benefits. Filing a formal claim with the RO should force the VA to begin its adjudication of the issue of whether the person qualifies as an accrued-benefits beneficiary, and should prevent any delay in the Court's determination as to whether substitution is appropriate. A sample motion to substitute appears at Appendix 15-G.

15.2.4 The Interrelationship between Motions for Reconsideration or Vacatur Filed with the BVA and the Court's Jurisdictional Requirements

The Court has established a set of rather complicated rules governing the effect that a motion for Board reconsideration or vacatur has on the Court's jurisdictional requirements in Court-eligible cases, including the effect on the running of the 120-day appeal period.[170] Before describing the possible scenarios, it is important to understand what constitutes a motion for reconsideration or vacatur and the rules regarding the date a motion for reconsideration or vacatur is considered filed with the Board.

The Court will not consider a document to be a motion for BVA reconsideration unless it comports with the regulation governing motions for reconsideration, 38 C.F.R. § 20.1002 (2020). Specifically, the document must be in writing and include (1) the name of the veteran or claimant, (2) the applicable VA file number, (3) the date of the Board's decision(s) to be reconsidered, (4) the specific issue or issues to which the motion pertains, and (5) allegations of obvious error of fact or law or show that new and material military service records have been discovered that are pertinent to the appeal.[171] A document that is submitted to the VA and clearly expresses an

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[168] Reeves, 682 F.3d at 994.

[169] Breedlove, 24 Vet. App. at 20–21.

[170] *See* Cerullo v. Derwinski, 1 Vet. App. 195 (1991); Rosler v. Derwinski, 1 Vet. App. 241 (1991); Breslow v. Derwinski, 1 Vet. App. 359 (1991).

[171] 38 C.F.R. § 20.1002 (2020). *See* Durr v. Principi, 17 Vet. App. 486 (2004), *rev'd* 400 F.3d 1375 (Fed. Cir., 2005); *see also* Brown v. West, 13 Vet. App. 88, 90 (1999) (veteran's letter to BVA was not a request for reconsideration so as to toll the 120-

intent to seek judicial review will be construed as a misfiled notice of appeal and not a motion for reconsideration.[172] A claimant may move for vacatur of a Board decision on the ground that there has been a violation of due process.[173]

Pursuant to *38 C.F.R. § 20.1002(b) (2020)*, a motion for reconsideration must be filed at the following address: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. However, the Court has held that "strict compliance as to where within the Board, or even within the VA, the motion for reconsideration must be filed is not required."[174] Thus, the Court has construed a Statement in Support of Claim, VA Form 21-4138, that contained all the information required under *38 C.F.R. § 20.1001(a)*, to constitute a valid motion for reconsideration, even though it was not addressed to the Director of Management and Administration.[175] Even a document that contains all the information required under *38 C.F.R. § 20.1001(a)* and is submitted to a RO rather than to the Board may be construed as a motion for reconsideration.[176]

There is no deadline for the filing of a motion for reconsideration or vacatur or any limitation on the number of times a veteran may file a motion for reconsideration or vacatur.[177] The filing date of a motion for reconsideration or vacatur is the date on which the veteran *mailed* the motion for reconsideration to VA.[178] If it is impossible to determine the postmark date of the veteran's motion for reconsideration or vacatur, then the postmark date is presumed to be five days prior to the date of receipt of the motion for reconsideration or vacatur.[179]

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day notice of appeal period because the letter did not comport with the requirements of *38 C.F.R. § 20.1001(a)* (redesignated as *38 C.F.R. § 20.1002 (2020)*, effective Feb. 19, 2019) as it did not set forth specific errors of fact or law allegedly committed by the Board, and it did not identify the specific issues to which the veteran's motion pertained).

[172] *Irwin, 23 Vet. App. at 131–32*; *cf.* *Posey, 23 Vet. App. at 408–09* (finding that the document submitted to the Board on a VA form not intended for use as a notice of appeal was not a valid notice of appeal because it contained no mention of the Court or indication that the veteran was seeking judicial review). See *Section 15.2*.3.2.1 for a discussion of the effect of a misfiled notice of appeal.

[173] *38 C.F.R. § 20.1000(a) (2020)*; *Browne v. Principi, 16 Vet. App. 278 (2002)*. Unlike the rule pertaining to motions for reconsideration, the rule pertaining to motions to vacate does not specify any requirements for filing such motions. The rule does give examples of due process violations that would be grounds for vacating a BVA decision. For example, due process violations that would be grounds to vacate a BVA decision include the denial of the appellant's right to representation before the Board, the failure to issue a SOC or supplemental statement of the case (SSOC) for a legacy appeal, and the failure to afford the appellant a personal hearing. *38 C.F.R. § 20.1000 (a) (2020)*.

[174] *Kouvaris v. Shinseki, 22 Vet. App. 377, 381 (2009)* (citing *Jaquay, 304 F.3d at 1287*); *see also* *Boone v. Shinseki, 22 Vet. App. 412 (2009)*.

[175] *Kouvaris, 22 Vet. App. 377*.

[176] *Boone, 22 Vet. App. at 412*; *Fithian v. Shinseki, 24 Vet. App. 146, 157–58 (2010)*.

[177] *See* *Murillo v. Brown, 10 Vet. App. 108, 110 (1997)* (per curiam order); *Perez, 2 Vet. App. at 150*.

[178] *See* *Linville v. West, 165 F.3d 1382, 1386 (Fed. Cir. 1999)* (the postmark rule set forth in *38 C.F.R. § 20.305* (redesignated as *38 C.F.R. § 20.110 (2020)*, effective Feb. 19, 2019) applies to motions for reconsideration of BVA decisions).

[179] *38 C.F.R. § 20.110 (2020)*; *Kight v. West, 13 Vet. App. 132, 133 (1999)* (per curiam) (where motion for reconsideration was received by BVA 125 days after the decision was mailed and the postmark is not of record, postmark date is presumed to be five days prior to the BVA's receipt of motion); *cf.* *Pogue, 13 Vet. App. at 373–74* (where there is no evidence regarding either the postmark date of the motion for reconsideration or the date of the BVA's receipt of such a motion, the Court held that the veteran did not sustain his burden of proof that his motion for reconsideration was timely received so as to toll the 120-day deadline for the filing of a notice of appeal).

The rules regarding the effect that a motion for Board reconsideration or vacatur has on the Court's jurisdiction depend on the timing and sequence of various types of actions taken by the claimant, as described in the three scenarios below.[180]

Whether to file a motion for reconsideration or vacatur in the first place is a matter of strategy and is discussed in *Chapter 14* of this Manual. If after considering the pros and cons, the advocate decides to file a motion for reconsideration or vacatur, scenario #2 below is the most advantageous to the claimant of the three possibilities.

Scenario #1: (a) the Board issues its decision, and then (b) the claimant files a motion for reconsideration or vacatur with the Board, within the 120 day appeal period and before any notice of appeal is filed with the Court.

In this scenario there is no need to file a notice of appeal within 120 days of the initial Board decision in order to protect the right to appeal to the Court. A new 120-day appeal period within which to appeal to the Court begins to run when the first of the following three events occurs:

- The claimant withdraws the motion for reconsideration or vacatur;
- The Board properly sends notice of its decision to deny the motion for reconsideration or vacatur;[181] or
- The Board properly sends notice of its decision to deny complete relief after the motion for reconsideration or vacatur was granted and the case was referred to an expanded panel of the Board for reconsideration on the merits.[182]

Thus, under this scenario, there is no need to file a notice of appeal to protect the right to appeal to Court until one of these three events occurs. Indeed, if the claimant does file a notice of appeal with the Court before any of the foregoing three events, it will be a useless act because the Court will dismiss the appeal.[183]

As stated, there is no limit on the number of times a veteran may file a motion for reconsideration or vacatur.[184] Even after one of these three events occurs, a claimant may file another Board motion for reconsideration or vacatur within the new 120-day period, which will result in yet another new 120-day period that will start running until either the Secretary issues a final decision on the motion or the claimant withdraws the motion.[185] Under this scenario, the deadline for filing the notice of appeal will be well beyond 120 days after the initial Board decision.

Moreover, where the Board denies multiple claims in a single decision, and the veteran identifies only one or some of the denied claims in his or her request for reconsideration, the entire Board decision in considered non-final, not just the claim or claims identified in the request for reconsideration. For example, in *Fagre v. Peake*, the Board denied service connection for, among other things, "a disability manifested by fatigue, a disability manifested by a skin rash, a disability manifested by headaches, and a disability manifested by diarrhea and abdominal complaints, all claimed as undiagnosed illnesses resulting from service in the Persian Gulf War."[186] The veteran filed for reconsideration of only that part of the decision denying service connection

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[180] *See also* *Gomez, 28 Vet. App. 39*.

[181] The phrase "denying a motion for reconsideration or vacatur" refers throughout this section to a decision by the Chairman of the BVA to deny the motion without having the appeal referred to an expanded BVA panel and reconsidered.

[182] *See* *Gates v. Nicholson, 19 Vet. App. 376 (2005)*; *see also* *Rosler, 1 Vet. App. at 249*.

[183] *Gates, 19 Vet. App. 376*; *Browne, 16 Vet. App. at 283* (holding that where a motion to vacate is filed within the 120-day judicial appeal period, like a motion for reconsideration, the finality of the Board decision is abated and the time period for appeal starts anew after the motion to vacate is denied). *See* *Pulac v. Brown, 10 Vet. App. 11, 12 (1997)*; *Dudnick v. Brown, 9 Vet. App. 397, 397–98 (1996)*; *Wachter v. Brown, 7 Vet. App. 396, 397 (1995)*; *Rosler, 1 Vet. App. at 249*.

[184] *See* *Browne, 16 Vet. App. at 280*; *Murillo, 10 Vet. App. at 110*; *Perez, 2 Vet. App. at 150*.

[185] *See* *Browne, 16 Vet. App. at 280*.

for a disability manifested by diarrhea and abdominal complaints. The Court held that even though the request for reconsideration identified only one claim, the finality of the Board decision was abated for all claims, and the 120-day time period for appealing the decision as a whole did not begin to run until the Board had made a final decision on the motion for reconsideration. The Court ruled that because the decisions rendered by the Board with regard to the various disabilities claimed by the veteran were contained within the same document and issued on the same date, and since notice to the veteran of how to appeal the Board decision treated the decision as one decision rather than one document containing several individual decisions, the request for reconsideration made nonfinal the overall Board decision on his claim for disability compensation.[187]

Scenario #2: (a) the Board issues its decision, and then (b) the claimant files a notice of appeal with the Court within the 120 day appeal period, and then (c) the claimant files a motion for reconsideration or vacatur with the Board.

In this situation, the Board and its Chairman do not have the authority to vacate the initial Board decision that is the subject of the motion for reconsideration or vacatur without the Court's permission. In addition, the Court will not dismiss the appeal solely because a motion for reconsideration or vacatur is pending before the Board.

If the Board or its Chairman wishes to grant the motion for reconsideration or vacatur and to have an expanded panel of the Board reconsider the case on the merits or take some other course of action, the Court requires the following procedure:

> [T]hrough the Secretary [of Veterans Affairs], the BVA Chairman may indicate, after an [sic] NOA has been filed with this Court, that he is inclined to grant reconsideration under *38 U.S.C.S. § [7103 (a)* and *(b)*] for one of the reasons articulated in 38 C.F.R. §§ 19.185–86 (redesignated as *38 C.F.R. § 20.1001*, effective Feb. 19, 2019), or the Board may indicate a desire to correct an obvious error under *38 U.S.C.S. § [7104(c)*]. At that time, a motion for remand must be filed with this Court. The remand motion may be the result of a decision by the Secretary to confess error, the Chairman, or the Board itself, or settlement negotiations involving the veteran. The motion must clearly articulate the reasons for the remand request and the nature of the proceedings proposed by the Secretary. The other party will be afforded an opportunity to respond. We note that in some instances the BVA may wish to confess error as to one aspect of an appeal but argue other issues. This is permissible. The parties are also free to enter into a stipulation resulting from settlement negotiations. If the parties have reached an agreement as to settlement or stipulation of issues after an NOA has been filed, they may file a joint motion for approval of the agreement by the Court.[188]

As this procedure indicates, the Secretary may file a motion for remand with the Court even if the claimant has not filed a motion for reconsideration or vacatur. In addition, the claimant may decide to withdraw a pending motion for reconsideration or vacatur at any time and pursue the case in the Court. For example, the claimant

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[186] *22 Vet. App. 188, 189 (2008)*.

[187] *See* *Fagre, 22 Vet. App. at 189–91*.

[188] *Cerullo, 1 Vet. App. at 200–01*. After a veteran files an appeal with the Court, the veteran may decide to pursue a motion for reconsideration with the Board. Like the Secretary, the veteran must file a motion to stay Court proceedings, pursuant to Rule 5 of the rules of the Court, so that the Board may act on the motion for reconsideration. In *Graves v. Principi, 294 F.3d 1350 (Fed. Cir. 2002)*, the veteran failed to file such a motion and instead filed a voluntary dismissal of his appeal pursuant to Rule 42 of the rules of the Court. The veteran did not indicate in the dismissal that he wanted the Court to stay proceedings while he pursued a motion for reconsideration before the Board. The Court granted the motion and dismissed the appeal. The veteran then filed a motion for reconsideration with the Board. After the Board denied the veteran's motion for reconsideration, he attempted to file a notice of appeal to the Court. The Court dismissed his appeal. The Federal Circuit affirmed the Court's dismissal of the second appeal. *Graves, 294 F.3d at 1351*. The Federal Circuit held that once the veteran's first appeal was dismissed, it was as if the timely appeal of the initial Board decision had never been filed. The Court further held that if the veteran had pursued the proper course of action, which was to seek a stay of Court proceedings under Rule 5 of the rules of the Court, he would have preserved his right to appeal after VA acted on his motion for reconsideration. *Graves, 294 F.3d at 1356*.

may wish to withdraw the motion for reconsideration owing to delay by the Board in considering the motion or because, in the interim, the Court has issued a controlling precedent that makes a victory in Court likely.

In summary, assuming the claimant wishes to pursue reconsideration or vacatur, his or her options are better under scenario #2 than they are under scenario #1.

Scenario #3: (a) the Board issues its decision, (b) the veteran fails to file a notice of appeal or a motion for reconsideration or vacatur within the 120-day appeal period, and (c) then after the 120-day appeal period has expired, the claimant files a motion for reconsideration with the Board.

Although there is no deadline for the filing of a motion for reconsideration or vacatur, if the claimant does not file either a notice of appeal or a motion for Board reconsideration or vacatur within the 120-day appeal period, any subsequent notice of appeal received by the Court will be considered untimely.[189] A motion for reconsideration or vacatur filed with the Board after the 120-day appeal period expires cannot toll the 120-day filing period.[190] However, if the claimant files a motion for reconsideration or vacatur after the 120-day period has expired, and the motion is subsequently granted, and the Board issues a new decision by an expanded panel of the Board that does not grant complete relief, then it is likely that the Court would agree it has jurisdiction if a notice of appeal is filed within 120 days of the new decision issued by the expanded panel of the Board.

Scenario #4: (a) the Board issues its decision, and then (b) the claimant files with the RO a written document expressing disagreement with the Board's decision, within the 120 day appeal period for filing a notice of appeal with the Court.

The M21-5 *Appeals and Reviews (M21-5)* provides that when a RO receives written communications expressing disagreement with Board decisions, the RO must promptly forward the documents to the Board for the Board to "determine whether they are true [motions for reconsideration] or misfiled NOAs."[191] As a result, the Court has held that:

> when a written expression of disagreement with a Board decision is filed at the RO during the 120-day period to file a NOA, the filing abates the finality of the Board decision for purposes of appealing to the Court until one of the following actions is taken: (1) The Secretary determines the written disagreement is a NOA and returns it to the claimant with information concerning the proper location to file an appeal or forwards it to the Court and so notifies the claimant; (2) the Board Chairman determines the status of the document, that is, whether it is a motion for Board reconsideration, and notifies the claimant of his determination; or (3) the claimant files a NOA with the Court and, assuming the Court becomes aware that before the NOA was filed a written disagreement was filed with the RO within the Court's appeal period, the Court determines that the written disagreement was a misfiled NOA and not a motion for Board reconsideration.[192]

In other words, when a claimant submits a written disagreement with a Board decision to the RO, the time to appeal that Board decision to the Court does not begin until the RO, the Board, or the Court determines whether the document is a notice of appeal or motion for BVA reconsideration.

15.2.5 The Exception to the Normal Jurisdictional Requirements for Petitions Under the All Writs Act

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[189] *See* Murillo, 10 Vet. App. at 110; Perez, 2 Vet. App. at 150; Jones, 22 Vet. App. at 250; Durr, 17 Vet. App. at 486; Rich v. Derwinski, 2 Vet. App. 586, 587 (1992); Binion v. Derwinski, 2 Vet. App. 260, 261 (1992).

[190] *See* Jones, 22 Vet. App. at 250; Rich, 2 Vet. App. at 587; Binion, 2 Vet. App. at 261.

[191] M21-5 Appeals and Reviews (M21-5), Chapter 7, Section G.2.d (change date Mar. 2, 2020) [*available at* https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000140917/M21-5-Chapter-7-Section-G-Board-of-Veterans-Appeals-Board-Decisions-and-Remands#2 (last visited June 11, 2020)]; *see also* Ratliff, 26 Vet. App. at 358–59.

[192] Ratliff, 26 Vet. App. at 360–61.

The All Writs Act (AWA), a federal statute, provides an exception to the requirement that the Court may review only final Board decisions. This Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions."[193] Writs are orders issued by a court, directed to a person, and requiring the performance of a specified act. The AWA is a powerful tool that authorizes a federal court to grant extraordinary relief in cases where it currently does not, but may later, have jurisdiction to review a final agency action under its general statutory authority.[194]

The Court clearly has the power to issue extraordinary writs to VA officials under the AWA.[195] However, because the purpose of the AWA is to aid a court in protecting its jurisdiction, the first question to be resolved whenever a party seeks a writ from a court is whether the subject of the writ is within the court's jurisdiction. Under *38 U.S.C.S § 7252*, the Court's jurisdiction is limited to review of final Board decisions. Accordingly, the Court does not have the power to issue an extraordinary writ unless the writ pertains to actions or inactions by VA officials that will lead to a final Board decision over which the Court would eventually have jurisdiction.[196]

Yi v. Principi[197] illustrates this principle. In that case, the veteran complained that officials at a VA medical center had not redacted certain information from his medical records. The Court concluded that "the petitioner's complaint is with actions by VA's G[eneral] C[ounsel] surrounding an agreement apparently not related to any pending claim or Board decision thereon." The Court held that it could not grant the veteran's request for a writ of mandamus because the actions the veteran was challenging would not later become the subject of a final Board decision. Accordingly, a writ under these circumstances would not be in aid of the Court's "prospective jurisdiction."[198]

The AWA also provides the Court with authority to entertain a class action.[199] The AWA permits the Court "to fill gaps in their judicial power where those gaps would thwart the otherwise proper exercise of their jurisdiction."[200] Because the Court's jurisdiction extends to "compel action of the Secretary unlawfully withheld or unreasonably delayed,"[201] and a class action procedure aids in that endeavor, the Court can rely on the AWA to aggregate claims to aid its jurisdiction.[202]

The Court has ruled that even when it has the power to issue a writ, "the circumstances that would justify the issuance of … a writ must be compelling."[203] The Court will issue a writ if three conditions are satisfied:

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[193] *28 U.S.C.S. § 1651(a)*.

[194] *See* *Erspamer v. Derwinski, 1 Vet. App. 3, 8 (1990)*.

[195] *See* *Bates v. Nicholson, 19 Vet. App. 197 (2005)* (issuing a writ compelling the Secretary to issue a SOC within 21 days of the Court's Order); *Woznick v. Nicholson, 19 Vet. App. 198 (2005)* (issuing a writ compelling the Secretary to issue a SOC, but not specifying a date certain by which the Secretary must take this action); *Cox v. West, 149 F.3d 1360, 1363 (Fed. Cir. 1998)* (holding that AWA applies to CAVC), *vacating on other grounds* *In the Matter of the Fee Agreement of Cox, 10 Vet. App. 361, 370 (1997)*.

[196] *Bates v. Principi, 17 Vet. App. 443, 444–45 (2004)*, *rev'd on other grounds*, *Bates v. Nicholson, 398 F.3d 1355 (2005)*, *writ granted on remand*, *19 Vet. App. 197*.

[197] *15 Vet. App. 265, 267 (2001)*.

[198] *Yi, 15 Vet. App. at 267*.

[199] *Monk II, 855 F.3d at 1318–19*.

[200] *Monk II, 855 F.3d at 1318*.

[201] *38 U.S.C.S. § 7261(a)(2)*.

[202] *Monk II, 855 F.3d at 1318–19*.

(1) the petitioner has shown that his or her right to the writ is "clear and indisputable"[204] (because, for example, the VA has plainly violated or is threatening to violate rights of the petitioner protected by law); (2) the petitioner has shown that he or she lacks adequate alternative means to obtain the relief the Court is asked to provide;[205] and (3) the Court, in the exercise of its discretion, is satisfied that the writ is appropriate under the circumstances.[206]

15.2.5.1 Requesting a Writ When VA Unreasonably Delays Action on a Claim

Unreasonable delays by the VA in handling an individual claim may be grounds for petitioning the Court for a writ under the AWA. The Court has held that the VA is obligated to issue a decision on a claim within a reasonable period of time.[207] However, it is an unfortunate fact that in some cases the RO neglects to issue a rating decision within a reasonable amount of time after it receives a claim, or, in the case of a legacy appeal, fails to issue a SOC even though the claimant files a timely NOD. In some cases, the RO may even affirmatively refuse to issue a rating decision or SOC because it believes for some erroneous reason that it is not required to do so. The RO's failure or refusal to issue a decision effectively deprives a claimant of the right to a day in Court, as the Court can only review final decisions of the Board, and the Board cannot issue a final decision until a rating decision or, in the case of a legacy appeal, a SOC, has been issued. In *DiCarlo v. Nicholson*,[208] the Court recognized this phenomenon, and explained that

> [A] claim may remain in an unadjudicated state due to the failure of the Secretary to process it. In such instances, the appropriate procedure for a claimant to press a claim believed to be unadjudicated (and for which there is no final decision that arguably failed to consider the claim) is to pursue a resolution of the claim, e.g., seek issuance of a final RO decision with proper notification of appellate rights and initiate an NOD … . If the Secretary fails to process the claim, then the claimant can file a petition [for a writ of mandamus] with this Court challenging the Secretary's refusal to act.

The CAVC has held that it has jurisdiction to issue writs compelling the VA to process a claim when the VA unreasonably delays the processing. For example, in *Erspamer v. Derwinski*, the Court found that the RO had unreasonably delayed the case by failing to comply with the Board's remand instructions for six years.[209] The Court further found that the claimant had exhausted her administrative remedies by writing "between 30 and 40 letters" to the RO. The Court therefore held that the claimant had satisfied the requirements for a writ of mandamus; however, it ultimately denied her request based on representations from counsel for the Secretary that the RO had begun to process the claim.[210] Notwithstanding, the Court retained jurisdiction over the case, and permitted the claimant to renew her request if the VA did not

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[203] *Erspamer, 1 Vet. App. at 7*.

[204] *See In re Wick, 40 F.3d 367 (Fed. Cir. 1994)*; *see also Kelley v. Shinseki, 26 Vet. App. 183, 192 (2013)*.

[205] *See Hansen v. Wilkie, 32 Vet. App. 67, 69 (2019)*; *Snyder v. Gober, 14 Vet. App. 154, 161 (2000)*; *Nash v. West, 11 Vet. App. 91, 93 (1998)* (per curiam); *Friscia v. Brown, 8 Vet. App. 90, 91 (1995)*; *Erspamer, 1 Vet. App. at 12*.

[206] *See Youngman v. Peake, 22 Vet. App. 152, 154 (2008)*.

[207] *Erspamer, 1 Vet. App. at 12*.

[208] *20 Vet. App. 52, 56–57 (2006)*.

[209] *1 Vet. App. at 14*.

[210] Often, after a veteran files for a writ of mandamus, the Secretary begins to act on the underlying claim and the request for a writ is denied as moot. *See Ebanks, 877 F.3d at 1037*. In order to address systemic VA delays, claimants may file an aggregate action, so that even if the named representative's claim becomes moot, the Court may still address the delays harming other, similarly situated members of the class. *See Monk, 855 F.3d at 1312*.

process the claim within six months.[211] Likewise, in *Vargas-Gonzalez v. Principi*,[212] the Court held that it could issue a writ of mandamus to compel the Secretary to provide expeditious treatment as required by the Veterans' Benefits Improvement Act (VBIA)[213] to a case that had been remanded by the Court to the Board for further adjudication on a claim of pension benefits. However, the Court ultimately denied the request because the Board acted on the Court's remand while the petition for the writ was pending before the Court.[214] In addition, in *Ribaudo v. Nicholson*,[215] the Court granted a petition for a writ after the Chairman of the Board unilaterally imposed a stay upon all pending Board cases affected by a Court decision pending the outcome of the Secretary's appeal of the Court decision to the Federal Circuit, effectively nullifying the legal effect of the judicial decision. The Court granted the writ rescinding the Board Chairman's stay directive and holding that the Chairman's action, without first obtaining judicial approval for the act, would leave claimants without means to challenge the action.[216] The Court has also issued writs in several legacy cases requiring the Secretary to issue a SOC.[217]

Despite the fact that it has the power to issue a writ of mandamus to compel the Secretary to act in delay cases, the Court is extraordinarily reluctant to do so even when there has been substantial delay by the VA in adjudicating an individual's claim.[218] An example of the Court's extreme reluctance is found in the procedural history of *Sellers v. Shinseki*.[219] In that case, the Court issued a decision in 2012 in which it found that VA's attempts to rescind a June 2004 rating decision that granted the veteran full benefits were improper. The Court held that the 2004 rating decision was binding on VA, and ordered the Board to "proceed expeditiously."[220] However, despite the fact that benefits had been awarded yet unpaid for over eight years, the Court subsequently denied the claimant's request for a writ of mandamus to compel the RO to provide "expeditious treatment" in its execution of the June 2004 decision and provide a date by which it

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[211] *Erspamer, 1 Vet. App. at 11*.

[212] *15 Vet. App. 222, 233 (2001)*; *but see* ***Dailey v. Principi, 17 Vet. App. 61 (2003)*** (holding that claimant was not entitled to a writ of mandamus because "expeditious treatment" under the Veterans' Benefits Improvement Act and advancement on the BVA docket were separate and distinct concepts, and the claimant had not demonstrated that he had a statutory right to advancement on the BVA docket).

[213] ***Pub. L. No. 103-446***, § 302, ***108 Stat. 4645***, 4658 (2007).

[214] *Vargas-Gonzalez, 15 Vet. App. at 232*.

[215] *20 Vet. App. 552 (2007)*.

[216] *Ribaudo, 20 Vet. App. at 558*. The Court eventually issued an order granting a limited stay, after the Secretary properly filed a motion with the *CAVC. Ribaudo v. Nicholson, 21 Vet. App. 16 (2007)*.

[217] *Freeman v. Shinseki, 24 Vet. App. 404 (2011)*; *Youngman, 22 Vet. App. at 154–55*; *Bates, 19 Vet. App. at 197*; *Woznick, 19 Vet. App. at 201*.

[218] *See* *Nash, 11 Vet. App. at 93* (CAVC denied writ in a case involving four remands by the Board to the RO, remarking that "the delay involved, although frustrating to the petitioner, must be unreasonable under all circumstances before the Court will inject itself into the administrative agency's adjudicative process"); *Chandler v. Brown, 10 Vet. App. 175, 177–78 (1997)* (per curiam order) (delay of two and one-half years was not unreasonable); *Bullock v. Brown, 7 Vet. App. 69, 69 (1994)* (per curiam order) ("mere passage of time in reviewing a matter does not necessarily constitute extraordinary circumstances requiring this Court to invoke its mandamus power").

[219] *25 Vet. App. 265 (2012)*.

[220] *Sellers, 25 Vet. App. at 283*.

would attend to his case, finding that the claimant had not demonstrated that the RO had arbitrarily refused to execute the rating decision.[221]

In June 2018, the Federal Circuit set forth the proper standard to be used by the Court in evaluating mandamus petitions based on unreasonable delay, the TRAC standard.[222] In *TRAC*, the D.C. Circuit held that the paramount question in analyzing a claim of unreasonable delay is "whether the agency's delay is so egregious as to warrant mandamus."[223] To make this determination, the D.C. Circuit set forth six factors relevant to the inquiry:

> (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 agency action is unreasonably delayed.[224]

Of these factors, the Federal Circuit has focused on the "rule of reason" factor as the most important.[225] Thus, the TRAC standard requires a thorough analysis, focusing primarily on the reasonableness of the delay in light of the particular agency action that is delayed.[226]

In the first class action ever certified by the CAVC, *Godsey v. Wilkie*,[227] the Court in 2019 issued a writ of mandamus compelling the Secretary to take, within 120 days of the Court's Order, the action VA had been withholding in thousands of cases. The Court held that "the current time that it takes the Secretary to initiate precertification review after the filing of a Substantive Appeal is per se unreasonable under *TRAC* …"[228] The Court relied on the fact that it took an average of 773 days after the filing of a Substantive Appeal for a regional office to certify the appeal for transfer to the Board of Veterans' Appeals, and that "there is simply no rule of reason that can justify a multiyear wait before an RO even looks at an appealed case to determine whether further development and/or adjudication is warranted before certifying and transferring a case to the Board."[229] The Court went on to state that "[s]uch delays are particularly intolerable because

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[221] *No. 12-2884, 2012 U.S. App. Vet. Claims LEXIS 2231 (Oct. 31, 2012)* (mem. dec.).

[222] *Martin v. O'Rourke, 891 F.3d 1338, 1348 (Fed. Cir. 2018)*; Telecomms. Research & Action Ctr. v. FCC ("TRAC"), *750 F.2d 70, 79–80 (D.C. Cir. 1984)*. Prior to *Martin, 891 F.3d 1338*, the Court held that in delay cases, a clear and indisputable right to the writ did not exist unless the petitioner demonstrated that the alleged delay was "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." *See* *Costanza v. West, 12 Vet. App. 133, 134 (1999)* (per curiam).

[223] *TRAC, 750 F.2d at 79*.

[224] *Martin, 891 F.3d at 1344–45* (citing *TRAC, 750 F.2d at 80*).

[225] *Martin, 891 F.3d at 1345*.

[226] *See generally* *Monk IV, 32 Vet. App. at 102–07* (providing an analysis of the TRAC factors for a petition for an extraordinary writ).

[227] 31 Vet. App. 207 (2019).

[228] *Godsey, 31 Vet. App. at 228*.

[229] *Godsey, 31 Vet. App. at 228*.

they consist of nothing but waiting in line: no development, no adjudication, no action whatsoever on the part of VA."[230]

It has been more difficult to obtain a writ of mandamus from the CAVC to end VA delay in taking action that is not ministerial in nature, like issuing a decision on a claim. In *Dambach v. Gober*,[231] for example, the Federal Circuit reversed a decision by the Court, and noted that the case had been on appeal for more than seven years, in part because of the VA's reliance on an inaccurate medical opinion. The Federal Circuit further noted that the case had to be remanded yet again for additional factual findings. The Federal Circuit stated that "it is time for this case to be concluded, especially given the veteran's poor health," and that "it would be appropriate for the Veterans Court to set a deadline by which this veteran's case will be concluded."[232] However, on remand, the Court refused to set a deadline, explaining that

> This Court is not part of the Department of Veterans Affairs and its administrative machinery. We are not privy to the caseloads, the number of remands taking precedence over this case, and the relative priorities established at the BVA or the regional offices. Nor do we know whether such an order might well displace the other, perhaps even more deserving, cases … . To impose an arbitrary date without the slightest clue as to whether such a date was either reasonable or appropriate would be wrong.[233]

Despite the Court's general reluctance to issue writs of mandamus compelling the Secretary to process a claim in a timely manner, the advocate should seriously consider requesting a writ when the VA unduly delays in processing a claim. The mere filing of the petition often causes the VA to take the action it has been delaying in order to avoid defending the delay in court, as demonstrated in *Erspamer* and *Vargas-Gonzalez*.[234] In one case, the Court dismissed the petition for a writ of mandamus due to VA's action on the claim while the petition was pending in Court, but imposed monetary sanctions upon VA in the amount of the attorneys' cost and fees associated with the preparation and prosecution of the petition for a writ of mandamus.[235] However, the Court was careful to point out that the circumstances of that case were extraordinary as they dealt with VA's failure to comply with a Court order, and that "it must be clearly understood by those representing claimants (as well as claimants themselves) that the Court will not blindly issue writs or sanctions where delay is the result of an overburdened system, rather than a disregard for the importance of compliance with a Court order."[236]

15.2.5.2 Requesting a Writ in Non-Delay Cases

Delay is not the only occasion for considering whether to request the Court to issue an extraordinary writ. Whenever the VA has violated or threatens to violate a claimant's rights during the course of processing a claim, an extraordinary writ is a possible alternative. For example, the Court has held that it can issue a writ

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[230] *Godsey, 31 Vet. App. at 228*.

[231] *223 F.3d 1376 (Fed. Cir. 2000)*.

[232] *Dambach, 223 F.3d at 1381*.

[233] *Dambach, 14 Vet. App. at 308*.

[234] *Vargas-Gonzalez, 15 Vet. App. at 222*; *Erspamer, 1 Vet. App. at 3*; *Chandler, 10 Vet. App. at 177*; *Ebert v. Brown, 4 Vet. App. 434, 437 (1993)*; *Mokal, 1 Vet. App. at 14*; Williams v. McDonald, 614 F. App'x. 499 (Fed. Cir. 2015) (unpublished opinion dismissing appellant's appeal when, *inter alia*, the veteran had been issued a fully favorable decision prior to the appeal); Grant v. Nicholson, Vet. App. No. 07-0527 (Aug. 24, 2007) (unpublished order denying a petition for a writ filed to compel the RO to issue a SOC where the SOC was finally issued two days prior to the date oral argument was scheduled in the case before CAVC).

[235] *Harvey v. Shinseki, 24 Vet. App. 284 (2011)*.

[236] *Harvey, 24 Vet. App. at 288–89*.

to prohibit the VA from retaliating against a veteran who had filed an appeal to Court by scheduling the veteran for a medical examination to determine whether his or her disability rating should be reduced.[237] In addition, the Court has issued a writ prohibiting the VA from disseminating false information regarding attorney fee agreements to claimants represented by attorneys.[238]

The key question the Court is likely to ask in a non-delay case is why should the Court not wait until the Board has issued a final decision in the case and then address whether the VA violated the veteran's rights in the course of deciding the appeal of the Board decision to the Court. In other words, the Court may deny the petition on the ground that the claimant failed to exhaust his or her administrative remedies (that is, appealing the case to the Board).[239] The advocate may be able to avoid this result by documenting the severity of the injury to the claimant that would be caused by waiting until the Board decides the case and by showing that an appeal to the Board would probably be futile. In this type of situation the Court requires a showing that the delay in waiting for a Board decision would result in *irreparable* injury.[240]

In addition, as with all cases before the Court, there must be a case or controversy for the Court to resolve.[241] Therefore, if while the petition is pending with the Court, VA grants the relief requested in the petition, the Court will likely dismiss the petition as moot.[242] However, oftentimes the filing of the petition alone can be a powerful tool, as it may motivate VA to quickly grant the relief requested in the petition in order to avoid a Court order directing it to grant that relief.

15.2.5.3 How to File a Petition for an Extraordinary Writ

Rule 21 of the rules of the Court discusses the procedure to be followed in filing a petition for an extraordinary writ. Among the documents that must be filed are copies of those parts of the claims file that are "necessary to understand and support the petition."[243] The petitioner should keep in mind that the Court does not have access to the veteran's claims file. The only way the Court will know about these documents is if the petitioner includes copies of them with the petition.

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[237] *See* Snyder, 14 Vet. App. at 165; Moore v. Derwinski, 1 Vet. App. 83 (1990).

[238] Jones v. Derwinski, 1 Vet. App. 596 (1991); *cf.*, Kelley, 26 Vet. App. at 190 (denying a writ of mandamus because VA's communications with the represented claimant did not damage or interfere with the attorney-client relationship).

[239] *See* Beasley v. Shinseki, 709 F.3d 1154 (Fed. Cir. 2013) (affirming the CAVC's denial of a writ of mandamus because, *inter alia*, the veteran did not show that VA's refusal to afford him a retroactive medical opinion could not be remedied via an appeal to the BVA); Hargrove v. Shinseki, 629 F.3d 1377 (Fed. Cir. 2011) (affirming the CAVC's denial of a writ of mandamus because the time for filing a NOD to a rating decision reducing a disability rating had not expired); Solze v. Shinseki, 26 Vet. App. 118 (2013) (dismissing a petition for a writ of mandamus to compel the Secretary to appoint a fiduciary and finding that the matter may be reviewed by the Board and ultimately, by the Court); In the Matter of a Letter from Michael Quigley, 1 Vet. App. 1 (1990) (dismissing a petition for an extraordinary writ to prohibit VA from revoking the veteran's fee basis card entitling him to specific medical benefits on the ground that he had failed, among other things, to seek review of the matter at the BVA); *see also* In re Fee Agreement of Cox, 10 Vet. App. 361, 373–74 (1997); Steffens v. Brown, 8 Vet. App. 142, 144 (1995).

[240] *See* Kaplan v. Brown, 7 Vet. App. 425, 428 (1995) (per curiam order).

[241] *See* Mendoza, 25 Vet. App. at 190; Vargas-Gonzalez, 15 Vet. App. at 232. See Section 15.2.3.4 for a discussion of the "case or controversy" requirement.

[242] *See* Mendoza, 25 Vet. App. at 190; ***Moore v. Peake, 22 Vet. App. 239 (2008)***; Caudill v. Nicholson, 20 Vet. App. 294 (2006); Ramsey v. Nicholson, 20 Vet. App. 223 (2006); Belton v. West, 13 Vet. App. 200 (1999); Rife v. Brown, 7 Vet. App. 340 (1995); Mokal, 1 Vet. App. at 12; *but see* Browder v. Shulkin, 29 Vet. App. 170, 172 (2017) (holding a petition for writ of mandamus moot even where the petitioner did not receive the exact relief he requested because the relief provided by the VA was the most relief the Court could have afforded the petitioner).

[243] U.S. VET. APP. R. 21(a)(4).

Often, copies of relevant documents in the claims file will not be enough to make a proper showing to the Court. For example, all of the important facts may not be adequately reflected in these documents. Accordingly, the advocate should consider filing affidavits from individuals with personal knowledge about events that are not adequately reflected in the claims file. In addition, in an effort to show that the petitioner will suffer irreparable, or at least very serious, harm if the petition is denied, allowing the case to proceed to a final BVA decision, affidavits should be filed attesting to the harm that is likely to occur.

*****Advocacy Tip*****

Before you can file a writ, you must create a record of good faith efforts to resolve the matter with the agency. You will want to create a paper trail to append to the writ to demonstrate your efforts to exhaust your administrative remedies.

[244] Contact information for the Veterans Service Center Manager and Director of each RO can be located on the individual RO websites located here: REGIONAL BENEFIT OFFICE WEBSITES, http://benefits.va.gov/benefits/offices.asp (last visited Apr. 23, 2020). Once on the RO website, you may find the Veterans Service Center Manager and Director under the "Leadership Team" tab.

The authors of this Manual advise that you should proceed in writing and as follows: First, contact the Veterans Service Center Manager of the local RO[244] *or the Chairman of the Board, in writing, to provide information regarding the action that the agency has not yet taken. This initial correspondence should not be aggressive or confrontational. You should ask for a written response that includes an explanation for the delay in the agency action and a time frame in which the agency will act. Give a specific time frame in which you expect a response to your correspondence. Thirty days is appropriate. If the agency fails to respond to the initial contact within that time, contact them again.*

Identify this subsequent correspondence as your second request. You should indicate that you are considering Court intervention but would prefer to resolve the problem without litigation if possible. Give the VA another thirty days to respond to your request. If there is still no action after the two first contacts, then your third correspondence should be more assertive. Request that the agency act within thirty days and explain the writ of mandamus and other legal issues that you are considering as a result of the agency's failure.

If there is still no action within thirty days, for a total of at least ninety days from the initial contact, then if the delay is at the RO, contact the Director of the RO. Request the Director's intervention and assistance before you are forced to seek aid through judicial means. Throughout your correspondence, emphasize that you do not wish to file a writ, but that you simply want the agency to perform the actions that are required. If there is still no action, you are ready to compose and file a writ of mandamus with the Court.

15.2.6 The Applicability of the Doctrine of Exhaustion of Administrative Remedies: Can CAVC Review Claims for Benefits or Legal Issues That Were Not Addressed by Either the BVA or the Claimant Below?

Sometimes an advocate will look at a Board decision and conclude that the claimant deserved greater benefits than the Board allowed, but the Board did not discuss whether the claimant was entitled to these greater benefits. Sometimes, an advocate will look at a Board decision and conclude that the claimant deserved the benefits expressly sought because of a particular legal theory or VA regulation, but the Board did not discuss whether that legal theory or VA regulation entitled the claimant to these greater benefits.

There is no question that a claimant may appeal these two types of Board decisions to the Court when the claimant expressly sought the benefit in question and expressly raised the legal theory or VA regulation in question. The Board cannot validly ignore relevant arguments or benefit requests advanced by the claimant, and the Court has the authority to review a Board failure to address such arguments or benefit requests.

The law is well-settled that the Court has jurisdiction to review *all* issues finally denied in a Board decision.[245] But the question often arises whether a claimant can appeal to the Court the issue of entitlement to a benefit when, although the evidence in the administrative record before the Board raises the question whether the claimant is entitled to that benefit, the claimant never expressly requested, and the Board never addressed entitlement to, the benefit. Similarly, the question often arises whether a claimant can raise or argue to the Court a legal issue that may affect whether the Board properly denied the benefit when, although the evidence in the administrative record before the Board raises the legal issue, the claimant never expressly raised or argued the issue, and the Board never addressed the issue in denying the stated benefit request.

The doctrine of exhaustion of administrative remedies often operates to preclude a party seeking judicial review of federal agency action from raising in federal court either a request for relief or a legal issue that had not been previously presented to the administrative agency. Whether the exhaustion doctrine precludes a claimant from presenting a claim or legal issue to the Court for resolution when the claim or legal issue was not raised before or decided by the VA depends in part upon whether the matter to be presented to the Court for the first time is a "claim" or an "issue," as we are about to define.

A "claim," as we use this word here, refers to a request for a particular benefit administered by the VA. For service-connected disability compensation, each type of disability for which a claimant may seek disability compensation is a different claim. Thus, a claim for service-connected disability compensation for a back disorder is a different claim from one for service-connected disability compensation for a neck disorder.

An "issue," as we use this word here, is a legal or factual matter that may affect the outcome of a claim. Each claim is composed of many "issues." Some "issues" involve facts. Examples of issues of fact include whether the claimant currently suffers from posttraumatic stress disorder; on what date the VA received the claim; and whether the onset of a particular disability occurred within one year of discharge from military service.

Other "issues" involve legal questions. For example, Chapter 3 of this Manual discusses the variety of different ways—or legal theories—by which the VA can service connect a particular disability. Each legal theory (direct service connection, secondary service connection, aggravation of a preexisting condition, etc.) is covered by a different VA regulation and has criteria that differ from the other legal theories by which the VA can service connect a condition. These legal "issues" therefore are the matters within a claim that control whether the claim is granted or denied. As the Court held in *Bingham v. Principi,*[246] a request for service connection of a particular injury, disease or disability that is based on two different methods of establishing service connection—direct service connection and presumptive service connection—is one claim based on two different legal theories.[247]

An "issue" as we use the word here can also involve a legal question regarding whether the VA violated the claimant's right to certain procedures. For example, a claim may involve one or more of the following "issues": whether the VA violated the duty to assist, whether a NOD was timely filed, or whether the VA violated the claimant's rights by suggesting a desired outcome that is unfavorable to the claimant in the course of preparing a written request for an independent medical opinion on whether it is as likely as not that the claimant's current disability resulted from a particular in-service event, injury, or disease.

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[245] *See, e.g.*, Cacciola v. Gibson, 27 Vet. App. 45, 55 (2014).

[246] 18 Vet. App. 470, 474–75 (2004).

[247] *See* Rice v. Shinseki, 22 Vet. App. 447 (2009).

This Section discusses the current state of the law on the applicability of the exhaustion doctrine to the Court review of Board decision-making. Exhaustion of "claims" is discussed first, followed by exhaustion of "issues."

15.2.6.1 Whether the CAVC Can Consider a Claim for Benefits That Was Not Addressed by the BVA

As Sections 8.1.1.1, and 12.5 of this Manual discuss, a claim for benefits must identify the benefit sought. Assuming, however, that a claimant satisfied this requirement by making a written claim for benefit X, the RO and the Board may be required to address and adjudicate not only the claim for benefit X, but also a different claim for a different benefit—benefit Y.

The Federal Circuit has made clear on a number of occasions that the VA "has a duty to 'fully and sympathetically develop a veteran's claim to its optimum.'"[248] What this means is that the VA must "give a sympathetic reading to the veteran's filings by 'determining all potential claims raised by the evidence, applying all relevant laws and regulations.'"[249] In direct appeals, this rule applies regardless of whether the veteran was represented by an attorney or a veterans service officer in the proceedings before the agency.[250]

As *Beverly v. Nicholson*[251] demonstrates, if the RO and the Board violate this principle by failing to determine that a claim for benefit X is also a claim for benefit Y, the claimant can remedy this error by appealing to the Court. In *Beverly*, a veteran with service-connected schizophrenia appealed to the Board a RO decision denying his claim for reimbursement of the costs he incurred at a residential care facility. While the reimbursement claim was pending before the Board, the veteran submitted a medical examination report that stated the veteran required the daily personal health care services of a skilled provider without which he would require hospital, nursing home, or other institutional care. The Board denied the claim for reimbursement, but did not address the issue of whether the veteran was entitled to special monthly compensation (SMC) on the ground that he required aid and attendance due to the severity of his service-connected disability.[252]

The veteran appealed the Board's decision to the Court and retained an attorney who realized that there was a strong argument that the Board should have recognized, from a sympathetic reading of the record, that the evidence reasonably raised the issue of entitlement to SMC. Accordingly, the attorney argued to the Court on behalf of the veteran that the Board violated its duties under *Roberson*[253] by failing to recognize a claim for SMC. The Court held that the case should be remanded to the Board for it to determine in the first instance whether the veteran's "submissions and arguments reasonably raised an informal claim … for SMC for aid and attendance."[254] The result of this victory is that if the Board were to agree on remand that an informal claim for SMC was raised and the veteran thereafter were to prevail on

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[248] Moody v. Principi, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (quoting Roberson v. Principi, 251 F.3d 1378, 1384 (Fed. Cir. 2001), which, in turn, quoted Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998)); *see also* Andrews v. Nicholson, 421 F.3d 1278 (Fed. Cir. 2005).

[249] Moody, 360 F.3d at 1310 (quoting Szemraj v. Principi, 357 F.3d 1370, 1373 (Fed. Cir. 2004), which, in turn, quoted Roberson, 251 F.3d at 1384)); *see also* Barringer v. Peake, 22 Vet. App. 242, 245 (2008) (holding that the Board erred in failing to address the evidence reasonably raising entitlement to an extraschedular rating).

[250] Robinson v. Shinseki, 557 F.3d 1355, 1361 (Fed. Cir. 2009); Comer v. Peake, 552 F.3d 1362, 1369 (Fed. Cir. 2009).

[251] 19 Vet. App. 394 (2005).

[252] Beverly, 19 Vet. App. at 398.

[253] 251 F.3d at 1384.

[254] Beverly, 19 Vet. App. at 405.

this informal claim, the date the veteran submitted the medical report indicating that he was in need of aid and attendance would serve as the date of claim for purposes of determining the effective date.

Even where a veteran explicitly identifies one diagnosis as the disability for which he or she is claiming entitlement to service connection, VA may be required to determine whether the veteran is entitled to service connection for a different disability. In *Clemons v. Shinseki*, the Court held that when a veteran identifies a specific diagnosis,

> it cannot be a claim limited only to that diagnosis, but it must rather be considered a claim for any … disability that may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim.[255]

In that case, the veteran specifically identified PTSD as the disability for which he sought service connection, but the evidence included other psychiatric diagnoses. The Board denied the claim because the evidence did not include a confirmed diagnosis of PTSD. However, the Court held that the Board erred by failing to determine whether the claim included the other psychiatric diagnoses.[256]

In *DeLisio v. Shinseki*, the Court went one step further and held that

> When a claim is *pending* and information obtained [by VA] reasonably indicates that the claimed condition is *caused* by a disease or other disability that may be associated with service, the Secretary generally must investigate the possibility of secondary service connection; and, if that causal disease or disability is, in fact, related to service, the pending claim reasonably encompasses a claim for benefits for the causal disease or disability, such that no separate filing is necessary to initiate a claim for benefits for the causal disease or disability … .[257]

In that case, the veteran had filed a claim for service connection for peripheral neuropathy, and medical evidence obtained during the processing of that claim revealed that the peripheral neuropathy was caused by diabetes. Although the veteran did not file a formal claim for diabetes until many years after filing the claim for peripheral neuropathy, the Court found that the claim for peripheral neuropathy reasonably encompassed a claim for diabetes because the evidence established that diabetes caused the veteran's peripheral neuropathy, and the veteran was entitled to the same effective date for service connection for both conditions.[258]

In many cases, the claimant or the claimant's advocate may not realize until after the VA decision becomes final that the record reasonably raised a claim for a benefit, or that the veteran's claim for service connection included diagnoses other than those that the veteran specifically identified. Section 17.17 of this Manual discusses the avenues a claimant may pursue to correct a VA failure to adjudicate a claim reasonably raised by the record after the VA's decision has become final.

15.2.6.2 Whether the CAVC Can Consider an Issue That Was Not Addressed by the BVA or Raised by the Claimant Below in Support of a Claim over Which the CAVC Has Jurisdiction

The Court's jurisdiction is defined by *38 U.S.C.S. §§ 7252* and *7261*. Section 7252(a) provides that the Court's jurisdiction is to "review decisions of the Board of Veterans' Appeals." Section 7261(a)(3) further provides that "[i]n no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court." Thus, when the Board does not address an issue in its decision, either because the claimant failed to explicitly raise the issue or because it was reasonably

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[255] *23 Vet. App. at 5*.

[256] *Clemons, 23 Vet. App. at 4, 6*.

[257] *25 Vet. App. 45, 55 (2011)* (emphases in original).

[258] *DeLisio, 25 Vet. App. at 47–48, 56*.

raised by the record but the Board ignored it, the Court's authority to review and/or resolve the issue is constrained by these jurisdiction-conferring statutes. This Section will discuss the rules for determining whether the Court will *review* an issue in the first instance. Section 15.2.6.3 addresses when the Court can *resolve* an issue in the first instance.

When the Board issues a decision, it is required by statute to include "a written statement of [its] 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."[259] However, the statutes and regulations do not clearly answer the question whether a claimant must specifically raise an issue while the claim is before the VA in order for the issue to qualify as a "material" issue "presented on the record." In other words, the statutes and regulations do not clearly answer the question whether a claimant must raise or argue an issue in order for the Board to be required to address the issue.[260]

The way this issue typically arises in an appeal to the Court is that the appellant argues to the Court that the Board erred by not complying with a particular legal requirement. Sometimes the appellant characterizes this error as a Board failure to explain in its decision whether the agency complied with a particular legal requirement. If the claimant never raised or discussed this particular legal requirement while the claim was pending before the VA, the Secretary may argue to the Court that it should not consider the issue regarding compliance with this particular legal requirement because the claimant failed to raise this issue during the administrative process. This type of argument is generally referred to as an attempt to enforce an "issue exhaustion" requirement (that is, the claimant must "exhaust" an issue by raising it before the agency in order to earn the right to present it to the Court).

For example, assume that the Board denies a claim for service connection for PTSD. On appeal to the Court, the veteran argues that the Board erred because it did not require the RO to follow certain procedures contained in the *Manual M21-1* for handling PTSD claims.

In response to a contention by the Secretary that the Court should not consider this argument because the claimant failed to complain about the *Manual M21-1* violation when the claim was before the Board, the Court must first decide whether the claimant waived the right to present this issue to the Court by failing to raise it below. If the Court's answer to this question is "yes," then unless there was some other error made by the Board, the Court would affirm the Board denial of service connection. If the Court's answer to this question is "no," then it will take one of two courses of action: (1) decide for itself the merits of the new argument (in this example, whether the VA violated a binding rule contained in *Manual M21-1*), or (2) remand the case to the Board for the Board to address the *Manual M21-1* issue in the first instance.

Either of the latter two courses of action by the Court is a major victory for claimants. A rule that claimants waive the right to raise an issue at the Court due to the failure to raise it below would be devastating to claimants because unless there was some other error in the Board decision, the Court would affirm the Board denial. Although claimants could still file a reopened claim, if the VA granted the reopened claim, the effective date for the award would be no earlier than the date the reopened claim was filed. On the other hand, a rule allowing claimants to raise new issues at the Court level without first raising them below means that if they ultimately prevail on the claim, they may receive as the effective date of the award, the date the VA received the claim that was ultimately appealed to the Court. Thus, there may be tens of thousands of dollars in benefits at stake in how the Court answers the question of issue exhaustion.

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[259] *38 U.S.C.S. § 7104(d)(1)*.

[260] Section 7105(d)(3) does state that the claimant's substantive appeal (VA Form 9) "should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case." *38 U.S.C.S. § 7105(d)(3)*; *see also 38 C.F.R. § 19.22 (2020)*; *cf. Evans v. Shinseki, 25 Vet. App. 7, 15–17 (2011)* (holding that veteran's substantive appeal may be sufficient as to all claims even though it did not contain a specific assertion of error with regard to some claims because veteran checked the box on VA Form 9 indicating that he wished to appeal all the issues listed in the SOC).

Because the statutes and regulations do not contain a clear answer to this question, the courts have been called upon to provide an answer. The general rules regarding issues exhaustion are discussed below in *Section 15.2*.6.2.1. The courts have also established several special rules that govern when issue exhaustion is required and when it is not. These rules are discussed below in *Section 15.2*.6.2.2. Finally, the special rules pertaining to whether the Court can consider a theory that was not raised below in reviewing a request or motion to revise a final decision based on clear and unmistakable evidence are discussed in *Section 15.2*.6.2.3.

15.2.6.2.1 General Rules Governing Issue Exhaustion

The Federal Circuit ruled in *Maggitt v. West*,[261] that the Court has jurisdiction to consider any issue advanced in support of the appeal of a Board's denial of benefits, including issues that the claimant raises for the first time at the Court level. A rule precluding Court jurisdiction over an issue unless the claimant raised the issue during the VA administrative proceedings "[w]ould be inconsistent with the nonadversarial ex parte system that supplies veterans benefits."[262]

On the other hand, the Federal Circuit ruled that simply because the Court has jurisdiction to consider new issues does not mean it must consider new issues. The Federal Circuit stated that it was "not prepared at this time to establish an across-the-board" guideline either generally requiring or generally not requiring the claimant to raise an issue before the RO or Board in order to earn the right to have the Board and the Court resolve the issue.[263] "We think," the Federal Circuit stated, "the Veterans Court is uniquely positioned to balance and decide the considerations regarding" whether the claimant is required to raise an issue "in a particular case."[264] This should "entail [ ] a case-by-case analysis of the competing individual and institutional interests, including whether the Veterans Court should use its authority to 'remand the matter as appropriate' to the Board."[265]

In assigning the Court the responsibility to conduct a case-by-case analysis, the Federal Circuit appeared to signal that the Court should err on the side of **not** requiring that issues be raised by the claimant in order to earn the right to have the Board or the Court resolve them. In the first place, the Federal Circuit suggested that instead of refusing to consider an issue presented for the first time at the Court level, the Court should consider simply remanding the case back to the Board for the Board to consider the new issue. Second, it stated that "perhaps most important [ ] for the determination of whether exhaustion should be invoked in a particular case," is whether "invocation of the doctrine would frustrate the purpose or purposes for which Congress has created a particular statutory arrangement."[266]

A few months after the Federal Circuit's decision in *Maggitt*, the U.S. Supreme Court issued a decision that also suggests that VA claimants should not be required to raise an issue as a prerequisite to Court

[261] *202 F.3d at 1370*.

[262] *Maggitt, 202 F.3d at 1377*.

[263] *Maggitt, 202 F.3d at 1377*. The Federal Circuit did indicate that "it is open to question whether [requiring claimants to raise all issues before the BVA as a prerequisite to raising them to the CAVC] is consistent with the statutory purposes underlying veterans benefits laws." *Maggitt, 202 F.3d at 1378*.

[264] *Maggitt, 202 F.3d at 1377*.

[265] *Maggitt, 202 F.3d at 1377*

[266] *Maggitt, 202 F.3d at 1377*. In this regard, the Federal Circuit pointed out that the statutory prohibition against paying an independent representative to assist a VA claimant while the claim is before VA "suggest[s] that the system may not be particularly 'user friendly' for the presentation by the veteran of a legal [issue], either in a regional office or before the Board." *Maggitt, 202 F.3d at 1377*.

consideration. In *Sims v. Apfel,* the Supreme Court ruled that a Social Security claimant is **not** required to raise an issue before the highest level within the Social Security Administration (SSA) and can raise the new issue for the first time in federal court, and the court must consider it.[267] In reaching this result, the five-member majority of the Supreme Court stated that the argument that a claimant should be required to raise an issue while the case is before an agency is "much weaker" where, as in both VA and SSA proceedings, the "administrative proceeding is not adversarial."[268] One member of the five-member Supreme Court majority wrote separately to state that the most important reason for not requiring exhaustion was that the SSA does not "notify claimants of an issue exhaustion requirement."[269]

The veteran-friendly decisions in the *Maggitt* and *Sims* cases were followed by many cases in which the Court remanded a new issue that was raised for the first time at the Court level for the Board to consider and resolve the new issue in the first instance.[270] However, the Federal Circuit subsequently issued a decision that was unfavorable to the appellant in *Bernklau v. Principi*.[271] In *Bernklau*, the veteran appealed to the Court a Board decision denying an earlier effective date, where the veteran raised a legal theory regarding why he was entitled to an earlier effective date that he had not raised when the case was before the Board. Citing *Maggitt*, the Court stated that "'in its discretion, [it] will decline to exercise its jurisdiction over this [new] argument … because the appellant has failed to demonstrate that there are significant reasons for remanding the matter to the [Board] for its consideration of this argument in the first instance.'"[272]

On appeal, the Federal Circuit upheld the Court's ruling that the veteran lost his right to raise a legal theory in support of his earlier effective date claim due to his failure to raise it before the Board. Moreover, the Federal Circuit ruled that although the Court was required by *Maggitt* to conduct a "case-by-case analysis of the competing individual and institutional interests" in deciding whether to impose an issue exhaustion requirement in the veteran's case, the Court did not have to explain its analysis and the Federal Circuit would not require the Court to explain its analysis.[273]

The Federal Circuit's support of the right of the Court to analyze on a case-by-case basis whether to impose issue exhaustion continued in its 2015 decision in *Scott v. McDonald*,[274] and its 2016 decision in *Dickens v. McDonald*.[275] In *Scott*, the Federal Circuit upheld the Court's right to impose issue exhaustion on a procedural issue, stating that the Federal Circuit's prior decisions:

> [D]o not go so far as to require the Veterans Court to consider procedural objections that were not raised, even under a liberal construction of the pleadings.

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[267] 530 U.S. 103, 112 (2000).

[268] Sims, 530 U.S. at 110–11.

[269] Sims, 530 U.S. at 112–14.

[270] Maggitt, 202 F.3d at 1370; Sims, 530 U.S. at 103; ***see*** Kilpatrick v. Principi, 16 Vet. App. 1, 6–7 (2002); Parker v. Principi, 15 Vet. App. 407, 411 (2002); Livesay, 15 Vet. App. at 173; Gordon v. Principi, 15 Vet. App. 124, 127–28 (2001); Harvey v. Gober, 14 Vet. App. 137, 140 (2000); McCormick v. Gober, 14 Vet. App. 39 (2000).

[271] 291 F.3d 795 (Fed. Cir. 2002).

[272] Bernklau, 291 F.3d at 799 (citing Maggitt, 202 F.3d at 1370).

[273] Bernklau, 291 F.3d at 801–02; Maggitt, 202 F.3d at 1370.

[274] 789 F.3d 1375 (Fed. Cir. 2015).

[275] 814 F.3d 1359 (Fed. Cir. 2016).

> There is a significant difference between considering closely-related theories and evidence that could support a veteran's claim for disability benefits and considering procedural issues that are collateral to the merits. As to the former, the veteran's interest is always served by examining the record for evidence that would support closely related claims that were not specifically raised. As to procedural issues, that is not always the case. A veteran's interest may be better served by prompt resolution of his claims rather than by further remands to cure procedural errors that, at the end of the day, may be irrelevant to final resolution and may indeed merely delay resolution. Under such circumstances, the failure to raise an issue may as easily reflect a deliberate decision to forgo the issue as an oversight. Having initially failed to raise the procedural issue, the veteran should not be able to resurrect it months or even years later when, based on new circumstances, the veteran decides that raising the issue is now advantageous. For this reason, absent extraordinary circumstances not apparent here, we think it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran, though at the same time giving the veteran's pleadings a liberal construction.
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> In short, we hold that the Board's obligation to read filings in a liberal manner does not require the Board or the Veterans Court to search the record and address procedural arguments when the veteran fails to raise them before the Board. Under the balancing test articulated in *Maggitt*, the VA's institutional interests in addressing the [denial of the veteran's right to a] hearing issue early in the case outweigh Scott's interests in the Veterans Court's adjudication of the issue.[276]

Similarly, in *Dickens,* the Federal Circuit affirmed the Court's imposition of issue exhaustion where the appellant could have, but failed to include in a prior joint motion for remand, the issue of whether the Board member who held the appellant's hearing wrongly failed to suggest to the appellant the evidence that was needed to substantiate the veteran's claim. The Federal Circuit found no error in the Court's imposition of issue exhaustion when the veteran attempted to raise for the first time in his second appeal to the Court the argument about the Board member's duty to assist error made in a hearing that took place before the veteran's first appeal to the Court.[277]

Despite the imposition of issue exhaustion by the Court in the cases appealed to the Federal Circuit in *Scott* and *Dickens*, as a general matter, the Court has resolved issue exhaustion in a manner that is favorable to appellants. For example, in *Barger v. Principi*,[278] the Court reviewed and decided on the merits an issue never raised by the claimant at the agency level: whether the VA's notice of indebtedness to the appellant adequately informed the veteran of her right to request a waiver of recovery of a debt. Similarly, in *Shoffner v. Principi*,[279] the Court reviewed and decided on the merits an issue never raised by the claimant at the agency level: whether engagement letters from the RO and the Board requesting medical opinion evidence were tainted because of certain details in the engagement letters requesting the medical opinion evidence. Neither of these cases involved factual determinations, which would have required the Court to remand the issues for further development to the Board.[280] To the contrary, each case presented legal issues appropriate for judicial review regarding whether actions taken by the VA violated a relevant law and regulation.[281] Most recently, the

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[276] *Scott, 789 F.3d at 1381*.

[277] *Dickens, 814 F.3d at 1361–62*.

[278] *16 Vet. App. 132 (2002)*.

[279] *16 Vet. App. 208 (2002)*.

[280] *Hensley v. West, 212 F.3d 1255, 1264 (Fed. Cir. 2000)*.

[281] *See* *Bingham, 18 Vet. App. at 474*. On the other hand, in *Kay v. Principi, 16 Vet. App. 529, 533–34 (2002)*, the Court was unwilling to decide the merits of certain statutory and constitutional issues raised for the first time on appeal by the veteran even

Federal Circuit overturned the Court's decision that "erroneously expanded the legal definition of issue exhaustion to apply to a claimant's citation of additional record evidence in support of his previously raised claim for an earlier effective date."[282] As a result of the Federal Circuit's decision, appellants can rest assured that "issue exhaustion cannot be invoked to bar citation of record evidence in support of a legal argument that has been properly preserved for appeal."[283]

In fact, the Court may raise on its own an issue not presented below. In *Edwards v. Peake,*[284] the Court on its own raised an issue that was not raised by the claimant at the agency level: whether the claimant's letters to the VA constituted a request for a waiver of overpayment of pension benefits. In that case, the VA had sent two separate notifications to the claimant notifying her of overpayment of two separate amounts, although the second notification was not part of the record and was apparently lost. The Board found that of the five statements that the claimant had submitted in response to notifications of overpayment, only one constituted a waiver request and it was untimely. On appeal, the Court held that the Board erred in not sympathetically reading the claimant's requests for waiver in response to the first notification of overpayment and remanded the claim to the Board for it to do so in the first instance. Apparently, however, the argument below did not address whether the letters constituted waiver requests with regard to the second overpayment. Therefore, the Court raised the issue on its own and remanded the matter to the Board for adjudication, even though the issue had never been presented to the Board.[285]

Separate from, but related to the *Maggitt* analysis is whether the evidence before the Board reasonably raised the issue that the Board failed to address.[286] As explained in Section 15.2.6.*2.2 below*, both the Court and the Federal Circuit have held that the Board's failure to address an issue that was not explicitly raised by the claimant but was nonetheless reasonably raised by the record constitutes error.[287] While *Maggitt* stands for the proposition that the Court has discretion in determining whether it will consider arguments raised for the first time on appeal, the Federal Circuit held in *Robinson v. Shinseki*[288] that the Board is required to address all issues and arguments reasonably raised by the record, regardless of whether the claimant explicitly raised the argument. In *Massie v. Shinseki*,[289] the Court examined the interplay between the Federal Circuit's holdings in *Maggitt* and *Robinson* and

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though it appears that adjudication of these issues by the Court would not have required the Court to engage in fact-finding. The Court did vacate and remand the case on other grounds and held that a narrow decision preserves for the appellant an opportunity to argue the newly claimed errors before the Board during the readjudication process. *Kay, 16 Vet. App. at 533–34*; *see also* *Seri v. Nicholson, 21 Vet. App. 441 (2007)* (CAVC refused to address an issue because that issue was not properly before the Board where the claimant did not raise it below).

[282] *Bozeman v. McDonald, 814 F.3d 1354, 1358 (Fed. Cir. 2016)*.

[283] *Bozeman, 814 F.3d at 1359*.

[284] *22 Vet. App. 57 (2008)*.

