

VETERANS' BENEFITS LAW 2010-2013: SUMMARY, SYNTHESIS, AND SUGGESTIONS

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INTRODUCTION

The year 2013 commemorated twenty-five years of judicial review of veterans' benefits determinations by the United States Court of Appeals for Veterans Claims (CAVC).² This anniversary was truly a monumental one given the work the CAVC has accomplished³ in creating a body of law in an area in which there had been nothing but metaphorical blank pages for essentially 200 years.⁴ Before entering into the details of recent developments or exploring the deficiencies in the current system, it is important to take a moment to acknowledge what all those engaged in assisting our Nation's veterans have accomplished together over the past quarter century.

The CAVC's Twelfth Judicial Conference's theme was "25 Years of Judicial Review: Moving Forward and Looking

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² See Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

³ I described in detail the incredible challenges facing the CAVC as well as some of its successes and failures on the occasion of its twentieth anniversary. See Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361 (2009).

⁴ See *Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's 'splendid isolation.'). For more detailed discussion of preclusion of judicial review prior to the CAVC's creation, see Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 486-88 (2007).

Back.”⁵ This was a fitting title in many respects. At the most basic level, it recognized the reality that where you are going depends in significant measure on where you have been. The development of the law concerning veterans’ benefits over the past twenty-five years provides the stage on which the law will grow. But the conference theme also highlighted a more subtle point. The past few years have simultaneously been a period of both great changes in the area as well as a continuation of some of the fundamental challenges facing the system. This observation may seem to highlight an inconsistency, but that is not the case. Rather, it underscores the reality that even as we experience changes in the law and the personnel who work with it, we must not forget that deficiencies in the system and obstacles to ultimate success remain.

This Article attempts to capture both the changes and continued challenges in the veterans’ benefits system over the past three years.⁶ Specifically, for the period from April 1, 2010, through March 31, 2013, I have reviewed all the precedential decisions of the CAVC, all decisions of the United States Court of Appeals for the Federal Circuit (Federal Circuit)⁷ concerning veterans’ law, and relevant decisions of the Supreme Court of the United States (Supreme Court).⁸ My goal was to identify the most significant developments in this area during this period as well as to distill themes and trends for the future.

⁵ See United States Court of Appeals for Veterans Claims, Twelfth Judicial Conference (Apr. 18-19, 2013) (brochure) (on file with author).

⁶ This time period roughly tracks the span between the CAVC’s Eleventh and Twelfth Judicial Conferences. See *CAVC Judicial Conference Index*, VETERANS’ LAW LIBRARY, http://www.veteranslawlibrary.com/Judicial_Conf_11.html (last visited Nov. 9, 2013) (indicating that the Eleventh Judicial Conference was held in March 2010); United States Court of Appeals for Veterans Claims, Twelfth Judicial Conference (Apr. 18-19, 2013) (brochure) (on file with author).

⁷ The United States Court of Appeals for the Federal Circuit (Federal Circuit) has exclusive jurisdiction to review the CAVC’s decisions. 38 U.S.C. § 7292(c) (2006).

⁸ I also reviewed relevant statutory and regulatory developments as well as decisions from other courts bearing on this area.

This Article proceeds in four parts. Part I briefly describes the relevant environment in which the developments I discuss took place. Specifically, I consider the workloads of the various parts of the system as well as some significant changes in the major players in the field.⁹ Part II is the heart of the Article. It discusses and synthesizes the significant developments in veterans' law from 2010 to 2013. Along the way, Part II also highlights some of the issues that will almost certainly play an important role in this area of law over the next several years.¹⁰ Part III turns to consideration of some broader themes in this area that the developments described in Part II bring to light. In addition to discussing these themes, I also make certain policy recommendations to address significant challenges in the system.¹¹

I. THE ENVIRONMENT

In this Part, I briefly discuss the environment in which the significant developments in veterans' law took place from 2010 to 2013. There were significant changes and also familiar themes.

Let me begin with the changes. I discuss the significant substantive and procedural changes in the law below.¹² The changes to which I refer now are in personnel. Since the CAVC's last judicial conference in 2010, that court has seen a significant change in membership. Chief Judge Greene retired. Chief Judge Kasold assumed his current position. And, most importantly, Judge Bartley, Judge Pietsch, and Judge Greenberg joined the court.¹³

⁹ See *infra* Part I.

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part II.

¹³ Information concerning the judges of the CAVC including their tenure can be found on the website of the court at <http://www.uscourts.gov/cavc/judges.php> (last visited Sept. 14, 2013).

Change has not been the province of the CAVC alone. The Federal Circuit has also seen a rather dramatic alteration of its personnel. Since 2010, that court has had a change in leadership with Chief Judge Michel retiring and Chief Judge Rader assuming his current post. In addition, Judge Gajarsa retired and Judge Mayer took senior status. Finally, four new judges took the bench: Judges Wallach, Reyna, Taranto, and O'Malley.¹⁴

At first blush, it may seem that I am trivializing the concept of “change” by highlighting the fact that there are new judges on the CAVC and the Federal Circuit. I do not believe that is the case. I have confidence that each of these new judges will do his or her best to follow the law as they see it. So my reference to change is not meant to suggest that the law will be different simply because Judge Greenberg, for example, wants to decide a case differently than Judge Greene would have. Rather, my point is that the Federal Circuit and the CAVC are appellate bodies that reach decisions through collegial, group decision-making.¹⁵ As such, the addition of any new member to either court will have some effect on the institution's overall dynamic. That effect will likely be even greater given the magnitude of the changes over the past three years.

Despite these significant changes, there was also certain continuity over the past three years. The key point to make in this regard is that all levels in the veterans' benefits system remain quite busy. This Article is not the place for a comprehensive statistical review of the state of the veterans' benefits system. My goal is merely to set the stage on which the developments of the past several years have played out.

¹⁴ See United States Court of Appeals for the Federal Circuit, Judges, <http://www.cafc.uscourts.gov/judges> (last visited Sept. 14, 2013).

¹⁵ For a collection of sources concerning collegial appellate decision-making, see Allen, *supra* note 4, at 518 n.208.

A. The Department of Veterans Affairs¹⁶

Within the Department of Veterans Affairs (VA or “the Secretary”), a claimant who is dissatisfied with an action taken by a Regional Office (RO) may submit a Notice of Disagreement (NOD).¹⁷ The RO will then prepare a Statement of the Case (SOC) summarizing the basis for the decision.¹⁸ After receiving the SOC, a claimant may perfect an appeal by filing certain forms. The appeals are heard by the Board of Veterans’ Appeals (“Board”).¹⁹

For fiscal year 2012, the Board physically received 49,611 appeals.²⁰ During this same period, the Board disposed of 44,300 appeals.²¹ Finally, during fiscal year 2012, there were 111,641 NODs filed concerning RO decisions.²²

B. CAVC

The most recent statistics available concerning the CAVC’s workload are for fiscal year 2012.²³ During this period, there were 3,803 appeals and petitions filed with the court.²⁴ The workload of the court is even greater when one considers dispositions. In fiscal year 2012, there were 6,992 dispositions of one form or another

¹⁶ I refer to the Department of Veterans Affairs in this Article interchangeably as “VA” and “the Secretary.”

¹⁷ 38 U.S.C. § 7105(a) (2006).

¹⁸ *Id.* § 7105(d).

¹⁹ *See id.* §§ 7101-05.

²⁰ *See* BOARD OF VETERANS’ APPEALS, DEP’T. OF VETERANS AFFAIRS, REP. OF THE CHAIRMAN: FISCAL YEAR 2012, at 16 (2013), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf.

²¹ *Id.* at 24.

²² *Id.* at 21.

²³ *See* ANNUAL REPORT, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, OCTOBER 1, 2011 TO SEPTEMBER 2012 (FISCAL YEAR 2012), <http://www.uscourts.cavc.gov/documents/FY2012AnnualReport.pdf> [hereinafter CAVC 2012 ANNUAL REPORT].

²⁴ *Id.* at 1. There were 3,649 appeals and 154 petitions filed. The pro se filing rate remains high with 44% of appeals and 61% of petitions being filed by pro se litigants. *Id.* In addition, there were 2,355 Equal Access to Justice Act (EAJA) applications filed in Fiscal Year 2012. *Id.*

constituting 4,355 appeals, 144 petitions, 2,298 applications under the Equal Access to Justice Act (EAJA),²⁵ and 195 requests for reconsideration or panel review.²⁶ In terms of how those decisions were rendered, the CAVC reported the following:

- 4,402 matters were resolved by the Clerk of Court;
- 2,444 matters were resolved by a single judge;
- 129 matters were resolved by a panel; and
- 17 matters were resolved by the court sitting en banc.²⁷

C. Federal Circuit

In fiscal year 2012, the most recent period for which statistics are available, there were 189 appeals filed in the Federal Circuit originating in the CAVC.²⁸ This accounts for approximately 14% of the matters filed at the Federal Circuit.²⁹ During this same period, the court resolved 193 matters originating in the CAVC, also amounting to approximately 14% of terminations.³⁰

II. SIGNIFICANT DEVELOPMENTS: APRIL 1, 2010 THROUGH MARCH 31, 2013

This Part identifies and discusses the significant developments in the law of veterans' benefits in the period from

²⁵ *Id.* EAJA refers to the Equal Access to Justice Act, Pub. L. No. 96-481, tit. 2, § 201, 94 Stat. 2321 (1980) (codified in part at 28 U.S.C. § 2412).

²⁶ CAVC 2012 ANNUAL REPORT, *supra* note 23, at 1. In terms of the pro se rate at disposition, 27% of appellants in appeals and 62% of petitioners in petitions remained pro se. *Id.*

²⁷ *Id.* at 1-2.

²⁸ TABLE B-8, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT – APPEALS FILED, TERMINATED, AND PENDING DURING THE TWELVE-MONTH PERIOD ENDED SEPTEMBER 30, 2012 (rev. Dec. 2012), http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Appeals_Filed_Terminated_and_Pending_2012_REV.pdf.

²⁹ *See id.*

³⁰ *Id.*

April 1, 2010 to March 31, 2013. Before doing so, however, two caveats are in order. First, it is not possible in this Article to discuss every development that could be deemed “significant” during this three-year period. Indeed, doing so would in many respects simply be re-typing the decisions included in West’s *Veterans Law Reporter*. Thus, I had to make decisions about what to include, what to highlight, and what merely to mention. Second, and related to the first caveat, I recognize that, as with beauty, significance is in the eye of the beholder.³¹ I have no doubt that I will have identified something of significance that some (perhaps many) readers will find trivial. And equally true, I am sure to have omitted developments that readers may find surprising. Therefore, what follows should really be taken as one interested observer’s perspective on the law over the past three years.

Judge Lance has commented that “[t]here is an unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year.”³² The sentiment Judge Lance captured in this quotation is a critically important reality of the current law of veterans’ benefits. Moreover, if the body of law that has developed may be too complex for RO adjudicators to apply, how much more daunting is the task of the unrepresented claimant in navigating these waters.³³ I return to this point below.³⁴ For now, however, I ask the reader to keep the issue of complexity in mind as he or she proceeds through the balance of this Part. To preview my concern, excellent rules crafted by experts may turn out to be not

³¹ The phrase appears to be based on the work of Plato in the SYMPOSIUM. See <http://www.quoteland.com/articles/identify.asp> (last visited Sept. 14, 2013).

³² *Delisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring). Judge Lance’s comment is a more refined version of what I once wrote: “This Stuff is Hard.” Michael P. Allen, *The Law of Veterans’ Benefits 2008-2010: Significant Developments, Trends, and A Glimpse Into the Future*, 3 VETERANS L. REV. 1, 60 (2011).

³³ I also note that some aspects of this area of the law may in fact be too complex for the uninitiated lawyer.

³⁴ See *infra* Part III.B.

so good after all if they cannot be understood or followed by the frontline players.

I have divided the developments into seven groups. There are not neat dividing lines among these categories. Moreover, the category titles are not meant to be technical. My goal was simply to adopt a scheme for organizing the large number of decisions of significance over the past three years that would assist a reader in connecting the various cases and other developments. Ultimately, of course, the categorization is far less important than the substantive decisions. This Part is divided as follows: (A) CAVC jurisdiction and powers; (B) administrative process matters; (C) some miscellaneous matters; (D) medical matters; (E) of claims and the like; (F) EAJA and other attorney-fee matters; and (G) miscellaneous matters.

A. CAVC Jurisdiction and Powers

One of the more interesting points to come out of the period under review is how many court decisions addressed matters related in one way or another to the CAVC's jurisdiction or the way in which it exercises its powers. Perhaps this is not surprising. After all, the CAVC is only celebrating its twenty-fifth anniversary. That being said, jurisdictional decisions may be one of the more complicated ones for RO adjudicators or pro se claimants to understand. This may mean something as we collectively move forward.³⁵ I address various decisions concerning the CAVC's jurisdiction and powers below.

i. Equitable Tolling

In order to appeal to the CAVC, a dissatisfied claimant must file a notice of appeal with the CAVC within 120 days of an adverse final Board decision.³⁶ A question that has seemed

³⁵ I return to this theme below. *See infra* Part III.B-C.

³⁶ 38 U.S.C. § 7266(a) (2006).

almost ever-present in veterans' law for the past several years is whether that 120-day period is jurisdictional in nature.³⁷ The Federal Circuit had held in a series of cases that the time limit was not jurisdictional and, accordingly, could be tolled for equitable reasons in appropriate circumstances.³⁸ Following this lead, the CAVC had developed a complex body of law concerning the circumstances in which equitable tolling of the 120-day period was appropriate.³⁹

All of this changed in 2009 when the Federal Circuit reversed course in *Henderson v. Shinseki*.⁴⁰ In *Henderson*, the Federal Circuit determined that a recent Supreme Court decision had undermined the foundation of the Federal Circuit's earlier decisions.⁴¹ *Henderson* was a bombshell.

The Supreme Court ultimately disagreed with the Federal Circuit's decision.⁴² The Supreme Court concluded that the 120-day period within which an appeal to the CAVC from the Board must be filed is not jurisdictional.⁴³ The Supreme Court based its decision on a number of factors, significantly including the uniquely pro-claimant nature of the veterans' benefits system.⁴⁴ What is interesting about this line of reasoning is that the system the Supreme Court was describing might not, in fact, reflect reality. Nevertheless, the Supreme Court's decision that the 120-day appeal period is non-jurisdictional is highly significant.

³⁷ See, e.g., Allen, *supra* note 32, at 4-8 (discussing controversy concerning jurisdictional nature of notice of appeal provision); Allen, *supra* note 4, at 497-502 (same).

³⁸ E.g., Jaquay v. Principi, 304 F.3d 1276 (Fed. Cir. 2002) (en banc); Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) (en banc).

³⁹ See, e.g., McCreary v. Nicholson, 19 Vet. App. 324, 332 (2005) (establishing a three-part test to determine whether equitable tolling based on extraordinary circumstances is warranted).

⁴⁰ 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *rev'd*, 131 S. Ct. 1197 (2011).

⁴¹ *Id.* at 1212-20 (citing *Bowles v. Russell*, 551 U.S. 205 (2007)).

⁴² *Henderson*, 131 S. Ct. at 1200.

⁴³ *Id.* at 1204-06.

⁴⁴ *Id.* at 1205-06.

While holding that the period is non-jurisdictional, the *Henderson* Court also noted that “[t]he 120-day limit is nevertheless an important procedural rule.”⁴⁵ The Supreme Court did not explain precisely what it meant by this statement. It also did not take a position as to whether the 120-day period was, in fact, subject to equitable tolling.⁴⁶

It did not take the CAVC long to answer the question the Supreme Court left open concerning equitable tolling. In *Bove v. Shinseki*,⁴⁷ the CAVC determined that equitable tolling was available with respect to the 120-day appeal period.⁴⁸ Importantly, the CAVC in *Bove* made clear that it was essentially reinstating the Federal Circuit and CAVC decisions that had been swept away when the Federal Circuit decided *Henderson*.⁴⁹ Thus, we find ourselves back in the business of exploring the specific factual circumstances that warrant equitable tolling of the 120-day period. There will no doubt be additional developments in this area over the next several years, but many questions have now been settled.

One final point is worth mentioning concerning equitable tolling. After concluding in *Bove* that the 120-day appeal period was subject to equitable tolling, the CAVC then considered whether the Secretary could waive or forfeit an objection that an appellant had not filed a notice of appeal within the 120-day period.⁵⁰ The CAVC held that the Secretary could not waive or forfeit the defense that an appeal had been filed late and that the court had the

⁴⁵ *Id.* at 1206.

⁴⁶ *Id.* at 1206 n.4.

⁴⁷ 25 Vet. App. 136 (2011).

⁴⁸ *Id.* at 138-40.

⁴⁹ *Id.* at 139-40. True to its word, the CAVC has returned to pre-*Henderson* case law to evaluate equitable tolling matters. See, e.g., *Checo v. Shinseki*, 26 Vet. App. 130, 133-35 (2013) (applying the *McCreary* three-part test to determine whether equitable tolling was warranted for an extraordinary circumstance). In addition, the CAVC sitting en banc also ruled that equitable tolling is applicable when a claimant timely files a notice of appeal but does so in an incorrect location. *Rickett v. Shinseki*, 26 Vet. App. 210, 222 (2013).

