

1-1-2011

Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit

Paul R. Gugliuzza

University of Florida Levin College of Law, prgugliuzza@law.ufl.edu

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>



Part of the [Disability Law Commons](#), and the [Military, War and Peace Commons](#)

Recommended Citation

Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 Am. U. L. Rev. 1201 (2011), available at <http://scholarship.law.ufl.edu/facultypub/252>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

VETERANS BENEFITS IN 2010: A NEW DIALOGUE BETWEEN THE SUPREME COURT AND THE FEDERAL CIRCUIT

PAUL R. GUGLIUZZA*

TABLE OF CONTENTS

Introduction.....	1202
I. The Veterans Claims Process and Federal Circuit Jurisdiction.....	1203
II. Supreme Court Review of Veterans Benefits Decisions.....	1210
A. The First Wave? (1988–2008)	1212
B. A New Wave? (2009–present)	1214
C. A New Dialogue Between the Supreme Court and the Federal Circuit.....	1216
III. The 2010 Veterans Benefits Decisions of the Federal Circuit	1220
A. Duty to Assist.....	1222
1. Medical records.....	1222
2. Medical examinations.....	1224
a. Unsupported lay assertions of service connection	1224
b. Persuasive lay testimony of service connection ...	1226
B. Service Connection	1228
1. Medical evidence	1228
a. Private physicians.....	1228
b. Lay testimony	1230
2. Presumed service connection.....	1231
3. Post-traumatic stress disorder.....	1232
4. Rare diseases	1234
5. Dental conditions.....	1237

* Visiting Legal Skills Professor, University of Florida Levin College of Law. J.D., *summa cum laude*, Tulane University School of Law; B.A., B.B.A., University of Oklahoma. I thank Rachel Rebouché for comments on a draft of this Article. I also thank the editors of the *American University Law Review*, particularly Michelle Tessier, for their work on this Article and for organizing an excellent conference on the 2010 decisions of the Federal Circuit.

C. Effective Date.....	1238
1. Claims filed within one year of discharge.....	1238
2. Awards of increased compensation.....	1242
3. Reduction of benefits	1244
D. Procedural Matters.....	1245
1. Clear and unmistakable error	1245
2. Implicit denial rule	1248
a. Informal claims.....	1248
b. Unresolved appeals.....	1250
E. Claims Arising from VA Medical Treatment.....	1251
IV. Veterans Law in the Executive and Legislative Branches.....	1254
A. Executive Branch.....	1254
B. Legislative Branch	1255
Conclusion	1257
Addendum	1258

INTRODUCTION

The Supreme Court of the United States rarely grants certiorari in a veterans benefits case. Congress gave the United States Court of Appeals for the Federal Circuit exclusive jurisdiction over veterans appeals in 1988¹ but, until 2009, the Supreme Court had reviewed only two Federal Circuit veterans decisions.² In the 2010 Term, however, the Court decided its second veterans case in less than two years.³ Although patent lawyers are familiar with a trend of increasing Supreme Court interest in the Federal Circuit's work,⁴ little attention has been paid to the similar, albeit incipient, trend that may be emerging in the field of veterans law.

In this Article, I explore whether the recent increase in Supreme Court veterans cases indicates a new, genuine interest in veterans law or is simply an aberration. Although I conclude that it is too early to tell whether a clear trend is developing, the factors that have potentially contributed to the Court granting certiorari in two cases in three Terms have the potential to fuel a larger veterans docket for

1. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4120-21 (1988).

2. *Scarborough v. Principi*, 541 U.S. 401 (2004); *Brown v. Gardner*, 513 U.S. 115 (1994); 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, 372 n.59 (2009).

3. *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011); *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009).