[285] *Edwards, 22 Vet. App. at 58–61*; *see also* *Molitor v. Shulkin, 28 Vet. App. 397 (2017)* (adjudicating sua sponte the soundness and application of a VA Gen. Coun. opinion); *Donnellan v. Shinseki, 24 Vet. App. 167 (2010)* (finding that the Board applied the presumption of aggravation without first determining whether the claimant had established his status as a veteran, and remanding for the Board to do so); *Barringer, 22 Vet. App. at 242* (finding that the Board erred by not addressing the reasonably raised issue of entitlement to an extra schedular rating and remanding for the Board to consider the issue).

[286] *Maggitt, 202 F.3d at 1370*; *see* *Robinson, 557 F.3d at 1355*, *aff'g* *Robinson v. Mansfield, 21 Vet. App. 545, 545 (2008)*.

[287] *See* *Robinson, 557 F.3d at 1355*; *Schroeder v. West, 212 F.3d 1265 (Fed. Cir. 2000)*.

[288] *557 F.3d at 1360, 1362*; *but see* *Maggitt, 202 F.3d at 1370*.

[289] *25 Vet. App. 123, 128–30 (2011)* (citing generally *Maggitt, 202 F.3d at 1370*; *Robinson, 557 F.3d 1355*).

expressed uncertainty about *Robinson*'s effect on *Maggitt.* The Court noted that the circumstances before it in *Massie* would usually warrant the invocation of the doctrine of exhaustion of administrative remedies.[290] Nevertheless, the Court went on to consider the appellant's contention that the argument he had raised to the Court had been reasonably raised before the Board, and the Board erred in failing to address it. The Court explained:

> Given the resulting uncertainty regarding whether the Court truly maintains [discretion as to whether it will give any consideration to arguments first raised on appeal] or must instead always engage in the type of "reasonably raised by the record" analysis described in the *Robinson* decisions, the Court, out of an abundance of caution, will address Mr. Massie's assertion that, in this case, his newly raised theory for an earlier effective date was raised by the record before the agency and that the Board erred in failing to consider it sua sponte.[291]

15.2.6.2.2 Specific Rules Governing Issue Exhaustion

As indicated above, the courts have held that the Board is required to consider some arguments and theories even if the claimant does not explicitly raise them to the Board. Over the years, the courts have established specific rules that govern whether issue exhaustion will be required in specific contexts. For example, in *Schroeder v. West*,[292] the Federal Circuit ruled that in adjudicating a claim for service connection, the Board is required to address in its decision (and ensure that the VA assists in the development of pertinent evidence regarding) all possible legal theories by which the disability or death may be service connected. The Federal Circuit's holding in *Schroeder* seemed to place the burden on the VA to address *all possible in-service causes*, even those unknown to and not argued or raised by the claimant.[293] This would mean that a claimant was not precluded from raising and arguing before the Court that the Board should have addressed whether the claimant was entitled to the requested benefits based upon all existing service connection theories. However, in *Robinson v. Mansfield*, the Court interpreted the Federal Circuit's holding in *Schroeder* not to require the VA to consider "*all* possible" causes.[294] Rather, the Court held:

> As a nonadversarial adjudicator, the Board's obligation to analyze claims goes beyond the arguments explicitly made. However, it does not require the Board to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision. The question of the precise location of the line between the issues fairly raised by the appellant's pleadings and the record and those that are not must be based on the record in the case at hand; therefore, it is an essentially factual question.[295]

The Federal Circuit affirmed the Court's holding, agreeing that "the Board is not obligated to consider 'all possible' substantive theories of recovery."[296] Rather, "[w]here a fully developed record is presented

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[290] *Massie, 25 Vet. App. at 129*.

[291] *Massie, 25 Vet. App. at 129–30*.

[292] *212 F.3d at 1265*.

[293] *Schroeder, 212 F.3d at 1267*. Similarly, in a claim for service-connected death benefits (DIC) in which the veteran had a totally disabling service-connected disability at the time of death, VA must consider entitlement under *38 U.S.C.S. § 1318* regardless of whether the survivor raised this theory of entitlement. *See* *Timberlake v. Gober, 14 Vet. App. 122, 134–35 (2000)*; *Carpenter v. West, 11 Vet. App. 140, 147 (1998)*.

[294] *21 Vet. App. at 553*, *aff'd*, *557 F.3d 1355, 1361 (Fed. Cir. 2009)* (emphasis added).

[295] *Robinson, 21 Vet. App. at 553*.

to the Board with no evidentiary support for a particular theory of recovery, there is no reason for the Board to address or consider such a theory."[297] Thus, under *Schroeder* and *Robinson*, the VA's consideration of potential theories of entitlement is not strictly limited to those explicitly advanced by the claimant, but there must be some evidence in the record that reasonably raises a theory not explicitly advanced by the claimant in order to trigger the Board's duty to address it.[298]

Another special rule that has evolved regarding issue exhaustion relates to entitlement to TDIU. The Courts have made clear that in some cases, the Board is required to address entitlement to TDIU even though the veteran never specifically asserted entitlement to that benefit. In *Rice v. Shinseki*,[299] the Court held that a TDIU claim is not a free-standing claim for benefits; rather, it "involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of the initial adjudication of a claim or, if a disability upon which entitlement to TDIU is based has already been found to be service connected, as part of a claim for increased compensation." Thus, when the record contains evidence of unemployability, the VA is required to address whether a veteran is entitled to TDIU, regardless of whether the claim before it is an initial claim for VA disability compensation or a claim for an increased rating and regardless of whether the veteran specifically raised the issue.[300]

To illustrate this rule, assume that a veteran files a claim for an increased disability rating for his service-connected PTSD, which is currently rated as 70 percent disabling.[301] In his written submissions to the RO, the veteran claims that his disability has increased in severity, and he has been receiving regular VA medical treatment for his disability. In addition, there is evidence in the claims file (comprised of notations in his medical records and VA vocational rehabilitation records) showing that he was fired from his job in 1995 after he attacked his supervisor during a flashback episode. The evidence also shows that since this incident he has not worked and he has been hospitalized three times related to his PTSD. He never asked the RO for TDIU entitlement nor did he mention that he was unemployed in any of his submissions or that his service-connected PTSD was the reason for losing his job. In its adjudication of his claim, the RO denied entitlement to a rating in excess of 70 percent for his PTSD and did not adjudicate TDIU entitlement. In his appeal to the Board, the veteran only addressed the RO's denial of an increased rating for his PTSD. In this example, the Board would be required to address whether the veteran was entitled to TDIU because there is evidence of his unemployability due

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[296] *Robinson, 557 F.3d at 1361*.

[297] *Robinson, 557 F.3d at 1361*.

[298] *Robinson, 557 F.3d at 1361*; *Robinson, 21 Vet. App. at 553*; *see also* *Kyhn v. Shinseki, 23 Vet. App. 335, 343 (2009)*, *rev'd on other grounds*, *716 F.3d 572 (Fed. Cir. 2013)*; *Acciola v. Peake, 22 Vet. App. 320, 327 (2007)*.

[299] *22 Vet. App. at 447*.

[300] *Rice, 22 Vet. App. at 447*; *see also* *Harper, 30 Vet. App. at 359–62* (holding that the RO's grant of TDIU did remove its status as part and parcel of the claim for the appropriate disability evaluation and, because he was not awarded TDIU for the entire appeal period, the issue of entitlement to TDIU for the entire period remained on appeal, and the Board had jurisdiction to consider that matter); *Comer, 552 F.3d at 1362*; *Norris v. West, 12 Vet. App. 413 (1999)*; In the Matter of the Fee Agreement of Kenneth B. Mason, Jr., in Case Number 90-920, *13 Vet. App. 79 (1999)*; *cf.* *Jackson v. Shinseki, 587 F.3d 1106 (Fed. Cir. 2009)* (holding that the issue of entitlement to TDIU is not raised where the record does not contain any evidence of unemployability).

[301] In general, VA regulations provide that TDIU is available only if there is either (1) one service-connected disability ratable at 60 percent or more, or (2) if there are two or more disabilities and at least one disability is rated at 40 percent or more and sufficient additional disability(ies) bring the combined rating to 70 percent or more. *See* *38 C.F.R. § 4.16(a) (2020)*.

to his service-connected disability, even though he never expressly raised the TDIU claim and even though the RO did not address it.[302]

The Board would still be required to address entitlement to a total disability rating based on TDIU even if the claim had been an initial claim for disability compensation rather than a claim for an increased disability rating. For example, in *Rice*, the veteran filed a claim for entitlement to service connection for PTSD, which the RO eventually granted and assigned a 30 percent disability rating and an effective date of the date when the veteran filed the claim.[303] Within a year of the date of that rating decision, the veteran submitted VA Form 21-8940, "Veteran's application for increased compensation based on unemployability," as well as evidence demonstrating that he had become unemployed.[304] The RO granted the claim for entitlement to TDIU, but assigned an effective date later than the date that the veteran filed the initial claim for entitlement to service connection for PTSD. On appeal to the Board, the Board remanded the PTSD claim for further development and adjudication, but denied the claim for an earlier effective date for TDIU. After finding that the veteran had properly raised entitlement to TDIU as part of his initial claim, the Court found that it was error for the Board not to also remand the matter of the proper effective date for the award of TDIU when it remanded the issue of the proper disability rating for the underlying disability.[305]

A third specific rule is that the Board is required to address entitlement to an extraschedular disability rating under *38 C.F.R. § 3.321 (2020)* or *38 C.F.R. § 4.16(b) (2020)* so long as the evidence indicates that either the rating schedule does not provide an adequate basis for rating a particular veteran's disability or the veteran's service-connected disability or disabilities prevent substantially gainful employment.[306] The OGC has issued a precedential opinion setting forth this rule.[307] This rule is compatible with the rule set forth in *Rice* that a veteran need not explicitly raise entitlement to TDIU under *38 C.F.R. § 4.16(a) (2020)* so long as there is some evidence in the claims file of unemployability due to the veteran's service-connected disability or disabilities.[308]

In addition, the Court has held that entitlement to special monthly compensation (SMC) is not a separate claim that must be pled with any specificity; rather it is an issue within a claim for an increased disability rating. As an example, in *Akles v. Derwinski*, a veteran sought an increased rating for a testicular disability.[309] The claim was denied, and on appeal to the Court, the veteran argued that VA should have considered entitlement to SMC for loss of use of a creative organ. The Court agreed, noting that the non-adversarial nature of proceedings before the VA dictated that the Board "infer[] from

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[302] The Board's ability to address TDIU entitlement in the first instance is limited by due process considerations; therefore, the Board may be required to remand the case or provide notice to the claimant or representative of its intention to address it. *See* VA Gen. Coun. Prec. 6-96, ¶ 19 (Aug. 16, 1996).

[303] *22 Vet. App. at 449–50*.

[304] *Rice, 22 Vet. App. at 449*.

[305] *Rice, 22 Vet. App. at 450, 453–54*.

[306] *Kuppamala v. McDonald, 27 Vet. App. 447 (2015)* (establishing that the "Board reviews the entirety of the Director's decision de novo and is thus authorized to assign an extraschedular rating when appropriate"); *see also* *Morgan v. Wilkie, 31 Vet. App. 162 (2019)*.

[307] VA Gen. Coun. Prec. 06-96 (Aug. 16, 1996).

[308] *22 Vet. App. at 449–50*.

[309] *Akles v. Derwinski, 1 Vet. App. 118, 121 (1991)*.

the veteran's request for an increase in benefits involving a creative organ a request for special monthly compensation whether or not it was placed in issue by the veteran."[310]

In addition to the veteran-friendly special rules discussed above, there have evolved three special rules that are unfavorable to veterans. The first rule is that an issue exhaustion requirement appears to always apply to the question of a VA examiner's competency to render a specific medical opinion.[311] Both the Federal Circuit and the Court have held that if a challenge to the examiner's competency is not raised while the claim is pending before the agency, the courts will not consider the issue on appeal.[312] The Federal Circuit has also held that a challenge to whether a VA medical examiner was adequately informed cannot be raised for the first time in the courts.[313] The Courts have explained the presumption of administrative regularity operates to presume that the examiner the VA chose is competent, but that presumption is rebuttable.[314] In most cases, rebutting the presumption requires the *claimant* to raise an objection to the examiner's qualifications while the claim is pending before the agency, and possibly to provide information showing that the examiner is not qualified to render the particular opinion.[315] If the examiner's qualifications are being attacked with documentary evidence such as prior disciplinary proceedings, those documents must be actually or constructively before the agency; the Court is precluded from considering material that is not part of the record of proceedings before the Secretary and the Board.[316]

However, in some cases, the *examiner* may raise the issue of his or her competency. In those cases, the claimant is *not* required to separately raise the issue. For example, in *Wise v. Shinseki*, the VA examiner was asked to render an opinion as to whether the veteran's service-connected PTSD caused or contributed to the cardiovascular conditions that caused his death.[317] The examiner prefaced her opinion by noting that she had "no formal training or background in [p]sychiatry other than the rudimentary month[-]long [p]sychiatry rotation in medical school more than 25 years ago."[318] The examiner further noted that her opinion was rendered "[f]rom a relative lay person's perspective of psychiatry … ."[319] The Court held that these statements "suggest irregularity in the Board's process of selecting [the examiner] to provide the expert medical opinion because, by [the examiner's] own

[310] *Akles, 1 Vet. App. at 120–21*.

[311] *See* *Parks v. Shinseki, 716 F.3d 581 (Fed. Cir. 2013)*; *Sickels v. Shinseki, 643 F.3d 1362, 1365 (Fed. Cir. 2011)*; *Bastien v. Shinseki, 599 F.3d 1301, 1306–07 (Fed. Cir. 2010)*; *Rizzo v. Shinseki, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009)*; *Cox v. Nicholson, 20 Vet. App. 563, 568–70 (2007)*.

[312] *See* *Parks, 716 F.3d at 581*; *Bastien, 599 F.3d at 1306–07*; *Rizzo, 580 F.3d at 1290–91*; *Cox, 20 Vet. App. at 568–70*.

[313] *Scott v. McDonald, 789 F.3d 1375, 1381 (Fed. Cir. 2015)* ("absent extraordinary circumstances … it is appropriate for … [the CAVC] to address only those procedural arguments specifically raised by the veteran, though, at the same time giving the veteran's pleadings a liberal construction."); *Sickels, 643 F.3d at 1362*.

[314] *See* *Fears v. Wilkie, 31 Vet. App. 308 (2019)* provides a detailed discussion of the history and precedent addressing the presumption of competence.

[315] *Parks, 716 F.3d at 585–86*.

[316] See *Fear*s, *31 Vet. App. at 318* (explaining that documents the appellant relies upon to challenge the examiner's competency must have been actually or constructively before the Board, and that the Court is prohibited by statute from entertaining materials outside the record of proceedings).

[317] *26 Vet. App. 517, 521, 525–26 (2014)*.

[318] *Wise, 26 Vet. App. at 522* (alterations in original).

[319] *Wise, 26 Vet. App. at 522*.

admission, she lacks the necessary expertise to provide that opinion."[320] The Court therefore found that the claimant was not required to raise the issue of the examiner's competency below, as "it would be unreasonable to allow the Board to ignore this explicit denial of expertise."[321]

The second unfavorable rule involves a case in which an attorney agrees to a joint motion for remand (JMR) that is filed with the Court and addresses a specific claim. The language used in the JMR may have the effect of limiting the scope of the Board's duty to address reasonably raised issues with regard to the same claim on remand.[322]

In *Carter v. Shinseki*, the Court held that "when an attorney agrees to a joint motion for remand based on specific issues and raises no additional issues on remand, the Board is required to focus on the arguments specifically advanced by the attorney in the [joint] motion [for remand], … and those terms will serve as a factor for consideration as to whether or to what extent other issues raised by the record need to be addressed."[323] In that case, the veteran was represented by the same attorney when the JMR was filed with the Court, and when the case was on remand before the Board. On remand, neither the veteran nor the attorney raised any additional argument or submitted additional evidence, and the Board denied the claim again. The same attorney then appealed the Board's second denial to the Court, and argued that the Board failed to address reasonably raised issues.[324] Upon review of the record, the Court noted that the previous JMR explicitly instructed the Board to "reexamin[e] the evidence of record," and therefore the JMR did not limit the scope of the Board's duty to address any reasonably raised issues.[325] Accordingly, the Court went on to address the merits of the attorney's argument, but concluded that the issues identified by the attorney were not reasonably raised, and in doing so, appeared to take into consideration the fact that the issues were not addressed in the prior JMR.[326] On appeal, the Federal Circuit refused to consider this issue.[327]

As discussed in *Section 15.6.10*, the important take-away from *Carter* is that if counsel enters into a JMR, and no additional argument or evidence is presented to the Board on remand, it is possible that the Court will invoke the doctrine of issue exhaustion in a subsequent appeal and refuse to consider any issues that were not addressed in the JMR. It is unclear from *Carter* whether this rule applies when counsel does not represent the claimant before the Board on remand; however, as explained in Section 15.6.10, attorneys are advised to always raise any additional issues on remand or to advise their clients to do so in order to prevent the Court from invoking the doctrine of issue exhaustion in any subsequent appeal.

The third and final unfavorable rule is that an appellant must explicitly raise procedural errors to the Board, and failure to do so will prevent the appellant from raising those arguments before the Court. The Federal Circuit has explained that "[t]here is a significant difference between considering closely-

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[320] *Wise, 26 Vet. App. at 525–26*.

[321] *Wise, 26 Vet. App. at 527*; *Fears*, *31 Vet. App. at 317–18* (discussing and distinguishing *Wise*).

[322] Joint motions for remand filed at the CAVC are discussed in *Section 15.6.10*.

[323] *26 Vet. App. 534 (2014)*, *vacated and remanded on other grounds by sub nom.* *Carter v. McDonald, 794 F.3d 1342 (Fed. Cir. 2015)*; *see also* Dickens, 814 F.3d at 1361.

[324] *Carter, 26 Vet. App. at 537–38, 543*.

[325] *Carter, 26 Vet. App. at 543*.

[326] *Carter, 26 Vet. App. at 544*.

[327] *Carter v. McDonald, 794 F.3d 1342, 1344 (Fed. Cir. 2015)* ("As the record may change on remand, we do not decide whether the Veteran's Court committed any error with respect to whether a remand motion like the one in this case could alter the Board's otherwise-applicable duty regarding consideration of issues raised by the record.").

related theories and evidence that could support a veteran's claim for disability benefits and considering procedural issues that are collateral to the merits."[328] Thus, the Federal Circuit held that "absent extraordinary circumstances … , we think that it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran, though at the same time giving the veteran's pleadings a liberal construction."[329]

15.2.6.2.3 Whether the CAVC Can Consider a Legal Theory Not Addressed by the BVA or Raised by the Claimant Below in Reviewing a Request or Motion to Revise a Final Decision Based on Clear and Unmistakable Error

It is clear that a claimant cannot wait until his or her case is in court to first request revision of a prior final RO or Board decision based on clear and unmistakable error (CUE).[330] However, whether a claimant can raise for the first time in court a new legal theory as to why a prior decision contains CUE is a more complicated question. Section 20.1404(b) provides that a motion to revise a final Board decision based on CUE "must set forth clearly and specifically the alleged clear and unmistakable error" and "the legal or factual basis for such allegations."[331] While the requirement to "set forth clearly and specifically the alleged clear and unmistakable error" is not found in the regulation relating to requests to revise a prior RO decision,[332] the case law is well settled that both motions to revise prior Board decisions and prior RO decisions must be pled with specificity.[333] The requirement that a request to revise a prior RO or Board decision be pled with specificity would seem to suggest that a claimant could not raise a legal theory at the Court level regarding why a prior final VA decision was the product of CUE when that legal theory was not specifically argued by the claimant while the CUE claim was before the agency.

In *Andrews v. Nicholson*, the Federal Circuit ruled, however, that in adjudicating a pro se claimant's request to revise a prior RO or Board decision, "VA must give a sympathetic reading to the veteran's filings in that earlier proceeding to determine the scope of the claims."[334] VA must read all of the claimant's submissions sympathetically to "determine all potential claims raised by the evidence, applying all relevant laws and regulations."[335] *Andrews* held that a sympathetic reading of a CUE claim could lead to the result that a legal theory, which was not expressly raised at the agency level could nonetheless be raised by reading the submission "sympathetically" to "determine all potential" legal theories raised "by the evidence, applying all relevant laws and regulations." The Federal Circuit's view on this matter is that "[t]he VA's duty to sympathetically read a veteran's pro se CUE motion to discern all potential claims [precedes] a determination of whether a CUE claim has been pled with specificity."[336]

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[328] *Scott v. McDonald, 789 F.3d 1375, 1381 (Fed. Cir. 2015)*.

[329] *Scott, 789 F.3d at 1381*.

[330] *38 C.F.R. § 20.1404 (2020)*; *Russell v. Principi, 3 Vet. App. 310, 314 (1992)*.

[331] *38 C.F.R. § 20.1404(b) (2020)*.

[332] *38 C.F.R. § 3.105(a) (2020)*.

[333] *See, e.g.*, *Comer, 552 F.3d at 1372*.

[334] *421 F.3d at 1278*; *Moody, 360 F.3d at 1310*.

[335] *Andrews, 421 F.3d at 1282* (quoting *Roberson, 251 F.3d at 1384*); *Beverly, 19 Vet. App. at 405*.

[336] *Andrews, 421 F.3d at 1283*.

However, the Federal Circuit also held in *Andrews* that this pro-claimant sympathetic reading rule does not apply if the claimant was represented by an attorney during the VA's handling of the CUE claim. Thus, if an attorney represented the claimant below, no new legal theory may be raised on an appeal to the Court of the Board denial of CUE.[337]

The Federal Circuit's ruling in *Andrews* that potentially allows a claimant who was not represented by an attorney to raise a new legal theory at the Court level appears to be inconsistent with the earlier Federal Circuit decision in *Andre v. Principi*.[338] In *Andre*, the Federal Circuit held that "each specific assertion of CUE constitutes a distinct and separate claim that must be the subject of a decision by the BVA before the Veterans Court can exercise jurisdiction over it."[339] In that case, the Federal Circuit affirmed a Court decision holding that it had no jurisdiction over a CUE claim based on a legal theory raised for the first time on appeal to the Court.[340]

The Court's decision in *Hillyard v. Shinseki*[341] further complicates the issue. In *Hillyard*, the Court held that under 38 U.S.C.S. § 20.1409(c) (2020), a claimant may not submit more than one motion to revise a prior final Board decision denying a claim based on CUE.[342] Because Section 20.1404 (2020) requires that the motion be pled with specificity, if the claimant fails to raise a specific theory of CUE in the motion, under *Hillyard*, the claimant will be permanently foreclosed from raising that theory in the future. The impact of *Hillyard* is that an advocate should raise in any appeal of a Board decision denying a motion for CUE all plausible legal theories, and rely on the Federal Circuit's holding in *Andrews* for the proposition that these theories were reasonably raised by the motion.[343]

15.2.6.3 Whether the Court Has Authority to Resolve on Its Own Issues That Were Not Resolved by the BVA

Sometimes an appeal to the Court presents an issue that the Board did not resolve but that the Court believes needs to be resolved. The Board may not have resolved the issue because it was not raised by the appellant to the Board or it may be one that was argued by the claimant to the Board, but the Board ignored it or thought it was not relevant. The question then becomes whether the Court has the power to resolve the issue that was not resolved by the Board?

There are two principles that greatly limit the authority of the Court to resolve issues that were not resolved by the Board prior to the appeal to the Court. Both principles relate to the fact that the Court is an appellate court with limited jurisdiction. First, 38 U.S.C. § 7261(c) strictly forbids the Court from making factual

[337] In *Comer, 552 F.3d at 1369*, the Federal Circuit held that "representation by an organizational aide is not equivalent to representation by a licensed attorney." Therefore, a claimant represented by a veterans service organization during the proceedings before the agency may freely argue on appeal that VA failed in its duty to sympathetically read the claimant's CUE pleadings and submissions to identify all potential claims.

[338] *301 F.3d 1354, 1361 (Fed. Cir. 2002)*.

[339] *Andre, 301 F.3d at 1361*.

[340] *Andre, 301 F.3d at 1361*; *Baxter v. Principi, 17 Vet. App. 407, 409 (2004)*.

[341] *24 Vet. App. 343 (2011)*, *aff'd*, *695 F.3d 1257 (Fed. Cir. 2012)*.

[342] It appears that under the regulation, a claimant is limited to one motion per *claim*. *38 C.F.R. § 20.1409(c) (2020)*. In other words, if the Board denies several claims in a decision, the claimant can submit more than one motion to revise the decision, so long as each motion pertains to one claim. On the other hand, it appears that a claimant is not limited to just one opportunity to raise an allegation of CUE in a prior RO decision as *38 C.F.R. § 3.105(a) (2020)* permits a claimant to raise a new argument that the RO committed CUE "at any time." *See* *Larson v. Shinseki, 744 F.3d 1317, 1319 (Fed. Cir. 2014)*.

[343] *421 F.3d at 1283*; *see also* *Porriello v. Shulkin, 30 Vet. App. 1 (2018)*.

findings. This Section states "[i]n no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."[344] Thus, the Court is not empowered to make factual findings in the first instance.[345] If the Court were to do so, it would be impermissibly substituting its judgment for that of the Board's.[346]

The second principle limiting the authority of the Court to resolve issues left unresolved by the Board is the "simple but fundamental rule of administrative law" discussed by the Supreme Court over a half century ago in *SEC v. Chenery Corp.* "That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."[347]

The two principles discussed above combine to make it usually inappropriate for the Court to resolve an issue in the first instance when the Board has not addressed it. In most cases, the Court must remand the issue to the Board for it to resolve in the first instance. This is especially true of issues of fact and issues that involve the application of law to facts.[348] In *Hensley v. West*, the Federal Circuit held that the Court "may remand if it believes the [Board] failed to make findings of fact essential to the decision; it may set aside findings of fact it determines to be clearly erroneous; or it may reverse incorrect judgments of law based on proper factual findings; 'but it should not simply [make] factual findings on its own.'"[349] Even when the facts are clear from the record and the resolution of the issue is obvious, the Federal Circuit has made clear that the Court should not engage in its own fact finding but should instead remand the matter back to the Board for it to consider the unaddressed issue.[350] Thus, the Court has remanded, rather than reversed, in cases where the facts were in the veteran's favor in order to allow the Board to apply a provision of law in the first instance.[351]

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[344] 38 U.S.C.S. § 7261(c).

[345] *See* Hensley, 212 F.3d at 1264; *see also* Byron v. Shinseki, 670 F.3d 1202, 1205–06 (Fed. Cir. 2012).

[346] The Federal Circuit has held that the CAVC erred when it engaged in fact finding in the first instance. *See, e.g.*, Elkins v. Gober, 229 F.3d 1369, 1377 (Fed. Cir. 2000); Hensley, 212 F.3d at 1264; Winters v. Gober, 219 F.3d 1375, 1378 (Fed. Cir. 2000).

[347] 332 U.S. 194, 196 (1947); *see also* Mayfield v. Nicholson, 444 F.3d 1328, 1334 (Fed. Cir. 2006); Scott v. Wilkie, 920 F.3d 1375, 1380 (Fed. Cir. 2019) (ruling that CAVC erred by substituting its own rationale for the VA's failure to make necessary factual findings). However, the situation described in *Chenery Corp*. and *Mayfield* is distinguishable from the situation in which the Court finds that the Board's error was harmless. *See* Vogan v. Shinseki, 24 Vet. App. 159 (2010). The Court's prejudicial error analysis is discussed in further detail in Section 15.3.3.3.

[348] *See, e.g.,* Mayfield, 444 F.3d at 1328; Holliday v. Principi, 14 Vet. App. 280, 287–88 (2001).

[349] Hensley, 212 F.3d at 1263 (quoting Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986)). The CAVC has remanded cases to the BVA to allow it to engage in fact-finding in the first instance. *See, e.g.,* Holliday, 14 Vet. App. at 286–87 (CAVC remands case to BVA to determine whether the Veterans Claims Assistance Act applies to appellant's claims); Dambach v. Principi, 14 Vet. App. 307, 308 (2001) (CAVC remands service connection claim to allow Board to apply 38 U.S.C.S. § 1154 to claim); Thompson v. Gober, 14 Vet. App. 187, 189 (2000) (CAVC remands case to BVA to consider evidence that indicates that veteran was POW); Nolen v. Gober, 14 Vet. App. 183, 184 (2000) (CAVC remands claim to BVA to determine whether VA complied with statutory duty to assist).

[350] Byron, 670 F.3d at 1205–06; Hensley, 212 F.3d at 1263–64; Mayfield, 444 F.3d at 1334–36; *see also* Roberson v. Principi, 17 Vet. App. 135, 144–45 (2003).

[351] *See, e.g.*, Shipley v. Shinseki, 24 Vet. App. 458, 464–65 (2011).

Sanchez-Benitez v. Principi[352] provides an example of a situation where the Federal Circuit found that the Court erroneously engaged in fact-finding. In that case, the veteran filed an appeal with the Court to challenge a Board decision that denied his claim for a rating increase for a low back disorder. The appellant argued that the Board erred when it failed to address whether he was entitled to a rating increase under 38 C.F.R. § 3.321(b), which provides for an extraschedular rating if there are "exceptional or unusual circumstances." Instead of remanding the case to the Board for the Board to address the applicability of 38 C.F.R. § 3.321(b) in the first instance, the Court held that there was nothing in the record to demonstrate that the veteran's case presented "exceptional or unusual" circumstances and affirmed the Board's decision to deny the rating increase. The Federal Circuit held that "it is not the role of the Veterans Court to make such factual determinations *sua sponte.* Rather, it should wait until the issue is 'properly presented on appeal.'"[353]

Thus, the Federal Circuit has approved the Court's refusal to make factual findings in the first instance even when those findings were likely to be favorable to the appellant. In *Byron*,[354] a widow sought an earlier effective date for entitlement to service connection for the cause of her husband's death, which she alleged was due to in-service radiation exposure. The Board granted entitlement to *presumptive* service connection and assigned an effective date consistent with the effective date of the law that created the legal presumption of service connection. However, the Board failed to make any findings as to whether the evidence established *direct* service connection, which would entitle the widow to an earlier effective date for the grant of service connection. The Court remanded the claim for the Board to make findings related to direct service connection in the first instance. On appeal to the Federal Circuit, the widow argued that the Court should have reversed, rather than remanded, the Board's decision. The Federal Circuit disagreed, holding that because the Board failed to make key factual findings in the first instance, "a remand is the proper course."[355] The Federal Circuit held that "[i]t is not enough that only a few factual findings remain or that the applicant may have strong case on the merits."[356] The Federal Circuit further explained:

> It is not enough for Ms. Byron to claim that all of the evidence of record supports her position. The Board must still make an initial determination of whether Ms. Byron has sufficiently supported a claim for an earlier effective date. It may well be that the Board concludes that Ms. Byron has established these facts. That, however, is precisely what needs to be done by the fact-finding agency in the first instance, not by a court of appeals.[357]

On the other hand, the Federal Circuit has held that the Court does have jurisdiction to make the finding in the first instance as to whether a Board error was harmless.[358] The scope of the Court's review in applying the rule of prejudicial error is discussed in detail in Section 15.3.3.3.

In addition, where the Court is presented with an issue involving statutory interpretation and no factual development is required, the Court has shown a willingness to exercise its discretion and consider arguments not decided below by the Board.[359] However, the Court has been reluctant to interpret the law in

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[352] 259 F.3d 1356 (Fed. Cir. 2001); *distinguished on other grounds by* Saunders v. Wilkie, 886 F.3d 1356 (Fed. Cir. 2018).

[353] Shipley, 259 F.3d at 1363 (quoting Winters, 219 F.3d at 1379).

[354] 670 F.3d at 1204.

[355] Byron, 670 F.3d at 1205–06.

[356] Byron, 670 F.3d at 1206.

[357] Byron, 670 F.3d at 1206.

[358] Newhouse v. Nicholson, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

[359] *See* Sandstrom v. Principi, 16 Vet. App. 481, 483–84 (2002).

the first instance when it is faced with the task of "straightening out … [an] extraordinarily complicated and tangled web of apparently conflicting statutory provisions."[360] Under these circumstances, the Court has indicated that it is appropriate for the Secretary to make sense of the statutory and regulatory conflicts in the first instance.[361]

The Court has also shown a willingness to address an issue not decided below when it concludes that it is in a better position than the Board to decide the particular issue. For example, in *Crain v. Principi*,[362] a case in which the Court was reviewing the Board's decision to dismiss a veteran's appeal for failure to perfect his appeal to the Board by filing a timely substantive appeal, the Court reasoned that the Secretary's burden to demonstrate that appellant received a copy of the SOC did not fit the VA's non-adversarial adjudication system. In such a situation, the Board was placed in the peculiar position that it would not only have to act as the adjudicator, but it would also have to "carry the burden of showing compliance with the statute" requirement that the Secretary served the veteran with a copy of the SOC. For this reason, the Court concluded that it was better situated than the Board to decide whether the Secretary had satisfied its burden to demonstrate that the appellant received a copy of the SOC, the document that triggers the time limit in which a veteran must file his substantive appeal in a legacy case.[363] Similarly, in *Marsh v. Nicholson,*[364] the Court concluded that it was better situated to ascertain whether the Secretary had rebutted the presumption of regularity with regard to the mailing of an appellant's NOD.[365]

15.2.7 The CAVC's Jurisdiction to Certify and Adjudicate Class Actions

Prior to the Veterans' Judicial Review Act of 1988 (VJRA), some veterans were able to bring class actions against the VA in U.S. district courts, which would certify a case as a class action pursuant to *Fed. R. Civ. P. 23*. For example, a 1986 suit challenging the VA's denial of claims for benefits resulting from exposure to Agent Orange was certified by the United States District Court for the Northern District of California.[366] In 1988, however, the VJRA transferred jurisdiction previously exercised by the U.S. district courts to the CAVC and the Federal Circuit.

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[360] *See, e.g., Cotant v. Principi, 17 Vet. App. 116, 129 (2003)* (Court refuses VA's invitation to invalidate *38 C.F.R. § 3.304(b)* as inconsistent with *38 U.S.C.S. § 1111*, in view of the complicated and confusing tapestry of law and regulations at issue); *Mariano v. Principi, 17 Vet. App. 305, 317 (2004)* (Because a particular diagnostic code (DC 5201) was susceptible to more than one interpretation, the Court concluded that "it is preferable for the Secretary to undertake the initial consideration of this matter. The Court, therefore, will put this ball squarely in the Secretary's court and require him to answer in the first instance, clearly and unambiguously, the questions presented by his regulation"). However, in *Byrd v. Nicholson, 19 Vet. App. 388 (2005)*, the Court did address a challenge that VA's dental regulations conflicted with *38 U.S.C.S. § 1110*, an argument not raised before the Board.

[361] *Cotant, 17 Vet. App. at 129*; *Mariano, 17 Vet. App. at 317*.

[362] *17 Vet. App. 182 (2003)*.

[363] *Crain, 17 Vet. App. at 194*.

[364] *19 Vet. App. 381, 388 (2005)*.

[365] *See also Bingham, 18 Vet. App. at 470* (Court considered in the first instance whether appellant's prior informal claims met the definition of "claim" in assigning an earlier effective date); *Jones, 18 Vet. App. at 248* (Court considered for the first time on appeal whether BVA should have considered separate ratings for gunshot wound injuries to multiple muscle groups); *Acosta v. Principi, 18 Vet. App. 53 (2004)* (Court considered in the first instance whether there was a pending NOD in considering whether an earlier effective date was warranted).

[366] *Nehmer v. U.S. Veterans Admin., 118 F.R.D. 113 (N.D. Cal. 1987)*. The subsequent history of the *Nehmer* class action is discussed in *Section 8.10*.1 of this Manual.

Following the Court's creation in 1988, it rejected requests for class actions or other aggregate relief.[367] In Harrison v. Derwinski,[368] the Court held that it lacked authority to adjudicate class actions based on (1) *38 U.S.C.S. § 7252*, which limits the Court's jurisdiction to a review of Board decisions; (2) *38 U.S.C.S. § 7261(c)*, which states that findings of fact by the VA will not be subject to trial de novo by the Court; and (3) *38 U.S.C.S. § 7266*, which requires a claimant to file a NOA to appeal a Board decision. The Court had also held that a class action procedure would be "highly unmanageable" and unnecessary in light of the binding effect of the Court's published opinions.[369]

However, in 2017, the Federal Circuit found that contrary to this tradition, the Court does, in fact, have the authority to certify a class action or for similar aggregate resolution procedures.[370] In *Monk v. Shulkin*, the claimant proposed that a class be formed consisting of all claimants who applied for VA benefits, faced a significant financial or medical hardship as defined by *38 U.S.C.S. § 7107(a)(2)(B)-(C)*, and had timely filed a NOD but had not received a decision within twelve months.[371] The Court rejected the request for a class action or other aggregate relief on the grounds that it lacked authority to maintain class actions. Specifically, the Court stated that "Mr. Monk fails to appreciate the Court's long-standing declaration that it does not have the authority to entertain class actions" and that in "the absence of such authority, no other arguments matter."[372] On appeal, the Federal Circuit found that the Court's decision that it lacks the authority to certify and adjudicate class action cases was an abuse of discretion. Instead, the Federal Circuit held that the Court *does* have this authority based on the All Writs Act (AWA), the Court's statutory authority, and the Court's inherent powers, as detailed below.[373]

The AWA provides that the Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[374] Thus, the AWA allows the Court to "fill gaps in their judicial power where those gaps would thwart the otherwise proper exercise of their jurisdiction."[375] Because the Court's jurisdiction includes compelling the Secretary to act when such action has been unlawfully withheld or unreasonably delayed, and a class action procedure aids in that endeavor, the AWA gives the Court the authority to aggregate claims to aid its jurisdiction.[376]

Statutory authority also establishes that the Court has jurisdiction to certify and adjudicate class action cases. First, *38 U.S.C.S. § 7264(a)* expressly delegates to the Court the broad power to prescribe its own rules of practice and procedure. Despite the Court's reliance on *38 U.S.C.S §§ 7252*, *7261(c)*, and *7266* in Harrison v.

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[367] *See* *Harrison v. Derwinski, 1 Vet. App. 438 (1991)* (en banc); *Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991)*; *Henderson v. Brown, 10 Vet. App. 272, 278 (1997)* ("[T]his Court determined, en banc, in *Lefkowitz* … and *Harrison* … that it lacked the authority to establish a class action procedure and that to do so would be both unwise and unnecessary."); *see also* *Am. Legion v. Nicholson, 21 Vet. App. 1, 3–4 (2007)*.

[368] *1 Vet. App. at 438*.

[369] *Lefkowitz, 1 Vet. App. at 440*.

[370] *Monk II, 855 F.3d at 1320*.

[371] *Monk II, 855 F.3d at 1314–15*; *Monk v. McDonald (Monk I), No. 15-1280, 2015 U.S. App. Vet. Claims LEXIS 684, at *2 (May 27, 2015)*.

[372] *Monk I, 2015 U.S. App. Vet. Claims LEXIS 684, at *2, *7*.

[373] *Monk II, 855 F.3d, at 1318–20*.

[374] *28 U.S.C.S. § 1651(a)*. See *Section 15.2*.5 for a discussion of the Court's jurisdiction under the AWA.

[375] *Monk II, 855 F.3d at 1318*.

[376] *38 U.S.C.S. § 7261(a)(2)*; *Monk II, 855 F.3d at 1318–19*.

Derwinski,[377] the Federal Circuit found that none of these statutes limit the Court's express authority to "compel action of the Secretary unlawfully withheld or unreasonably delayed."[378] Additionally, when Congress created the Court, as part of the VJRA, it neither limited the Court's jurisdiction to preclude class actions, nor indicated an intention to limit such authority.[379] In fact, a Congressional Budget Office cost estimate, issued shortly before the VJRA was enacted, indicates that Congress *did* intend for the Court to entertain class actions.[380] Thus, the Court has the inherent authority to prescribe the rules required for certifiying and adjudicating a class action case.[381]

The Federal Circuit also concluded that a class action procedure at the Court will promote "efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources."[382] The Federal Circuit also stated that class actions may help prevent issues of mootness, result in more precedential opinions at the Court, compel the correction of systemic errors, and promote consistent treatment of similar claimants and claims.[383]

In 2018, after the Federal Circuit remanded *Monk* to the CAVC, an eight-member en banc Court issued what Chief Judge Davis called "a watershed decision" that represents a "seismic shift in our precedent."[384] The Court embraced its power in an appropriate case to use the class action device in connection with petitions seeking writs under the All Writs Act, and adopted *Rule 23 of the Federal Rules of Civil Procedure* as a guide for its use of the class action device.[385] On the issue of whether the class proposed by the petitioners in *Monk* should be certified, the en banc Court split 4-4, thereby denying the motion for class certification.[386]

In June 2019, however, the Court certified a class action for the first time in its 30-year history. In *Godsey v. Wilkie*,[387] the Court applied *Fed. R. Civ. P. 23* to certify a class consisting of all VA benefit claimants who filed a Substantive Appeal at least 18 months prior to the date of the Court's Order and who are waiting for the VA to initiate pre-certification review of their cases (that is, to determine whether to certify the appeal to the Board of Veterans' Appeals, initiate development, or make a new decision). In the same Order certifying the class, the Court addressed the merits of the claim of the class representatives that the VA had unreasonably delayed in initiating pre-certification review. The Court held that "the current time that it takes the Secretary to initiate pre-certification review after the filing of a Substantive Appeal is per se unreasonable …"[388] The Court relied on the

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[377] *1 Vet. App. at 438*.

[378] *38 U.S.C.S. 7261(a)(2)*; *Monk II, 855 F.3d at 1319*.

[379] *See* *Section 15.1*.2 for a discussion of the VJRA.

[380] H.R. Rep. No. 100-963, pt. 1, at 41–42 (1988) (stating that "most challenges to regulations are class actions, involving large groups of beneficiaries or potential beneficiaries").

[381] *Monk II, 855 F.3d at 1318–20*.

[382] *Monk II, 855 F.3d at 1320*.

[383] *Monk II, 855 F.3d at 1316, 1321*.

[384] *Monk v. Wilkie (Monk III), 30 Vet. App. 167, 184 (2018)*.

[385] *Monk III, 30 Vet. App. at 174*; *see also* *Thompson v. Wilkie, 30 Vet. App. 345, 347 (2018)*.

[386] *Monk III, 30 Vet. App. at 174*, *appeal on the merits dismissed as moot*, *Monk IV, 32 Vet. App. 87, 96* (holding that an appeal to the Federal Circuit "concerning class certification does not divest the Court of jurisdiction over individual merits questions").

[387] *31 Vet. App. 207 (2019)*.

[388] *Godsey, 31 Vet. App. at 228*.

fact that it took an average of 773 days after the filing of a Substantive Appeal for a regional office to certify the appeal for transfer to the Board of Veterans' Appeals, and held that "there is simply no rule of reason that can justify a multiyear wait before an RO even looks at an appealed case to determine whether further development and/or adjudication is warranted before certifying and transferring a case to the Board."[389] The Court went on to state that "[s]uch delays are particularly intolerable because they consist of nothing but waiting in line: no development, no adjudication, no action whatsoever on the part of VA."[390]

As to relief, the Court ordered the Secretary to conduct pre-certification review of each class member's case within 120 days of the Court's Order and either certify the appeal to the Board or affirmatively initiate any development or adjudication activities necessary for certification to the Board or resolution at the RO. The Court appointed attorneys from the National Veterans Legal Services Program and Covington and Burling LLP as class counsel and ordered the Secretary to file within 60 days of the Court's Order the names and VA claims numbers of all members of the class and their current status with regard to the relief ordered by the Court.[391]

Additionally, in September 2019, the Court certified a second class in *Wolfe v. Wilkie*.[392] The issue in *Wolfe* was the validity of *38 C.F.R. § 17.1005(a)(5)*, which provided that "VA will not reimburse a veteran under this section for any copayment, deductible, coinsurance, or similar payment that the veteran owes the third party or is obligated to pay under a health plan contract."[393] Previously in *Staab v. McDonald*, the Court had held that VA had violated the law when it used a veteran's coverage by a health insurance contact as a bar to all reimbursement for emergency medical treatment at a non-VA facility pursuant to *38 U.S.C. § 1725*.[394] *38 C.F.R. § 17.1005(a)(5)*, was the Secretary's response to the Court's ruling.[395] The Court held that this new regulation was invalid particularly as the Court's prior holding in *Staab* precluded the new limitations on reimbursement for qualifying emergency medical care.[396] In particular, the Court found that the new regulation maintained the pre-*Staab* statute because it created the same result as VA's prior complete ban on reimbursement by blocking reimbursement from all the costs that would be imposed on a veteran if he had a healthcare contract.[397] The Court found that class certification was warranted for the following class: "All claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny, in whole or in part, on the ground that the expenses are part of the deductible or coinsurance payments for which the veteran was responsible."[398] The Court then granted the class' petition for an extraordinary writ under the All Writs Act.[399]

Finally, in December 2019, the Court certified a third class in *Skaar v. Wilkie*.[400] The Court held that: (1) it may, in appropriate circumstances, certify classes in the context of an individual appeal of a Board decision; (2) its

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[389] *Godsey, 31 Vet. App. at 228*.

[390] *Godsey, 31 Vet. App. at 228*.

[391] *Godsey, 31 Vet. App. at 230–31*.

[392] *32 Vet. App. 1 (2019)*.

[393] *Wolfe, 32 Vet. App. at 16*.

[394] *Staab v. McDonald, 28 Vet. App. 50 (2016)*.

[395] *Wolfe, 32 Vet. App. at 16–17*.

[396] *Wolfe, 32 Vet. App. at 12*; *see* *Staab, 28 Vet. App. at 50*.

[397] *Wolfe, 32 Vet. App. at 12*; *see* *Staab, 28 Vet. App. at 50*.

[398] *Wolfe, 32 Vet. App. at 34*.

[399] *Wolfe, 32 Vet. App. at 34–40*.

jurisdiction allows it to include both persons who have obtained a final Board decision, as well as those who have not; (3) as in the petition context, it will use *Fed. R. Civ. P. 23* as a guide when deciding whether to grant class certification; and (4) class certification will be reserved for those cases where appellants demonstrate the class device is a superior vehicle for litigating the class claim than a precedential decision.[401] The Court found that class certification was warranted for the following class: “All U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation VA has denied or will deny by relying, at least in part, on the findings of dose estimates requested under *38 C.F.R. § 3.311*, except those whose claims have been denied and relevant appeal windows of those denials have expired, or those whose claims have been denied solely based on dose estimates obtained before 2001.”[402] The Court recognized its authority to aggregate actions in the appeal context and this decision marked “the beginning of an era in which” it entertains, but “by no means always” certifies class actions “in the first instance,” making it the “only Federal appellate court in the Nation to do so.”[403]

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[400] *32 Vet. App. 156 (2019)*.

[401] *Skaar, 32 Vet. App. at 167*.

[402] *Skarr, 32 Vet. App. at 201*.

[403] *Skarr, 32 Vet. App. at 201*.

15.3 THE POWER OF THE CAVC AND THE SCOPE OF REVIEW IT APPLIES IN REVIEWING BVA DECISIONS

15.3.1 The General Rule That the Court May Review Only the Documents That Were Before the BVA

Many veterans are surprised to discover that the U.S. Court of Appeals for Veterans Claims (CAVC or Court) does not hold a trial when a veteran appeals to the Court. Those who are surprised are generally unaware of the tradition in U.S. law that judicial review of federal agency action is based solely on a review of the record created before the agency.

The Veterans' Judicial Review Act (VJRA) follows this tradition in providing for judicial review of Board of Veterans' Appeals (BVA or Board) decision-making. Title *38 U.S.C.S. § 7252(b)* provides that "[r]eview in the Court shall be on the record of proceedings before the [Secretary] and the Board [of Veterans' Appeals]." In addition, *38 U.S.C.S. § 7261(c)* provides that "[i]n no event shall the findings of fact made by the [Secretary] or the Board of Veterans' Appeals be subject to trial de novo by the court."

Thus, the Court has refused to consider medical treatment records that were referenced in another medical record that was not formally part of the record of proceedings before the Board,[404] or treatment records that were mentioned during a Board hearing but not formally made a part of the record of proceedings.[405] Similarly, the Court has refused to consider medical treatises that were not a part of the record of proceedings before the Board and that were submitted by the appellant to the Court to substantiate the argument that the veteran's in-service trench foot condition caused the development of arthritis.[406] In addition, the Federal Circuit has held that the Court is prohibited from considering affidavits that were not in the claims file, even for the narrow purpose of ascertaining whether there exists a regular VA practice in order to determine whether the presumption of soundness may be applied.[407] For a thorough discussion of what constitutes the "record of proceedings," see *Section 15.6*.6 and 15.6.8.

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[404] *Segars v. Shinseki, 23 Vet. App. 290 (2009)*.

[405] *See* *Rogozinski v. Derwinski, 1 Vet. App. 19 (1990)*. Sometimes documents that should have been placed by VA into the claimant's claims file have been omitted from the file. This sometimes leads to a dispute in court over whether such documents can be included in the record on appeal, a question that involves whether the documents are part of the record of proceedings before the Secretary and the BVA. This issue is discussed in *Section 15.6*. Note also that in *Robinson v. McDonald, 28 Vet. App. 178, 192 (2016)*, the Court held that VA is obligated to keep, rather than destroy, the paper copy of a claims file that has been scanned by VA into VA's electronic database.

[406] *See* *Moore v. Derwinski, 1 Vet. App. 401, 406 (1991)*; *see also* *Monzingo v. Shinseki, 26 Vet. App. 97, 101–04 (2012)* (taking judicial notice of the *existence* of medical research reports that were not actually nor constructively in the record of proceedings before the BVA, but refusing to consider the information contained within those reports); *McCullough v. Principi, 15 Vet. App. 272, 274 (2001)* (documents attached to appellant's brief were stricken from the record because even though they predated BVA decision and could potentially be included in the record, none of the documents was relevant to issue on appeal); *Brown v. West, 12 Vet. App. 388, 389–90 (1999)* (record on appeal may not include the VA Physicians Guide to medical examinations as it was not part of the record of proceedings before the BVA).

[407] *Kyhn v. Shinseki, 716 F.3d 572 (Fed. Cir. 2013)*.

15.3.2 Exceptions to the General Rule That the Court May Review Only the Documents Before the BVA

There are some exceptions to the general rule prohibiting the introduction of new evidence to the Court, as well as some methods of circumventing the rule. The remainder of this section catalogues the major exceptions to the rule.

15.3.2.1 The *Bell* Rule and Constructive Notice

The Court has issued a line of cases establishing that certain documents generated by, or submitted to, the VA prior to the date of the Board decision on appeal can be considered part of the record "before the Secretary and the BVA"[408] even though they were not actually in the claims file that the Board reviewed at the time of its decision. It is from the first of this line of cases that the doctrine of constructive possession, also known as the "*Bell* Rule," derives its name.[409]

Specifically, in *Bell v. Derwinski,*[410] the Court determined that several documents, which were not part of the VA claims file and were not considered by the Board in reaching its determination, would nevertheless be considered part of the record on appeal. The Court held that the Board had "constructive, if not actual knowledge" of three documents that VA itself had generated and a fourth that the appellant had submitted in support of her claim.[411] These records all predated the Board decision on appeal and, as such, the Court determined that they were "within the VA's control and may reasonably be expected to be part of the record."[412]

In the cases that followed *Bell*, the Court significantly narrowed the constructive possession doctrine. For example, in 1998, the Court modified the "reasonable expectation" element of the doctrine to include a relationship requirement and held that the document cannot be "too tenuous[ly]" related to the claim before the Board.[413] Later that year, the Court clarified further that documents generated by VA for "claims for VA benefits for an individual other than the appellant and … [that] were not submitted to VA with regard to the appellant's claim" were too tenuously related to an appellant's claim to be included in the record under the constructive possession doctrine.[414]

In *Monzingo v. Shinseki*, the Court further limited the scope of the constructive possession doctrine, holding that the current state of the law provides that a document will be deemed constructively in the possession of VA only when two criteria are met: (1) the document was clearly generated by VA or submitted to VA by the appellant; and (2) the document was within the Secretary's control and reasonably expected to be part of the record.[415] The Court explained that, in order to meet the second criterion, the document must have "a direct relationship to the claimant's appeal."[416] The Court stated that "[t]o hold otherwise would essentially

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408 *38 U.S.C.S. § 7252(b)*.

409 *Bowey v. West, 11 Vet. App. 106, 110 (1998)* (per curiam order) (recognizing that the Court has "applied the Bell rule to documents" that the VA either generated itself or "were submitted to it by the appellant").

410 *2 Vet. App. 611 (1992)*; *see also* *Rollins v. Derwinski, 2 Vet. App. 481 (1992)*.

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

412 *Bell, 2 Vet. App. at 611*.

413 *Bowey v. West, 11 Vet. App. 106, 109 (1998)* (per curiam order).

414 *Goodwin v. West, 11 Vet. App. 494, 496 (1998)* (per curiam order).

415 *26 Vet. App. at 101–02* (citing *Bowey, 11 Vet. App. at 108*).

416 *Monzingo, 26 Vet. App. at 102* (citing *Goodwin, 11 Vet. App. at 495*).

lead to any reports on diseases or injuries contained in VA libraries being deemed constructively before the Board in every case involving a claim arising from the disease or injury addressed in such reports; such an application of the constructive possession doctrine places an impossible burden on the Board … ."[417]

In 2019, the Court decided *Euzebio v. Wilkie*, holding that, "even if VA is aware of a report and the report contains general information about the type of disability on appeal, that is insufficient to trigger the constructive possession doctrine; there must also be a direct relationship to the claim on appeal."[418] The Court in *Euzebio* summarized the current state of the constructive possession doctrine as requiring that an appellant show a "*direct* relationship" between a record and his or her claim, even when the document was generated for and received by VA under a statutory mandate.[419] To meet this requirement, the Court emphasized that the appellant must demonstrate that the record was more integral to the claim than merely providing general information about the type of disability on appeal, being referenced in other evidence of record, or being relied upon by other appellants in similar cases.[420]

Euzebio included a dissent by Judge Allen, who cautioned that the holding of the majority contravened the "pro-veteran, nonadversarial system" of claims adjudication by favoring attorney-represented claimants over their *pro se* counterparts.[421] Specifically, Judge Allen warned that while the former could depend on their advocates to supplement the record with medical treatises and other public records that supported their claims, the latter relied on VA adjudicators having the discretion to assume that such evidence "is constructively in [the veterans'] file[s]."[422]

Euzebio has been appealed to the U.S. Court of Appeals for the Federal Circuit, but advocates should be aware that, when a particular document is not directly related to a particular appellant's claim, it will be very difficult to show that VA had constructive possession of it and that the failure to consider it constituted

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[417] *Monzingo, 26 Vet. App. at 102*; *Nici v. Brown, 9 Vet. App. 494, 497–98 (1996)* (medical treatises attached to appellant's brief were not part of record before agency and could not be considered to be part of record on appeal).

[418] *31 Vet. App. 394, 402 (2019)* (holding that the National Academies of Sciences, Engineering & Medicine's (NAS) report, *Veterans and Agent Orange: Update 2014* (10th Biennial Update 2016) was not constructively before the Board because it did not bear a direct relationship to appellant's claim); ***but see*** *Euzebio, 31 Vet. App. at 408* (Allen, J., dissenting) (NAS "reports have a special place in the veterans benefits system that make them suited to being considered as having the required direct relationship to claims involving Agent Orange exposure"). Notably, in a series of unpublished, nonprecedential decisions issued prior to *Euzebio*, the Court held that a NAS study linking hypertension to herbicide exposure was before the Secretary and the Board even though it was not included in the veteran's claims files because the study was cited by the Secretary in the Federal Register. *See* *Clark v. Shinseki, No. 12-2667, 2013 U.S. App. Vet. Claims LEXIS 2056 (Dec. 20, 2013)*; *Rodela v. Shinseki, No. 12-2894, 2013 U.S. App. Vet. Claims LEXIS 1976 (Nov. 27, 2013)*; *King v. Shinseki, No. 12-2893, 2013 U.S. App. Vet. Claims LEXIS 1642 (Sept. 20, 2013)*; *Allsopp v. Shinseki, No. 12-1847, 2013 U.S. App. Vet. Claims LEXIS 1424 (Aug. 27, 2013)*.

[419] *31 Vet. App. at 401, 403–04* (emphasis in original).

[420] *31 Vet. App. at 401*.

[421] *Euzebio, 31 Vet. App. at 409* (Allen, J., dissenting).

[422] *Euzebio, 31 Vet. App. at 409* (Allen, J., dissenting).

error.[423] The authors of this manual recommend that advocates submit any relevant documents to the agency during the development of the claim in order to avoid any question on constructive possession.

Another significant barrier to proving constructive possession is that the constructive notice rule applies only to VA adjudications issued after the 1992 *Bell* decision.[424] In addition, the doctrine does not include correspondence or non-VA-generated evidence that a claimant asserts was submitted to the VA prior to the Board decision unless the claimant can corroborate that the disputed documents were actually received by the VA.[425] If the claimant can establish that the VA received the documents, even though they were not made part of the record, a rebuttable presumption is created that such evidence was "within the control of the VA."[426] If the VA fails to successfully rebut the presumption, then the disputed documents will be included in the record.

In a case in which the appellant successfully argues that documents should be included in the record on appeal even though they were not in the claims file at the time of the Board decision under review, the question will often arise whether the case should then be remanded to the Board for a new decision after consideration of the documents the Board should have considered but did not. In *Bell*,[427] the Court held that if such documents "could be determinative of the claim … a remand for readjudication would be in order."

15.3.2.2 Expanding the Record by Getting the Court to Take Judicial Notice of Pertinent Facts

Another exception to the general rule involves asking the Court to take judicial notice of certain facts, even though there may be no evidence in the record before the Board to support these facts. The Court has recognized that it should follow *Federal Rule of Evidence 201(b)*, which provides that "[c]ourts may take judicial notice of facts of universal notoriety, which need not be proved, and of whatever is generally known within their jurisdictions."[428]

Getting the Court to take judicial notice of a fact is accomplished by attaching as exhibits to the appellant's brief or dispositive motion documents demonstrating the existence of a fact and then arguing that the Court should take judicial notice of the fact. The VA, of course, may urge the Court not to take judicial notice, for example by arguing that there is a genuine dispute within the community on the asserted fact. If the Court agrees with the appellant, however, the appellant has in effect expanded the record on review.

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[423] In *Turner v. Shulkin, 29 Vet. App. 207, 218 (2018)*, the Court held that in order for VA treatment records to be considered constructively received within a year of the date of a rating decision for purposes of *38 C.F.R. § 3.156(b)*, VA adjudicators at the VA regional offices must have sufficient knowledge that such records exist. To take just one example, this means that if a veteran informs the regional office while the claim is pending that he or she is receiving treatment from a particular VA medical center, then all the treatment records generated by that medical center are constructively part of the VA claims file. The Court also indicated that this principle applies even if the VA treatment was for a medical condition unrelated to the disabilities that are the subject of the veteran's claim. However, the Court was careful to make clear that this rule applies for "constructive receipt in the context of *38 C.F.R. § 3.156(b)*, dealing exclusively with VA treatment records … ." *Turner, 29 Vet. App. at 218*. Section 8.4 of this Manual contains more information regarding *38 C.F.R. § 3.156(b)*.

[424] *See* *Damrel v. Brown, 6 Vet. App. 242, 246 (1994)*.

[425] *See* Simington v. Brown*, 9 Vet. App. 334, 335–36 (1996)* (claimant had to establish that documents supplied to VA were "at any time," in the possession of VA before rebuttable presumption arose that disputed evidence was "within the control of the Secretary" and should be included in the record on appeal).

[426] *Simington, 9 Vet. App. at 335–36*.

[427] *2 Vet. App. at 613*.

[428] *See* *Brannon v. Derwinski, 1 Vet. App. 314, 317 (1991)* (quoting *B.V.D. Licensing Corp. v. Body Action Design, Inc., 846 F.2d 727, 728 (Fed. Cir. 1988))*; *see also* *Smith v. Derwinski, 1 Vet. App. 235, 238 (1991)*; *Hampton v. Nicholson, 20 Vet. App. 459 (2006)*.

Thus far, the Court has taken judicial notice of VA regulations providing that a duodenal ulcer is a chronic disorder in all cases,[429] of the fact that the poverty threshold in 1988 for a single person under age sixty-five was $6,155,[430] of geographical maps,[431] of the law of the Philippines regarding the legal existence of a marriage,[432] of the issuance of a Presidential Unit Citation,[433] of an appellant's age,[434] of the zip code for Tulsa, Oklahoma,[435] of a district court's determination that a veteran engaged in fraud,[436] and of legal arguments that the VA made in pleadings in other cases before the Court.[437]

The decisions of the Court, however, especially in *Brannon,*[438] reflect a strong aversion to taking judicial notice of medical facts. In *Brannon,* the appellant requested the Court take judicial notice of the fact that a duodenal ulcer was a "chronic" disease in all cases. He submitted numerous medical texts with his brief in support of the proposition that this medical fact was of universal notoriety. The VA did not object to the Court taking judicial notice of the "chronic" nature of a duodenal ulcer. Indeed, as the Court noted, the VA itself had requested the Court to take judicial notice of this very same fact in a different case. Nevertheless, the Court refused to take judicial notice, stating:

> We observe again … that the submitted medical texts are better suited for consideration before a Department of Veterans Affairs (VA) Regional Office or the BVA … If a duodenal ulcer is chronic, it is not a fact 'of universal notoriety, which need not be proved.' We cannot say, based upon the submissions of both parties, albeit in different cases, that a duodenal ulcer is a 'chronic' disease in all instances.[439]

The Court's ruling reflects a deep aversion toward judicial notice and a strong preference for having medical texts made a part of the record of proceedings before the Board. The Court apparently prefers to avoid being the initial arbiter of any issue concerning medical facts, no matter how well documented and beyond dispute. It has repeatedly urged both claimants and the VA to place medical evidence, including medical treatises, in the administrative record so it may be evaluated initially by VA adjudicators.[440]

However, it appears that if either party cites to, or quotes from, a medical text or treatise as part of the adjudication of the claim before the case comes to Court, the medical texts and treatises are considered part of the record of proceedings. This is true, even though the actual medical text or treatise was not physically submitted below. The Court has ordered that copies of all medical texts or treatises, which have

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[429] Brannon, 1 Vet. App. at 317.

[430] Moore v. Derwinski, 1 Vet. App. 356, 359 (1991).

[431] Gray v. McDonald, 27 Vet. App. 313, 324 n.9 (2015); Tulingan v. Brown, 9 Vet. App. 484, 486 (1996).

[432] Dedicatoria v. Brown, 8 Vet. App. 441, 443–44 (1995).

[433] Falk v. West, 12 Vet. App. 402, 405 (1999).

[434] **Burris v. Principi, 15 Vet. App. 348, 353 (2001)**.

[435] Crain v. Principi, 17 Vet. App. 182, 189 (2003).

[436] Roberts v. Shinseki, 23 Vet. App. 416, 424 n.3 (2010).

[437] *See* Cotant, 17 Vet. App. at 134; Shepard v. Gober 10 Vet. App. 486, 487 (1997); In re Fee Agreement of Cox, 10 Vet. App. 361, 367 (1997).

[438] 1 Vet. App. at 314.

[439] Brannon, 1 Vet. App. at 316.

[440] *See, e.g.,* Monzingo, 26 Vet. App. at 103–04; Murphy v. Derwinski, 1 Vet. App. 78, 81 (1991); Colvin v. Derwinski, 1 Vet. App. 171, 175 (1991); Fallo v. Derwinski, 1 Vet. App. 175, 177 (1991).

been cited by the parties, are properly part of the record on appeal and has ordered that copies of such records be included in the record on appeal to the Court.[441]

15.3.2.3 Expanding the Record in a Challenge to VA Regulations

As discussed in *Section 15.3*.3, the Court has the authority to review the validity of VA regulations. In a case where the appellant is challenging a VA regulation, the appellant should be able to compel the VA to file and have the Court consider the administrative record considered by the agency when it conducted its rulemaking proceeding, even though this rulemaking record was not part of the record of proceedings before the Board.[442] In addition, the appellant may be able to convince the Court that supplementation of the record beyond the rulemaking documents proffered by the VA is necessary in order to allow for effective judicial review.[443] Indeed, in at least three cases, the courts have reviewed BVA decisions in other cases to determine whether the language of a VA regulation was plain on its face, and if not, whether the Court should defer to the VA's interpretation of that regulation.[444] The Court has also reviewed VA's Disability Benefits Questionnaires[445] in order to determine whether VA's interpretation of a regulation at the litigation stage is entitled to deference.[446]

15.3.2.4 Other Exceptions

In a variety of circumstances, the Court has considered declarations or affidavits filed by the party for the purpose of establishing facts that were not relevant to the Board review of the case. For example, the Court has considered affidavits for the purpose of resolving a jurisdictional dispute turning on whether a notice of appeal was timely filed.[447] In addition, the Court has reviewed evidence that was not part of the record of

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[441] *See* ***Colvin v. Derwinski, 4 Vet. App. 133 (1992)***.

[442] In Haas v. Nicholson, No. 04-0491 (Dec. 16, 2005) (per curiam order), where the issue before the Court was the validity of VA's regulatory definition of what constitutes "service in the Republic of Vietnam" under *38 C.F.R. §§ 3.307(a)(6)(iii)*, *3.313 (2004)*, the CAVC denied VA's motion to exclude an "Agent Orange Brief" prepared by the Environmental Agents Service of VA's Central Office. The brief addressed issues including the possible health effects on Vietnam veterans exposed to Agent Orange and risks of developing specific types of cancer after exposure. The Court took judicial notice of the brief "[g]iven VA's universal publication of the Agent Orange brief, and the Agent Orange brief's possible effect on the development of the regulation at issue" and because "it is not being cited to contradict the findings of fact regarding the appellant's claim. Interpretive aids need not be submitted to the Board prior to the Court's de novo review of a question of law decided by the Board." Slip op. at 2. By statute, the BVA is bound to follow VA regulations. Likewise, in *Gray, 27 Vet. App. at 322, n.7*, the CAVC took judicial notice of an Institute of Medicine (IOM) study to determine whether VA's interpretation of its own regulation was reasonable. *See* *38 U.S.C.S. § 7104(c)*; *Floyd v. Brown, 9 Vet. App. 88, 97 (1996)*.

[443] *See generally* S. Stark & S. Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984). *But see* *Haas v. Peake, 525 F.3d 1168, 1194 (Fed. Cir. 2008)*. In *Haas*, the Federal Circuit refused to consider a study conducted by the Australian Department of Veterans Affairs that suggested that Vietnam veterans of the Royal Australian Navy may have been exposed to Agent Orange by drinking water distilled on board their vessels, finding that "[j]udgments as to the validity of such evidence and its application to the particular problem of exposure to herbicides in Vietnam are properly left to Congress and the DVA in the first instance. …" *525 F.3d at 1194*.