⁵⁰ *Bove*, 25 Vet. App. at 140-43.

authority, *sua sponte*, to raise the matter.⁵¹

I confess to having been surprised by the CAVC's holding in this regard. As the CAVC noted, the general rule, including when the government is a party, is that failure to comply with a non-jurisdictional time bar is a defense that may be waived.⁵² The CAVC reasoned that the general rule did not apply in the veterans' law context largely because of the unique relationship between the Secretary and the CAVC. For example, the CAVC noted that the Secretary was the appellee in every case before the CAVC.⁵³ As such, the CAVC expressed concern that allowing the Secretary to waive a late filing "would give him unwarranted control" of cases on the CAVC's docket.⁵⁴ In other words, the Secretary could possibly use the ability to waive a late filing at the CAVC as a means to get an issue before the CAVC even though the Secretary could not appeal himself.⁵⁵

It is possible that the Secretary could attempt to manipulate waiving the 120-day period in the manner *Bove* suggests. It strikes me, however, that the situation would be a rather odd one. After all, the Secretary could not plan that an appellant would not file an appeal within 120-days. Moreover, if the appellant had made the deadline the issue would be before the CAVC in any event.

I believe that some of this decision is actually driven by a sense of judicial insecurity. The CAVC stated that another reason for its holding was that allowing waiver "could lead to an appearance for litigants that this Court is not independent, but that the Secretary remains in control of the litigation."⁵⁶ The CAVC should not be insecure. Having reached twenty-five and been remarkably successful, the court should feel secure in its place in

⁵¹ *Id.* at 143.

⁵² *Id.* at 141.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 141-42 (citing 38 U.S.C. § 7252 (2006)).

⁵⁶ *Id.* at 142.

this system. I would not comment on this matter if it were not for the reality that *Bove's* holding makes it more likely than it would otherwise be that a claimant will not have his or her claim heard in court. That may be justified on a number of grounds, but concern about the Secretary's control over the CAVC is not one of them.

ii. CAVC Jurisdiction

In addition to decisions concerning equitable tolling, the CAVC and, to a lesser extent, the Federal Circuit, decided a number of other cases dealing with the CAVC's jurisdiction and related matters. In this subsection, I discuss these various decisions connected in one form or another to the CAVC's jurisdiction.

One of the most significant of these decisions practically speaking is *Freeman v. Shinseki*.⁵⁷ At issue in *Freeman* was whether the CAVC had jurisdiction to consider a dispute concerning the VA's appointment of a Veteran's fiduciary.⁵⁸ The VA had appointed a paid fiduciary and had refused to accept a NOD filed with respect to that action.⁵⁹ The Veteran sought a writ of mandamus compelling the VA to accept the NOD.⁶⁰ The CAVC granted the writ, concluding that it would have jurisdiction over the appointment of a fiduciary.⁶¹

Freeman is significant because it opens an entire area of VA business to court supervision. Indeed, one of the rationales the CAVC advanced for its decision was precisely the special need for judicial review in this area.⁶² I suspect that the CAVC will continue to develop a body of law in this area now that the jurisdictional door is open.⁶³

⁵⁷ 24 Vet. App. 404 (2011).

⁵⁸ *Id.* at 405-06.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 417.

⁶² *See id.* at 414-15.

⁶³ The CAVC has already begun to address issues in this area, again through the lens

There were also a number of decisions over the past three years concerning how certain actions of the Board affect the CAVC's jurisdiction. An issue that arose on more than one occasion concerned the impact of the filing of a motion for reconsideration with a Board decision. It is well settled that the filing of such a motion tolls the running of the 120-day appeal period to the CAVC following a final Board decision.⁶⁴ In *Posey v. Shinseki*,⁶⁵ the CAVC provided additional guidance concerning how one determines whether a document expresses an intent to appeal, thereby becoming a misfiled notice of appeal, or expresses a desire for further review at the Board such that it constitutes a motion for reconsideration.⁶⁶ While this type of decision will always remain one that is based on all the facts and circumstances, *Posey* is instructive in making these distinctions.

The CAVC also determined in *Fithian v. Shinseki*⁶⁷ that the filing of a motion for reconsideration anywhere within the VA is a constructive filing with the Board.⁶⁸ Accordingly, if a claimant mistakenly files a motion for reconsideration at an RO instead of at the Board, that motion will still toll the 120-day appeal period to the CAVC because it will be presumed to have been filed with the Board.⁶⁹ The CAVC also underscored that it has the authority to determine whether a document filed before the VA is, in fact, a motion for reconsideration in addition to determining that it is not a notice of appeal.⁷⁰ The CAVC made clear that it has the power to make jurisdictional determinations that include determining

of petitions for extraordinary relief. See, e.g., *Solze v. Shinseki*, 26 Vet. App. 118 (2013). The fact that these cases reach the CAVC by petition almost certainly has skewed the discussion. The law will truly develop in this area once appeals begin reaching the CAVC.

⁶⁴ See *Rosler v. Derwinski*, 1 Vet. App. 241, 249 (1991).

⁶⁵ 23 Vet. App. 406 (2010).

⁶⁶ *Id.* at 408-09.

⁶⁷ 24 Vet. App. 146 (2010).

⁶⁸ *Id.* at 158.

⁶⁹ See *id.*

⁷⁰ *Id.* at 155-57.

whether an appeal is timely.⁷¹ To do so, the CAVC must be able to say whether a document before the VA filed within the 120-day appeal period is a notice of appeal or a motion for reconsideration.⁷²

The Secretary had argued in *Fithian* that the CAVC lacked the power to do more than say something was not a notice of appeal.⁷³ In my favorite line of any opinion ever rendered at the CAVC, Judge Davis described the issue raised as: “Phrased in zoological terms, may the Court determine only that what looks like a duck is not a duck, or may the Court determine that what initially looks like a duck, is, in fact, a platypus, and say so?”⁷⁴ The CAVC left no doubt that it may call something either a duck or a platypus as the facts demand.

There were also decisions from both the Federal Circuit and the CAVC dealing with the CAVC’s jurisdiction over certain Board decisions in which more than one action was taken (e.g., denying one claim and remanding another). In *Young v. Shinseki*,⁷⁵ an en banc CAVC determined that it had jurisdiction over a situation in which the Board “refers” a claim to an RO instead of “remanding” the claim, at least when the Board has denied a part of the claim.⁷⁶ The CAVC left open whether it would have jurisdiction in a situation in which there was only a referral without some portion of the claim being denied.⁷⁷

The majority reasoned that the CAVC has the authority to determine whether the Board has jurisdiction and a referral connotes that the Board did not.⁷⁸ As such, the majority concluded

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 155.

⁷⁴ *Id.*

⁷⁵ 25 Vet. App. 201 (2012).

⁷⁶ *Id.* at 201-02. *Young* was actually an EAJA case in which it was necessary to determine the CAVC’s jurisdiction over the underlying claim. *Id.*

⁷⁷ *Id.* at 202.

⁷⁸ *Id.* at 202-03.

that the CAVC had jurisdiction to determine whether the Board was correct in the determination of its own jurisdiction.⁷⁹ *Young* is an important jurisdictional decision even with the question it leaves open about the referred claim standing alone. It was also noteworthy for the two dissents in the case. Judge Lance dissented in a very strongly worded opinion,⁸⁰ arguing that the decision was legally incorrect and would lead to negative consequences for claimants.⁸¹ Time will tell if Judge Lance is correct. And on an entirely less serious note, Judge Hagel's dissent is important because through it we learned that there is a poet on the court!⁸²

In *Tyrues v. Shinseki*,⁸³ the Federal Circuit affirmed another en banc CAVC decision concerning jurisdiction over a "mixed" Board decision.⁸⁴ In *Tyrues*, the Federal Circuit reaffirmed that "[s]eparate claims are separately appealable. Each particular claim for benefits may be treated as distinct for jurisdictional purposes."⁸⁵ *Tyrues* is particularly significant because it makes clear that while the CAVC has discretion whether to take jurisdiction over the appeal of the finally decided claim in a mixed decision, the claimant must file a notice of appeal from such a decision in order

⁷⁹ *Id.*

⁸⁰ *Id.* at 205-18 (Lance, J., dissenting). For example, Judge Lance began the introduction to his dissent as follows: "The infirmity of the majority opinion is simply breathtaking." *Id.* at 206.

⁸¹ *Id.* at 206-08.

⁸² *Id.* at 219-20 n.9 (Hagel, J., dissenting).

⁸³ 631 F.3d 1380 (Fed. Cir. 2011). In the wake of its decision in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), the Supreme Court granted a writ of certiorari in *Tyrues* and ordered that the Federal Circuit reconsider the case to ensure that it complied with *Henderson*. *Tyrues v. Shinseki*, 132 S. Ct. 75 (2011). On remand from the Federal Circuit, the CAVC determined that *Henderson* did not undermine the *Tyrues* decision. *Tyrues v. Shinseki*, 26 Vet. App. 31, 33 (2012), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013). Accordingly, I will refer to the Federal Circuit's 2011 decision in the balance of this subsection of the Article.

⁸⁴ *Tyrues*, 631 F.3d at 1381-82. The Federal Circuit described a mixed decision as a "decision remanding one or more claims, while denying at least one other." *Id.* at 1382 n.1. Although no court has so held, one could also consider a referral/denial situation such as present in *Young* to be a mixed decision.

⁸⁵ *Id.* at 1383.

to preserve his or her appellate rights.⁸⁶

Tyrues is an important decision and most certainly a trap for the unwary claimant or claimant's counsel. It is true, as the Federal Circuit noted, that "[p]ublic policy supports allowing veterans to appeal denied claims as quickly as possible."⁸⁷ And if one interpreted the relevant appeal provisions to allow but not mandate an appeal in a mixed decision situation that public policy goal would be advanced with no risk to a veteran's rights.⁸⁸ However, by making the appeal mandatory in such a situation, there will be veterans whose claims are lost through pro se inadvertence or attorney error. True, that is the nature of much of American litigation. The rub is that the administrative process is not supposed to be such a system.⁸⁹ This incongruity is a hallmark of the current system in which devices are put into place to protect veterans and other claimants but those same devices may end up working against their interests because of quirks in the system.⁹⁰

The CAVC also addressed two other issues concerning its jurisdiction (and the distinct point of the scope of its powers) that merit discussion. First, in terms of power, a majority of a divided CAVC panel determined that the CAVC has the power to declare a statute unconstitutional on its face.⁹¹ Judge Hagel dissented on this point.⁹² While not a common occurrence for the CAVC to face an argument that a statute is facially unconstitutional, recognition of this power is an important development.

⁸⁶ *Id.* at 1383-85.

⁸⁷ *Id.* at 1384.

⁸⁸ The Federal Circuit rejected the discretionary appeal approach based on the statutory language describing appeals to the CAVC. *Id.* at 1384-85.

⁸⁹ *See, e.g., Henderson*, 131 S. Ct. 1197, 1200-01, 1205-06 (2011).

⁹⁰ I return to this point below. *See infra* Part III.B.

⁹¹ *Copeland v. Shinseki*, 26 Vet. App. 86, 90 & n.4 (2012).

⁹² *Id.* at 92-96 (Hagel, J., dissenting).

Second, and more significant, is the CAVC's decision in *Massie v. Shinseki*.⁹³ Mr. Massie was a U.S. Army Veteran who was service-connected for varicose veins.⁹⁴ Mr. Massie eventually sought an increased rating for this condition that, after protracted proceedings, the RO granted.⁹⁵ The Veteran then sought an earlier effective date for his increased rating.⁹⁶ The substantive issue in the case concerned whether a certain letter in the file from a VA physician was a "report of examination" such that it could constitute an informal claim for benefits.⁹⁷

Massie is significant not so much for its holding about the ultimate issue of the appropriate effective date for the increased rating. Instead, its significance flows from the decision's discussion of the role of lawyers in the veterans' benefits system. The *Massie* court makes clear that it will hold veterans to a higher standard on various matters when those veterans have counsel before the agency.⁹⁸ Because lawyers are becoming more significant players in the system, the CAVC's attitude is critically important.⁹⁹

I discuss the decision here because the CAVC's various statements concerning the role of lawyers were made as part of its consideration of whether to address on appeal a theory of entitlement to an earlier effective date that had not been raised below.¹⁰⁰ The CAVC noted that it had discretion to address such a new theory despite the general rule that a party should exhaust its administrative remedies.¹⁰¹ The CAVC further noted, however,

⁹³ 25 Vet. App. 123 (2011).

⁹⁴ *Id.* at 124.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 132-34. The CAVC concluded that the document was not a report of examination sufficient to warrant an earlier effective date. *See id.* at 133-34; *see also* 38 C.F.R. § 3.157(b)(1) (2012) (discussing when a VA or uniformed services report of examination or hospitalization is a claim for increased rating or to reopen).

⁹⁸ *Massie*, 25 Vet. App. at 134-35.

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 126-35.

¹⁰¹ *Id.* at 126-27.

that it would usually not consider a new theory in a situation such as it faced in *Massie* in large part because Mr. Massie had been represented by counsel before the Board.¹⁰² This conclusion is highly significant both for its substantive import as well as for the CAVC's attitude of approaching cases in which there has been legal representation before the VA. As I discuss more fully below, lawyers need to have an understanding that a reviewing court will, in some very real sense, hold their clients to standards more demanding than those applied to an unrepresented claimant.¹⁰³

The CAVC continued in *Massie* with a further important jurisdictionally-related discussion. Having concluded that it would normally not exercise its discretion to hear the newly raised theory of entitlement, the CAVC addressed whether, in fact, it was required to address the theory, as Mr. Massie asserted.¹⁰⁴ The argument in favor of the need to address the theory was that the Board was required to consider any theory reasonably raised by the record before the agency.¹⁰⁵ The CAVC declined to address whether or not it was required in every case to address a newly raised theory on this basis.¹⁰⁶ Leaving that matter aside as a general point, the CAVC in the case before it did, in fact, consider whether on the record the theory of entitlement at issue was reasonably raised.

Here, we find another point of significance in the decision. The CAVC concluded that the theory was not raised in the record in large measure because Mr. Massie was represented by

¹⁰² *Id.* at 127 (“Specifically, in this case, Mr. Massie was represented by his current counsel throughout the administrative appeals process, meaning that the Federal Circuit’s concerns regarding the potentially harsh result of applying the exhaustion of remedies doctrine against a party who was not represented by an attorney while before VA has no bearing upon this appeal.”).

¹⁰³ See *infra* Part III.C.

¹⁰⁴ *Massie*, 25 Vet. App. at 128-30.

¹⁰⁵ *Id.* at 128-29 (discussing sympathetic reading doctrine under *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009)).

¹⁰⁶ *Id.* at 130 (noting uncertainty about the question and stating that “the Court, out of an abundance of caution, will address” the issue).

counsel. The CAVC began by holding that even though a veteran's submissions are to be sympathetically construed whether the veteran is represented or not, "representation [by an attorney] may be a factor in determining the *degree* to which the pleading is liberally construed."¹⁰⁷ It went on to hold in the case at hand that "in interpreting Mr. Massie's pleadings, the Board, although required to provide a liberal reading, was entitled to assume that the arguments presented by Mr. Massie were limited for whatever reason under the advice of counsel and that those were the theories upon which he intended to rely."¹⁰⁸

The importance of *Massie* cannot be overstated. Just briefly consider the potential implications of the decision. A hallmark of the veterans' benefits system is its veteran-friendly nature.¹⁰⁹ A major device by which the courts have attempted to implement this veteran-friendly system is the sympathetic reading canon.¹¹⁰ And that canon has been extended to include represented veterans.¹¹¹ However, if one adopts the view that the failure to include a certain theory of entitlement can be assumed to be the result of a conscious attorney choice, it is difficult to see what is left of the canon of sympathetic reading in cases in which veterans have legal representation. And I see no reason why this same logic would not be applicable to situations in which the sympathetic reading relates to the assertion of a claim as opposed to a theory of entitlement. Moreover, this point becomes increasingly more important as more lawyers enter the system. I imagine that the next several years will see continued development of the law in this area.

¹⁰⁷ *Id.* at 129 (quoting *Cogburn v. Shinseki*, 24 Vet. App. 205, 213 (2010) (alteration in original)).

¹⁰⁸ *Id.* at 131.

¹⁰⁹ *E.g.*, *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200-01, 1205-06 (2011).

¹¹⁰ *See, e.g.*, *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (finding that VA must sympathetically read a veteran's statements in a motion alleging clear and unmistakable error).

¹¹¹ *E.g.*, *Robinson v. Shinseki*, 557 F.3d 1355, 1359-60 (Fed. Cir. 2009).

iii. Prejudicial Error

Turning from jurisdictional matters, the balance of this subsection will consider three issues related, broadly speaking, to the exercise of the CAVC's power. The first such matter concerns decisions about the CAVC's duty to "take due account of the rule of prejudicial error."¹¹² As the CAVC noted, the Supreme Court recently held that "generally notice errors are not presumptively prejudicial and that the burden of demonstrating error does not shift on appeal from the losing party to the prevailing party."¹¹³ The CAVC also noted, however, that the Supreme Court had indicated that the CAVC's experience in dealing with veterans' benefits matters could lead the CAVC to determine that "certain types of notice errors generally have the effect of producing prejudice as a factual matter."¹¹⁴

Following the Supreme Court's lead, the CAVC in *Vazquez-Flores* addressed whether there are such notice errors that as a general matter should be deemed to be prejudicial.¹¹⁵ There, the CAVC determined that not all so-called "Type-I" notice errors—errors dealing with notice of how to substantiate a claim—are presumptively prejudicial.¹¹⁶ Instead, the CAVC held the following:

When notice how to substantiate a claim is wholly defective as to a key element needed to substantiate the claim, such that the absence of evidence on the key element will result in denial of the claim, the natural effect is that the claimant is deprived

¹¹² 38 U.S.C. § 7261(b)(2) (2006).