4. See, e.g., Gregory A. Castanias, Lawrence D. Rosenberg, Michael S. Fried & Todd R. Geremia, *Survey of the Federal Circuit's Patent Law Decisions in 2006: A New Chapter in the Ongoing Dialogue with the Supreme Court*, 56 AM. U. L. REV. 793, 796 (2007); see also *infra* note 72 (citing additional commentary).

the Supreme Court in the future. Most notably, veterans in recent years have increasingly been represented by attorneys with substantial experience in both the Supreme Court and the Federal Circuit, thanks to newly created pro bono programs for veterans who have meritorious claims but no legal counsel.⁵

In addition to exploring the Supreme Court's encounters with veterans law, this Article, as is customary in this issue of the *American University Law Review*, summarizes significant developments in veterans benefits law in 2010, focusing mainly on the decisions of the Federal Circuit.⁶ I also briefly consider important veterans legislation passed by Congress and administrative regulations issued by the United States Department of Veterans Affairs (VA).⁷

The Article proceeds as follows: Part I provides background on the veterans claims process and the Federal Circuit's jurisdiction over veterans cases. Part II explores the emerging dialogue between the Supreme Court and the Federal Circuit on issues of veterans law and concludes that we might be entering a new phase of increased Supreme Court supervision of Federal Circuit veterans decisions. In Part III, I summarize and analyze the important veterans cases decided by the Federal Circuit in 2010. Part IV reviews legislative and administrative developments in the field of veterans law. I conclude by considering what the future may hold for veterans before the Supreme Court, the Federal Circuit, Congress, and the VA.

I. THE VETERANS CLAIMS PROCESS AND FEDERAL CIRCUIT JURISDICTION

As of September 30, 2010, 3.2 million veterans received disability compensation from the VA.⁸ To obtain disability benefits, an eligible veteran⁹ must prove three basic elements: (1) a present disability, (2)

5. See *infra* Part II.C.

6. See *infra* Part III.

7. See *infra* Part IV.

8. Nat'l Ctr. for Veterans Analysis & Stat., *Department of Veterans Affairs Statistics at a Glance*, U.S. DEP'T OF VETERANS AFFAIRS (Dec. 2010), available at <http://www.va.gov/vetdata/docs/Quickfacts/Homepage-quickfacts.pdf>. Veterans are eligible for a wide range of benefits from the VA, from education benefits to life insurance benefits to burial and memorial benefits. See generally U.S. DEP'T OF VETERANS AFFAIRS, *FEDERAL BENEFITS FOR VETERANS, DEPENDENTS & SURVIVORS* (2010), available at http://www1.va.gov/opa/publications/benefits_book.asp (summarizing benefits available from the VA to veterans, dependents, and survivors). Because Federal Circuit case law mainly focuses on medical disability benefits, I focus on that area of law in this background discussion.

9. For an overview of which service members are eligible for benefits and which are not, see Miguel F. Eaton, Sumon Dantiki & Paul R. Gugliuzza, *Ten Federal Circuit Cases from 2009 that Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155,

incurrence or aggravation of a disease or injury while in military service, and (3) a causal connection between the present disability and the in-service disease or injury.¹⁰ A veteran may submit a formal claim for benefits online¹¹ or by submitting a hard-copy form¹² and supporting evidence to a VA regional office (RO).¹³ The RO reviews the claim under the “benefit of the doubt” standard.¹⁴ Under this standard, the VA must grant a veteran’s claim if the evidence in favor of and against the claim is approximately equal.¹⁵

As the benefit of the doubt standard suggests, the claims process is not intended to be adversarial.¹⁶ The VA has a statutory duty to make reasonable efforts to assist a veteran in developing the evidentiary record to support the claim.¹⁷ As part of the duty to assist, the VA must, among other things, obtain relevant medical records for the veteran,¹⁸ provide medical examinations to certain veterans,¹⁹ and notify veterans of the evidence necessary to substantiate their claims.²⁰

1157–58 (2010); *see also* VETERANS BENEFITS MANUAL ch.2 (Barton F. Stichman & Ronald B. Abrams, eds., 2010) (summarizing eligibility criteria for VA benefits).

10. *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009); *see also* 38 U.S.C. § 1110 (2006) (providing benefits “[f]or disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty” during a period of war); *id.* § 1131 (providing benefits for the same disabilities as § 1110 for times other than a period of war).

11. *Veterans Online Application (“VONAPP”)*, U.S. DEP’T OF VETERANS AFFAIRS, <http://vabenefits.vba.va.gov/vonapp/main.asp> (last visited Feb. 28, 2011).

12. *VA Form 21-526*, U.S. DEP’T OF VETERANS AFFAIRS (2009), *available at* <http://www.vba.va.gov/pubs/forms/VBA-21-526-ARE.pdf>.