[444] *See* *Hudgens v. McDonald, 823 F.3d 630, 637 (Fed. Cir. 2016)*; *Haas, 525 F.3d at 1189*; *Fountain v. McDonald, 27 Vet. App. 258, 270–71 (2015)*.

[445] Disability Benefits Questionnaires, or DBQs, are discussed in *Section 5.1*.8.1 of this Manual.

[446] *Gill v. Shinseki, 26 Vet. App. 386, 391 (2013)*.

[447] *Clark v. Principi, 15 Vet. App. 61, 62 (2001)*; *Timberlake v. Gober, 14 Vet. App. 122, 132 (2000)* (establishing that the Court may review documents that postdate BVA decision when relevant to the question whether the Court has jurisdiction over a motion for BVA reconsideration; however, such documents should be submitted separately in the form of a supplemental record

proceedings before the Board, in order to exercise its authority to review a fee agreement pursuant to *38 U.S.C.S. § 7263(c)* and to resolve motions for attorney's fees.[448]

15.3.3 The Scope of Court Review

Title *38 U.S.C.S. § 7261* governs the scope of review the Court must apply in reviewing decisions of the Board. It is similar in most respects to the scope of review provisions of the Administrative Procedure Act.[449] Section 7261 provides:

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims to the extent necessary to its decision 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 Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(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 Secretary, 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 adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board 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 Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.[450]

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on appeal); *Dixon v. Shinseki, 741 F.3d 1367, 1377 (Fed. Cir. 2014)* (recognizing that a determination as to whether equitable tolling is warranted often requires consideration of "clarifying evidence"), *rev'd and remanded on other grounds*, *815 F.3d 799 (Fed. Cir. 2016)*; *Bove v. Shinseki, 25 Vet. App. 136, 143 (2011)* (holding that "this Court has the authority to address untimely filings and equitable tolling sua sponte, and may seek facts outside the record before the Board and independently weigh the facts to determine if equitable tolling is appropriate. …"); *Norvell v. Peake, 22 Vet. App. 194, 200–01 (2008)* (holding that the Court is not prohibited from considering affidavits not part of the administrative record in determining whether it has jurisdiction over a claim); *cf. Kyhn, 716 F.3d at 577–78* (holding that the CAVC erred in considering affidavits not part of the administrative record for purposes of determining whether the presumption of administrative regularity could be applied).

[448] *See In re Fee Agreement of Vernon, 8 Vet. App. 457 (1996)*; *Bazalo v. Brown, 9 Vet. App. 304 (1996)* (en banc).

[449] *See 5 U.S.C.S. § 706*.

Section 7261 makes clear that the Court may review almost any issue of law that affects the outcome of a case over which the Court has jurisdiction. Even though the Board is bound by VA regulations, the instructions of the Secretary of Veterans Affairs, and the precedent opinions of the VA's Office of the General Counsel (OGC),[451] these authorities do not bind the Court. Thus, the Court may overturn a Board decision and order the grant of benefits based on a construction of the law that was beyond the authority of the Board to adopt.

The instructions Congress gave to the Court on how to review determinations of the Board, the Secretary, or the OGC differ according to whether the determination is one of fact or one of law.

15.3.3.1 The Scope of Court Review of Adverse BVA Findings of Fact

In most Board decisions that deny the claimant the full benefits sought, the disagreement between the claimant and the Board centers on what the facts are. For example, in a claim for service-connected disability compensation, the Board finds that the veteran's current ulcer condition did not have its inception in service, but the veteran asserts that it did. Or, the Board finds that the mental disability from which the veteran suffered while in service was a personality disorder (which is not a compensable disability), but the veteran contends that it was schizophrenia (which is a compensable disability).

Because of the critical role played by Board findings of fact, the degree to which the Court is authorized to scrutinize Board findings of fact greatly affects the chance of success of most appeals of Board decisions to the Court. The Court has the authority to review material adverse Board findings of fact and to set them aside or reverse them. Section 7261(a)(4) provides that the Court should set an adverse finding of fact aside or reverse it "if the finding is clearly erroneous." Section 7261(a)(4) does not provide the Court with authority to set aside favorable findings of fact.[452]

"Clearly erroneous" is a standard that Congress has rarely, if ever, used for court review of federal agency action. The Court interpreted this standard of review in its landmark decision in *Gilbert v. Derwinski* by holding that a finding is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[453] The Court also explained:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty … if it undertakes to duplicate the role of the [BVA]. … If the [BVA's] account of the evidence is plausible in light of the record viewed in its entirety, the court … may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.[454]

In *Padgett v. Nicholson*,[455] the Court, sitting en banc, made clear that the Court may rule that a Board finding is clearly erroneous even if the evidence relevant to the finding is controverted. The Board finding at

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[450] 38 U.S.C.S. § 7261, as amended by the Veterans Benefits Act of 2002, ***Pub. L. No. 107-330***, tit. IV, § 401(a), ***116 Stat. 2820***, 2832 (2002).

[451] 38 U.S.C.S. § 7104(c) (2020).

[452] *See* Section 15.3.7.

[453] 1 Vet. App. 49, 52 (1990) (quoting Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985)).

[454] Gilbert, 1 Vet. App. at 52 (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

[455] ***19 Vet. App. 84 (2005)***, *withdrawn on other grounds*, 19 Vet. App. 334 (2005), *rev'd and remanded*, 473 F.3d 1364 (Fed. Cir. 2007).

issue in *Padgett* was that Mr. Padgett's right hip injury was not related to his service-connected left knee disability. The record contained four medical opinions on this medical nexus issue. Opinions from two VA physicians were that the right hip injury was not related to the left knee disability, while two private physicians stated that the right hip injury was related to the left knee disability.

In determining whether the Board's finding was clearly erroneous, the Court evaluated for itself the relative probative value of each of the opinions. The Court observed that the two opinions in the veteran's favor were from doctors with "intimate knowledge of [the veteran] and his medical status"; one had treated the veteran's knee condition for over a decade; while the other had treated his right hip for over a decade.[456]

The Court contrasted these two opinions "based on personal examinations and knowledge of Mr. Padgett's pertinent medical and physical history" with the two opinions from VA physicians. Although the first VA physician had examined Mr. Padgett, he did not review the claims file and made no mention of the material fact that the veteran injured his right hip in service. In the Court's eyes, this rendered the opinion of "questionable probative value." The probative value of the opinion was further diminished, according to the Court, by the use of non-definitive language; the opinion was couched in terms of what the evidence "suggests," plus the physician stated that "[f]or a more definitive opinion, it is suggested that a certified orthopedist review this case."

The second VA physician's opinion was also of "questionable probative value" because it was made without knowledge that the veteran injured his right hip in service. The Court then concluded that "given the little probative weight, if any, that can legally and reasonably be accorded" the opinions of the two VA physicians, "as opposed to the opinions of [the two private physicians] that strongly support secondary service connection for the right-hip injury, the finding of the Board that the evidence preponderated against this claim is simply, not 'plausible …' and the Court has 'the definite and firm conviction that a mistake has been committed.' "

Despite the willingness of the Court in *Padgett*, *Mariano v. Principi,*[457] and *Van Valkenburg v. Shinseki*,[458] to reverse Board findings of fact as clearly erroneous when the evidence of record is controverted, the Court still accords the Board a great degree of deference in reviewing its findings on issues of material fact.[459] The Court also categorizes many questions that come before it as pure issues of material fact, and therefore subject to review under the "clearly erroneous" standard of review. For example,

1. A challenge to a Board finding that a preexisting injury or disease did not increase in disability during military service is reviewed by the Court under the "clearly erroneous" standard applicable to findings of material fact;[460]

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[456] ***Padgett, 19 Vet. App. at 84***.

[457] *17 Vet. App. 305 (2003)*. For a detailed discussion of the court's application of the clearly erroneous standard in *Mariano, see Section 15.3*.4.

[458] *23 Vet. App. 113 (2009)* (reversing the Board's finding that the evidence weighed against entitlement to an earlier effective date for DIC benefits).

[459] *See Romanowsky v. Shinseki, 26 Vet. App. 289, 296 (2013)* ("This Court has a lengthy history of deferring to the factual findings of the Board, which the Court will not disturb absent a showing of clear error.").

[460] *See Beverly v. Brown, 9 Vet. App. 402, 405 (1996)*. As explained in Section 3.4.3 of this Manual, once it is established that a pre-existing disability underwent an in-service increase in disability, the burden shifts to VA to show by clear and unmistakable evidence that the disability was not aggravated by service. While the BVA's finding as to whether the veteran met the burden of showing an in-service increase in disability is reviewed under the "clearly erroneous" standard, the Court reviews de novo the BVA's finding that clear and unmistakable evidence shows that the disability was not aggravated by service. *Cotant, 17 Vet. App. at 116*. The Court also reviews de novo the BVA's finding that the evidence rebuts the presumption of soundness because it clearly and unmistakably shows that there was no in-service aggravation. *See Horn v. Shinseki, 25 Vet. App. 231 (2012)*. See *Section 3.3*.2 of this Manual for a discussion of the presumption of soundness.

2. A challenge to the Board's finding that a disability or disease was not incurred in service is a factual finding;[461]

3. A challenge to the Board's finding as to the degree of impairment resulting from a disability is reviewed by the Court under the "clearly erroneous" standard;[462]

4. A challenge to a Board finding that the veteran was employable (and therefore was not entitled to TDIU) is reviewed by the Court under the "clearly erroneous" standard;[463]

5. A challenge to a Board finding regarding the proper effective date for an award of benefits is reviewed by the Court under the "clearly erroneous" standard,[464] including the determination of whether an informal claim was filed under the rules in effect prior to March 25, 2015;[465]

6. A challenge to a Board finding as to whether a claimant submitted new and material evidence sufficient to reopen a previously denied claim is subject to the "clearly erroneous" standard of review;[466]

7. A challenge to a Board finding that the veteran is eligible for certain VA educational benefits is a question of fact;[467]

8. A challenge to a Board finding that the veteran is not entitled to the benefit of the doubt is reviewed by the Court under the "clearly erroneous" standard;[468]

9. A challenge to a Board finding that *38 U.S.C.S. § 5103(a)* notification requirements have been met is subject to the "clearly erroneous" standard of review;[469]

10. A challenge to a Board finding that a veteran fraudulently secured the award of VA benefits is subject to the "clearly erroneous" standard of review; and,[470]

11. A challenge to a Board finding that a medical opinion is adequate is subject to the "clearly erroneous" standard of review.[471]

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[461] *See Pentecost v. Principi, 16 Vet. App. 124, 129 (2002)*.

[462] *See Brambley v. Principi, 17 Vet. App. 20, 22–23 (2003)*; *Spurgeon v. Brown, 10 Vet. App. 194, 196 (1997)*; *Cathell v. Brown, 8 Vet. App. 539 (1996)*; *Francisco v. Brown, 7 Vet. App. 55, 57 (1994)*; *Solomon v. Brown, 6 Vet. App. 396, 402 (1994)*; *Lovelace v. Derwinski, 1 Vet. App. 73, 74 (1990)*.

[463] *See Cathell, 8 Vet. App. at 539*.

[464] *See Taylor v. Wilkie, 31 Vet. App. 147, 154 (2019)* (citing *Evans v. West, 12 Vet. App. 396, 401 (1999)*).

[465] *See Brokowski v. Shinseki, 23 Vet. App. 79, 85 (2009)* (citing *Ellington v. Nicholson, 22 Vet. App. 141, 144 (2007)*); ***Criswell v. Nicholson, 20 Vet. App. 501, 504 (2006)***. See *Section 12.5*.2 of this Manual for more information about informal claims under the rules in effect prior to March 25, 2015.

[466] *Elkins v. West, 12 Vet. App. 209 (1999)* (en banc); *see also Prillaman v. Principi, 346 F.3d 1362, 1363 (Fed. Cir. 2003)*.

[467] *See Celano v. Peake, 22 Vet. App. 341, 347–48 (2009)*; *West v. Principi, 15 Vet. App. 246, 250 (2001)* (discussing the standard of review of a BVA determination that a veteran was not eligible for educational benefits pursuant to the consent decree in Pacheco v. Dep't of Veterans Affairs, No. C83-3098 (N.D. Ohio 1991)).

[468] *Padgett v. Nicholson, 19 Vet. App. 133 (2005)*, *withdrawn on other grounds*, *19 Vet. App. 334 (2005)*, *rev'd and remanded*, *473 F.3d 1364 (Fed. Cir. 2007)*; *Mariano, 17 Vet. App. at 313*.

[469] *Garrison v. Nicholson, 494 F.3d 1366 (Fed. Cir. 2007)*; *Gordon v. Nicholson, 21 Vet. App. 270 (2007)*.

[470] *Roberts, 23 Vet. App. at 416*.

Despite the formidable task advocates face in trying to convince the Court that a Board finding of material fact is clearly erroneous, some appellants have been able to persuade the Court that a Board finding should be set aside. When this occurs, the next question becomes whether this error should result in: (1) a reversal of the Board's decision to deny benefits and a court order requiring the agency to grant the benefits in question; or (2) vacatur of the Board decision and a remand to the Board for further proceedings. The position the Court has generally adopted is to look at all the elements that the claimant needs to prove to be entitled to the benefit in question. A reversal, rather than a remand, is appropriate where, for each element, either: (1) the Board has resolved the issue in the claimant's favor; or (2) the only permissible view of the evidence is contrary to the Board's decision.[472]

Listed in the footnotes below are numerous decisions in which the appellant was able to convince the Court to set aside a Board finding of material fact as "clearly erroneous" in the context of a Board determination involving: service connection for a disability;[473] degree of disability under the rating schedule;[474] a total

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[471] *D'Aries v. Peake, 22 Vet. App. 97, 104 (2008)*.

[472] *See* *Washington v. Nicholson, 19 Vet. App. 362 (2005)*; *Gutierrez v. Principi, 19 Vet. App. 1, 10 (2004)* ("Reversal is the appropriate remedy, however, only in cases in which the only permissible view of the evidence is contrary to the Board's decision. …").

[473] *See* *Pentecost, 16 Vet. App. at 129* (in claim for service connection for PTSD, the Court reversed BVA finding that there was no corroboration of in-service stressor, as there was no plausible basis for such finding in light of uncontroverted evidence of veteran's exposure to rocket attacks); *Traut v. Brown, 6 Vet. App. 495 (1994)* (reversal of Board's denial of service connection for multiple sclerosis due to clearly erroneous factual finding); *Bucklinger v. Brown, 5 Vet. App. 435, 440 (1993)* (no plausible basis for BVA's conclusion that veteran's tinnitus was caused by disease rather than trauma); *Harder v. Brown, 5 Vet. App. 183, 189 (1993)* (reversal of BVA decision where "the sum total of evidence dictates one result," secondary service connection for right knee condition); *Cook v. Brown, 4 Vet. App. 231, 238 (1993)* (reversal of finding that veteran's ulcer was not manifested within one year after discharge from service); *Hoag v. Brown, 4 Vet. App. 209, 212 (1993)* (BVA finding that veteran's myofascial pain syndrome was not manifested in service is clearly erroneous); *Chisem v. Brown, 4 Vet. App. 169, 174 (1993)* (no plausible basis in record to deny veteran's claim for service connection for psychiatric disorder); *Garrett v. Derwinski, 2 Vet. App. 334 (1992)* (medical evidence left the Court with definite and firm conviction that a mistake had been made in the BVA's finding that the residuals of the veteran's in-service fracture did not cause his dental malocclusion); *Futch v. Derwinski, 2 Vet. App. 204 (1992)* (BVA's finding that veteran's narrowing of the artery was not due to service-connected condition was clearly erroneous where BVA rejected favorable diagnoses by two VA physicians and impermissibly based its decision on its own unsubstantiated medical opinion); *Look v. Derwinski, 2 Vet. App. 157 (1992)* (there was no plausible basis for the BVA's finding of fact that foot disability was not caused by surgery performed in a VA medical center; the only conclusion that could be drawn from the medical evidence in the record was that the appellant's disability was the direct result of the surgery performed at the VA medical center); *Hanson v. Derwinski, 1 Vet. App. 512 (1991)* (the BVA's finding that the appellant's Tourette's syndrome was first manifested several years after service was clearly erroneous, the Board relied only on the absence of an in-service diagnosis to support its finding and the evidence included an expert opinion of a VA treating psychiatrist who unequivocally stated the syndrome began in service, and testimony of the appellant and a fellow Army service member as to in-service manifestations of the condition); *Meister v. Derwinski, 1 Vet. App. 472 (1991)* (BVA's factual finding that the passage of thirty-four years between the date of appellant's service-connected right forearm amputation and the onset of the appellant's left shoulder condition made it unlikely that the shoulder condition was secondary to the amputation was clearly erroneous, since two physicians' opinions posited a direct link between the amputation and the later left shoulder pathology); *Brannon, 1 Vet. App. at 314* (the BVA finding that the veteran's "inservice epigastric complaints did not represent a chronic stomach disorder" was clearly erroneous); *Caldwell v. Derwinski, 1 Vet. App. 466 (1991)* (BVA's finding of fact that paranoid schizophrenia was revealed "at a time too remote from the time of military service to be related thereto" was clearly erroneous as record contained lay evidence that symptoms began in service and expert medical opinion that disease was manifested in service or within a year of discharge and no medical evidence to the contrary); *Spencer v. Derwinski, 1 Vet. App. 125 (1991)* (setting aside as clearly erroneous a BVA finding that a postservice trauma caused the veteran's current arthritic condition); *Willis v. Derwinski, 1 Vet. App. 66, 69–70 (1991)* (BVA finding that veteran's mental disorder was not present during service is clearly erroneous).

[474] *See* *Murray v. Shinseki, 24 Vet. App. 420 (2011)* (Board's decision effectively reducing the veteran's protected 10 percent rating for knee instability to zero was clearly erroneous, and was reversed with instructions to reinstate the 10 percent rating); *Johnson v. Brown, 9 Vet. App. 7 (1996)* (only permissible view of evidence is that veteran is entitled to a compensable rating for

disability (100 percent) rating based on individual unemployability;[475] a reduction in a disability rating;[476] and the appropriate effective date of an award of benefits.[477]

15.3.3.2 The Scope of Court Review of Agency Determinations That Do Not Involve Pure Issues of Fact

The Court may "hold unlawful and set aside" a number of agency actions other than pure findings of fact. The agency actions that the Court may review include "conclusions, rules and regulations issued or adopted by the Secretary, Board or the Chairman of the Board."[478] These other issues may involve pure questions of law (such as the proper interpretation of a statute or regulation), or mixed questions of law and fact (such as the Board's application of law to the facts in an individual case).

The Court has the authority to set aside as unlawful agency conclusions on these non-factual issues if the Court finds them to be, among other things, "arbitrary, capricious, [or] an abuse of discretion," "in violation of statutory right," "not in accordance with law," or "without observance of procedure required by law."[479] The degree of deference accorded by the Court to these agency conclusions on issues that are not purely factual varies depending upon the nature of the non-factual issues.

In this Section of this Manual, we canvass the large variety of agency determinations that are not purely factual in nature, and, for each, the degree of deference the Court states it accords to the agency's determination when it reviews that determination. In Section 15.3.3.2.1, we discuss specific rules that the Court applies in reviewing VA's interpretation of statutes and its own regulations.

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left knee disability); *Carroll v. Brown, 5 Vet. App. 208, 210 (1993)* (denial of rating increase for coronary artery disease was reversed because it was based upon clearly erroneous BVA finding of fact and evidence demonstrates condition satisfies criteria for 100 percent rating); *Barnhill v. Brown, 5 Vet. App. 75 (1991)* (record compellingly establishes that veteran was entitled to a rating of at least 70 percent for PTSD); *Hill v. Principi, 3 Vet. App. 540 (1993)* (a 10 percent rating was warranted for service-connected finger injury); *Tucker v. Derwinski, 2 Vet. App. 201, 203 (1992)* (BVA finding that veteran's bipolar disorder did not produce more than definite impairment is clearly erroneous based on "medical evidence of record").

[475] *See* *James v. Brown, 7 Vet. App. 495 (1995)* (BVA clearly erred in denying veteran's claim for TDIU due to service-connected narcolepsy); *Vettese v. Brown, 7 Vet. App. 31 (1994)* (there was no plausible basis in record to deny appellant's claim for TDIU due to service-connected mental disorder); *Beaty v. Brown, 6 Vet. App. 532 (1994)* (no evidence to support BVA's finding that veteran was not unemployable due to service-connected disabilities); *Kaiser v. Brown, 5 Vet. App. 411, 412 (1993)* (BVA's conclusion that veteran's unemployability was due to non-service-connected illness and that he was not entitled to TDIU was clearly erroneous); *Moore v. Derwinski, 2 Vet. App. 209 (1991)* (BVA finding that the veteran was able to perform substantial, gainful employment was clearly erroneous, since the only evidence to which the BVA could point to support its finding was that the veteran last worked full-time seven years earlier, that he held a master's degree in education, and that he was currently maintaining part-time self-employment as a counselor and tutor); *Gleicher v. Derwinski, 2 Vet. App. 26 (1991)* (BVA finding that the appellant was able to follow or secure a substantially gainful occupation in view of his advanced education and experience as an engineer was clearly erroneous, both the examining VA psychiatrist's report and the social and industrial survey demonstrated that the appellant was unemployable due to the severity of his service-connected psychiatric disorder); *Hersey, 2 Vet. App. at 91* (BVA's unemployability finding was clearly erroneous where the BVA disregarded overwhelming evidence that confirmed that the veteran's unemployability was due to service-connected ACD with hypertension).

[476] *See* *Hohol v. Derwinski, 2 Vet. App. 169 (1992)* (BVA finding that there was material improvement in the veteran's mental condition was clearly erroneous, since there was no evidence to support the finding); *Karnas v. Derwinski, 1 Vet. App. 308 (1991)* (same).

[477] *See* *Quarles v. Derwinski, 3 Vet. App. 129, 136 (1992)* (BVA decision regarding effective date of disability reversed as clearly erroneous); *Banks v. Principi, 3 Vet. App. 418 (1992)* (BVA's findings to deny earlier effective date for 10 percent disability rating for lumbosacral strain were clearly erroneous).

[478] *38 U.S.C.S. § 7261(a)(3)*.

[479] *38 U.S.C.S. § 7261(a)(3)*.

When reviewing pure issues of law, the Court has long made clear that it reviews the agency's resolution of the issue de novo, without according the agency any deference to the Board's view of the law.[480] Some examples of Board findings that the Court reviews de novo include: what constitutes "clear evidence" needed to rebut the presumption of regularity and whether the Secretary met his burden to establish that a notice of disagreement (NOD) was not postmarked within the one-year appeal period;[481] whether the appellant would be prejudiced by the Board deciding an issue that was not first decided by the RO;[482] whether a document qualifies as a NOD;[483] whether a document qualifies as a substantive appeal in a legacy case;[484] whether the Board erred in determining that a particular attorney fee agreement was unreasonable pursuant to *38 U.S.C.S. § 5904*;[485] and whether the record contains clear and unmistakable evidence sufficient to rebut the presumptions of soundness and aggravation.[486]

However, many issues that come before the Court involve mixed issues of fact and law. When courts review agency determinations that involve a mixed question of fact and law, courts typically employ the "arbitrary, capricious, [or] an abuse of discretion" standard and provide some deference to the determinations.[487] In other words, they typically do not put themselves in the position of the agency and decide what they would have done if they had been serving as the agency adjudicators.[488] Instead, they review the record and the agency's reasoning, and give the agency some deference when deciding whether the agency was right or wrong in applying the law to the facts.

The types of issues that the Court has characterized as involving the application of law to facts include:

1. A challenge to the VA's selection of the appropriate diagnostic code for purposes of rating the veteran's degree of disability involves a mixed question of law and fact that the Court reviews under the deferential "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard;[489]

2. Whether the Board erred in determining that a prior final agency decision did not contain clear and unmistakable error (CUE) is reviewed by the Court under the "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" standard.[490] However, whether

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[480] *Marsh, 19 Vet. App. at 387*.

[481] *Marsh, 19 Vet. App. at 387*.

[482] *See* *Curry v. Brown, 7 Vet. App. 59, 66 (1994)*.

[483] *38 C.F.R. § 20.202 (2020)*. *See* ***Archbold v. Brown, 9 Vet. App. 124, 131 (1996)***. *But see* *Palmer v. Nicholson, 21 Vet. App. 434, 438 (2007)* (noting that supplemental memoranda were sought regarding the appropriate standard of review of whether a NOD was filed, but concluding that in that case, "under any standard of review that the Court might apply, the [veteran's] letters satisfied the requirements of an NOD. …").

[484] *Gibson v. Peake, 22 Vet. App. 11, 15 (2007)*.

[485] *See* *In re Fee Agreement of Vernon, 8 Vet. App. at 459*.

[486] *See* *Vanerson v. West, 12 Vet. App. 254, 261 (1999)*. In earlier cases, the Court stated that this issue was purely an issue of law reviewed by the Court *de novo*. *See* *Miller v. West, 11 Vet. App. 345, 347 (1998)*; *Junstrom v. Brown, 6 Vet. App. 264, 266 (1994)*; *Bagby v. Derwinski, 1 Vet. App. 225, 227 (1991)*; *Cotant, 17 Vet. App. at 116*; *Horn, 25 Vet. App. at 231*.

[487] *Westberry v. West, 12 Vet. App. 510, 515 (1999)*, *aff'd*, *255 F.3d 1377 (Fed. Cir. 2001)*.

[488] *See* *George v. Shulkin, 29 Vet. App. 199, 206 (2018)* ("The scope of review under the 'arbitrary and capricious' standard is quite narrow and the Court is not to substitute its judgment for that of the agency.").

[489] *See* ***Smallwood v. Brown, 10 Vet. App. 93, 98 (1997)***; *Arnesen v. Brown, 8 Vet. App. 432, 439 (1995)*; *Bierman v. Brown, 6 Vet. App. 125, 131 (1994)*; *Butts v. Brown, 5 Vet. App. 532, 539 (1993)* (en banc).

(a) the claimant sufficiently explained the claim to the VA to satisfy the pleading requirements that must be made for a CUE claim to be reviewable in the Court and (b) whether an applicable law or regulation was not applied or was applied incorrectly are pure questions of law that the Court reviews de novo.[491]

3. Whether the Board erred in determining that the veteran was not entitled to continuation of a temporary 100 percent rating based on convalescence is reviewed under the deferential "arbitrary or capricious" standard.[492]

4. Whether the Board erred in determining that the evidence in the record contained clear and convincing evidence within the meaning of 38 U.S.C.S. § 1154(b) sufficient to overcome a combat veteran's lay evidence that a disease or injury was incurred or aggravated in service appears to be a question that the Court reviews under the deferential "arbitrary and capricious" standard.[493]

5. Whether the Board erred in denying a request for a waiver of indebtedness, which is reviewed under the deferential "arbitrary or capricious" standard.[494]

6. In assessing the need for a medical examination under 38 U.S.C.S. § 5103A(d)(2)(B), whether the evidence indicates that a disability "may be associated" with service is reviewed under the "arbitrary or capricious" standard.[495]

15.3.3.2.1 The Standard of Review of VA's Interpretations of Statutes and Its Own Regulations

As with any other pure issue of law, the proper interpretation of a statute or regulation is subject to de novo review.[496] However, unlike other pure issues of law, the Court will accord some level of deference to VA's interpretation of a statute or regulation in some circumstances. Whether the Court will accord deference to VA's interpretation, and if so, to what degree, depends on whether it is a statute or a regulation at issue and whether the language of the statute or regulation is clear on its face, among other factors.

In interpreting a statute, the first question is whether the statutory language is clear on its face.[497] If the language is clear, then there is no need to defer to the VA's interpretation because Congress has spoken directly to the precise question at issue.[498] However, where the language is ambiguous, and

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[490] *See* Andrews v. Principi, 18 Vet. App. 177 (2004); Livesay, 15 Vet. App. at 174; Phillips v. Brown, 10 Vet. App. 25, 30 (1997); Crippen v. Brown, 9 Vet. App. 412, 418 (1996); Damrel, 6 Vet. App. at 246; Russell v. Principi, 3 Vet. App. 310, 315 (1992) (en banc).

[491] *See* Joyce v. Nicholson, 19 Vet. App. 36 (2005); Andrews, 18 Vet. App. at 182; Phillips, 10 Vet. App. at 30.

[492] *See* Seals v. Brown, 8 Vet. App. 291 (1995).

[493] *See* Caluza v. Brown, 7 Vet. App. 498, 509 (1995). In Velez v. West, 11 Vet. App. 148, 154 (1998), the Court stated that the proper standard of review of this question had not yet been definitively resolved by the Court and characterized the discussion in *Caluza,* identifying the standard of review of this question, as nonbinding dicta.

[494] Reyes v. Nicholson, 21 Vet. App. 370 (2007); McCullough, 15 Vet. App. at 275.

[495] McLendon v. Nicholson, 20 Vet. App. 79 (2006).

[496] *See* Lane v. Principi, 339 F.3d 1331, 1339 (Fed. Cir. 2003); Payne v. Wilkie, 31 Vet. App. 373, 383 (2019); Cullen v. Shinseki, 24 Vet. App. 74, 78 (2010); Cacatian v. West, 12 Vet. App. 373, 376 (1999).

[497] *See* Heino v. Shinseki, 24 Vet. App. 367, 371–72 (2011); Singleton v. Shinseki, 23 Vet. App. 376, 379 (2010); Ortiz v. Shinseki, 23 Vet. App. 353 (2010).

VA's interpretation is contained within a regulation, the Court will generally defer to the VA's reasonable interpretation.[499] This standard of review is consistent with the Supreme Court's holding in *Chevron v. Nat'l Res. Def. Council* that when a Court reviews an administrative agency's interpretation of a statute, and the statute is silent or ambiguous with respect to a specific issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." In determining whether the language of a statute is clear on its face, the Court may consider not only the plain language of the statute, but also the context of the statute, including but not limited to the legislative history,[500] the statute's location within the U.S. Code,[501] and the policy behind the statute.[502]

If the Court concludes that the statutory language is *un*clear, it may accord some level of deference to the VA's interpretation of the statute as set forth in the regulation. The degree of deference that must be accorded to the VA's regulation interpreting a statute is a matter of some debate in light of the Supreme Court's holding in *Brown v. Gardner*[503] that "interpretive doubt is to be resolved in the veteran's favor. …"

In *Sears v. Principi*,[504] the Federal Circuit rejected an argument that *Chevron* deference did not apply in a veteran's benefits case because under *Brown*, any statutory ambiguity must always be resolved in favor of the veteran. The Federal Circuit explained that "[e]ven when the meaning of a statutory provision is ambiguous, we must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case."[505] Nonetheless, it remains unclear after *Sears* when and to what extent the Supreme Court's holding in *Brown* applied in resolving statutory ambiguity.

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[498] *See* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); Ravin v. Wilkie, 956 F.3d 1346 (Fed. Cir. 2020) (recognizing that "[w]here the statutory language provides a clear answer, the [Court's] analysis ends there"); Payne, 31 Vet. App. at 383 (quoting *Chevron* for the proposition that "[t]he first question in statutory interpretation is always 'whether Congress has directly spoken to the precise question at issue.'"); Bailey v. O'Rourke, 30 Vet. App. 54 (2018); Trafter v. Shinseki, 26 Vet. App. 267 (2013) ("The matter of statutory construction is at an end if the intent of Congress is unambiguously expressed."); Mountford v. Shinseki, 24 Vet. App. 443, 447–48 (2011) (finding that the plain language of the statute at issue was clear); *see also* Veterans Justice Grp. v. Sec'y of Veterans Affairs, 818 F.3d 1336, 1346 (Fed. Cir. 2016) (establishing that the Federal Circuit's "review of an agency's interpretation of a statute that it administers is governed by the two-step framework articulated in [*Chevron*]").

[499] Chevron, 467 U.S. at 842; Veterans Justic Grp., 818 F.3d at 1346; Wolfe v. Wilkie, 32 Vet. App. 1, 34–35 (2019) (recognizing that "when reviewing 'an agency's construction of the statute which it administers,' a court always asks first 'whether Congress has directly spoken to the precise question at issue,' and, 'if the intent of Congress is clear, that is the end of the matter [because] the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress [but] if the statute issilent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute' ") (quoting Chevron, 467 U.S. at 843–44); Buffington v. Wilkie, 31 Vet. App. 293, 301 (2019) (acknowledging that where "there is a gap in the statute, the Court must now turn to step two of the Chevron analysis, 'whether the agency's answer is based on a permissible construction of the statute' ").

[500] *See* Breedlove, 24 Vet. App. at 11–14.

[501] *See* Holle, 28 Vet. App. at 116; Breedlove, 24 Vet. App. at 11–14; Andrews v. Shinseki, 26 Vet. App. 193 (2013).

[502] *See* Osman v. Peake, 22 Vet. App. 252 (2008).

[503] 513 U.S. 115, 118 (1994) (citing King v. St. Vincent's Hosp., 502 U.S. 220–21 (1991)).

[504] 349 F.3d 1326, 1331–32 (Fed. Cir. 2003).

[505] Sears, 349 F.3d at 1332–32.

In *Trafter v. Shinseki*,[506] the Court appears to have attempted to resolve the issue with a new, comprehensive rule for interpreting ambiguous statutes in the context of the veterans benefits system. The Court explained that

> Within the complex veterans benefits scheme, if VA's interpretation of the statutes is reasonable, the courts are precluded from substituting their judgment for that of VA, unless the Secretary has exceeded his authority; the Secretary's action was clearly wrong; or the Secretary's interpretation is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA's veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions.[507]

This new rule contemplates both *Chevron* deference and the pro-veteran *Brown* rule, because it creates an exception to *Chevron* deference that applies when a more veteran-friendly interpretation is available that is consistent with other relevant provisions. In addition, the *Trafter* rule allows veterans advocates to argue that VA's interpretation of a statute should not be accorded deference, even though it is a reasonable interpretation, because an interpretation that is more favorable to the veteran is available.[508]

The VA's interpretation of a statute may be found in a regulation,[509] a VA OGC Opinion,[510] a Fast Letter,[511] the *Manual M21-1*,[512] the Board's decision, or even in the VA attorney's appellate brief. However, the courts have signaled that if the VA's interpretation is not contained in a regulation that has been through the notice and comment process,[513] or when VA's regulation simply parrots the language of the ambiguous statute, it will be afforded a different, slightly lower level of deference.[514] Under this standard, the Court will defer to the VA's interpretation only so far as it has "the power to persuade."[515]

Just as the first step in interpreting a statute is determining the meaning of its plain language, the first step in interpreting a regulation is to look to its language.[516] If the language is ambiguous, the Court will

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[506] *26 Vet. App. 267, 272 (2013)*.

[507] *Trafter, 26 Vet. App. at 272* (citing *Brown, 513 U.S. at 117–18*; *Chevron, 467 U.S. at 837*; *U.S. v. Shimer, 367 U.S. 374, 382 (1961)*; *Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946))*.

[508] *See* *Cook v. Snyder, 28 Vet. App. 330, 340–45 (2017)*.

[509] *Buffington*, 31 Vet. App. at 302 (holding that "[38 C.F.R.] § 3.654(b) fills the gap left by Congress by delineating the procedure by which benefits are suspended and reinstated as a veteran comes in and out of active service" in accordance with 38 U.S.C. § 5112); *Schertz v. Shinseki, 26 Vet. App. 362, 368–69 (2013)* (deferring to VA's regulatory interpretation of the term "not reasonably foreseeable" as used in *38 U.S.C.S. § 1151*).

[510] *O'Bryan v. McDonald, 771 F.3d 1376, 1380 (Fed. Cir. 2014)*.

[511] *Gray, 27 Vet. App. at 313, 322*.

[512] *Gray, 27 Vet. App. at 322*.

[513] Generally, federal agencies (including the VA) are required to publish notice of a proposed regulation in the Federal Register and allow comment from interested parties. 38 U.S.C.S. § 553; *Fugere v. Derwinski, 1 Vet. App. 103, 107–08 (1990)*, *aff'd*, *972 F.2d 331 (Fed. Cir. 1992)*.

[514] *See* *Cook, 28 Vet App. at 339–40* (citing *Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))*; *Fountain, 27 Vet. App. at 265*.

[515] *Skidmore, 323 U.S. at 140*.

turn to VA's interpretation of the regulation. The level of deference that the Court will accord to VA's interpretation of its own regulation is significantly higher than the level of deference that is accorded to an interpretation of a statute.[517] The Court has made clear that it will accept VA's interpretation of its own regulation unless it is "'plainly erroneous or inconsistent with the regulation.'"[518] This standard of review is consistent with the Supreme Court's holding in *Auer v. Robbins*.[519] In determining whether the language of a regulation is clear on its face, the Court will look to both the plain language of the regulation and the statutory and regulatory framework against which it was promulgated.[520]

Thus, in *Arneson v. Shinseki*,[521] the Court rejected the VA's interpretation of *38 C.F.R. § 20.707 (2010)*, finding that the interpretation the VA attorney offered on appeal "ma[de] no sense," and was inconsistent with the plain language of the regulation. Similarly, in *Gray*,[522] the Court found that VA's interpretation of the term "Republic of Vietnam" in *38 C.F.R. § 3.307(a)(6)(iii) (2016)* as excluding DaNang Harbor was "both inconsistent with the regulatory purpose and irrational … ." Likewise, in *Hudgens v. McDonald*,[523] the Federal Circuit concluded that deference to VA's interpretation of *38 C.F.R. § 4.71a*, Diagnostic Code 5055 was not warranted where VA's interpretation was inconsistent with prior interpretations and the interpretation offered by the veteran was "permitted by the text of the regulation." The Federal Circuit therefore resolved any doubt in the interpretation of the regulation in favor of the veteran pursuant to *Gardner*.[524]

Like the VA's interpretation of a statute, the VA's interpretation of its own regulation may be found in other agency documents and can be raised for the first time in an appellate brief.[525] The Courts have made clear that even when VA's interpretation of a statute is first raised in an appellate brief, deference may still be accorded to that interpretation provided that "there is 'no reason to suspect that the

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[516] *Williams v. Wilkie, 30 Vet. App. 134 (2018)* (citing a popular medical dictionary to ascertain the ordinary meaning of the word "deformity" as used in *38 C.F.R. § 4.115b*, DC 7522); *Ortiz-Valles v. McDonald, 28 Vet. App. 65, 68–71 (2016)*; *Johnson v. McDonald, 762 F.3d 1362, 1365–66 (Fed. Cir. 2014)* (rejecting VA's interpretation of *38 C.F.R. § 3.321 (2012)* as inconsistent with the plain language of the regulation); *Middleton v. Shinseki, 727 F.3d 1172, 1177, 1178 (Fed. Cir. 2013)* (interpreting the plain language of VA regulations).

[517] *Mason v. Shinseki, 26 Vet. App. 1, 7 (2012)* ("An agency's interpretation of its regulations does not require the same observance of formalities as when an agency interprets a statute. …").

[518] *See* *Arneson v. Shinseki, 24 Vet. App. 379, 385 (2011)* (quoting *Auer v. Robbins, 519 U.S. 452, 461 (1997)*).

[519] *519 U.S. at 461* (citing *Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)*).

[520] *Langdon v. Wilkie, 32 Vet. App. 291, 296 (2020)* (recognizing that when the Court "assess[es] the meaning of a regulation, [it] should not read its words in isolation but rather in the context of the regulatory scheme and structure as a whole"); *Middleton, 727 F.3d at 1177, 1178*; *Prokarym v. McDonald, 27 Vet. App. 307 (2015)*; *King v. Shinseki, 26 Vet. App. 484, 491 (2014)*; *Johnson v. Shinseki, 26 Vet. App. 237 (2013)*; *Cook, 28 Vet. App. at 338–40*.

[521] *24 Vet. App. at 386*.

[522] *27 Vet. App. at 325*. *See also* *Petitti v. McDonald, 27 Vet. App. 415, 428–29 (2015)* (holding that the requirement of "objective" evidence to prove painful motion pursuant to C.F.R. § 4.71a, DC 5002 does not preclude the use of lay statements or evidence). *But see* *Tatum v. Shinseki, 26 Vet. App. 443, 449 (2013)* (deferring to VA's reasonable interpretation of *38 C.F.R. § 4.115b (2013)*); *see also* *Burton v. Shinseki, 25 Vet. App. 1, 4 (2011)* (deferring to VA's reasonable interpretation of *38 C.F.R. § 4.59 (2011)*); *Cullen, 24 Vet. App. at 81* (according substantial deference to VA's interpretation of *38 C.F.R. § 4.71a (2010)*).

[523] *823 F.3d at 638–39*.

[524] *Hudgens, 823 F.3d at 639*.

[525] *See* *Gill, 26 Vet. App. at 391* (reviewing regulatory history as printed in the Federal Register and VA's Disability Benefits Questionnaire to determine VA's interpretation of *38 C.F.R. § 4.104 (2013)*).

interpretation does not reflect the agency's fair and considered judgment on the matter.'"[526] However, the United States Supreme Court has held that deference to an agency's interpretation of a statute or regulation that is raised for the first time during litigation is not appropriate where "the agency's interpretation conflicts with a prior interpretation . . . ."[527] Therefore, if an advocate is aware of the existence of a pleading (such as a brief or a joint motion for remand) or an agency document (such as a Board decision)[528] in which the VA's interpretation of a statute or regulation is inconsistent with the interpretation advocated in another case, the advocate should attach the pleading to his or her brief, request that the Court take judicial notice of the pleading, and argue that the Court should not defer to VA's litigation position because it is inconsistent with a prior litigation position.[529]

15.3.3.3 The Rule of Prejudicial Error

The Court is required by *38 U.S.C.S. § 7261(b)* to "take due account of the rule of prejudicial error."[530] Relying on this provision, the Court has affirmed many Board decisions even though it found that the VA committed legal error, because the Court determined that the error was "harmless" and not prejudicial.[531] The Court has also held that the doctrine of harmless error applies to allegations that the

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[526] *Cullen, 24 Vet. App. at 80* (quoting *Cathedral Candle Co. v. U.S. ITC, 400 F.3d 1352, 1364 (Fed. Cir. 2005))*; *see also* *Burton, 25 Vet. App. at 4*; *Arneson, 24 Vet. App. at 385*.

[527] *Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 170 (2012)*; *see also* *Turner, 29 Vet. App. at 215–16* (holding that the Secretary's regulatory interpretation was not entitled deference where "there [was] no single position to which to defer under *Auer*.").

[528] *See* *Hudgens, 823 F.3d at 638*.

[529] The Court has held that it can and will take judicial notice of VA's pleadings in other, unrelated cases. *See* *Cotant, 17 Vet. App. at 124*; *In re Cox, 10 Vet. App. 361, 367 (1997)*.

[530] *Shinseki v. Sanders, 556 U.S. 396, 406–07 (2010)*; *Vogan v. Shinseki, 24 Vet. App. 159, 161–62 (2010)*.

[531] *See* *Simmons v. Wilkie, 30 Vet. App. 267 (2018)* (holding that while the Board erred in its analysis of whether the presumptions of soundness and service connection applied, its error was harmless because it did not affect a substantial right that disrupted the fundamental fairness of the adjudication nor affected its ultimate determination); *Nielson v. Shinseki, 23 Vet. App. 56, 60–61 (2009)* (holding that the Board erred in applying a General Counsel precedential opinion since the applicable regulation's language was clear on its face, but the error was harmless since the precedential opinion was consistent with the regulation); *Marciniak v. Brown, 10 Vet. App. 198, 201 (1997)* (unavailability of statement of the case (SOC) was harmless error); *Tedeschi v. Brown, 7 Vet. App. 411, 414 (1995)* (even though the BVA failed to provide an adequate statement of reasons or bases for why it chose a particular diagnostic code to evaluate the veteran's foot condition, this constitutes harmless error where there was no medical evidence that the veteran's current symptomatology could be attributed to his service-connected disorder); *Irby v. Brown, 6 Vet. App. 132, 135–36 (1994)* (even though the BVA violated its duty to assist veteran by failing to order a thorough and contemporaneous psychiatric examination, error was harmless since there was a plausible basis in the record to deny claim for service connection for posttraumatic stress disorder); *Yabut v. Brown, 6 Vet. App. 79 (1993)* (even though VA erred by failing to provide appellant with notice and an opportunity to respond to medical treatises cited in its decision, this constitutes harmless error where other evidence of record provides a plausible basis for BVA's decision); *Soyini v. Derwinski, 1 Vet. App. 540, 546 (1991)* (BVA's failure to articulate reasons or bases for its decision, in violation of *38 U.S.C.S. § 7104(d)(1)*, was harmless error, since there was overwhelming evidence in support of the BVA's decision). *But see* *Procopio v. Shinseki, 26 Vet. App. 76, 83 (2012)* (rejecting the Secretary's argument that the Board's error in failing to comply with *38 C.F.R. § 3.103(c)(2) (2012)* was harmless because "the Secretary's proposed prejudicial error analysis … renders a portion of § 3.103(c)(2) a legal nullity.").

VA has committed errors that violate the United States Constitution.[532] As a general rule, the burden is upon the appellant to demonstrate that VA's error prejudiced the appellant.[533]

Although generally, the Court may not make findings in the first instance, an exception to this general rule arises when the Court engages in a prejudicial error analysis under *38 U.S.C.S. § 7261(b)(2)*. In *Newhouse v. Nicholson*,[534] the Federal Circuit upheld the Court's finding that the VA's failure to provide adequate notice of the evidence needed to substantiate the claim constituted harmless error because the veteran had actual knowledge of the evidence that was needed. On appeal to the Federal Circuit, the veteran argued that the Court had overstepped the boundaries of its jurisdiction by making a finding as to the prejudicial effect of the notice error in the first instance. The Federal Circuit disagreed, holding that

> The statute defining the Veterans Court's jurisdiction to review Board decisions, *38 U.S.C. § 7261(b)(2)*, states that the Veterans Court "shall review the record of proceedings before the Secretary and the Board … and shall … (2) take due account of the rule of prejudicial error." … The statute does not limit the Veteran's Court's inquiry to the facts as found by the Board, but rather requires the Veterans Court to "review the record of the proceedings before the Secretary and the Board" in determining whether a VA error is prejudicial. Because Congress vested the Veterans Court with jurisdiction to "take due account of the rule of prejudicial error," the Veterans Court's performance of its statutory duty in this case was proper. …[535]

In *Vogan v. Shinseki*,[536] the Court applied the prejudicial error exception to the general rule that it may not make findings in the first instance. In that case, the Board denied the veteran's claim for an increased rating for a disability that could potentially be rated under several different diagnostic codes. However, the Board discussed whether an increase was warranted under only some of the potentially applicable diagnostic codes. The Court agreed with the veteran that the Board erred by failing to discuss the other potentially applicable diagnostic codes, but nonetheless affirmed the Board's decision based on its finding that the Board's error was harmless. In reaching this conclusion, the Court considered the other potentially applicable diagnostic codes, but found that the evidence in the record could not satisfy the criteria for a higher rating under those diagnostic codes. The Court determined that it was permitted to make such findings in the context of prejudicial error analysis, because *38 U.S.C.S. § 7261(b)(2)* "places no limitations on the scope of the Court's inquiry regarding prejudicial error."[537]

In *Clark v. O'Rourke*, the Court held that it was prejudicial error for the Board to deprive the claimant the time provided in its caselaw[538] to submit new evidence after a Court remand, where the claimant

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[532] *See* *Anderson v. West, 12 Vet. App. 491, 498 (1999)*.

[533] *See* *Shinseki v. Sanders, 556 U.S. 396, 409 (2009)* ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.").

[534] *497 F.3d 1298, 1300 (Fed. Cir. 2007)*. *But see* *Hensley v. West, 212 F.3d 1255 (Fed. Cir. 2000)* (holding that the CAVC erred in affirming a BVA denial on grounds other than those invoked by the BVA); *Winters v. Gober, 219 F.3d 1375, 1380 (Fed. Cir. 2000)*. ("[T]he rule of harmless error cannot be invoked to allow the Court of Appeals for Veterans Claims to decide a matter that is assigned by statute to the [VA] for the initial determination.").

[535] *Newhouse, 497 F.3d at 1301–02*.

[536] *24 Vet. App. 159 (2010)*.

[537] *Vogan, 24 Vet. App. at 159–60, 163, 165–66* (citing *Mlechick v. Mansfield, 503 F.3d 1340, 1345 (Fed. Cir. 2007))*; *Newhouse, 497 F.3d at 1301*.

asserted that if given the requisite time he "may have been able to procure evidence material to his claim."[539]

In *Simmons v. Wilkie*,[540] the Court summarized the general framework for its harmless error analysis as set forth by the Supreme Court in *Shinseki v. Sanders*.[541] Specifically, the Court noted that the basics of its harmless error analysis will include: (1) assessing whether the error affected the claimant's fundamental rights; (2) conducting the review through a case-specific application of judgment based on the individual record, rather than any mandatory presumption of prejudicial error and rigid rules; (3) considering whether certain errors naturally affect a claimant's substantial rights; (4) placing the burden of demonstrating prejudicial error on the claimant; and,(4) specific to the non-adversarial nature of the veterans benefits system, considering whether the error is harmful in the veteran's case, where it might be considered harmless in other contexts.[542] The Court concluded that prejudice is established in a particular case by "demonstrating a disruption in the essential fairness of the adjudication" which can be shown by demonstrating that the error: (1) prevented the claimant from effectively participating in the adjudicatory process; or (2) affected or could have affected the outcome of the determination.[543]

In addition to summarizing its general harmless error framework, the Court also took the opportunity to expand on this framework.[544] After noting several non-binding generalizations about "inherently prejudicial" errors,[545] the Court declined to find any mandatory presumptions of prejudicial error in the Board's failure to ensure that the claimant was afforded the benefit of two statutory presumptions. The Court reasoned that where such a presumption relieves the claimant from providing evidence on some, but not all elements necessary to prove a claim, the failure to apply the presumption "does not have the natural effect of preventing meaningful participation in the VA decision-making process."[546]

15.3.3.3.1 The Rule of Prejudicial Error and Violations of the Notice Provisions of 38 U.S.C.S. § 5103(a)

The Courts have developed special rules regarding prejudicial error in cases where the adequacy of the notice provided to the claimant under 38 U.S.C.S. § 5103(a) or the assistance provided, under 38 U.S.C.S. § 5013A, is at issue. Since 2000, 38 U.S.C.S. § 5103(a) has required the VA, upon receipt of a complete or substantially complete application for benefits, to notify the claimant of "any information,

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[538] Kutscherousky v. West, 12 Vet. App. 369 (1999) (providing that in the context of Court remands to the Board for readjudication, Appellants have 90 days to submit evidence after the Board mails a postremand notice without a showing of good cause).

[539] 30 Vet. App. 92, 99 (2018); *see also* Quinn v. Wilkie, 31 Vet. App. 284, 286 (2019) (holding that it was prejudicial error for the Board to deprive the appellant of the right to a Board hearing, where the appellant had one hearing before the Board which resulted in a remand to the regional office for further development and requested a second Board hearing after the regional office returned her claims to the Board following the additional development).

[540] 30 Vet. App. 267 (2018).

[541] 556 U.S. 396 (2010).

[542] 30 Vet. App. at 280.

[543] 30 Vet. App. at 280.

[544] 30 Vet. App. at 280–81.

[545] While declining to set forth a finite set of such errors, the Court noted several errors that affect the essential fairness of a proceeding or deprive a claimant of a meaningful opportunity to participate in the VA adjudicatory process. 30 Vet. App 281–82.

[546] 30 Vet. App. at 283.

and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim."[547] In addition, the VA is obligated to "indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant."[548]

In *Mayfield v. Nicholson,*[549] the Court explained how it would apply the rule of prejudicial error in a case in which the Court concluded that the VA failed to comply with one or more of the notice requirements in 38 U.S.C.S. § 5103(a) or 38 C.F.R. § 3.159. The Court indicated that the burdens on the parties differ depending on what part of the notification requirement the VA violated. The Court divided the types of notice requirements into several categories. The "first notice element" is notice of the information or evidence needed to substantiate the claim, and the "natural effect" of VA's failure to provide this notice "has the natural effect of producing prejudice and thus … shift[s] to the Secretary the burden of demonstrating that there was clearly no prejudice to the appellant based on [this] failure. …"[550]

The "second notice element" is notice of the information and evidence, if any, that the claimant must provide in order to substantiate the claim. The "third notice element" is notice of the information or evidence that the VA, in accordance with the duty to assist the claimant, will attempt to obtain on behalf of the claimant. The "fourth notice element" is the duty set forth in 38 C.F.R. § 3.159(b)(1) to "request that the claimant provide any information and medical or lay evidence that is necessary to substantiate the claim."[551] However, unlike when the VA fails to comply with the "first notice element," VA's failure to comply with the second through fourth notice elements does not result in a burden on the Secretary to demonstrate that there was clearly no prejudice. Rather, the general rule applies, and the burden is upon the appellant to demonstrate that VA's failure to provide the required notice somehow prejudiced the appellant. This showing should include "how the notice was defective[,] what evidence the appellant would have provided or requested the Secretary to obtain … had the" VA complied and "how the lack of that notice and evidence affected the essential fairness of the adjudication."[552]

15.3.3.3.2 The Rule of Prejudicial Error and Violations of the Duty to Assist Under 38 U.S.C.S. § 5103A

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[547] Veterans Claims Assistance Act of 2000, ***Pub. L. No. 106-475***, § 3(a), ***114 Stat. 2096*** (2000), codified at 38 U.S.C.S. § 5103(a); 38 C.F.R. § 3.159(b) (2020).

[548] Veterans Claims Assistance Act of 2000, ***Pub. L. No. 106-475***, § 3(a), ***114 Stat. 2096*** (2000), codified at 38 U.S.C.S. § 5103(a); 38 C.F.R. § 3.159(b) (2020).

[549] 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006). In a subsequent case, Sanders v. Nicholson, 487 F.3d 881 (Fed. Cir. 2007), the Federal Circuit held all VCAA notice errors are presumed prejudicial and that VA has the burden of rebutting this presumption. The Secretary appealed the Federal Circuit's *Sanders* decision to the U.S. Supreme Court, which reversed the Federal Circuit. The Court held that in adopting a blanket rule that all notice errors are presumed prejudicial and requiring the Secretary to affirmatively prove otherwise, the Federal Circuit had created a "rigid rule[]" that "imposes an unreasonable evidentiary burden upon the VA." Shinseki v. Sanders, 556 U.S. 396, 398 (2009). However, the Court was clear that its holding did not disturb the CAVC's *Mayfield* rule that only "first notice element" errors have the "natural effect" of prejudice. Shinseki, 556 U.S. at 411–13. The Court noted that the CAVC "sees sufficient case-specific raw material in veterans' cases to enable it to make empirically based, nonbinding generalizations about 'natural effects.'" Shinseki, 556 U.S. at 412. Thus, it appears that the *Mayfield* rule still applies, and claimants who are not notified of the evidence needed to substantiate the claim can argue that VA's failure to provide such notice constituted prejudicial error.

[550] Mayfield, 19 Vet. App. at 122.

[551] Mayfield, 19 Vet. App. at 110.

[552] Mayfield, 19 Vet. App. at 121.

The Court has held that where there is no indication that a veteran's Social Security records include any information that is relevant to the claim on appeal, the Board's failure to make reasonable efforts to obtain the records under *38 U.S.C.S. § 5103A* is harmless error.[553] However, the Federal Circuit has more recently made it difficult for VA to succeed in a harmless error argument when there is a duty to assist violation.[554] In *Moore v. Shinseki*, the veteran filed a claim for entitlement to service connection for an acquired psychiatric disorder approximately one year from the date of his discharge.[555] After several years of proceedings before the agency, the Board awarded staged ratings, but denied entitlement to a rating above 10 percent for the period immediately after service. The veteran appealed, arguing that in denying the higher disability rating, the Board violated its statutory duty to assist by failing to obtain the records of his in-service psychiatric hospitalization. The Court found for the VA, concluding that because the hospitalization records related to a hospitalization that occurred before the effective date of the grant of VA disability benefits, they were irrelevant to the issue of a proper disability rating and the VA therefore had no duty to obtain them. On appeal, the Federal Circuit reversed the Court and rejected the VA's argument that the failure to obtain the records was harmless error.[556] The Court "fail[ed] to understand how the government, without examining the [hospital] records, can have any idea as to whether they would, or would not, support [the veteran]'s claim for an increased disability rating."[557] Likewise, in *King v. Shinseki*, the Court rejected the Secretary's argument that VA's failure to obtain necessary evidence was harmless error, noting that "[t]here is no way of knowing whether the record supports [the appellant's] claim without developing the record, and consequently there is no way of determining whether the appellant was harmed by VA's failure to obtain a complete statement of his service."[558] Most recently, in *Quinn v. Wilkie*, the Court held that it was prejudicial error for the Board to deprive the appellant of the right to a Board hearing, reasoning that Congress specifically codified Board hearing rights because of the unique beneifts of that opportunity—an opportunity that is not equivalent to the opportunity to provide written evidence.[559]

15.3.4 The Court's Authority to Overturn BVA Decisions and Order Payment of Benefits

The Court has the "power to affirm, modify, or reverse a decision of the [BVA] or to remand the matter, as appropriate."[560] In approximately 70 percent of all appeals disposed of on the merits by the Court over the last decade, the Court has, at least in part, reversed the Board decision or vacated and remanded it for further

[553] *See* *Dixon v. Gober, 14 Vet. App. 168, 173 (2000)*.

[554] *See* *Moore v. Shinseki, 555 F.3d 1369, 1374–75 (Fed. Cir. 2009)*.

[555] *Moore, 555 F.3d at 1370*.

[556] *Moore, 555 F.3d at 1370, 1371, 1375*.

[557] *Moore, 555 F.3d at 1375*.

[558] *26 Vet. App. at 492*.

[559] *31 Vet. App. at 292* (holding that "VA's denial of the requested hearing here is not consistent with the solicitous guarantee of claim development evident from the specific sections and overall structure of the VA claims and appeals process).

[560] *38 U.S.C.S. § 7252(a)*. *Stankevich v. Nicholson, 19 Vet. App. 470 (2006)* (first case to "modify" a Board decision; the Court modified the Board decision to include a finding that appellant's pains are manifestations of an undiagnosed illness).

administrative proceedings.[561] Of these nearly 70 percent, the Court has vacated and remanded, rather than reversed, in the vast majority.[562] In other cases, the Court modified the Board's decision.[563]

Common reasons for a remand include the failure of the Board to issue an adequate statement of findings, reasons, and bases for its decision and the failure of the VA to satisfy its duty to develop the evidence in the case.[564] When the Board fails to provide an adequate statement of reasons or bases for its decision, the Court has held that a remand is the appropriate remedy because the Court is unable to determine the actual basis for the Board's decision.[565] The Court also considers a remand to be the appropriate remedy when the Board fails to develop the evidence because under those circumstances the Board did not have an adequate record before it on which to base its decision.[566]

In a much smaller number of cases in which the Court has found error in the Board decision, the Court has completely reversed the Board decision denying relief and ordered the VA to provide the claimant with the benefits sought.[567] Prior to 2002, the Court held an outright reversal was the appropriate remedy only when, for each element of a claim, (1) the Board resolved the issue in the veteran's favor, or (2) the evidence supporting a finding in the veteran's favor is not controverted by any negative evidence.[568] The Court refused to reverse a Board decision when the evidence contained both favorable and unfavorable evidence. Under these circumstances, the evidence is controverted. The Court took the view that because the evidence in the record contained more than one permissible view of the evidence, remand was the appropriate remedy.

In 2002, Congress amended *38 U.S.C.S. § 7261(a)(4)* as part of the Veterans Benefits Act (VBA) of 2002.[569] Section 401 of the VBA revised several aspects of the Court's review authority under *38 U.S.C.S. § 7261*. Although Section 401 maintained the "clearly erroneous" standard for Court review of Board findings of fact, the methodology for applying the clearly erroneous standard was modified. First, Section 7261(b) was amended to provide that "[i]n making determinations under subsection (a) [including determinations as to whether a BVA finding of material fact adverse to the claimant is clearly erroneous], the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals" and "shall … take due account of the Secretary's application of section 5107(b) of [title 38]."[570] Second, Section 7261(a)(4) was amended to provide

[561] *See* CAVC Annual Reports *available at* *http://www.uscourts.cavc.gov/report.php* (last accessed Apr. 23, 2020). This figure includes cases that have been resolved as a result of a Court order granting the parties' joint motion for remand.

[562] *See* CAVC Annual Reports *available at* *http://www.uscourts.cavc.gov/report.php* (last accessed Apr. 23, 2020).

[563] *See, e.g.*, *Boyd v. McDonald, 27 Vet. App. 63, 78–79 (2014)* (modifying the Board decision to remove certain findings); *Tatum, 26 Vet. App. at 450* (modifying the Board decision to correct the date the veteran's total rating ended); *Seri v. Nicholson, 21 Vet. App. 441, 444 (2007)* (modifying the Board decision to remove a paragraph commenting on the finality of a prior decision); *Stankevich, 19 Vet. App. at 470* (modifying the Board decision to include a finding that appellant's pains are manifestations of an undiagnosed illness).

[564] *Kuppamala, 27 Vet. App. at 447* (remanding because "[t]he Board's limited analysis frustrates the Court's ability to review the Board's assessment of Mr. Kuppamala's disability picture."); *Kay v. Principi, 16 Vet. App. 529, 533 (2002)*; *Swiney, 14 Vet. App. at 70*.

[565] ***Zink v. Brown, 10 Vet. App. 258 (1997)*** (failure to give an adequate statement of reasons or bases frustrates judicial review).

[566] *Brambley, 17 Vet. App. at 23*; *Goss v. Brown, 9 Vet. App. 109 (1996)*.

[567] *See* *Section 15.3*.3.1.

[568] *See, e.g.*, *Pentecost, 16 Vet. App. at 129*; *Felden v. West, 11 Vet. App. 427 (1998)*; *Rose v. West, 11 Vet. App. 169 (1998)*; *Drosky v. Brown, 10 Vet. App. 251 (1997)*; *Beyrle v. Brown, 9 Vet. App. 377 (1996)*.

[569] ***Pub. L. No. 107-330***, tit. IV, § 401(a), ***116 Stat. 2820***, 2832 (2002).

that if a Board finding of material fact adverse to the claimant is clearly erroneous, the Court has authority to "reverse," in addition to its previously existing authority to "set aside."[571]

Mariano v. Principi[572] and *Padgett*[573] initially suggested that the VBA of 2002 would result in an increase in reversals of Board decisions. In *Mariano,* the Court made a significant departure from its prior practice of only reversing factual findings when the evidence was uncontroverted. The Court reversed a Board finding of fact even though the evidence in the record was controverted. The Court noted that under the VBA of 2002, it must review factual determinations under the clearly erroneous standard and in doing so it must "take due account" of the benefit of the doubt rule.[574] The benefit of the doubt rule mandates that when there is an approximate balance of negative and positive evidence regarding any material issue, the Secretary must give the veteran the benefit of the doubt.[575] The Court held that the Board's application of the benefit of the doubt rule is a factual determination that the Court reviews under the clearly erroneous standard.[576]

The Court reviewed the Board's factual determination that the veteran was not entitled to a rating increase for the residuals of his service-connected gunshot wound to the left shoulder based on limitation of motion because any limitation of motion was due to a non-service-connected arthritic condition of the left shoulder. The Court reviewed the entire record on this issue and held that the Board's factual finding was clearly erroneous. The Court stated:

> [T]he evidence reflects two examination reports that are unambiguously favorable to the appellant on this question; one examination report that is at best ambiguous on this question; and one examination report that, although unfavorable on this question, is of questionable probative value because the methodology

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[570] § 401(b), 116 ***Stat at 2832***. *38 U.S.C.S. § 5107(b)* provides that "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."

[571] These provisions of the Veterans Benefits Act of 2002 were a compromise between Senate-passed and House-passed bills. The Joint Explanatory Statement prepared by the conferees in lieu of a conference report provides a definitive statement of Congress' intent in enacting this compromise. That statement provides, in pertinent part, that the amendments:

> … would modify the requirements of the review the Court must perform when it is making determinations under *section 7261(a) of title 38, United States Code*. … the addition of the words "or reverse" after "and set aside" is intended to emphasize that the Committees expect the Court to reverse clearly erroneous findings when appropriate, rather than remand the case.
>
> New subsection (b) would … require the Court to examine the record of proceedings before the Secretary and BVA and the special emphasis during the judicial process on the benefit of the doubt provisions of section 5107 (b) as it makes findings of fact in reviewing BVA decisions. … The combination of these changes is intended to provide for more searching appellate review of BVA decisions, and thus give full force to the "benefit of the doubt" provision.

Joint Explanatory Statement Regarding The Veterans Benefits Act of 2002, 148 Cong. Rec. S11329, 11337 (Nov. 18, 2002). A floor statement from Senator Rockefeller also reveals that Congress intended that "the new language in section 7261 would overrule the recent Court of Appeals for the Federal Circuit decision of Hensley v. West, emphasized that CAVC should perform only limited, deferential review of BVA decisions, and stated that the BVA fact-finding 'entitled on review to substantial deference.'" 148 Cong. Rec. S11334 (daily ed. Nov. 18, 2002) (statement of Sen. Rockefeller, Chairman of the Senate Comm. of Veterans Affairs).

[572] *17 Vet. App. 305 (2003)*.

[573] *Padgett, 19 Vet. App. at 133*, *withdrawn on other grounds*, *19 Vet. App. 334*, *rev'd and remanded*, *473 F.3d 1364 (Fed. Cir. 2007)*.

[574] *Mariano, 17 Vet. App. at 313*.

[575] *See 38 U.S.C.S. § 5107(b)*.

[576] *Mariano, 17 Vet. App. at 313*.

> was flawed. Thus, the Court holds that the Secretary's application of the section 5107(b) equipoise standard in finding that any LOM [limitation of motion] at or below shoulder level … is primarily due to arthritis, rather than his service-connected GSW residuals, was clearly erroneous and was not entitled to the benefit of the doubt was clearly erroneous and will reverse it.[577]

In *Padgett v. Nicholson*,[578] the Court made explicit what *Mariano* made implicit. The Court, sitting en banc, unanimously overruled its prior precedents and held that a claimant may obtain a reversal and an award of benefits from the Court based on a conclusion that a Board finding is clearly erroneous even when there is a mix of evidence that is favorable and unfavorable to the claimant.[579]

However, since *Padgett*, the Court has retrenched. Over the last few years, the Court has been very prone to remand Board decisions for a more perfect statement of the Board's reasons or bases or further development of the evidentiary record, rather than exercise its authority under *Mariano* and *Padgett* to reverse the Board's findings as clearly erroneous. In *Gutierrez v. Principi*,[580] the Court held that "reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision." The Court went on to explain that in that case, even though "the Board has made clearly erroneous findings as to certain facts relevant to the determination of service connection … [t]he Court cannot … conclude from the evidence before it that the only 'permissible view' is a finding of service connection."[581] The Court therefore remanded the case for the Board to provide an adequate statement of reasons or bases, rather than reversing the Board's decision and ordering the Secretary to pay the veteran benefits. In *Romanowsky v. Shinseki*, the Court explained that "the Court will reverse a Board decision that is clearly erroneous when 'the court is left with the definite and firm conviction that a mistake has been committed,' as well as when the 'only permissible view of the evidence is contrary to the Board's decision.'"[582] It is unclear whether these are two separate standards for determining whether reversal is required, and if so, in which circumstances each applies.