¹¹³ *Vazquez-Flores v. Shinseki*, 24 Vet. App. 94, 99 (2010) (citing *Shinseki v. Sanders*, 556 U.S. 396, 407-09 (2009)).

¹¹⁴ *Id.* at 100 (citing *Sanders*, 556 U.S. at 411-12).

¹¹⁵ *Id.* at 104-05. The CAVC had declined to reach this question earlier. See *Simmons v. Shinseki*, 24 Vet. App. 87, 92-93 (2010).

¹¹⁶ *Vazquez-Flores*, 24 Vet. App. at 104-05 (discussing among other decisions *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005)).

of a meaningful opportunity to participate in the processing of his claim.¹¹⁷

In other words, only in this situation is there presumptive prejudice.¹¹⁸

The CAVC then turned to the specific factual situation in *Vazquez-Flores* concerning a claim for an increased rating. In this context, the CAVC held that “except when section 5103(a) notice how to substantiate an increased-rating claim simply is not provided at all, a shift of the appellant’s burden to the Secretary to show that the appellant was not prejudiced is unwarranted.”¹¹⁹

Vazquez-Flores is significant in large part because it reflects an area of the law that will likely be the subject of development over the next few years. The CAVC has made clear that the assessment of when prejudice will be presumed is not confined to specific types of notice errors but rather is tied to the notice error in combination with the type of claim at issue. The result is that claimants will continue to have significant hurdles to clear on appeal even when they are able to demonstrate error.

¹¹⁷ *Id.* at 105.

¹¹⁸ *Id.* And even in this situation, the CAVC reminded us that “the Court always has the duty to review the record for prejudice.” *Id.* In this regard, the majority continued to reject the contrary position of Judge Hagel. *See id.* at 109 (Hagel, J., concurring). In a subsequent decision, the CAVC reiterated this point, pointedly holding: “The Court therefore holds that in assessing the prejudicial effect of any error of law or fact, the Court is not confined to the findings of the Board but may examine the entire record before the Agency, which includes the record of proceedings.” *Vogan v. Shinseki*, 24 Vet. App. 159, 164 (2010). In this regard, the CAVC also reminded parties—particularly appellants—to “take care to make sure that any portions of the record pertaining to a showing of prejudice, or lack thereof, are cited in the briefing, thereby assuring that they will be included in the [record of proceedings].” *Id.* at 164 n.4; *see Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (making clear that the CAVC may go outside facts found by the Board when assessing the issue of prejudice).

¹¹⁹ *Vazquez-Flores*, 24 Vet. App. at 106-07. The CAVC reasoned that this was so because in the context of an increased-rating claim a merely defective or incomplete notice “does not necessarily mean the increased-rating claim will be denied.” *Id.* at 106.

iv. Reversal and Remand

The next issue of significance in the realm of the CAVC's powers concerns decisions to remand a matter to the Board as opposed to reverse the Board's decision outright. This has long been a contentious issue that is essentially framed by several relevant statutory provisions. First, Congress has provided that the CAVC has the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate."¹²⁰ Second, and related to the first point, with respect to a factual finding, the CAVC may "hold unlawful and set aside or reverse such finding if the finding is clearly erroneous."¹²¹ On the other hand, Congress also created the CAVC as an appellate body and specifically provided that "[i]n no event shall findings of fact made by the Secretary or the [Board] be subject to trial de novo by the Court."¹²² The upshot of these provisions is that, while the CAVC has the clear ability to reverse a Board decision, doing so is often difficult because such a decision would arguably require the CAVC to engage in prohibited fact-finding.¹²³ The practical import of this remedial question is an increase in remands and, thereby, an increase in delays for the ultimate adjudications of claims.¹²⁴

This remedial issue has attracted the Federal Circuit's attention. That court has rendered two decisions of significance in this area. First, early in 2012, the Federal Circuit decided

¹²⁰ 38 U.S.C. § 7252(a) (2006).

¹²¹ *Id.* § 7261(a)(4).

¹²² *Id.* § 7261(c).

¹²³ Examples of this phenomenon, discussed more fully *infra* Parts II.A.iv., II.B.ii., include the following: *Deloach v. Shinseki*, 704 F.3d 1370 (Fed. Cir. 2013); *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012); and *Shiple v. Shinseki*, 24 Vet. App. 458 (2011). However, this is not to say that reversal is never adopted as the appropriate remedy. *E.g.*, *Horn v. Shinseki*, 25 Vet. App. 231, 245 (2012); *Murray v. Shinseki*, 24 Vet. App. 420, 428 (2011).

¹²⁴ For an interesting discussion of remands before the CAVC, see James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113 (2009).

Byron v. Shinseki.¹²⁵ Mr. Byron was a Veteran who alleged that he was exposed to radiation in service and, as a result, developed cancer.¹²⁶ The Veteran died in 1971 from cancer.¹²⁷ While the procedural history of the case is complicated, for present purposes it is possible to simplify matters. When the Veteran died in 1971, his spouse filed an application for dependency and indemnity compensation (DIC) or death pension.¹²⁸ She was awarded a death pension shortly after applying, but the DIC claim was not adjudicated.¹²⁹

In the mid-1990s, several decades after Ms. Byron filed her DIC claim, she submitted a number of pieces of evidence concerning her husband's exposure to radiation while in-service as well as medical opinions concerning the causal connection between that exposure and Mr. Byron's cause of death.¹³⁰ She also filed a request to reopen what she believed to have been a denial of her 1971 claim for DIC benefits.¹³¹ After several years passed, in 2003, the RO granted Ms. Byron's DIC application based on presumptive service connection and assigned an effective date of August 14, 1995, one year prior to the filing of her request to reopen.¹³²

Ms. Byron appealed the effective date determination to the Board.¹³³ The Board affirmed.¹³⁴ Eventually the CAVC

¹²⁵ 670 F.3d 1202. I have discussed *Byron* in detail in a prior essay. Michael P. Allen, *Commentary on Three Cases from the Federal Circuit and the Court of Appeals for Veterans Claims as We Approach Twenty-Five Years of Judicial Review of Veterans' Benefits*, 5 VETERANS L. REV. 136 (2013). The discussion of *Byron* here draws on that essay.

¹²⁶ *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *1 (Vet. App. June 20, 2011). This is the single-judge memorandum decision of the CAVC the Federal Circuit affirmed.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at *1-2.

¹³¹ *Id.* at *2.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

remanded the matter to Board.¹³⁵ After additional proceedings in which Ms. Byron submitted additional medical evidence, the Board determined that she was entitled to an effective date of May 1, 1988, the date on which the Radiation-Exposed Veterans Compensation Act of 1988 went into effect.¹³⁶

Ms. Byron again appealed to the CAVC the Board's decision as to the effective date.¹³⁷ She argued, and the Secretary agreed, that the Board had erred by not considering whether the evidence in the record established direct service connection, something that could lead to an effective date earlier than the 1988 enactment of the statute providing for presumptive service connection for this type of injury.¹³⁸ In a single-judge memorandum decision, the CAVC also agreed that the Board had committed error by not considering direct service connection.¹³⁹ Ms. Byron argued that the CAVC should reverse the Board's decision instead of vacating it and remanding the matter for further adjudication.¹⁴⁰ The Secretary argued against an outright reversal.¹⁴¹

The CAVC held that vacation and remand was the correct remedy.¹⁴² Judge Schoelen based the CAVC's decision on the ground that the determination of whether direct service connection was established by the evidence of record and the effective date of any award on that basis were questions of fact.¹⁴³ As the CAVC stated: "The Court only has the authority to decide whether factual determinations are clearly erroneous or whether they have not been supported by an adequate statement of reasons or bases. The Court

¹³⁵ *Id.*

¹³⁶ *Id.* at *2-3.

¹³⁷ *Id.* at *2.

¹³⁸ *Id.* at *4.

¹³⁹ *Id.* at *4-6.

¹⁴⁰ *Id.* at *6.

¹⁴¹ *Id.* at *4.

¹⁴² *Id.* at *6-7.

¹⁴³ *Id.*

is not positioned to make findings about factual determinations yet to be made.”¹⁴⁴

Ms. Byron then appealed to the Federal Circuit alleging legal error in the CAVC’s decision to vacate and remand instead of reverse.¹⁴⁵ The Federal Circuit agreed with the CAVC that remand was the appropriate remedy.¹⁴⁶ Judge Moore stated in her opinion for the Federal Circuit the following:

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.¹⁴⁷

Recently, the Federal Circuit decided *Deloach v. Shinseki*¹⁴⁸ in which it ultimately determined (similar to *Byron*) that remand was the appropriate remedy.¹⁴⁹ However, the tone of the Federal Circuit’s opinion was at least somewhat different from *Byron*, appearing to be slightly more favorable, in the abstract, to reversal as a remedy.¹⁵⁰ To be sure, the Federal Circuit did not retreat from

¹⁴⁴ *Id.* at *6 (citation omitted).

¹⁴⁵ *Byron v. Shinseki*, 670 F.3d 1202, 1204 (Fed. Cir. 2012).

¹⁴⁶ *Id.* at 1205-06.

¹⁴⁷ *Id.* at 1206 (citation omitted).

¹⁴⁸ 704 F.3d 1370 (Fed. Cir. 2013).

¹⁴⁹ *Id.* at 1381. *Deloach* is also interesting for a totally unrelated reason. One of the new members of the Federal Circuit, Judge Reyna, authored the opinion. *Id.* at 1372. Instead, of using the shorthand term “Veterans Court” in the opinion, Judge Reyna referred to the CAVC as the “Court of Appeals for Veterans Claims” throughout the opinion. *Id.* at 1372-81. This is the first time of which I am aware in which the Federal Circuit did not use the “Veterans Court” designation.

¹⁵⁰ *Id.* at 1380. The case was actually consolidated appeals of two veterans. *Id.* at 1372. In both cases, the issues turned on the Board’s failure to provide sufficient reasons and bases for its decision to either reject medical opinions or accord certain medical

its prior decisions holding that the “evaluation and weighing of evidence are factual determinations committed to the discretion of the fact-finder – in this case, the Board.”¹⁵¹ But at the same time, the Federal Circuit (1) clearly stated after a comprehensive review of relevant legislative history that the CAVC “is free to exercise reversal power in appropriate cases and is not legally restricted only to remand;”¹⁵² (2) expressly held that “where the Board has performed the 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;”¹⁵³ and (3) reiterated that the law “does not foreclose the Court of Appeals for Veterans Claims from finding that reversal is appropriate where, despite the existence of controverting evidence, a finding of material fact is clearly erroneous.”¹⁵⁴

Deloach reflects a greater willingness to consider reversal. However, it does not go far enough. I have suggested elsewhere that the CAVC should adopt a form of hypothetical clearly erroneous review.¹⁵⁵ Under this suggestion, the CAVC would ask whether, on the state of the evidence, *if* the Board had made a factual finding against the claimant, *would* the CAVC have been left with the “definite and firm conviction that a mistake has been committed.”¹⁵⁶ The CAVC uses such a standard to assess actual findings of fact the Board has made.¹⁵⁷ It is true that the proposal would be a hypothetical review of a finding of fact not actually

opinions less weight than others. *Id.* at 1372-74.

¹⁵¹ *Id.* at 1380; *see* Bastien v. Shinseki, 599 F.3d 1301, 1306 (Fed. Cir. 2010); Andre v. Principi, 301 F.3d 1354, 1362 (Fed. Cir. 2002).

¹⁵² *Deloach*, 704 F.3d at 1380.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See* Allen, *supra* note 125, at 150-58.

¹⁵⁶ *Id.* at 152 (internal quotation marks omitted); *see* United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (setting forth federal standard for clearly erroneous review of factual findings).

¹⁵⁷ *See, e.g.,* Byron v. Shinseki, No. 09-4634, 2011 WL 2441683, at *4 (Vet. App. June 20, 2011).

made. My point, however, is that if the CAVC were to conclude that on the face of the record a finding of fact adverse to a veteran would be clearly erroneous it seems that there is no need for a remand.¹⁵⁸

As with much else, only time will truly tell if *DeLoach* reflects a greater willingness to countenance reversal as opposed to remand. As I mention below, while doing so would by no means solve the problems of endemic delay in the veterans' benefits system, every little bit of delay reduction helps.¹⁵⁹ Whether it be something like hypothetical error review or a different approach, I urge the CAVC and the Federal Circuit to more aggressively pursue the use of reversal in appropriate cases.

*v. Chevron*¹⁶⁰ and *Brown v. Gardner*¹⁶¹

One of the puzzles of veterans' law is how to reconcile the Supreme Court's directive in *Brown v. Gardner* that "interpretative doubt is to be resolved in the veteran's favor"¹⁶² with *Chevron's* command that a court should defer to an Agency's permissible interpretation of an ambiguous statute.¹⁶³ As I have written before:

If a statute is ambiguous and Congress has provided that an agency shall have the authority to issue regulations interpreting it, *Chevron* instructs that a court's role is to defer to the regulation as long as it is a "permissible" construction of the statutory text

¹⁵⁸ I note here that engaging in such a hypothetical exercise is not unknown to the CAVC. It does something similar when it "takes due account of the rule of prejudicial error." See *supra* text accompanying notes 110-17 (discussing 38 U.S.C. § 7261(b)(2) (2006)); see also *Vogan v. Shinseki*, 24 Vet. App. 159, 161 (2010) (concluding that remand was not required despite the CAVC's finding of error based on its assessment of the facts).

¹⁵⁹ See *infra* Part III.A.

¹⁶⁰ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁶¹ 513 U.S. 115 (1994). For additional discussion of this topic, see *Allen, supra* note 125.

¹⁶² *Brown*, 513 U.S. at 118.

¹⁶³ *Chevron*, 467 U.S. at 842-43.

(or a gap in that text). But, of course, if the statute is ambiguous in the veterans' law context, under *Brown v. Gardner* that doubt should be resolved in favor of the veteran.¹⁶⁴

In addition to what I have previously written on the topic, Professor Linda Jellum has extensively addressed this matter.¹⁶⁵ I raise it (albeit briefly) again to underscore that it continues to be an issue in this area of the law. For example, in *Guerra v. Shinseki*¹⁶⁶ the Federal Circuit considered whether a combined set of disabilities means the same thing as a single disability rated at 100% for purposes of special monthly compensation under 38 U.S.C. § 1114(s).¹⁶⁷ The Board denied the Veteran's claim and the CAVC affirmed that denial.¹⁶⁸ The key issue was whether the statute required that Mr. Guerra have a single disability rated at 100% or whether a combined rating of total disability would suffice for the special monthly compensation at the rate provided in section 1114(s).¹⁶⁹

The VA had promulgated a regulation providing in part that “[t]he special monthly compensation provided by 38 U.S.C. § 1114(s) is payable where the veteran has a single service-connected disability rated as 100 percent.”¹⁷⁰ The majority of the Federal Circuit panel held that “[w]hile the language of subsection 1114(s) is not entirely free from ambiguity, we are compelled to defer to the DVA's interpretation of subsection 1114(s), and we uphold the decision of the Veterans Court on that ground.”¹⁷¹ As the Federal Circuit majority explained, *Chevron*

¹⁶⁴ Allen, *supra* note 125, at 161.

¹⁶⁵ E.g., Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption that Interpretative Doubt be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59 (2011).

¹⁶⁶ 642 F.3d 1046 (Fed. Cir. 2011).

¹⁶⁷ *Id.* at 1048-52.

¹⁶⁸ *See id.* at 1048.

¹⁶⁹ *Id.* at 1048-49.

¹⁷⁰ 38 C.F.R. § 3.350(i) (2012).

¹⁷¹ *Guerra*, 642 F.3d at 1049.

decided the matter because “the rule of *Chevron* provides that when an agency ‘has statutory authority to issue regulations [and] invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations.’”¹⁷² The regulation at issue was a permissible one and thus the Veteran did not prevail.

Judge Gajarsa dissented in *Guerra*.¹⁷³ As he explained in summary:

Because, in my view, the language of § 1114(s) is clear [in supporting the veteran’s position], it is unnecessary to rely on the related regulation [under *Chevron*]. To the extent that any ambiguity does exist in § 1114(s)—as the majority suggests—it should be resolved in favor of the veteran [under *Brown v. Gardner*].¹⁷⁴

The majority responded to Judge Gajarsa’s invocation of the *Brown* presumption by noting that the Federal Circuit had previously “rejected the argument that the pro-veteran canon of construction overrides the deference due to the DVA’s reasonable interpretation of an ambiguous statute.”¹⁷⁵ Perhaps the Federal Circuit’s view of the interaction between *Brown* and *Chevron* is captured best by the following passage from a case dealing with the meaning of “service trauma”¹⁷⁶ as it related to dental matters:

The mere fact that the particular words of the statute—that is, “service trauma”—standing alone might be ambiguous does not compel us to resort to the *Brown* canon. Rather, that canon is only

¹⁷² *Id.* (alteration in original) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008)).

¹⁷³ *Id.* at 1052-55 (Gajarsa, J., dissenting).

¹⁷⁴ *Id.* at 1054 (citation omitted).

¹⁷⁵ *Id.* at 1051 (citing *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003)).