13. There are fifty-nine VA regional offices, located both in the United States and abroad. *Contact Veterans Benefits Administration*, U.S. DEP’T OF VETERANS AFFAIRS (Sept. 18, 2008), <http://www.vba.va.gov/bln/21/ro/rocontacts.htm>. For a simple overview of the claims and appeals process, *see* HOW DO I APPEAL?, BD. OF VETERANS APPEALS (Apr. 2002) *available at* <http://www.bva.va.gov/docs/Pamphlets/010202A.pdf> [hereinafter HOW DO I APPEAL?]. In addition to formal claims for benefits, certain actions by a veteran or the VA are considered to be informal claims. *See infra* Part III.D.2 (addressing the relationship between informal and formal claims for the same benefits).

14. 38 U.S.C. § 5107(b).

15. *See id.* (“When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.”); *see also* 38 C.F.R. § 3.102 (2010) (further explaining the VA’s policy that “reasonable doubt” be resolved in favor of the veteran).

16. *See* 38 C.F.R. § 3.103(a) (“Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.”).

17. 38 U.S.C. § 5103A(a)(1) (enacted as part of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, § 2, 114 Stat. 2096, 2097).

18. *Id.* § 5103A(b).

19. *Id.* § 5103A(d).

20. *Id.* § 5103(a)(1).

The VA regional office makes the initial decision about whether a veteran is entitled to benefits. If the RO determines that a veteran has a service-connected disability, it then makes two further determinations. First, it determines the severity of the disability by assigning a “rating,” a percentage that accounts for the impairment of earning capacity of an average veteran suffering from the same disability.²¹ The VA will give a 100% disability rating, for example, to a veteran suffering from a disability that would render the average veteran completely incapable of holding gainful employment.²² The rating determines the amount of monthly benefits paid to the veteran.²³

In addition to awarding benefits based on generalizations about the effect of particular disabilities on the average veteran, the system also accounts for the unique circumstances of individual claimants, particularly those who cannot maintain employment. For example, a veteran without a 100% disability rating may still be considered totally disabled if the VA grants “total disability based on individual unemployability,” called “TDIU” in the parlance of veteran’s law.²⁴ To obtain a TDIU rating, the veteran must meet two criteria. First, the veteran must be unable to sustain gainful employment because of a disability connected to military service.²⁵ Second, the veteran must have one disability rated at or above 60% *or* the veteran must have a combined disability rating²⁶ of 70% or more with one of the disabilities rated at 40% or more.²⁷

The second determination made by the VA is the “effective date” for benefits payments, typically a date in the past. By regulation, the effective date is usually the later of: (a) the date the VA received the claim for benefits or (b) the date the veteran became entitled to benefits (i.e., the date the disability arose).²⁸ Thus, upon receiving an

21. *Id.* § 1155.

22. *See* 38 C.F.R. § 4.15 (2010) (explaining the total disability rating).

23. *See* 38 U.S.C. § 1114 (providing the rates of monthly compensation for each disability rating). A veteran’s monthly disability payment can range from \$0 (for a disability rated at 0% impairment of earning capacity) to \$2673 (for a disability rated at 100%). *Id.* § 1114(a)–(j). Veterans who suffer from particularly severe disabilities are entitled to special compensation beyond the normal disability payment. *See id.* § 1114(k)–(s).

24. VETERANS BENEFITS MANUAL, *supra* note 9, at 329–30.

25. *Id.* at 329.

26. In the case of a veteran who suffers from multiple disabilities, the VA rates each disability separately. *Amberman v. Shinseki*, 570 F.3d 1377, 1380 (Fed. Cir. 2009). The VA then uses a “combined ratings table” to calculate a single disability rating used to determine the veteran’s monthly payments. *See* 38 C.F.R. § 4.25.

27. 38 C.F.R. § 4.16(a).