One thing that is clear, however, is that the Court may not reverse a Board decision when doing so would require it to weigh the evidence. In *Deloach v. Shinseki*, the Federal Circuit made clear that "[t]he Court of Appeals for Veterans Claims, as part of its clear error review, must *review* the Board's weighing of the evidence; it may not weigh any evidence itself."[583] The Federal Circuit explained that this is because *38 U.S.C.S. § 7261* prohibits the Court from making factual findings in the first instance, and that "the evaluation and weighing of evidence are factual determinations committed to the discretion of the fact-finder—in this case, the Board."[584] Nonetheless, the Federal Circuit was careful to note that "where the Board has performed the

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[577] *Mariano, 17 Vet. App. at 316–17*.

[578] *Padgett, 19 Vet. App. at 133*, *withdrawn on other grounds*, *19 Vet. App. 334*.

[579] For a more detailed discussion of the Court's application of the clearly erroneous standard in *Padgett*, *see* *Section 15.3*.3.1. Another example of a case in which the Court reversed a BVA decision even though there was mixed evidence is *Cantu v. Principi, 18 Vet. App. 92 (2004)*. In that case, the Board reversed a BVA decision and remanded the case for the BVA to order VA payment of the allowable medical expenses associated with the veteran's hospitalization at a private medical facility. The Court reversed, as clearly erroneous, the BVA's finding that the veteran did not receive medical treatment from the private facility for a medical emergency that posed a threat to the veteran's health and the BVA's finding that there was no prior authorization for the veteran's medical treatment at the private facility. *See also* *Van Valkenburg, 23 Vet. App. at 121*.

[580] *19 Vet. App. at 10* (citing *Johnson, 9 Vet. App. at 10*).

[581] *Gutierrez, 19 Vet. App. at 10* (citing *Gilbert, 1 Vet. App. at 57*).

[582] *Romanowsky, 26 Vet. App. at 297* (citing *U.S. Gypsum, 333 U.S. at 395*; *Gutierrez, 19 Vet. App. at 10*).

[583] *704 F.3d 1370, 1380 (Fed. Cir. 2013)* (emphasis in original).

[584] *Deloach, 704 F.3d at 1380* (citing *Bastien v. Shinseki, 599 F.3d 1301, 1306 (Fed. Cir. 2010)*).

necessary fact-finding and explicitly weighed the evidence, the Court of Appeals for Veterans Claims should reverse when, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed."[585]

Of course, when the Court finds no error occurred in the Board decision, or that any error was not prejudicial to the appellant, it will affirm the decision of the Board, leaving the appellant with the same benefits provided for in the affirmed Board decision. As discussed in *Section 15.2*.2, the Court has not reversed, and does not appear to have the power to reverse, a Board decision and order that the appellant be provided with less benefits than provided for in the Board decision under review.

15.3.5 The Court's Authority to Order a Remand and Retain Jurisdiction

The Court also has the power to order a remand to the Board while retaining jurisdiction over the appeal for further proceedings—a power the Court exercised in *Skaar v. Wilkie* ("*Skarr I*").[586]

In *Skaar I*, the appellant challenged a Board decision denying him service connection for leukopenia, to include as due to radiation exposure. Before the Board issued its decision, the appellant expressly challenged the VA's methodology for measuring radiation exposure under *38 C.F.R. § 3.311*, an argument the Board failed to adjudicate. Appellant sought class certification or an aggregate resolution. The Court held that the Board's failure to consider the appellant's argument prevented it from effectively and efficiently reviewing the appeal, including the motion for class certification, and ordered a limited remand for the Board to provide a "supplemental statement of reasons or bases addressing appellant's expressly raised argument in the first instance." The Court then ordered the Secretary to file the Board's supplemental statement with the Court and instructed the parties to thereafter submit supplemental briefs concerning the effect, if any, of the Board's supplemental statement on the issues raised on appeal, including the issue of class certification.[587]

In retaining jurisdiction over the matter while proceedings were conducted at the Board, the Court observed that the retention of jurisdiction is a "common practice" among courts of appeals. The Court signaled that soliciting a supplemental response from the Board, rather than vacating the Board decision, for the discrete purpose of evaluating class certification arising from the appeal "is undoubtedly a unique circumstance" making it appropriate for the Court to retain jurisdiction, while ordering a limited remand.

In December 2019, the Court issued a second precedential decision, *Skaar v. Wilkie* ("*Skaar II*"), where it granted in part, and denied in part, the appellant's motion for class certification. The Court held that it "may, in appropriate situations, certify classes in the context of an individual appeal of a Board decision" and that its "jurisdiction allows … such classes [to include] both persons who have obtained a final Board decision as well as those who have not." The Court further held that "*Federal Rule of Civil Procedure 23* [will serve] as a guide when deciding whether to grant class certification," and that such action "will be reserved for those cases where appellants demonstrate the class device is a superior vehicle for litigating the class claim than a precedential decision."[588]

Two months before deciding *Skaar II*, the Court issued a precedential decision in another case addressing questions of jurisdiction and class certification. In *Monk v. Wilkie (Monk V)*, the Court ruled that it retained jurisdiction over nine individual petitions while a related appeal for class certification—*Monk IV*— was pending before the United States Court of Appeals for the Federal Circuit ("Federal Circuit").[589] The Court held that,

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[585] *Deloach, 704 F.3d at 1380* (citing *U.S. Gypsum, 333 U.S. at 395*).

[586] *Skaar v. Wilkie, 31 Vet. App. 16 (2019)*. ("*Skarr I*").

[587] *Skaar v. Wilkie, 31 Vet. App. 16 (2019)*.

[588] *Skaar v. Wilkie, 32 Vet. App. 156, 167 (2019)* ("*Skaar II*") (outlining the principles for certifying a class action and applying them to deny certification in the context of appellant's claim for service connection for leukopenia pursuant to *38 C.F.R. § 3.309*, but granting it with respect to his pursuit of such benefits under *38 C.F.R. § 3.311*).

consistent with judicial precedent, the pendency of the Federal Court appeal only divested it of jurisdiction "respecting the questions raised and decided in the order that is on appeal.' "[590]

15.3.6 The Court's Authority to Issue Equitable Relief or to Impose Sanctions

Like most courts, the Court has the inherent and statutory authority to impose sanctions as a form of punishment for "contempt of its authority."[591] The statute provides that sanctions may be in the form of a fine or imprisonment, but the authors of this Manual are unaware of any instance in which the Court ordered imprisonment as a sanction.[592] The authors of this Manual are also unaware of any instance in which the Court imposed a fine that exceeded the amount of attorneys' fees and costs in litigating the matter of sanctions.

In contrast, because the Court is an Article I tribunal created by 38 U.S.C. § 7251, its equitable powers do not reach as far as the equitable powers inherent in an Article III tribunal. For example, while the Court has authority to grant certain forms of non-substantive equitable relief, including relief provided by other statutes and interlocutory procedural relief,[593] it lacks the equitable authority to grant monetary relief.[594]

In *Burris v. Wilkie*,[595] the appellants sought a grant of monetary relief under the Court's equitable authority. After considering the powers granted to the Court in 38 U.S.C. § 7261, and concluding that Congress granted the Secretary exclusive discretion to award equitable monetary relief under 38 U.S.C. § 503(b), the Federal Circuit held that the Court's equitable authority did not extend to awarding substantive monetary relief. The Federal Circuit cautioned that while the Court had authority to grant certain non-substantive equitable relief required to

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[589] 32 Vet. App. 87, 97 (2019) (holding that, the pendency of a class-certification appeal before the Federal Circuit does not divest the Court of jurisdiction to adjudicate the merits of individual petitions brought by members of the putative class). Monk v. Wilkie (*Monk IV*), No. 19-1094 (Fed. Cir. petitioners'-appellants' reply brief filed Apr. 23, 2019).

[590] Monk V, 32 Vet. App. at 94 (quoting N.Y. State Nat'l Org. of Women v. Terry, 886 F.2d 1339, 1350 (2d Cir. 1989).

[591] 38 U.S.C.S. § 7265 (listing "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;" "misbehavior of any of its officers within their official transactions;" and "disobedience or resistance to its lawful writ, process, order, rule, decree, or command" as examples of "contempt of its authority.") *See* Groves v. McDonald, 27 Vet. App. 168, 178 (2014) (imposing sanctions against the Secretary for failure to comply with the Court's remand order in an expeditious manner); Harvey v. Shinseki, 24 Vet. App. 284 (2011) (imposing sanctions against the Secretary for failure to comply with Court's remand order in an expeditious manner); Pousson v. Shinseki, 22 Vet. App. 432, 437 (2009) (imposing sanctions against the Secretary for "gross negligence and gross lack of diligence in fulfilling the requirements of the Court's rules"); Adamski v. Derwinski, 2 Vet. App. 46 (1991) (imposing sanctions against the Secretary for continued delay and procrastination in complying with the Court's order); Jones v. Derwinski, 1 Vet. App. 596 (1991) (imposing sanctions against the Secretary for failing to correct an inaccurate statement made to the Court); *cf.* Rickett v. McDonald, 27 Vet. App. 240, 244 (2015) (declining to impose sanctions against appellant's attorney who failed to inform the Court of the veteran's death for approximately four years); ***Massey v. Brown, 9 Vet. App. 134 (1996)*** (denying, in the exercise of restraint, appellant's motion for sanctions against the Secretary for making "serious accusations … without factual basis" against appellant's counsel during oral argument).

[592] 38 U.S.C.S. § 7265(a). *But see* Edwards v. Nicholson, 21 Vet. App. 265 (2007) (imposing a prohibition against future filings without permission from the Court as a sanction against a pro se appellant for repeated frivolous filings).

[593] *See, e.g.*, Monk v. Shulkin, 855 F.3d 1312, 1318–22 (Fed. Cir. 2017) (holding that the Veterans Court has authority to certify class actions); Padgett v. Nicholson, 473 F.3d 1364, 1367–68 (Fed. Cir. 2007) (holding that the Veterans Curt has authority to issue judgment *nunc pro tunc*); Ribaudo v. Nicholson, 20 Vet. App. 552, 562–63 (2007) (en banc) (enjoining the Secretary from staying the processing claims at the Board pending appeal of an unfavorable court decision and ordering a contrary directive rescinded); Servello v. Derwinski, 3 Vet. App. 196, 200 (1992) (precluding the VA from asserting on remand that a claimant's informal claim was not cognizable for effective date purposes); Erspamer v. Derwinski, 1 Vet. App. 3, 9 (1990) (holding that the Court has authority to issue mandamus to the Secretary under the All Writs Act).

[594] Burris v. Wilkie, 888 F.3d 1352 (Fed. Cir. 2018).

[595] 888 F. 3d 1352 (Fed. Cir. 2018).

enable it to carry out its statutory grant of jurisdiction, it "cannot invoke equity to *expand* the scope of its statutory jurisdiction."[596] Such an award of equitable monetary relief would raise concerns about violating the Appropriations Clause. Having concluded that the Court was without authority to grant substantive equitable monetary relief, the Federal Circuit expressly declined to determine how far the Court's equitable powers extend, instead "leav[ing] that question for another day."[597]

Following *Burris*, the Court issued *Burkhart v. Wilkie*, in which it declined to award an appellant a VA home loan guaranty, holding that while the relief is "not necessarily monetary given that most veterans will never suffer a loss requiring VA to outlay funds," it is substantive because the Court would decide the merits of entitlement to the guarantee.[598] The Court concluded that such a grant of entitlement, "based solely on equity," would impermissibly expand the scope the Court's jurisdiction."[599]

The Court applied the holdings of *Burris* and *Burkhart* in *Taylor v. Wilkie*, where it denied an earlier effective date of benefits for post-traumatic stress disorder. The Court held that, because the appellant had not submitted a prior claim for such benefits, to award them retrospectively would be tantamount to granting "equitable monetary relief," which would impermissibly expand its jurisdiction.[600]

15.3.7 Whether the Court Will Resolve All Allegations of BVA Error Advanced by the Appellant

One question that often arises is whether the Court believes it is obligated to, or should as a matter of policy, consider and resolve all allegations of Board error advanced by an appellant. If the appellant argues for reversal, the appellant can be assured that the Court will resolve the alleged errors upon which the reversal argument is based (assuming the Court believes it has jurisdiction over the appeal).[601] But the answer to the question whether the Court will generally resolve all allegations of error that would lead to remand is often no. The Court often does not resolve all of the appellant's allegations of error. In *Mahl v. Principi*,[602] the Court held that when a remand is ordered because of an "undoubted" error that requires a remand, the Court generally will not address other "putative" errors raised by the appellant.[603] The Court noted that although it has the power to address other allegations of error, "generally [the Court] decides cases on the narrowest possible grounds."[604]

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[596] Burris, 888 F.3d at 1361.

[597] Burris, 888 F.3d at 1361.

[598] Burkhart v. Wilkie, 30 Vet. App. 414, 426 (2019).

[599] Burkhart, 30 Vet. App. at 426.

[600] Taylor v. Wilkie, 31 Vet. App. 147, 153 (2019) (citing Burris, 888 F.3d at 1358–59 and Burkhart, 30 Vet.App. at 426).

[601] *See, e.g.*, Pentecost, 16 Vet. App. at 125 (stating that "the veteran requests that the Court reverse the Board decision. … The Secretary requests that the case be remanded for readjudication … and does not address the veteran's arguments on the merits. The Court will deny the Secretary's motion and address the veteran's request for reversal, a remedy greater than that proposed by the Secretary."); Brannon, 1 Vet. App. at 315 ("[b]ecause it is apparent that appellant seeks more relief than suggested by the Secretary's motion for remand and because appellant's brief and pleadings, fairly taken, specifically eschew the issue of adequate reasons or bases and invite the Court to rule on the merits of his claim, appellee's motion for remand is denied.").

[602] 15 Vet. App. 37, 37–40 (2001) (per curiam order).

[603] Mahl, 15 Vet. App. at 38; *see also* Best v. Principi, 15 Vet. App. 18, 19–20 (2001) (per curiam order).

[604] Mahl, 15 Vet. App. at 38; *see also* Best, 15 Vet. App. at 19.

The Court stated that deciding cases on the narrowest grounds possible was consistent with its jurisdictional mandate, set forth in 38 U.S.C.S. § 7261(a), that it should decide all questions of law "to the extent necessary to its decision."[605] The Court was also persuaded by the fact that any allegation of error would be preserved for presentation to the VA as part of any remand proceedings since a remand entitles the appellant to a full readjudication of the case.[606]

Initially, the Court's pronouncement that it would not address issues that were not necessary to a decision was applied in the context where there had been a change of law that required a remand so that the Board could consider the applicability of the new law to the case.[607] However, the Court has extended the *Mahl* principles and refused to resolve every allegation of error that has arisen in the course of an appeal even where there has been no change in law.

For example, in *Brambley v. Principi*,[608] the Court held that the Board had erred in adjudicating appellant's claim for an increased rating on an extraschedular basis without having the benefit of a complete evidentiary record regarding the veteran's employability, but refused to address other arguments and issues that the veteran had raised on appeal.[609] The additional arguments that the Court refused to consider included an argument that the Board failed to discuss favorable evidence that related directly to the issue of the veteran's employability and therefore to his entitlement to an increased rating on an extraschedular basis.[610] Citing the principles articulated in *Mahl*, the Court held that it would decide the appeal on the narrowest grounds possible preserving for appellant the opportunity to present these arguments to the Board upon remand.[611]

Quirin v. Shinseki,[612] is the rare case in which the Court addressed each of the appellant's arguments while acknowledging that doing so was inconsistent with its holding in *Best*. The Court noted that "[i]t is well settled

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[605] *Mahl, 15 Vet. App. at 38*; *see also* *Best, 15 Vet. App. at 19*.

[606] *Mahl, 15 Vet. App. at 38*; *see also* *Best, 15 Vet. App. at 19*.

[607] The principles of law announced in *Mahl* and *Best* were brought about following enactment of the Veterans Claims Assistance Act of 2000 (the VCAA). In *Holliday v. Principi, 14 Vet. App. 280 (2001)*, the CAVC ruled that it could not decide in the first instance whether the VCAA applies to a particular claim, whether the VCAA is more favorable to the appellant than pre-VCAA law, or whether the VCAA would have required VA to take certain actions in the appellant's case that VA did not in fact take while the claim was pending before VA. *Holliday, 14 Vet. App. at 286–90*. Based on *Holliday*, in 2001 the Court remanded 1,724 appeals for the BVA to determine in the first instance what impact, if any, the VCAA has on the claim. In many of these 1,724 cases, the appellants tried to get the Court to consider other errors made under pre-VCAA law. The appellants in these cases were concerned that the BVA would repeat the errors on remand. Accordingly, these appellants requested the Court to issue specific remand instructions preventing repetition of the alleged errors on remand. Relying on the reasoning articulated in *Mahl*, these requests were largely denied by the Court when the veteran was not seeking a remedy any greater than a remand. The CAVC judges refused to delay a final resolution and expend judicial resources to consider and resolve what the pre-VCAA law required in a particular case, when it could dispose of the case without addressing these issues.

[608] *17 Vet. App. at 20*.

[609] *Brambley, 17 Vet. App. at 24*.

[610] *Brambley, 17 Vet. App. at 24*.

[611] *Brambley, 17 Vet. App. at 24*; *see also* *Kay, 16 Vet. App. at 533–34* (after finding remandable error on several bases, Court refused to consider certain statutory and constitutional arguments in support of appeal of a claim for DIC benefits); *Charles v. Principi, 16 Vet. App. 370, 373 (2002)* (after holding, with respect to veteran's claim to reopen a denial of service-connection for right-ear hearing loss and his claim for service connection for tinnitus, that VA violated its duty to notify under the VCAA and additionally erred in failing to obtain a medical nexus opinion, the Court refused to decide another allegation of error, noting that appellant was free to raise this issue as to this claim on remand).

[612] *22 Vet. App. 390, 395–96 (2009)*.

that the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion."[613] Nonetheless, the Court recognized that in some cases, it is necessary to address additional arguments "in order to provide guidance to the lower tribunal [on remand]."[614] The issues before the Court in *Quirin* were whether the Board erred in failing to provide the appellant the presumption of soundness, and whether it had improperly classified his disability as a congenital disease. After finding that the Board indeed erred in classifying the disability as a congenital disease without first procuring a medical opinion, the Court went on to find that the Board erred in failing to adequately discuss whether the presumption of soundness attached.[615]

It is clear that an appellant cannot be reasonably assured that the Court will resolve all allegations of error raised in his brief. The Court uses its discretion to selectively decide which issues it will review. Because it is impossible to discern what issues the Court will choose to resolve, an appellant should brief all relevant issues to the Court, and request that the Court invoke *Quirin* and decide all issues. However, as discussed in *Section 15.7*, the Court's established limited resolution policy undoubtedly should affect an appellant's litigation strategy, particularly when negotiating a joint motion for remand with the Secretary.

15.3.8 Issues That Are Beyond the Court's Power to Review

Section 15.2.6 discusses issues that the Court will not review in certain circumstances. This section discusses issues that are beyond the Court's power to review in all circumstances.

First, the Court may not review findings of fact made by the Board that are favorable to the claimant. The Court must accept these favorable findings.[616] However, it appears that the Board must have actually made such a finding; the Court has shown reluctance to find that the Board implicitly made a favorable finding.[617] It also appears that the Court must accept a Board ruling that resolves in the claimant's favor an issue that is partly factual and partly legal in nature.[618]

Second, the Court is prohibited from reviewing the schedule of ratings for disabilities as specified by Congress or as promulgated by the Secretary of the VA.[619]

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[613] *Quirin, 22 Vet. App. at 395–96* (citing *Best, 15 Vet. App. at 19–20*).

[614] *Quirin, 22 Vet. App. at 395–96* (citing *Xerox Corp. v. 3Com Corp., 458 F.3d 1310, 1314–15 (Fed. Cir. 2006))*.

[615] *Quirin, 22 Vet. App. at 393, 395, 397–98*.

[616] *See* *Tatum, 26 Vet. App. at 450* (finding no legal requirement to overturn a favorable finding); *Medrano, 21 Vet. App. at 170* ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority"); *Hines v. Principi, 18 Vet. App. 227, 239 (2004)* (citing *38 U.S.C.S. § 7261(a)(4)*, which provides that the Court may reverse or set aside only findings of fact "adverse to the claimant"); *Roberson v. Principi, 17 Vet. App. 135, 138 (2003)* (per curiam order). *But see* *Johnson, 26 Vet. App. at 252 n.10* (Kasold, C.J., dissenting). As the Court pointed out in *Anderson v. Shinseki, 22 Vet. App. 423, 427–28 (2009)*, there is no such limitation on the Board's authority to review a DRO's favorable findings. *But see* *Murphy v. Shinseki, 26 Vet. App. 510, 516 (2014)* (differentiating between a factual finding by the RO and an award of benefits); *but see* *Sapp v. Wilkie, 32 Vet. App. 125, 150 (2019)* (clarifying a narrow exception to the general rule that arises in simultaneously contested claims, where a material finding of fact is favorable to one appellant and unfavorable to another).

[617] *See* *Donnellan, 24 Vet. App. at 171* (rejecting the parties' arguments that the Board implicitly made a finding as to whether the claimant established veteran status because the Board applied the presumption of aggravation without addressing veteran status). *But see* *Stankevich, 19 Vet. App. at 470* (modifying the Board decision to include a finding that appellant's pains are manifestations of an undiagnosed illness.).

[618] *See* *Nolen v. Gober, 222 F.3d 1356, 1360–61 (Fed. Cir. 2000)* (holding that it was improper for the CAVC to reconsider the favorable ruling that the claim was well-grounded that was made when the claim was pending before VA); *Williams v. Principi, 15 Vet. App. 189, 198 (2001)* (holding that the Court could not review a favorable BVA ruling on the appropriate effective date for award of benefits).

As a result of this statutory bar to judicial review, the Federal Circuit has held that the Court had no authority to review the non-constitutional issue whether the requirement in *38 C.F.R. § 4.87a*, diagnostic code 6260 (1998), that in order to qualify for a compensable disability rating for tinnitus, the tinnitus had to be a symptom of a head injury, concussion, or acoustic trauma, violated *38 U.S.C.S. § 1110*.[620] The Federal Circuit has also held that the Court stepped outside the bounds of its jurisdiction when it reviewed whether VA was statutorily permitted to award noncompensable ratings.[621] In *Marcelino v. Shulkin*, the Court held that it lacked jurisdiction to determine whether obesity is a condition for which service connection can be established, because obesity is not listed as a disability in the rating schedule, and "direct review of the content of rating schedule is 'indistinguishable' from review of what should be considered a disability."[622]

Although the statutory proscription against Court review of the disability rating schedule is broad, there are three recognized exceptions to the general rule.[623] The first exception to the general rule is that the Court is permitted to review a constitutional challenge to the rating schedule.[624]

The second exception to the general rule is that the Court is allowed to review the Board's interpretation of the rating schedule. In *Sellers v. Principi*,[625] the veteran appealed a Board decision that denied him a rating in excess of 70 percent for PTSD. The veteran argued that according to the plain language of *38 C.F.R. § 4.130* the VA was required to consider PTSD symptoms contained in the Diagnostic and Statistical Manual (DSM-IV) when rating the degree of disability of his PTSD.

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[619] *See* *38 U.S.C.S. § 7252(b)*; *Wingard v. McDonald, 779 F.3d 1354 (Fed. Cir. 2015)* (holding that *38 U.S.C.S. § 7252(b)* precludes the CAVC from reviewing whether VA's disability rating schedule violates statutory constraints by providing for a zero percent rating). The legislative history related to the VJRA provides an illustration of the impact of this prohibition. Sen. Cranston stated the following on the Senate floor:

> For example, if a veteran was assigned a service-connected disability rating of 10 percent by the BVA and in court argued that his or her disabling condition—condition A—is as disabling as that of condition B which has a disability rating of 30 percent under the rating schedule, the court would be prohibited from changing the veteran's rating from 10 to 30 percent because the veteran would, in effect, be asking the court to rewrite the provisions of the rating schedule to classify condition A at the 30 percent rate. In this situation, there would be no underlying factual disagreement as to the disabling condition itself, only as to where it should fall on the rating schedule.
>
> In contrast, … if the BVA assigned a veteran a disability rating of 30 percent and the veteran went to court to argue that his or her rating was incorrect because the facts underlying the BVA's decision were determined incorrectly—for instance, arguing that the rating should be 50 percent because the facts demonstrate that the extension of his or her leg was limited to 45 degrees—not the 20-degree limitation the BVA found—and under the rating schedule, a 45-degree limitation is rated at 50 percent and not 30 percent—the Court could modify the decision if it found the VA's finding of fact to be "clearly erroneous."

134 CONG. REC. S16,648 (daily ed. Oct. 18, 1998). However, in 2008, Congress enacted the Veterans' Benefits Improvement Act of 2008, ***Pub. L. No. 110-389***, § 102, ***122 Stat. 4145***, (2008), which vested in the Federal Circuit the jurisdiction to review VA rating schedule changes. *See* Section 15.8.2 of this Manual.

[620] *Wanner v. Principi, 370 F.3d 1124 (Fed. Cir. 2004)*; *see also* *Byrd v. Nicholson, 19 Vet. App. 388, 392 (2005)*.

[621] *Wingard v. McDonald, 779 F.3d 1354, 1356–57 (Fed. Cir. 2015)*.

[622] *29 Vet. App. 155, 157 (2018)* (quoting *Wanner, 370 F.3d at 1131*); *but see* *Saunders v. Wilkie, 886 F.3d 1356, 1361–63 (Fed. Cir. 2018)* (ruling that VA has authority to service connect as a disability disabling pain without a medical diagnosis explaining the cause of the pain).

[623] *See* *Marcelino, 29 Vet. App. at 158* (citing *Wingard, 779 F.3d at 1356–57*).

[624] *See* *Marcelnio, 29 Vet. App. at 158*.

[625] *372 F.3d 1318 (Fed. Cir. 2004)*; *see also* *Cullen, 24 Vet. App. at 78* (reviewing VA's interpretation of 38 U.S.C.S. § 4.71a).

The Federal Circuit rejected the VA's argument that the Court was prohibited from considering the veteran's argument because it involved an attack on the substance of the rating schedule. The Federal Circuit held that the veteran's argument "goes not to the content of the rating criteria, but rather to the correct interpretation of section 4.130, specifically the relationship between the DSM-IV and the general rating formula. … In short, appellants claim that the Veterans Court and the Board misread the regulation."[626]

Moreover, the Court is not barred from reviewing a regulation promulgated by the Secretary simply because it is placed in Part 4 of Title 38 of the Code of Federal Regulations.[627] In *Martinak v. Nicholson*, the veteran challenged a regulation prescribing the VA's policies and procedures for conducting audiometry testing.[628] The Court held that although the regulation was found in Part 4, it had jurisdiction to review it because it did not establish disabilities and set forth the terms under which compensation would be provided.[629]

The third exception to the general rule is that the Court may review challenges to a regulatory amendment to the rating schedule brought under the Administrative Procedures Act (APA).[630] The Federal Circuit has held that APA challenges to amendments to the rating schedule are challenges to the *manner* in which the amendments are made, whereas *38 U.S.C.S. § 7252(b)* prohibits only review of the *substance* of VA's actions.[631]

A third issue that the Court does not have jurisdiction to review was recognized in *Darrow v. Derwinski.*[632] In that case, the Court ruled that it does not have jurisdiction to review the Secretary's exercise of authority under *38 U.S.C.S. § 503(a)* to grant equitable relief to claimants due to administrative error on the part of the VA. The Court distinguished "the Secretary's authority to grant relief based upon principles of equity from his authority to award benefits based upon statutory entitlements."[633]

The Secretary's authority to grant equitable relief[634] is governed by *38 U.S.C.S. § 503(a)*, which provides:

> If the Secretary determines that benefits have not been provided by reasons of administrative error on the part of the Federal government or any of its employees, the Secretary may provide such relief … as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.

Unlike the Secretary's authority to grant entitlement to benefits under the law, Congress has restricted the authority to grant equitable relief under section 503(a) to the Secretary "personally."[635] The Court held that

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[626] *See also* *Prokarym, 27 Vet. App. at 310–11* (reviewing VA's interpretation of certain terms used in the rating schedule for musculoskeletal disabilities).

[627] *Martinak v. Nicholson, 21 Vet. App. 447, 452 (2007)*.

[628] *Martinak, 21 Vet. App. at 450*.

[629] *Martinak, 21 Vet. App. at 451–52*.

[630] *Wanner, 370 F.3d at 1131, n.4*; *Fugere v. Derwinski, 972 F.2d 331, 334–35 (Fed. Cir. 1992)*.

[631] *Fugere, 972 F.2d 334–35*.

[632] *2 Vet. App. 303, 303 (1992)*.

[633] *Darrow, 2 Vet. App. at 304*.

[634] The Court *itself* does not have authority to grant equitable relief to appellants in the form of benefits awards. *See* *Eicher v. Shulkin, 29 Vet. App. 57, 62–63 (2017)* (adhering to the doctrine that federal courts are prohibited from "'ordering an award of public funds to a statutorily ineligible claimant on the basis of equaitable estoppel.'") (quoting *Rosenberg v. Mansfield, 22 Vet. App. 1, 5 (2007))*.

[635] *Darrow, 2 Vet. App. at 305*.

"there is no analogous statutory grant of jurisdiction to the Board [BVA] to review … a matter which under section 503(a) … is subject to decision by the Secretary. Congress did not create a right to appeal a decision on a claim for benefits made in the exercise of the Secretary's equitable relief … under 503(a)."[636]

Thus, the Court held that the Board lacked jurisdiction to review the Secretary's exercise of authority to grant equitable relief.[637] Moreover, the Court indicated that because the power to grant equitable relief was committed to the absolute discretion of the Secretary and there were no judicially manageable standards to review the exercise of such power, under well-established principles of administrative law, the Secretary's Section 503 power to grant equitable relief was beyond judicial review.[638]

Historically, the Court also treated the Secretary's appointment of a fiduciary under *38 U.S.C.S. § 5502(a)(1)* as a matter left to the sole discretion of the Secretary and therefore outside the Court's jurisdiction.[639] However, in *Freeman v. Shinseki*, a panel of the Court considered the issue and determined that because the statute does not explicitly prohibit judicial review, a strong presumption in favor of judicial review applied.[640] The Court also found that statutory and regulatory provisions existed that governed the process the Secretary must follow when appointing a fiduciary, thereby providing the Court with standards by which to review the Secretary's decision.[641]

Other examples of agency decisions that are beyond the Court's jurisdiction because they involve decisions that Congress, by statute, has left to the absolute discretion of the Secretary with no judicially manageable standards to evaluate the Secretary's exercise of his discretion, include the Secretary's determination regarding entitlement to nursing-home care[642] and the manner in which grants are disbursed for specially adapted housing pursuant to *38 U.S.C.S. § 2101*.[643] However, where VA regulations structure the discretion granted to the Secretary by Congress so that there are judicially manageable regulatory standards, the Board's application of these standards is reviewable by the Court.[644]

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[636] *Darrow, 2 Vet. App. at 306*. Nor is the Board under an obligation to discuss whether a recommendation for equitable relief should be made to the Secretary. *Eicher, 29 Vet. App. at 64–65*.

[637] *Darrow, 2 Vet. App. at 306*; *see also* *Kay, 16 Vet. App. at 532*; *Zimick v. West, 11 Vet. App. 45, 51 (1998)*.

[638] *Darrow, 2 Vet. App. at 306*. On the other hand, the Ninth Circuit has ruled that a U.S. district court had jurisdiction to enforce a consent decree in which the Secretary agreed to exercise his Section 503 authority in the future to require payment of retroactive compensation to the estates of deceased class members. *See* *Nehmer v. VA, 284 F.3d 1158, 1162–63 (9th Cir. 2002)*.

[639] *See* *Freeman v. Shinseki, 24 Vet. App. 404, 412–13 (2011)* (discussing the Court's previous view of appointment of a fiduciary as decided in single judge memorandum decisions); *see also* *Willis v. Brown, 6 Vet. App. 433, 435–36 (1994)*.

[640] *Freeman, 24 Vet. App. at 415*.

[641] *Freeman, 24 Vet. App. at 416–17*.

[642] *See* *Malone v. Gober, 10 Vet. App. 539, 544–45 (1997)* (holding that the Court was precluded from reviewing the Secretary's determination regarding the veteran's entitlement to nursing home care because the decision was committed by statute to the Secretary's unfettered discretion and the Secretary had not promulgated any regulations limiting his discretion).

[643] *See* *Werden v. West, 13 Vet. App. 463, 467 (2000)*.

[644] *See* *Meakin v. West, 11 Vet. App. 183, 186 (1998)* (the Board had jurisdiction to review the Secretary's determination of whether a veteran was eligible for fee-basis outpatient treatment because the Secretary had promulgated regulatory guidance); *Scott v. Brown, 7 Vet. App. 184, 189–90 (1994)* (Secretary's discretionary decision about whether to extend the period for filing a NOD was reviewable because the regulatory requirement of "good cause" was a sufficiently manageable standard).

15.3.9 The Proper Law to Apply in Cases in Which the Applicable Law Has Changed After Filing of a Claim

One issue that sometimes arises during the course of the VA's or the Court's consideration of a claim for veterans benefits is what version of a law or regulation should apply when the applicable law changes during the course of the administrative or judicial adjudication of a claim. For example, while the claim is pending, Congress may pass a new law or the VA may issue a new regulation that affects the veteran's claim.

In *Princess Cruises v. United States*, the Federal Circuit announced the three-part test for determining whether a statute or a regulation was applied in a manner that gave it a prohibited retroactive effect.[645] The Federal Circuit held that in determining whether application of a statute or regulation creates an unlawful retroactive effect, three factors must be considered: (1) the nature and extent of the change of the law; (2) the degree of connection between the operation of the new rule and a relevant past event; and (3) familiar considerations of fair notice, reasonable reliance, and settled expectations.[646] The Federal Circuit applied the *Princess Cruises* test in *Rodriguez*[647] and in *Tarver v. Shinseki.*[648] In both cases, the claimant was a surviving spouse who argued that she was entitled to retroactive application of *38 C.F.R. § 3.22*, which had been interpreted by the Court in a series of cases to allow a surviving spouse to seek DIC benefits based on the theory that the veteran had been hypothetically entitled to a 100 percent disability rating for the ten years preceding his death.[649] The Court's interpretation of the Section 3.22 was subsequently abrogated by the VA's amendment of the regulation to prohibit an award of DIC benefits under the "hypothetical entitlement" theory.[650] In *Rodriguez*, the claimant filed her claim for DIC benefits prior to both the Court's issuance of the decisions interpreting the regulation to allow the "hypothetical entitlement" theory and the subsequent amendment to Section 3.22.[651] The Court held that the Board had erred in applying the amended version of Section 3.22 to the claim, thereby giving it a retroactive effect. On appeal, the Federal Circuit applied the *Princess Cruises* test and reversed the Court.[652]

The Federal Circuit found that the first *Princess Cruises* factor, the nature and extent of the change of the law, weighed against a finding of unlawful retroactivity because in amending Section 3.22, the Secretary was merely clarifying the VA's interpretation of *38 U.S.C.S. § 1318* that it held prior to the line of Court cases providing for "hypothetical entitlement."[653] The Federal Circuit also found that the second *Princess Cruises* factor, the degree of connection between the operation of the new rule and a relevant past event, weighed against retroactivity. The Court explained that the claimant did not rely to her detriment on the Court's interpretation of Section 3.22, evidenced by the fact that she had filed her claim prior to the issuance of those decisions. The Court stated that "[w]hile the[] [CAVC] holdings may have injected new hope into her case, merely continuing to pursue a claim does not constitute a significant connection to past events under the *Princess Cruises* test."[654] Finally, with

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[645] ***397 F.3d 1358 (Fed. Cir. 2005)***.

[646] *Princess Cruises*, **397 F.3d at 1362–63** (quoting Landgraf, 511 U.S. at 270); *see also* Rodriguez v. Peake, 511 F.3d 1147, 1153 (Fed. Cir. 2008).

[647] *511 F.3d at 1153–56*.

[648] *557 F.3d 1371, 1375–77 (Fed. Cir. 2009)*.

[649] *Rodriguez, 511 F.3d at 1148–51*; *Tarver, 557 F.3d at 1373–74*; *see also* Kernea v. Shinseki, 724 F.3d 1374 (Fed. Cir. 2013); *Moffitt v. Shinseki, 26 Vet. App. 424 (2014)*. See *Section 7.3*.2.2.1 of this Manual for a discussion of entitlement to DIC benefits based on a ten-year total disability rating.

[650] *Rodriguez, 511 F.3d at 1148–51*; *Tarver, 557 F.3d at 1373–74*.

[651] *511 F.3d at 1148–51*.

[652] *Rodriguez, 511 F.3d at 1151–57*.

[653] *Rodriguez, 511 F.3d at 1153–54*.

respect to the third factor, familiar considerations of fair notice, reasonable reliance, and settled expectations, the Court found that the claimant had fair notice of the ambiguity of the statutory language that led to the series of Court cases, that she did not reasonably rely on the Court's interpretation of the regulation, and that she could not have had settled expectations regarding the law, given the multiple interpretations rendered during the pendency of her claim.[655] Because all three factors weighed against the claimant, the Federal Circuit concluded that application of the amended Section 3.22 to the claimant's case did not constitute retroactive application.

The Federal Circuit reached the same conclusion in *Tarver*,[656] even though in that case, the claimant had filed her claim after the Court issued its decisions interpreting Section 3.22 to allow "hypothetical entitlement," but before the VA's subsequent amendment of the regulation. The Court found that the timing of the filing of the claim was irrelevant to the first *Princess Cruises* factor, and that the remaining elements weighed heavily against a finding of retroactivity for the same reasons they did in *Rodriguez*.[657] The Federal Circuit therefore concluded that "[i]t would be inconsistent with our precedents in *Princess Cruises* and *Rodriguez* to hold the amended [3.22] inapplicable to [this] claim on the ground that it was filed before the amended rule took effect but after the Veterans Court's decision[s]. …"[658]

One situation where the anti-retroactivity canon surely will not apply is when a statute or regulation is favorable to VA claimants and Congress (in the case of a statute) or the VA (in the case of a regulation) clearly indicates that it intends the statute or regulation to be applied retroactively to help VA claimants. In this situation, the change in law will be applied to pending claims.[659]

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[654] *Rodriguez, 511 F.3d at 1155–54*.

[655] *Rodriguez, 511 F.3d at 1155–56*.

[656] *557 F.3d at 1371*.

[657] *Tarver, 557 F.3d at 1375–76*.

[658] *Tarver, 557 F.3d at 1377*.

[659] *See* *Ervin v. Shinseki, 24 Vet. App. 318, 326–27 (2011)* (holding that the Secretary's 2010 amendment to *38 C.F.R. § 3.304(f)* that favored VA claimants by relaxing the evidentiary standard for proving a PTSD stressor applied to claims pending before the Court on the date of the amendment because the regulatory history clearly established the Secretary's intent for retroactive application); *Friedsam v. Nicholson, 19 Vet. App. 555 (2006)* (holding that the 2000 amendment to *38 U.S.C.S. § 5113* that favored VA claimants by authorizing an earlier effective date for certain educational assistance claims applied to claims pending on the date the amendment was enacted because Congress expressly stated that the amendment should apply to pending claims; the Court overruled the contrary ruling contained in VA Gen. Coun. Prec. 9-2004 (July 27, 2004)).

15.4 ORGANIZATION OF THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Title III of the Veterans' Judicial Review Act (VJRA) established a new court under Article I of the U.S. Constitution.[660] The court, formerly known as the U.S. Court of Veterans Appeals, commenced operation on October 16, 1989. On March 1, 1999, the name assigned by the VJRA to that court was changed to the U.S. Court of Appeals for Veterans Claims (CAVC or Court).[661]

The principal office of the Court is required to be in Washington, D.C.[662] The Court is currently located at 625 Indiana Avenue NW.[663] It occupies several floors (the second, sixth, ninth, tenth, and eleventh) of a commercial building in the area of Washington, D.C. where most of the federal and local courts are located.

15.4.1 The Judges

The VJRA initially provided that the Court will have from three to seven judges who are appointed by the President with the advice and consent of the Senate.[664] The VJRA also provided that the Court must consist of a "chief judge" and at least two, but not more than six, other judges.[665] "The chief judge is the head of the Court."[666] As discussed below, Congress has temporarily expanded the number of active judges. The term of office for all Court judges is fifteen years; however, the President may remove a judge from office prematurely for various specified reasons that would prevent the proper execution of the judge's duties.[667]

The first judge appointed by President George H.W. Bush was Frank Q. Nebeker, appointed to serve as the Court's first chief judge. Kenneth B. Kramer and John J. Farley III, appointed as judges, followed him. When the Senate confirmed these three appointments, the Court was able to begin operations in October 1989. About a year later, the Court began to operate with a full complement of seven judges after President Bush appointed and the Senate confirmed Hart T. Mankin, Ronald M. Holdaway, Donald L. Ivers, and Jonathan R. Steinberg as judges. Judge Mankin died in May 1996, and Judge William P. Greene was appointed as a judge to replace him in November 1997. Chief Judge Nebeker resigned from the Court in October 2000. Judge Holdaway resigned from the bench effective November 2002. Judges Bruce E. Kasold and Lawrence B. Hagel were appointed in December 2003. In December 2004, Judges Robert N. Davis, Alan G. Lance, William A. Moorman, and Mary J.

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[660] The major difference between federal courts created pursuant to Article III of the U.S. Constitution and those created pursuant to Article I, such as the CAVC, is that the judges of an Article III court are appointed for life and their salaries cannot be decreased.

[661] *See* The Veterans Programs Enhancement Act of 1998, *38 U.S.C.S. § 101*.

[662] *See 38 U.S.C.S. § 7255*.

[663] The Court's mailing address is 625 Indiana Avenue NW, Suite 900, Washington, D.C. 20004-2950.

[664] *38 U.S.C.S. § 7253(a)*, *(b)*.

[665] *38 U.S.C.S. § 7253(a)*.

[666] *38 U.S.C.S. § 7253(d)*.

[667] *38 U.S.C.S. § 7253(c)*, *(f)(1)*.

Schoelen were appointed to the Court. In August 2005, Judges Ivers and Steinberg retired upon expiration of their terms of service and Judge Greene was named chief judge of the Court. The Veterans' Benefits Improvement Act of 2008 temporarily increased, as of October 2008, the number of acting judges from seven to nine and eliminated the restrictions on how many days per year a retired judge may voluntarily serve in recall status.[668] In 2010, Judge Greene retired and Judge Kasold replaced him as chief judge of the Court. In May 2012, the Senate confirmed Margaret Bartley and Coral Wong Pietsch to the bench. The Senate confirmed William S. Greenberg to the bench in December 2012. In August 2015, Judge Hagel replaced Judge Kasold as the chief judge. In August 2015, Judge Moorman assumed senior status as a retired recall-eligible judge. In October 2016, Judge Hagel assumed senior status as a retired recall-eligible judge and Judge Davis replaced Judge Hagel as the chief judge. In December 2016, Congress extended the temporary expansion of the Court until January 1, 2021.[669] In August 2017, the Senate confirmed Amanda L. Meredith, Joseph L. Toth, and Michael P. Allen to the bench. In April 2018, the Senate confirmed Joseph L. Falvey, Jr. to the bench. In December 2019, Judge Schoelen and Chief Judge Davis assumed senior status as retired recall-eligible judges and Judge Margaret Bartley was named chief judge.

As of the date of publication of the 2020–2021 edition of this Manual, the active bench is comprised of Chief Judge Margaret Bartley, Judge Coral W. Pietsch, Judge William S. Greenberg, Judge Michael P. Allen, Judge Amanda L. Meredith, Judge Joseph L. Toth, and Judge Joseph L. Falvey, Jr. A brief biography of each of the current judges and each of the retired judges appears on the Court's website at *http://www.uscourts.cavc.gov/judges.php*.

About half of the current sitting judges had no significant previous experience in veterans' affairs before joining the Court's bench. They came to the Court with the benefit of being able to approach their duties of reviewing the VA system without preconceived notions.

Chief Judge Bartley and Associate Judges Meredith and Allen are the exceptions. Judge Bartley served as a staff attorney with the National Veterans Legal Services Program from 1995 until her confirmation in 2012. She also acted as the Director of Outreach and Education for the Veterans Consortium Pro Bono Program from 2005 until her confirmation in 2012. Prior to her tenure with NVLSP, Judge Bartley served as a judicial law clerk for Judge Steinberg. Judge Meredith worked for the Republican staff of the United States Senate Committee on Veterans' Affairs for more than 12 years prior to her appointment. Prior to joining the staff of the Committee on Veterans' Affairs, Judge Meredith worked for the Court, including as the judicial law clerk and, later, as the Executive Attorney to Chief Judge Kenneth Kramer. Prior to his appointment, Judge Allen was a professor of law for sixteen years at Stetson University College of Law, where he taught courses on veterans benefits law and served as the director of Stetson's Veterans Law Institute.

The Court conducts its administrative (as opposed to case-related) business as a group at board of judges meetings. These are arranged at the call of the chief judge. They generally occur at least once a month. The Clerk of the Court attends such meetings.

There are two separate divisions of staff at the Court: the judges' staff and the staff of the Clerk of the Court. Generally, the judges' staff consists of the judges' law clerks and clerical personnel. Three law clerks and a secretary are assigned to each associate judge. The chief judge has a slightly larger staff than the other judges. The Clerk of the Court and the Clerk's staff are described in Section 15.4.3.

15.4.2 The Rules of the Court

Instead of mandating specific rules of practice and procedure, Congress delegated to the Court broad power to prescribe its own rules.[670] One example that illustrates the extent to which Congress left matters to the discretion of the Court is that the Court may decide cases by judges sitting alone or by panels of three or more

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[668] ***Pub. L. No. 110-389***.

[669] *38 U.S.C.S. § 7253(i)*; Veterans Health Care and Benefits Improvement Act of 2016, ***Pub. L. No. 114-315, 130 Stat. 1536*** (2016).

[670] *See generally* *Baughman, 1 Vet. App. at 563*; *38 U.S.C.S. § 7264*.

judges, as determined by the procedures that the Court itself establishes.[671] Similarly, the VJRA leaves it to the Court to decide whether and to what extent it should hear cases outside of Washington, D.C., which Congress selected as the principal place of business for the Court.[672]

The Court issued interim general rules on November 21, 1989. These rules became effective on December 18, 1989, and were modeled after the Federal Rules of Appellate Procedure. Based on the Court's experience, the comments of interested persons, and the views of the Court's advisory committee, formed consistent with *28 U.S.C.S. § 2077(b)*, the Court published Rules of Practice and Procedure on April 4, 1991.[673] These rules have since been amended on numerous occasions. The most recent amendment occurred on February 13, 2020.[674]

The Court's Rules of Practice and Procedure currently in effect can be found on the Court's website at *http://www.uscourts.cavc.gov/rules_of_practice.php*. The appropriate way to cite these rules is U.S. Vet. App. R. [rule number].

As a general matter, the rules "do not extend or limit the jurisdiction" of the Court.[675] The Court on its own initiative or on a party's motion may suspend the application of the rules "and otherwise order proceedings as it sees fit."[676] Parties, and perhaps interested members of the public, may also petition the full Court to adopt or amend a rule.[677]

In January 1992, the Court adopted a set of internal operating procedures (IOP) intended to provide information about the internal workings of the Court.[678] The Court revised its IOP on several occasions thereafter.[679] The current IOP discusses the way in which a case is screened, reviewed, decided, and published by the Court, and it appears on the Court's website at *http://www.uscourts.cavc.gov/internal_operating_procedures.php*.

Additionally, in February 1993, the Court, pursuant to *38 U.S.C.S. § 7253(g)*, adopted rules governing complaints of judicial misconduct and disability. These rules explain the options that are available to any individual who has a complaint about the conduct of any of the judges. The current rules governing judicial misconduct appear on the Court's website at *http://www.uscourts.cavc.gov/judicial_misconduct.php*.

15.4.3 The Clerk of the Court

The Clerk of the Court not only performs many vital day-to-day functions on behalf of the Court, but also is an extremely important contact point for appellant's counsel. The Clerk's official duties are described at U.S. Vet. App. R. 45. These specified functions are similar to the functions of all court clerks, except in two respects. First, the Clerk also serves in the additional role of the court's chief executive officer. This latter role is similar to that of a circuit executive in the Article III appellate courts. Second, the Office of the Clerk contains the Central Legal Staff of the Court, whose duties are discussed below.

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[671] *38 U.S.C.S. § 7254(b)*.

[672] *38 U.S.C.S. §§ 7255*, *7256*.

[673] *See* 1 Vet. App. XXXIX-VVI (Order, Apr. 4, 1991).

[674] CAVC Misc. Order. No. 07-20 (Feb. 13, 2020).

[675] U.S. VET. APP. R. 1(b).

[676] U.S. VET. APP. R. 2.

[677] *Lefkowitz v. Derwinski, 1 Vet. App. 439 (1991)*.

[678] *See* 1 Vet. App. XCIII-C (Jan. 9, 1992).

[679] For examples of changes to the procedures, *see* 7 Vet. App. XXIX–XXXVII (Oct. 5, 1994); 10 Vet. App. CDXXI–CDXXIX (June 2, 1997); 13 Vet. App. XI (Sep. 24, 1999).

15.4.3.1 Duties of the Clerk

The chief routine functions of the Clerk of the Court are docket maintenance, case file custodianship, and service of court orders or opinions.[680] The Clerk may act on motions, if consented to or unopposed,[681] that seek to:

- Dismiss or terminate an appeal or a petition with or without prejudice to reinstate it;
- Remand a case;
- Reinstate a case that was dismissed for failure to comply with the rules;
- Extend the time for taking any action required or permitted by the rules or by an order of the Court, unless the motion is made after the time limit has elapsed;
- Consolidate appeals;
- Withdraw or substitute an appearance; or
- Correct a brief or other paper.

The Clerk is authorized to return any paper that is not in compliance with the Court rules.[682] The Clerk also may dismiss an appeal for failure to pay a filing fee or to file a brief.[683]

Any party adversely affected by a procedural action of the Clerk may, by motion, request that the Court reconsider, vacate, or modify the action within ten days "after the action is announced."[684] A party in a case dismissed by the Clerk for failure to pay a filing fee or to file a brief may move for reconsideration by the Clerk, and if the party does so, they must do so within 21 days after the Clerk's decision.[685] By rule, the Clerk is to "liberally construe the rules as they apply to appellants representing themselves."[686]

15.4.3.2 Senior Staff within the Office of the Clerk

The Clerk of the Court is Gregory O. Block. He was appointed to this post by the Judges of the Court in September 2010. Prior to his appointment as the Clerk of Court, Mr. Block served for over 30 years in the U.S. Army in the Judge Advocate General's Corps, and retired from active service in the rank of Colonel. He served in multiple overseas locations including Germany, Korea, Bosnia, and Afghanistan, and completed his service in Charlottesville, Virginia, where he served as Dean of the Judge Advocate General's School. His telephone number is (202) 501-5980, ext 1015.[687]

The chief staff attorney is Cynthia Brandon-Arnold. She is the deputy clerk of the Central Legal Staff. Her telephone number is (202) 501-5902, ext 1153.

15.4.3.3 The Structure within the Office of the Clerk

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[680] U.S. VET. APP. R. 45.

[681] U.S. VET. APP. R. 27(a) requires all motions to indicate whether the motion is unopposed.

[682] U.S. VET. APP. R. 45(k).

[683] U.S. VET. APP. R. 45(i).

[684] U.S. VET. APP. R. 27(b).

[685] U.S. VET. APP. R. 35(a) and (d)(1).

[686] U.S. VET. APP. R. 45(j).

[687] *See* Clerk of the Court section of the CAVC's website located here: http://www.uscourts.cavc.gov/block.php (last visited Apr. 18, 2020).

15.4.3.3.1 Executive Office

The Executive Office includes the Counsel to the Clerk, the Financial Manager, the Director of Automation (heading the automation system office), the Editor, and an executive assistant who serves as the bailiff, admissions clerk,[688] and correspondence clerk.

15.4.3.3.2 Administrative Office

The Deputy Executive Officer, oversees the administrative functions of the Court, and is responsible for procurement, property management, personnel systems, travel, and various other administrative functions.

15.4.3.3.3 Public Office

Ann Stygles is the Chief Deputy Clerk of Operations and directs the Public Office. She serves as the Clerk's operations manager and supervises the docket Clerks and the mail flow. Personnel in this office are responsible for day-to-day contact with *pro se* appellants. The telephone number for the Public Office is (202) 501-5970, ext. 1030. The facsimile number for the Court is (202) 501-5848.

The Public Office has a reading room, where files may be reviewed and Court opinions and memorandum decisions may be read.

15.4.3.3.4 Central Legal Staff

The Court has a case management system under which the Central Legal Staff within the Office of the Clerk provides the initial evaluation in each appeal or petition. The Staff has a senior staff attorney, seven staff attorneys, and two paralegals.

After the briefs on both sides and the record of proceedings are filed with the Clerk of the Court, they are sent to the Central Legal Staff. Historically, the Central Legal Staff sometimes provided an initial evaluation of the case and a memorandum recommending a particular disposition. Today, very few cases are screened by the Central Legal Staff. The Central Legal Staff's principal duty is to play a lead role in staff conferences conducted pursuant to U.S. Vet. App. R. 33.[689]

15.4.3.4 Business Hours of the Office of the Clerk

The Office of the Clerk is open Monday through Friday (except legal holidays, as defined in U.S. Vet. App. R. 26(a)) from 9:00 A.M. to 4:00 P.M. Eastern Time. Parties may file documents electronically when the office is closed.[690]

15.4.4 How the Court Processes a Case through to a Decision

After a case file leaves the Central Legal Staff, the case is forwarded to a screening judge who reviews the case and the Central Legal Staff's initial evaluation and recommendations. The screening judge decides how the case will be set for the calendar. The duties of the screening judge also include reviewing incoming motions and ruling on them if a panel of three judges has not yet been assigned to the case. All of the Court judges take turns serving as a screening judge, with the assignment rotating on a regular basis.

A case may be set by the screening judge for summary disposition by one judge or disposition by a panel of three judges. The screening judge may also make recommendations that the case be reviewed en banc at this

[688] When there is a question of an applicant's fitness to practice, the Clerk shall refer the application to the Court's Admissions Committee. Rules of Admission and Practice, App. to U.S. VET. APP. R. 46.

[689] Staff conferences are discussed in Section 15.6.9.

[690] *See* Section 15.6.2 for a discussion of filing procedures.

time. Once the screening judge formulates the instructions for handling the case, the file is transmitted to the Clerk for further action. In the overwhelming majority of the appeals sent to a screening judge, the screening judge decides that the appeal should be disposed of by a single judge. In FY 2019, for example, a single judge decided 1,802 of the 1,850 appeals that were decided in that year by one of more Court judges (or 97 percent). The remaining 48 appeals that were not decided by a single judge were decided by a three-judge panel.[691]

If the formation of a panel of three judges is directed, the Clerk selects panel members. Panels consist of the screening judge and two other judges, selected at random, with due consideration of each judge's workload. When a determination is made, at any point during the consideration of a case, that a case in which a party is not represented should be disposed of by other than a single judge, the Clerk's order will be entered stating that such a determination has been made and that the matter will be stayed for 30 days to permit the *pro se* appellant an opportunity to obtain counsel.[692] The Clerk provides copies of the record, the briefs, the screening judge's calendaring instructions, and the memorandum of the Central Legal Staff to the panel members. If oral argument is ordered, the judges may or may not confer before the argument. The senior judge of the panel assigns the decision writing responsibility to one of the panel members. Decision writing is frequently assigned to the screening judge, who has already invested significant time in the case. When approved by the panel, the decision is circulated to the other judges of the Court for their information, with a date selected for release of the decision. The Clerk is responsible for conducting a format review of all Court decisions before they are issued.

The time it takes for a case to be resolved by the Court varies significantly depending on whether it is resolved by a single judge or by a multi-judge panel. The median time from the filing of an appeal to disposition by a single judge is 435 days (14.5 months). If the case is decided by a multi-judge panel, the median time from the filing of an appeal to disposition by the panel is 682 days (22.7 months).[693]

15.4.5 The Court's Website and Public Access to the Court's Decisions

The Court issues three different types of decisions: opinions, memorandum decisions, and orders. Beginning in 1991, the West Publishing Company began publishing all past and future Court precedent opinions in the *Veterans Appeals Reporter.* All Court dispositions (both precedential and nonprecedential) can be accessed through Lexis and Westlaw, and the Court's website.

A great amount of useful information is available at no cost on the CAVC's home page, found at *https://uscourts.cavc.gov/index.php*. The Court's website enables an individual to choose from a list of topics including: About the Court; Helpful Links; How to Appeal; FAQs; Court Forms; Court Rules and Procedures; Information about Practitioners; Orders and Opinions; Active Panel and Stayed Cases; Electronic Filing; Docket Search; and Oral Arguments.

The "Information about Practitioners" topic contains the Court's "public list" of attorneys and nonattorney practitioners who are admitted to practice before the Court (the list is "public" in the sense that the individuals on the list have indicated a willingness to represent appellants before the Court, and have agreed to be included on a list that is distributed to all *pro se* appellants). Although the list on the website is updated on a regular basis, the most up-to-date version may be obtained directly from the Court.

The "Docket Search" topic allows one to search for closed cases as well as currently pending cases. For most cases that were closed after October 2008, the motions, briefs, and decisions can be viewed via this topic.

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[691] *See* Annual Rep. of the United States Court of Appeals for Veterans Claims, Oct. 1, 2018 to Sept. 30, 2019 *http://www.uscourts.cavc.gov/documents/FY2019AnnualReport.pdf* (Fiscal Year 2019). The Annual Reports section of the CAVC's website is located here: *http://www.uscourts.cavc.gov/report.php* (last visited April 18, 2020). Additional information on single-judge decision-making appears in Section 15.6.1.

[692] *See* *In re Panel Referrals, 14 Vet. App. 232 (Dec. 26, 2000)* amending United States Court of Appeals for Veterans Claims, Internal Operating Procedures: Rule II(f).

[693] Annual Rep. of the United States Court of Appeals for Veterans Claims, Oct. 1, 2018 to Sept. 30, 2019 (Fiscal Year 2019). See Annual Reports section of the CAVC's website located here: *http://www.uscourts.cavc.gov/report.php* (last visited Apr. 18, 2020).

Finally, the “Oral Arguments” topic includes the Court’s upcoming oral argument schedule, as well as an “Oral Argument Guide” that provides useful information for practitioners who are preparing for an oral argument before the Court. In addition, the “Oral Arguments” topic contains links to audio and video files of actual oral arguments that were before the Court from 2005 through the present.[694]

In summary, the Court’s website provides important information for the appellant and advocate, which can be used in conjunction with other electronic and non-electronic research tools.[695]

The Court maintains a public reading room on its premises in which all of its opinions, orders, and memorandum decisions are made available. Opinions of the Court are not available on a subscription basis. Copies of opinions, memorandum decisions, and orders are available for $.50 per page from the Office of the Clerk. The Court has no plans to have the West Publishing Company report its memorandum decisions or its orders issued by one or more judges, except for those designated by the Court for publication.

15.4.6 Court Fees for Filing, Copying, and Other Matters

The public has access to unsealed case files in the Office of the Clerk during business hours. A hand-held copier may be used to copy documents in the files, or copies may be obtained for $.50 a page. The schedule of fees published by the Clerk includes the following:[696]

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[694] Oral arguments before the Court are available for live streaming. *United States Court of Appeals for Veterans Claims YouTube Channel*, YOUTUBE, https://www.youtube.com/channel/UCkhT0OvwPHFaX-d0ZEFup0g (last accessed Apr. 18, 2020).

[695] Chapter 17 of this Manual addresses other ways to conduct research on veterans law.

[696] This fee schedule is effective as of May 27, 2014 and can be accessed here: http://www.uscourts.cavc.gov/fee_schedule.php (last visited Apr. 18, 2020).

15.5 REPRESENTATION BEFORE THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

This section discusses the rules governing authorization to practice before the U.S. Court of Appeals for Veterans Claims (CAVC or Court) as an advocate. Issues relating to attorney's fees in practice before the Court are discussed in *Chapter 19* of this Manual.

15.5.1 How to Become Authorized to Represent Appellants

U.S. Vet. App. R. 46 governs representation before the Court. The rule contains explicit requirements that must be fulfilled before an attorney or nonattorney can appear before the Court. The rules for admission to practice differ according to whether or not the individual is an attorney. Rule 46.1 provides that appellants have the right to represent themselves.

15.5.1.1 Admission of Attorneys to Practice

Rule 46(a) governs the admission of attorneys to practice before the Court. The only eligibility requirement is that the attorney be of good moral character and repute and be admitted to practice in, and be in good standing with, the U.S. Supreme Court or the highest court of any state or the District of Columbia, or a territory, or commonwealth of the U.S.[697]

To be admitted to the bar of the Court, an attorney needs to file an application. An example of the appropriate application form is available on the Court's website.[698] A certificate of good standing executed by the clerk of the highest court in the relevant jurisdiction within three months of the application, along with a payment of $100 must accompany the application.[699] The application may be completed online, or may be sent, along with a check or money order for $100 payable to the *U.S. Court of Appeals for Veterans Claims*, to the Admissions Clerk at U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue NW, Suite 900, Washington, DC 20004.

An attorney appearing before this Court is expected to comply with the Model Rules of Professional Conduct unless otherwise provided by the Court's Rules of Admission and Practice.[700]

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[697] The CAVC denied a motion for reconsideration of a decision by the Court that denied an applicant admission to the Court's bar where the applicant submitted a certificate of good standing from the Mashantucket Pequot Tribal Court. *See* *In re Admission of Unger, 16 Vet. App. 205 (2002)*. The Court denied the application on the ground that the certificate did not meet the criterion of Rule 46, which, at that time, required a "certificate of good standing from the Clerk of the Supreme Court of the United States, or the highest court of any state, the District of Columbia or a territory, possession, or commonwealth of the United States." The Court held that admission to the Mashantucket Pequot Tribal Court did not qualify as a territory, possession, or commonwealth of the United States as those terms were used in Rule 46. *In re Admission of Unger, 16 Vet. App. at 206*. Likewise, an attorney licensed in the Philippines was not qualified for admission pro hac vice to the Court absent prior admission to practice in another U.S. jurisdiction. *DeGuzman v. Nicholson, 20 Vet. App. 526 (2006)*.

[698] At the time of publication of the 2020–2021 edition of this Manual, the appropriate application form could be found here: *https://pay.gov/public/form/start/731042996* (last accessed Apr. 18, 2020).

[699] *See* U.S. VET. APP. R. 46(a)(1) and (2).

15.5.1.2 Admission of Nonattorneys to Practice

A nonattorney of good moral character and repute may be admitted to practice under one of two circumstances:

- Under the direct supervision of an attorney admitted to the bar of the Court; or
- If the advocate (1) is employed by an organization that is both chartered by Congress and is recognized by the VA for claims representation, and (2) provides a written statement signed by the organization's chief executive officer and certifying the employee's proficiency in and understanding of the law relevant to representing appellants.[701]

The notice of appearance filed in each case where the nonattorney is the representative should include the name, address, and signature of the responsible supervising attorney or the identification of the employing organization.[702]

Rule 46(b)(1)(G) allows for eligible law students to appear before the Court. The student must have the written consent of the appellant and the attorney of record, who must be a member of the bar of the Court.[703] Rule 46(b)(1)(G)(ii) allows the student to participate in every aspect of an appeal, although the rule also requires that the student be carefully supervised by the attorney of record at all times. Among other requirements, the student must have completed at least two semesters of law school, must attend an American Bar Association approved law school, and must be certified by the dean of the law school as being of good character and competent legal ability, and must certify in writing that the student is familiar with the code of professional responsibility in the state or jurisdiction where the student attends school.[704]

15.5.1.3 Permission to a Nonmember of the Court's Bar to Represent the Appellant in a Particular Case

Rule 46(b)(1)(F) provides that upon a motion showing good cause, the Court may permit an attorney or nonattorney who is not a member of the Court's bar to represent an appellant for the purposes of a particular case. Anyone admitted to practice under Rule 46(b)(1)(F) is subject to the disciplinary rules of the Court. The Court has ruled that good cause to justify representation by a nonmember requires that there be a special relationship other than contractual between the appellant and the nonmember, that no fee be charged by the nonmember, and that special circumstances exist limiting the ability of the appellant to represent him or herself.[705]

15.5.2 Representation by the VA Office of the General Counsel of the Secretary of Veterans Affairs

The Court provides the first level of review in veterans benefits proceedings in which the proceedings are adversarial in the sense that there is someone arguing before a forum that the claimant should not receive the benefits sought. At the VA regional office (RO) and the Board of Veterans' Appeals (BVA or Board), no one representing the agency appears before adjudicators to argue that relief should be denied.

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[700] U.S. VET. APP. R. ADM. & PRAC. 4(a); *see also* Barela v. Peake, 22 Vet. App. 155 (2008).

[701] *See* U.S. VET. APP. R. 46(a)(2)(B). The nonattorney's proficiency in and understanding of the law relevant to representing veterans, includes "an understanding of the procedures and jurisdiction of the Court and of the nature, scope, and standards of its judicial review." U.S. VET. APP. R. 46(a)(2)(B)(i).

[702] *See* U.S. VET. APP. R. 46(b)(1)(C).

[703] *See* U.S. VET. APP. R. 46(b)(1)(G)(i).

[704] U.S. VET. APP. R. 46(b)(1)(G)(iii).

[705] *See* *Carlson v. Derwinski, 2 Vet. App. 144, 146–47 (1992)*; *Saginza v. Derwinski, 1 Vet. App. 575, 578 (1991)*; *Thomas v. Derwinski, 1 Vet. App. 289, 291 (1991)*.