¹⁷⁶ 38 U.S.C. § 1712(a)(1)(C) (2006).

applicable after other interpretative guidelines have been exhausted, including *Chevron*.¹⁷⁷

If this is all the *Brown* presumption means in the context of *Chevron*, it seems a far cry from the power it once seemed to bear. On a closely related point, namely the level of deference the VA should have in terms of interpreting its own regulations, Judge Moorman wrote one of the most stunning opinions I have ever read putting much of the debate in this area into context. In *Johnson v. Shinseki*,¹⁷⁸ an en banc decision, the CAVC considered whether a certain regulation limited an extraschedular rating to individual disabilities as opposed to disabilities collectively.¹⁷⁹ The majority of the CAVC concluded that the Secretary's interpretation of the regulation to include only a single disability was entitled to deference.¹⁸⁰

Judge Moorman concurred in the result in *Johnson*.¹⁸¹ What was so astounding about this concurrence was its honesty about how awkward it is to defer to a VA interpretation of a regulation (and one would assume a regulation interpreting a statute) using the same standard one would apply in a different administrative context, that is one that is not avowedly pro-claimant. Judge Moorman explained that "this case has caused me to ponder whether special rules of construction should be applied to VA regulations."¹⁸² He made his point even clearer later in his opinion when he commented as follows:

Perhaps VA, as an agency whose mission statement is etched in stone at the Lincoln Memorial and was formulated as part of President Lincoln's Second Inaugural Address: "to care for him who shall have

¹⁷⁷ *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010).

¹⁷⁸ 26 Vet. App. 237 (2013).

¹⁷⁹ *Id.* at 239-40 (considering 38 C.F.R. § 3.321(b)(1) (2012)).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 248-52 (Moorman, J., concurring).

¹⁸² *Id.* at 251.

borne the battle and for his widow, and his orphan,” should, in this case, be afforded a less strict level of judicial deference.¹⁸³

I believe serious consideration should be given to Judge Moorman’s forthright and eloquently expressed suggestion in the years to come.

A similar resistance to the *Brown* presumption is present even when there is no implementing regulation. In fact, this resistance suggests that the Federal Circuit would not necessarily follow through on the statement set forth above that the *Brown* presumption would do any work even if *Chevron* did not answer the question when a regulation was in place.

A prime example is *Frederick v. Shinseki*.¹⁸⁴ This was a complicated case concerning the meaning of a change in the law related to when a surviving spouse could receive DIC benefits after re-marriage.¹⁸⁵ It is difficult to honestly say that the statutory provision at issue was unambiguous. The CAVC had determined that the provision meant one thing.¹⁸⁶ A majority of the Federal Circuit panel concluded it meant the opposite.¹⁸⁷ Yet, the Federal Circuit majority did not rely on the *Brown* presumption, instead interpreting the statutory provision in a manner adverse to the Veteran’s interest.¹⁸⁸ Judge Reyna in dissent argued to no avail that “even if ambiguity [in the statute] can be shown, canons of construction unique to veterans law require that we resolve any remaining doubt in [the appellant’s] favor.”¹⁸⁹ It does not appear that the Federal Circuit (at least) is inclined to give the *Brown*

¹⁸³ *Id.* (footnote omitted).

¹⁸⁴ 684 F.3d 1263 (Fed. Cir. 2012).

¹⁸⁵ *Id.* at 1265-67 (discussing amendments to 38 U.S.C. § 103(d)(2)(B) dealing with Dependency and Indemnity Compensation (DIC) and remarriage).

¹⁸⁶ *Frederick v. Shinseki*, 24 Vet. App. 335 (2011), *rev’d*, 684 F.3d 1263.

¹⁸⁷ *Frederick*, 684 F.3d at 1272-73.

¹⁸⁸ *Id.* at 1269-73.

¹⁸⁹ *Id.* at 1273-74 (Reyna, J., dissenting).

presumption any meaningful force.¹⁹⁰

At the end of the day, I suspect that debates about the meaning of the *Brown* presumption either standing alone or in conjunction with the *Chevron* doctrine will continue. However, unless the Supreme Court steps into the fray, I doubt that the *Brown* presumption will become anything more than an increasingly antiquated statement of law made in the abstract almost two decades ago.

B. Administrative Process Matters

Much as the past three years has seen a large number of decisions concerning the powers and jurisdiction of the CAVC, there have been almost as many significant developments concerning the administrative process before the VA. I discuss these various matters below.¹⁹¹

¹⁹⁰ *Frederick* is not an isolated decision. I have discussed a similar state of affairs in *Chandler v. Shinseki*, 676 F.3d 1045 (Fed. Cir. 2012), elsewhere. See Allen, *supra* note 125, at 158-63.

¹⁹¹ I should note here that the classification of matters by those relating to the “administrative process” is particularly amorphous. In some sense, everything in this area of the law relates to the administrative process in one way or another. What I have attempted to do in this subpart of the Article is collect those developments that deal with matters closely related to procedure at the Agency level. So, for example, this subpart considers matters such as duties of hearing officers, the conduct of Board proceedings, and issues related to the various forms a claimant must complete in the process. One topic that could have been included here is the role of lawyers in the administrative process. See, e.g., *Cogburn v. Shinseki*, 24 Vet. App. 205, 217 (2010) (noting that representation by an attorney has a part in determining how liberally a pleading will be construed). I have largely deferred that discussion until later in this Article. See *infra* Part III.C. Similarly, one could address the various cases commenced outside the CAVC-Federal Circuit structure challenging certain features of the overall veterans’ benefits structure. See, e.g., *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (en banc); *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010). I have also deferred discussion of these matters even though they are intimately connected to the administrative process before the VA. See *infra* Part III.A.

i. Of Hearings and Draft Decisions

Claimants for benefits are afforded a wide array of procedural rights in connection with their claims. Among them is the right to hearings before both the Board and the RO.¹⁹² The CAVC rendered a number of decisions over the past several years reinforcing a claimant's hearing rights. Among the most important of these decisions is *Bryant v. Shinseki*.¹⁹³

Bryant concerned a Veteran's claims for service connection for a number of ailments.¹⁹⁴ The principal issue the CAVC addressed was the scope of a hearing officer's duties "to explain fully the issues and suggest the submission of evidence that the claimant may have overlooked."¹⁹⁵ The CAVC first held that the relevant statutory and regulatory requirements did not require that the hearing officer engage in any type of "pre-adjudication" of a claim.¹⁹⁶ In other words, the hearing officer is not required to weigh the evidence and determine that a veteran would not prevail so that he or she would inform the veteran of what to do based on such a pre-adjudication.¹⁹⁷

While there was no duty to pre-adjudicate a matter, the CAVC stressed that the duties of a hearing officer to (1) fully explain the issues at play and (2) suggest the submission of evidence possibly overlooked were meaningful.¹⁹⁸ It suggested that it would police these duties as it did in this case in which it determined that the Board's Veterans Law Judge (VLJ) did not comply and that the failures were prejudicial to the claimant.¹⁹⁹

¹⁹² See 38 U.S.C. § 7107(b) (2006); 38 C.F.R. § 3.103(c) (2012); see also 38 C.F.R. § 20.700 (concerning Board hearings in particular).

¹⁹³ 23 Vet. App. 488 (2010).

¹⁹⁴ *Id.* at 490.

¹⁹⁵ *Id.* at 491.

¹⁹⁶ *Id.* at 497-99.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 497-98.

¹⁹⁹ *Id.* at 497-500.

Moreover, the CAVC explained that the Secretary's duty to notify a claimant of certain matters under 38 U.S.C. § 5103(a) was not a substitute for the separate duties imposed on hearing officers.²⁰⁰ The CAVC made clear that its decision in *Bryant* concerning the importance of the requirements imposed on a hearing officer applied equally to Board and RO hearings.²⁰¹

These decisions concerning the scope of a hearing officer's duties — whether at the Board or the RO — are significant for several reasons. First, many claimants still proceed in the administrative process without an attorney. If the system is to be truly non-adversarial and pro-claimant, there needs to be real processes in place to assist claimants as they proceed in the system. In addition, enforcing the duties of hearing officers to assist claimants should reduce delays in the aggregate. If hearing officers comply with their duties, it stands to reason that there will be fewer remands and claims will be decided on their merits earlier than would otherwise be the case. Finally, these decisions stand out for the message they send to VA adjudicators. The CAVC has

²⁰⁰ *Id.* at 498.

²⁰¹ See *id.* at 497-500 (applying the CAVC's holding to a hearing held before the Board); *Procopio v. Shinseki*, 26 Vet. App. 76, 79-81 (2012). The VA was not pleased with *Bryant* and sought to change the regulation at issue to make clear that it did not apply to Board hearings. Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Clarification, 76 Fed. Reg. 52,572 (Aug. 23, 2011). That regulation was challenged before the Federal Circuit. *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013). In response to this litigation, the Secretary withdrew the amended regulation. *Id.* at 1332; Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Repeal of Prior Rule Change, 77 Fed. Reg. 21,128 (Apr. 18, 2012); Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Repeal of Prior Rule Change, 77 Fed. Reg. 70,686 (Nov. 27, 2012) (confirming repeal and clarifying that it applies to decisions issued by the Board on or after August 23, 2011). However, the litigation continued to deal with a potential contempt sanction against the Secretary for continuing to apply the withdrawn regulation even after assuring the Federal Circuit that he would not do so. *Nat'l Org. of Veterans Advocates, Inc.*, 710 F.3d at 1330. In August 2013, the Federal Circuit approved VA's plan to address any harms caused by application of the August 2011 rulemaking and concluded that there was no current need for sanctions. *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 725 F.3d 1312, 1315 (Fed. Cir. 2013).

indicated rather clearly that it takes the hearing officer's duties seriously, will enforce them through judicial review, and will not lightly assume that a failure to comply will be non-prejudicial.

Also related to the procedural right to have a hearing, the CAVC determined that a claimant is entitled to a personal hearing in front of all Board members who ultimately decide an administrative appeal.²⁰² In reaching its decision, the CAVC explained why such a hearing is so important:

Unlike a traditional judicial appeal where review is of the record, the opportunity for a personal hearing before the Board is significant because it is the veteran's one opportunity to personally address those who will find facts, make credibility determinations, and ultimately render the final Agency decision on his claim.²⁰³

Thus, the CAVC once again underscored the importance it attached to due process protections in the administrative system and signaled a willingness to enforce them vigorously.²⁰⁴

There is one final decision to note in this regard, and it is a particularly significant one. In *Sellers v. Shinseki*,²⁰⁵ the CAVC dealt with the interesting question of what the import is of a "draft" RO decision that had been officially communicated to a claimant.²⁰⁶

²⁰² *Arneson v. Shinseki*, 24 Vet. App. 379, 386 (2011).

²⁰³ *Id.* at 382.

²⁰⁴ The CAVC made clear that it was not casting doubt on the Board's discretion to add members to decide an appeal. *Id.* at 386 ("If the claimant's appeal is assigned to a Board panel in a piecemeal fashion, that claimant must still be afforded the opportunity for a hearing before every member of the panel that will ultimately decide his case. This is not to say that the claimant must be afforded a hearing before every panel member *at the same time*; only that he be afforded the opportunity to be heard—be it in-person, telephonically, or via video conference—by every panel member who will decide his case.").

²⁰⁵ 25 Vet. App. 265 (2012).

²⁰⁶ *Id.* at 267-73.

The facts in *Sellers* were complicated, but for present purposes the important points are as follows. An RO had prepared a decision on Mr. Seller's claims in June 2004.²⁰⁷ The CAVC determined that the VA communicated that decision to the claimant.²⁰⁸ Moreover, even if this communication was not entirely in conformity with statutory and regulatory requirements, the CAVC noted "that defects of decisional notice are cured when the record demonstrates that the claimant and his representative *actually* received notice of the decision."²⁰⁹ Having concluded that the June 2004 decision had been formally communicated to the claimant, the CAVC determined that it bound the VA.²¹⁰

The CAVC also noted that there was an independent reason why the June 2004 decision should be deemed binding under the facts of the case. It appeared that after the June 2004 decision had been reached, it was forwarded to other officials within the RO for review before it was issued.²¹¹ The claimant was not notified of this procedure nor was he given an opportunity to have a hearing before the official reviewing his claim.²¹² The CAVC found this procedure to violate the claimant's procedural rights.²¹³ Again, this decision underscores the importance the CAVC has attached to the rights to due process afforded to claimants in the

²⁰⁷ *Id.* at 268.

²⁰⁸ *Id.* at 276-77.

²⁰⁹ *Id.* at 277. This point is worth underscoring because it is one of the few times I can recall in which the doctrine of actual receipt curing a notice defect has actually worked in a claimant's favor. Indeed, Chief Judge Kasold makes a similar point in his concurring opinion. *Id.* at 284 (Kasold, C.J., concurring).

²¹⁰ *Id.* at 279.

²¹¹ *Id.* at 279-83.

²¹² *Id.* at 282-83.

²¹³ *Id.* The CAVC analogized the situation in *Sellers* to that presented to the Federal Circuit in *Military Order of the Purple Heart v. Secretary of Veterans Affairs*, 580 F.3d 1293 (Fed. Cir. 2009). *Sellers*, 25 Vet. App. at 279-83. In *Purple Heart*, the Federal Circuit struck down a VA procedure by which RO decisions were forwarded without the claimant's knowledge to non-RO personnel in cases of large awards. 580 F.3d at 1294-98. The Federal Circuit determined that such a procedure was inconsistent with the statutory rights of claimants. *Id.* at 1297-98. In *Sellers*, the CAVC determined that the same logic applied even though the inappropriate review before it had occurred entirely within the RO. 25 Vet. App. at 282-83.

administrative process.

ii. Forms, Forms, and More Forms

As anyone who has dealt even tangentially with the veterans' benefits system is well aware, there are many forms to fill out at various stages of the process. It is perhaps not surprising given this state of affairs that the CAVC rendered a number of decisions over the past several years regarding claims or appeal forms. I briefly consider those decisions here.

- The CAVC held that when a claimant checks the appropriate box on “VA Form 9, Substantive Appeal”, block 9A, indicating that he or she wishes to appeal all issues, a failure of the claimant to provide narrative explanations as to all parts of the decision at issue does not serve as a waiver of those issues.²¹⁴
- A claimant may not file an NOD with respect to a deferred rating decision of an RO.²¹⁵ Instead, the appropriate procedural step — although one in which the claimant likely does not face good prospects for success — is to utilize a petition for a writ of mandamus seeking the desired agency action, if appropriate.²¹⁶
- VA procedures require that the RO complete a “VA Form 8, Certification of Appeal” for every appeal to the Board.²¹⁷ However, the CAVC held that there is no requirement for an RO to do so when returning a claim to the Board that had been remanded.²¹⁸

²¹⁴ *Evans v. Shinseki*, 25 Vet. App. 7, 15-17 (2011).

²¹⁵ *Shiple v. Shinseki*, 24 Vet. App. 458, 462 (2011).

²¹⁶ *Id.* at 462-63.

²¹⁷ 38 C.F.R. § 19.35 (2012). See *Kyhn v. Shinseki*, 24 Vet. App. 228, 237 (2011), *vacated on other grounds and remanded*, 716 F.3d 572 (Fed. Cir. 2013).

²¹⁸ *Kyhn*, 24 Vet. App. at 237.

- The Federal Circuit held that there is nothing in the statutory or regulatory framework that requires a claimant appealing to the Board to be specific in his or her arguments on appeal.²¹⁹ What is necessary is that the appeal documents be such that the Board can determine the matters that the claimant wishes to appeal.²²⁰ If, for example, there was only a single issue on which an RO had ruled against a claimant, nothing in the way of specificity would be required in the claimant's appeal documents to indicate what he or she was appealing.²²¹

iii. Presumptions of Soundness and Aggravation

Presumptions of various types have an important place in the veterans' benefits system. Two such presumptions are the so-called "presumption of sound condition,"²²² also referred to as the presumption of soundness, and the "presumption of aggravation."²²³ The presumption of soundness provides in sum that "when no preexisting medical condition is noted upon entry into service, a veteran is presumed to have been sound in every respect."²²⁴ The presumption of aggravation is "related but distinctly different" from the presumption of soundness.²²⁵ It deals with situations in which a preexisting condition is noted on an entrance examination

²¹⁹ *Rivera v. Shinseki*, 654 F.3d 1377, 1381 (Fed. Cir. 2011). The Federal Circuit's decision reversed an en banc decision of the CAVC. See *Ortiz v. Shinseki*, 23 Vet. App. 353 (2010) (en banc).

²²⁰ See *Rivera*, 654 F.3d at 1381.

²²¹ *Id.*

²²² 38 U.S.C. § 1111 (2006).

²²³ *Id.* § 1153.

²²⁴ *Horn v. Shinseki*, 25 Vet. App. 231, 234 (2012). In a separate case, the Federal Circuit made clear that the presumption of soundness in section 1111 applies only if a disease or injury qualifies under 38 U.S.C. § 1110. *Morris v. Shinseki*, 678 F.3d 1346, 1353-54 (Fed. Cir. 2012). In that case, the "personality disorder" for which the claimant sought benefits was not a qualifying condition under section 1110 and, as such, the presumption of soundness had no application. *Id.*

²²⁵ *Horn*, 25 Vet. App. at 234.

and worsens during service.²²⁶ There were several significant developments dealing with these important presumptions over the past three years.