28. *Id.* § 3.400.

award, a veteran will, in addition to receiving benefits in the future, usually receive back payments of benefits to compensate for the time it took the VA to decide the claim.²⁹

If the regional office determines that a veteran is not eligible for benefits, or if the veteran disagrees with the rating or effective date established by the RO, the veteran may file a notice of disagreement, which initiates an appeal to the Board of Veterans' Appeals (Board).³⁰ Once a veteran files a notice of disagreement, the RO must prepare a statement of the case, which, in essence, forms the record on appeal.³¹ The RO sends the statement of the case to the veteran, along with VA Form 9, the substantive appeal form.³² To perfect the appeal to the Board, the veteran must return that form to the RO within sixty days of the date the RO mailed the statement of the case, or within one year of the original RO decision denying the claim, whichever is later.³³

Before further discussing the claims process, it is important to note that, until the veteran files a notice of disagreement and appeals to the Board, the veteran is prohibited from retaining paid counsel to pursue a claim.³⁴ This limitation has, correctly in my view, been criticized.³⁵ Although the VA has a statutory duty to assist the veteran and must resolve all doubts in the veteran's favor, the claims process

29. VETERANS BENEFITS MANUAL, *supra* note 9, at 591; *see, e.g.*, *Carpenter v. Principi*, 15 Vet. App. 64, 68 (2001) (awarding over \$206,000 in past-due benefits).

30. *See* 38 C.F.R. § 3.103(f). The notice of disagreement must be filed within one year from the date that the RO notifies the veteran of its decision. *Id.* § 20.302(a). As an alternative to filing a notice of disagreement, a veteran may first request that the file be reviewed by a Decision Review Officer at the RO who, in essence, performs a second review of the veteran's file. HOW DO I APPEAL?, *supra* note 13, at 4.

31. 38 U.S.C. § 7105(d)(1) (2006); *see* 38 C.F.R. § 19.29 (providing that a statement of the case must contain (1) a summary of evidence in the case, (2) a summary of the applicable law, and (3) the reasons for the RO's ruling).

32. HOW DO I APPEAL?, *supra* note 13, at 6.

33. *See* 38 C.F.R. § 20.302(b)(1). *See generally* 38 U.S.C. § 7105(a) (2006) (outlining the procedure for appeal to the Board).

34. 38 U.S.C. § 5904(c)(1).

35. *See, e.g.*, David R. DiMatteo, Comment, *Walters Revisited: Of Fairness, Due Process, and the Future of Veterans' Fight for the Right to Hire an Attorney*, 80 TUL. L. REV. 975, 976-82 (2006) (collecting criticism of the ban on paid counsel); *see also* Benjamin W. Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney*, 19 FED. CIR. B.J. 433, 446-57 (2010) (analyzing the statistical probability that veterans represented by counsel would succeed more often in their appeals); Matthew J. Dowd, Note, *No Claim Adjudication Without Representation: A Criticism of 38 U.S.C. § 5904(c)*, 16 FED. CIR. B.J. 53, 71-78 (2006) (arguing that the inability to have counsel prior to filing an appeal results in more pro se appeals, which often fail for procedural reasons); John W. Egan, Note, *The Department of Veterans Affairs and the Constitutional Implications of Judicial Review: Veterans' Due Process Right to Hire Counsel*, 16 FED. CIR. B.J. 31, 38-52 (2006) (contending that the prohibition on hiring an attorney violates veterans' due process rights).

is inherently adversarial.³⁶ The government has a scarce resource—benefits funding—that it must allocate among veterans who want it. The VA’s institutional flaws, which are no different than those suffered by any bureaucratic government agency, compound the hostility between veterans and the VA.³⁷ Furthermore, veterans who seek benefits are frequently persons who could most benefit from expert lawyer help to navigate the system. Disability claims raise complex medical issues³⁸ and the veteran’s ability to understand those issues might be obstructed by the very disability for which the veteran is applying for benefits.