The Veterans' Judicial Review Act (VJRA) requires the VA's Office of the General Counsel (OGC) to represent the Secretary of Veterans Affairs before the Court.[706] Thus, Congress rejected representation by the Department of Justice, which usually represents federal agencies in federal court. The OGC provides representation through its Court of Appeals Litigation Group. A list of OGC attorneys and their contact information may be found at Appendix 15-A.

15.5.3 The Lack of Enough Advocates to Represent Appellants before the Court and the Veterans Consortium Pro Bono Program

For a long period after the Court opened its doors in 1989, appellants had a problem securing an advocate to represent them before the Court. Of the approximately 26,682 VA claimants who filed a notice of appeal with the Court from 1989 through 2003, approximately 18,741 (or 70 percent) did not have a representative at the time the appeal was initiated. This percentage peaked in fiscal year 1993, when the rate of veterans representing themselves rose to 82.5 percent.[707] However, due to the growth of a private bar and the pro bono program discussed below, the percentage of appeals in which the appellant was unrepresented at the time the Court issued a final decision has been on the decline, decreasing to 12 percent in FY 2019.[708]

In 1991, the Court of Veterans Appeals responded to the *pro se* problem by requesting that Congress transfer to the Legal Services Corporation (LSC) part of the Court's FY 1992 appropriation so that LSC could administer a grant program to provide *pro bono* representation to some limited-income appellants. Congress quickly enacted legislation to accomplish this result.[709]

To implement the legislation, LSC issued a request for proposals and ultimately awarded a grant in 1992 to a group known as the Veterans Consortium Pro Bono Program composed of four veterans service organizations: The American Legion, the Disabled American Veterans, the National Veterans Legal Services Program, and the Paralyzed Veterans of America. Due to its success, Congress has continuously funded LSC to operate this *pro bono* program.

The Veterans Consortium Pro Bono Program is now in its twenty-eighth year of operation. Since the program's inception, the Consortium has secured volunteer attorneys to represent over 4,000 claimants who have appealed to the Court without a representative. The rate of success has been consistently high, with a lifetime win rate of nearly 82 percent.[710]

The Consortium recruits private bar attorneys to represent *pro se* appellants on a *pro bono* basis. Attorneys from all over the United States have agreed to participate in the program and have entered appearances before the Court on behalf of *pro se* appellants.[711] The Consortium provides free training to the attorneys who

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[706] ***See*** *38 U.S.C.S. § 7263(a)*. The Department of Justice must approve and represent VA in all appeals of CAVC decisions to the U.S. Court of Appeals for the Federal Circuit that VA wishes to file.

[707] The Veterans Consortium Pro Bono Program, Annual Rep. 2006.

[708] Annual Rep. of the United States Court of Appeals for Veterans Claims, Oct. 1, 2018 to Sept. 30, 2019 (Fiscal Year 2019). See Annual Reports section of the CAVC's website located here: *http://www.uscourts.cavc.gov/report.php* (last visited Apr. 18, 2020).

[709] ***Pub. L. No. 102-229*** (1991). Since 1991, Congress has continually appropriated funds for the pro bono program originally authorized by ***Pub. L. No. 102-229***. *See, e.g.*, ***Pub. L. No. 107-73, 115 Stat. 682*** (2001).

[710] The Veterans Consortium Pro Bono Program, Annual Rep. 2018. See Annual Reports section of the Veterans Consortium Pro Bono Program's website located here: *https://www.vetsprobono.org/about/item.7661-Annual_Reports* (last visited Apr. 18, 2020).

[711] The Veterans Consortium Pro Bono Program, Annual Rep. 2018.

volunteer to participate in the program. Since the program began in 1992, over 4,300 attorneys have been trained.[712] Full-day training programs are typically held four times a year in different parts of the country.

The Consortium also screens cases for financial eligibility and relative merit. Since the program began, it has screened the cases of over 10,000 appellants who contacted the Consortium to request a volunteer attorney. When the screening results in a determination that the appeal satisfies the eligibility criteria, the appeal is placed with a volunteer attorney who has already been recruited and trained. A case-screening memorandum, which discusses the facts and one or more appealable issues, accompanies each referral.

Upon placement of the case, the volunteer attorney is provided comprehensive advisory services. The volunteer is assigned an attorney who monitors the progress of the case and a mentoring attorney. Advisory services include assistance with the Court's procedures and rules of practice, advice on researching veterans law, help in formulating the best litigation strategy, provision of sample briefs and other pleadings, review of draft briefs and motions, and preparation of the volunteer for oral argument. A free copy of this Manual is also provided to every volunteer at the time the case is placed with the volunteer attorney.

The Court maintains on its website a list of hundreds of members of the Court's bar.[713] Although the number of individuals on this list has steadily increased, not all of these advocates regularly accept cases for representation before the Court. Those who regularly represent appellants before the Court include attorneys and nonattorney practitioners employed by the National Veterans Legal Services Program, the Paralyzed Veterans of America, and dozens of private law firms. Many of the private bar attorneys who regularly practice before the Court are members of the National Organization of Veterans Advocates.[714] Unrepresented appellants also usually receive by mail a number of solicitations from private bar attorneys offering to evaluate their case to determine whether the attorney is willing to represent the appellant before the Court.

Despite these efforts aimed at helping unrepresented appellants find a representative, many unrepresented appellants do not reach a representation agreement with a private attorney. The Veterans Consortium Pro Bono Program sends the unrepresented appellant a notice about the Consortium Program and all necessary forms to request a *pro bono* representative. Those who wish to work with a pro bono attorney may return these requests to the Consortium.

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[712] The Veterans Consortium Pro Bono Program, Annual Rep. 2018.

[713] U.S. Court of Appeals for Veterans Claims, *Public List*, http://www.uscourts.cavc.gov/public_list.php (last visited Apr. 18, 2020). This list does not include every member of the Court's bar. It only includes those who have indicated to the Court that they wish to appear on a list made available to the public and mailed to all unrepresented appellants.

[714] A directory of members of the National Organization of Veterans Advocates can be found here: https://www.vetadvocates.org/cpages/sustaining-members-directory (last visited Apr. 18, 2020).

15.6 THE RULES OF PRACTICE AND PROCEDURE OF THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

As described in Section 15.4.2, the U.S. Court of Appeals for Veterans Claims (CAVC or Court) has adopted rules of practice and procedure that govern proceedings before the Court. Section 15.5 describes the rules relating to representation of parties before the Court. The present section discusses the other rules of practice and procedure and provides general guidance for those representing appellants before the Court.

The process used by the Court to decide appeals of Board of Veterans' Appeals (BVA or Board) decisions is quite similar to the process used by the U.S. circuit courts of appeals. The Court's rules are modeled after the Federal Rules of Appellate Procedure—the rules used by the circuit courts of appeals.

The current process is illustrated below in Chart 15. Chart 15 lists in chronological order the various documents that are typically filed by the appellant (the individual appealing to the Court), filed by the appellee (the Secretary of Veterans Affairs), or docketed by the Court and mailed to the parties. The time limits, if any, for filing each document are listed in the right-hand column.

15.6.1 Precedential and Non-Precedential Decisions of the Court

For more than a century, federal appellate courts have decided appeals through use of panels composed of three judges. When Congress created the CAVC in 1988, however, it provided that the "Court may hear cases by judges sitting alone or in panels, as determined pursuant to the procedures established by the Court."[715] From the outset, the Court has exercised this authority to decide appeals by a single judge. According to the standards set in 1990 by the Court in *Frankel v. Derwinski,* single judge disposition is appropriate where the case on appeal is of relative simplicity *and*

1. does not establish a new rule of law;
2. does not alter, modify, criticize, or clarify an existing rule of law;
3. does not apply an established rule of law to a novel fact situation;
4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
5. does not involve a legal issue of continuing public interest; and
6. the outcome is not reasonably debatable.[716]

From the outset, the large majority of the appeals decided by the Court's judges (as opposed to a joint disposition of an appeal approved by the Clerk of the Court) were decided by a single judge in the form of a

[715] 38 U.S.C.S. § 7254(b).

[716] 1 Vet. App. 23 (1990).

memorandum decision or an order. Indeed, in fiscal year 2019, the Court issued a single-judge decision in 1,802 cases, 97 percent of all the appeals decided by chambers.[717]

Shortly after the Court established the six *Frankel* criteria, it clarified that single-judge decisions are not precedential.[718] Only decisions issued by a panel of three judges or by the Court en banc carry precedential value and bind the VA to follow the Court's precedential decision in other cases. In other words, the VA is free to ignore the Court's legal rulings in a single-judge decision in adjudicating all claims for benefits other than the one that was the subject of the single-judge decision.

This means that in fiscal year 2019 the Court issued a precedential decision in only 48 cases, 3 percent of all the contested appeals that it decided. By way of comparison, in fiscal year 2014, the federal geographic courts of appeals issued a published, precedential decision in 12 percent of its decisions, and no court of appeals issued published, precedential decisions in less than 6 percent of its decisions.[719]

The Court's practice of issuing relatively few precedential decisions appears to result, at least in part, from the fact that the judges are not complying with the *Frankel* criteria governing when an appeal should be adjudicated by a panel of three judges and made precedential. Often a single-judge decision will state in the introductory remarks that "single-judge disposition is appropriate," with a citation to *Frankel*, as the extent of the discussion regarding the applicability of the *Frankel* criteria.

A 2016 law review article reported on the results of an empirical study of the more than 4,000 single-judge decisions issued in 2013–14, and concluded that the Court has not been following at least the sixth criterion in *Frankel*, which allows single-judge decision-making only if "the outcome is not reasonably debatable." The article's conclusion was based on the fact that although appeals are assigned to individual judges on a random basis, there is a large variance from judge to judge in the outcomes of appeals decided by a single judge. During the two years studied, the affirmance rate (that is, the percentage of all appeals decided on the merits by the judge in which he or she affirmed the Board's denial of the benefits claim challenged by the appellant in the appeal) varied from 22 percent (for the judge least likely to affirm the Board's decision) to 63 percent (for the judge most likely to affirm the Board's decision). Moreover, three of the Court's nine active judges were more than twice as likely to affirm the Board's decision as the two judges who were the least likely to affirm.[720]

Perhaps because of its heavy reliance on single-judge, nonprecedential decisions, the Court amended Rule 30(a) of the Court's Rules of Practice and Procedure so that a party may cite these decisions under certain circumstances. The rule states that "[a]ctions designated as nonprecedential by this Court [i.e., all single-judge decisions] or any other court may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and the party includes a discussion of the reasoning as applied to the instant case."

15.6.2 The General Procedure for Filing Documents

Different filing rules apply to represented parties and unrepresented parties. Represented parties are required to use the Court's Case Management/Electronic Filing system (CM/ECF) to file documents unless

[717] *See* Annual Rep. of the United States Court of Appeals for Veterans Claims, Oct. 1, 2018 to Sept. 30, 2019 (Fiscal Year 2019). The Annual Reports section of the CAVC's website is located here: *http://www.uscourts.cavc.gov/report.php* (last visited Apr. 19, 2020).

[718] *See* *Bethea v. Derwinski, 2 Vet. App. 252, 253–54 (1992)* (stating that a single-judge disposition "is fully binding on the Board and the Secretary in that case; however, it carries no precedential weight. [It] is not binding in another case before a single judge or a panel").

[719] *See* Annual Rep. of the United States Court of Appeals for Veterans Claims, Oct. 1, 2018 to Sept. 30, 2019 (Fiscal Year 2019); James D. Ridgway, Barton F. Stichman, & Rory E. Riley, *"Not Reasonably Debateable": The Problems with Single Judge Decisions by the Court of Appeals for Veterans Claims*, *27 Stan. L. & Pol'y Rev. 1, 11 (2016)*.

[720] Ridgway, Stichman, & Riley, *27 Stan. L. & Pol'y Rev. at 23–26*.

granted permission by the Court to file paper documents. Unrepresented parties are required to file paper documents with the Court, unless the Court grants the unrepresented party permission to file electronically.[721] Sections 15.6.2.1 and 15.6.2.2 explain the two filing systems in detail.

15.6.2.1 Filing Rules for Represented Parties

Use of the Court's CM/ECF filing system is mandatory (for all non-case-initiating documents) for all represented parties unless an exception is granted by the Court.[722] In order to file electronically, parties will need a computer, an internet connection, Adobe Writer or similar software, and Java Version 6 or higher.[723] The Court's website contains a section entitled Electronic Filing, found at *http://www.uscourts.cavc.gov/e-filing.php*. This section provides useful computer-based training modules on how to log into the CM/ECF Application and how to file electronically. The section also contains the Interim E-Rules, an E-filing checklist, and tips on creating a "PDF" document and using Adobe software, in order to file a document with the Court.

Case-initiating documents, such as a notice of appeal and notices of appearance, cannot be filed via CM/ECF because CM/ECF requires a case number to file documents, and case numbers are not assigned until after the notice of appeal has been filed.[724] Case-initiating documents can only be filed using one of the methods described in Section 15.6.2.2 or filed via e-mail at *esubmissions@uscourts.cavc.gov*. E-mailed pleadings must be sent as separate PDFs.

When a document is submitted through the CM/ECF system, the system will electronically generate a notice of docket activity. That notice shall constitute both service and proof of service of the submitted document with regard to any party in that case who is also a CM/ECF user.[725]

15.6.2.2 Filing Rules for Unrepresented Parties

Unrepresented parties are not required to use CM/ECF, but may instead e-mail case-initiating documents and pleadings to *self-rep@uscourts.cavc.gov*. Rules regarding filing by e-mail are set forth in Rule 25(b)(3)(B)(i) of the Court's Rules of Practice and Procedure. Specifically, all documents attached to e-mails must be in PDF format; have at the top the names of the parties and the docket number of the case, if one has been assigned; and bear an electronic signature. The subject line of the e-mail forwarding the pleading should include the name of the document, the names of the parties, and the docket number of the case, if available. This method of filing is preferable as delivery is instantaneous, and the party can track, and keep a record of, the e-mail delivery.

A second method of filing is to hand deliver the document to the Office of the Clerk, located at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950.[726] Although U.S. Vet. App. R. 45(a) specifies that the Court "is always open for the purpose of filing," the Office of the Clerk is open only Monday through Friday (except legal holidays) from 9:00 A.M. to 4:00 P.M. Eastern Time.

A third method of filing permitted papers is to mail the paper addressed to the Clerk. Submissions through the U.S. Postal Service shall be deemed received by the Clerk as of the date of postmark; otherwise, the Clerk shall use the actual date of receipt for filing purposes.[727] The Clerk's address is: Clerk of the Court,

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[721] E-RULE 2(b), 3(b).

[722] E-RULE 2(b), 3(b).

[723] Java may be downloaded for free at *http://www.java.com*.

[724] See *Section 15.2*.3.3 and 15.6.5 for a discussion of the substance of case-initiating documents.

[725] VET. APP. R. 25(c)(1).

[726] VET. APP. R. 25(b)(1).

United States Court of Appeals for Veterans Claims, 625 Indiana Ave. NW, Suite 900, Washington DC, 20004-2950.

A fourth method of filing permitted papers and case-initiating documents, applicable to all papers except (a) pleadings that are more than 10 pages in length and (b) briefs of any length, is to send the document by facsimile (fax), addressed to the Clerk at (202) 501-5848. Faxed documents shall be preceded by a cover sheet showing the sender's name, address, and telephone and fax numbers; the Court case number, if one has been assigned, and caption; and the number of pages being sent.[728]

The Clerk shall use the actual date of receipt for filing purposes. If a paper, except a notice of appeal, is received by the Clerk by fax on a nonbusiness day, or on any business day before 7:00 A.M. Eastern Time on that day, it is considered received by the Court on the preceding business day.[729] Therefore, if a case-initiating document or other permitted paper is due to be filed with the Court on a Friday, and the non-represented appellant or advocate sends it by fax so that it is received on the following Monday before 7 A.M., it will be considered to have been timely filed on the preceding Friday. The advocate can confirm that a transmission was received by telephoning the Court (at (202) 501-5970) during its business hours. After the office closes, there is no way to confirm receipt. The Court does not require (and indeed does not want to receive) a confirmation copy of the fax by mail.

*****Advocacy Tip*****

[730] The only way to confirm receipt of any pleading, including the notice of appeal, is to check the Court's case docket on the Court's website (www.uscourts.cavc.gov) because the Court does not provide a confirmation copy of any document that is filed by fax. There may be a one- to two-day delay between the time that a pleading is filed with the Court and when the docket entry appears on the website.

[731] *See* Section 15.6.4.

Although an appellant may file a notice of appeal by fax, U.S. Vet. App. Rule 25 states "the sender bears the risk of fax transmission." Therefore, if the Court does not receive the fax or receives a partial copy, the filing may be deemed untimely. It is always preferable to file the notice of appeal far enough in advance so that the appellant can confirm the Court's receipt of the fax.[730] *If a non-represented party files a notice of appeal through the mail, it is best to send it by certified mail. Although the Court uses the date of postmark to determine the date of filing by mail, occasionally a postmark is illegible. However, a certified mail receipt has been accepted by the Court as proof of the date of filing.*[731]

[732] U.S. Vet. App. R. 25(c)(2).

Additionally, any document submitted for filing with the Court shall be served on all parties in the case.[732] For unrepresented parties, service shall be accomplished by providing a copy of the document to the Secretary's representative, the Office of General Counsel, whose address is General Counsel (027), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420-0002. Proof of service is accomplished by submitting, with the document to be filed, either an acknowledgment by the person served of his or her personal service, or a statement certified by the person(s) who made service, showing the date and manner of service and the

[727] *See* E-Rule 2, 3; Vet. App. R. 25(b)(1)(A).

[728] Vet. App. R. 25(b)(2)(B).

[729] *See* E-Rule 2, 3; Vet. App. R. 25(b)(2)(A).

names and addresses of the persons served.

15.6.3 The Necessity of Filing a Notice of Appearance at the Outset

Rule 46(b)(1)(A) of the Court's Rules of Practice and Procedure states that no attorney or nonattorney practitioner may "appear" in a case on behalf of a party or amicus without first filing "a written notice of appearance in the detail set out in Form 3 of the [Court's] Appendix of Forms"[733] and "a copy of any retainer agreement and any fee agreement for representation before the Court." The Rule further provides that these documents must be filed "no later than the date of the first filing submitted by practitioner on behalf of the appellant."[734]

This does not mean that every attorney or nonattorney practitioner whose name appears on a pleading, motion, or other paper filed with the Court must file a written notice of appearance. It means that on every pleading filed there must appear the name of at least one practitioner who has already submitted, or is submitting simultaneously with the pleading, a written notice of appearance (and, if necessary, a copy of the fee agreement). With the exception of an organization operating under the provisions of *Public Law No. 102-229*, an appearance may not be made in the name of a law firm or other organization.[735] The Court has returned and refused to accept pleadings that do not satisfy this requirement. The Court allows an attorney to file a limited appearance for the purpose of filing a notice of appeal for a veteran.[736]

15.6.4 Computation of Time Periods for Purposes of Filing Papers

For purposes of computing any period of time set by the Court's rules, the Court's orders, or any applicable statutes, the day of the event as of which the time begins to run *will not be included* for purposes of calculating time periods.[737] The last day of the period *will be included*, unless it is a Saturday, Sunday, or legal holiday, in which case the period for filing will be extended to the next day that is not a Saturday, Sunday, or legal holiday.[738] Whenever the rules provide that the time period is to run as of the date of service of a document by the opposing party, and the paper is served by mail, 5 days are added to the date the paper was mailed for purposes of calculating time, except when the paper served is on an appellant or representative located outside any state, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands, in which case 30 additional days are added.[739]

15.6.5 Filing the Notice of Appeal

As described in Section 15.2.3.2, the notice of appeal must be postmarked or received by the Court within 120 days of the proper mailing by the Board of the Board decision. After the Clerk receives the notice of appeal, he

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[733] The Court's Form 3 appears on the Court's website at *http://www.uscourts.cavc.gov/documents/Notice_of_Appearance_Form_3_11-14.pdf* (last visited Apr. 19, 2020).

[734] U.S. VET. APP. R. 46(b)(1)(A).

[735] U.S. VET. APP. R. 46(b)(1)(E).

[736] *See* U.S. Vet. App. R. 46(b)(2)(A). Additionally, the Court allows the Pro Bono Consortium attorneys operating under a grant or contract made in connection with the authority first provided in ***Pub. L. No. 102-229*** to enter limited appearances for the purpose of case screening and referral. U.S. Vet. App. R. 46(b)(2)(B).

[737] *See* U.S. VET. APP. R. 26(a)(1).

[738] U.S. VET. APP. R. 26(a)(2). The Court's calendar, including federal holidays, can be found here: *http://www.uscourts.cavc.gov/events.php* (last accessed Apr. 19, 2020).

[739] *See* U.S. VET. APP. R. 26(c).

or she sends a notice of docketing informing the appellant and appellant's representative of the date of receipt.[740]

Although the rules provide a standardized form for the notice of appeal, "correspondence will be liberally construed in determining whether it is a [notice of appeal]."[741] Because the notice of appeal will likely contain personal identifiers, that electronic record will be locked and accessible through CM/ECF only to CM/ECF users who have entered a notice of appearance in that case. Failure to timely file a notice of appeal in accordance with the law will result in dismissal of the appeal.[742]

The Court requires a filing fee of $50 to accompany the notice of appeal.[743] If the filing fee will impose a financial hardship, the appellant may complete and file a declaration of financial hardship form (it is preferable to file this with the notice of appeal).[744] The declaration of financial hardship form is provided on the Court's website.[745] If the Court does not waive the filing fee, the appellant must pay the required filing fee within fourteen days of the Court's order denying the motion, or the appeal may be dismissed.[746] The Court has traditionally been quite liberal in granting waivers of the filing fee.

The failure to pay a filing fee, file the declaration of financial hardship, or serve the notice of appeal properly does not automatically result in dismissal of the appeal, but the Court could consider it as grounds for the dismissal of the appeal in the exercise of its discretion.

15.6.6 Access to the Appellant's VA Claims File After the Filing of the Notice of Appeal

The rules provide that "[r]eview in the Court shall be on the record of proceedings before the Secretary and the Board."[747] Therefore, in order to represent an appellant effectively, the advocate should have a complete copy of the appellant's VA claims file. After a notice of appeal has been filed, the VA is required by the rules to provide the appellant and any representative access to the Record Before the Agency (RBA), which constitutes the original documents that were in the record before the Board (that is, the appellant's VA claims file, in almost all cases).[748] The rules require the Secretary to permit the appellant or the appellant's representative to inspect and copy the original record, but they do not specify where or how the original claims file is to be made available. The rules simply provide that such inspection and copying shall be subject to reasonable regulation by the Secretary.[749]

As the VA has moved towards an electronic system, namely Virtual VA and Veterans Benefits Management System (VBMS) electronic databases, new issues have arisen regarding what constitutes the RBA and whether

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[740] U.S. VET. APP. R. 45(b)(1).

[741] U.S. VET. APP. R. 3(c). The standardized notice of appeal form is attached to the rules of practice as Form 1 and can also be found here: *http://www.uscourts.cavc.gov/documents/Form1.pdf* (last visited Apr. 19, 2020). See *Section 15.2*.3.3 for a discussion of the required contents of a notice of appeal.

[742] *See* *Section 15.2*.3.2.1 for a discussion of the Court's procedure once an appeal has been identified as untimely.

[743] *See* U.S. VET. APP. R. 3(f). The filing fee is also required for a petition for a writ of mandamus or of prohibition. *See* U.S. VET. APP. R. 21(a).

[744] *See* U.S. VET. APP. R. 3(f), 24.

[745] The standardized form is attached to the rules of practice as Form 4 and can be found here: *http://www.uscourts.cavc.gov/documents/Form4.pdf* (last visited Apr. 19, 2020).

[746] *See* U.S. VET. APP. R. 3(f), 24.

[747] *38 U.S.C.S. § 7252(b)*.

[748] *See* U.S. VET. APP. R. 10(a), (d).

[749] *See* U.S. VET. APP. R. 10(a).

the appellant's representative is entitled to access paper copies of the record. For example, in *Robinson v. McDonald*, the Court held that the VA is obligated to keep the paper copy of a claims file that has been scanned into the VA's electronic database.[750]

The appellant or representative should expect to receive the RBA by mail as a CD in PDF format. The RBA should contain all of the veteran's service records, VA medical records, evidence submitted by the veteran, and benefits paperwork, including all of the documents generated for all of the claims the veteran has ever filed with the VA, which can be several thousand pages. The Board decision on appeal should be the first document in the RBA, but the RBA typically will not otherwise be in any chronological order. Sometimes the RBA will include bookmarks, but this is not consistent. The RBA is searchable and paginated, with page numbers noted on the bottom right hand side of each document.[751]

In cases in which the claims file reviewed by the Board was in paper, rather than electronic format, advocates can gain access to an original paper claims file for inspection at the OGC in Washington, D.C.[752] The OGC will allow the appellant or representative to copy the claims file on the OGC's copying machine at no cost. Appellant or appellant's counsel who lives outside of the Washington, D.C. area may also request that the claims file be physically transferred to a VA office (including ROs, district offices, or medical centers) located near him or her. This will allow appellant or appellant's counsel an opportunity to review the original claims file. Using this method, neither appellant nor appellant's counsel is allowed to make copies of the documents, instead the VA office will make copies of documents tabbed by appellant or appellant's counsel.

15.6.7 Motion Practice

U.S. Vet. App. R. 27 governs the filing of motions. As subsection (a) of that rule provides, each motion must:

- contain or be accompanied by any material required by any of the rules governing such a motion;
- state with particularity the specific grounds on which it is based;
- describe the relief sought; and

if the appellant is represented

- indicate whether the motion is opposed and, if so, whether the moving party has been advised that a response in opposition will be filed. If the nonmoving party cannot be reached to provide their position, the motion should describe the steps taken to contact the nonmoving party to determine their position on the motion.

Motions should not be accompanied by a proposed implementing order.[753]

No more than one subject may be addressed in any non-dispositive motion. Therefore, a party may not file a motion for an oral argument in combination with a motion for reconsideration of a panel decision.[754] A motion or response to a motion may not exceed 10 pages in length.[755]

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[750] *28 Vet. App. 178, 192 (2016)*.

[751] U.S. VET. APP. R. 10(a).

[752] The office at which the file may be inspected is different from the OGC's mailing address. Files may be inspected in the document review room at the office of Professional Staff Group VII of the OGC on the mezzanine level of 90 K Street NE in Washington, D.C. The telephone number of this office is (202) 632-7143. It is wise to telephone in advance to arrange to review the file.

[753] U.S. VET. APP. R. 27(a).

[754] U.S. VET. APP. R. 27(e).

[755] U.S. VET. APP. R. 27(d).

Rule 26 governs motions for extension of time to file pleadings with the Court. The rule has two components. The first component is that one or more extensions of time totaling no more than 45 days may be granted for each particular pleading upon a showing of "good cause."[756]

The Court rule does not define "good cause," but its practice is to consider a request for an extension based on workload consideration as good cause. Thus, parties have readily been able to obtain 45 days worth of extensions for a particular pleading simply by stating in a motion for extension of time that due to counsel's workload more time is necessary to complete the pleading. The Court greatly prefers that motions for extension based on good cause be for the full 45 days, since this avoids the extra clerical time that would result from handling multiple requests for shorter extensions. Nothing prevents a party from filing the pleading before the extended deadline.

The second component of the rule on extensions is that an extension of time to file on a due date that is more than a total of 45 days after the original due date of a particular pleading will be granted only for "extraordinary circumstances." Although the rule does not define "extraordinary circumstances," it specifically states that "workload considerations" do not constitute "extraordinary circumstances."[757] The Court also requires that a party seeking an extension of time beyond a total of 45 days for any particular pleading must file such a motion no later than 14 days before the due date of the pleading sought to be extended. Any extension of time based on extraordinary circumstances that is filed later than the 14 days before the due date is deemed denied if it is not acted upon by the Court prior to the due date for which an extension is sought.[758] The bottom line is that extensions of time beyond 45 days are difficult to obtain.

All motions for extension of time must contain the following: (1) the current due date to be extended, (2) the revised due date sought, (3) the total number of days of extensions previously granted to the movant both for the same pleading as well as for the entire merits phase of the case, (4) the total number of days of extension previously granted by the Court to the other party(ies) during the merits phase of the case,[759] and (5) a statement describing the steps taken to contact the other party(ies) to determine whether the motion is opposed and whether the other party advised the movant that an opposition to the motion will be filed.[760]

If the nonmoving party is opposed to a motion for extension of time, a written opposition must be filed with the Court within five days after service of the motion. The Court will treat the motion as being unopposed if no opposition is filed within this time period. The Court will grant no extensions of time to file an opposition. Because the Court treats motions for extensions of time as unopposed if no written opposition is filed, it is important that the nonmoving party file a written opposition even it is only a single-page opposition.[761]

No motion for extension of time may be combined with any other motion.[762] Therefore, a party may not file a pleading requesting both an extension of time and a motion for a stay of proceedings.

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[756] U.S. VET. APP. R. 26(b); *see* [Coley v. Wilkie, No. 19-0678(E), 2020 U.S. App. Vet. Claims LEXIS 203, at *3 (Feb. 5, 2020)] (holding that the "good cause" standard set forth in Rule 26(b) applies to the Secretary's response to an EAJA application).

[757] U.S. VET. APP. R. 26(b).

[758] U.S. VET. APP. R. 26(b). In certain cases, motions for leave to file a motion for extension of time, out of time, have been granted. However, the authors of this Manual do not recommend this practice.

[759] U.S. VET. APP. R. 26(b)(1)(C) and (E). When a party is seeking an extension of time to file a pleading in the attorney-fee phase of the case, the movant must provide the Court with the total number of days previously granted for the particular pleading in the attorney-fee phase of the case, as well as the total number of days granted to both parties in the attorney-fee phase of the case. Thus, for extensions during the fees phase, it is not necessary to discuss all previous extensions of time granted by the Court to the parties during the merits phase of the case. U.S. VET. APP. R. 26(b)(1)(C) and (E).

[760] U.S. VET. APP. R. 26(b)(1).

[761] U.S. VET. APP. R. 26(b)(2).

[762] U.S. VET. APP. R. 26(d).

15.6.8 Creation of the Administrative Record to Be Submitted to the Court

Although the Veterans' Judicial Review Act states that the Court shall base its decision on the record that was before the Board when it rendered its decision,[763] in almost all cases the Court never sees or has access to this entire record. VA claims files are often quite voluminous, and they often include documents relating to claims that were decided long ago and are not related to the claim(s) before the Board.[764] Instead of requiring that the entire claims file be filed with the Court, the rules establish a procedure for the parties to obtain and review the record and then to decide what materials within the claims file should be before the Court.[765] This collection of documents is called the "Record of Proceedings" and is filed after the completion of, rather than before, the briefing process.[766]

Well before the Record of Proceedings is compiled, shortly after the Clerk has issued the notice of docketing, the Secretary will send to the unrepresented appellant a form that will allow the appellant to request the RBA in either paper or electronic format. If an appellant is represented, the RBA will be sent to appellant's counsel in electronic format.[767]

If the RBA is requested in electronic format, the VA will scan all of the documents and save them to a CD in PDF format. A major advantage of this format over paper format is that the CD is "searchable," meaning that one can search for a word or term in the document. However, the search feature will not recognize handwritten notes.

The RBA must be sent to appellant (or appellant's counsel if appellant is represented) within 60 days of the date of the Clerk's notice of docketing and includes a copy of all materials that were in the claims file on the date the Board issued the decision, as well as any information not contained in the claims file but upon which the VA or the Board relied, and a list of any documents found in the claims file or upon which the VA or the Board relied that cannot be duplicated. The RBA is not filed with the Court. The contents of the RBA must be paginated by the Secretary with the Board decision appearing as the first document.[768]

Any dispute that arises as to the preparation or content of the RBA must be brought to the Court's attention by motion within 19 days of service upon the appellant. The parties must first make a good faith effort to resolve the dispute and must describe those efforts in the motion. An opposing party may submit to the Clerk for filing a response to such a motion within 7 days after the motion is served.[769]

The briefing process begins 79 days after the date that the Secretary serves the RBA.[770] When referring to a document contained in the RBA, the parties must provide a pinpoint cite to the page number on which the

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[763] *See* 38 U.S.C.S. § 7252(b).

[764] See Section 15.6.6 for a discussion about obtaining the appellant's claims file.

[765] In *Homan v. Principi, 17 Vet. App. 1, 3 (2003)*, the CAVC rejected appellant's argument that an amendment to *38 U.S.C.S. § 7261(b)*, found in title IV of the Veterans Benefits Act of 2002, ***Pub. L. No. 107-330, 116 Stat. 2820*** (2002), required the Court to review the entire claims file of the appellant and eliminated the necessity for the parties to undergo the designation of the record and counter designation process.

[766] U.S. VET. APP. R. 28.1.

[767] The appellant has a right to inspect paper source documents that were part of the record of proceedings before the agency related to the claim on appeal even where the Secretary has converted paper documents into electronic records. *Robinson, 28 Vet. App. at 192*.

[768] U.S. VET. APP. R. 10(a).

[769] U.S. VET. APP. R. 10(b). Although U.S. VET. APP. R. 10(b) provides that any such response is due 14 days from the date of service, 5 additional days are added because the Record Before the Agency is served by mail. *See* U.S. VET. APP. R. 26(c).

[770] U.S. VET. APP. R. 10(b); U.S. VET. APP. R. 31(a).

document appears, followed by the page numbers of first and last pages on which the full document cited appears in parentheses.[771]

Fourteen days after the appellant files the reply brief, or, if no reply brief is filed, after the date that the reply brief was due, the Secretary must prepare the Record of Proceedings.[772] The Record of Proceedings consists of any document from the RBA that is cited in either party's brief(s), the Board decision, and any other documents before the Secretary and the Board that are relevant to the issues to be decided by the Court. The Record of Proceedings is arranged and paginated in the same order as the documents appeared in the RBA, and because certain documents in the RBA may not be included in the Record of Proceedings, this arrangement may result in pages not having consecutive numbers, e.g., page 22 may be followed immediately by page 43.[773]

Any disputes between the parties relating to the preparation or content of the Record of Proceedings should first be resolved by the good faith efforts of the parties. If the parties cannot resolve the dispute, within 14 days of service of the Record of Proceedings, a motion must be made to the Court to resolve the dispute.[774] An opposing party may file a response to such a motion not later than 7 days after the motion is served.[775]

15.6.8.1 Sealing the Court's Records to Prevent Public Access

The records maintained by the VA with regard to claims for benefits are confidential, and the agency is generally prohibited by statute from disclosing the contents of these records to the public.[776] Claimants therefore have an expectation that these records will be kept confidential.

The claimant's expectation of confidentiality of their records should not extend to an appeal of their case to the Court. There is a presumption that the public is entitled to access to records filed in federal court, and this presumption is codified in *38 U.S.C.S. § 7268(a)*, which provides that "all decisions of the [CAVC] and all briefs, motions, [and] documents … received by the Court … shall be public records open to the inspection of the public."[777]

The Court's decision in *In re a Motion for Standing Order*[778] authorizes the VA to file with the Court any documents in the claims file except for those covered by *38 U.S.C.S. § 7332*, which controls disclosure of treatment records concerning drug and alcohol abuse, human immunodeficiency virus, and sickle cell

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[771] U.S. VET. APP. R. 28. For example, if the Board decision is located on pages 2–14 of the Record Before the Agency and the advocate wants to cite to page 4 of the Board decision, the citation will appear as R. at 4 (2–14).

[772] U.S. VET. APP. R. 28.1.

[773] U.S. VET. APP. R. 28.1.

[774] U.S. VET. APP. R. 28.1. Unlike the time limit to respond to the RBA, an additional five days is not added because the Record of Proceedings is not served by mail.

[775] U.S. VET. APP. R. 28.1.

[776] *See* *38 U.S.C.S. § 5701* (providing that all records pertaining to claims filed with VA are "confidential and privileged" and limiting their disclosure by the agency); *38 U.S.C.S. § 7332* (providing that veterans' records relating to "drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia" are confidential and limiting their disclosure by the agency); Privacy Act of 1974, *5 U.S.C.S. § 552a* (limiting circumstances under which government agencies may disclose records of individuals); *but see* *Release of VA Records Relating to HIV, 81 Fed. Reg. 51,836* (proposed Aug. 5, 2016). *See generally* *In re Motion for Standing Order, 1 Vet. App. 555 (1990)*.

[777] *See generally* *Pritchett v. Derwinski, 2 Vet. App. 116 (1992)*; *Stam v. Derwinski, 1 Vet. App. 317 (1991)*.

[778] *1 Vet. App. 555 (1990)* (Court issued standing order requiring Secretary to transmit all records and materials not subject to special protection under *38 U.S.C.S. § 4132* (recodified in 1991 as *38 U.S.C.S. § 7332*) that are necessary to resolution of an action pending before the Court).

anemia. U.S. Vet. App. R. 48 sets forth procedures the parties should follow if the VA or the appellant identifies any records covered by Section 7332 during the record designation process and at least one party believes that such a record should be made a part of the record on appeal.[779] This process may result in the assignment of a new case number, recaption of the case using an encoded identifier instead of the appellant's name, or the sealing of the record on appeal and the file of the Court.[780]

Those non-represented appellants and representatives who are utilizing E-Filing must file sealed material or motions to seal using the CM/ECF system and a specific docket entry. Sealed material must also be filed in accordance with U.S. Vet. App. Rules 10(d)(2) and 48. If the motion to seal is granted, electronic access to the sealed material will be automatically limited to the Court and those authorized to file documents in that case.[781]

If there are records other than those covered by Section 7332 that one of the parties wishes to make a part of the record on appeal and that the appellant wishes to keep from public view, the advocate should take action during the record designation process by filing a motion pursuant to U.S. Vet. App. R. 48. The advocate may suggest that the Court seal the records using the procedures discussed in Rule 48(a) for sealing records.[782]

In getting the Court to seal non-Section 7332 records, the burden is on the appellant to demonstrate that a cognizable privacy interest is involved that overcomes the presumption of public access.[783] In other words, articulable facts, rather than unsupported conjecture, must underlie the reasons the appellant wishes the records sealed. The Court has denied a motion to seal records when there was only "unsupported conjecture that if the public is given access to the records of this appeal [the appellant] may be discriminated against due to her medical condition."[784] However, even where the appellant has provided articulable facts demonstrating why the record should be sealed, the Court will not automatically seal the records at issue. Rather, "[i]t is the duty of the Court to weigh and balance the various factors involved … and arrive at a resolution of the matter that, in each case, adequately addresses the needs of the parties involved—that best balances the competing interests."[785]

15.6.9 The Staff Conference Held Prior to the Filing of Appellant's Brief

The Court has adopted two major innovations that have expedited the resolution of appeals and conserved judicial resources. One is the use of single judges to decide most of the contested appeals, an innovation discussed in Section 15.6.1. The other is the use of the Court's Central Legal Staff (CLS) to promote settlements on appeals, with minimal involvement by a judge of the Court. This section discusses the latter innovation.

The Court's dispute resolution process has been a major success. Part of the reason for its success is that the Board often commits legal errors. During fiscal years 2002–2019, of the 58,690 appeals terminated by the Court on the merits, in 43,913 appeals (or approximately 74.8 percent), the Court has either vacated the Board decision, in whole or in part, and remanded the case to the Board for further proceedings, or reversed the

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[779] *See* 38 C.F.R. § 1.511 (2020) (disclosure of claimant records in connection with judicial proceedings generally).

[780] *See* U.S. VET. APP. R. 48; *ZN v. Brown, 6 Vet. App. 183 (1994)*.

[781] U.S. VET. APP. INTERIM E-RULE 8; *see also* U.S. VET. APP. R. 10, 48.

[782] *See* U.S. VET. APP. R. 48(b). Examples of cases sealed as a result of the motion of the appellant are *YU v. Brown, 8 Vet. App. 184 (1995)* (*Order) and EF v. Derwinski, 1 Vet. App. 324, 325 (1991)*.

[783] *See* *Mack v. Derwinski, 2 Vet. App. 345, 346 (1992)*; *Pritchett, 2 Vet. App. at 120*; *Stam, 1 Vet. App. at 319*.

[784] *Stam, 1 Vet. App. at 320*.

[785] *Pritchett, 2 Vet. App. at 120*. Even after the Court has sealed records, it will unseal them at the request of the appellant. *See* *YI v. Principi, 15 Vet. App. 265, 267 (2001)*.

decision of the Board and ordered the Secretary to grant relief to the appellant.[786] The large majority of these decisions vacating or reversing the Board decision were based on a finding that the Board committed one or more legal errors.

This is quite a high error rate. Fortunately for claimants, in the majority of these cases, the errors are identified and the appeal is resolved without the necessity of either full briefing by the parties or expenditure of time by the Court. This relatively speedy resolution occurs through the filing of either a joint motion to vacate the Board decision and remand or a joint motion to dismiss accompanied by a settlement agreement.

Some of these joint motions result because counsel for one of the parties contacts opposing counsel early in the appeals process and initiates settlement negotiations, without any help from the CLS. For example, the Court of Appeals Litigation Group of the OGC of the VA (which represents the appellee, Secretary of Veterans Affairs, on all appeals at the CAVC) is comprised of teams of appellate attorneys, with each team including at least one attorney who screens Board decisions shortly after appeals are filed to detect legal error. This sometimes results in a telephone call from counsel for the Secretary to counsel for the appellant, before the record is even developed by the Secretary, suggesting that the Board decision contains certain legal errors and that the parties settle the case with a joint motion for remand. This type of early resolution, however, is rare.

More often, joint motions are reached somewhat later in the appeals process, prodded by a Rule 33 staff conference.[787] Shortly after the Clerk has sent the notice to the appellant that his or her brief is due within 60 days of the date of the notice, a member of the CLS will schedule a three-way telephone conference between appellant or appellant's counsel, counsel for the Secretary, and the CLS attorney. The Court issues an order officially setting that date and time for the telephonic briefing conference, identifying the attorney from CLS who will conduct the conference, stating that the purpose of the conference is to discuss the issues to be briefed and the future course of the appeal, requesting that the parties notify CLS if they reach an agreement on a joint disposition of any or all issues prior to the conference, and requiring that the parties attend the briefing conference with authority to enter into a joint motion for remand.

The Court's order will also direct the appellant's advocate to serve on the Secretary and CLS attorney a briefing memorandum outlining the issues that the appellant intends to raise on appeal. This briefing memorandum may not exceed 10 pages and must be served on the Secretary and the CLS attorney no later than 14 days prior to the date that the briefing conference is scheduled to take place.[788] In addition, the memorandum must be accompanied by "pertinent material in the record before the agency."[789] Often, this requirement puts the appellant's advocate in a difficult position because he or she may not receive the order until mere days before the briefing memorandum is due. In that case, if the advocate cannot meet the deadline for serving the memorandum, he or she should file a motion with the Court asking it to reschedule the briefing conference. The motion should request that the date of the conference be postponed to a date and time certain (acceptable to both the CLS attorney and counsel for the Secretary).

The Rule 33 briefing memorandum should identify the errors made in the Board decision with citations to the RBA. Relevant legal authorities should also be cited in support of the advocate's arguments. The memorandum and redacted pertinent material from the RBA must be faxed or e-mailed to the CLS attorney, at *cls-calendar@uscourts.cavc.gov*, and to the Office of General Counsel attorney, whose contact information can be found on the notice of appearance filed with the Court. A certificate of service, but not the memorandum or RBA excerpts themselves, must be filed with the Court indicating the date of the appellant's submission of the memorandum to the Secretary and to the CLS attorney, the specific manner of the service (e-mail or fax), and

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[786] *See* Annual Reports of the CAVC on the CAVC's website (*https://www.uscourts.cavc.gov/report.php*) (last visited Apr. 19, 2020).

[787] *See* U.S. VET. APP. R. 33.

[788] U.S. VET. APP. R. 33(b)(1) and (2).

[789] U.S. VET. APP. R. 33(b)(1).

the names and addresses of the persons served. A sample briefing conference memorandum may be found at Appendix 15-B.

Sometimes, counsel for the parties confer prior to the conference to discuss their positions on how the appeal should be resolved, and sometimes these pre-conference discussions bear fruit and an agreement is reached. In that case, the parties should contact the CLS attorney and may choose to cancel the conference. If the conference is cancelled, appellant's brief must be filed 60 days after the Court's notice to file appellant's brief. Often, however, the staff conference is conducted as scheduled, either because counsel for the parties have not conferred prior to the conference (there is no requirement that they confer beforehand) or because pre-conference discussions have not resulted in a settlement of all of the issues. When pre-conference discussions do not result in a settlement of the issues, advocates are advised to go forward with the conference because the CLS attorney may be able to exert pressure on the VA attorney to settle the case. In addition, while nothing that occurs during the conference may be mentioned to a judge, the CLS attorney prepares a legal memorandum to the judge assigned to the case, so there may be a benefit to going forward with the conference if there is any doubt regarding the parties' ability to reach a joint disposition.

The conference may end with counsel for the parties tentatively agreeing on a resolution of all of the issues, in which case counsel for one of the parties (typically counsel for the Secretary) will volunteer to draft a joint motion for remand (or settlement agreement in the relatively rare event that counsel for the Secretary agrees to an outright reversal of the Board's decision) for review by opposing counsel. Alternatively, the conference may conclude with the parties desiring to continue to explore the possibility of a joint resolution after further research or consultation with the client. Finally, the conference may end with a clear understanding that a joint agreement will not occur and that the appeal will have to be resolved by a judge or a panel of judges. Following the conference, either the joint motion, settlement agreement, or appellant's initial brief are due 30 days after the date of the conference or 60 days after the Court's notice to file appellant's brief, whichever is later.[790]

15.6.10 Drafting a Settlement Agreement or Joint Motion to Resolve the Appeal

As indicated above, counsel for the parties often are able to agree to a settlement of an appeal without briefing the case or the intervention of a judge. The settlement typically takes one of two forms, either an outright grant of benefits or a remand to the Board.

If the parties agree that the appellant is entitled to an award of additional benefits outright (for example, service connection, a higher disability rating, or an earlier effective date) the parties typically submit two documents: (1) a settlement agreement in which the Secretary agrees to award additional, specified benefits and (2) a joint motion to dismiss the appeal in light of the settlement agreement. Examples of these two documents appear as Appendix 15-F at the end of this Chapter.

In most cases ending in a settlement, however, the relief the parties typically agree to is to vacate the Board decision and remand the case to the Board for correction of one or more legal errors.

In *Stegall v. West*, the Court ruled that "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 a remand, either personally or as … 'head of the Department.'"[791] In the past, the Court has held that the compliance measures outlined in *Stegall* would not attach unless a Court Order vacating and remanding based on the joint motion for remand expressly incorporated the terms of the joint motion. However, now the Court uses the following language in its orders:

> ORDERED that the motion is granted. The matter is remanded, pursuant to *38 U.S.C. § 7252(a)*, for action consistent with the terms of the joint motion. *See Forcier v. Nicholson, 19 Vet.App. 414, 425 (2006)*; *Stegall v. West, 11 Vet.App. 268, 271 (1998)*.

Because the Court relies on the joint motion in its remand Order, the wording of a joint motion for remand presents counsel for appellant with a golden opportunity to shape the future course of proceedings in the case.

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[790] U.S. VET. APP. R. 31(a)(1).

[791] *11 Vet. App. 268, 271 (1998)*.

Thus, the most important consideration in drafting a joint motion to vacate the Board decision and remand involves whether the Board and/or the RO on remand will be affected by what is said in the joint motion for remand. It does little good for an appellant to obtain a Court Order vacating the Board decision and remanding based on a joint motion in which, for example, the parties agree that the VA erred by not obtaining a medical nexus opinion, but the motion is drafted in such a way that the agency on remand feels free to ignore the words of the motion and deny the claim without obtaining any additional medical evidence.[792]

Thus, because a joint motion imposes on the VA a duty to ensure compliance, the more detailed and precise the description in the joint motion for remand is with regard to what the agency is required to do on remand, the greater the chance the agency will actually do what it should do after the case is remanded.

Another reason the wording of a joint motion for remand is important derives from the fact that these motions typically state that a copy of the joint motion will be placed in the appellant's claims file. Placing a copy in the claims file not only helps avoid misunderstandings by VA adjudicators about exactly what the parties have agreed they are required to do, it also helps VA adjudicators understand what errors were made in the past and the reasons why they are being required to take certain actions.

Accordingly, the more detailed and precise the joint motion is about what legal errors were made in the past and why the agency needs to accomplish on remand what the joint motion requires, the more likely it will be that VA adjudicators will react on remand by granting the claim. The ideal joint motion narrows the legal theories VA adjudicators would otherwise have available to them to deny the claim on remand. The joint motion can accomplish this result by pointing out the errors that were made in the past and that cannot be repeated in the future and by making favorable conclusions of law that bind the agency in the future. In other words, the ideal joint motion is crafted so that the VA adjudicators who are assigned the case on remand will come to the conclusion, after reading and implementing it, that they have no real choice but to grant the claim.

The Court has held that the scope of a joint motion for remand may be considered in determining whether the Board had a duty on remand to address issues not addressed in the motion.[793] Meaning, the lack of discussion of a legal or factual issue in the joint motion for remand may later lead the Court to rule, in a second appeal challenging the Board decision on remand, that the appellant waived the right to raise during the second appeal an issue that was not discussed in the joint motion for remand or in the claimant's argument to the Board on remand.

There are several techniques that counsel for appellant can use to avoid issue preclusion in a potential second appeal. First, you can try to convince the VA to include in the joint motion for remand (JMR) a statement that even though the Secretary disagrees with a specific allegation of error by the appellant, the Board should address this specific allegation of error on remand. Second, in a case in which appellant filed an initial brief before the JMR, you should request that the JMR include a statement that the appellant's initial brief will be included in the appellant's VA claims file (thereby preserving all arguments advanced in the initial brief). Third, you can try to persuade the VA to include in the JMR the following language:

> A remand is meant to entail a critical examination of the justification of the decision. … [The Board should fully assist appellant and] reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case.[794]

The Court in *Carter* held that this language creates an enforceable provision and "[r]equires the Board to examine the record for any issues reasonably raised therein."[795]

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[792] See *Kutscherousky v. West, 12 Vet. App. 369 (1999)* (per curiam) (holding that on remand the appellant may submit new evidence to the Board); *Carter, 794 F.3d at 1342* (holding that the veteran's counsel must be provided adequate notice of Board's deadline for submission of new evidence on remand).

[793] *Carter, 26 Vet. App. at 542–43, vacated and remanded on other grounds by Carter v. McDonald, 794 F.3d 1342 (Fed. Cir. 2015)*.

[794] *Fletcher v. Derwinski, 1 Vet. App. 394, 396 (1991); see also Atencio v. O'Rourke, 30 Vet. App. 74, 88 (2018)*.

[795] *26 Vet. App. at 543*.

*****Advocacy Tip*****

In order to avoid a RO or Board decision that ignores the joint motion for remand or a Court decision on a second appeal preventing the appellant from raising an issue not expressly addressed in a previous joint motion, the authors of this Manual recommend including the following language in any joint motion for remand:

> *The parties request that the Court vacate the Board decision and remand for readjudication, to the extent discussed herein. Upon remand, Appellant may submit additional evidence and argument on the questions at issue, and the Board may "seek any other evidence it feels is necessary" to the timely resolution of Appellant's claim. Kutscherousky v. West, 12 Vet. App. 369 (1999). Before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof and an opportunity to respond thereto. See Austin v. Brown, 6. Vet.App. 547 (1994); Thurber v. Brown, 5 Vet. App. 119 (1993). Further, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case."Fletcher v. Derwinski, 1 Vet. App. 394, 397 (1991). VA will incorporate Appellant's brief, this Joint Motion for Remand, and the Court's Order with the claims file for consideration in its readjudication of the claim. See Breeden v. Principi, 17 Vet. App. 475 (2004). The Court has noted that remand confers on the Appellant a right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. See Stegall v. West, 11 Vet. App. 268, 271 (1998). Finally, the Board shall provide this claim expeditious treatment, as required by 38 U.S.C. § 7112.*

In addition, if the Board decision denied multiple claims, but the joint motion does not address all of the claims, care must be exercised to ensure that that the joint motion does not affect the appellant's right to pursue a future motion to revise the Board's decision on the remaining claims based on clear and unmistakable error (CUE).[796] The Court has made clear that a notice of appeal confers with it jurisdiction over all claims finally denied in a Board decision, and an appellant may not seek revision based on CUE of the Board's denial of claims that the Court affirms. However, if the Court *dismisses* the appeal as to a certain claim, the appellant is not precluded from seeking revision of the Board's denial of that claim based on CUE.[797] Accordingly, advocates should be sure to include in the JMR language that the parties agree the Court should *dismiss* the appeal as to those claims the Board denied that are not addressed in a joint motion.

Because a joint motion vacates the underlying Board decision, care must also be exercised to ensure that favorable decisions by the Board (either a grant of benefits or a favorable factual finding or legal conclusion) are not vacated as well. For example, in a multiple-claim case in which the Board granted a claim in whole or in part (e.g., the Board granted entitlement to service connection for one disability or granted a higher rating for an already-service connected disability), language should be added to the joint motion indicating that the parties do not wish to disturb the favorable part of the Board's decision, e.g., "the parties do not wish to disturb that part of the Board's decision that granted entitlement to service connection for a back disability." This would be similarly applicable in a case in which the Board made a favorable factual finding (e.g., the presumption of soundness had not been rebutted) or legal conclusion (e.g., new and material evidence had been submitted). The addition of such language to a joint motion for remand will help ensure that the Board does not re-visit an issue that had been favorably resolved.

In *Bly v. Shulkin*,[798] the Federal Circuit held that remand orders based on consent are appealable until 60 days after the entry of the remand order.[799] Following this decision, the Court began waiting 21 days after the joint

[796] Motions to revise a prior Board decision based on CUE are discussed in *Section 14.4*.3 of this Manual.

[797] *See Cacciola v. Gibson, 27 Vet. App. 45, 54, 58 (2014)*; *see also Pederson v. McDonald, 27 Vet. App. 276, 283–84 (2015)*.

motion for remand was granted to enter judgment and 60 days after that to enter mandate. The effect of this change was that instead of the veteran's case being remanded to the Board several days after the joint motion is filed, the case would linger for several months before being remanded.

In response to *Bly*, parties began including the following language in the JMR in order to avoid a delay in the case being remanded to the Board:

> The parties agree that this joint motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded except the parties' right to appeal the Court's order implementing this JMR. The parties agree to unequivocally waive any right to appeal the Court's order on this JMR and respectfully ask that the Court enter mandate upon the granting of this motion.

The Court's order granting a JMR with this language will note that as part of the motion, the parties affirmatively waive any right to appeal the matter. The effect of this waiver is that the claimant will not have to wait for judgment and mandate to be issued separately. Instead, the Court's mandate will be issued simultaneous with or shortly after the order is issued and the case will be remanded to the Board shortly thereafter. Effective February 13, 2020, the Court amended Rules 36 (Entry of Judgment), 41 (Mandate), and 42 (Voluntary Termination of Dismissal) of the Court's Rules of Practice and Procedure to reflect this practice.[800]

An example of a detailed joint motion for remand to which the Secretary agreed appears as Appendix 15-D at the end of this Chapter. It contains concessions by the VA of several specific errors and detailed instructions to agency adjudicators about the actions that must be taken on remand.

15.6.11 Motions for Stay of Proceedings to Allow the Parties to Negotiate a Settlement

The Court may stay, or pause, proceedings in a case when the parties are attempting to negotiate a settlement or joint motion for remand.[801] Unless otherwise ordered, when a stay expires or is lifted, the preexisting filing schedule resumes at the point at which it was stayed.[802] Prior to the expiration of a stay, a party or an organization may move for continuation of the stay.[803] A motion to stay may not be combined with any other motion.[804]

15.6.12 Preparing Appellant's Main Brief

The appellant's brief is the advocate's principal opportunity to convince the Court that the Board decision should be set aside. It is undoubtedly the most important document the advocate will file with the Court. Its importance is magnified by the fact that a prerequisite to oral argument is that the appeal must be referred to a panel or the full Court for a decision, which the Court rarely does,[805] and that the failure to identify in the initial

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[798] *883 F.3d 1374 (Fed. Cir. 2018)*.

[799] *Bly, 883 F.3d at 1376–77*.

[800] U.S. VET. APP. R. 41(c)(2), 42, 36(b)(1)(B).

[801] U. S. VET. APP. R. 5(a)(2).

[802] U.S. VET. APP. R. 5(b).

[803] U.S. VET. APP. R. 5(c).

[804] U.S. VET. APP. R. 5(d).

[805] From FY 2003 through FY 2019, the Court held a total of 357 oral arguments, representing less than one percent of the appeals filed. *See* Annual Reports section of the CAVC's website located here: *http://www.uscourts.cavc.gov/report.php* (last visited Apr. 19, 2020).

brief a particular issue or claim may forever foreclose the appellant from raising the issue or claim thereafter before the Court or a higher court.

U.S. Vet. App. R. 28 and R. 32 contain instructions for the contents and form of the brief. The contents and form are similar to the briefs that are filed in the U.S. courts of appeals pursuant to the Federal Rules of Appellate Procedure.[806] An appellant's brief must contain, in the following order, these separate divisions:

(1) a table of contents, with page references;

(2) a table of cases (alphabetically listed), statutes, other authorities cited, and pages of the RBA cited in numerical order by record citation with a brief description of the document cited and references to the page of the brief where they are cited, unless the case is expedited under U.S. Vet. App. R. 47;

(3) a statement of the issues;

(4) a statement of the case, showing briefly the nature of the case, the course of proceedings, the result below, and the facts relevant to the issues, with appropriate references to the record on appeal;

(5) an argument, beginning with a summary and containing the appellant's contentions with respect to the issues and the reasons for those contentions, with citations to the authorities and relevant parts of the record on appeal; and

(6) a short conclusion stating the precise relief sought.[807]

Covers are not required on briefs or appendices, but briefs must begin with a separate caption page.[808] Principal briefs may not exceed 30 pages. This page count does not include the table of contents; the table of citations; any appendix containing superseded statutes, rules, regulations, and unpublished authorities; or the certificate of service.[809] Perhaps the most important factor for an advocate to consider in preparing an initial brief is that the brief should raise all of the legal issues that the appellant may ever wish to litigate in the case, either at the Court, or, if the case is further appealed, before the Federal Circuit. Both the Court and the Federal Circuit have refused to entertain legal arguments that were either not raised at all before the Court or were raised for the first time in the appellant's reply brief or at oral argument.[810]

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[806] Form 2 of the rules illustrates the form to be used on the cover of the brief. Appendix 15-C contains a sample initial appellant's brief. The Court has produced forms for filing an "Informal Brief of *pro se* Appellant" under Rules 28 and 32, but only an unrepresented appellant may use an informal brief on the prescribed form. *See* Anders v. Derwinski, 2 Vet. App. 223 (1992).

[807] U.S. Vet. App. R. 28(a).

[808] U.S. Vet. App. R. 32(c).

[809] *See* U.S. Vet. App. R. 32(e). Note that under U.S. Vet. App. E-Rule 5, a document filed electronically is deemed filed at the time and date stamped on the Notice of Docket Activity generated by CM/ECF. Therefore, briefs filed electronically need not contain a separate Certificate of Service.

[810] *See* Forshey v. Principi, 284 F.3d 1335, 1354–55 (Fed. Cir. 2002) (refusing to address issues raised for the first time on appeal); Westberry v. Principi, 255 F.3d 1377, 1381 n.2 (Fed. Cir. 2001) (refusing to address for the first time on appeal a Manual M21-1 provision that the appellant had not relied upon when the case was before the CAVC); Smith v. West, 214 F.3d 1331 (Fed. Cir. 2000); Boggs v. West, 188 F.3d 1335, 1337–38 (Fed. Cir. 1999) (declining to review a question of statutory interpretation, which was neither explicitly nor implicitly raised below); Carbino v. West, 168 F.3d 32, 34 (Fed. Cir. 1999) ("improper or late presentation of an issue or argument [i.e., raised in the reply brief for the first time] … ordinarily should not be considered"), *aff'g* Carbino v. Gober, 10 Vet. App. 507, 511 (1997) (declining to review argument first raised in appellant's reply brief); ***McPhail v. Nicholson, 19 Vet. App. 30 (2005)***; Lynch v. West, 12 Vet. App. 391 (1999) (Court declines to entertain legal argument that appellant failed to raise to CAVC as part of direct appeal where appellant failed to raise argument in main brief, reply brief, during supplemental briefing and raised instead, for the first time, on appeal to Federal Circuit); Savage v. Gober, 10 Vet. App. 488, 498 (1997) (Court declines to review matter first raised by amicus curiae subsequent to appellant's motion for panel review); *but see* Crumlich v. Wilkie, 31 Vet. App. 194, 202 (2019) (holding that the unique circumstances of a case and the interests of justice may weigh in favor of exercising the Court's discretion to address a late-raised argument).

Carbino v. Gober[811] illustrates why selection of the issues to present in the initial brief is so important. In that case, the appellant's initial brief argued that the Board's conclusion that the agency was not required to provide appellant any assistance in developing the evidence in her case was erroneous because the Board erred in concluding that her claim for service-connected death benefits (DIC) was not well grounded. In response to the Secretary's brief defending the Board's determination that the claim was not well grounded, the appellant argued in her reply brief that the VA was required to assist her regardless of whether her claim was well grounded because the substantive rules in *Manual M21-1* require the agency to assist all claimants, whether or not their claims are well grounded.

The Court refused to consider the legal question raised by the *Manual M21-1* provisions because the appellant had failed to identify this legal issue in the statement of the issues section of her initial brief, as U.S. Vet. App. R. 28(a)(3) requires.[812] The Federal Circuit upheld the Court's decision to sidestep this issue, stating that the CAVC's "Rule 28(a)(3) is similar to the corresponding rule of the Federal Rules of Appellate Procedure. In applying that rule, courts have consistently concluded that the failure of an appellant to include an issue or argument in the opening brief will be deemed a waiver of the issue or argument."[813]

As this case demonstrates, advocates cannot reasonably risk waiting until the reply brief to first raise alternative legal arguments (that is, legal arguments that only become relevant in the event that the Court does not ultimately accept the advocate's primary argument). This statement applies equally to alternative legal arguments that in effect challenge binding Federal Circuit or Court precedents as wrongly decided. It is important to list all alternative arguments in the statement of issues section of the brief, and to at least write a sentence or two about them in the argument section of the brief. Although the Court and the Federal Circuit always have discretion to consider an argument first raised after the filing of the initial brief, taking the foregoing precautions will ensure the Court and Federal Circuit cannot validly refuse to consider alternative legal arguments.

Turning to the other aspects of the initial brief, the authors of this Manual suggest that the advocate follow the general guidelines below:

- In the statement of the case section, identify the specific claims that the appellant wishes the Court to address, and ask the Court to dismiss the appeal as to any other claims that were denied in the Board decision on appeal. The Court will likely grant the request and dismiss the appeal as to those claims, rather than affirm the Board's decision as to those claims. This will ensure that the appellant's right to seek revision of the Board's denial of those claims in a future CUE motion will not be affected.[814] Additionally, in the statement of the case section, appellant should request that the Court not disturb any favorable part(s) of the Board decision.

- Advance arguments that should lead to reversal of the Board decision first, followed by alternative arguments that should lead to a remand in case the arguments for reversal are rejected. The argument that Board findings of material fact are clearly erroneous is an example of an argument that, if successful, could lead to reversal. The advocate should then follow these arguments with ones that should lead to a remand, introducing them to the Court with the caveat that the Court should reach these arguments only if the Court rejects the arguments for reversal. The arguments that the Board violated the duty to assist in the development of the facts or that the Board failed to provide reasons or

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[811] *10 Vet. App. at 507*, *aff'd sub nom.*, *Carbino, 168 F.3d at 32* ("improper or late presentation of an issue or argument [i.e., raised in the reply brief for the first time] … ordinarily should not be considered"). *See also* *Untalan v. Nicholson, 20 Vet. App. 467 (2006)*.

[812] *See* *Carbino, 10 Vet. App. at 510–11*; *see also* *Shephard v. Shinseki, 26 Vet. App. 159, 167 (2013)* (refusing to consider arguments raised in appellant's brief that were "stated perfunctorily," noting that "Federal courts are disinclined to pass upon constitutional questions cast in abstract terms."); *but see* *Crumlich, 31 Vet. App. at 202*.

[813] *See* *Carbino, 168 F.3d at 34*.

[814] *See* *Cacciola, 27 Vet. App. at 58*.

bases for its findings and conclusions are examples of arguments that typically lead to a remand. The authors of this Manual suggest that this order of presentation be followed even if the arguments for reversal are not as strong as the arguments for a remand, because this order will nonetheless tend to maximize the possibility that the Court will grant the relief most favorable to the appellant.

• For every issue of fact or law that the advocate presents, discuss the standard of review the Court should apply to its review of the issue, keeping in mind that the Court reviews pure issues of law de novo, and gives the agency some deference when reviewing issues that are not purely legal issues. In some cases there may be different ways to formulate a challenge to a Board decision. For example, an advocate may be faced with a case where an argument that the Board's findings of fact were clearly erroneous holds promise for success, but where at the same time the Board's reasons for its findings of fact make apparent that the Board did not apply the correct legal standard. The failure to apply the correct legal standard is an issue of law[815] and should not be neglected. In cases such as the one just described, the advocate should consider arguing first that the decision should be reversed on the ground that the Board applied an incorrect legal standard and that under the correct legal standard, there can be no dispute given the evidence in the record that the claimant should prevail. Following this argument, the advocate can then argue in the brief that, in the alternative, if the Court determines that the Board applied the correct legal standard, the Board decision should still be reversed because the Board's findings were clearly erroneous.

• An argument that Board findings of fact were clearly erroneous should generally be coupled with the argument that the Board's finding with regards to the benefit of the doubt is clearly erroneous.[816]

• You may cite single-judge actions of the Court or other actions that have not been published as precedent by following the guidelines in U.S. Vet. App. R. 30(a). Specifically, Rule 30 provides that nonprecedential actions by the Court may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and includes a discussion of the reasoning as applied to the case on appeal.

15.6.13 Preparing a Reply Brief

The Secretary has 60 days within which to file his or her brief to respond to the appellant's initial brief.[817] It is typically the only brief the Secretary is permitted to file. Usually, the Secretary requests one extension of time within which to file his or her brief.

The appellant may, but is not required to, file a reply brief. Reply briefs must be filed within 14 days of service of the Secretary's brief.[818] There is a 15-page limit for a reply brief.[819]

In preparing a reply brief, the advocate should focus on replying to the arguments advanced in the Secretary's brief. Using the reply brief to remake the arguments made in the initial brief is viewed with disfavor by the Court, as reflected by its decision in one case to reduce by two-thirds the amount of attorney's fees sought for preparing a reply brief because 10 of the 15 pages in the reply brief were devoted to a reiteration of the initial brief.[820]

It is appropriate to raise arguments in the reply brief that do not appear in the initial brief, as long as the new arguments are truly advanced to respond to an argument made in the Secretary's brief. But the Court may

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[815] *See, e.g.*, Fallo v. Derwinski, 1 Vet. App. 175 (1991).