Horn is a particularly informative decision. In that case, an Army Veteran's service entry examination did not note any hip-related defect.²²⁷ He developed certain hip problems shortly after induction and was eventually separated from service as medically unfit.²²⁸ Shortly before his separation, the claimant was seen by a medical evaluation board (MEB).²²⁹ The MEB indicated with an "X" on a form that the hip condition existed prior to service and was not aggravated by service although it provided no explanation for this conclusion.²³⁰ The Veteran sought benefits for the hip injury but was denied.²³¹

The issue before the CAVC concerned how the presumption of soundness played into the Veteran's appeal of the Board's denial. The CAVC first explained that the presumptions of soundness and aggravation may be related but they are distinct.²³² The distinction not only goes to the substantive contours of the presumptions. It also extends to the manner in which the presumptions can be overcome. The CAVC explained that the Secretary may overcome the presumption of soundness only by showing clear and unmistakable evidence of both (1) the preexistence of the injury or condition and (2) a lack of aggravation of that preexisting injury or condition during service.²³³ The CAVC made absolutely clear that "[o]nce the presumption of soundness applies, the burden of proof remains with the Secretary on both the preexistence and

²²⁶ *Id.*

²²⁷ *Id.* at 233.

²²⁸ *Id.* at 233-34.

²²⁹ *Id.*

²³⁰ *Id.* at 234.

²³¹ *Id.* at 233.

²³² *Id.* at 234.

²³³ *Id.* at 234-35.

the aggravation prong; it never shifts back to the claimant.”²³⁴ The CAVC underscored that the Secretary’s burden is in the conjunctive in that he must prove both preexistence and a lack of aggravation.²³⁵

The CAVC contrasted these procedural aspects of the presumption of soundness with how the presumption of aggravation operates. Under the presumption of aggravation, the claimant initially “bears the burden of showing that his preexisting condition worsened in service.”²³⁶ Once a veteran carries this burden, “the burden shifts to the Secretary to show by clear and unmistakable evidence that the worsening of the condition was due to the natural progress of the disease.”²³⁷

The CAVC specifically underscored that when the presumption of soundness is implicated, the Secretary must prove a lack of aggravation by clear and unmistakable evidence.²³⁸ Unlike the situation when only the presumption of aggravation is at issue, the claimant does not need to show any worsening of a preexisting injury in the first instance.²³⁹ If only the presumption of aggravation is at issue it would be the claimant’s burden to demonstrate a worsening and, if he or she does so, then the burden would shift to the Secretary to show by clear and unmistakable

²³⁴ *Id.* at 235.

²³⁵ *Id.* (“[E]ven when there is clear and unmistakable evidence of preexistence, the claimant need not produce any evidence of aggravation in order to prevail under the aggravation prong of the presumption of soundness.”).

²³⁶ *Id.* at 235 n.6.

²³⁷ *Id.* The situation is different when one is considering establishing veteran status in connection with National Guard service for training. In that context there are no presumptions at play. *See, e.g.,* *Smith v. Shinseki*, 24 Vet. App. 40, 48 (2010) (holding that the presumption of aggravation does not apply where a claim is based on a period of active duty for training). The CAVC held that in order to establish such status based on the aggravation of an injury, it is the claimant’s burden to establish that during his period of active duty for training, he experienced a permanent increase in disability beyond the natural progression of that disease or injury. *Donnellan v. Shinseki*, 24 Vet. App. 167, 173-74 (2010), *appeal dismissed*, 676 F.3d 1089 (Fed. Cir. 2012).

²³⁸ *Horn*, 25 Vet. App. at 235.

²³⁹ *Id.*

evidence that the worsening of the condition the claimant has established is the result of natural progression.²⁴⁰ This is clearly an important difference.

Let me pause for a moment to take a brief detour from the decision itself. The opinion is a wonderful example of what the CAVC has done over the first twenty-five years of its existence. While we can quibble with the length of opinions and other stylistic matters, the reality is that the CAVC has developed law in an area where there was none. *Horn* is almost a treatise on these presumptions. It is written in a clear manner and provides guidance to those practicing in the area about these important matters. Moreover, it does so in an area that the CAVC would later describe as being “confusing.”²⁴¹ My point is that *Horn* is an example of the CAVC at its best in terms of providing guidance to those involved in the veterans’ benefits system.

Returning to the decision itself, the CAVC had to determine whether the Secretary had sufficiently rebutted the presumption of soundness with respect to the claimant’s hip condition. While the appellant contested the issue, it really was not a close call that there was clear and unmistakable evidence that the condition preexisted service.²⁴² But to overcome the presumption, as explained above, the Secretary also needed clear and unmistakable evidence of a lack of aggravation.

The Secretary attempted to do so by pointing to the MEB report with the “X” next to the box indicating that the hip condition preexisted service and was not aggravated by service.²⁴³ The CAVC concluded this MEB report was insufficient to establish a

²⁴⁰ *Id.* at 235 n.6.

²⁴¹ *Gilbert v. Shinseki*, 26 Vet. App. 48, 51 (2012) (“The law surrounding the presumption of soundness and its application can be confusing and has been the subject of much litigation.”).

²⁴² *Horn*, 25 Vet. App. at 237-38.

²⁴³ *Id.* at 240.

lack of aggravation by clear and unmistakable evidence.²⁴⁴ The CAVC held that a medical report cannot rebut the presumption of soundness (here the lack of aggravation prong) without it containing an analysis of how the conclusions at issue were reached.²⁴⁵ In this regard, the CAVC adopted the various factors laid out in *Nieves-Rodriguez v. Peake*²⁴⁶ that it utilizes to assess the adequacy of VA medical examinations.²⁴⁷

The *Horn* court also explained that the presumption of soundness only goes to establish the second prong of a service-connection claim—that is the in-service incurrence or aggravation of a disease or injury.²⁴⁸ A claimant benefiting from the presumption of soundness must still demonstrate both a current disability as well as nexus.²⁴⁹

C. Some Miscellaneous Matters

Finally, there were a number of decisions of significance over the past three years that roughly can be considered as relating to the administrative process as I have defined it that do not fit into any particular category. I briefly describe these decisions:

- The CAVC made clear that the terms of a joint motion for remand (JMR), whether granted by the Clerk of Court or a judge, are enforceable on remand whether or not they are expressly incorporated in the order.²⁵⁰

²⁴⁴ *Id.* at 242.

²⁴⁵ *Id.* at 240-42.

²⁴⁶ 22 Vet. App. 295 (2008).

²⁴⁷ *Horn*, 25 Vet. App. at 241-42.

²⁴⁸ *Id.* at 236; *see* *Gilbert v. Shinseki*, 26 Vet. App. 48, 55 (2012). In order to establish a service-connection claim, “the veteran must show: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service.” *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004). The third requirement is also referred to as “nexus.” *Gilbert*, 26 Vet. App. at 53.

²⁴⁹ *Gilbert*, 26 Vet. App. at 53-54; *Horn*, 25 Vet. App. at 236-37.

²⁵⁰ *Russell v. Shinseki*, 25 Vet. App. 26, 28 (2011). This decision reaffirmed an earlier holding of the CAVC in *Forcier v. Nicholson*, 19 Vet. App. 414, 425 (2006).

The CAVC went on to note that just because the terms of a JMR are expressly incorporated in an order does not mean that a claimant is automatically entitled to the issuance of a writ of mandamus should he or she seek one in connection with the remanded matter.²⁵¹

- The Federal Circuit held that the statutory presumption contained in 38 U.S.C. § 1154(b) concerning combat applies to both the fact of trauma as well as establishing that an injury was sustained.²⁵²
- The CAVC noted that the presumption of regularity in mailing can apply to private individuals as well as government actors.²⁵³ However, the government agency on the alleged receiving end of such a mailing can rebut receipt through the use of the presumption of regularity in its procedures concerning incoming correspondence.²⁵⁴ In a separate decision concerning the presumption of regularity in mailing, this one dealing with the VA, the CAVC seemed to give its approval to the VA's procedures for mailing a notice of a medical examination.²⁵⁵ The CAVC opined that even if the procedure required that a copy of the mailed notice be included in the file, the mere absence of such a copy standing alone was not sufficient to rebut the presumption of regularity.²⁵⁶
- The CAVC held that the “benefit of the doubt” rule under 38 U.S.C. § 5107(b) applies to the determination

²⁵¹ *Russell*, 25 Vet. App. at 28-29.

²⁵² *Reeves v. Shinseki*, 682 F.3d 988, 999 (Fed. Cir. 2012).

²⁵³ *Fithian v. Shinseki*, 24 Vet. App. 146, 150 (2010).

²⁵⁴ *Id.* at 150-51.

²⁵⁵ *Kyhn v. Shinseki*, 24 Vet. App. 228, 235 (2011), *vacated and remanded*, 716 F.3d 572 (Fed. Cir. 2013). Although the CAVC concluded that it could accept and consider affidavit evidence of the nature of the procedure for mailing a notice of a medical examination, the Federal Circuit vacated its decision, concluding that the CAVC could not consider such “extra-record” evidence. 716 F.3d at 576-78.

²⁵⁶ *Khyn*, 24 Vet. App. at 235.

of “veteran” status under 38 U.S.C. §§ 101(2), 101(24) and their implementing regulations.²⁵⁷

- The CAVC clarified the constructive possession doctrine under which some documents are deemed to be in the Board’s possession when they are either generated by the VA or sent to the VA. The CAVC held that such documents will only be deemed to be constructively in the claimant’s file if “the document has a direct relationship to the claimant’s appeal.”²⁵⁸

D. Medical Matters

Given the nature of many of the benefits available under Title 38 of the United States Code, it is not surprising that issues concerning medical examinations and evidence are often critical. It has been so in the past.²⁵⁹ It is true today. This subpart of the Article considers some of the important decisions over the past several years concerning these medical matters.

A good starting point is the congressional directive that the Secretary’s duty to assist “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.”²⁶⁰ The statute goes on to state when such an examination or opinion is “necessary.” I set forth the statute at length because several significant decisions track the language closely. The statute

²⁵⁷ *Donnellan v. Shinseki*, 24 Vet. App. 167, 174-75 (2010), *appeal dismissed*, 676 F.3d 1089 (Fed. Cir. 2012).

²⁵⁸ *Monzingo v. Shinseki*, 26 Vet. App. 97, 102 (2012).

²⁵⁹ See, e.g., *Allen*, *supra* note 32, at 25-30 (discussing medical examinations and evidence matters); *Allen*, *supra* note 4, at 510-12 (further discussing medical examinations and evidence matters).

²⁶⁰ 38 U.S.C. § 5103A(d)(1) (2006). The Federal Circuit has reiterated, however, that the duty to seek such an examination is not open-ended. For example, it does not mandate that VA provide a medical examination or opinion at the claimant’s demand. *Beasley v. Shinseki*, 709 F.3d 1154, 1159 (Fed. Cir. 2013) (finding that VA was not required to direct a claimant’s VA treating physician to provide a retrospective opinion).

provides that the Secretary:

[S]hall treat an examination or opinion as being necessary to make a decision on a claim . . . if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant)—

- (A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and
- (B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but
- (C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.²⁶¹

The Federal Circuit issued an important decision in *Waters v. Shinseki*²⁶² that explained how these statutory provisions fit together. It explained that “[s]ubsections A and B address, respectively, the evidence necessary to establish the veteran’s present disability and its connection to his military service. Subsection C relates to the evidence the Secretary requires to decide these issues.”²⁶³ The Federal Circuit then explained that each of these sections uses a different evidentiary standard: “competent evidence” for a disability; “evidence . . . indicating” nexus; and “medical evidence” necessary to decide the claim.²⁶⁴ It further reasoned that because Congress used these three different descriptions in the same statutory formula it likely intended them to have different meanings.²⁶⁵

²⁶¹ 38 U.S.C. § 5103A(d)(2).

²⁶² *Waters v. Shinseki*, 601 F.3d 1274 (Fed. Cir. 2010).

²⁶³ *Id.* at 1277.

²⁶⁴ *Id.* (omission in original).

²⁶⁵ *Id.*

In a decision following *Waters*, the Federal Circuit made clear “that medically competent evidence is not required [under subsection B] to ‘indicate’ that the claimant’s disability ‘may be associated’ with the claimant’s service.”²⁶⁶ This holding is highly significant because it underscores that a claimant may trigger the Secretary’s duty to provide a medical examination or obtain a medical opinion even when the claimant himself or herself does not possess competent medical evidence of nexus.²⁶⁷

A cautionary note is important. Decisions such as *Waters* and *Colantonio* dealing with lay evidence do not mean that the Board may not weigh that lay evidence as part of its fact-finding. Both the Federal Circuit and the CAVC have rendered decisions that affirmed a Board decision that a claimant had not established a matter even though they had submitted lay evidence on the point at hand.²⁶⁸ An error occurs only when the Board discounts lay evidence solely on that basis.²⁶⁹

Having discussed when a medical examination or opinion is required, we can now turn to what the Board’s (or RO’s) request may say and, then, how one evaluates the report or opinion. Not to sound flippant, but a good shorthand description of recent developments about what the VA may say when requesting an examination or opinion is that it must keep Goldilocks in mind—it can’t say too much and it can’t say too little. During the past several years, the CAVC has chastised the Board or RO when it appears to phrase its requests to examining or opining doctors in a leading manner.²⁷⁰ On the other end of the spectrum, the CAVC

²⁶⁶ *Colantonio v. Shinseki*, 606 F.3d 1378, 1382 (Fed. Cir. 2010).

²⁶⁷ Of course, as the Federal Circuit noted, there could be situations in which lay evidence falls short of this standard. *Id.* But the key is that lay evidence can be enough.

²⁶⁸ *E.g.*, *King v. Shinseki*, 700 F.3d 1339, 1345 (Fed. Cir. 2012); *Bardwell v. Shinseki*, 24 Vet. App. 36, 39 (2010).

²⁶⁹ *King*, 700 F.3d at 1345; *Bardwell*, 24 Vet. App. at 40. For an example of such an error during the period under review, see *Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011), where the CAVC noted that “the Board’s categorical rejection and failure to analyze and weigh the appellant’s lay evidence in accordance with established precedent” was error.

²⁷⁰ *E.g.*, *Kahana*, 24 Vet. App. at 436-37.

has criticized VA for not phrasing a request broadly enough to encompass aggravation as opposed to only direct causation.²⁷¹ The lesson is that the Board (and RO) needs to carefully consider how it frames a request for a medical examination or opinion. A failure to do so will likely lead to a remand and consequent delay in the ultimate resolution of the claim.

The CAVC also continued to provide guidance concerning how a medical report or opinion should be evaluated. Building on its past case law, the CAVC made the following points in *Monzingo v. Shinseki*,²⁷² a significant decision:

- A medical report must be read and judged in context.²⁷³
- The mere lack of citation to scientific studies in a report does not make it inadequate because one can assume that a doctor keeps up to date in terms of his or her medical knowledge.²⁷⁴
- If a report is, in fact, inadequate to decide a claim that does not automatically mean that the report is entitled to absolutely no weight.²⁷⁵ Instead, when a report is lacking in detail such that it is inadequate to decide a claim, a court should give it the weight appropriate based on the “amount of information and analysis it contains.”²⁷⁶

Before leaving the topic of medical examinations, there were two decisions concerning private medical examinations as opposed to VA examinations that are worth noting. First,

²⁷¹ See *El-Amin v. Shinseki*, 26 Vet. App. 136, 140-42 (2013).

²⁷² 26 Vet. App. 97 (2012).

²⁷³ *Id.* at 106.

²⁷⁴ *Id.* at 106-07.

²⁷⁵ *Id.* at 107. The CAVC made clear, however, that if the report is based on an inaccurate factual premise it is not entitled to any weight. *Id.*

²⁷⁶ *Id.* (citing *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302 (2008) and similar cases discussing the weight given to a medical opinion lacking detail). I have previously discussed *Nieves-Rodriguez* favorably. Allen, *supra* note 32, at 25-27.

the Federal Circuit held that a private medical examination report may not be discounted solely because the doctor did not review the claims file.²⁷⁷ Second, the CAVC determined that, in limited circumstances, the VA has a duty to seek clarification or supplementation with respect to private medical opinions.²⁷⁸ Such a duty will arise in “those instances in which the missing information is relevant, factual, and objective—that is, not a matter of opinion—and where the missing evidence bears greatly on the probative value of the private examination report.”²⁷⁹

Finally, and although the topic does not necessarily fit comfortably in this section about medical matters, there were a number of decisions in the period at issue concerning posttraumatic stress disorder (PTSD) claims. I mention certain of those decisions here:

- The Federal Circuit made clear that the specific rules that govern establishing service connection for PTSD take precedence over the more general service-connection rules.²⁸⁰
- The liberalizing amendments to 38 C.F.R. § 3.304(f)(3) allowing for lay testimony to establish an in-service stressor related to “fear of hostile military or terrorist activity” are retroactive.²⁸¹
- A claimant in a military sexual assault claim must proceed under the military sexual trauma regulation, 38 C.F.R. § 3.304(f)(5), and not the regulatory provision concerning a fear of hostile military or terrorist actions, 38 C.F.R. § 3.304(f)(3).²⁸²

²⁷⁷ *Gardin v. Shinseki*, 613 F.3d 1374, 1377-79 (Fed. Cir. 2010).

²⁷⁸ *Savage v. Shinseki*, 24 Vet. App. 259, 269-70 (2011).

²⁷⁹ *Id.* at 270. The CAVC stressed that it believed such situations would be rare and that it did not believe it was imposing a broad duty on VA adjudicators. *Id.*

²⁸⁰ *Arzio v. Shinseki*, 602 F.3d 1343, 1346-47 (Fed. Cir. 2010).