Of course, veterans may obtain free help in pursuing their claims from veterans service organizations and law students.³⁹ But data on the success of veterans appearing before the Board (where veterans are, for the first time in the process, permitted to retain paid counsel) suggest that veterans with attorneys fare quite well. In 2009, the Board allowed 24% of all the claims it decided, remanded 37.3%,

36. See *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 31 (2005) (statement of Hon. Kenneth B. Kramer, Former C.J., U.S. Court of Appeals for Veterans Claims) (noting that “[s]ome will oppose [permitting a veteran to retain paid counsel earlier in the claims process] as upsetting the non-adversarial agency process, which in my mind is illusory once you have said ‘no’ to a claimant”); Tom Daschle, *Making the Veterans Administration Work for Veterans*, 11 J. LEGIS. 1, 11 (1984) (“[T]he appeals process is already adversarial. Unfortunately for the veteran, the opposition acts as both defendant and judge.”); Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans’ Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 919 (1975) (“While the VA appears to be a strongly client-oriented organization, . . . the VA is confronted with an impressive number of demands that it regards as unwarranted.”). Congress took a step toward recognizing the de facto adversarial nature of the claims process when it amended § 5904 in 2006 to permit representation by paid counsel before the Board. See Allen, *supra* note 2, at 378–79 (citing Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3407). Previously, veterans could retain counsel only after the Board issued a final decision. See 38 U.S.C. § 5904(c) (2000).

37. See Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL’Y 303, 303 (2004) (explaining the problems of the veterans benefits administration process as resulting from the mixture of the “charity” and the “social insurance” benefits models); James T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 227 (2001) (“The VA ‘paperwork system’ . . . has many significant flaws that deny the ex-soldier or ex-sailor accuracy, efficiency and acceptability: three tenets [*sic*] noted . . . to be the keystones of good administrative procedure.”) (emphasis omitted); Melinda F. Podgor, Note, *The Inability of World War II Atomic Veterans to Obtain Disability Benefits: Time Is Running Out on Our Chance to Fix the System*, 13 ELDER L.J. 519, 529–33 (2005) (asserting that the inefficient VA claims process has resulted in World War II atomic veterans being left without disability benefits).

38. Rabin, *supra* note 36, at 915.

39. Steven K. Berenson, *Legal Services for Struggling Veterans—Then and Now*, 31 HAMLINE J. PUB. L. & POL’Y 101, 134–39 (2009).

and denied 36.1%.⁴⁰ Veterans with attorneys obtained allowance in 22.7% of the cases, remand in 46.4%, and had the claim denied in 28.8%.⁴¹ By comparison, unrepresented veterans fared much worse, having their claims allowed in only 18.7% of cases, remanded in 32.9%, and denied in 46.1%.⁴² If veterans were permitted to retain counsel even earlier in the process—before a claim reaches the Board—veterans might have more success before the RO and, as an additional benefit, reduce the workload of the already overworked Board.

Returning to the appeals process, the Board of Veterans Appeals consists of a chairman, vice chairman, principal deputy vice chairman, and sixty veterans law judges who decide nearly 50,000 appeals annually.⁴³ Appeals are decided by individual members of the Board, or by panels of three or more members.⁴⁴ As with proceedings before the RO, an appeal to the Board is not intended to be adversarial, although, as noted, a veteran may retain paid counsel when appealing to the Board.⁴⁵ At the veteran's request, the Board conducts an in-person (or videoconference) hearing where the Board receives testimony and argument relevant to the appeal.⁴⁶ The Board then issues a decision in writing that must: state findings of fact and conclusions of law; explain the bases for those findings and conclusions; and contain an order allowing, denying, or remanding the claim to the RO or dismissing the appeal.⁴⁷

If the Board denies a claim, the veteran then has four options for continuing to pursue the claim. First, the veteran may ask the Board

40. BD. OF VETERANS APPEALS, FISCAL YEAR 2009 REPORT OF THE CHAIRMAN 21–22 (2009), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf.

41. *Id.*

42. *Id.*

43. *Id.* at 3; *see also* 38 U.S.C. § 7101 (2006) (outlining the composition of the Board).

44. 38 C.F.R. § 19.3(a) (2010). If the Board decides to reconsider its initial decision, the appeal will be considered by a panel of three (in the case of a matter originally heard by a single member) or by an enlarged panel (in the case of a matter originally heard by a panel of members). *Id.* § 19.11(b); *see also id.* § 20.1000 (listing the grounds for reconsideration by the Board).

45. 38 C.F.R. § 20.700(c) (“Hearings conducted by the Board are *ex parte* in nature and nonadversarial.”).

46. *Id.* § 20.700(b), (e). The hearing may take place at either the VA headquarters in Washington, D.C. or at any other VA office capable of hosting hearings. *Id.* § 20.705.