[816] *See* Section 15.3.4.

[817] *See* U.S. VET. APP. R. 31(a).

[818] *See* U.S. VET. APP. R. 31(a).

[819] *See* U.S. VET. APP. R. 32(e).

[820] *See* Vidal v. Brown, 8 Vet. App. 488, 493 (1996).

validly refuse to address an argument in the reply brief that could have been, but was not raised in the initial brief, such as contending that the Board decision under review contains a legal error or violates a legal authority that was not identified by the appellant in the initial brief.[821]

15.6.14 Post-Briefing Citation of Supplemental Authority

U.S. Vet. App. R. 30(b) explains that when pertinent authority comes to the attention of a party after a brief or reply brief has been filed, or after oral argument, but before a decision has been rendered, the party must promptly file notice with the Clerk and serve all other parties, providing the citation(s) to the authority or including a copy of the supplemental authority. If the authority is not available in a Reporter system, the party must provide the Clerk with a copy. The letter must refer to the page of the brief or to a point argued orally to which each citation pertains, and the letter must state, without argument, the reasons for the supplemental citation(s).

This notice can provide a good opportunity for an appellant to underscore arguments already raised in the pleadings. However, the Court will deem any notice in which new argument is raised, that is, where the notice does not “refer” to a point previously made in the pleading, as a nonqualifying paper.[822]

The Rule also indicates that if a response is filed by the opposing party, it must be made promptly and must be similarly limited. Thus, the opposing party may not use a response as an opportunity to present additional argument not already developed if the opposing party’s brief has been filed.

15.6.15 The Possibility of Oral Argument

U.S. Vet. App. R. 34(a) and (f) provide that oral argument will be allowed only if the Court orders it and will usually not be granted to resolve a motion. Notably, oral arguments before the Court are on the rise, but remain relatively rare. In Fiscal Year 2019, the Court disposed of 7,261 appeals on the merits but heard only 37 oral arguments. A total of 49 oral arguments were scheduled, but in 12 of those cases, the parties canceled or resolved the issues before the scheduled date of the oral argument.[823]

The Court may order oral argument on its own initiative, or if the parties formally request it. A request for oral argument cannot be made in a brief. The request must be made in a separate motion. If an appellant wishes to have an oral argument, a motion should be filed no later than 14 days after the appellant’s reply brief is either filed or due to be filed, whichever is sooner.[824] The Court has indicated that it will usually grant motions for oral arguments in cases assigned to a panel of three judges or the full Court for a decision. Oral argument normally is not granted on nondispositive matters or matters being decided by a single judge.

Because the Court sits in Washington, D.C., an important question for advocates living outside Washington, D.C. in a case in which oral argument is granted is whether they will have to travel to Washington, D.C. in order to present an oral argument. The Court is authorized to sit in any place within the United States,[825] and the

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[821] *See* [Carbino, 168 F.3d at 34]() (“improper or late presentation of an issue or argument [i.e., raised in the reply brief for the first time] … ordinarily should not be considered”), *aff’g* [Carbino, 10 Vet. App. at 511]() (declining to review argument first raised in appellant’s reply brief); *but see* [Crumlich, 31 Vet. App. at 202]().

[822] [Matthews v. Nicholson, 19 Vet. App. 202, 206 (2005)]() (per curiam order). The Court noted that all arguments should be “presented and developed” in the initial pleading and that the “Rule 30(b) letter” is not an invitation to engage in “piecemeal litigation.”

[823] Annual Rep. of the United States Court of Appeals for Veterans Claims, Oct. 1, 2018 to Sept. 30, 2019 (Fiscal Year 2019). The Annual Reports section of the CAVC’s website is located here: *http://www.uscourts.cavc.gov/report.php* (last visited June 11, 2020).

[824] U.S. VET. APP. R. 34(b).

[825] *See* [38 U.S.C.S. § 7255]().

Court's rules state that the appellant may request that oral argument be held outside Washington, D.C., when the appellant moves for oral argument at the same time the appellant's brief is filed.[826]

Over the past several years, the Court has frequently traveled to hear an oral argument. Generally, the Court holds travel arguments at law schools across the country. It is the experience of the authors of this Manual that before scheduling a travel argument, the Court will contact counsel for the parties to determine whether their attendance at a travel argument is feasible. As of April 23, 2019, oral arguments before the Court are available for live streaming and interested parties may subscribe to the Court's YouTube channel for updates on future oral arguments.[827]

15.6.16 Motions to Expedite Proceedings

The Court may expedite proceedings with respect to some or all of the procedural steps in a case.[828] Either party may file a written motion that establishes that there is good cause for the Court to expedite proceedings or the parties may file a written agreement to expedite proceedings with the Court.[829] If the Court grants a motion to expedite the proceedings, it seems likely that it will endeavor to expedite its decision-making in a case; however, the rule on expediting proceedings does not require the Court to do so.

U.S. Vet. App. R. 47 gives three examples of good cause for which the Court will expedite proceedings. First, good cause exists if the veteran or petitioner suffers from a serious health condition that makes death imminent. To support such a motion, the moving party must submit a statement by a physician that includes identification of the physician's licensing authority and current license number.[830] Second, good cause exists if the appellant or petitioner is of advanced age (over 75 years) and has failing health due to a "nontemporary health condition."[831] To support such a motion, the movant must submit a physician's statement that includes identification of the physician's licensing authority and current license number. Finally, good cause exists if there are "any other exceptional circumstances that make expeditious proceedings necessary to avoid an injustice to the appellant or petitioner."[832] The Rule requires the moving party to submit "credible evidence" to support such a motion.

If the Court expedites proceedings in a case and the parties do not reach a joint resolution during the Rule 33 conference, the appellant's principal brief must be served and filed no later than 20 days after the date of the Clerk's notice that the record on appeal has been filed. The Secretary's brief must be served and filed no later than 20 days after service of the appellant's brief. Any reply brief must be served and filed no later than 10 days after service of the Secretary's brief.[833] Principal briefs are limited to 15 pages, reply briefs are limited to 7 pages, and a table of authorities is not required.[834]

15.6.17 Motions After the Court Issues a Decision Affirming, Reversing, or Vacating the BVA's Decision

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[826] *See* U.S. VET. APP. R. 34(a).

[827] *United States Court of Appeals for Veterans Claims YouTube Channel*, YouTube, https://www.youtube.com/channel/UCkhT0OvwPHFaX-d0ZEFup0g (last accessed June 11, 2020).

[828] *See* U.S. VET. APP. R. 47.

[829] *See* U.S. VET. APP. R. 47(a).

[830] *See* U.S. VET. APP. R. 47(a)(1).

[831] *See* U.S. VET. APP. R. 47(a)(2).

[832] *See* U.S. VET. APP. R. 47(a)(3).

[833] U.S. VET. APP. R. 47(b).

[834] U.S. VET. APP. R. 47(c).

Whether the initial decision by the Court is in the form of a single-judge Memorandum Decision, an opinion issued by a panel of three judges, or an opinion issued by the Court en banc (meaning the full Court), U.S. Vet. App. R. 35 provides the losing party with steps that can be taken in an attempt to amend or overturn the Court's decision, short of appealing the case to the Federal Circuit. A motion for reconsideration, requesting the single judge, panel of three judges or Court en banc that issued the decision to change the decision, must be filed within 21 days of the date of the decision that is the subject of the request for reconsideration.[835] A motion for reconsideration is decided by the same single judge, panel of three, or Court en banc who issued the decision that is being challenged.

A motion for panel decision, requesting a panel of three judges to change the decision of a single judge, must also be filed within 21 days of the date of the single-judge Memorandum Decision. Because the time period for filing a motion for reconsideration is the same length, and runs from the same starting point as a motion for panel decision, there is no time to file a motion for reconsideration of a single-judge disposition and wait for a decision on it before filing a motion for panel decision. Accordingly, the losing party can either bypass the single judge and file a motion for panel decision, or simultaneously file a motion for reconsideration and a motion for panel decision, in separate documents.

After a panel has decided a case, or after a panel has denied a motion for panel decision, the losing party may move for a decision by the full Court.[836] The motion for a full Court decision must be filed within 21 days after the date of the initial panel decision or the denial of a motion for panel decision.[837] As with motions for panel decision, because the time period for filing a motion for the panel to reconsider its decision is the same and runs from the same starting point as a motion for full Court decision, there is no time to file a motion for panel reconsideration and wait for a decision on it before filing a motion for full Court decision. Accordingly, a motion for reconsideration by the panel and a motion for full Court decision should be filed simultaneously.

A motion for initial consideration of a case by the full Court is available to a party and must be filed within 21 days after the date that a panel has decided a case or a panel has denied a motion for reconsideration or granted a motion for a decision by a panel but held that the single-judge memorandum decision remains the decision of the Court.[838] The Court's rules provide that "[m]otions for a full Court decision are not favored," and that "[o]rdinarily they will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance."[839]

All of the motions discussed in this section must contain a supporting argument.[840] In equitable tolling cases, the parties may be able to introduce supplementary evidence along with the motion; however, "the introduction of supplementary evidence is the exception rather than the rule."[841] In addition, motions for panel decision or a motion for single-judge, panel, or full Court reconsideration must address the points of law or fact that the party believes the Court has overlooked or misunderstood.[842] A motion for a panel decision must state why the resolution of an issue before the Court would establish a new rule of law; modify or clarify an existing rule of law; apply established law to a novel fact situation; constitute the only recent, binding precedent on a particular

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[835] *See* U.S. Vet. App. R. 35(d)(1), (2). For a party outside a state, the District of Columbia, the Commonwealth of Puerto Rico, or the U.S. Virgin Islands, this motion must be filed within 51 days, rather than 21 days.

[836] *See* U.S. Vet. App. R. 35(c). The Court's rules do not permit a motion for decision by the full Court in a case decided only by a single judge.

[837] *See* U.S. Vet. App. R. 35(d)(2). The motion for a full Court decision must be filed within fifty-one (51) days if the motion is filed by a person located outside a state, the District of Columbia, Puerto Rico, or the Virgin Islands.

[838] *See* U.S. Vet. App. R. 35(d).

[839] U.S. Vet. App. R. 35(c).

[840] *See* U.S. Vet. App. R. 35(e).

[841] *Dixon v. Shinseki, 741 F.3d 1367, 1378 (Fed. Cir. 2014)*.

[842] *See* U.S. Vet. App. R. 35(e)(1).

point of law; involve a legal issue of continuing public interest; or, result in an outcome of the case that is reasonably debatable. Finally, a motion for full Court decision must address "(A) how such action will secure or maintain uniformity of the Court's decisions or (B) what question of exceptional importance is involved."[843]

The Rule prohibits a party from responding to a motion for reconsideration, motion for panel decision, or motion for full Court decision, unless the Court requests a response. However, a motion for panel or full Court decision will not ordinarily be granted by the Court until after it has requested the nonmoving party to respond.[844] If a party files an appeal with the Federal Circuit while a motion for reconsideration, motion for panel decision, or motion for full Court decision is pending before the Court, the Court will not rule on the motion. In *Sumner v. Principi*,[845] the Court held that the filing of the notice of appeal with the Federal Circuit divested the Court with jurisdiction over the appeal.

One question the language of Rule 35 does not definitively answer is whether a party may seek panel or full Court review of interlocutory decisions on procedural issues (such as decisions to stay a case). At least some of the judges on the Court have interpreted the rule to limit the right to review only to final case decisions on the merits of a case.[846] According to this interpretation, a party cannot immediately seek review of a decision by a single judge on an issue that does not finally dispose of a case. Unless the case is subsequently transferred to a panel of judges, the party must wait until the case has finally been resolved by the single judge before the party may seek review of the matter by a panel of three judges pursuant to Rule 35.

U.S. Vet. App. R. 36 directs the Clerk to enter judgment after the time period has expired for filing a motion for reconsideration or the time for review has expired or after the Court has acted on a timely motion for reconsideration or for review. The 60 days within which to appeal to the Federal Circuit begins to run on the date that the Clerk places the notation of entry of judgment in the docket.

15.6.18 Motions to Recall the Court's Mandate

Under Rule 41 of the Court's rules, the mandate of the Court will be on the 60th day after the date of judgment, unless otherwise directed by the Court, and is evidence that a judgment has become final.[847] Although mandate may be recalled, such action is taken only under "exceptional or extraordinary" circumstances, "for good cause or to prevent injustice, and only when 'unusual circumstances exist sufficient to justify modification or recall of a prior judgment.' "[848]

The Court, upon its own motion, or on motion by either party, has recalled mandate in some circumstances, such as when a pertinent change in law occurred subsequent to the issuance of a Court's order, but before mandate;[849] when the Federal Circuit determined that the Secretary wrongfully applied a regulation;[850] when a

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[843] U.S. VET. APP. R. 35(e)(3).

[844] ***See*** U.S. VET. APP. R. 35(g).

[845] *15 Vet. App. 404 (2002)*; ***but see*** *Monk v. Wilkie, 32 Vet. App. 87, 94–95 (2019)* (discussing *Sumner* and clarifying that the Court retains jurisdiction over distinct issues that are not involved in the appeal to the Federal Circuit).

[846] *Homan v. Principi, 17 Vet. App. 58 (2003)* (per curiam); *Kushindana v. Derwinski, 2 Vet. App. 73, 74 (1992)*; *Hayes v. Derwinski, 1 Vet. App. 482, 483 (1991)*.

[847] *38 U.S.C.S. § 7291*.

[848] Sapp v. Wilkie, 32 Vet. App. 125, 147 (2019); Smith v. Shinseki, 26 Vet. App. 406, 410–11 (2014); *Serra v. Nicholson, 19 Vet. App. 268, 271 (2005)* (quoting ***Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988))***; *see* *McNaron v. Brown, 10 Vet. App. 61, 62 (1997)*.

[849] ***See*** Wells v. Gober, No. 99-414, 2001 U.S. App. Vet. Claims LEXIS 36 (Jan. 3, 2001) (single-judge order).

[850] *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs, 725 F.3d 1312 (Fed. Cir. 2013)* (holding that in cases where a mandate was issued pursuant to the unlawful 2011 version of *38 C.F.R. § 3.103*, VA was required to offer to file a joint

later finding revealed that the Board did not have jurisdiction to render its original decision in a matter that the Court had decided;[851] when an appellant died prior to mandate and the attorney failed to so inform the Court;[852] and when a later finding revealed that the Board committed prejudicial procedural errors during a simultaneously contested claim.[853] Other circumstances under which mandate has been recalled include fraud and clerical error.[854]

15.6.19 Suspension of Secretarial Action Pending Disposition of Appeal or Petition

U.S. Vet. App. Rule 8 permits a party to seek extraordinary relief to suspend action by the Secretary while the Court considers an appeal or petition currently before it. When determining whether a stay is appropriate, the Court considers (1) the likelihood of success on the merits of the moving party's appeal; (2) whether the moving party will suffer irreparable harm in the absence of such relief; (3) the effect of that stay on the nonmoving party; and (4) the public interest.[855]

After an appeal or petition has been filed, an appellant or petitioner seeking a Court order to suspend action by the Secretary or the Board pending proceedings in the Court must file with the Clerk a motion stating the reason for the relief requested and the facts relied on and be supported by affidavits or other sworn statements addressing any facts in dispute. The motion will normally be considered by a panel of three or more judges, but in exceptional cases, the motion may be acted on by a single judge pending consideration by a panel.[856]

U.S. Vet. App. R. 8 relief may be appropriate in cases where a notice of appeal has been filed seeking review in the Federal Circuit. However, Rule 8 relief is not available to stay a decision of the Federal Circuit.[857]

15.6.20 Miscellaneous Court Rules

U.S. Vet. App. R. 32 dictates the format of all papers filed with the Court, including briefs and motions. Papers must be printed or typewritten on letter size paper (8½ by 11 inches), with margins at least one inch wide from all edges, and with type or print on only one side of the page.[858]

If a proportionally spaced typeface is used, such as Arial or Times New Roman, it must be 13-point or larger.[859] If a monospaced typeface is used, it must not contain more than 10½ characters per inch. Text must be double

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motion to recall the mandate and a joint motion for remand); *but see* *Smith v. McDonald, 789 F.3d 1331* (holding that the Court was not bound by *Nat'l Org. of Veterans Advocates* to grant every joint motion filed, but rather the Court maintains the ability to consider the merits of each motion and the discretion to grant or deny it).

[851] *Snyder v. Gober, 14 Vet. App. 146 (2000)*.

[852] *See* *Newman, 23 Vet. App. at 96*; *Serra, 19 Vet. App. at 271*.

[853] *Sapp, 32 Vet. App. at 147–48*.

[854] *See, e.g.*, *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248–50*, 1944 Dec. Comm'r Pat. 675 (1944) (recalling mandate after it was discovered that judgment was obtained by fraud); *Lamb v. Farmers Ins. Co., Inc., 586 F.2d 96, 97 (8th Cir. 1978)* (recalling mandate after error of court clerk caused Court's erroneous decision).

[855] *Ribaudo v. Nicholson, 21 Vet. App. 137 (2007)*; *see* *Standard Havens Products, Inc. v. Gencor Industries, Inc., 897 F.2d 511, 512 (Fed. Cir. 1990)*; *see also* *Hilton v. Braunskill, 481 U.S. 770, 776–77 (1987)*.

[856] U.S. VET. APP. R. 8.

[857] *Ribaudo v. Peake, 23 Vet. App. 67 (2008)* (per curiam order). Petitioner sought U.S. VET. APP. R. 8 relief to continue the stay of adjudication of cases potentially affected by *Haas* after the Federal Circuit issued its decision in the case and pending the outcome of a writ of certiorari pending before the U.S. Supreme Court. The CAVC determined that Rule 8 relief was not available because Petitioner was actually seeking action in a case that was no longer pending before the CAVC and that, if granted, would effectively stay a decision of the Federal Circuit. However, the Federal Circuit has demonstrated a willingness to stay proceedings before the agency pending final appellate review of an issue.

[858] U.S. VET. APP. R. 32.

spaced.[860] However, quotations, which are 50 words or more, and footnotes must be single spaced and must conform to the typeface requirements.[861] Pages must be numbered in the center of the bottom margin, using Arabic numerals for the pages that are subject to the page limitation.[862]

For other than case-initiating documents, the electronic signature, name, address, and telephone number of the representative of record must appear on documents submitted for filing to the Clerk.[863] The Clerk's office will deem papers submitted for filing that are not in compliance with the Court's rules as non-conforming, and will require correction.[864]

Because the Court conducts its business in English, any documents filed with the Court that originally appear in a language other than English must be accompanied by an English translation.[865]

Parties must not include an appellant's VA claims file number or other personal identifiers (e.g., Social Security number, date of birth, financial account number, name of minor child) on motions, briefs, and responses filed with the Court that are not locked or sealed. Additionally, parties must redact appellant's claims file number or other personal identifiers from documents submitted to the Court in connection with motions, briefs and responses.[866]

Appeals may be consolidated by order of the Court on its own initiative or on a party's motion, in order to address specific questions of fact or law.[867] A motion to consolidate "must assert why consolidation is appropriate, be served on all involved parties, and comply with the requirements of Rule 27."[868]

15.6.21 Five Reasons Pleadings Are Rejected by the Court

1. A party files a motion seeking more than one form of relief. For example:
   - Appellee files a motion to strike a document included in the designation of record and in the same motion asks the Court to stay proceedings while the motion to strike is pending.
   - Appellant files a motion for extension of time to file his brief and in the same motion asks the Court for leave to supplement the record on appeal.
2. A single party files a dispositive motion after the Court has issued notice to appellant to file brief.[869] For example:

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[859] *See* U.S. VET. APP. R. 32(b). The parties may not use photo reproduction that reduces print size smaller than the size required by the Rule. However, this Rule does not apply to photocopies of documents that are contained in an appendix as long as the pages are legible. U.S. VET. APP. R. 32(b).

[860] Motions and responses to motions may be single spaced. U.S. VET. APP. R. 32(b).

[861] U.S. VET. APP. R. 32(b).

[862] *See* U.S. VET. APP. R. 32(d).

[863] *See* U.S. VET. APP. R. 32(h); *see also* U.S. VET. APP. INTERIM E-RULES 1(a)(2) and 10. An electronic signature requires an "/s/" before the typed name of the representative, for example, /s/ Caitlin Milo.

[864] *See* U.S. VET. APP. R. 45(j).

[865] *See* U.S. VET. APP. R. 3(h).

[866] *See* U.S. VET. APP. R. 6.

[867] *See* U.S. VET. APP. R. 3(e); *Sapp, 32 Vet. App. at 148–49* (holding consolidation was appropriate to protect the integrity of the Court's process in a simulataenously contested claim).

[868] *See* U.S. VET. APP. R. 3(e).

[869] Non-dispositive motions (procedural motions and joint dispositive motions) may be filed after the notice to file a brief has been issued by the Court.

- Appellant files a motion for summary vacation and remand of the Board decision after the notice to file brief has been issued.
- Appellee files a motion to dismiss the appeal for lack of jurisdiction.

3. A party files a brief that does not comply with Rules 28 or 32. For example:
   - Appellant files a brief without a complete table of authorities.
   - Appellant files a brief with the wrong font size.
4. A party files a pleading without having filed an entry of appearance in the case. For example:
   - Appellant's counsel files a motion for extension of time to file a counter designation of record without having filed a notice of appearance in the case.
5. Counsel for a party files a motion that does not comply with Rule 26(b). For example:
   - Appellant files a motion for an extension of time without including the total number of days of extensions previously granted to the party(ies) in the case.

If the Court rejects a pleading because it does not conform to the Court's rules, it will give the offending party an opportunity to correct the deficiency. The Court will stamp the pleading as "received" and then send a notice to the party that the pleading has been rejected because it does not conform to the Court rules. The notice identifies the problem and typically gives the party 7-14 days from the date of the notice to correct the deficiency and refile the pleading. The case is stayed during this period of time. If the party fails to file a conforming document within the designated period, there is a risk that the case could be dismissed for failure to follow the Court's rules.

15.6.22 En Banc Determinations by the Court

The Court rarely decides cases en banc (meaning as a full court). Since the Court's inception, it has decided fewer than 100 cases in this manner.

Rule VII of the Court's internal operating procedures governs the process by which the Court makes en banc determinations.[870] The Court sits en banc when a majority of the judges agree to decide an appeal or petition for an extraordinary writ; review a panel decision; or hear oral argument in a particular case.

The CLS handles the en banc process for the Clerk. If a party files a motion for a full Court decision, the CLS circulates the motion to the eligible judges. If within 5 working days at least 3 judges request that the Court seek a response from the other party, then CLS issues an order seeking a response. CLS then circulates to all participating judges the motion, the response, and a vote sheet. If within 10 working days, a majority of the judges vote to grant the motion, the case will be given en banc consideration.[871] If a majority of the judges do not vote to grant the motion, it is denied and CLS prepares a denial order for issuance by the full court. Even without a motion, if one judge on his or her own requests full Court consideration of a case, the CLS will circulate a notice and a memorandum from the requesting judge explaining the rationale for en banc consideration and a vote sheet. If within the 5 working day voting period a majority of the judges vote for the request then en banc consideration is ordered. If a majority of the judges do not vote to grant the request, then it is denied and the CLS prepares an order of denial for issuance by the full Court.[872]

En banc consideration is not favored by the Court and will only be ordered "when necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance."[873] Indeed, in fiscal year 2019, the Court issued a full Court decision in only 1 case.[874]

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[870] The Court's internal operating procedures may be found at *https://www.uscourts.cavc.gov/internal_operating_procedures.php* (last visited Apr. 19, 2020).

[871] CVA Internal Operating Procedures R. VII(b)(2)(B).

[872] CVA Internal Operating Procedures R. VII(b)(2)(A).

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[873] CVA INTERNAL OPERATING PROCEDURES R. VII(a); *see also* *Allen v. Brown, 7 Vet. App. 439, 439–46 (1995)* (en banc review required to resolve conflicting interpretations of law issued in two separate decisions by the Court).

[874] Annual Rep. of the United States Court of Appeals for Veterans Claims, Oct. 1, 2018 to Sept. 30, 2019 (Fiscal Year 2019). The Annual Reports section of the CAVC's website is located here: *http://www.uscourts.cavc.gov/report.php* (last visited Apr. 19, 2020).

15.7 COMMON ISSUES FACED BY COUNSEL FOR APPELLANTS IN EXPLORING SETTLEMENT WITH THE VA'S OFFICE OF THE GENERAL COUNSEL

A large percentage of the appeals filed with the Court of Appeals for Veterans Claims (CAVC or Court) are ultimately resolved by the filing of a document that grants some degree of relief and that is jointly signed by counsel for appellant and an attorney from the VA's Office of the General Counsel (OGC), on behalf of appellee Secretary of Veterans Affairs. These joint dispositions typically take one of two forms: (1) a joint motion to vacate the Board of Veterans' Appeals (BVA or Board) decision and remand for further proceedings, or (2) a settlement agreement or joint stipulated agreement accompanied by a motion to dismiss the appeal.

In a typical joint motion for remand, the parties agree that the Board made some error in adjudicating a claim or claims, and request that the Court issue an order vacating the BVA decision and remanding the claim(s) and incorporating the terms of the motion. The terms of the motion usually either require the Board to discuss relevant evidence in the record that the parties agree the Board did not discuss in the decision on appeal, or require the Board to conduct additional evidentiary development.

A settlement agreement or joint stipulated agreement, accompanied by a motion to dismiss the appeal based on the terms of the agreement, is the form typically used by the parties when the Secretary of Veterans Affairs agrees to grant some or all of the benefits sought. A settlement agreement might require the Secretary to grant service connection of the claimed disability (leaving it to the VA to determine administratively in the future the degree of disability and effective date), a specific disability rating for a disability that is already service connected, and/or a specific effective date for an award of benefits.

There are two common types of dilemmas faced by counsel for appellant in exploring a joint resolution of an appeal with the OGC. The first type of dilemma occurs when appellant seeks a reversal of the Board's decision and a grant of the benefits sought (typically, service connection, a higher disability rating, and/or an earlier effective date), and the OGC offers instead to dispose of the case by a joint motion to vacate the Board decision and to remand for further proceedings, based on one or more administrative errors that the OGC is willing to concede the Board made. In this scenario, the appellant and appellant's counsel need to balance the likelihood of ultimately obtaining a reversal from the Court in the case (relief that the Court rarely grants) against the benefit of obtaining a quick remand for further proceedings without having to wait for the Court to resolve a contested case, but having to wait until the agency acts on remand (which can sometimes take years).

A second type of dilemma occurs when the relief appellant seeks is a remand to correct a number of administrative errors, and the OGC offers to sign a joint motion to vacate the Board decision and remand based on one or more, but not all, of the administrative errors that counsel for appellant identified. In this scenario, at least three factors should be considered before rejecting such an offer and continuing to litigate the appeal.

First, appellant should evaluate the likelihood of success on the claim(s) of error to which the OGC is unwilling to concede. Second, appellant should evaluate whether, on remand, appellant could remedy the error(s) to which the OGC is unwilling to concede. For example, if the Board erred by failing to obtain the appellant's social security or private medical records as it was required to obtain by the duty to assist, it would seem unwise to reject a VA offer of a joint motion for remand just because the OGC is unwilling to include this error in the joint motion. This is because, on remand the appellant should be able to submit a renewed request for VA assistance in obtaining these records or obtain and submit them without VA assistance, even in the absence of a Court Order requiring the VA to obtain these records. By agreeing to a quick joint motion for remand based on

other errors, the appellant can both expedite the claim and still force the agency on remand to obtain and/or consider the records that should have been obtained and considered earlier.

On the other hand, if the OGC is unwilling to concede an error that involves a complicated legal question, and the attorney is unable to represent the claimant in the remand proceedings before the Board, the attorney may consider rejecting the OGC's offer and proceeding to brief the issue. This is because the claimant may be prohibited from raising issues in any subsequent appeal that were not addressed in the joint motion for remand and are not raised on remand, especially if the argument deals with a procedural error.[875] If the argument is too complex to reasonably expect the claimant to clearly articulate it below, it may be in the claimant's best interest to pursue the argument before the Court. It is unclear whether this rule applies when the claimant is not represented by counsel below, but until the matter is resolved, attorneys are advised to proceed with caution.

The third factor that counsel and appellant should consider is the likelihood that the Court would refuse to resolve the claim(s) of error that the OGC is unwilling to concede if appellant moved forward with briefing, and the parties submit briefs that agree certain errors were made requiring a remand, but that disagree over other allegations of error. This third factor is quite important because the Court has made clear that it will not always consider and resolve all of the appellant's allegations of error. In *Mahl v. Principi*,[876] the Court held that when an "undoubted" error exists that requires a remand, the Court generally will not address other "putative" errors raised by the appellant.[877] The Court noted that although it has the power to address other allegations of error, "generally [the Court] decides cases on the narrowest possible grounds."[878] The Court's holding was premised on the fact that a limited remand preserves all allegations of error for presentation to the VA since a remand entitles the appellant to a full readjudication of the case.[879]

Because of *Mahl*, an appellant does not have much leverage in persuading the Secretary to alter his position if the OGC refuses to agree to all the allegations of error. The OGC knows that if the parties were forced to brief the issues, the Court would not necessarily address all of the appellant's additional allegations of error, and the appellant knows that rejecting the joint motion for remand and litigating the additional allegations of errors may be a fruitless exercise because the Court's general policy is not to resolve every allegation of error.

There are two strategies an appellant may use in an effort to force the Court to resolve an additional allegation of error. These two methods are discussed in *Sections 15.7*.1 and 15.7.2. If the appellant is unlikely to obtain benefits on remand unless these additional allegations of error are resolved, it may be wise for an appellant to employ one of these schemes. For example, if the Board misinterpreted the substantive legal criteria that apply to a claim, and the appellant is unlikely to prevail on remand unless the Court corrects this error, use of one of these two strategies may be warranted.

15.7.1 Influencing the Court to Resolve an Alleged Error by Seeking a Reversal

If the appellant requests a reversal of the Board decision rather than a remand, this should, as a general matter, influence the Court to review and address the appellant's allegations of errors that could lead to a reversal of the Board decision. The Court has recognized that the Secretary cannot validly block the Court from determining whether reversal is required by simply seeking to vacate the Board decision and to remand.[880]

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[875] *See Carter, 26 Vet. App. at 542–43*, *vacated and remanded on other grounds by Carter v. McDonald, 794 F.3d 1342 (Fed. Cir. 2015)*; *Dickens v. McDonald, 814 F.3d 1359 (Fed. Cir. 2016)*. *But see Bozeman v. McDonald, 814 F.3d 1354, 1359 (Fed. Cir. 2016)* ("[I]ssue exhaustion cannot be invoked to bar citation of record evidence in support of a legal argument that has been properly preserved for appeal.").

[876] *15 Vet. App. 37 (2001)* (per curiam order).

[877] *See Mahl, 15 Vet. App. at 38*; *see also Best v. Principi, 15 Vet. App. 18, 19–20 (2001)* (per curiam order).

[878] *See Mahl, 15 Vet. App. at 38*; *Best, 15 Vet. App. at 19*.

[879] *See Mahl, 15 Vet. App. at 38*; *Best, 15 Vet. App. at 19*.

However, where the Board's statement of reasons or bases is so inadequate that the Court cannot resolve whether the Board's findings are clearly erroneous and warrant reversal, the Court will vacate the Board decision to correct this error on remand.[881]

In *Mahl*, the Court held that it would not address errors raised by the appellant if both parties agreed that the appropriate resolution of the appeal should be a remand.[882] Specifically, the Court stated, "[i]n short, if the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."[883] The Court reasoned that there is no need to address errors raised by an appellant if they are not necessary "in effecting the proposed disposition."[884] Conversely, *Mahl* also stands for the proposition that if an appellant is seeking a remedy greater than remand, which is the case when an appellant seeks a reversal, then the Court should consider the merits of the appellant's allegations of errors.[885]

Therefore, notwithstanding the Secretary's request for a remand based on a limited set of concessions of error, the appellant can influence the Court to address other allegations of error underlying appellant's request for a reversal of the Board's decision.

15.7.2 Influencing the Court to Resolve an Alleged Error by Waiving Appellant's Right to Court Consideration of the Errors Identified by the Secretary

An appellant may determine that it is in his or her interest to waive the right to Court consideration of the errors proposed by the Secretary. Counsel and appellant may conclude that the errors the VA refuses to include in a joint motion for remand are such an important barrier to ultimate success on the claim that appellant should be willing to forego the Court's consideration of the errors that the Secretary proposes as a basis for remand.

For example, assume that in an appeal involving a denial of service connection for a back disability, the VA is willing to remand a case to correct the VA's failure to notify the veteran of the information and evidence, if any, that is needed to substantiate his claim under the Veterans Claims Assistance Act.[886] However, in addition to this error, assume the appellant has concluded that the VA violated its statutory duty to assist by failing to afford him a medical examination that includes an opinion as to whether his current back condition is related to an injury or event in service.

If the appellant and counsel determine that appellant cannot establish entitlement to compensation benefits without a medical nexus opinion, then a remand simply requiring adequate notice of the evidence required to establish the claim would be of limited value. The appellant would have compelling reasons for not wishing to

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[880] *See* Pentecost v. Principi, 16 Vet. App. 124, 125 (2002) (stating that "[t]he veteran requests that the Court reverse the Board decision and order the Secretary to award service connection for PTSD … The Secretary requests that the case be remanded for readjudication in light of the enactment of the VCAA … . The Court will deny the Secretary's motion and address the veteran's request for reversal, a remedy greater than that proposed by the Secretary"); *Brannon v. Derwinski, 1 Vet. App. 314, 315 (1991)* ("because it is apparent that appellant seeks more relief than that suggested by the Secretary's motion for remand and because appellant's brief and pleadings, fairly taken, specifically eschew the issue of adequate reasons or bases and invite the Court to rule on the merits of his claim, appellee's motion for remand is denied.").

[881] *See* *Pierce v. Principi, 18 Vet. App. 440, 444 (2004)*.

[882] *15 Vet. App. at 37*.

[883] *Mahl, 15 Vet. App. at 38*.

[884] *Mahl, 15 Vet. App. at 38*.

[885] *Mahl, 15 Vet. App. at 38*; *see* *Pentecost, 16 Vet. App. at 125*.

[886] *See* *Quartuccio v. Principi, 16 Vet. App. 183 (2002)* (holding that VA violated its duty under the VCAA to provide the claimant notice of (1) the information to be provided by the claimant to substantiate the claim and (2) the information and evidence to be provided by the Secretary in an effort to substantiate appellant's claim).

have his claim remanded only for additional notice because such a remand could well result in a delay of years without getting the veteran any closer to a grant of benefits. On remand, the VA may well continue to refuse to obtain a medical nexus opinion, and deny the claim again, forcing the veteran to appeal yet again to the Court.

To avoid this result, the appellant may wish to waive the right to Court consideration of rights guaranteed by the notice provisions of the VCAA and request that the Court adjudicate his other allegations of error. In *Janssen v. Principi*, the Court held that an appellant who is represented by counsel, may waive the Court's consideration of any duty-to-assist and notice rights potentially afforded to him under the VCAA, "especially in the absence of some affirmative indication of Congress' intent to preclude his ability to do so."[887] Accordingly, if an appellant is willing to waive Court consideration of the errors conceded by the OGC, he is likely to succeed in influencing the Court to address the contested allegations of error that are of significance to him.

Appellant and counsel should be aware that there is a risk to this waiver strategy. The risk is that the Court could grant the waiver and then affirm the Board decision denying benefits after rejecting appellant's allegations of error. Thus, the waiver strategy is best employed when appellant has a high likelihood of success on the allegations of error that the OGC refuses to include in a joint motion for remand.[888]

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[887] *15 Vet. App. 370, 375 (2001)*.

[888] In Coburn v. Nicholson, the appellant argued in his brief that the Board's denial of service connection was clearly erroneous and should be reversed and that remand for additional development was specifically not sought. In his brief, the Secretary argued that the appeal should be remanded for the Board's failure to ensure compliance with remand instructions to secure a medical opinion. In its opinion, the Court, with Judge Lance dissenting, held that "in the overall context of his briefing, [we] perceive[] the assertion that remand is not being sought as an argument meant to bolster [the appellant's] position that reversal is the appropriate remedy and not, as the dissent perceives, as an explicit waiver of a remand." *19 Vet. App. 427, 431 (2006)*.

15.8 JURISDICTION AND AUTHORITY OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Veterans' Judicial Review Act (VJRA) provided the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), an existing Article III court that sits in Washington, D.C., with exclusive jurisdiction to hear cases involving challenges to VA decision-making in two different situations: in an appeal of a U.S. Court of Appeals for Veterans Claims (CAVC or Court) decision and in a direct challenge to VA regulations and VA policies of general applicability.

15.8.1 Appeals of Final CAVC Decisions

The Federal Circuit has exclusive jurisdiction to hear appeals of final Court decisions.[889] Unlike the one-sided appeal process from the Board of Veterans' Appeals (BVA or Board) to the Court (in which the claimant, but not the VA, may appeal), a Court decision may be appealed to the Federal Circuit either by the individual who appealed to Court or by the VA.[890]

Appeals to the Federal Circuit must be filed within 60 days of the final Court decision.[891] An appellant's filing of an appeal to the Federal Circuit "divests this Court of all jurisdiction over [a] case."[892] Recently, the Court

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[889] *See* *38 U.S.C.S. § 7292*. Although *38 U.S.C.S § 7292* does not specifically use the term "final decision," the Federal Circuit has recognized that its authority to review CAVC decisions is predicated upon the issuance of a "final" CAVC decision. *See* *Winn v. Brown, 110 F.3d 56, 57 (Fed. Cir. 1997)*; *Johnson v. Derwinski, 949 F.2d 394, 395 (Fed. Cir. 1991)*.

Interlocutory appeals to the Federal Circuit of non-final CAVC decisions are allowed under *38 U.S.C.S § 7292(b)*. Pursuant to that Section, a single judge or panel of the CAVC may determine that a CAVC decision, which is otherwise not appealable, should be allowed to be appealed to the Federal Circuit. The judges must make the following assessment before a case can be certified for appeal: the decision involves a controlling question of law as to which there is a disagreement between the appellant and the Secretary; and "the ultimate termination of the case may be materially advanced by the immediate consideration of that question." Having reached such a determination, the judge or panel, "shall notify the chief judge of that determination." *38 U.S.C.S. § 7292(b)(1)*. The chief judge must then "certify" this issue for appeal. The role of the chief judge is "solely ministerial." He must make the certification to the Federal Circuit if he receives the requisite determination from a judge or panel of the Court. *See* *Bowey v. West, 11 Vet. App. 188, 189 (1998)*.

In *Homan v. Principi, 17 Vet. App. 58 (2003)* (per curiam order), the CAVC denied the appellants' motion for a determination by a panel that a controlling question of law existed involving the content of the record on appeal and a request that the chief judge certify the question for an appeal to the Federal Circuit. The Court held that the appellants did not satisfy the three-part test necessary for an interlocutory appeal. The Court held that while there was an issue of law as to which the parties disagreed, "[n]othing in … [appellants'] motion demonstrates how immediate consideration by the Federal Circuit of their assertion … will materially advance the ultimate termination of their appeals." *Homan, 17 Vet. App. at 60*.

[890] *38 U.S.C.S. § 7292*.

[891] The VJRA states that an appeal to the Federal Circuit "shall be obtained by filing a notice of appeal with the [CAVC] within the time and the manner prescribed for appeal to United States courts of appeals from United States district courts." *38 U.S.C.S. § 7292(a)*. Section 2107 provides that in any action, suit, or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties for appeal to a court of appeals shall be sixty days from such entry of judgment, order, or

cautioned against reading this statement too broadly and out of context.[893] Specifically, the Court clarified that, consistent with general Federal appellate Court practice, it retains jurisdiction over issues that are distinct from those appealed to the Federal Circuit.[894] Once the Federal Circuit renders a final decision, either the VA or the claimant may petition the U.S. Supreme Court for certiorari within 90 days of the Federal Circuit's final action.[895]

15.8.1.1 The Exception to the Requirement of a Final CAVC Decision in a Case Where Multiple Claims Are Involved

The Federal Circuit has jurisdiction over final decisions of the Court. Many Board decisions that are appealed to the Court involve multiple claims. One issue that arises in cases in which there are multiple claims is whether the Court must render a "final" decision disposing of all the claims before the Federal Circuit may exercise appellate jurisdiction over the Court decision. For example, assume the Court decides an appeal from the Board that involves two claims: a claim for service connection for arthritis of the knee, and a claim for a rating increase for a headache disorder. The Court issues a decision that remands the service connection claim for further adjudication by the VA and affirms the Board denial of the rating increase claim. Can the Federal Circuit exercise jurisdiction over a veteran's appeal of the Court decision to affirm the Board's denial of the rating increase claim?

Under the traditional "final judgment rule," an appellate court cannot review a lower court decision involving multiple claims, unless the lower court renders a decision that ends the litigation on the merits with nothing left to be done in the case. In the example above, application of the "final judgment rule" would mean that the Federal Circuit would not be able to exercise jurisdiction over the appeal of the denial of the rating increase claim because the Court decision did not end the litigation of the other claim. Since the Court remanded the service connection claim, the Court decision did not dispose of the case in its entirety.

However, the Federal Circuit does not apply the "final judgment rule" to decisions issued by the VA. Instead, in *Elkins v. Gober*,[896] the Federal Circuit stated that the relevant consideration is whether the Federal Circuit's exercise of jurisdiction would disrupt the orderly process of adjudication by the administrative agency of the remanded claims.

The Federal Circuit held that where the various claims decided by the Court are separate and involve different facts or legal issues, the Federal Circuit would exercise jurisdiction over the finally decided claims because doing so would not disrupt the orderly process of the VA's adjudication of the remanded claims.[897]

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decree. *28 U.S.C.S. § 2107*. Accordingly, claimants and VA have sixty days from entry of judgment by the CAVC within which to appeal a CAVC decision.

[892] *Sumner v. Principi, 15 Vet. App. 404 (2002)*.

[893] *Monk, 32 Vet. App. at 94–95*.

[894] *Monk, 32 Vet. App. at 94–95*.

[895] Section 7292(c) states that "[t]he judgment of [the Federal Circuit] shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28." *38 U.S.C.S. § 7292(c)*. Section 1254(1) states that cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari. *28 U.S.C.S. § 1254(1)*. Section 2101(c) provides "[a]ny other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." *28 U.S.C.S. § 2101(c)*.

[896] *Elkins v. Gober, 229 F.3d 1369, 1373 (Fed. Cir. 2000)*.

[897] *Elkins, 229 F.3d at 1374–75*. Examples of decisions in which the Federal Circuit determined that various claims decided by the CAVC were separate and involved different facts or legal issues such that the Federal Circuit could exercise jurisdiction over the finally decided claims even though other non-final claims had been remanded by the CAVC for further adjudication include *Stanley v. Principi, 283 F.3d 1350 (Fed. Cir. 2002)* and *Arnesen v. Principi, 300 F.3d 1353 (Fed. Cir. 2002)*. In *Stanley*, the

On the other hand, the Court noted that if the various claims or issues were inextricably intertwined such that the Court's exercise of jurisdiction would disrupt the orderly adjudication over the remanded claims, the Federal Circuit would not exercise jurisdiction.[898]

In applying this test to *Elkins*, the Federal Circuit concluded that the various claims involved in the appeal presented distinct legal issues.[899] The Federal Circuit held that because the claimant's finally denied headache claim and neck claim were not intertwined with his remanded back claim, its review of the Court's decision with respect to these two matters would not "disrupt the orderly process of adjudication" of the remanded claim.[900] The Federal Circuit also recognized that its decision "advances the goal of timely providing benefits to disabled veterans."[901] The Federal Circuit noted that if a veteran had to wait for a remanded claim to be resolved by the VA before the Federal Circuit could entertain an appeal over a finally decided issue, a veteran might have to wait years before all his or her claims were fully adjudicated, thus resulting in serious financial harm to the veteran during the delay.[902]

In *Hudgens v. McDonald*,[903] the Federal Circuit applied the *Elkins* doctrine to a case involving a veteran's entitlement to separate ratings for a single service-connected disability. In that case, the CAVC: (1) affirmed the Board's denial of a disability rating under DC 5055, holding that the plain language of *38 C.F.R. § 4.71a*, Diagnostic Code (DC) 5055 (2012) applied to *only* total knee replacements, and not to partial knee replacements; (2) remanded for the Board to determine whether the veteran's knee disability could be rated by analogy to DC 5055; and (3) vacated the Board's determinations as to the issues of right knee instability and degenerative joint disease. The Federal Circuit held that it had jurisdiction to review the CAVC's decision affirming the Board's denial of a rating under DC 5055 because "the claims remanded by the [CAVC] are separate claims for right knee disability distinct from the non remanded claim of whether [the veteran] is entitled to an evaluation for prosthetic knee replacement under DC 5055."[904] The Federal Circuit explained that the veteran's "path to achieving a rating under DC 5055 is … a separate claim that cannot be

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Federal Circuit exercised jurisdiction over a CAVC decision that affirmed the denial of a request for legal fees pursuant to *38 U.S.C.S. § 5904(c)* for two claims involving cervical spine disability and TDIU, even though the CAVC had remanded another attorney's fees request, pursuant to *38 U.S.C.S. § 5904(c)*, involving a claim for PTSD. *Stanley, 283 F.3d at 1354*. In *Arnesen*, the Federal Circuit exercised jurisdiction over the CAVC's dismissal of his claim for interest and cost-of-living increases for a retroactive award for increased ratings of 10 percent for chondromalacia and arthritis of the left knee, even though the CAVC had remanded three other claims for further adjudication under the VCAA, including claims for service connection for generalized arthritis, increased rating in excess of 10 percent for chondromalacia and arthritis of the left knee, and an earlier effective date for the award of a 10 percent rating for chondromalacia and arthritis of the left knee. *Arnesen, 300 F.3d at 1358*.

[898] *Elkins, 229 F.3d at 1374–75*.

[899] The appeal in *Elkins* involved multiple claims: service connection for headaches, a neck injury, and a back injury. The CAVC affirmed the denial of the veteran's claims for service connection for his headaches, dismissed his claim for service connection for a neck injury; and remanded his claim for service connection for a back injury. *Elkins, 229 F.3d 1369*.

[900] *Elkins, 229 F.3d at 1375–76*. In *Smith v. Gober, 236 F.3d 1370, 1372 (Fed. Cir. 2001)*, the Federal Circuit declined to hear an appeal from a case that involved two separate claims: a denial of a claim of clear and unmistakable error (CUE) for service connection for vision problems and a denial of a petition to reopen a claim for service connection for vision problems. The CAVC affirmed the CUE claim and remanded the new and material evidence claim for further adjudication. The Federal Circuit refused to hear the appeal of the CUE claim on the ground that the CUE claim was not separable for purposes of appeal from his claim for new and material evidence, as the facts underlying the two claims were sufficiently intertwined that they had to be considered together. *Smith, 236 F.3d at 1372*.

[901] *Elkins, 229 F.3d at 1376*.

[902] *Elkins, 229 F.3d at 1376*.

[903] *823 F.3d 630 (Fed. Cir. 2016)*.

[904] *Hudgens, 823 F.3d at 636*.

reviewed by the Board on remand."[905] In addition, the Federal Circuit concluded that "a determination of whether [the veteran] meets [DC 5055] *by analogy* 'is not the same' as remanding to determine whether he meets the rating *directly* under that specific regulation."[906]

15.8.1.2 The Exception to the Finality Requirement When the CAVC Has Remanded a Claim to the BVA for Further Adjudication

The Federal Circuit will sometimes review a Court decision to remand a claim to the Board for further adjudication, even though there is no question under this circumstance that the Court decision is not final.

In *Williams v. Principi*,[907] the Federal Circuit adopted a three-part test for deciding whether to review an appeal of a non-final Court decision:

- There must be a clear and final decision of a legal issue that will govern the remand proceedings. The Court's final decision on this legal issue must either directly govern the remand proceedings, or if the Court's final decision is reversed by the Federal Circuit, the reversal would render the remand proceedings unnecessary;
- The resolution of the legal issues must adversely affect the party seeking review; and
- There must be a substantial risk that the decision would not survive a remand; i.e., that the remand proceeding may moot the issue.[908]

All three conditions must be satisfied for the exception to the final judgment rule to apply. The Federal Circuit has recognized that in many cases, both the first and second *Williams* factors will be satisfied, and the issue of whether the Court may review a Court remand order will turn on the third factor.[909]

In some cases, the Federal Circuit will find that it has jurisdiction to review a Court remand order when the appellant contends that the Court should have reversed the Board's decision rather than remanding the claim. The Court has held that in those cases, the first *Williams* factor is satisfied by an appellant's assertion that the Court's order remanding the matter to the Board violates his or her right to an immediate decision on the merits without a remand.[910] In *Byron*,[911] the appellant argued that the Court had the

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[905] *Hudgens, 823 F.3d at 636*.

[906] *Hudgens, 823 F.3d at 637* (emphasis in original).

[907] *275 F.3d 1361 (Fed. Cir. 2002)*.

[908] *Williams, 275 F.3d at 1364*. Additionally, the Federal Circuit held that it would resolve an issue, even if not raised before the CAVC, (a) involving the Court's jurisdiction, (b) involving statutes or regulations that came into existence after the CAVC issued the decision under appeal, (c) involving judicial interpretations of existing law that occurred after the CAVC issued the decision under appeal, and (d) involving issues that had not been raised by any of the parties, but which needed to be resolved in order to properly decide the appeal. *Forshey v. Principi, 284 F.3d 1335, 1356–57 (Fed. Cir. 2002)*. Also, the Federal Circuit stated that where the appellant was not represented while his or her case was before the CAVC, the Federal Circuit would "require less precision in the presentation of the issue to the [CAVC] than it [would] demand of a litigant represented by counsel. *Forshey, 284 F.3d at 1357–58*.

[909] *Donnellan v. Shinseki, 676 F.3d 1089, 1091–92 (Fed. Cir. 2012)* ("In this case, as in many others, the question whether we will review the remand order from the Veterans Court comes down to the third factor set forth in *Williams*. …"); *cf.* *Arnesen, 300 F.3d at 1358* (finding that none of the *Williams* factors had been satisfied).

[910] *Deloach v. Shinseki, 704 F.3d 1370, 1376–77 (Fed. Cir. 2013)*; *Byron v. Shinseki, 670 F.3d 1202, 1205 (Fed. Cir. 2012)*; *Stevens v. Principi, 289 F.3d 814, 817 (Fed. Cir. 2002)*; *see also* *Adams v. Principi, 256 F.3d 1318, 1321 (Fed. Cir. 2001)* (pre-*Williams* case finding jurisdiction where the appellant contended that the CAVC should have ruled, without a remand, that VA offered insufficient evidence to rebut the presumption of soundness).

[911] *670 F.3d at 1205*.

authority to reverse the Board's decision and but failed to do so, thereby depriving her of her right to a decision without a remand, and the Federal Circuit concluded that this assertion was sufficient under the first *Williams* factor. In *Byron*, the Court had explicitly analyzed its statutory authority and determined that it did not have the authority to reverse the Board's findings.[912] Similarly, in *Stevens*,[913] the Federal Circuit found jurisdiction based in part on the appellant's contention that the Court's remand order was for the prohibited purpose of allowing VA to gather evidence sufficient to rebut the presumption of aggravation.[914]

However, in *Ebel*,[915] the Court rejected a very similar argument and concluded that it did not have jurisdiction to review the Court's remand order despite the appellant's argument that the Court should have decided the merits rather than remanding the claim. The Federal Circuit distinguished its holding in *Ebel* from those in prior cases by pointing out that in the latter, the Court's remand order involved an interpretation of statutes, regulations, or case law.[916] In contrast, the appellant's argument in *Ebel* was not that the Court somehow misinterpreted the law in concluding that remand was appropriate, but rather that the Court should have concluded that the appellant was entitled to a reversal based on the evidence of record.[917] The Federal Circuit concluded that to hold that such an assertion was sufficient to satisfy the first *Williams* factor would lead to a situation where "virtually any petitioner would satisfy the *Williams* conditions by merely appealing a remand order and arguing that the petitioner was entitled to a reversal on the record."[918] The Court further concluded that "[s]uch a holding would cause the allegedly narrow exception under *Williams* to swallow our strict rule of finality."[919]

Generally, it is not difficult to satisfy the second *Williams* factor—that the party seeking review is adversely affected by the Court's remand order. In *Byron*[920] and *Stevens*,[921] this element was met because the appellants asserted that the Court's remand orders adversely affected them by forcing them to submit to the remand despite their asserted right to a decision on the merits.

Appellants generally have the most difficulty establishing that the third *Williams* factor has been satisfied—that there is a substantial risk that the Court's decision would not survive a remand and thus evade review. In most cases, there will not be a substantial risk that the Court's interpretation of the law will evade review because the appellant will be free to present additional evidence and argument on remand and to appeal the Board's decision if it is adverse to the appellant.[922] For example, in *Myore v. Principi*,[923] the Federal

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[912] *670 F.3d at 1204*; *see also* *Ebel v. Shinseki, 673 F.3d 1337, 1341 (Fed. Cir. 2012)*.

[913] *289 F.3d at 817*.

[914] *Stevens, 289 F.3d at 816* (The CAVC had concluded in the remand order that the Board's misapplication of *38 U.S.C.S. § 1153* and 38 C.F.R. § 3.306 required remand for a reassessment of the evidence under the proper legal standard).

[915] *673 F.3d 1337*.

[916] *Ebel, 673 F.3d at 1341 n.2, 1342*.

[917] *Ebel, 673 F. 3d at 1341*.

[918] *Ebel, 673 F.3d at 1341 n.1*.

[919] *Ebel, 673 F.3d at 1341 n.1*.

[920] *670 F.3d at 1205*.

[921] *289 F.3d at 817*.

[922] *See* *Duchesneau v. Shinseki, 679 F.3d 1349, 1353–54 (Fed. Cir. 2012)*; *Donnellan, 676 F.3d at 1091–92*; *Joyce v. Nicholson, 443 F.3d 845, 850 (Fed. Cir. 2006)*.

Circuit concluded there was not a substantial risk that the Court's interpretation of the relevant statutes would evade further review if the appellant were to lose on remand. The Court ruled that, on remand, the veteran would be allowed to present additional evidence in support of her claim and could therefore win or lose on the facts of her case without regard for the Court's interpretation of the pertinent statutes. If the appellant were to lose before the Board and the Court were then to affirm the Board denial, the appellant could seek review of the Court's interpretation of the law as part of a then final judgment.[924]

While it is oftentimes difficult to demonstrate that the third *Williams* factor is satisfied, the Federal Circuit has concluded that it is satisfied in two categories of cases: (1) where an appellant argues that the Court should have reversed the Board's decision rather than remanding a claim(s); and (2) where the Secretary appeals a Court remand order. The Federal Circuit has found that the third *Williams* factor is satisfied in the first category of cases because the Court's remand order effectively moots the appellant's argument that he or she has a legal right to a decision on the merits without the need for a remand.[925] With respect to the second category of cases, the third *Williams* factor is satisfied because under *38 U.S.C.S. § 7252(a)*, the Secretary does not have the right to seek Court review of BVA decisions that are favorable to the claimant. Therefore, a substantial risk exists that the Court's interpretation of the law will evade future review because if the Court's interpretation requires VA to grant benefits, VA will be deprived of the ability to seek further judicial review.[926]

15.8.1.3 The Bar to Federal Circuit Review of Issues of Fact

The scope of the Federal Circuit's jurisdiction over a Court decision is more limited than the scope of the Court's jurisdiction to review a Board decision. The most important restriction on the Federal Circuit is that it cannot review factual determinations made by the Board and reviewed by the Court except to the extent that the appeal presents a constitutional issue.[927] On nonconstitutional issues, the Federal Circuit must accept the Board findings of fact except to the extent that the Court reverses the findings, in which case the Federal Circuit must accept the Court's view of the facts. However, where the appeal involves a

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[923] *323 F.3d 1347 (Fed. Cir. 2003)*.

[924] *Myore, 323 F. 3d 1347 (Fed. Cir. 2003)*.

[925] *See* *Byron, 670 F.3d at 1205*; *Stevens, 289 F.3d at 817*.

[926] *see* *Haas v. Peake, 525 F.3d 1168, 1175 (Fed. Cir. 2008)*; *Conway v. Principi, 353 F.3d 1369, 1375 (Fed. Cir. 2004)*.

[927] *See* *38 U.S.C.S. § 7292(d)(2)*. In *Jefferson v. Principi, 271 F.3d 1072, 1075 (Fed. Cir. 2001)*, the Federal Circuit held that despite appellant's argument that he was challenging the CAVC's interpretation of *38 C.F.R. § 3.309(a)* and *(c)*, pertaining to presumptive service connection for heart disease, and *38 C.F.R. § 3.307(b)*, which provides that a veteran may produce lay or medical evidence to support a claim, "essentially the veteran [was] argu[ing] … that he had submitted enough proof, … to establish treatment of hypertension within one year of discharge and of beriberi heart disease." The Court held that "these are factual challenges over which we have no jurisdiction." *See also* *Delisle v. McDonald, 789 F.3d 1372, 1374 (Fed. Cir. 2015)* (holding that of the propriety of the denial of a rating under DC 5257 "concerns questions of fact—or at least questions of the application of the law to the facts—which are beyond the jurisdiction of this court"); *Kernea v. Shinseki, 724 F.3d 1374, 1382 (Fed. Cir. 2014)* ("[T]he interpretation of the contents of a claim for benefits is a factual issue over which we do not have jurisdiction."); *Butler v. Shinseki, 603 F.3d 922, 926 (Fed. Cir. 2010)* ("[T]he factual findings of when a disability was claimed or service connection established are not subject to our review."); *Willsey v. Peake, 535 F.3d 1368 (Fed. Cir. 2008)* (Court may address whether the three prong test for CUE was applied in a rating decision, not whether application of the three-prong test for establishing CUE was correct); *Bonner v. Nicholson, 497 F.3d 1323 (Fed. Cir. 2007)*; *Winsett v. Principi, 341 F.3d 1329, 1330 (Fed. Cir. 2003)*; *Pierce v. Principi, 240 F.3d 1348, 1351 (Fed. Cir. 2001)*; *Carpenter v. Gober, 228 F.3d 1379, 1380–81 (Fed. Cir. 2000)*; *Leonard v. Gober, 223 F.3d 1374, 1375–76 (Fed. Cir. 2000)*; *Clemmons v. West, 206 F.3d 1401, 1404 (Fed. Cir. 2000)*; *Routen v. West, 142 F.3d 1434, 1437 (Fed. Cir. 1998)*; *Yeoman v. West, 140 F.3d 1443, 1445–46 (Fed. Cir. 1998)*; *Zevalkink v. Brown, 102 F.3d 1236, 1240 (Fed. Cir. 1996)*; *Johnson, 949 F.2d at 395*.

constitutional issue, the Federal Circuit may review factual determinations, but only to the extent necessary to decide the constitutional issue.[928]

This means that if, for example, the Board finds that a claimant does not suffer from post-traumatic stress disorder (PTSD) in a claim for service-connected disability compensation, and the Court rejects the claimant's argument that this Board determination is "clearly erroneous" (the standard by which the Court reviews Board findings of fact), the claimant cannot appeal this decision to the Federal Circuit on the ground that the Board determination that the claimant does not suffer from PTSD was, contrary to the conclusion of the Court, "clearly erroneous." On this issue, the Court decision is final and unappealable.

Conversely, if the Court does reverse the Board decision on the ground that it was "clearly erroneous" for the Board to find that the claimant is not suffering from PTSD, the VA cannot challenge the Court's decision by appealing it to the Federal Circuit on the ground that the Court was wrong to conclude that this Board finding of fact was "clearly erroneous." In this scenario the Court's decision on this issue is also final and unappealable.

15.8.1.4 The Bar to Federal Circuit Review of Application of Law to Fact

As discussed in *Section 15.8*.1.3 of this Manual, the Federal Circuit is prohibited from reviewing findings of fact. Additionally, the Federal Circuit is prohibited from reviewing the Court's application of law to fact.[929] This means that the Federal Circuit cannot review the Court's application of a legal standard to the facts of a particular case to determine whether there has been an error that is essentially factual in nature. For example, in a claim for a rating increase for PTSD, the Federal Circuit could not review a Court decision upholding the Board's factual finding that the veteran was not entitled to the benefit of the doubt. Similarly, the Federal Circuit has no jurisdiction to review a Court determination that a VA error is prejudicial or harmless.[930]

However, the Federal Circuit has held that it does have jurisdiction when the resolution of an issue requires at least some application of law to fact, but the material facts are undisputed.[931] In *Bailey v. Principi*,[932] the issue before the Federal Circuit was whether the Court erred in refusing to apply equitable tolling to excuse the veteran's untimely filing of a notice of appeal. The Court noted that the facts in that case were undisputed, and that "[t]he question whether equitable tolling applies to a particular case often involves, in part, the application of law to fact, because it frequently requires not only a decision as to what legal principle applies but also an assessment of the facts and a decision of whether application of the governing legal principle to those facts requires that the limitations period be equitably tolled."[933] However, the Court

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[928] *See* *Edwards v. Shinseki, 582 F.3d 1351, 1354 (Fed. Cir. 2009)* (finding that because the appellant invoked the due process clause, the Federal Circuit had jurisdiction to review the CAVC's factual determinations "but only to the extent necessary to ensure compliance with due process."); *Cushman v. Shinseki, 576 F.3d 1290, 1296 (Fed. Cir. 2009)* ("[T]his court has jurisdiction to resolve the due process issue in deciding [this] claim.").

[929] *38 U.S.C.S. § 7292(d)(2)*. In *Beasley v. Shinseki, 709 F.3d 1154, 1157 (Fed. Cir. 2013)*, the Federal Circuit rejected the argument that this prohibition would bar it from ever reviewing the CAVC's decision under the All Writs Act because the question of whether a petitioner has an adequate alternative remedy would inherently require the application of law to fact. *See also* *Delisle, 789 F.3d at 1374*; *Williams*, 614 F. App'x. 499.

[930] *Newhouse v. Nicholson, 497 F.3d 1298 (Fed. Cir. 2007)*.

[931] *See* *Sneed, 819 F.3d at 1351* (applying California law regarding the establishment of an attorney-client relationship to the facts to determine whether equitable tolling was appropriate); *Reeves v. Shinseki, 682 F.3d 988, 994 (Fed. Cir. 2012)*; *Groves v. Peake, 524 F.3d 1306, 1310 (Fed. Cir. 2008)*; *Wood v. Peake, 520 F.3d 1345 (Fed. Cir. 2008)*; *Mapu v. Nicholson, 397 F.3d 1375, 1379 (Fed. Cir. 2005)*; *Bailey v. Principi, 351 F.3d 1381, 1384 (Fed. Cir. 2003)*. *But see* *Toomer, 783 F.3d at 1236, n.1* (finding that the material facts were in dispute because the parties disagreed as to when the Board had actually mailed its decision to the appellant).

[932] *351 F.3d at 1383–84*.

went on to hold that it nonetheless has jurisdiction to review the Court's decisions with respect to the doctrine of equitable tolling "when the material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome of the equitable tolling claim. …"[934]

15.8.1.5 Jurisdiction over Rules of Law

The Veterans Benefits Act of 2002[935] amended *38 U.S.C.S. § 7292* by adding a new matter over which the Federal Circuit has jurisdiction when it reviews an appeal of a Court decision—a "rule of law."[936] This "rule of law" amendment expanded the scope of the Federal Circuit's jurisdiction in two major ways—the Federal Circuit may now review: (1) Court decisions involving questions of law that are not derived from a statute or regulation; and (2) statutes, regulations, and interpretations thereof, regardless of whether the Court relied upon that statute, regulation, or interpretation thereof in the decision below.

First, the Federal Circuit can review judicially created rules of law that are not premised on the interpretation of a particular statute or regulation.[937] The Federal Circuit has held that the phrase "rule of law" is not limited to judicially created rules; it also covers "legislatively created rules as well."[938] This means that "rule of law" jurisdiction authorizes the Federal Circuit to decide the proper interpretation of statutes (which are legislative rules created by Congress) and VA regulations (which are legislative rules created by the Secretary of Veterans Affairs).[939]

As Section 15.8.1.6 explains, separate and apart from "rule of law" jurisdiction, *38 U.S.C.S. § 7292(a)* provides the Federal Circuit with jurisdiction to review "the validity of … any statute or regulation … or any interpretation thereof … that was relied on by the [CAVC] in making the decision" on appeal to the Federal Circuit.[940] This grant of jurisdiction mirrors "rule of law" jurisdiction in the sense that it too authorizes review of issues of statutory and regulatory interpretation. But "rule of law" jurisdiction is broader than the grant of jurisdiction discussed in *Section 15.8*.1.6 because the grant of jurisdiction discussed in *Section 15.8*.1.6 covers interpretations of statutes or regulations only if these interpretations were "relied on by the [CAVC] in

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[933] *Bailey, 351 F.3d at 1384*.

[934] *Bailey, 351 F.3d at 1384*.

[935] ***Pub. L. No. 107-330***, tit. IV, § 402(a), ***116 Stat. 2820***, 2832 (2002).

[936] Prior to 2002, the primary focus of Federal Circuit review of an appeal from the Court concerned the validity and proper interpretation of statutes and regulations that the Court relied upon in making its decision. *See* *38 U.S.C.S. § 7292(a)* as it existed prior to Dec. 6, 2002; *Pierce, 240 F.3d at 1352*; *Yates v. West, 213 F.3d 1372, 1374 (Fed. Cir. 2000)*; *Madden v. Gober, 125 F.3d 1477 (Fed. Cir. 1997)*; *Livingston v. Derwinski, 959 F.2d 224 (Fed. Cir. 1992)*.

[937] ***Pub. L. No. 107-330***, tit. IV, § 402(a), ***116 Stat. 2820***, 2832 (2002); *see also* *Morgan v. Principi, 327 F.3d 1357 (Fed. Cir. 2003)*. One example of a judicially created rule of law that the Federal Circuit was previously prohibited from reviewing is demonstrated by *Andre v. Principi, 301 F.3d 1354 (Fed. Cir. 2002)*. In *Andre*, the CAVC ruled that the appellant had waived certain CUE claims because he had failed to include any arguments on these claims in his main brief. In a decision issued before the amendment of *38 U.S.C.S. § 7292* made by the Veterans Benefits Act of 2002, the Federal Circuit held that it could not review appellant's arguments that the CAVC had erred when it concluded that he waived his CUE claims because this involved an application by the CAVC of a "jurisprudential rule" of law that was beyond the Federal Circuit's jurisdiction, which was limited to CAVC's interpretation of statutes and regulations. *Andre, 301 F.3d at 1363*. The result would be different under the amended Section 7292.