²⁸¹ *Ervin v. Shinseki*, 24 Vet. App. 318, 323-24 (2011).

²⁸² *Acevedo v. Shinseki*, 25 Vet. App. 286, 289-93 (2012). The significance in this

- Finally, the Federal Circuit held that post-hoc medical opinions may be used in appropriate circumstances to support finding an in-service stressor with respect to military sexual trauma under 38 C.F.R. § 3.304(f)(5).²⁸³

E. Of Claims and the Like

There are a number of significant decisions that can, very broadly speaking, be clustered together based on their connection to a type of “claim” in the system. Again, the grouping itself has no import beyond an organizing principle. There are five areas that fall into this classification, each of which I will discuss in turn below. Matters concerning: (1) the implicit denial doctrine; (2) ratings (including entitlement to a total disability rating based on individual unemployability (TDIU)); (3) claims to reopen; (4) clear and unmistakable error (CUE); and (5) effective date issues.

i. Implicit Denial Doctrine

One of the more difficult aspects of veterans’ law is the doctrine that has developed concerning when a claim may be “implicitly denied.” That is, when can a veteran make a claim, have the RO fail to adjudicate it, but yet have the claim be deemed denied by some other action.²⁸⁴ There were several decisions of import concerning the implicit denial doctrine during the past several years. I discuss them below.

I begin with one of the most significant decisions in the relevant period in my estimation, *Cogburn v. Shinseki*.²⁸⁵ To have a sense of the legal issues discussed in the case, one must have a

decision is with respect to the use of lay testimony to establish the in-service stressor, something allowed under (f)(3) but not (f)(5). *Id.*

²⁸³ *Menegassi v. Shinseki*, 638 F.3d 1379, 1382 (Fed. Cir. 2011).

²⁸⁴ The Federal Circuit has held that the implicit denial doctrine applies to both formal and informal claims. *Munro v. Shinseki*, 616 F.3d 1293, 1297-98 (Fed. Cir. 2010).

²⁸⁵ 24 Vet. App. 205 (2010).

fairly detailed understanding of the facts.

Mr. Cogburn was a Veteran of the U.S. Army with service in Vietnam.²⁸⁶ In November 1974, he filed a claim for a “severe nervous condition” in which he underlined both the words “compensation” and “pension.”²⁸⁷ The RO denied the claim stating that “[t]his is a claim for pension.”²⁸⁸

Mr. Cogburn again filed a claim for benefits in June 1983 claiming a “nervous disorder.”²⁸⁹ The RO issued a decision denying a claim of service connection for PTSD and also informed him that he was entitled to a nonservice-connected pension based on PTSD.²⁹⁰ Service connection was denied due to a lack of evidence of an in-service stressor.²⁹¹ Mr. Cogburn appealed to the Board.²⁹² In 1985, the Board denied service connection for PTSD, although it concluded there was medical evidence he suffered from schizophrenia.²⁹³ The Board did not discuss whether that condition was related to service.²⁹⁴

In October 1991, Mr. Cogburn sought to “reopen” his claim for service-connected PTSD.²⁹⁵ The RO denied the claim finding that no new and material evidence had been submitted.²⁹⁶ After an appeal, the RO awarded Mr. Cogburn service connection for PTSD and assigned an effective date of October 1, 1991, the date on which Mr. Cogburn’s claim to reopen was received.²⁹⁷ Shortly thereafter, Mr. Cogburn submitted what he termed a claim for an

²⁸⁶ *Id.* at 206.

²⁸⁷ *Id.* (emphasis omitted).

²⁸⁸ *Id.* (alteration in original).

²⁸⁹ *Id.* (emphasis omitted).

²⁹⁰ *Id.* at 206-07.

²⁹¹ *Id.* at 207.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* I discuss reopening based on new and material evidence *infra* Part II.E.iii.

²⁹⁷ *Cogburn*, 24 Vet. App. at 207. I discuss effective date related issues *infra* Part II.E.v.

earlier effective date.²⁹⁸ At that point, the matter was effectively stayed for reasons not relevant to the present discussion.

When the stay was lifted, the RO treated Mr. Cogburn's request as a motion to revise a decision based on CUE.²⁹⁹ Mr. Cogburn resisted this characterization and argued that his 1974 claim for a nervous condition had, in fact, never been adjudicated and thus remained pending.³⁰⁰ Eventually, the RO disagreed and denied his claim finding that the 1985 Board decision had denied the claim.³⁰¹

Mr. Cogburn appealed to the Board and continued to press his argument that the 1974 nervous condition claim remained unadjudicated and pending.³⁰² The Board continued to deny Mr. Cogburn's earlier effective date claim, although it did not specifically address the allegation that the 1974 claim for a nervous condition remained pending.³⁰³ Mr. Cogburn appealed to the CAVC setting up the need for the court to wade into the implicit denial doctrine.³⁰⁴

The first item of business for the CAVC was to address Mr. Cogburn's argument that the implicit denial doctrine was unconstitutional. In an important, although not particularly surprising, ruling, the CAVC held that it was constitutional.³⁰⁵ Having addressed the constitutional issue, the CAVC turned to the doctrine itself.

The CAVC did an excellent job of laying out the implicit denial doctrine in a manner that was accessible and

²⁹⁸ *Cogburn*, 24 Vet. App. at 207.

²⁹⁹ *Id.* I discuss clear and unmistakable error (CUE) matters *infra* Part II.E.iv.

³⁰⁰ *Cogburn*, 24 Vet. App. at 207-08.

³⁰¹ *Id.*

³⁰² *Id.* at 208.

³⁰³ *Id.*

³⁰⁴ *Id.* at 208-09.

³⁰⁵ *Id.* at 209-10, 217.

understandable.³⁰⁶ As with the discussion above concerning the court's description of the presumptions of soundness and aggravation, *Cogburn* is an example of the CAVC as teacher. Given the complexity of veterans' law, the CAVC does a great service to the bar when it takes a step back to describe the contours of the law in the way it did in *Cogburn*.

In any event, the CAVC explained that a claim, whether formal or informal, will remain pending until it is finally adjudicated.³⁰⁷ However, in certain circumstances “a claim for benefits will be deemed to have been denied, and thus finally adjudicated, even if [VA] did not expressly address that claim in its decision.”³⁰⁸ Over time it has developed that an implicit denial can occur in two basic situations. One is when a claimant files two claims at the same time and the RO acts on one but fails to address the other.³⁰⁹ The second situation is when only a single claim is filed and not acted on but there is later a claim for the same disability that is eventually resolved by an RO or Board denial.³¹⁰

These two situations are described well in an earlier CAVC decision in which the CAVC stated:

A reasonably raised claim remains pending until there is either a recognition of the substance of the claim in an RO decision from which a claimant could deduce that the claim was adjudicated or an explicit adjudication of a subsequent “claim” for the same disability.³¹¹

³⁰⁶ See *id.* at 210-12.

³⁰⁷ *Id.* at 210.

³⁰⁸ *Id.* (alteration in original) (quoting *Adams v. Shinseki*, 568 F.3d 956, 961 (Fed. Cir. 2009)).

³⁰⁹ See *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006).

³¹⁰ *Williams v. Peake*, 521 F.3d 1348, 1350 (Fed. Cir. 2008); *Jones v. Shinseki*, 619 F.3d 1368, 1373 (Fed. Cir. 2010).

³¹¹ *Ingram v. Nicholson*, 21 Vet. App. 232, 243 (2007). In a later decision the CAVC made clear that the implicit denial doctrine could apply in the context of entitlement to a total disability rating based on individual unemployability (TDIU) in the appropriate

As the Federal Circuit has explained, the central concept is one of notice. As that court recently noted:

The key question is whether sufficient notice has been provided so that a veteran would know, or reasonably can be expected to understand, that he will not be awarded benefits for the disability asserted in his pending claim, and thus can decide for himself whether to accept the decision or seek redress elsewhere.³¹²

Having set forth the relevant doctrine—again an important development in its own right—the CAVC articulated four factors to consider when deciding whether a claim should be deemed implicitly denied. This is a highly significant development. The *Cogburn* factors are:

- First: “the specificity of the claims or the relatedness of the claims.”³¹³ The more closely related the claims, the more likely it will be that one adjudication will give notice to the claimant that the other, related claim, has been acted on.³¹⁴
- Second: “the specificity of the adjudication, i.e., does the adjudication allude to the pending claim in such a way that it could reasonably be inferred that the prior claim was denied?”³¹⁵

situation. *Locklear v. Shinseki*, 24 Vet. App. 311, 315-16 (2011).

³¹² *Jones*, 619 F.3d at 1373. The specific issue in *Jones* concerned whether an earlier pending claim that was in appellate status but that was unadjudicated could be deemed denied by a later appellate decision. *Id.* The Federal Circuit held that it could be if the later decision served the notice goals underlying the doctrine itself. *Id.*

³¹³ *Cogburn*, 24 Vet. App. at 212.

³¹⁴ *See id.*

³¹⁵ *Id.*

- Third: “the timing of the claims.”³¹⁶ All things being equal it appears that the closer in time the two claims are the more likely that a person could perceive an implicit denial of one by another.³¹⁷
- Fourth: “whether the claimant is represented.”³¹⁸ It appeared that the majority believed that representation should make it more likely that a claim will be deemed implicitly denied.³¹⁹

So what of Mr. Cogburn’s claim? The CAVC remanded the case to the Board because the Board had not made the factual findings necessary to determine whether under the facts presented the implicit denial doctrine applied to the claim at issue.³²⁰ Despite the remand, however, the CAVC’s discussion of some of the things the Board should consider with respect to the *Cogburn* factors is illuminating. I note three points in particular.

First, the CAVC indicated that the first factor concerning the relatedness of the claims at issue is affected in some measure by the legal standards under which claimants may seek benefits. For example, the CAVC specifically noted that a claimant “must describe the nature of the disability for which he is seeking benefits” and may do so “by referring to a body part or system that is disabled or by describing symptoms of a disability.”³²¹ This method of asserting a claim makes sense because claimants are not trained medical personnel. Yet it also means that it will be

³¹⁶ *Id.* at 213.

³¹⁷ *See id.*

³¹⁸ *See id.* It is on this issue that Judge Schoelen vigorously disagreed in her concurring opinion. *Id.* at 218-20 (Schoelen, J., concurring). I discuss this disagreement in notes 321-22 and accompanying text.

³¹⁹ *Cogburn*, 24 Vet. App. at 213; *see id.* at 217 (“[W]hether a claimant is represented is particularly relevant to what disability was initially claimed and how any decision based on the implicit denial doctrine is interpreted.”).

³²⁰ *Id.* at 217-18. It should be underscored that there are many factual determinations built into the implicit denial calculus.

³²¹ *Id.* at 215.

possible as a factual matter to find more claims to be “related” for the implicit denial doctrine than would be the case with a more technical reading of the claims.

Second, with respect to the consideration focusing on the specificity of the adjudication, the CAVC reminded the Board that the standard by which this assessment should be made is that of a “reasonable person.”³²² In this regard, the CAVC quoted at length from a definition from *Black’s Law Dictionary* stating in part that a reasonable person ““is not necessarily the same as the average man”” and is one ““who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable.””³²³ It is difficult to assess the import of the definition the CAVC selected. I will note, however, that the description of the reasonable person set forth in *Cogburn* may bear little resemblance to many of the veterans seeking compensation, especially those suffering from various forms of mental illness.

Finally, the CAVC continued its discussion of the role of legal representation in connection with the implicit denial doctrine. It is clear from this discussion that the CAVC considers the presence of a lawyer—not merely a representative of a Veterans Service Organization—to be highly relevant in the analysis.³²⁴ In this regard, the CAVC stated that “whether a claimant is represented is particularly relevant to what disability was initially claimed and how any decision based on the implicit denial doctrine is interpreted.”³²⁵

Judge Schoelen strongly disagreed with the majority’s inclusion of representation as a factor in the implicit denial calculus.³²⁶ She noted:

³²² *Id.* at 216.

³²³ *Id.* (quoting BLACK’S LAW DICTIONARY 1380 (9th ed. 2009)).

³²⁴ *Id.* at 217.

³²⁵ *Id.*

³²⁶ *Id.* at 218-20 (Schoelen, J., concurring).

Undoubtedly, representation by counsel can be an invaluable asset to the unsophisticated lay-claimant who may not understand the labyrinths of VA's adjudication system. One would expect the added benefit of more precise pleadings, succinct legal arguments, and a greater understanding of the agency's adjudication of the claim and the appellate process. However, while the presence of counsel can positively influence a claim's processing and the claimant's understanding of VA's decision on the claim, I do not believe that there is any basis in law for finding the presence of counsel to alleviate, or alter the scope of, VA's obligations to a claimant.³²⁷

What is clear after *Cogburn* is that there is a divide on the CAVC about the way in which the increased presence of lawyers in the administrative system will affect claimants. It will be very interesting to see how that area of the law develops.³²⁸

ii. Ratings (Including TDIU)

Another aspect of establishing a claim is setting the appropriate rating for the disability at issue. There were several decisions during the past three years concerning rating matters. This subsection briefly describes the more significant of those decisions.

- The CAVC recently held that the Board may not consider the effect of medication when determining the appropriate rating for a disability unless the use of medication is contemplated as part of the relevant

³²⁷ *Id.* at 218. Judge Schoelen went on to express her disagreement on this score in constitutional terms. She noted that: "Although there are circumstances that require *enhanced* due process protections beyond what is ordinarily expected, I am not aware of any case law that permits *less* solely because a party is represented." *Id.* at 219 (emphasis in original).

³²⁸ I return to the role of lawyers in the system *infra* Part III.C.

diagnostic code.³²⁹

- The CAVC also concluded that a claimant is not entitled to more than one disability rating for the same condition under the same diagnostic code.³³⁰

In addition to these more general rating-related decisions, there were also developments concerning a rating of TDIU.³³¹ I discuss TDIU matters in this subsection because TDIU “is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability.”³³² As to TDIU:

- The Federal Circuit held: “Given that a TDIU determination does not require any analysis of the actual opportunities available in the job market, we decline to conclude that an industrial survey is ‘necessary’ for that purpose in connection with TDIU claims. Because job market information is not required, the duty to assist does not require the VA to provide such information through an industrial survey.”³³³
- The CAVC reminded VA adjudicators that TDIU is not a freestanding claim but rather is a claim for an appropriate rating for a disability.³³⁴ Therefore, it is error to treat it as a freestanding claim.³³⁵

iii. Claims to Reopen

Once an administrative decision is final and the time to

³²⁹ Jones v. Shinseki, 26 Vet. App. 56, 61 (2012).

³³⁰ Cullen v. Shinseki, 24 Vet. App. 74, 81-82 (2010).

³³¹ See 38 C.F.R. § 4.16(a) (2012).

³³² Rice v. Shinseki, 22 Vet. App. 447, 453 (2009).

³³³ Smith v. Shinseki, 647 F.3d 1380, 1385 (Fed. Cir. 2011).

³³⁴ Mayhue v. Shinseki, 24 Vet. App. 273, 280-82 (2011).

³³⁵ *Id.*

appeal has expired, “generally, the claim may not be reopened.”³³⁶ There are two exceptions to this rule of finality. The first is to seek revision of the decision on the grounds that the final decision contains “clear and unmistakable error.”³³⁷ The second is for the claimant to submit “new and material evidence” in order to reopen the decision for further adjudication.³³⁸ Some recent decisions concerning claims to reopen based on new and material evidence are discussed in this subsection. The next subsection turns to motions to revise based on CUE.

*Shade v. Shinseki*³³⁹ is an interesting decision both for its particular holding as well as for how various aspects of the veterans’ benefits system fit together. As a doctrinal matter, *Shade* holds that a claim may be reopened based on the submission of new and material evidence without determining whether the result in the adjudication sought to be reopened would certainly be different.³⁴⁰ All that is required is that the new and material evidence “raises a reasonable possibility of substantiating the claim” and triggers VA’s duty to assist.³⁴¹

It may seem like an exercise in futility if, in fact, a claim were reopened but the new and material evidence would not change the result. Here is where the connections come into play. Once the underlying claim is reopened because there is “a reasonable possibility of substantiating the claim,” the Secretary would have the obligation to assist the claimant under 38 U.S.C. § 5103A(a)(1).³⁴² This assistance could be a powerful asset to a claimant in prevailing given the presence of the new and material

³³⁶ *Shade v. Shinseki*, 24 Vet. App. 110, 113 (2010) (citing 38 U.S.C. § 7104 (2006)).

³³⁷ 38 U.S.C. §§ 5109A, 7111.

³³⁸ *Id.* § 5108.

³³⁹ 24 Vet. App. 110.

³⁴⁰ *Id.* at 116-18 (citing 38 C.F.R. § 3.156(a) (2012)).

³⁴¹ *Id.* at 118. Evidence is “new” if it was not previously before the adjudicator and “material” if it goes to the reason why the claim was originally denied. 38 C.F.R. § 3.156(a).

³⁴² *Shade*, 24 Vet. App. at 121.

evidence. I highlight this point to illustrate that there are many parts to the veterans' benefits system and understanding how they relate to one another can be both difficult and critically important.³⁴³

In addition to *Shade*, there were several other developments in this area:

- The Federal Circuit held that in circumstances addressed by 38 C.F.R. § 3.156(b), the VA must evaluate whether a veteran's submission contains new and material evidence with respect to a previously denied claim even if the veteran calls the submission a new claim.³⁴⁴
- The CAVC held that an accrued benefits claim may be reopened based on new and material evidence.³⁴⁵ The court explained that the fact that such a situation might be rare does not mean such a claimant is categorically barred from using 38 U.S.C. § 5108.³⁴⁶
- The Federal Circuit held that there is a distinction between “the requirements for an application to reopen a claim” and “the requirements to actually reopen the claim.”³⁴⁷ The key difference is that the application does not require the simultaneous submission of new and material evidence although the actual reopening does.³⁴⁸ As I explain later in this subsection, this distinction can make a significant difference in terms of the effective date of a benefit.