[938] *Wilson v. Principi, 391 F.3d 1203, 1209 (Fed. Cir. 2004)*.

[939] *See* *Veterans Justice Grp. v. Sec'y of Veterans Affairs, 818 F.3d 1336 (Fed. Cir. 2016)*.

[940] *See* *Herbert v. McDonald, 791 F.3d 1364, 1366 (Fed. Cir. 2015)* (holding that the Federal Circuit has jurisdiction over the legal issue of whether the CAVC relied on a misinterpretation of *38 U.S.C. § 5103A*).

making the decision" on appeal to the Federal Circuit. In contrast, "rule of law" jurisdiction over interpretations of statute or regulation or judicially created rules does not depend on whether the Court technically relied on the interpretation in the decision below.

For example, in *Morgan v. Principi*,[941] the Federal Circuit ruled that it had jurisdiction over a Court decision that affirmed a Board denial of a request for an extension of time to file a substantive appeal. The Court had ruled that the veteran's substantive appeal was untimely. On appeal to the Federal Circuit, the appellant raised an issue that was not raised before the Court. He argued that the Court should have applied the doctrine of equitable tolling to the deadline for the substantive appeal. The Federal Circuit ruled that because of the amendments to 38 U.S.C.S. § 7292 made by the Veterans Benefits Act of 2002, it had jurisdiction under the amended statute over the matter of equitable tolling, which is a judge-made rule of law. The Federal Circuit held that "in a case such as this, in which the decision below would have been altered by adopting the position being urged, this court has jurisdiction to entertain the matter, even though the issue underlying the stated position was not 'relied on' by the Veterans Court."[942] The Federal Circuit concluded that the "relied on" language in Section 7292 does not apply to rules of law.[943]

Thus, the second major way in which the "rule of law" amendment expands the scope of the Federal Circuit's jurisdiction is that it authorizes the Federal Circuit to review statutes, regulations, and interpretations thereof, regardless of whether the Court relied upon that statute, regulation, or interpretation thereof in the decision below. In other words, "rule of law" jurisdiction "confers on [the Federal Circuit] a form of 'case jurisdiction,' as opposed to 'issue jurisdiction.'"[944]

It would therefore appear that a party who wants the Federal Circuit to resolve a particular issue of statutory or regulatory interpretation should always argue that the Federal Circuit has authority to resolve this issue by virtue of its "rule of law" jurisdiction. This route eliminates the necessity of persuading the Federal Circuit that the Court "relied on" the interpretation in the decision below. All that the party would have to do to obtain Federal Circuit review would be to make a plausible case that if the interpretation of the statute or regulation advanced by the party is valid, the decision of the Court below would have been different.

Regardless of whether the Federal Circuit has jurisdiction because the matter is a rule of law or an interpretation of law relied upon by the Court below, the Federal Circuit is authorized to review these issues of law under a de novo standard.[945] It can overturn a rule of law or a statute, regulation, or an interpretation

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[941] 327 F.3d 1357 (Fed. Cir. 2003).

[942] Morgan, 327 F.3d at 1363; *see also* Sneed, 819 F.3d at 1351 ("There is no dispute here as to the relevant facts, so the issue presented is one of law, a matter within our jurisdiction").

[943] Morgan, 327 F.3d at 1360; *see also* Edwards, 582 F.3d at 1355 (holding that it had jurisdiction to review the issue of due process even though the veteran had not raised it in proceedings before the CAVC because the CAVC addressed the point in reaching its decision).

[944] Wilson, 391 F.3d at 1209 (quoting Morgan, 327 F.3d at 1361); *see also* Willsey, 535 F.3d at 1370–72.

[945] *See* Winsett, 341 F.3d at 1330 (holding that Federal Circuit will review de novo the CAVC's interpretation of the regulation governing CUE challenges to BVA decisions); Herndon v. Principi, 311 F.3d 1121, 1124 (Fed. Cir. 2002) (finding that whether the regional office's termination of appellant's TDIU rating was subsumed by a BVA decision that affirmed that termination because the statement of the case preceding the BVA decision was statutorily inadequate presents a legal issue that the Court reviews de novo, regarding the relationship between 38 U.S.C.S. § 7105, which sets forth the statutory requirements for a SOC, and 38 U.S.C.S. § 7104(b), which is the statutory basis for the subsuming doctrine); Williams v. Principi, 310 F.3d 1374, 1377 (2002) (establishing that whether the CAVC properly interpreted a United States District Court order involves a question of law that the Court reviews de novo); Maggitt v. West, 202 F.3d 1370, 1378 (Fed. Cir. 2000) (holding that the CAVC decision to invoke the doctrine of exhaustion of administrative remedies so as to preclude the CAVC from considering a legal issue, because it was not first raised before VA, is a matter of law that the Federal Circuit reviews *de novo*); Hodge v. West, 155 F.3d 1356, 1359 (Fed. Cir. 1998); Haines v. West, 154 F.3d 1298, 1298 (Fed. Cir. 1998); Bazalo v. West, 150 F.3d 1380, 1302 (Fed. Cir. 1998); Prenzler v. Derwinski, 928 F.2d 392, 393 (Fed. Cir. 1991) (citing the first sentence of 38 U.S.C.S. § 7292(d)(1)).

thereof, if the Court concludes that it is arbitrary, capricious, an abuse of discretion, unconstitutional, contrary to a statute, in excess of statutory authority, without observance of procedure required by law, or otherwise not in accordance with the law.[946]

15.8.1.6 Jurisdiction over Interpretations of Statutes and Regulations Relied Upon by the CAVC

In addition to “rules of law,” 38 U.S.C.S. § 7292 authorizes the Federal Circuit to review “the validity of … any statute or regulation … or any interpretation thereof … that was relied on by the [CAVC] in making the decision on appeal to the Federal Circuit.”[947] Thus, a potential roadblock faced by a party who seeks to have the Federal Circuit resolve the validity or proper interpretation of statutes and regulations under this part of Section 7292 is the requirement that the statute or regulation, or interpretation thereof “was relied upon” by the Court in deciding the case on appeal to the Federal Circuit.[948]

In *Forshey*,[949] the Federal Circuit, in an en banc decision, held that it has jurisdiction to review a Court decision under the “was relied upon” part of Section 7292 if the appeal presents one or more of the following issues:

> (1) issues concerning the validity of a statute or regulation on which the CAVC decision depended; (2) issues of interpretation of a statute or regulation if the Court of Appeals for Veterans Claims elaborated the meaning of a statute or regulation and the decision depended on that interpretation; and (3) issues of validity or interpretation raised before the Court of Appeals for Veterans Claims but not decided, if the decision would have been altered by adopting the position that was urged.[950]

15.8.1.7 The Major Roadblocks to Obtaining Federal Circuit Review of Rules of Law or Interpretations of Statutes or Regulations

There are two major roadblocks facing a party who seeks to have the Federal Circuit resolve a rule of law or the validity or proper interpretation of statutes and regulations. First, the Federal Circuit may not resolve the legal issue if the party raising the legal issue does not characterize it carefully. The need to be careful in describing the legal issue presented to the Federal Circuit derives from a seeming inconsistency in the statute defining the Federal Circuit’s jurisdiction.[951] On the one hand, the Federal Circuit can review questions of law and “any interpretation” of a statute or VA regulation “(other than a determination as to a factual matter) that was relied on by the [CAVC] in making the decision.”[952] On the other hand, “[e]xcept to

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[946] *See* 38 U.S.C.S. § 7292(d)(1); Winsett 341 F.3d at 1330.

[947] Cousin v. Wilkie, 905 F.3d 1316, 1319 (2018).

[948] 38 U.S.C.S. § 7292(a) and (d)(1); *see* Ellington v. Peake, 541 F.3d 1364 (Fed. Cir. 2008) (holding that a claim for effective date depended on interpretation of regulations 38 C.F.R. §§ 3.310 and 3.400—a purely legal issue that the Federal Circuit had jurisdiction to review); Winsett, 341 F.3d at 1330 (finding that the veteran’s request that the Federal Circuit review CAVC’s interpretation of 20 C.F.R. § 20.1400(b), regulation governing BVA decisions that are subject to claims that the Board committed clear and unmistakable error, is an issue within the Court’s jurisdiction); Howard v. Gober, 220 F.3d 1341, 1343 (Fed. Cir. 2000); Belcher v. West, 214 F.3d 1335, 1337 (Fed. Cir. 2000); Boyer v. West, 210 F.3d 1351, 1356 (Fed. Cir. 2000).

[949] 284 F.3d 1335 at 1351 (Fed. Cir. 2002) (en banc).

[950] Forshey, 284 F.3d at 1351. In Graves v. Principi, 294 F.3d 1350 (Fed. Cir. 2002), the Federal Circuit held that it had jurisdiction over an appeal in which the veteran argued that the CAVC improperly interpreted Rules 5 and 42 of its rules of practice and procedure when it dismissed his appeal. Even though the Court had not mentioned either rule in its decision, the Federal Circuit held that “the text of the decision makes clear that the Court elaborated upon the meaning of Rule 42 in reaching its decision.” Graves, 294 F.3d at 1354–55.

[951] 38 U.S.C.S. § 7292.

[952] 38 U.S.C.S. § 7292(a); *see also* 38 U.S.C.S. § 7292(d)(1).

the extent that an appeal … presents a constitutional issue," the Federal Circuit "may not review … a challenge to a law or regulation as applied to the facts of a particular case."[953]

However, the Federal Circuit has explained that where the central issue is whether the Court improperly interpreted the law, the Federal Circuit has jurisdiction even if factual disputes remain or the Court's factual findings are unclear.[954] Thus, in *Acree v. O'Rourke*,[955] the Federal Circuit held that the Court erred in finding that the law did not require the Board to ascertain whether the veteran fully understood the consequences of withdrawing a claim, and remanded the appeal for further development. The Federal Circuit explained that "[o]ur jurisdictional statute, *see* 38 U.S.C. § 7292, authorizes 'us to determine whether a Veterans Court decision may have rested on an incorrect rule of law, and moreover, to determine that the correct rule of law requires factual determinations missing from the [b]oard's decision (and perhaps further factual development), thus precluding Veterans Court affirmance of the [b]oard's decision.'"[956] The Federal Circuit has also declared that it has "jurisdiction to review the Veterans Court's legal determinations with respect to the 'the types of evidence which may support a claim for benefits.' "[957]

A skillful advocate should be able to identify an interpretation of a statute or regulation in most cases in which the Court applies a statute or regulation to the facts. If the advocate is careful in framing the issue for Federal Circuit review, there is a good chance that the Federal Circuit will agree that it has jurisdiction over the issue, especially if the advocate can persuade the Federal Circuit that the relevant facts are not in dispute or that the Board has not yet found the relevant facts.[958] This point is illustrated by *Madden v. Gober.*[959] In that case, the Secretary contended that the Federal Circuit lacked jurisdiction to hear the veteran's appeal "because he seeks no more than to argue that the facts he has asserted satisfy his burden to earn a presumption of service connection for his psychiatric disorder."[960] The Secretary's argument failed, however, because of the skill of the veteran's advocate. "Madden however proposes an interpretation of the governing law under which his appeal would succeed, were we to agree to his interpretation of the law. He thus characterizes his appeal as raising a question of interpretation of relevant law, a matter fixedly within our jurisdiction."[961]

However, in *Ferguson v. Principi*,[962] an appellant's advocate was unable to convince the Court that his appeal involved an interpretation of a statute. The appellant argued to the Federal Circuit that he was

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[953] 38 U.S.C.S. § 7292(d)(2); Waltzer v. Nicholson, 447 F.3d 1378 (Fed. Cir. 2006) (finding that a challenge to the sufficiency of evidence used to rebut the presumption of soundness is a challenge to weight or "sufficiency in fact," not legal sufficiency of evidence and thus involves application of law to facts, which is outside the Federal Circuit's jurisdiction to review); *see also* Winsett, 341 F.3d at 1330.

[954] Checo v. Shinseki, 748 F.3d 1373, 1381 (Fed. Cir. 2014) (remanding an equitable tolling case for the CAVC to "engage in further fact finding as necessary"); Sneed v. Shinseki, 737 F.3d 719, 724 (Fed. Cir. 2013) (citing Lamour v. Peake, 544 F.3d 1317, 1321 (Fed. Cir. 2008)).

[955] 891 F.3d 1009 (Fed. Cir. 2018).

[956] Acree, 891 F.3d 1009, 1015 (quoting Martin v. McDonald, 761 F.3d 1366, 1369 (Fed. Cir. 2014)).

[957] AZ v. Shinseki, 731 F.3d 1303, 1310 (Fed. Cir. 2013) (quoting Buchanan v. Nicholson, 451 F.3d 1331, 1335 (Fed. Cir. 2006)).

[958] *See* Acree, 891 F.3d at 1015; Akers, 673 F.3d at 1355–56; Bond v. Shinseki, 659 F.3d 1362, 1366–67 (Fed. Cir. 2011); Szemraj, 357 F.3d at 1372.

[959] 125 F.3d at 1477.

[960] Madden, 125 F.3d at 1480.

[961] Madden, 125 F.3d at 1480.

appealing the Court's interpretation of 38 U.S.C.S. § 5107(b), involving the benefit of the doubt doctrine. The Federal Circuit concluded that the appeal did not involve an interpretation of the statute but merely an application of the law to the facts in the case.[963] The Federal Circuit stated "[w]hen as here, a statute is unambiguous on its face, the parties did not argue for differing interpretations, and the Court of Appeals for Veterans Claims opinion is silent on adopting a particular statutory construction, the only logical conclusion is that the statute was not being interpreted, only applied."[964]

The second potential roadblock faced by a party who seeks to have the Federal Circuit resolve a rule of law or the validity or proper interpretation of statutes and regulations involves whether the party raised this legal issue before the U.S. Court of Appeals for Veterans Claims. In *Forshey*, the Federal Circuit also held that based on prudential considerations it will ordinarily decline to review issues that are raised by a party for the first time on appeal to the Federal Circuit, even if it has jurisdiction to resolve the issue.[965] The Federal Circuit stated that it would recognize four exceptions to this general rule.

As to the first two exceptions, the Federal Circuit stated that it would resolve an issue that was not raised by a party at the Court level if the issue involves (1) a new statute that came into existence after the Court issued the decision on appeal, or (2) a change in Federal Circuit or Supreme Court interpretation of existing law that occurred after the Court issued the decision on appeal.[966] The third exception to the general rule is that the Federal Circuit would consider an issue of law not raised below if such consideration was necessary to properly decide an issue that was raised below.[967]

Finally, the Federal Circuit stated that where the appellant was not represented while his or her case was before the Court, the Federal Circuit would "require less precision in the presentation of the issue to the [Court] than it [would] demand of a litigant represented by counsel."[968] The Federal Circuit indicated a reluctance to elaborate further and did not further explain the amended language of Section 7292. Although the Federal Circuit determined that it had jurisdiction over the issue, it declined as a prudential matter to resolve the equitable tolling rule of law because this issue was not presented or considered by the Court.[969]

15.8.1.8 Federal Circuit Review of "Free-standing" Constitutional Issues

The Federal Circuit also has jurisdiction to decide constitutional issues that do not include a challenge to the validity of a statute or regulation or interpretation thereof. For example, if the party appealing to the Federal Circuit contends that the process used by the Court to decide his or her case violated the party's

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[962] ***273 F.3d 1072 (Fed. Cir. 2001)***.

[963] ***Ferguson, 273 F.3d at 1075***; *see also* *Githens v. Shinseki, 676 F.3d 1368, 1371–72 (Fed. Cir. 2012)* (rejecting the appellant's argument that the CAVC's decision involved an interpretation of a regulation); *Cook v. Principi, 353 F.3d 937, 940 (Fed. Cir. 2003)* (rejecting the appellant's argument that CAVC's decision involved an interpretation of a relevant statute and concluding instead that it involved an application of the law to the facts).

[964] ***Ferguson, 273 F.3d at 1075***

[965] *Forshey, 284 F.3d at 1355*; *see also* *Emenaker v. Peake, 551 F.3d 1332 (Fed. Cir. 2008)*. In addition, the Federal Circuit will generally decline to address a new legal theory raised for the first time in a petition for rehearing. *See* *Haas v. Peake, 544 F.3d 1306 (2008)* (Court noted general rule but nonetheless addressed merits of issue raised for first time before denying petition).

[966] *Forshey, 284 F.3d at 1355–57*.

[967] *Forshey, 284 F.3d at 1357*.

[968] *Forshey, 284 F.3d at 1357*.

[969] *Forshey, 284 F.3d at 1357*.

rights guaranteed by the *Due Process Clause of the Fifth Amendment to the U.S. Constitution*, the Federal Circuit would have jurisdiction to review that legal question.[970]

The right to Federal Circuit review of a constitutional claim provides another opportunity for a skillful advocate to frame the issue on appeal in a way that navigates around the jurisdictional bar to Federal Circuit review of the application of law to the facts of a particular case. In *Helfer v. West,* for example, the veteran pointed to a number of Court decisions and "argue[d] that the [Court] ha[d] adopted a legal rule" and "this case falls within the scope of the legal rule, and when the [Court] failed to apply that rule to his case and failed to explain why it was not doing so, it denied him due process."[971] The Federal Circuit held that it had jurisdiction over this constitutional challenge because it was more than a mere claim that the Court erred in applying the law to the facts of the veteran's case.[972]

15.8.2 Direct Challenges to VA Regulations and VA Policies and General Counsel Opinions of General Applicability

The Federal Circuit, rather than U.S. district courts, has exclusive jurisdiction to review direct challenges to VA regulations, VA rating schedule changes,[973] rules of procedure, substantive rules of general applicability, statements of general policy and interpretations of general applicability, including opinions and interpretations of the OGC that fit this description.[974] The Federal Circuit reviews these direct challenges under the scope of review provisions of the Administrative Procedure Act.[975] This grant of jurisdiction extends to both substantive and interpretive rules.[976] As of the publication of this manual, the Federal Circuit has held that it lacks jurisdiction to review direct challenges to the VA Adjudication Procedures Manual (M21-1), which is considered an administrative staff manual that falls outside the purview of the Federal Circuit's jurisdiction under *38 U.S.C.S. § 502*.[977] However, the Federal Circuit has recently granted a petition for hearing en banc to revisit the

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[970] *See* *In re Bailey, 182 F.3d 860, 864 (Fed. Cir. 1999)*; *Pierre v. West, 211 F.3d 1364 (Fed. Cir. 2000)*; ***see also*** *Preminger v. Sec'y of Veterans Affairs, 498 F.3d 1265 (Fed. Cir. 2007)* (holding that Federal Circuit has jurisdiction to hear facial challenges to the constitutionality of VA regulations that pertain to the provision of veterans benefits, but only federal district courts have jurisdiction to hear as-applied challenges to regulations that pertain to other matters, such as the restriction of speech on VA property).

[971] *174 F.3d 1332, 1336 (Fed. Cir. 1999)*.

[972] *Helfner, 174 F.3d at 1336*.

[973] Veterans' Benefits Improvement Act of 2008, ***Pub. L. No. 110-389, 122 Stat. 4145***, Sec. 102 (2008) (codified at *38 U.S.C.S. § 502*).

[974] *38 U.S.C.S. § 502*. ***See, e.g.***, *Snyder v. Sec'y of Veterans Affairs, 858 F.3d 1410, 1413 (Fed. Cir. 2017)*; *Veterans Justice Grp., 818 F.3d at 1343* ("we must 'hold unlawful and set aside agency action' we find 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' " (quoting *5 U.S.C. § 706(2)*)); *Nat'l Org. of Veterans Advocates, 725 F.3d 1312*; *Splane and Paralyzed Veterans of Am. v. West, 216 F.3d 1058 (Fed. Cir. 2000)*; *Paralyzed Veterans of Am. v. West, 138 F.3d 1434 (Fed. Cir. 1998)*; *LeFevre v. Sec'y, Dep't of Veterans Affairs, 66 F.3d 1191 (Fed. Cir. 1995)* (Federal Circuit possesses jurisdiction to review a petition under *38 U.S.C.S. § 502*, to challenge the Secretary's decision to refuse to presumptively service-connect certain diseases as a result of exposure to Agent Orange); *Pena v. Sec'y, Dep't of Veterans Affairs, 944 F.2d 867 (Fed. Cir. 1991)*. Under FED. CIR. R. 47.12(a), any action for judicial review of rules or regulations must be filed "within 60 days of the issuance of the rule or regulation or denial of a request for amendment or waiver of the rule or regulation." This 60-day rule, however, may be invalid because it abridges the substantive right to judicial review granted by Congress under *38 U.S.C.S. § 502*. This statute contains no statute of limitations, and the general federal statute of limitations (*28 U.S.C.S. § 2401(a)*) is six years after the cause of action accrues.

[975] Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs, 464 F.3d 1306, 1314 (Fed. Cir. 2007). *See* *Nat'l Org. of Veterans Advocates v. Sec'y of Veterans Affairs, 710 F.3d 1328, 1332 (Fed. Cir. 2013)*.

[976] Coal. for Common Sense in Gov't Procurement, 464 F.3d at 1314.

issue of whether it has jurisdiction under *38 U.S.C.S. § 502* to review the provisions of the M21-1 that are binding on VA adjudicators, but not on the Board of Veterans' Appeals.[978]

The jurisdictional statutes therefore contemplate that claimants may challenge VA regulations and general policies that affect their cases through two judicial paths.[979] They may file a direct challenge in the Federal Circuit. Alternatively, they may appeal their case to the Board (which is bound by VA regulations, "instructions" of the Secretary, and OGC "precedent opinions")[980] and if they lose at the Board, challenge the VA regulation or policy in Court as part of an appeal of a Board denial, with subsequent review available in the Federal Circuit.

Among the factors to be considered in determining which of these two courses of action to pursue is the time it would take for the case to be ripe for Federal Circuit review and the court in which success is more likely. With regard to the first factor, if a claimant wishing to challenge the regulation or policy in issue has not yet received a final Board decision, it may take years before the claim is finally adjudicated by the Board and an appeal to the Court is possible. Immediately petitioning the Court for an extraordinary writ is theoretically possible, but the petition would likely be denied for failure to satisfy one of the criteria for a writ, such as the exhaustion requirement or the requirement that the right to relief from the regulation or policy be clear (that is, that the illegality of the regulation or policy is clear). On the other hand, the claimant may file suit immediately in the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) to challenge VA regulations and policies controlling the claim for benefits, without first exhausting an appeal to the Board.

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[977] *Gray v. Sec'y of Veterans Affairs, 875 F.3d, 1102, 1108–09 (Fed. Cir. 2017)*, cert granted, ***139 S. Ct. 451 (2018)***; *Disabled Am. Veterans v. Sec'y of Veterans Affairs, 859 F.3d 1072, 1077–78 (Fed. Cir. 2017)*.

[978] Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs, No. 20-1321, Order (Fed. Cir., May 6, 2020) (granting petition for en banc hearing).

[979] ***See*** 134 CONG. REC. S16,647–48 (daily ed. Oct. 18, 1988) (remarks of Sen. Cranston); 134 CONG. REC. H10, 359–60 (daily ed. Oct. 19, 1988) (remarks of Rep. Edwards).

[980] *38 U.S.C.S. § 7104(c)*.

15.9 THE REMAINING JURISDICTION OF THE U.S. DISTRICT COURTS

The Veterans' Judicial Review Act (VJRA) amended the judicial review preclusion statute in title 38 to prohibit any court from reviewing a decision of the Secretary of Veterans Affairs on "all questions of law and fact necessary to a decision by the [Secretary] under a law that affects the provision of benefits by the [Secretary] to veterans or the dependents or survivors of veterans" except for the provisions authorizing judicial review in the Court of Appeals for Veterans Claims (CAVC or Court) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) described above.[981] Thus, U.S. district courts no longer have jurisdiction to entertain challenges to VA regulations and policies that are established by the Secretary and that affect the provision of veterans benefits.[982]

U.S. district courts retain jurisdiction to adjudicate lawsuits challenging VA actions that are not connected to a decision by the Secretary that directly affects the provision of veterans benefits. For example, after passage of the VJRA, two veterans organizations and several individual veterans challenged in U.S. district court the failure of the Secretary of the VA to conduct an epidemiological study of any long-term adverse health effects in Vietnam veterans from exposure to the herbicide "Agent Orange," as mandated by the Veterans' Health Programs and Improvement Act of 1979.[983]

Although implementation of the Act could ultimately have had an impact on the provision of veterans benefits, the lawsuit did not challenge a "decision by the [Secretary of Veterans Affairs] under a law that affects the provision of benefits" within the meaning of Section 511(a). The primary focus of the 1979 Agent Orange Act was to require that a study be conducted. Although the results of the study could potentially cause the Secretary to change the VA's regulations for the provision of benefits, this result would be secondary to the primary statutory requirement, which did not itself affect the provision of veterans benefits. Accordingly, Section 511(a) does not bar the U.S. district court from entertaining this type of challenge.

U.S. district courts have concurrent jurisdiction with the Court to review suits brought by claimants who are dissatisfied with a VA determination in an insurance claim under the National Service Life Insurance Program.[984]

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[981] 38 U.S.C.S. § 511(a).

[982] *See* Blue Water Navy Vietnam Veterans Ass'n v. McDonald, 830 F.3d 570 (D.C. Cir. 2016); Beamon v. Brown, 125 F.3d 965 (6th Cir. 1997); Hall v. U.S. Dep't Veterans Affairs, 85 F.3d 532, 534–35 (11th Cir. 1996); Zuspann v. Brown, 60 F.3d 1156, 1158–60 (5th Cir. 1995), *cert. denied*, ***516 U.S. 1111 (1996)***; Larrabee v. Derwinski, 968 F.2d 1497, 1499–1501 (2d Cir. 1992); Hicks v. Veterans Admin., 961 F.2d 1367, 1369–70 (8th Cir.1992). In Pacheco v. Dep't of Veterans Affairs, No. C83-3098 (N.D. Ohio 1991), a U.S. district court issued a consent order that settled a class action suit arising from a VA policy of denying delimiting period extensions to veterans pursuing educational courses as part of associate degree programs under 38 U.S.C.S. § 3462(a). The consent order included a provision that stated that the CAVC could not review any Board decision issued pursuant to a claim made under the provisions of the consent order. The CAVC, in West v. Principi, 15 Vet. App. 246, 249 (2001), held that this provision in the consent order was null and void. The CAVC concluded that "[t]he District Court overstepped its limited jurisdiction when it directed that *Pacheco* claimants were barred from seeking this Court's review of a BVA denial of individual *Pacheco* claims. …" West, 15 Vet. App. at 249.

[983] Am. Legion v. Derwinski, 827 F. Supp. 805 (D.D.C. 1993); 38 U.S.C.S. § 219 note (Supp. 1991).

[984] *See* 38 U.S.C.S. §§ 1975, 1984(a); Young v. Derwinski, 1 Vet. App. 70 (1991).

They also have concurrent jurisdiction with the Court over decisions of the VA regarding the VA's Loan Guarantee Program, including VA decisions that the veteran is liable to the VA for a debt.[985]

The U.S. district courts retain jurisdiction in lawsuits brought against the VA under the Freedom of Information Act and the Privacy Act.[986] They also continue to have jurisdiction over Federal Tort Claims Act lawsuits.[987]

Because Section 511(a) addresses only judicial review of challenges to decisions by the Secretary of Veterans Affairs, the Supreme Court's decision in *Johnson v. Robison,*[988] construing section 511(a) as it existed before the VJRA, should remain good law. U.S. district courts should still retain jurisdiction over lawsuits challenging the constitutionality of title 38 statutes because the challenge is to a decision of Congress, not to a decision of the Secretary.[989] Similarly, veterans and veterans organizations may be able to obtain district court jurisdiction over other challenges to VA actions that are not connected to a decision by the Secretary affecting the provision of veterans benefits.[990]

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[985] *See* *38 U.S.C.S. § 511(b)(1)–(3)*; *Smith v. Derwinski, 1 Vet. App. 267 (1991)*.

[986] *5 U.S.C.S. §§ 552*, *552a*.

[987] *See generally* *Chapter 4* of this Manual.

[988] *415 U.S. 361 (1974)*.

[989] For example, in 1991 a U.S. district court retained jurisdiction over a class action lawsuit challenging the constitutionality of a provision in the Consolidated Omnibus Budget Reconciliation Act of 1990, 38 U.S.C.S. § 3205(a) (Supp. 1991) (recodified in 1991 as *38 U.S.C.S. § 5505(a)*), that required VA to withhold service-connected disability compensation from veterans rated mentally incompetent by VA if the value of the veteran's estate exceeded $25,000, exclusive of the veteran's home. *See* *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs, 783 F. Supp. 187, 195 (S.D.N.Y. 1992)*, *vacated and remanded* *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs, 962 F.2d 136 (2d Cir. 1992)* (vacated and remanded on other grounds).

[990] *See* *Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012)*, *cert. denied*, ***133 S. Ct. 840 (2013)*** (holding that the district court had jurisdiction to review an organizational plaintiff's challenge to the absence of VA system-wide procedures but lacked jurisdiction to review a challenge to existing VA procedures as doing so would require the district court to review the circumstances surrounding the provision of benefits to individual veterans); *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs, 962 F.2d 136, 140–41 (2d Cir. 1992)* (holding that the district court had jurisdiction to review the constitutionality of a statutory classification drawn by Congress).

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Elizabeth Kubala

APPENDIX 15-B Sample Briefing Conference Memorandum

BRIEFING CONFERENCE MEMORANDUM

TO:	U.S. Court of Appeals for Veterans Claims VA Office of General Counsel
FROM:	Caitlin M. Milo, National Veterans Legal Services Program
DATE:	May 2020
RE:	Appellant v. Robert L. Wilkie, Vet. App. 20-XXXX

This memorandum is prepared as directed by the Court's Order of [DATE], which scheduled a Rule 33 Staff Conference for [DATE], at [TIME] a.m. This memorandum addresses the primary issues in the above-captioned appeal for the purposes of refinement of the issues and seeking a joint resolution of the matter. This memorandum does not raise all the issues that may be briefed on appeal. It is assumed that VA counsel has reviewed the Record Before the Agency ("R.") and the law. Thus, the issues presented below are set forth solely in an effort to find common ground for a joint motion for remand or other settlement or disposition, and there may be issues not expressly stated in this memorandum, but implicated by the record and the law. It is the position of Appellant that Rule 33(b) prohibits the dissemination of this memorandum (which includes revealing to the Court the contents of all or part of this memorandum) without express written consent of Appellant's counsel.

The issues on appeal are entitlement to (1) service connection for a low back injury; (2) a disability evaluation in excess of 20 percent for severe degenerative joint disease of the left knee; (3) a disability evaluation in excess of 20 percent for severe degenerative joint disease of the right knee; and (4) a total disability rating based on individual unemployability (TDIU). R. at 5 (4–16). Vacatur of the July 2019 decision and remand are required for three reasons, as detailed below. First, the Board erred by failing to address the applicability of *38 C.F.R. § 3.303(b)* in determining whether Appellant's low back injury is related to service. *38 U.S.C. § 7104(d)(1)*. The Board also erred by failing to fulfill its duty to assist in the development of his bilateral knee claims. *38 U.S.C. § 5103A*; *38 C.F.R. § 4.40*. Finally, the Board erred by denying TDIU where the conditions that cause TDIU are still on appeal. *Tyrues v. Shinseki, 23 Vet. App. 166 (2009)*.

I. Entitlement to service connection for a low back injury.

In adjudicating whether Appellant's low back injury is related to service, the Board erred by failing to address the applicability of *38 C.F.R. § 3.303(b)*. With respect to a claim for entitlement to service connection for a chronic disease as defined by *38 C.F.R. § 3.309(a)*, *38 C.F.R. § 3.303(b)* permits a finding of service connection when there are "subsequent manifestations of the same chronic disease at any later date, however remote … unless clearly attributable to intercurrent causes." Even when evidence establishing chronicity in service is lacking, evidence of continuity of symptomatology following discharge may establish service connection. *38 C.F.R. § 3.303(b)*. In *Walker v. Shinseki, 708 F.3d 1331, 1336 (Fed. Cir. 2013)*, the Federal Circuit established that a medical nexus opinion is not required to establish continuity of symptomatology, and that there is a presumption of service connection under § 3.303(b) when continuity of symptomatology has been established. Specifically, the Court explained:

> The primary difference between a chronic disease that qualifies for § 3.303(b) analysis, and one that must be tested under § 3.303(a), is that the latter must satisfy the "nexus" requirement of the three-element test, whereas the former benefits from presumptive service connection (absent intercurrent causes) or service connection via continuity of symptomatology.

Id. at 1338–39.

Appellant's low back injury has been diagnosed as degenerative arthritis of the spine, a chronic condition under § 3.309(a). R. at 828 (827–36). He also noted a back injury condition in service in 1988. *R. at 1720–22, 2744, 2750*. Finally, he has continued to report back pain symptoms since service. *See e.g*., R. at 2623 (July 1989, statement that since the in-service injury, "my back has never fully recovered"), 2659 (May 1992, medical record regarding back condition), 2726 (February 1998, statement regarding constant back pain), 2254 (September 2010, statement that "I injured my low back while on active duty for training [in 1988], this has been an ongoing disability since that time"), 283 (August 2012, medical record regarding back condition). Thus, the Board erred by failing to address the applicability of § 3.303(b) at all in its decision. R. at 7–10 (4–16).

Instead of addressing § 3.303(b), the Board relied on the September 2016 and April 2018 VA medical opinions. R. at 8–9 (4–16), 827–36, 862–64. However, where § 3.303(b) applies, a presumption of service connection exists and a nexus opinion is not necessary. Moreover, the 2016 examiner provided as rationale for the negative opinion, in part, that "[t]here is no medical evidence of ongoing treatment for the back," R. at 863 (862–64), and the 2018 examiner focused on the gap between service and his diagnoses, R. at 167 (166–67); however, the focus of a § 3.303(b) analysis is on *symptoms*, not treatment or the diagnosis. Neither examiner addressed Appellant's statements regarding his ongoing symptoms since service.

Thus, vacatur and remand are required for the Board to address the favorable evidence of record and the applicability of *38 C.F.R. § 3.303(b)*. *38 U.S.C. § 7104(d)(1)*. Alternatively, vacatur and remand are required for the Board to afford Appellant a new medical opinion taking into consideration his competent and credible statements regarding ongoing back pain symptoms since service. *38 U.S.C. § 5103A*

II. Entitlement to disability evaluations in excess of 20 percent, each, for severe degenerative joint disease of the bilateral knees.

Appellant's current bilateral knee disabilities are rated 20% each for dislocation of semilunar cartilage with frequent episodes of locking, pain, and effusion into the joint, under *38 C.F.R. § 4.71a*, Diagnostic Code (DC) 5258. R. at 10 (4–16). The Board found that he was not entitled to ratings for limitation of flexion or extension under DCs 5260 and 5261 because "a review of VA examinations indicate that the Veteran had normal extension, and, at worst, flexion was limited to 120 degrees." R. at 11 (4–16). Although the Board did not note which VA examination reports it was referring to, the Board likely relied on the November 2009 and September 2016 VA medical opinions to assess the severity of Appellant's bilateral knee conditions. R. at 10–11 (4–16). However, as detailed below, the Board erred by failing to address, or obtain an adequate medical opinion addressing, the severity of Appellant's bilateral knee condition during a flare-up and after repeated use over time. *38 U.S.C. §§ 7104(d)(1)*, *5103A*. Had the examiners properly opined on the severity of Appellant's knees during flare-ups and after repeated use over time, he may have been entitled to ratings higher than 20% under DC 5260 or 5261.

In *DeLuca v. Brown, 8 Vet. App. 202, 206 (1995)*, the Court held that where a veteran's disability rating is based on a loss of motion, § 4.40 requires the Board to ensure that it has obtained a medical opinion that addresses whether pain could significantly limit functional ability when the joint is used repeatedly over time and/or during a flare-up. *See also* *Mitchell v. Shinseki, 25 Vet. App. 32, 37 (2011)*. When feasible, "these determinations should … be 'portrayed' (§ 4.40) in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *DeLuca, 8 Vet. App. at 206*; *see also* *Mitchell, 25 Vet. App. at 37*. Thus, adjudicators are required to obtain medical opinions as to whether "pain could significantly limit functional ability" in two situations: (1) "during flare-ups," or (2) "when the joint is used repeatedly over time." *Mitchell, 25 Vet. App. at 37*.

If an examiner fails to provide a conclusive opinion because doing so would require speculation, it must be clear that an examiner has "considered all procurable and assembled data" and the examiner "must explain the basis for such an opinion or the basis must otherwise be apparent in the Board's review of the evidence." *Jones v. Shinseki, 23 Vet. App. 382, 390 (2010)*; *see also* *Sharp v. Shulkin, 29 Vet. App. 26, 33 (2017)*. The rationale behind this requirement is so the Board can ensure that the reason an opinion is not rendered is not because "some additional testing or information is needed, and possibly available, that would permit such an opinion. …" *Id.* The Board must ensure that the examiner performed "all due diligence in seeking relevant medical information that may have bearing on the requested opinion," and the opinion was not "the first impression of an uninformed examiner." *Jones, 23 Vet. App. at 390*.

Here, both the November 2009 and September 2016 VA examination reports note additional functional loss during flare-ups, but neither addressed "the degree of additional range-of-motion loss due to pain on use or during flare-ups." *DeLuca, 8 Vet. App. at 206*.

Specifically, the November 2009 VA examiner reported that Appellant stated his right knee "always gives out and flares up." R. at 2358 (2358–62). The examiner found that for the right knee, Appellant suffered from severe flare-ups weekly, lasting 3–7 days, and for the left knee, he suffered from severe flare-ups every 1–2 months, lasting 1–2 weeks. R. at 2359 (2358–62). During a flare-up, Appellant described that he couldn't walk on his right knee without limping or holding something and he dragged his left leg due to pain and swelling. *Id*. The examiner did not provide an assessment of the additional limitation of motion during a flare-up.

During the September 2016 VA examination, Appellant reported flare-ups and additional functional loss after repeated use over time. R. at 839 (836–51). Specifically, Appellant stated he has flare-ups "3 times a week lasting all day—he can't move around and has to wait till it goes back down, he gets his crutches if he has to go somewhere and he has to just rest." *Id*. He also reported his functional loss effects running, skipping, jumping, bending, and stretching. *Id*. The examiner stated that he was not examined after repeated use over time, but that he did not suffer from functional impairment with repeated use over time. R. at 841 (836–51). Regarding flare-ups, the examiner stated that he was unable to say without "mere speculation" whether flare-ups caused additional functional loss. R. at 841–42 (836–51).

The Board did not mention, or address, this evidence in its evaluation of the applicability of ratings under DCs 5260 and 5261. *Thompson v. Gober, 14 Vet. App. 187, 188 (2000)*. Instead, the Board erroneously opined on the severity of Appellant's limitation of motion without an adequate medical opinion regarding the severity of this condition during a flare-up or after repeated use over time. *Colvin v. Derwinski, 1 Vet. App. 171, 175 (1991)* (holding that the Board may only consider independent medical evidence and may not substitute its own medical opinion.). Without an adequate opinion regarding Appellant's functional loss, the Board's analysis regarding his entitlement to DCs 5260 and 5261 is inadequate and, vacatur and remand are required. *38 U.S.C. § 7104(d)(1)*, *5103A*; *see* *Barr v. Nicholson, 21 Vet. App. 303, 311 (2007)*.

III. Entitlement to TDIU.

In the decision on appeal, the Board also denied entitlement to TDIU. However, vacatur of this part of the decision and remand are also required because the Board failed to provide an adequate rationale for its decision and this matter is inextricably intertwined with the issue of service connection for the back condition and foot condition.

The Board found that Appellant met the threshold requirements for TDIU—namely, an 80% combined rating for a right foot injury, PTSD, right knee DJD, left knee DJD, left foot bunion, right third finger sprain, right foot scar, and bilateral knee scars—throughout the entire period on appeal. R. at 12 (4–16). However, the Board denied TDIU for three reasons: (1) "[t]he medical evidence reveals no hospitalizations or intensive outpatient treatment for the Veteran's service-connected disabilities"; (2) although VA examiners "determined that his occupational activities would be impacted by his service-connected disabilities," they did not find that he "was unable to obtain and secure substantially gainful employment"; and (3) "[t]he record shows the Veteran's occupational functioning was primarily impacted by a non-service-connected condition," specifically, his back and ankles. R. at 13–14 (4–16).

Notably, hospitalizations or intensive outpatient treatment is not a requirement for TDIU and it is unclear why, or the extent to which, the Board relied on this erroneous standard to assess Appellant's employability. *38 U.S.C. § 7104(d)(1)*.

Additionally, the Board erred by disregarding, or mitigating, the favorable medical evidence detailing the impact of Appellant's service-connected conditions because the VA examiners "did not find that the Veteran was unable to obtain and secure substantially gainful employment." R. at 13 (4–16). It is well established that "medical examiners and VA adjudicators have distinct and separate roles in the veterans benefits system, based on the differing types of expertise each possesses: the medical examiner provides an opinion on medical matters and the adjudicator makes findings of fact and law to determine a veteran's entitlement to disability benefits." *Cardenas v. Wilkie*, Vet. App. 19-1788, at 3 (May 15, 2020); *see* *Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 301 (2008)*; *Moore v. Nicholson, 21 Vet. App. 211, 218 (2007)*.

Here, whether Appellant is able to obtain and maintain substantially gainful employment is a finding tasked to the Board, not a VA medical provider. The medical providers were instead tasked with answering whether and to what extent Appellant's service-connected conditions impact his occupational activities so that the Board could make a finding as to whether TDIU was warranted. The November 2009 VA examiner found that his bilateral knee condition had "significant effects" on his usual occupation. R. at 2361–62 (2358–62). The examiner noted he was "terminated because he could not get to his job on time due to medications and due to pain in his knees. States that when he took the medications at night and went to sleep, he would have difficulty waking up in the morning to get to work" and he "would be restricted to walking no more than one mile. He also would need to be able to change positions every fifteen to twenty minutes due to pain." R. at 2361 (2358–62). The March 2010 VA examiner also found that his conditions effected his employability such that he would have to sit/stand at will and could not walk for prolonged periods. R. at 2311–13 (2304–13). The September 2016 VA examiner also noted that Appellant reported being terminated from his last job due to "too much time off for pain" and checked "yes" that his conditions "impact his or her ability to perform any type of occupational task." R. at 791, 851 (836–51) (medical opinion regarding the knees), 862 (851–62) (medical opinion regarding the feet).

At no point in any of these medical opinions was the examiner asked to address whether Appellant "was unable to obtain and secure substantially gainful employment" based on his service-connected conditions. R. at 13–14 (4–16). Instead, the examiners were asked to determine whether his conditions "impact his [] ability to perform any type of occupational task (such as standing, walking, lifting, sitting, etc.)," which the examiners answered in the affirmative, as detailed above, and then the Board was tasked with using these medical findings to make a determination about TDIU. A TDIU analysis is subjective and based on the individual veteran's capabilities and the Board should have addressed these capabilities in light of the multiple examiner's findings regarding his limitations. *Roberson v. Principi, 251 F.3d 1378, 1380 (Fed. Cir. 2001)*. Thus, the Board's rationale that "though the VA examiners assessing the Veteran's feet and knees determined that his occupational activities would be impacted by his service-connected disabilities, they did not find that the Veteran was unable to obtain and secure substantially gainful employment," is a misplacement of the duty to adjudicate and an inadequate rationale.

Finally, the Board's finding that Appellant's "occupational functioning was primarily impacted by a non-service-connected condition," his back and ankles, establishes that the claim for TDIU in inextricably intertwined with claims that continue on appeal. R. at 13–14 (4–16). Specifically, in 2019, this Court remanded Appellant's claim for service connection for his left foot and that claim is still pending. Additionally, as detailed above, vacatur and remand are required for Appellant's back claim for re-adjudication.

The Court has held that two claims are inextricably intertwined when a decision on one would have a "significant impact" upon the other that "could render any review by this Court of the decision [on the other] claim meaningless and a waste of judicial resources." *Harris v. Derwinski, 1 Vet. App. 180, 183 (1992)*, *overruled in part on other grounds by* *Tyrues, 23 Vet. App. 166*. Thus, further development and adjudication of Appellant's back and left foot claims could have a "significant impact" upon whether he is also entitled to TDIU. *Id*. Accordingly, in the interest of judicial efficiency, vacatur and remand of the Board's denial of TDIU are warranted.

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[1 Veterans Benefits Manual APPENDIX 15-C]

APPENDIX 15-C Sample Brief for Appellant

United States Court of Appeals for Veterans Claims

Vet. App. No. 20-XXXX

VETERAN,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S BRIEF

Emily Woodward Deutsch

Barton F. Stichman

National Veterans Legal Services Program

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R. 398–408 (May 2016 VA Rating Decision)
R. 449–54 (February 2016 VA Mental Health Consult Note)
R. 471–475 (December 2015 VA Mental Disorders Examination)
R. 514–18 (August 2015 VA Treatment Note)
R. 566–80 (March 2016 VA Rating Decision Letter)

R. 592–606 (March 2016 VA Rating Decision)
R. 663 (January 2016 VA Orthopedic Clinic Note)
R. 1017–18 (March 2015 VA Orthopedic Consult)
R. 1066 (July 2015 Request for TDIU)
R. 1084–88 (January 2015 VA Rating Decision)
R. 1097–99 (October 2014 VA Pre-Operative Treatment Note)
R. 1099–1101 (October 2014 VA Operative Report)
R. 1102 (November 2014 VA Post-Operative Treatment Note)
R. 1144–45 (May 2014 VA Orthopedic Surgery Consult Note)
R. 1147 (May 2014 VA Outpatient Treatment Note)
R. 1160 (February 2014 VA Outpatient Treatment Note)
R. 1184–87 (October 2013 VA Orthotics Prosthetics Consult)
R. 1168 (January 2014 VA Treatment Note Addendum)
R. 1181(October 4, 2013 VA Treatment Note)
R. 1186–91 (October 2, 2013 VA Treatment Note)
R. 1202 (April 2012 VA Gallium Imaging Scan)
R. 1226–30 (February 2012 VA Outpatient Treatment Note)
R. 1231–32 (December 2011 VA Outpatient Treatment Note)
R. 1240–41 (December 2010 VA Outpatient Treatment Note)
R. 1273–30 (November 2010 VA Outpatient Treatment Note)
R. 1746 (January 2006 Service Treatment Records)
R. 1748–50 (February 2006 Service Treatment Records)
R. 1751 (April 2006 Service Treatment Record)
R. 1757–58 (March 2007 Service Treatment Record)
R. 1760–64 (November 2007 Service Treatment Record)
R. 2038–39 (July 2010 VA Form 9 Substantive Appeal)
R. 2077 (February 2010 Notice of Disagreement)
R. 2136–50 (March 2009 Compensation and Pension Examination)
R. 2103–15 (June 2009 VA Rating Decision)
R. 2125 (DD Form 214)

STATEMENT OF ISSUES

I. Whether the Board erred in relying on inadequate U.S. Department of Veterans Affairs ("VA") medical examination reports to deny Mr. Veteran an initial rating in excess of 10 percent for right knee pain and instability, effective March 6, 2009, and a separate rating in excess of 10 percent for symptomatic removal of the right knee seminlunar cartilage, effective February 1, 2015?

II. Whether the Board provided an inadequate statement of reasons or bases for denying separate ratings for painful right knee flexion and extension?

III. Whether the Board provided an inadequate statement of reasons or bases for denying additional compensation under the VA Rating Schedule, or referral for extraschedular consideration, for his right knee disability?

IV. Whether the Board provided an inadequate statement of reasons or bases for declining to refer Mr. Veteran for extraschedular consideration of a total disability rating based on individual unemployability (TDIU) before July 1, 2015?

V. Whether the Board erred in denying a schedular TDIU rating as of July 1, 2015?

STATEMENT OF CASE

The Appellant, ("Mr. Veteran"), appeals an April 2018 decision of the Board of Veterans' Appeals ("Board") that: assigned a 10 percent rating for right knee pain and instability from March 6, 2009; assigned a separate 10 percent rating for symptomatic removal of the right knee semilunar cartilage, effective February 1, 2015; and denied entitlement to TDIU. Record Before the Agency ("R.") 1–21. The Court has jurisdiction over Mr. Veteran's appeal pursuant to *38 U.S.C. §§ 7252(a)* and *7266*.

Mr. Veteran served honorably in the United States Navy from March 2001 to March 2009, during which time he was deployed overseas in support of the Global War on Terrorism. R. at 2125. It was also during this time that his right knee problems first manifested. Specifically, in January and February of 2006, Mr. Veteran sought in-service treatment for right knee pain, swelling, popping, and instability, and was diagnosed with a mid-patellar cyst and an anterior cruciate ligament ("ACL") tear. R. 1746, 1748–50. His symptoms persisted for the next two months and in April 2006, a magnetic resonance imaging scan revealed mild degenerative joint disease of the right knee. R. at 1751. In March of the following year, Mr. Veteran was again assessed with an ACL tear, as well as a right meniscal injury. R. at 1757–58. Eight months later, while serving aboard the USS *Enterprise*, he was struck in the right leg and assessed via X-ray with a right knee soft tissue injury, joint degeneration and bone spurs. R. at 1760–64.

Procedural and Medical History

Coincident with leaving the Navy, Mr. Veteran was afforded a March 2009 Compensation and Pension examination, where he was assessed, *inter alia,* with right knee "stiffness and giving way," which was not accompanied by pain, limitation of motion, or other functional impairment. R. at 2139 (2136–50). Based on this assessment, he was awarded service connection, effective the day following his discharge (March 2009), but was denied compensation for his right knee disability. R. at 2107 (2103–15).

Mr. Veteran filed a timely Notice of Disagreement ("NOD") and subsequently perfected an appeal to the Board, stating that his right knee warranted compensation as it not only was painful but also prevented him from running or engaging in other forms of exercise. R. at 2077, 2038–39. Thereafter, while Mr. Veteran's appeal was pending, he sought outpatient treatment for degenerative changes involving his right knee. *See, e.g.,* R. 1188 (noting February 2012 treatment for right knee pain); R. 1202 (noting that an April 2012 gallium imaging scan revealed degenerative joint disease of the right knee).

While Mr. Veteran's treatment records reflect a gap from May 2012 to October 2013, he later clarified that this was because he had temporarily moved from Virginia to North Carolina to live with his mother "to keep from being homeless because [he was] no longer able to maintain any type of employment." R. at 150 (133–62). Upon returning to Virginia, Mr. Veteran resumed treatment for his right knee symptoms, which were only partially responsive to medication. R. 1186–87 (1186–91) (noting that, as of October 2013, Mr. Veteran had returned from North Carolina and that his current right knee pain varied from 9–10 in terms of severity and was only partially relieved by oral analgesics).

During an October 2013 outpatient visit, Mr. Veteran complained that his right knee pain prevented him from sitting for long durations and thus interfered with his employment as an equipment operator. R. at 1187 (1186–91). He also stated that "[h]e [had been] told to get [his right] knee cap replaced, but … was too young for surgery." *Id.* His VA treating clinician prescribed a Corflex® hinged brace to provide medial and lateral support and thereby relieve his right knee discomfort during ambulation. *Id.* However, this conservative treatment soon proved futile as VA records dated from October 2013 to October 2014 reflect that Mr. Veteran experienced chronic pain, weakness, occasional popping, effusion, and decreased flexion in his right knee, and that none of his symptoms responded to the prescribed brace, oral painkillers, or physical therapy. R. at 1185 (1184–87), 1181, 1168, 1160, 1147, 1145, 1144. Ultimately, Mr. Veteran was referred for surgery for his multiple right knee diagnoses, which included degenerative joint disease, a medial meniscal tear, an osteochondral defect, synovitis, and an ACL rupture. R. at 1097 (1097–99) (noting that "he has failed conservative treatment" as "[n]othing has helped" relieve his right knee pain and "moving has made it worse").

Mr. Veteran's right knee operation, performed on October 30, 2014, consisted of an arthroscopy, an arthroscopic medial meniscectomy, a microfracture and abrasion meniscal repair, and an ACL reconstruction. R. at 1099 (1099–1101). While Mr. Veteran initially responded "well" to the surgery, his post-operative physical therapy was delayed because of scheduling constraints, and he remained on crutches for weeks with persistent right knee pain, swelling, and decreased flexion and extension. R. at 1102.

Mr. Veteran subsequently sought and received a temporary total rating under *38 C.F.R. § 4.30* for right knee surgery requiring convalescence from October 30, 2014, to January 31, 2015. R. at 1086 (1084–88). After that temporary award expired, he applied for a TDIU rating, stating that since his October 2014 right knee surgery,

he had been unable to work. R. at 1066. In support of his application, he further stated that he "m[ight] never be able to [] work [again]" because of the "severity" of the disabilities for which he had received, or was seeking, service connection. *Id*.

In addition to his right knee disability, Mr. Veteran was then receiving VA benefits for tinnitus and residuals of a right facial tumor, as well as for thoracolumbar spine strain, which manifested as chronic lower back pain that worsened with physical activity. R. at 1276 (1273–30); R. at 1240 (1240–41); R. at 1232 (1231–32); R. at 1226 (1226–30). His total combined rating was 20 percent. R. at 1084 (1084–88). Thereafter, a March 2016 rating decision granted service connection for a bilateral elbow disability and an unspecified depressive disorder, and it increased Mr. Veteran's rating for thoracolumbar strain from 0 to 10 percent. R. at 594–99 (592–606). These actions collectively increased his total combined rating from 20 to 60 percent, effective July 1, 2015. R. at 602 (592–606). However, Mr. Veteran still did not meet the schedular criteria for TDIU, and the agency of original jurisdiction ("AOJ") denied such benefits without referring his case for extraschedular consideration.[1] R. at 600 (592–606).

Despite the AOJ's adverse determination, VA medical records dated before and after the March 2016 rating decision reflect that Mr. Veteran's service-connected physical and mental disabilities were productive of functional and occupational impairment. R. at 1018 (1017–18) (noting that Mr. Veteran had not worked since his post-ACL reconstruction surgery the previous year); R. at 453 (449–54) (noting that his service-connected depression, in combination with the "pain issues" arising from his service-connected right knee and elbow disabilities "ma[d]e it difficult for him to leave the house [o]r have contact with anyone except his sister, with whom he lived"); R. at 285 (284-89) (noting that he had undergone "knee surgery and right elbow surgery recently," and that he "c[ould]n't really sleep at night … [he] stay[ed] by himself, ha[d] difficulty with people and ha[d] been withdrawn"); R. at 474 (471–475) (noting that Mr. Veteran's depression caused him *"difficulty in adapting to stressful circumstances, including work or a worklike setting*") (emphasis added); R. at 61 (58–63) (noting Mr. Veteran had a "history of mood dyscontrol mainly with irritability" as well as social withdrawal); R. at 45 (41–47) (noting that he "[c]ontinue[d] to engage in some social isolation").

Other medical records generated during the appeal reveal that, as a child, Mr. Veteran had repeated second grade because of learning disabilities and that his overall education was limited to high school. R. at 473 (471–475); R. at 58 (58–63). Additional records show that Mr. Veteran's service and post-service employment was limited to jobs requiring significant physical exertion, which he was no longer able to perform because of his right knee and elbow disabilities. R. at 515 (514–18) (describing Mr. Veteran as an "[u]nemployed shipyard equipment operator"); R. at 473 (471–75) (reporting that, up until his right knee surgery, Mr. Veteran had worked "as an equipment operator and rigger at a naval shipyard"); R. at 663 (noting that he was occupationally restricted from lifting objects in excess of 50 pounds). Notably, both of those service-connected disabilities required surgery. Indeed, less than a year after his right knee operation, Mr. Veteran underwent a bursectomy and enthesophyte excision to address his right elbow olecranon bursitis and arthritis. R. 334–36.

For his post-operative convalescence, he received another temporary total rating. R. at 401 (398–308) (granting a 100 percent rating under *38 C.F.R. § 4.30*, effective September 16, 2015, and reprising the 10 percent rating, effective December 1, 2015). Even after that award expired, however, Mr. Veteran was unable to resume his physically arduous occupation. R. at 334 (334–36) (noting that, as of April 2016, Mr. Veteran was "not able to come back to work because he ha[d] to push sleds weighing over 50 pounds, [which would] make his elbow hurt" and his employer "w[ould] not let him go back with any restrictions").

Mr. Veteran's functional and occupational impairment was further highlighted during a May 2016 VA joints examination, where he was assessed as having pain on extension, as well as painful right-knee flare-ups that "significantly limit[ed] his … ability with repeated use over time [and] ma[d]e it difficult to drive his truck." R. at 343–45, 351 (341–52). Despite these clinical findings, the May 2016 VA examiner observed that Mr. Veteran

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[1] As discussed in further detail in the next section, an award of schedular TDIU benefits requires that a veteran be unable to secure or follow a substantially gainful occupation as a result of a single service-connected disability ratable at 60 percent or more, or two or more service-connected disabilities with one ratable at 40 percent or more and sufficient additional disability to bring the combined rating to 70 percent or more. *See* *38 C.F.R. § 4.16(a)*; *see also* *Bowling v. Principi, 15 Vet. App. 1, 2 (2001)*.

was not experiencing any active flare-ups, or being tested immediately following repeated use over time, and thus declined to quantify the degree to which his ranges of motion were limited during such episodes. R. at 345–46 (341–52). Similarly, the May 2016 examiner declined to address whether Mr. Veteran exhibited any right knee functional loss, including range of motion loss, during passive motion or in weight bearing or nonweight-bearing.

Based upon the May 2016 VA examination, the AOJ increased Mr. Veteran's right knee rating to 10 percent, effective February 1, 2015, which meant he also met the schedular criteria for TDIU as of that date. R. at 271–72 (270–80). However, the AOJ did not grant any further right knee compensation, nor did it reverse its previous denial of TDIU. R. at 241 (227–44).Based upon the May 2016 VA examination, the AOJ increased Mr. Veteran's right knee rating to 10 percent, effective February 1, 2015, which meant he also met the schedular criteria for TDIU as of that date. R. at 271–72 (270–80). However, the AOJ did not grant any further right knee compensation, nor did it reverse its previous denial of TDIU. R. at 241 (227–44).

Thereafter, both issues were simultaneously certified to the Board and were addressed in a single remand. R. at 220–23; R. at 207–13. Although the Board did not specifically comment on the deficiencies in the May 2016 VA examination report with respect to flare-ups, it acknowledged that Mr. Veteran should be re-examined and directed the VA examiner to address the following on remand:

> Is there any additional functional loss … to include *any loss of range of motion due to pain or during flare-ups? The examiner should express the additional functional limitation in terms of the degree of additional limitation of motion due to weakened movement, excess fatigability, incoordination, flare-ups, or pain.*

R. at 211 (207–13) (emphasis added).

Conversely, the Board made no mention of the need to reexamine Mr. Veteran's right knee functional loss following repeated use over time. However, it did stress the need to ensure compliance with *Correia v. McDonald, 28 Vet. App. 158 (2016)*, which the Board interpreted as requiring "that all VA examinations include joint testing for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with range of motion measurements of the opposite undamaged joint." R. at 210 (207–13). The Board then noted that "[w]hile the [May 2016] VA examination report [had] include[d] a question about weight-bearing," it had only addressed "pain, not range of motion and [had not] indicate[d] ranges of motion on both active and passive testing." *Id.* In light of these omissions, the Board directed the VA examiner on remand to "test the range of motion in active motion, passive motion, weight-bearing, and nonweight-bearing for each joint in question and any paired joint." R. at 211 (207–13).

Additionally, the Board determined that Mr. Veteran's right knee claim was inextricably intertwined with his request for TDIU, and therefore remanded the issue of TDIU along with the issue of the increased rating for the knee. R. at 210 (207–13). The Board also directed the AOJ to send Mr. Veteran a VA Form 21-8940 (Application for Increased Compensation Based on Unemployability). R. at 212 (207–13). While such a form was sent, he does not appear to have returned it. R. at 201; R. at 574 (566–80).

Pursuant to the Board's remand, Mr. Veteran was afforded an August 2017 VA joints examination, which included range of motion testing of his right knee. R. at 133–62. Notably, the August 2017 examiner determined that Mr. Veteran's right knee flexion was limited to 130 degrees by a "sharp, aching" pain, which was assessed as a 6 out of 10 in terms of severity. R. at 152 (133–62). The VA examiner also found Mr. Veteran exhibited functional loss due to pain, weakness, fatigability or incoordination with repeated use over time, and that he required the "occasional" use of a brace in light of his history of right knee "stiffness and giving way." R. at 152–54, 159–61 (133–62). However, the examiner declined to quantify Mr. Veteran's right knee impairment in terms of degrees of additional limitation of motion, as the remand expressly required.

With respect to *Correia*, the VA examiner found "objective evidence of pain on passive range of motion testing of [Mr. Veteran's] right knee." R. at 161 (133–62). Conversely, the examiner found "no evidence of pain on nonweight-bearing testing of the right knee," nor any evidence of pain on passive range-of-motion, or on nonweight-bearing, testing of the unaffected left-knee. *Id.* Absent from the examiner's report, however, was any mention of the additional *degrees* of limitation of motion that Mr. Veteran exhibited during passive range-of-motion testing of his right knee. *Id.*

As for other functional impairment, the VA examiner opined that even with occasional use of a brace, Mr. Veteran "had difficulty with locomotion [and with] prolonged standing [and] walking due to frequent pain/swelling of [his] right knee." R. at 159–60 (133–62). The examiner further noted that these limitations adversely impacted Mr. Veteran's ability to work. *Id.* However, the examiner did not address the overall functional and occupational effects of Mr. Veteran's service-connected disabilities.

The April 2018 Board Decision on Appeal

Notwithstanding these deficiencies, the Board determined that the August 2017 VA examination, in tandem with the other evidence of record, was sufficient to rate Mr. Veteran's right knee claim. R. at 5 (1–21). The Board then predicated its award of separate 10 percent ratings on the schedular criteria governing instability and meniscal injuries—here, characterized by surgical removal of semilunar cartilage—while denying any compensation under the diagnostic codes ("DCs") governing limitation of extension and flexion.[2] R. at 15–16 (1–21), *citing* *38 C.F.R. § 4.71a*, DCs 5257, 5259, 5260, 5261. Significantly, the Board made no mention of Mr. Veteran's reliance on a brace, or his demonstrated functional and occupational impairment, in determining that he did not have "recurrent subluxation and lateral instability" sufficient to warrant a rating in excess of 10 percent under any applicable code. R. at 15–16 (1–21). The Board also tacitly declined to refer Mr. Veteran's right knee claim for consideration of an extraschedular rating pursuant to *38 C.F.R. § 3.321(b)(1)*. Similarly, the Board declined to make its own determination as to whether Mr. Veteran's right knee and other service-connected disabilities, singularly or jointly, prevented him from seeking or maintaining employment. Instead, the Board relied on the absence of an explicit medical opinion in this regard, in tandem with Mr. Veteran's own failure to return his completed VA Form 21-8940, to determine that he was not entitled to a TDIU rating. R. at 18 (1–21).

SUMMARY OF ARGUMENT

In denying the maximum benefits sought on appeal in its April 2018 decision,[3] the Board relied on VA examinations that did not correctly apply the criteria for rating limitation of motion pursuant to *38 C.F.R. § 4.40* and *38 C.F.R. § 4.45*, or the requirements for passive range of motion testing under *38 C.F.R. § 4.59*. *See* *DeLuca v. Brown, 8 Vet. App. 202 (1995)*; *Mitchell v. Shinseki, 25 Vet. App. 32 (2011)*; *Sharp v. Shulkin, 29 Vet. App. 26 (2017)*; *Correia, supra.* The most recent of those examinations also failed to substantially comply with the Board's June 2017 remand directives in contravention of *Stegall v. West, 11 Vet. App. 268, 271 (1998)* (holding that "a remand by this Court or the Board confers on the … claimant, as a matter of law, the right to compliance with the remand orders"). The Board did not address any of these inadequacies. Nor did the Board address the evidence of painful right knee flexion and extension in denying separate ratings pursuant to *38 C.F.R. §§ 4.59* and *4.71(a)*, DCs 5260, 5261. The Board also failed to adequately account for other functional and occupational effects of Mr. Veteran's right knee disability and whether they warranted increased compensation under the VA Rating Schedule, or referral for extraschedular consideration. *See* *38 C.F.R. § 3.321(b)(1)*.

Similarly, the Board failed to adequately account for the significant occupational impairment posed by Mr. Veteran's right knee and other service-connected disabilities in declining to refer him for consideration of an extraschedular TDIU rating prior to July 1, 2015. The Board also erred in overlooking evidence that clearly

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[2] The Board acknowledged that the Veteran's right knee had been originally rated 10 percent disabling under DC 5260-5024, which was "indicative of a limitation of flexion based on tenosynovitis," and that his existing evaluation had been established under DC 5003-5261, which comported with "degenerative arthritis [with] limitation of extension." R. at 8 (1–21). Nevertheless, the Board found that those hyphenated codes were inappropriate as the Veteran had demonstrated noncompensable limitation of flexion and "no limitation of extension" in his right knee. R. at 8, 12(1–21). *See* *Copeland v. McDonald, 27 Vet. App. 333, 337 (2015)* (explaining hyphenated ratings).

[3] To the extent that the April 2018 decision granted 10 percent ratings for painful right knee instability and symptomatic removal of the semilunar cartilage—which took effect October 2, 2013, and February 1, 2015, respectively—those are favorable findings the Court should not disturb. *Medrano v. Nicholson, 21 Vet. App. 165, 170 (2007)*.

warranted a schedular TDIU rating from that date forward. *See* 38 C.F.R. § 4.16(a), (b). Through all of these omissions and errors, discussed in further detail below, the Board failed to satisfy VA's statutory duty to assist and provided inadequate reasons or bases for its April 2018 decision. *See* 38 U.S.C. §§ 5103A(d)(1), 7104(d)(1); *see also* Allday v. Brown, 7 Vet. App. 517, 527 (1995) (noting that the Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record). Vacatur and remand of that decision is therefore warranted. *See* Tucker v. West, 11 Vet. App. 369, 374 (1998) (holding that remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

ARGUMENT

I. THE BOARD ERRED IN RELYING ON INADEQUATE VA MEDICAL EXAMINATIONS TO DENY MR. VETERAN RIGHT KNEE RATINGS IN EXCESS OF 10 PERCENT FOR PAIN AND INSTABILTY, EFFECTIVE MARCH 6, 2009, AND 10 PERCENT FOR SYMPTOMATIC REMOVAL OF THE SEMILUNAR CARTILAGE, EFFECTIVE FEBRUARY 1, 2015.