³⁴³ See *infra* Part III.B (discussing the complexities in the system).

³⁴⁴ *Bond v. Shinseki*, 659 F.3d 1362, 1367-68 (Fed. Cir. 2011). Section 3.156(b) concerns a veteran's submission to an RO during the period after a decision has been made but before the time to appeal has expired. 38 C.F.R. § 3.156(b).

³⁴⁵ *Quattlebaum v. Shinseki*, 25 Vet. App. 171, 177 (2012).

³⁴⁶ *Id.* at 173-77.

³⁴⁷ *Akers v. Shinseki*, 673 F.3d 1352, 1358 (Fed. Cir. 2012).

³⁴⁸ *Id.*

*iv. CUE*³⁴⁹

There were a couple of important developments concerning a claimant's option to file a motion to reverse or revise a final Board decision on the basis of CUE in such decision.³⁵⁰ First, the CAVC held, and the Federal Circuit affirmed, that a claimant is only entitled to make one CUE motion with respect to a Board decision.³⁵¹ This stands in contrast to an RO decision for which a claimant can raise more than one allegation of CUE provided such motions are based on different theories.³⁵²

The Federal Circuit also reiterated that while a CUE motion must be based on information that was "in the record" at the time of the decision at issue, it is possible that a document could qualify as being so if it was in the constructive possession of the VA adjudicators.³⁵³ Such a finding would generally be when the document was either generated by the VA or submitted to the VA at the time of the decision but not actually placed in the claims file.³⁵⁴

v. Effective Date Issues

A claimant must establish the effective date for his or her benefits, something the CAVC has described as "a complex matter."³⁵⁵ As a general matter, the effective dates for benefits "shall be fixed in accordance with the facts found, but shall not

³⁴⁹ A motion for CUE is a motion to revise a prior, final decision based on clear and unmistakable error. 38 U.S.C. §§ 5109A, 7111 (2006).

³⁵⁰ *Id.* § 7111.

³⁵¹ *Hillyard v. Shinseki*, 24 Vet. App. 343, 350-54 (2011), *aff'd*, 695 F.3d 1257 (Fed. Cir. 2012).

³⁵² *Id.* at 351. Also of note here is the CAVC's attempt to bring some clarity to the use of terms such as "claim," "issue," "theory," "matter," and "element." *Id.* at 355-56. I agree with the CAVC that clarity in the use of such terms would be a welcome addition to practice in this area. I commend the court for its effort and hope that advocates will begin to use the lexicon it has provided.

³⁵³ *Palmer v. Shinseki*, No. 2011-7020, 2011 WL 836645, at **3 (Fed. Cir. Mar. 11, 2011).

³⁵⁴ *See id.*

³⁵⁵ *Delisio v. Shinseki*, 25 Vet. App. 45, 51 (2011).

be earlier than the date of receipt of application therefor.”³⁵⁶ There were several decisions during the period under review concerning effective date determinations. I briefly highlight these developments:

- The CAVC held that the Secretary’s requirement that a claimant submit a formal application for benefits within one year of submitting an informal claim, and being supplied with the application, is lawful.³⁵⁷ The importance of this holding concerns the effective date of benefits. If a claimant submits an informal claim and is provided a claim form and submits it within one year, the effective date of benefits will be the date of the informal claim.³⁵⁸ However, if the person waits beyond a year to submit the form, the effective date will be the date of submission of the form.³⁵⁹
- As described above in this subsection, the Federal Circuit has held that the requirements to submit an application to reopen a claim based on new and material evidence are distinct from the requirements to actually reopen a claim.³⁶⁰ The Federal Circuit explained the effective date implication of this holding: “[A]n application to reopen does not necessarily require the simultaneous submission or proffer of new and material evidence and [therefore] the effective date of an application to reopen is not tied to the date when such evidence is actually submitted.”³⁶¹

³⁵⁶ 38 U.S.C. § 5110(a) (2006).

³⁵⁷ *Jernigan v. Shinseki*, 25 Vet. App. 220, 229 (2012).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Akers v. Shinseki*, 673 F.3d 1352, 1358 (Fed. Cir. 2012).

³⁶¹ *Id.*

F. EAJA and Other Attorney-Fee Matters

While there are many attorneys who provide services on a pro bono basis to claimants, many of those providing legal services to veterans related to benefits make at least a portion of their living from such representation. There is absolutely nothing wrong with that state of affairs. Of course, care needs to be taken that the fees earned are appropriate and the services are provided in an appropriate manner. But lawyers play an increasingly important part in the veterans' benefits system and they should not, as a group, be tarnished merely because this is a means to earn a living.

Later in this Article, I discuss the role of lawyers in the system in greater detail.³⁶² In this subpart, I describe some important rulings from the CAVC and the Federal Circuit over the past several years concerning attorneys' fees. The first part discusses decisions under the EAJA.³⁶³ The subsection then considers non-EAJA attorney fee decisions.

i. EAJA Decisions

The EAJA allows a claimant who is a prevailing party in an appeal before the CAVC or the Federal Circuit to recover his or her reasonable attorneys' fees or costs unless the government's litigation position was substantially justified.³⁶⁴ As the Federal Circuit has recently commented, the EAJA "plays a particularly important role in the veterans' adjudicatory system."³⁶⁵ It is not surprising, then, that much of the CAVC's workload is devoted to processing applications for fees under the EAJA.³⁶⁶

³⁶² See *infra* Part III.C.

³⁶³ 28 U.S.C. § 2412(d).

³⁶⁴ *Id.*; see *Scarborough v. Principi*, 541 U.S. 401, 405 (2004); *Kelly v. Nicholson*, 463 F.3d 1349, 1353 (Fed. Cir. 2006).

³⁶⁵ *Wagner v. Shinseki*, 640 F.3d 1255, 1258 (Fed. Cir. 2011).

³⁶⁶ For example, in Fiscal Year 2012 there were over 2,300 applications for fees under the EAJA filed at the CAVC. See CAVC 2012 ANNUAL REPORT, *supra* note 23, at 1. An issue beyond the scope of this Article is what this figure actually means. It surely shows

Over the past three years, the CAVC and the Federal Circuit have rendered a number of decisions concerning the EAJA. A brief description of those decisions follows:

- The courts made clear that whether a remand is predicated on what may be termed “old” or “new” law is not the dispositive factor in determining whether fees under the EAJA should be awarded.³⁶⁷ Rather, the key question is whether the remand, including a remand based on a joint motion, is predicated on administrative error.³⁶⁸ The “new” versus “old” law question can be relevant, but it is not the touchstone.³⁶⁹
- The Federal Circuit has made clear that the EAJA does not act to waive the attorney-client privilege.³⁷⁰ However, requiring that an application under the EAJA contain information sufficient to demonstrate that the fees and costs sought are reasonable does not run afoul of the privilege.³⁷¹ This principle is practically important because it puts veterans’ advocates on notice that they must keep accurate and detailed time records

that the EAJA plays an important role in the process and that the CAVC devotes a fair amount of its resources to processing these applications. But it also is troubling because in order to grant an application under the EAJA, the government’s position must not have been “substantially justified.” 28 U.S.C. § 2412(d). Perhaps the government merely does not contest that point. The other possibility is that the government is actually taking an unjustifiable position in a large number of cases. Either one of these explanations is troubling. Greater attention needs to be paid to this issue. On the one hand, if the government simply is not contesting the issue even though it had a legitimate justification for its position, there is an abdication of a responsibility to protect the public fisc. If the government’s positions are actually not justifiable the government is engaged in highly inappropriate conduct. As I said, neither option is particularly palatable. This rate of EAJA recovery was noted in oral argument before the Supreme Court in a Social Security case. See Transcript of Oral Argument, *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010) (No. 08-1322), available at 2010 WL 603696.

³⁶⁷ *Thompson v. Shinseki*, 24 Vet. App. 176, 178 (2010), *aff’d*, 682 F.3d 1377 (Fed. Cir. 2012).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Avgoustis v. Shinseki*, 639 F.3d 1340, 1344-45 (Fed. Cir. 2011).

³⁷¹ *Id.*

if they intend to seek fees and costs under the EAJA.

- The Federal Circuit held that a personal representative of a claimant's estate is not categorically barred from recovering fees and costs under the EAJA for work performed after the claimant's death.³⁷² If the work done is sufficiently related to the claimant's own claim for benefits, EAJA fees may be appropriate.³⁷³
- The Federal Circuit reaffirmed that a prevailing claimant is entitled to recover "fees on fees" if he or she is able to satisfy the relevant statutory criteria.³⁷⁴ In other words, a prevailing party can recover supplemental fees and costs associated with a successful motion under the EAJA.³⁷⁵ The Federal Circuit also made clear that the mere fact that the initial application for fees was reduced in an amount greater than the "fees on fees" sought in a follow-on application does not categorically prohibit an award of "fees on fees."³⁷⁶ The degree of success in the initial application is a factor to be considered in determining the reasonableness of the fee awards but there is no categorical bar to the award of "fees on fees" in this situation.³⁷⁷
- Finally, the CAVC has made clear that a litigant may qualify as a "prevailing party" even if only a portion of the Board decision at issue is remanded based on administrative error.³⁷⁸ In addition, the fees and costs awarded must be apportioned not only to account for the division of work between the error and the non-error portions of the decision, but also to account for the basis

³⁷² Padgett v. Shinseki, 643 F.3d 950, 954 (Fed. Cir. 2011).

³⁷³ *Id.*

³⁷⁴ Wagner v. Shinseki, 640 F.3d 1255, 1259-62 (Fed. Cir. 2011).

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 1260-61.

³⁷⁷ *Id.*

³⁷⁸ Vazquez-Flores v. Shinseki, 26 Vet. App. 9, 13-14 (2012).

of the error portion of the remand.³⁷⁹ In other words, to the extent that the error-remand is based on arguments not advanced by the prevailing party, fees and costs would not be warranted.³⁸⁰ In the case the CAVC was considering, for example, a part of the error-remand was predicated on arguments the court advanced *sua sponte*.³⁸¹ The party was not entitled to fees on this portion of the remanded case.³⁸²

ii. Non-EAJA Decisions

In addition to fees under the EAJA for work performed before judicial bodies, attorneys also have the ability to collect fees for work performed before VA in certain circumstances.³⁸³ There is no fee shifting statute similar to the EAJA for work performed before VA. The CAVC issued several decisions over the past three years concerning non-EAJA attorneys' fees. Given the increasing role of lawyers in the system,³⁸⁴ I suspect that these types of decisions will only be more common in the future. I briefly describe the developments in this area over the past few years below:

- The CAVC held that an attorney is only entitled to the recovery of fees under a contingency fee agreement if that agreement is entered into within one year of a Board decision.³⁸⁵

³⁷⁹ *Id.* at 15-17.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 16.

³⁸² *Id.* at 17.

³⁸³ As of 2006, a lawyer may charge a fee for work performed after a Notice of Disagreement (NOD) has been submitted in a matter before the VA. See 38 U.S.C. § 5904(c)(1), enacted as part of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3405-3408.

³⁸⁴ See *infra* Part III.C.

³⁸⁵ *Mason v. Shinseki*, 25 Vet. App. 83, 90 (2011).

- The CAVC also held that an attorney fees claim is a “simultaneously contested” one such that a NOD must be filed within 60 days of the relevant determination instead of the normal one-year period.³⁸⁶
- Finally, the CAVC determined that a “case” for purposes of the collection of attorneys’ fees “refers to a claim submitted by a claimant and adjudicated by the Secretary, including the adjudication of all elements and theories in support of such claim, but it does not include an additional claim for benefits that is presented after the final adjudication of an earlier claim, with new, different, or additional evidence even if the additional claim is related to the disability underlying the earlier claim.”³⁸⁷

G. Miscellaneous Matters

Finally, this subpart turns to a collection of decisions that are significant but that do not fit neatly into any of the categories I have discussed thus far. I have grouped these miscellaneous matters into four areas concerning: (1) section 1151 claims; (2) substitution; (3) severance; and (4) payments to incarcerated veterans. I discuss each area briefly below.

i. Section 1151 Claims

Pursuant to certain caveats, a veteran may establish service connection for an injury that was suffered in a VA medical facility as a result of VA negligence.³⁸⁸ The Federal Circuit recently held that even though section 1151 requires a showing of negligence on the part of the VA, it does not require direct causation in the

³⁸⁶ Mason v. Shinseki, 26 Vet. App. 1, 5-9 (2012) (interpreting 38 U.S.C. § 7105A (2006)).

³⁸⁷ Cameron v. Shinseki, 26 Vet. App. 109, 110 (2012).

³⁸⁸ See 38 U.S.C. § 1151(a).

sense that actual medical treatment itself resulted in the injury.³⁸⁹ Instead, the CAVC held that “Congress intended [in section 1151] to encompass not simply the actual care provided by VA medical personnel, but also treatment-related incidents that occur in the physical premises controlled and maintained by the VA.”³⁹⁰

ii. *Substitution*

There were several significant decisions concerning the substitution of a person eligible to receive accrued benefits for a claimant who had died. All of the decisions concerned an amendment to the relevant statutory provision Congress enacted in 2008.³⁹¹ Under the provision as amended, an accrued-benefits claimant can be substituted for a veteran who dies while a “claim” or “an appeal of a decision with respect to such a claim, is pending.”³⁹²

The CAVC first interpreted this statutory change in *Breedlove v. Shinseki*.³⁹³ There, the CAVC held that the amendment strictly applied only to proceedings before the VA and not to matters pending before a court.³⁹⁴ Nevertheless, the CAVC went on to conclude that Congress’s statutory change had altered the landscape with respect to substitution in court proceedings as well because the change undercuts the rationale of previous decisions imposing barriers to substitution in judicial proceedings.³⁹⁵

³⁸⁹ *Viegas v. Shinseki*, 705 F.3d 1374, 1378 (Fed. Cir. 2013).

³⁹⁰ *Id.* The CAVC also rendered a decision concerning section 1151 and the severance of benefits, which I discuss below. See *infra* Part II.G.iii.

³⁹¹ See Veterans’ Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 212, 122 Stat. 4145, 4151 (codified at 38 U.S.C. § 5121A).

³⁹² 38 U.S.C. § 5121A.

³⁹³ 24 Vet. App. 7 (2010).

³⁹⁴ *Id.* at 8.

³⁹⁵ *Id.* at 20.

The Federal Circuit agreed with this latter point in *Reeves v. Shinseki*.³⁹⁶ That court held “even if section 5121A directly applies only to actions pending before the VA, its enactment nonetheless undercuts the rationale for previous decisions that refused to allow a survivor to substitute when a veteran died while his appeal was pending before a court.”³⁹⁷ These decisions will greatly simplify the process for substitution of accrued benefits claimants when a veteran has died. The statutory change is an excellent example of how Congress could influence the procedural complexity of the veterans’ benefits system if it chooses to do so.³⁹⁸

iii. Severance

There were also several decisions of note in the past three years concerning the severance of service connection:

- The ten-year limitation on the severance of service-connected benefits³⁹⁹ does not apply in the context of claims of fraud.⁴⁰⁰
- The ten-year limitation on the severance of service-connected benefits applies to claims under 38 U.S.C. § 1151.⁴⁰¹
- “[S]ervice connection for a ‘disability’ is not

³⁹⁶ 682 F.3d 988, 996-98 (Fed. Cir. 2012).

³⁹⁷ *Id.* at 996. The Federal Circuit did not decide if section 5121A in fact applies directly to proceedings before a court. *Id.*

³⁹⁸ Two related decisions concerning substitution are worthy of mention. First, if there is no one eligible to receive accrued benefits and a veteran dies, an appeal must be dismissed as moot because “[i]t is beyond axiomatic that, where there is no appellant, there is no case or controversy.” *Briley v. Shinseki*, 25 Vet. App. 196, 197 (2012). Second, and slightly removed from substitution as a technical matter, the CAVC held that section 5121A is constitutional in terms of its establishment of an effective date for the statutory change concerning accrued benefits. *Copeland v. Shinseki*, 26 Vet. App. 86, 89-90 (2012).

³⁹⁹ *See* 38 U.S.C. § 1159 (2006).

⁴⁰⁰ *Id.*; *see* *Roberts v. Shinseki*, 647 F.3d 1334, 1341-42 (Fed. Cir. 2011).

⁴⁰¹ *Hornick v. Shinseki*, 24 Vet. App. 50, 55-56 (2010).

severed simply because the situs of a disability—or the Diagnostic Code associated with it—is corrected to more accurately determine the benefit to which a veteran may be entitled for a service connected disability.”⁴⁰²

iv. Payments to Incarcerated Veterans

A veteran entitled to receive disability compensation will have his or her payments reduced to a 10% rating level during a period of incarceration.⁴⁰³ The CAVC recently held that this reduction in payment does not mean that payments are merely delayed such that a veteran is entitled to receive a payment upon release from prison of the withheld amounts.⁴⁰⁴ This is a practically important, if not surprising, decision.