In its statement of reasons or bases for why Mr. Veteran did not qualify for additional compensation for his right knee disability, the Board cited the clinical findings from the aforementioned VA examinations and medical opinions. R. at 9–16 (1–21). However, in so doing, the Board failed to meet its statutory duty to assist Mr. Veteran by providing him with examinations and opinions that were adequate to adjudicate his right knee claim. *See* 38 U.S.C. § 5103A(a)(1) (holding that "[t]he Secretary shall make reasonable efforts to assist a claimant"); 38 U.S.C. § 5103A(d)(1) (holding that "[i] 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"); *see also* Barr v. Nicholson, 21 Vet. App. 303, 311 (2007) (holding that, upon undertaking a medical examination, VA must ensure its adequacy); Cox v. Nicholson, 20 Vet. App. 563, 569 (2007) (observing that, under 38 C.F.R. § 4.2, the Board must return an "incomplete or otherwise insufficient" examination report for further development).

Whether a VA examination or medical opinion is adequate is "a finding of fact," which this Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990). Where, as here, the disability involves the musculoskeletal system, the adequacy of the examination or medical opinion turns on its compliance with 38 C.F.R. § 4.40, which requires that it address whether pain significantly limits the "working movements of the body with normal excursion, strength, speed, coordination and endurance" on use and during flare-ups and further requires that, to the extent feasible, "these determinations should … be 'portrayed' (§ 4.40) in terms of the degree of additional range-of-motion." *See* DeLuca, 8 Vet. App. at 205–06; Mitchell, 25 Vet. App. at 44; Sharp, 29 Vet. App. at 32.

Notably, while "neither the law nor VA practice requires that an examination be conducted during a flare … [t]he critical question in assessing the adequacy of an examination not conducted during a flare is whether the examiner was sufficiently informed of and conveyed any additional or increased symptoms and limitations experienced during flares." Sharp, 29 Vet. App. at 34–35 (internal citations omitted). To answer this question, "the VA Clinician's Guide makes explicit what *DeLuca* clearly implied: it instructs examiners … to obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from the veterans themselves." *Id.*

In addition, 38 C.F.R. § 4.59 requires that a VA examiner elicit information that may be relevant to the question of whether additional limitation or functional loss exists during flare-ups or after repeated use over time, as well as the effect of pain when the joint is tested in weight-bearing position. Moreover, in *Correia,* this Court made clear that "to be adequate, a VA examination of the joints must, wherever possible, include the results of the range of motion testing described in the final sentence of [38 C.F.R.] § 4.59," which includes testing for pain on both active and passive motion and with weight-and nonweight-bearing. 28 Vet. App. at 170.

In this case, the examiner authoring the March 2009 examination report did not address whether Mr. Veteran experienced painful flare-ups or exhibited any loss of function in his right knee following repeated use over time. R. at 2139 (2136–50). Conversely, the examiner authoring the May 2016 examination report answered both of these questions in the affirmative, but declined to assess the *degree* to which Mr. Veteran's right knee mobility was limited by flare-ups or following repeated used over time. R. at 345–46 (341–52). To the extent such findings were omitted because Mr. Veteran was not exhibiting active flare-ups or being tested immediately following repeated use over time, the May 2016 opinion was inadequate as it failed to comply with the aforementioned guidelines articulated in *Sharp, 29 Vet. App. at 34–35*. In addition, the March 2009 and May 2016 VA examination reports failed to comport with *38 C.F.R. § 4.59*, which requires clinical findings addressing the effects of pain on passive motion, with weight- and nonweight-bearing. *See* *Correia, 28 Vet. App. at 170*.

It was incumbent on the Board to address all of these inadequacies in the March 2009 and May 2016 VA examinations. However, instead of doing so, the Board remanded for another VA examination, which proved similarly inadequate in assessing the degree of functional impairment that Mr. Veteran exhibited during flare-ups and following repeated use over time. R. at 152–54 (133–62). Indeed, like his predecessors, the August 2017 VA examiner determined that such assessments could not be made because Mr. Veteran was not experiencing active flare-ups nor engaged in repetitive use. *Id.* However, this rationale once again contravened the guidance articulated in *Sharp* for eliciting information from the record, and from Mr. Veteran himself, to address those factors. *29 Vet. App. at 34–35*.

Similarly deficient were the August 2017 VA examiner's findings with respect to passive motion with weight bearing and nonweight-bearing. Despite identifying "objective evidence of pain with passive motion," the examiner did not quantify this finding in terms of degrees of lost motion, nor clarify whether it occurred with both weight- and nonweight-bearing. R. at 175 (133–62).[4] Consequently, the examiner's report failed to comport with the Board's own interpretation of *Correia*, which, as previously noted, required passive range of motion findings with weight and nonweight-bearing. *See* *28 Vet. App. at 170*. Moreover, by failing to quantify Mr. Veteran's impairment during flare-ups, repetitive motion over time, weight-bearing, and passive motion in terms of additional degrees of lost motion, the examiner failed to comply with the Board's express remand directives. *See* *Stegall, 11 Vet. App. at 271*. Therefore, while the Board found that its duty to assist had been satisfied and that its remand instructions had met with substantial compliance, both of those findings were erroneous. R. at 4–6 (1–21). Furthermore, by relying on the findings from the deficient VA examinations summarized above, the Board provided inadequate reasons or bases for denying more than minimal compensable right knee ratings at any time throughout the appeal. *See* *38 U.S.C. §§ 1155*, *5107*; *38 C.F.R. §§ 4.59*, *4.71a*, DCs 5003, 5257, 5259; *see also* *Allday, 7 Vet. App. at 527* (observing that the Board's determination that an examination is adequate must by supported by a statement of reasons or bases that is precise enough to be understood by the claimant and facilitate judicial review). Accordingly, remand is required for the Board to ensure compliance with its duty to assist and prior remand orders, to include the provision of a new medical examination or opinion that addresses all right knee limitation of motion and other functional impairment throughout the pendency of the appeal. *38 U.S.C. § 5103A*; *Chotta v. Peake, 22 Vet. App 80, 84 (2008)*. Additionally, on remand, the Board must provide adequate reasons or bases for any determination that is less than fully favorable to Mr. Veteran's right knee claim. *38 U.S.C. §§ 1155*, *5107*; *38 C.F.R. §§ 4.59*, *4.71a*, DCs 5003, 5257, 5259; *see also* *Allday, 7 Vet. App. at 527* (observing that the Board's determination that an examination is adequate must by supported by reasons or bases that are precise enough to be understood by the claimant and facilitate judicial review).

II. THE BOARD PROVIDED AN INADEQUATE STATEMENT OF REASONS OR BASES FOR DENYING SEPARATE RATINGS FOR PAINFUL RIGHT KNEE FLEXION AND EXTENSION.

The 10 percent rating that the Board assigned under *38 C.F.R. § 4.59* was predicated on Mr. Veteran's "symptoms of a painful and occasionally unstable knee joint." R. at 12 (1–21) *citing* *38 C.F.R. § 4.71a*, DC 5257.

[4] While the August 2017 examiner noted that "there was no evidence of pain on non-weight bearing testing of the right knee," he declined to specify whether this included both active and passive ranges of motion. R. at 175 (133–62). As such, this finding standing alone was insufficient to satisfy the requirements of *Correia, supra.*

However, the Board did not address whether separate compensable ratings were also warranted based on the clinical findings of right knee flexion and extension that were both limited by pain. *See* 38 C.F.R. § 4.71a, DCs 5260, 5261.

The plain language of 38 C.F.R. § 4.59 provides that "actually painful, unstable, or malaligned joints, due to healed injury" are "entitled to *at least the minimum compensable rating* for the joint." (Emphasis added). This use of the modifier "at least" signals that greater than minimum compensation is assignable under that regulation. *See* Hudgens v. Gibson, 26 Vet. App. 558, 561 (2014) (citing Brown v. Gardner, 513 U.S. 115, 120 (1994) for the proposition that "[r]egulatory interpretation begins with the plain meaning of the words used"). Moreover, there is nothing in that regulation prohibiting the assignment of separate ratings for a disability that results in more than one type of painful motion. Nor is there anything elsewhere in the canons of veterans law that precludes such compensation. On the contrary, this Court has expressly held that the assignment of separate ratings for instability and for limitation of flexion and extension does *not* violate the anti-pyramiding provisions of 38 C.F.R. § 4.14. *See* English v. Wilkie, 30 Vet. App. 347, 352 (2018) (contemplating separate ratings for lateral knee instability under DC 5257, knee flexion under DC 5260, and knee extension under DC 5261); *see also* Lyles v. Shulkin, 29 Vet. App. 107, 114 (2017) (holding that 38 C.F.R. § 4.71a does not expressly prohibit separate evaluation under DC 5257 or 5261 and a meniscal code, such as 5259); *citing* Esteban v. Brown, 6 Vet. App. 259, 261 (1994).

The above line of cases supports an interpretation of 38 C.F.R. § 4.59 that is consistent with the plain language of that regulation—namely, that separate compensable ratings are warranted where there is evidence of both pain and joint instability and painful flexion and extension. *See* Allgood v. Wilkie, No. 16-3610, 2018 U.S. App. Vet. Claims LEXIS 538, at *7–8 (Apr. 17, 2018) (rejecting the Secretary's argument that assigning a compensable rating under DC 5260, 5261, or both would result in double compensation for symptoms of pain).[5] Such evidence is present in this case. Indeed, as discussed in the preceding section, the record reflects that, both prior to and after his October 2014 operation, Mr. Veteran exhibited not only pain and instability but also painful and limited flexion and extension in his right knee. R. at 1185 (1184–87), 1181, 1168, 1160, 1147, 1145, 1144, 1102; 152 (133–62). However, instead of addressing all of this evidence in the context of 38 C.F.R. § 4.59, the Board focused solely on his right knee instability in determining that a single 10 percent rating was warranted.

At the very least, the Board should have accounted for any determination that separate ratings were *un*warranted for Mr. Veteran's painful and limited right knee flexion and extension. *See* Gully v. McDonald, No. 13-2607, 2014 U.S. App. Vet. Claims LEXIS 2020, at *14 (Vet. App. Dec. 5, 2014) (rejecting the Secretary's post hoc argument that the appellant's assignment of a 10 percent rating for limitation of extension under DC 5261 precluded him from receiving a separate minimum compensable rating under DC 5260 and 38 C.F.R. § 4.59 and remanding that issue to the Board to address in the first instance).[6] By failing to do so, the Board frustrated judicial review and further undermined its statement of reasons or bases for denying additional compensation for his right knee disability. *See* 38 U.S.C. § 7104(d)(1); Allday, 7 Vet. App. at 527.

III. THE BOARD PROVIDED INADEQUATE REASONS OR BASES FOR DENYING MR. VETERAN ADDITIONAL COMPENSATION UNDER THE RATING SCHEDULE, OR REFERRAL FOR EXTRASCHEDULAR CONSIDERATION, FOR HIS RIGHT KNEE DISABILITY.

The Board also failed to adequately address other evidence of functional impairment associated with Mr. Veteran's right knee disability under the applicable schedular criteria. *See* 38 C.F.R. § 4.71a. For example,

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[5] Pursuant to U.S. Vet. App. Rule 30(a), Mr. Veteran cites this nonprecedential decision for the persuasive value of its logic and reasoning. He is unaware of any clear precedent that addresses the issue of separate ratings for painful and limited flexion and extension.

[6] Pursuant to U.S. Vet. App. Rule 30(a), Mr. Veteran cites this nonprecedential decision for the persuasive value of its logic and reasoning. He is unaware of any clear precedent that addresses the issue of separate ratings for painful and limited flexion and extension.

despite acknowledging his reliance on a right knee brace both before and after his October 2014 surgery—as well the disturbances of locomotion, interference with sitting and standing, inability to exercise, and residual pain and swelling posed by his service-connected disability—the Board declined to reconcile any of this evidence with its conclusion that a higher rating for lateral instability, or compensation for other limitation of motion, was unwarranted at any time throughout the appeal. *Compare* R. at 11 and 14 *with* R. at 12 and 16 (1–21) (*citing* 38 C.F.R. §§ 4.10, 4.40, 4.45, 4.59). Such a "mere[] listing [of] the evidence before stating a conclusion *does not constitute an adequate statement of reasons or bases*." *See* Dennis v. Nicholson, 21 Vet. App. 18, 22 (2007) (emphasis added).

The Board likewise failed to adequately address whether Mr. Veteran's right knee disability warranted consideration of an extraschedular evaluation under 38 C.F.R. § 3.321(b)(1). Although the Board is precluded from assigning such a rating in the first instance, it is authorized—and, indeed, required—to refer a case to the VA Director of Compensation Service, or his or her delegate, where the evidence presents "such an exceptional disability picture that the available schedular evaluation for that service connected disability are inadequate." *See* Thun v. Peake, 22 Vet. App. 111, 115 (2008); *see also* Colayong v. West, 12 Vet. App. 524, 536 (1999) (holding that, if either the applicant claims, or the record indicates that a schedular rating may be inadequate, the Board must adjudicate the issue of whether referral for an extraschedular rating is warranted). This requires the Board to include "an articulation of the actual symptoms and functional impairments" of that service-connected disability. *See* Anderson v. Shinseki, 22 Vet. App. 423, 429 (2009). Moreover, even if the Board determines that a claimant has not presented evidence warranting referral for extraschedular consideration, it must articulate the reasons or bases for that determination. *See* 38 U.S.C. § 7104(d)(1); Colayong, 12 Vet. App. at 536–37; Bagwell v. Brown, 9 Vet. App. 337, 339 (1996).

Notably, in *Thun*, this Court articulated a process to determine whether extraschedular referral is warranted and highlighted these two substantive requirements:

1. "The threshold factor for extraschedular consideration is a finding that the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate, a task performed either by the RO or the Board …";
2. "[I]f the schedular evaluation does not contemplate the claimant's level of disability and symptomatology and is found inadequate, the RO or Board must determine whether the claimant's exceptional disability picture exhibits other related factors such as those provided by the regulation as 'governing norms' (include "*marked interference with employment* or frequent periods of hospitalization" 38 C.F.R. § 3.321(b)(1).

Thun, 22 Vet. App. at 115-6 (emphasis added).

Here, the *Thun* criteria were clearly met as Mr. Veteran's right knee disability was productive of effects—such as impairment of his ability to drive, stand, and walk—which were not expressly contemplated by the VA Rating Schedule and markedly interfered with his employment. R. at 343–45, 351 (341–52); R. at 159–60 (133–62). While, as noted in the preceding section, Mr. Veteran was only intermittently employed after leaving the Navy—having spent a year living with his mother to "keep from being homeless"—his right knee pain interfered with his efforts to duties as an equipment operator and, following his surgery in October 2014, he was unable to return to work. R. at 334 (334–36); R. at 343–45, 351 (341–52); R. at 161 (133–62).

Mr. Veteran was competent to attest to the occupational effects of his right knee disability, which were within the realm of his experience. *See* Kahana v. Shinseki, 24 Vet. App. 428, 435 (2011), *citing* Jandreau v. Nicholson, 492 F.3d 1372, 1377 n. 4 (2007); Charles v. Principi, 16 Vet. App. 370, 374 (2002) (stating that a layperson is competent to report on symptoms capable of observation). Moreover, his statements were uncontroverted by other evidence of record and, thus, should have been deemed credible. *See, e.g.,* Spellers v. Wilkie, 30 Vet. App. 211, 221 (2018) (holding that when making credibility determinations, the Board may consider factors such as consistency with other evidence of record); Caluza v. Brown, 7 Vet. App. 498, 511 (1995), *aff'd per curiam*, *78 F.3d 604 (Fed. Cir. 1996)* (table). Indeed, this was particularly true of the statements he made while seeking medical treatment, rather than pursuing VA compensation. *See* Buchanan v. Nicholson, 451 F.3d 1331, 1337 (Fed. Cir. 2006).

Tellingly, the Board did not refute—or even question—the credibility of Mr. Veteran's statements regarding the impact of his right knee disability on his ability to work. R. at 16 (1–21). Nevertheless, the Board failed to address whether such evidence warranted referral for an extraschedular rating. *See* 38 C.F.R. § 3.321(b)(1); *Thun, 22 Vet. App. at 115–16*. Indeed, nowhere in the April 2018 decision did the Board even mention this as an avenue for maximizing VA benefits. *But see* *Bradley v. Peake, 22 Vet. App. 280, 294 (2008)* (noting that the "Secretary is required to maximize benefits"). By thus failing to discuss whether Mr. Veteran's service-connected disability warranted extraschedular consideration, the Board compounded the inadequacy of its reasons or bases with respect to his right knee claim. *See* 38 U.S.C. § 7104(d)(1); Colayong, 12 Vet. App. at 536–37; Bagwell v. Brown, 9 Vet. App. 337, 339 (1996).

IV. THE BOARD PROVIDED AN INADEQUATE STATEMENT OF REASONS OR BASES FOR DECLINING TO REFER MR. VETERAN FOR EXTRASCHEDULAR CONSIDERATION OF A TDIU RATING PRIOR TO JULY 1, 2015.

In turning to Mr. Veteran's request for entitlement to TDIU, the Board began its analysis by noting that "[p]rior to July 1, 2015, [he] did not meet th[e] minimum schedular" requirements for such benefits "as his combined total [disability evaluation] was 30 percent." R. at 17 (1–21) *citing* 38 C.F.R. § 4.16(a).[7] However, while the Board acknowledged that "entitlement to a TDIU on an extraschedular basis may be considered … even when the percentage requirements are not met," it cursorily determined that "the evidence does not reflect that the Veteran [wa]s unable to secure and follow a substantially gainful occupation in this instance." *Id.* The Board erred in reaching this conclusion, which was not supported by adequate—or, indeed, any—reasons or bases. *See* *Jones v. Principi, 16 Vet. App. 219, 225 (2002)* (noting that the Board must provide adequate reasons or bases for all determinations and not rely on its own unsubstantiated conclusions to support its ultimate decision). In fact, as explained below, the evidence strongly reflects that referral for an extraschedular TDIU rating *is* warranted.

This Court has consistently held that when a veteran is found to be unemployable due to one or more service-connected disabilities, but does not meet the percentage standards set forth in *38 C.F.R. § 4.16(a)*, the Board, or other VA adjudicator, should refer the matter to the VA Director of Compensation for extraschedular consideration under *38 C.F.R. § 4.16(b)*. *See* *Pederson v. McDonald, 27 Vet. App. 276, 285–86 (2015)* (noting that "the [AOJ] should submit the claim to the Director for extraschedular [TDIU] consideration" when it deems the veteran "unemployable by reason of service-connected disabilities"); *see also* Wages v. McDonald, 27 Vet. App. 233, 235–36 (2015).

To warrant referral for an extraschedular TDIU rating, a veteran need not be 100 percent unemployable. *See* *Pederson, 27 Vet. App. at 285–86* (*citing* Roberson v. Principi, 251 F.3d 1378, 1385 (2001)). Rather, he or she must demonstrate "an *inability to undertake substantially gainful employment as a result of a service-connected disability or disabilities." Id.* (emphasis added). In this regard, the central inquiry is the same as when considering entitlement to a schedular TDIU award—namely, "whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *See* Pederson, 27 Vet. App. at 286 (*citing* Hatlestad v. Brown, 5 Vet. App. 524, 529 (1993)). When making this determination, VA may not consider non-service-connected disabilities or advancing age. *See* Pederson, 27 Vet. App. at 286 (*citing* 38 C.F.R. §§ 3.341, 4.19 (2014)). Conversely, it must take into account the individual veteran's education, training, and work history. *See* Pederson, 27 Vet. App. at 286 (*citing* Hatlestad v. Derwinski, 1 Vet. App. 164 at 168; (1991)); *see also* Cathell v. Brown, 8 Vet. App. 539, 544 (1996); Gleicher v. Derwinski, 2 Vet. App. 26, 28 (1991) (holding that educational and occupational history are relevant to any TDIU assessment).

In the recent case of *Ray v. Wilkie*, this Court "'interpret[ed] the phrase 'unable to secure and follow a substantially gainful occupation' in § 4.16(b) to have two components: one economic and one noneconomic," elaborating as follows:

[7] *See* note *supra at 3* (outlining requirements for schedular TDIU rating).

> The economic component simply means an occupation earning more than marginal income … As for the noneconomic component **…** “the ultimate inquiry is [] on the individual claimant’s ability to secure or follow that type of employment.” …
>
> In determining whether a veteran can secure and follow a substantially gainful occupation, attention must be given to
>
> • the veteran’s history, education, skill, and training;
>
> • whether the veteran has the physical ability (both exertional and nonexertional) to perform the type of activities (e.g., sedentary, light, medium, heavy, or very heavy) required by the occupation at issue. Factors that may be relevant include, but are not limited to, the veteran’s limitations, if any, concerning lifting, bending, sitting, standing, walking, climbing, grasping, typing, and reaching, as well as auditory and visual limitations; and
>
> • whether the veteran has the mental ability to perform the activities required by the occupation at issue. Factors that may be relevant include … limitations, if any, concerning … ability to handle work place stress, get along with coworkers**,** and demonstrate reliability and productivity.

See Ray v. Wilkie, 31 Vet. App. 58, 73 (2019).

In this case, there is ample evidence that before Mr. Veteran met the schedular TDIU criteria on July 1, 2015, his service-connected disabilities rendered him “unable to secure and follow a substantially gainful occupation” in accordance with the *Ray* and its antecedents. Indeed, the record reflects that, even before his October 2014 surgery, he was only intermittently employed, as evidenced by the fact he had to live with his mother from mid-2012 and mid-2013 “to keep from being homeless.” R. at 150 (133–62). Moreover, to the extent that he managed to perform some work as an equipment operator, his right knee pain, weakness, popping, effusion, and decreased flexion significantly interfered with his duties. R. at 1185 (1184–87), 1181, 1168, 1160, 1147, 1145, 1144, 1188, 1202.

Following his October 2014 surgery, Mr. Veteran continued to experience chronic right knee pain, swelling, and decreased flexion and extension, which, in tandem with his other disabilities, rendered him unable to return to work. R. at 1066, 1102. He was not yet in receipt of VA benefits for his depressive disorder and bilateral elbow disabilities. Nevertheless, those disabilities for which he had been granted service connection—which included not only his right knee disability but also his thoracolumbar strain—were themselves of sufficient severity to render him “‘unable to secure and follow gainful employment” in both the economic and noneconomic aspects of the term. *See* Ray, 31 Vet. App. at 73. Not only did those service-connected disabilities prevent him from earning more than marginal income, but they also precluded him from securing and following a substantially gainful occupation when the following factors, highlighted in *Ray,* were taken into account:

- Mr. Veteran’s education, which in this case was limited to high school;
- His work history, skill and training, which was confined to service as a Navy boatswain and to post-service employment as an equipment operator; and
- His physical disabilities, which were restricted in terms of lifting, sitting, standing and walking.

See Ray v. Wilkie, 31 Vet. App. 58, 73 (2019).; Pederson, 27 Vet. App. at 286; Hatlestad, 5 Vet. App. at 529.

Put simply, Mr. Veteran’s modest educational background and occupational history limited to relatively unskilled, labor-intensive jobs rendered him unprepared and unable to perform all but the physically demanding occupations for which his service-connected disabilities disqualified him. *Id.* Tellingly, none of these factors was addressed by the Board in its unsubstantiated determination not to refer him for extraschedular TDIU consideration prior to July 1, 2015. As such, this determination must be vacated and remanded. *See* Allday, 7 Vet. App. at 527; Tucker, 11 Vet. App. at 374 (1998).

V. THE BOARD FURTHER ERRED IN DENYING A SCHEDULAR TDIU RATING, EFFECTIVE JULY 1, 2015.

In addition to denying referral of an extraschedular TDIU rating prior to July 1, 2015, the Board determined that a schedular award of such benefits was unwarranted at any time thereafter. As discussed below, this decision

was clearly erroneous and prejudicial, and should be reversed. *See* [Gutierrez v. Principi, 19 Vet. App. 1, 10 (2004)] ("[R]eversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision."); *Swain v. McDonald, 27 Vet. App. 219, 225 (2015)*.

Despite acknowledging that Mr. Veteran had met the requirements of C.F.R. § 4.16(a), effective July 1, 2015, the Board denied a schedular TDIU rating for reasons or bases that were essentially two-fold. First, the Board determined that neither he nor any other clinician had stated that the Veteran's service-connected disabilities, singularly or jointly, preclude[d] him from seeking or maintaining employment." R. at 17 (1–21). Second, the Board determined that the "Veteran [ha]d not submit[ted]" his VA Form 21-8940) or provided other "evidence regarding … his current unemployability." *Id.*

Neither of the Board's reasons or bases for denying a schedular TDIU rating has any merit. First, the fact that no VA examiner or clinician has opined as to whether Mr. Veteran's right knee and other service-connected disabilities preclude employment is immaterial as this is not their judgment to make—rather, it is the Board's. *See* *Floore v. Shinseki, 26 Vet. App. 376, 381 (2013)* (holding that "TDIU is to be awarded based on the 'judgment of the rating agency' and noting the "distinctive responsibilities of medical examiners and rating officials"). For the Board to thus abdicate its own responsibility as a VA adjudicator and use this as a predicate for its TDIU denial is wholly inadequate.

Second, whether Mr. Veteran returned his VA Form 21-8940 is also immaterial as the record is replete with other evidence showing that, since July 1, 2015, his service-connected disabilities have prevented him from obtaining or maintaining substantially gainful employment.[8] Indeed, not only has Mr. Veteran been unemployed throughout this entire period, but his VA treating clinicians and VA examiners also have found that his service-connected physical disabilities—most notably, his right knee and bilateral elbow diagnoses—are productive of significant occupational impairment. R. at 453 (449–54). Specifically, those service-connected disabilities collectively prevent him from sitting, standing, or walking for prolonged periods, or lifting objects of any considerable weight. *Id*.; R. at 334 (334–36). In addition, Mr. Veteran himself has provided an uncontroverted account that these limitations have prevented him from returning to his occupation as an equipment operator. R. 1066. There is no evidence that suggests he could enter another line of work that would provide a living wage in light of his limited education, training and work history. *See* *Pederson, 27 Vet. App. at 286*; *Hatlestad, 5 Vet. App. at 529*; *Cathell, 8 Vet. App. at 544*; *see also* *Ray, 31 Vet. App. at 73*.

Moreover, since July 1, 2015, Mr. Veteran has been in receipt of service connection for a psychiatric disability that has further rendered him "unable to secure and follow a substantially gainful occupation" in both the economic and noneconomic aspects of the term. *Ray, 31 Vet. App. at 73*. Indeed, in addition to the physical limitations that he demonstrated during the earlier stage of the appeal, his service-connected depressive disorder has caused significant difficulties dealing with others and "*adapting to stressful circumstances, including work or a worklike setting*." R. at 285 (284–89); R. at 474 (471–475) (emphasis added). As such, his service-connected disabilities are now productive of several of the physical *and* mental factors that this Court has expressly highlighted as examples of an inability to secure and follow gainful employment. *See* *Ray, 31 Vet. App. at 73*.

Accordingly, as the evidence since July 1, 2015 overwhelmingly supports a schedular TDIU rating under *38 C.F.R. § 4.16(a)*, the Board's denial of such benefits during this period constitutes clear and prejudicial error, which warrants reversal. *See* *Gutierrez, 19 Vet. App. at 10*; *Swain, 27 Vet. App. at 225*. Even if the Court disagrees, it should, at a minimum, vacate and remand this issue for the Board to re-adjudicate and provide an adequate reasons or bases if the requested benefits are not granted in full. *See* *38 U.S.C. § 7104(d)(1)*; *Allday, 7 Vet. App. at 527*; *Tucker, 11 Vet. App. at 374*.

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[8] This Court previously vacated and remanded a Board decision that relied on an AOJ finding that the issue of TDIU could not be considered without a completed VA Form 21-8940. *See* *Schott v. Shinseki, No. 12-0608, 2013 U.S. App. Vet. Claims LEXIS 722, at *3–4 (Vet. App. May 8, 2013)*. Pursuant to U.S. Vet. App. Rule 30(a), Mr. Veteran cites this nonprecedential decision for the persuasive value of its logic and reasoning. He is unaware of any clear precedent that addresses the issue of a completed VA Form 21-8940 as a condition precedent for awarding TDIU benefits.

CONCLUSION

For the foregoing reasons, Mr. Veteran respectfully requests that the Court vacate and remand the April 2018 decision to the extent that it denied right knee disability ratings in excess of 10 percent for pain and instability, effective March 6, 2009, and 10 percent for symptomatic removal of the right knee semilunar cartilage, effective February 1, 2015. In addition, Mr. Veteran respectfully requests that the Court vacate and remand the issue of extraschedular TDIU referral prior to July 1, 2015, and that it reverse, or at the very least, vacate and remand the issue of schedular TDIU from that date forward.

Respectfully submitted,

FOR THE APPELLANT

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APPENDIX 15-D Sample Joint Motion for Remand

IN THE UNITED STATES COURT OF APPEALS

FOR VETERANS CLAIMS

VETERAN, Appellant, v. **ROBERT WILKIE,** Secretary of Veterans Affairs, Appellee.	Vet. App. No. 20-XXXX

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g)(2), Appellant and Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, by and through their attorneys, respectfully move the Court to vacate the part of the [DATE] Board of Veterans' Appeals (BVA or Board) decision that denied: (1) an initial rating in excess of 20%, prior to July 6, 2017, for degenerative disc disease (DDD) with low back strain and in excess of 40% thereafter;, and (2) a rating in excess of 10% for status post right knee meniscal repair with patellofemoral syndrome and degenerative arthritis, and to remand those matters for further development and re-adjudication. [Record Before the Agency (R.) at 4–24].

The parties note that Appellant is not challenging the remainder of the Board decision and agree that the Court should dismiss the denial of service connection for a hernia condition and the denials of an initial rating above 10% for right wrist sprain, a rating above 10% for symptomatic removal of the semilunar cartilage, a compensable rating for erectile dysfunction, a compensable rating for scars of the right knee, a compensable rating for restless leg syndrome of the right leg, and a compensable rating for restless leg syndrome of the left leg. *Id. at 5–6*; *Pederson v. McDonald, 27 Vet.App. 276, 285 (2015)* (en banc). The parties agree that the Court cannot disturb the grant of a separate 10% rating for symptomatic removal of the semilunar cartilage of the right knee. *Id. at 5*; *Medrano v. Nicholson, 21 Vet.App. 165, 170 (2009)* (the Court cannot reverse favorable findings of fact).

BASES FOR REMAND

a. Status Post Right Knee Medial Meniscal Repair Disability

The parties agree that the Board erred by not providing an adequate statement of reasons or bases. 38 U.S.C. § 7104(d)(1); Allday v. Brown, 7 Vet.App. 517, 527 (1995) ("The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."). The Board denied a rating in excess of 10% because it determined that Appellant's flexion and extension were normal in 2011 and 2017. [R. at 18 (4–24)]. However, the Board did not discuss a February 19, 2015, VA treatment record stating that he had "decreased range of motion to extension." [R. at 660 (658–61)]. Because the Board found that Appellant did not have decreased range of motion without addressing this document, the parties agree that remand is warranted. *Daves v. Nicholson, 21 Vet.App. 46, 51 (2007)* (stating that the Board "cannot reject evidence favorable to the claimant without discussing that evidence").

The parties also agree that the Board did not provide an adequate statement of reasons or bases to support its finding that a separate rating for right knee instability is not warranted. [R. at 18 (4–24)]. The Board noted that although Appellant reported his right knee giving way the "objective stability testing on VA examinations in 2011 and 2017 revealed normal findings." *Id.* The Court has held that it is error when the Board does not explain an implicit finding that "medical evidence is categorically more probative than lay evidence or that lay evidence is not competent at all" on the issue of knee instability. *English v. Wilkie, 30 Vet.App. 347, 349 (2018)*. Therefore, the parties agree that remand is warranted so that the Board can comply with the Court's holding in *English*.

The parties also agree that the February 2017 knee examination is not adequate because it does provide an estimate of any range-of-motion (ROM) loss following repeated use over time. In *Mitchell*, the Court held that VA examiners must discuss functional loss following repeated use over time in terms of ROM loss, if feasible. *Mitchell v. Shinseki, 25 Vet.App. 32, 44 (2011)*. In *Sharp*, the Court explained this requirement, stating that the examiner is required to "obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment … from the veterans themselves." *Sharp v. Shulkin, 29 Vet.App. 26, 30 (2017)*. After soliciting such information, the examiner must "estimate the veteran's functional loss … based on all the evidence of record—including the veteran's lay information—or explain why she could not do so." *Id. at 35*. The February 2017 examination report indicates that Appellant has functional impairment after repeated use over time, but it does not provide an estimate of any ROM loss or explain why an opinion could not be provided in a manner that complies with *Sharp*. [R. at 318, 320 (317–26)]. Therefore, the parties agree that remand is warranted for the Board to obtain an opinion discussing Appellant's right knee functional loss after repeated use over time that complies with *Mitchell* and *Sharp*.

b. DDD With Low Back Strain

The parties agree that the July 2011 back examination does not comply with the Court's holding in *Mitchell* and *Sharp*, which require an examiner to provide an opinion on any additional ROM loss during a flare-up or explain why such an opinion is not feasible. *Sharp, 29 Vet.App. at 30*; *Mitchell, 25 Vet.App. at 44*. The July 2011 examination report states that during a flare-up Appellant experiences "functional impairment which is described as constant pain and weakness and limitation of motion of the joint." [R. at 868 (866–75)]. However, the examiner did not provide an estimate of any additional ROM loss. *Id.* Therefore, the parties agree that remand is warranted for the Board to obtain a new examination or to explain why one cannot be provided.

The parties also agree that remand is warranted for the Board to return the July 2017 back examination for clarification. *38 C.F.R. § 4.2*. The examination report states that a positive straight leg test "suggests radiculopathy," and it notes that he had a positive test in both legs. [R. at 127 (119–31)]. The examiner then stated that Appellant had no "signs or symptoms due to radiculopathy." *Id.* The parties agree that it is unclear how Appellant could have a positive straight leg test, which "suggests radiculopathy," and no signs or symptoms of radiculopathy. *Id.* Because the examiner did not explain what appears to be a contradiction, the parties agree that the Board must return the opinion for clarification. *38 C.F.R. § 4.2*.

Lastly, the parties agreed that the Board erred when it did not address favorable evidence of neurological deficits. [R. at 15 (4–24)]. A January 15, 2015, treatment record from William Grabowski, PA-C, states that Appellant had lumbosacral spondylosis without myelopathy and radiculitis-lumbothoracic. [R. at 539 (537–39)].

The parties agree that remand is warranted for the Board to address this favorable evidence in the first instance. *Daves, 21 Vet.App. at 51*.

CONCLUSION

The parties agree that this joint motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded except the parties' right to appeal the Court's order implementing this JMPR. Pursuant to Rule 41(c)(2), the parties agree to waive further Court review of and any appeal to the U.S. Court of Appeals for the Federal Circuit of the Court's order on this joint motion, and respectfully ask that the Court enter mandate upon the granting of this joint motion.

On remand, Appellant will be free to submit additional evidence and argument, and the Board "may seek other evidence it considers necessary to the timely resolution" of Appellant's claims. *Kutscherousky v. West, 12 Vet.App. 369, 372 (1999)*. Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. *See Austin v. Brown, 6 Vet.App. 547 (1994)*; *Thurber v. Brown, 5 Vet.App. 119 (1993)*. A "remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders," and imposes upon the Secretary "a concomitant duty to ensure compliance with the terms of the remand." *Stegall v. West, 11 Vet.App. 268, 271 (1998)*.

The Court has held that "'[a] remand is meant to entail a critical examination of the justification for the decision.'" *Kahana v. Shinseki, 24 Vet.App. 428, 437 (2011)*, (quoting *Fletcher v. Derwinski, 1 Vet.App. 394, 397 (1991))*. Thus, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher, 1 Vet.App. at 397*. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. *38 U.S.C. § 7104(d)(1)*. If the Court grants this joint motion, the Board shall obtain copies of this joint motion and the Court's order, and incorporate them into Appellant's record before VA. The Secretary shall provide these matters expeditious treatment, as required by *38 U.S.C. § 7112*.

WHEREFORE, the parties respectfully request that the Court vacate the part of the [DATE], Board decision that denied an initial rating in excess of 20% for DDD with low back strain prior to July 6, 2017, and in excess of 40% thereafter, and that denied a rating in excess of 10% for status post right knee medial meniscal repair and remand the matter for action consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

DATE ______________________ ___________________________
____

CHRISTOPHER GLENN MURRAY

BARTON F. STICHMAN
National Veterans Legal Services Program
1600 K Street, NW, Suite 500
Washington, DC 20006

FOR APPELLEE:

General Counsel

Elizabeth Kubala

Chief Counsel

/s/
Deputy Chief Counsel

DATE ______________________ /s/

____

____
Office of General Counsel (027J)
U.S. Department of Veterans
Affairs
810 Vermont Avenue, N.W.
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1 Veterans Benefits Manual APPENDIX 15-E

Veterans Benefits Manual > Part V The VA Claims Adjudication Process > CHAPTER 15 APPENDICES

APPENDIX 15-E Sample Order

IN THE UNITED STATES COURT OF APPEALS

FOR VETERANS CLAIMS

VETERAN, Appellant, v. **ROBERT L. WILKIE,** Secretary of Veterans Affairs, Appellee.	Vet. App. No. 20-XXXX

O R D E R

The parties have filed a joint motion for partial remand (JMPR) as to this appeal to the Board of Veterans' Appeals. As part of their motion, the parties have affirmatively waived any and all rights to appeal in this matter. It is

ORDERED that the motion for partial remand is granted. The matters identified in the JMPR are remanded, pursuant to *38 U.S.C. § 7252(a)*, for action consistent with the terms of the joint motion. *See Forcier v. Nicholson, 19 Vet.App. 414, 425 (2006)*; *Stegall v. West, 11 Vet.App. 268, 271 (1998)*. The appeal as to the remaining issues is dismissed. This order is the mandate of the Court. An application pursuant to *28 U.S.C. § 2412(d)*, the Equal Access to Justice Act (EAJA), for award of attorney fees and other expenses shall be submitted for filing with the Clerk not later than 30 days from the date of this order.

Dated: FOR THE COURT:
/s/ Gregory O. Bock
Gregory O. Block
Clerk of the Court

Copies to:

VA General Counsel (027)

Caitlin M. Milo, Esq.
National Veterans Legal Services

Program
1600 K Street, NW, Suite 500
Washington, DC 20006

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APPENDIX 15-F Sample Joint Motion to Terminate Appeal and Stipulated Agreement

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

VETERAN, Appellant, v. **ROBERT L. WILKIE,** Secretary of Veterans Affairs, Appellee.	Vet. App. No. 20-XXXX

JOINT MOTION TO TERMINATE THE APPEAL

Pursuant to U.S. Vet. App. Rules 27 and 42, Appellant and Appellee hereby agree to and move for termination of the captioned appeal. The terms upon which the parties agree this appeal is to be terminated are contained in the attached Stipulated Agreement.

The Court held that when the Secretary of Veterans Affairs enters into a stipulated agreement, the Board of Veterans' Appeals decision giving rise to the appeal is overridden, thereby mooting the case or controversy. *See* Bond v. Derwinski, 2 Vet. App. 376, 377 (1992); *see also* Kimberly-Clark v. Proctor & Gamble, 973 F.2d 911, 914 (Fed. Cir. 1992) ("Generally, settlement of a dispute does render a case moot.").

The General Counsel represents the Secretary of Veterans Affairs before the Court. 38 U.S.C. § 7263(a). In entering into this settlement agreement, the General Counsel is following well-established principles regarding the Government attorney's authority to terminate lawsuits by settlement or compromise, which principles date back well over a century. *Compare* Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 47 (D.C. Cir. 1992) ("[G]overnment attorneys [should] settle cases whenever possible.") (citing Executive Order on Civil Justice Reform, [Exec. Order No. 12,778, 3 C.F.R. § 359 (1991), *reprinted in* 28 U.S.C.S. § 519 (1992)]) *with* 2 Op. A.G. 482, 486 (1831);[9] *see also* Executive Order on Civil Justice Reform, Exec. Order 12,988, 61 Fed.

[9] "An attorney conducting a suit for a party has, in the absence of that party, a right to discontinue it whenever, in his judgment, the interest of his client requires it to be done. If he abuses his power, he is liable to the client whom he injures. An attorney of the United States, except in so far as his powers may be restrained by particular acts of Congress, has the same authority and control over the suits which he is conducting. The public interest and the principles of justice require that he should have this power … ."

Reg. 4729 (Feb. 7, 1996); *Stone v. Bank of Commerce, 174 U.S. 412 (1899)*; *Campbell v. United States, 19 Ct. Cl. 426, 429 (1884)*. The parties resolved, to their mutual satisfaction, an issue raised by this appeal and aver that (1) their agreement does not conflict with prior precedent decisions of the Court; (2) this is not a confession of error by the Secretary; and (3) this agreement disposes the above-noted claim on appeal addressed herein.

The parties agree to unequivocally waive any right to appeal the Court's order on this joint motion and respectfully ask that the Court enter mandate upon the granting of this motion.

WHEREFORE, the parties jointly move the Court for an order terminating the captioned appeal, in part, pursuant to Rule 42 of the Court's Rules of Practice and Procedure.

Respectfully submitted,

FOR APPELLANT:

____
____

KATHERINE MCDERMOTT EBBESSON
BARTON F. STICHMAN
National Veterans Legal Services Program
1600 K Street, NW, Suite 500
Washington, D.C. 20006

FOR APPELLEE:

General Counsel

Chief Counsel

/s/
Deputy Assistant General Counsel
/s/
Appellate Attorney
Office of the General Counsel (027H)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

STIPULATED AGREEMENT

WHEREAS, Appellant filed an appeal to the Court of Appeals for Veterans Claims in December 2018, from a September 2018, Board of Veterans' Appeals (Board) decision that denied a restoration of the 30 percent rating for a bilateral hearing loss disability, effective September 1, 2015; and

WHEREAS, the Secretary of Veterans Affairs (Appellee) and Appellant have reached a mutually satisfactory resolution of this litigation; and

NOW, **THEREFORE**, in consideration of the mutual promises contained herein, the parties hereby agree as follows:

1. Appellee agrees to reinstate the award of a 30% disability rating for Appellant's service-connected bilateral hearing loss, effective September 1, 2015.

2. Appellee agrees to promptly notify the Veterans Benefits Administration (VBA) upon final disposition by the Court with respect to this settlement, and that the VBA shall take prompt action to implement this agreement.

3. Appellee does not admit that any error was committed by the Department of Veterans Affairs or any of its employees in the adjudication of the issue that is the subject of this agreement.

4. Appellant agrees that his pending appeal in the United States Court of Appeals for Veterans Claims, U.S. Vet. App. No. 20-XXX, shall be terminated, with prejudice, as to the issue addressed in the September 2018, Board decision, following execution of this agreement.

5. The parties agree that this agreement is entered into for the purpose of avoiding further litigation and the costs related thereto. Both parties agree that this settlement is based on the unique facts of this case and in no way should be interpreted as binding precedent for the disposition of future cases.

Respectfully submitted,

FOR APPELLANT:

____

KATHERINE MCDERMOTT EBBESSON
BARTON F. STICHMAN
National Veterans Legal Services Program
1600 K Street, NW, Suite 500
Washington, D.C. 20006

FOR APPELLEE:

General Counsel

Chief Counsel

/s/
Deputy Assistant General Counsel
/s/
Appellate Attorney
Office of the General Counsel (027H)
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APPENDIX 15-G Sample Motion for Substitution of Parties

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

VETERAN, Appellant, and **WIDOW,** Appellant v. **ROBERT WILKIE,** Secretary of Veterans Affairs, Appellee.	Vet. App. No. 20-XXXX

APPELLANT'S UNOPPOSED MOTION FOR SUBSTITUTION OF PARTY

Pursuant to U.S. Vet. App. R. 43(a)(2), the Widow moves to be substituted as the appellant in the above-captioned case. The named appellant, Veteran, died on June 7, 2018. The Widow (Movant) is Veteran's surviving spouse, and is therefore an eligible accrued benefits claimant. As an eligible accrued benefits claimant, the Widow is entitled to be substituted as the claimant for the purposes of processing Veteran's claims for disability compensation benefits to completion, and therefore respectfully asks this Court to grant this motion for substitution.

Statement of the Case

In September 2017, the Board of Veterans' Appeals (Board) issued a decision that denied entitlement to effective dates earlier than March 2017, for the awards of service connection for: (1) neoplasm of the kidney with right kidney removal and chronic renal disease; (2) metastatic renal cell carcinoma to lung with pulmonary effusion; (3) renal cell carcinoma skin lesion; and (4) chronic diarrhea and constipation. On January 3, 2018, the undersigned counsel filed an appeal on behalf of the Veteran. On May 30, 2018, the parties filed a joint motion for remand in which the parties agreed that the Board erred by failing to provide an adequate statement of reasons or bases for its decision. On June 7, 2018, the Veteran passed away. A redacted version of the Veteran's Death Certificate is attached to this motion as Exhibit A. Counsel learned of the Veteran's death on

June 8, 2018 and notified the Court upon receipt of the June 7, 2018 medical record. The undersigned counsel has agreed to represent the movant, the Widow, as a client. A retainer agreement is being filed simultaneously with this motion. On June 20, 2018, the Court stayed proceedings and ordered the undersigned counsel to provide, not later than July 13, 2018, a copy of the Veteran's death certificate and show cause why the Board's September 2017 decision should not be vacated and the appeal dismissed. The undersigned counsel submits this motion and accompanying exhibits in response to the Court's Order.

Basis for Substitution

Under Rule 43(a)(2), "[i]f a party dies after a Notice of Appeal is filed or while a proceeding is pending in the Court, the personal representative of the deceased party's estate or any other appropriate person may, to the extent permitted by law, be substituted as a party on motion by such person." Under *38 U.S.C. § 5121A(a)(1)*,

> If a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant … may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purposes of processing the claim to completion.

Accrued benefits may be paid to the veteran's spouse, children, or dependent parents, in that order. *38 U.S.C. § 5121(a)(2)*. An application for accrued benefits must be filed within one year of the date of the claimant's death. *38 U.S.C. § 5121(c)*.

Prior to *Breedlove v. Shinseki, 24 Vet. App. 7, 15 (2010)*, the Court would allow a party to substitute a deceased appellant only if the appellant died after the case was "submitted," which the Court held occurred once the reply brief was filed or the time for filing the reply brief had expired. *See* *Pekular v. Mansfield, 21 Vet. App. 495 (2007)*. In this case, the joint motion for remand was filed with the Court on May 30, 2018, prior to the Veteran's death, thus the case was "submitted."

Additionally, in *Breedlove, 24 Vet. App. at 20*, this Court held that Congress's enactment of the provisions under 38 U.S.C. § 51021A altered the Court's jurisprudence regarding substitution of parties in an appeal pending at the Court and eligible accrued benefits beneficiaries are entitled to substitute a deceased appellant "regardless of the stage of briefing at the time of the veteran's death." Thus, under *Breedlove*, if it can be established that an individual qualifies as an accrued benefits beneficiary under *38 U.S.C. § 5121*, he or she may substitute an appellant before this Court who died after October 10, 2008 but before the case was "submitted." *Id*. Here, substitution is possible because the case has been submitted and because the Widow is an eligible accrued benefits beneficiary.

Substitution will be permitted where two requirements are met: (1) the person seeking substitution is eligible for accrued benefits under *38 U.S.C. § 5121*; and (2) considerations of justice and fairness weigh in favor of substitution. *Breedlove, 24 Vet. App. at 20–21*. As explained below, both requirements are met here, and this Court should therefore grant this motion.

First, there can be no dispute that the Widow is an eligible accrued benefits beneficiary under *38 U.S.C. § 5121(a)(2)(A)*. Section 5121(a)(2)(A) provides that upon the death of a veteran, "[t]he veteran's spouse" will be an accrued benefits beneficiary. Here, the Veteran's death certificate demonstrates that at the time of his death, he was married to the Widow. *See* **Exhibit A**. This is further supported by the marriage certificate attached to this motion that demonstrates that the Veteran married the Widow in July 19XX. *See* **Exhibit B**. Therefore, the Widow is eligible for accrued benefits as the Veteran's spouse. *See* *38 U.S.C. § 5121(a)(2)(A)*. Thus, it cannot be disputed that as the surviving spouse, the Widow is entitled to any benefits due and unpaid to her husband at the time of death, and there is no need for VA to make this determination in the first instance. *Norvell v. Peake, 22 Vet. App. 194, 200–01 (2008)* (holding that this Court is permitted to engage in fact finding for the purpose of assessing its own jurisdiction, to include whether a case or controversy exists).

Section 5121 further provides that an eligible accrued benefits beneficiary must file a claim for accrued benefits within one year of the veteran's death. *See* *38 U.S.C. § 5121(c)*. However, in *Reeves v. Shinseki, 682 F.3d 988,*

993 (Fed. Cir. 2012), the Federal Circuit held that where it is undisputed that the party seeking substitution is a surviving spouse and is entitled to any benefits due and unpaid to the veteran at the time of his death pursuant to *38 U.S.C. § 5121*, there is no need for the spouse to file a separate accrued benefits claim with VA or for VA to make a finding in the first instance as to whether the surviving spouse is an eligible accrued benefits beneficiary. Rather, his or her motion for substitution in the judicial proceedings is sufficient to satisfy the requirement that an application for accrued benefits be submitted within a year of the claimant's death. *Id*.

In this instance, however, the Widow did file an application for accrued benefits and a request for substitution with the VA Regional Office in Waco, Texas ("RO"). *See* **Exhibit C.** Therefore, with the filing of this motion, there can be no dispute that the Widow meets all the requirements for eligibility for accrued benefits under *38 U.S.C. § 5121*, including the requirements of *38 U.S.C. § 5121(c)*.

Furthermore, considerations of justice and fairness weigh in favor of substitution in this appeal. The legislative history of *38 U.S.C. § 5121A* demonstrates that the provision was created to avoid relitigation and to reduce the time and frustration veterans' survivors must expend in resolving an outstanding claim. *See* 154 Cong. Rec. H 7256, H 7262 (July 29, 2008) (statement of Rep. Hall); *see also* *Breedlove, 24 Vet. App. at 20* ("Congress enacted the substitution statute, section 5121A, to address the concern of delay, unfairness, and inefficiency."). Succinctly stated, Congress intended to "allow an eligible [survivor] to substitution for a claimant who passes away while a disability claim is pending rather than to begin the claims process all over again." Cong. Rec. H 7262 (daily ed. July 28, 2008) (statement of Rep. Lamborn)).

Here, the Veteran diligently pursued his claims for many years, but passed away before he could see the conclusion. To allow the Widow to be substituted for her husband in an appeal of the September 2017 Board decision for purposes of facilitating this Court's review of the propriety of the Board's denial of the Veteran's claim would serve to further Congress' intent that the processing of a deceased claimant's appeal not be delayed when there is an eligible accrued benefits beneficiary. Granting the Widow's motion for substitution in this case and allowing her to complete her husband's lengthy efforts to establish the appropriate effective date for his service-connected disability benefits, is exactly in line with the reason Congress adopted the substitution statute and the reason the Court now accepts substitution for a deceased appellant when the movant satisfies the criteria of *38 U.S.C. § 5121*.

Counsel for the Secretary has informed undersigned counsel that the Secretary is opposed to this motion at this time because the Secretary is seeking confirmation of substitution eligibility from the Agency of Original Jurisdiction and will inform the Court if and when the Secretary's position changes.

WHEREFORE, the movant respectfully requests that the Court grant this motion for substitution of a party.

Date: ______________________

Respectfully submitted,
/s/ Caitlin M. Milo
Caitlin M. Milo
Barton F. Stichman
National Veterans Legal Services Program
1600 K Street, N.W., Suite 500
Washington, D.C. 20006-2833

Counsel for Appellant and Movant

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Public Law 100-687
100th Congress

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.

Nov. 18, 1988
[S. 11]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A—VETERANS' JUDICIAL REVIEW

Veterans' Judicial Review Act.

SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

38 USC 101 note.

(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

"(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

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:

"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

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:

President of U.S.

"(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.".

Effective date.
5 USC 5315 note.

(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) of title 38, United States Code (as amended by subsection (a)).

38 USC 4001 note.

(c) TRANSITION TO NEW BOARD.—(1) Appointments of members of the Board of Veterans' Appeals under subsection (b)(2) of section

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.

38 USC 4001 note.

(d) 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 oppor-

tunity 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

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.".

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.
"4051. Status.
"4052. Jurisdiction; finality of decisions.
"4053. Composition.
"4054. Organization.
"4055. Offices.
"4056. Times and places of sessions.

"SUBCHAPTER II—PROCEDURE

"4061. Scope of review.
"4062. Fee for filing appeals.
"4063. Representation of parties; fee agreements.
"4064. Rules of practice and procedure.
"4065. Contempt authority; assistance to the Court.
"4066. Notice of appeal.
"4067. Decisions.
"4068. Availability of proceedings.
"4069. Publication of decisions.

"SUBCHAPTER III—MISCELLANEOUS PROVISIONS

"4081. Employees.
"4082. Budget and expenditures.
"4083. Disposition of fees.
"4084. Fee for transcript of record.
"4085. Practice fee.

"SUBCHAPTER IV—DECISIONS AND REVIEW

"4091. Date when United States Court of Veterans Appeals decision becomes final.
"4092. Review by United States Court of Appeals for the Federal Circuit.

"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.

"(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.

President of U.S.

"(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

District of Columbia.

"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.

"§ 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

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.

"(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.

Reports.

"(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.

Records.
Historic preservation.

"§ 4068. Availability of proceedings

Records.

"(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.

Public information.

"(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.

Classified information.

"(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.

"§ 4069. Publication of decisions

Public information.

"(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.

"§ 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

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

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. INITIAL APPOINTMENT OF JUDGES TO COURT OF VETERANS APPEALS.

38 USC 4053 note.

(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.

President of U.S.

(b) JUDGES.—Subject to subsection (a), judges of the Court of Veterans Appeals may be appointed after February 1, 1989.

SEC. 303. FACILITY FOR PRINCIPAL OFFICE OF COURT.

38 USC 4055 note.

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

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

38 USC 4051 note.

SEC. 401. 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.

38 USC 4051 note.

SEC. 402. 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.

38 USC 3404 note.

SEC. 403. 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.

Veterans' Benefits Improvement Act of 1988.

DIVISION B—VETERANS' BENEFITS IMPROVEMENT

SEC. 1001. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

38 USC 101 note.

(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.

38 USC 101 note.

SEC. 1002. DEFINITION OF ADMINISTRATOR.

For purposes of this division, the term "Administrator" means the Administrator of Veterans' Affairs.

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) 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.

38 USC 314 note.

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;

(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:

"Pay grade	Monthly rate	Pay grade	Monthly rate
E-1	$539	W-4	$ 773
E-2	555	O-1	682
E-3	570	O-2	704
E-4	606	O-3	754
E-5	622	O-4	797
E-6	636	O-5	879
E-7	667	O-6	991
E-8	704	O-7	1,071
E-9	[1] 735	O-8	1,174
W-1	682	O-9	1,259
W-2	709	O-10	[2] 1,381
W-3	730		

"[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—

(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. EFFECTIVE DATE FOR RATE INCREASES.

38 USC 314 note.

The amendments made by this title shall take effect on December 1, 1988.

TITLE XII—AGENT ORANGE AND RELATED PROVISIONS

Vietnam.

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. OUTREACH SERVICES.

38 USC 241 note.

(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—

(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.

Reports.

(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:

(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:

"§ 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:

"§ 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) The amendments made by this subsection shall take effect with respect to insurance policies maturing after the date of the enactment of this Act.

38 USC 728 note.

(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) The amendment made by paragraph (1) shall take effect with respect to premiums paid after the date of the enactment of this Act.

38 USC 729 note.

(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

Regulations.

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:

Regulations.

"(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:

"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. SPECIFICATION IN BUDGET SUBMISSIONS OF FUNDS FOR CERTAIN VETERANS BENEFITS.

38 USC 210 note.

(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 infeasi-

bility. 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.".

38 USC 612A note.

(b) 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 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)".

(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)".

38 USC 603 note.

(b) 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.

38 USC 603 note.

(c) 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.

(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

Reports.

"(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—

(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.".

38 USC 4103 note.

(c) 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.

38 USC 4103 note.

(d) 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) is amended by striking out "Subsection (b)(1)" and inserting in lieu thereof "Subsections (a), (b)(1), and (b)(2)".

38 USC 5025 note.

(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.".

(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) 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)".

38 USC 5025 note.

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. PACIFIC WAR MEMORIAL AND OTHER HISTORICAL AND MEMORIAL SITES ON CORREGIDOR IN THE REPUBLIC OF THE PHILIPPINES.

36 USC 125b.

(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).

(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.

Approved November 18, 1988.

LEGISLATIVE HISTORY—S. 11 (H.R. 5288):

HOUSE REPORTS: No. 100-963, Pt. 1, accompanying H.R. 5288 (Comm. on Veterans' Affairs).
SENATE REPORTS: No. 100-418 (Comm. on Veterans' Affairs).
CONGRESSIONAL RECORD, Vol. 134 (1988):
July 11, considered and passed Senate.
Oct. 3, H.R. 5288 considered and passed House; proceedings vacated and S. 11, amended, passed in lieu.
Oct, 18, Senate concurred in certain House amendment with an amendment and disagreed to another.
Oct, 19, House receded and concurred in Senate amendment with amendments.
Oct. 20, Senate concurred in House amendments.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 24 (1988):
Nov. 18, Presidential statement.

Brief Writing Advice from the US Court of Appeals for Veterans Claims
<u>(compiled for the CAVC Bar Association, August 2021)</u>

The CAVC judges were asked to provide their brief-writing advice to the Court's practitioners. Seven of the nine judges provided their commentary. This is advice directly from those who will read your brief and adjudicate the appeal accordingly. These are matters that are important to them and affect how they review your case. If it is important to them, it should be important to you.

<u>Takeaway</u>: The judges' comments generally had the same themes, although they addressed different aspects of the brief –

- **Be honest with the Court.** Variations on this theme included: not mischaracterizing the evidence or the law; directly acknowledging the lack of precedent, unfavorable caselaw, or that you are seeking an expansion of existing precedent; and stating and applying the correct standard of review. Do not cross the line from creative lawyering to dishonesty.
- **Be clear, concise, and precise.** Clearly state the issue before the Court, the Board's error, the remedy requested, etc. Be specific. Do not include extraneous facts in the statement of facts, extensive boilerplate, or unnecessary string cites.
- **Make the judge's job easier.** This relates to being clear, but make your brief as user-friendly as possible for the judge as the reader. The majority of the judges requested that the parties use subheadings and include them in the table of contents. They also asked that the parties not separate procedural history from the other factual history.
- **Connect the dots.** Many of the judges commented in some way or another that the parties must *explain why and how* the law and facts connect in the case so that you win. It is not enough to state the law then state some facts and say that the Board did or did not err. Explain how you get from point A to point B.

The following tips from the judges are broken down generally by the brief section. The "common points" reflect the advice given by the majority of the judges. The "additional comments" indicate additional pointers provided by individual judges that may not necessarily reflect the opinions of the majority.

<u>General Advice</u>
Common points:

- Be respectful toward the parties and the Court.
  - Don't use purple prose. For example, don't characterize VA action as gross malfeasance (unless, of course, that characterization is warranted).
  - Don't call the other party's argument ridiculous, absurd, laughable, and so forth. If the other party makes a baseless argument, the judge will see that from the analysis. This is unprofessional and a prop to hold up an otherwise weak argument.
  - Don't be disrespectful to the other party or the Court. Remember that proceedings here are aimed at ensuring veterans and their families receive justice. Every filing should reflect the respect that they are owed.
- Be clear, concise, and precise.
  - Have a plan, let the reader know the plan, and follow through with the plan.
  - Sentence structure should be simple and straightforward. Most sentences should not exceed two to three lines. No sentence should exceed five lines. All paragraphs should be less than a page.
  - Be precise with your record citations, particularly with assertions of error. *See* Rule 28(a)(4)(ii).
- Be truthful when characterizing the evidence and case holdings.
- Edit for typographical, grammatical, and citation errors.

  - Judges notice when a brief is sloppy, and it sends a message that the author has not taken the time to focus on the matter at hand.
  - Typos/missing words/incorrect cites might not impact the outcome but looks unprofessional and could be embarrassing if the Court points out your errors.

Additional comments:

- A brief should stand on its own without requiring the reader to read the Board decision or another brief.
- Do not use the maximum number of pages for a brief unless you absolutely need those pages to make your argument(s).

Table of Contents

Common point: The judges do actually read and use the table of contents. Therefore, use subheadings and include them in the table of contents.

- Subheadings should be substantive, full sentences so that even just skimming the table of contents gives the reader an idea of the issues.
- Be specific and clearly identify each argument.
  - For example: The examiner (or Board) failed to address the veteran's in-service symptoms; the Board did not need to address the veteran's statements because it found him/her not credible.
  - If the diagnostic code includes a symptom the Board failed to address, that should be evident from your table of contents. On the flip side, if the Board did the thing appellant claims they didn't or the Board didn't need to do it, that should also be in your table of contents. This way, the reader has an idea of what they need to pay attention to when they start reading your brief.
  - General assertions, such as "the VA medical examination was inadequate," are unhelpful.

Issue Statement/Question Presented

Common point: Be specific.

- Simply having a generic statement saying that the Board failed to provide adequate reasons or bases is not that helpful. Similarly, a statement of the issues that says "whether the Board errs when it relies on an inadequate exam" is not really helpful. The more focused on your case, the better.

Additional comment:

- This should be stated positively, simply, and as favorably as possible to your position.

Statement of Facts

Common points:

- Present the facts in chronological order.
- Do not separate the procedural history from the other factual history.
- Do not make arguments in the fact section.
- Do not include extraneous facts or citations. The judge should never be left wondering why they are reading something.
- Do not mischaracterize the record.

Additional comments:

- Include a statement about the veteran's branch and dates of service, including combat service.
- Identify parties by name (i.e., Ms. Smith or VA/Secretary) not status (i.e., appellant or appellee)

- Include a footnote or above the line text clarifying whether the appeal was under the legacy system or is an AMA appeal.
- Do not cite to 100s of pages of medical records in the fact section and not return to them in the analysis.
- Do not cite to duplicate records, just select the cleanest copy. And, parties should strive to cite the same document to avoid duplication.
- Double check record citations.

Analysis

Common points:

- Standard of Review: Address it, be honest and clear about whether you are asking the Court to review a factual finding by the Board or a legal question, and then apply the standard of review correctly.
- Be honest regarding facts and precedent.
  - Be clear and up front if no clear precedent exists, or if you are seeking an expansion of existing precedents.
  - Acknowledge and distinguish caselaw that's not in your favor.
  - Acknowledge if your argument is barred by current caselaw and you are raising it solely for purposes of preserving the issue for appeal.
  - Address unfavorable facts up front and distinguish or explain why those facts do not compel an opposite result.
- Each argument should be self-contained.
  - Follow the IRAC method for *each* issue in the case, so that it is a "one-stop shop": (1) state the issue you are addressing; (2) identify the applicable rule of law; (3) apply the law to the facts of the case—make your argument; and (4) conclude the point.
  - Do not weave multiple arguments together; keep each argument separate and address it fully before moving onto the next.
- Connect the dots between the facts and caselaw.
  - String cites to the record with no accompanying explanation are generally unhelpful.
  - Explain *why and how* the law as applied to the facts does or does not show Board error. It is required by the Court's rules (Rule 28(a)(5)) and may avoid an argument being deemed undeveloped or unpersuasive.
  - If you cite to law in your boilerplate, apply it in the analysis.

Additional Comments:

- Avoid string cites.
  - Unless you are relying on the specifics of a case or you are disputing what rule applies, you probably don't need a lot of cites or quotes to back up your rule of law.
- Discuss specific Board findings and conclusions.
  - If there are multiple key Board findings, explain how each is erroneous/plausible. Showing error/non-error in some Board findings may not matter if you leave unchallenged/undefended other pivotal findings.
  - Acknowledge when the Board did not make findings of fact and tell the Court why that does or does not require remand.
- Do not use *supra* to refer to record evidence from the statement of facts.
- Be selective in your arguments. The kitchen sink approach almost never works.
- Address issues for which you have the burden (jurisdiction, prejudice, rebuttal of a presumption).

- Be proactive – anticipate what factual or legal questions the Court may have after reviewing the law/evidence and answer them. Failing to do so could lead to delays (Court ordering additional briefing) or even impact the outcome on issues for which you have the burden.
- Do not assume the Court will do the legal research for you.
  - Especially if a legal issue is complicated or unclear, lay out the array of caselaw and how you came to your conclusion as to what caselaw requires.
- Divide the issues into "positive" and "negative" issues.
  - The positive issues are your affirmative issues about why your-client should win the case and should come first (i.e., the issue here is x; several cases decide x in our favor, we win).
  - The negative issues respond to your opponent's view about why they should win the case and should come last (i.e., (1) contrary to appellee's argument, these cases do not decide x in their favor, we still win, or (2) contrary to appellee's argument these facts do not change the application of the case law, we still win).
- Lead with your strongest argument.
- Ensure specificity in the analysis. When using the indefinite "this" or "that," ensure that the referent is clear or obvious.
- Many briefs could include less boilerplate (especially about standard of review). Use those pages instead to really explain your argument/analysis.

Remedy

Common point: Ask for what you want clearly and directly.

- If there is a specific approach that you want the Court to take (i.e., remand on Ground #1 even though you'd get the same relief under Ground #2), ask for it.
- Be clear if you are asking for any alternate relief.

Reply Brief

Common point: Always file a reply brief.

- Caveat: Do not merely rehash your opening brief. If you truly have nothing new to add, don't reply (but remember that silence could be viewed as concession of your opponent's argument).

Additional comment:

- If you are making a new argument or it's a close call, be up front about it and explain why the Court should address it anyway.

Miscellaneous

- *Solze* notices
  - Extensive boilerplate regarding the legal standard for a *Solze* notice is unnecessary.
  - Do not use *Solze* notices to raise an old case or existing statute/regulation that you forgot in your brief(s).
  - Do not use *Solze* as a second attempt to argue your case.
  - If necessary, seek leave to file a supplemental brief to address how new precedent impacts arguments made in your brief.
- Consider the possibility that your pleading may be read at least once on a tablet or phone. A short document with a good summary and substantive subheadings will be much easier to understand, especially if your opponent makes the judge hunt through pages of boilerplate for substance.
- The summary of the argument is important and should incorporate your best points.