III. BROADER THEMES

Part II described in detail a number of areas in veterans’ law in which there have been significant developments in the period from April 2010 through March 2013. I have attempted in that Part not only to describe these developments but also to note connections between and among various concepts and also highlight potential issues that are ripe for further development.

Part III takes a step back to consider the landscape from a different perspective. Specifically, it addresses broader themes that can be distilled from the more specific developments discussed above. Of course, there are no doubt additional themes that could be drawn from these developments. The ones I selected focus on major aspects of the veterans’ benefits system. In addition, the discussion below is not as detailed as much that has come before.

⁴⁰² *Read v. Shinseki*, 651 F.3d 1296, 1302 (Fed. Cir. 2011).

⁴⁰³ 38 U.S.C. § 5313(a)(1)(A); *Shephard v. Shinseki*, 26 Vet. App. 159, 163 (2013).

⁴⁰⁴ *Shephard*, 26 Vet. App. at 164-65.

My goal is to raise points for further discussion. In the following pages I discuss matters related to: (A) systemic delays; (B) systemic complexity; and (C) the role of lawyers.

A. Systemic Delays

It is probably obligatory in any writing about the veterans' benefits system to mention delays in the system of administrative action and judicial review.⁴⁰⁵ The problem with this reality is that it can make those of us who work in this area almost immune to the truly staggering delays in some of the cases that we see. For example, here are some anecdotes from the cases I reviewed as part of preparing this Article:

- The claimant in *Guerra v. Shinseki*⁴⁰⁶ had his claim pending for approximately 12 years between the date it was filed and the date he ultimately lost at the Federal Circuit.⁴⁰⁷
- In *Andrews v. Shinseki*⁴⁰⁸ the Veteran's claim was pending for almost 17 years before the Board.⁴⁰⁹
- Conservatively speaking, Mrs. Byron's claim was pending for 16 years, although it is possible to view it as pending for over 40 years.⁴¹⁰

⁴⁰⁵ For example, in a forthcoming essay concerning veterans' law I analogize the situation to the fictional case created by Charles Dickens, *Jarndyce v. Jarndyce*. CHARLES DICKENS, *BLEAK HOUSE* 14 (Stephen Gill ed., Oxford University Press 1998). According to Dickens, the case had been pending for so long in the English Chancery Court that, among other things, "[i]nnumerable children have been born into the cause; innumerable young people have married into it; [and] innumerable old people have died out of it." *Id.*

⁴⁰⁶ 642 F.3d 1046 (Fed. Cir. 2011).

⁴⁰⁷ *Guerra*, 642 F.3d at 1046 (noting date of Federal Circuit decision); *Guerra v. Shinseki*, No. 08-0223, 2010 WL 1140882, at *1 (Vet. App. Mar. 26, 2010) (noting date claim at issue filed with RO).

⁴⁰⁸ 26 Vet. App. 193 (2013).

⁴⁰⁹ *See id.* at 197.

⁴¹⁰ If one begins with the date on which Ms. Byron filed a claim to reopen what she believed to be a final decision on her claim, one starts in 1996. *See Byron v. Shinseki*,

- There was more than 10 years of time between the decision of an RO and the Federal Circuit in *Gaston v. Shinseki*.⁴¹¹
- In the consolidated cases in *DeLoach v. Shinseki*⁴¹² decided in January 2013, both Veterans filed their initial claims in 2001.⁴¹³ The result in these cases was a remand so the claims continue.⁴¹⁴

I could go on. My point here is not to suggest that anyone in the system, administrative or judicial, is falling down on the job. I honestly believe that everyone is trying to do their best and, in fact, is trying to reduce delay. But these efforts are not enough. When veterans advocacy groups file lawsuits in federal courts outside the system in order to seek relief from delay, there should be a red flag that something is seriously amiss.⁴¹⁵

In the past, I have argued that the best way in which to address systemic issues such as delay is to have all the relevant constituencies come together to balance the complex web of factors at play when we award millions of dollars per year in veterans' benefits.⁴¹⁶ These factors include the interests of veterans, the various institutions making up the system, and the public's twin interests in rewarding those who serve our country as well as protecting limited financial resources.⁴¹⁷ I have proposed a legislative commission to accomplish this goal.⁴¹⁸ In October 2013, the House of Representatives passed a bill that included a

No. 09-4634, 2011 WL 2441683, at *2 (Vet. App. June 20, 2011). However, one could also start the clock in 1971 when she filed her initial request for DIC. *See id.* at *1.

⁴¹¹ 605 F.3d 979, 981 (Fed. Cir. 2010).

⁴¹² 704 F.3d 1370 (Fed. Cir. 2013).

⁴¹³ *Id.* at 1372, 1374.

⁴¹⁴ *Id.* at 1381.

⁴¹⁵ *See, e.g.,* Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc); Vietnam Veterans of Am. v. Shinseki, 599 F.3d 654 (D.C. Cir. 2010).

⁴¹⁶ *See generally* Allen, *supra* note 3.

⁴¹⁷ *Id.* at 390-92.

⁴¹⁸ *Id.* at 388-90.

provision to establish “a commission or task force to evaluate the backlog of claims within [VA] and the appeals process of claims.”⁴¹⁹ This legislation considers many of the factors I have previously proposed.⁴²⁰ The bill is currently under consideration in the Senate.⁴²¹

Given the lack of a systemic approach to the systemic problems, more piecemeal action is the second best option. There is not space in this Article to fully discuss the types of actions that could potentially address delay. Instead, I briefly list some options that could be worth considering over the next several years:

- The VA should continue the work it has begun to computerize its records. While some may complain (perhaps with good reason) that an emphasis on such technological fixes distracts the Secretary from “real” problems, every little bit helps when approaching a problem as the sum of its parts. It seems difficult to argue with the proposition that enhancing the technology by which the claims process is managed would not have at least some positive effect on the pace of adjudications.
- Congress should continue its efforts to provide claimants with the opportunity to forego procedural protections that, in the abstract, are designed for their protection.
- Congress could also provide the CAVC the authority to promulgate a rule for the aggregate resolution of issues. Similar to the class action device, such aggregate resolution would have the potential to reduce delays on

⁴¹⁹ H.R. 2189, § 101, 113th Cong. (1st Session 2013).

⁴²⁰ *See id.*

⁴²¹ H.R. 2189: *To Improve the Processing of Disability Claims by the Department of Veterans Affairs, and for Other Purposes*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2189> (last visited Nov. 12, 2013).

a system-wide basis by allowing the CAVC to address issues common to thousands or hundreds of thousands of claims in a more comprehensive manner.

- The judiciary can take steps in this vein as well. I commend the CAVC for the work it has already done in providing for mediation in appeals and more generally streamlining its procedures. In addition, and as I have argued above, I believe the CAVC and the Federal Circuit could more aggressively use the power to reverse as opposed to remand Board decisions.⁴²²
- Finally, the players in the system can more actively accept the presence of lawyers. As I discuss below, the veterans' benefits system has become increasingly complex both procedurally and substantively.⁴²³ I have come to believe that lawyers, assuming that they pay heed to their duty of competent representation, can make navigating this complex system a more realistic journey for claimants. It may also be that their presence will make the system more efficient on an aggregate basis. Of course, more lawyers could mean the opposite. But I believe that we are at a point with delay that we need to try something. Congress has made lawyers a more ingrained part of the veterans' benefits world. We should embrace them and use their talents as a means to address the system's deficiencies.⁴²⁴

B. Systemic Complexity

If the reader has made it this far in the Article one thing at least is clear: Veterans' law is highly complex. Part II began with

⁴²² See *supra* notes 155-58 and accompanying text (discussing a proposal for "hypothetical clearly erroneous" review).

⁴²³ See *infra* Part III.B; see also *supra* Part II (discussing in detail the often complex significant developments in veterans' law over the past three years).

⁴²⁴ See *infra* Part III.C.

a quotation from Judge Lance about how the law may be becoming so complex that RO adjudicators will be unable to follow it.⁴²⁵ This may be true. It may also be the case that the law is becoming too complex for practitioners who have a duty to competently represent their clients.⁴²⁶ My point here about the complexity in this system relates instead to the claimants themselves.

It is common ground that the veterans' benefits system at the administrative level is designed to be non-adversarial and pro-claimant. Indeed, the Supreme Court's opinion in *Henderson* contained many references to this aspect of the administrative process.⁴²⁷ In fact, the Supreme Court even noted twice that proceedings before the VA were "informal."⁴²⁸

As anyone associated with veterans' law knows, there is a serious debate about whether the veterans' benefits system ever was non-adversarial and pro-claimant and, if it was, whether it remains so today.⁴²⁹ This debate has not been merely academic. It has also reached into the judiciary. For example, Judge Moore and Judge Bryson from the Federal Circuit had a spirited debate about the nature of the system in connection with a claim that failure to provide a means to probe VA medical examiners violated due process.⁴³⁰ These are interesting points, but they are not exactly

⁴²⁵ *Delisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring) ("There is an unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year.").

⁴²⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012) (setting forth duty of competent representation).

⁴²⁷ See, e.g., *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200-01, 1205-06 (2009).

⁴²⁸ *Id.* at 1200, 1206.

⁴²⁹ E.g., Allen, *supra* note 32, at 49-52; Allen, *supra* note 3, at 378-80.

⁴³⁰ Compare *Gambill v. Shinseki*, 576 F.3d 1307, 1313-23 (Fed. Cir. 2009) (Bryson, J., concurring) (arguing that the administrative process remains non-adversarial and pro-claimant), with *id.* at 1324-30 (Moore, J., concurring) (arguing that the system is no longer non-adversarial, at least not so much that claimants do not need to avail themselves of traditional litigation tools in certain circumstances). I discuss the debate between Judges Bryson and Moore in greater detail in an Article concerning the application of due process principles in the veterans' benefits system. See Michael P.

what I am getting at here.

My concern is that even if the system is non-adversarial, pro-claimant, and in some sense informal, it simply has become so complex that we cannot reasonably expect claimants, with or without the help of VA adjudicators, to successfully navigate it. To make my point, let me create a scenario based on the law. It would be possible for the following to take place:

- Veteran X files a claim for a benefit for “nerves.” That is the only claim he makes.
- However, the VA has a duty to sympathetically read his claim.⁴³¹ In doing so, it would be possible to find that Veteran X has made a claim for PTSD in addition to his stated claim for nerves.
- The RO issues a decision denying Veteran X’s claim for nerves. The decision says nothing about PTSD.
- Several years later, Veteran X files a claim for PTSD. The RO denies the claim for whatever reason.
- Veteran X appeals to the Board. The Board also denies the claim.
- Veteran X appeals to the CAVC. At this point Veteran X loses again. The reason: *res judicata*. How is that? Well, it turns out that we will sympathetically read Veteran X’s initial claim to include a claim for PTSD. Then we will say that the denial of the initial claim, where neither the denial nor the claim said anything about PTSD, implicitly denied the sympathetically read

Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans’ Benefits System*, 80 U. CIN. L. REV. 501, 530-32 (2011).

⁴³¹ *E.g.*, *Robinson v. Shinseki*, 557 F.3d 1355, 1358-59 (Fed. Cir. 2009); *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004); *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001).

claim for PTSD such that the time to appeal began to run.⁴³²

Of course, the scenario I posit above is not a common one. It is, however, entirely consistent with the law in this area as it has developed. Can we really expect any non-lawyer to comprehend procedural intricacies such as these? And what about the substance of the law, which is no less complex? My point is not to say that any part of the sympathetic reading or implicit denial doctrines is incorrect. Indeed, I am not advocating anything about the law now. Instead, I am suggesting that no matter what the administrative process is in terms of being non-adversarial or not, we can no longer pretend that notions of informality or a pro-claimant structure solve all problems.

At the end of the day, it may be that the imposition of judicial review has a downside: tremendously increased complexity. In my opinion, judicial review is worth that tradeoff. But it does require a more conscious appreciation of the complexity so that steps can be taken to ensure that the veterans the law is meant to serve are not made inadvertent victims of it.

C. The Role of Lawyers

For much of the history of the United States, there was a limited role for lawyers in the veterans' benefits process. To begin with, it was not until the enactment of the Veterans' Judicial Review Act in 1988 that there was judicial review (and judges are lawyers after all) of benefits determinations.⁴³³ It took until 2006 for Congress to allow lawyers charging a fee to represent claimants

⁴³² I have discussed the implicit denial rule above. *See supra* Part II.E.i.

⁴³³ Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.). Lawyers have always been an integral part of proceedings before the CAVC. We learned during the period under review, however, that an appellant is not entitled to effective assistance of counsel under the Constitution in these judicial proceedings. *Pitts v. Shinseki*, 700 F.3d 1279, 1283 (Fed. Cir. 2012).

prior to a final Board decision.⁴³⁴ Thus, while the nation's commitment to providing benefits to its veterans is not new, the integration of lawyers in a meaningful way into that system is still in its infancy.

I have discussed elsewhere the salutary effects that the addition of the judge-lawyer has had in connection with veterans' benefits.⁴³⁵ My focus here is on the lawyer as veteran advocate. In my view, lawyers will and should play an increasingly critical role in this system. To begin with, we should not forget that whether one would like lawyers in the system or not, Congress has already decided the question. It does not seem worth the effort to fight this decision.

Even if Congress had not provided for an increased role for lawyers in the veterans' benefits system, I would argue for their presence. As I described in Part III.B. and in discussing the developments over the past three years, the veterans' benefits system is amazingly complex.⁴³⁶ Substantively, one must consider a wide range of issues associated with administrative law, constitutional law, and statutory interpretation to name just a few. These principles are legal ones imposed largely by judges. Lawyers are trained to address these matters. Whether or not the system is non-adversarial, the super-structure of complex legal doctrine calls out for the skills lawyers bring to the table.

In addition to dealing with substantive and procedural complexity, lawyers are also useful in developing a record both for adjudication before the Agency as well as in connection with any judicial appellate proceedings that may be necessary. Take as one example the critical role played by medical evidence in

⁴³⁴ See 38 U.S.C. § 5904(c)(1), enacted as part of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101(c), 120 Stat. 3403, 3407.

⁴³⁵ See Allen, *supra* note 3, at 372-77 (discussing positive effects of the introduction of judicial review under the Veterans' Judicial Review Act).

⁴³⁶ See *supra* Parts II, III.B.

the determination of benefits.⁴³⁷ Lawyers are trained in putting together a factual record with an eye toward the relevant legal standard. All other things being equal, an attorney should be better able to assemble a medical record that addresses the relevant legal framework than would a non-lawyer. And the lawyer would certainly be better at addressing such record issues on appeal whether before the Board or a court.

If lawyers are to play an increasing role in the benefits' system and do it well, it will take work from all those involved. Beginning with the lawyers themselves, it is critical that the men and women who decide to represent veterans and other claimants attend to the fundamentals of professional responsibility. They must ensure that they have an understanding of this complex area of the law that is sufficient to competently represent their clients.⁴³⁸ And they must take care to keep their clients informed of the progress of their cases and otherwise consult with them as required by the professional rules.⁴³⁹ Failures in these basic responsibilities of lawyers will only feed skepticism of the presence of lawyers.

Other actors also bear a responsibility in terms of making lawyers a more integrated and effective part of the benefits' system. For example, VA adjudicators will need to begin to think about lawyers differently now that Congress has ensured that they will be more frequent players. There is no doubt that this change will be difficult. However, VA has been able to adapt to judicial review. It should be able to accept the presence of lawyers in a similar fashion.

Finally, judges have a role to play in terms of integrating lawyers successfully into the system. When reading the decisions

⁴³⁷ See *supra* Part II.D. (discussing significant developments concerning medical matters).

⁴³⁸ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012) (setting forth duty of competent representation).

⁴³⁹ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.4, 1.14 (discussing client communications and clients with diminished capacity).

over the past several years, I was struck by an attitude towards lawyers from the CAVC that is, at best, highly skeptical of their presence in the system and, at worst, affirmatively hostile to it. For example, in one case a judge stated that he believed “the only beneficiaries of the . . . decision are the attorneys who now have every incentive to [take a certain action] . . . in hopes of recovering EAJA fees for minimal effort.”⁴⁴⁰ In still other cases, the CAVC imposed what can be viewed as higher barriers on veterans when they were represented than when they proceeded without legal counsel.⁴⁴¹ The introduction of lawyers cannot be successful if judges are fundamentally unprepared to accept them.

If lawyers are to play a meaningful role in the system, we must all work together. Judicial and administrative hostility must give way to acceptance and the attorneys who elect to represent veterans need to act at the highest professional level. Lawyers are here to stay. We should make their presence an advantage instead of a hindrance.

CONCLUSION

This has been an interesting three-year period in veterans' law. It has seen changes from the introduction of new judges to the growth of procedural and substantive law. It has also been a time of continuity as those working in the system struggle to deal with a massive number of claims. I will end where I usually do when I write or speak about those who devote at least a portion of their professional lives to veterans' law. I am constantly in awe of your collective decision to live out the exhortation of President Abraham Lincoln.⁴⁴²

⁴⁴⁰ Young v. Shinseki, 25 Vet. App. 201, 218 (2012) (Lance, J., dissenting).

⁴⁴¹ See, e.g., Massie v. Shinseki, 25 Vet. App. 123, 126-31 (2011); Cogburn v. Shinseki, 24 Vet. App. 205, 213, 217 (2010).

⁴⁴² See Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *available at* <http://www.nationalcenter.org/LincolnSecondInaugural.html> (calling on the nation “to care for him who shall have borne the battle and for his widow and his orphan”).