47. 38 U.S.C. § 7104(d); 38 C.F.R. § 19.7(b); *see also* 38 C.F.R. § 19.9(a) (providing that the Board must remand a case to the RO “[i]f further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision”).

to reconsider its decision.⁴⁸ Second, the veteran may return to the RO and seek to reopen the claim. To have a claim reopened, the veteran must present “new and material” evidence supporting the claim.⁴⁹ Third, the veteran may ask either the RO or the Board to review its prior decision because it contained “clear and unmistakable error.”⁵⁰ Unlike a request to reopen, which is based on new evidence, a claim of clear and unmistakable error “must be based on the record and the law that existed at the time of the prior adjudication.”⁵¹ Finally, the veteran may file an appeal with the United States Court of Appeals for Veterans Claims (Veterans Court).⁵²

The Veterans Court is an Article I court with exclusive jurisdiction to review decisions of the Board.⁵³ Only a veteran may appeal to the Veterans Court—the VA has no right to appeal.⁵⁴ The scope of issues that the Veterans Court may decide is very broad and similar to the scope of issues that an Article III circuit court of appeals may consider when reviewing a decision of a district court or an administrative agency. For example, the Veterans Court may (1) decide any relevant questions of law that arise in a benefits proceeding, (2) compel VA action unlawfully withheld or unreasonably delayed, (3) hold unlawful or set aside actions or regulations adopted by the VA, and (4) reverse the VA’s fact-finding if it is clearly erroneous.⁵⁵ Also, just like the Article III courts of appeals, the Veterans Court must apply the harmless-error rule,⁵⁶

48. See *supra* note 44 (discussing the Board’s reconsideration procedure).

49. 38 U.S.C. § 5108; *Norton v. Principi*, 376 F.3d 1336, 1338–39 (Fed. Cir. 2004). There is no time limit on a veteran’s request to reopen a claim. WILLIAM F. FOX, JR., *THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION* 24 (2002).

50. 38 U.S.C. § 7111 (revision by the Board); § 5109A (revision by the RO).

51. *Willsey v. Peake*, 535 F.3d 1368, 1371 (Fed. Cir. 2008). But, like a request to reopen, a veteran may request revision of a Board decision on the grounds of clear and unmistakable error at any time. See 38 U.S.C. § 7111(d).

52. See 38 U.S.C. § 7266(a).

53. *Id.* § 7252(a). The Veterans Court consists of at least three and not more than seven judges who are appointed for fifteen-year terms by the President and confirmed by the Senate. *Id.* § 7253(a)–(c). Currently, the court has seven judges. *Judges*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/about/judges/> (last visited Feb. 28, 2011). The court may decide cases en banc, in panels of three, or, as the court resolves most of its cases, in a decision by a single judge. 38 U.S.C. § 7254(b); see FOX, *supra* note 49, at 21–22 (noting that over seventy-five percent of cases are decided by a single judge).

54. 38 U.S.C. § 7252(a).

55. *Id.* § 7261(a); see also *id.* § 7261(c) (prohibiting the Veterans Court from retrying de novo any factual findings made by the VA or the Board); *cf.* 5 U.S.C. § 706(1)–(2) (2006) (provision of the Administrative Procedure Act permitting the courts of appeals to compel agency action unlawfully withheld or to set aside unlawful agency action); FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . .”).

56. 38 U.S.C. § 7261(b)(2).

which forbids the Veterans Court from reversing a Board decision if the error did not affect a veteran's "substantial rights."⁵⁷

A decision of the Veterans Court may be appealed by the veteran—or the government—to the Federal Circuit.⁵⁸ In contrast to the Veterans Court's broad jurisdiction, the scope of Federal Circuit review is narrow. The Federal Circuit may review the Veterans Court's rulings on questions of law (including issues of constitutional, statutory, or regulatory interpretation).⁵⁹ But it may not review factual determinations, and it may review the application of law to fact only if it implicates a constitutional issue.⁶⁰

A Federal Circuit decision in a veterans case, like any decision by an Article III court of appeals, is reviewable in the Supreme Court of the United States by writ of certiorari.⁶¹ In the past two years, the Supreme Court has used its certiorari jurisdiction more frequently to review veterans cases, a development explored in the next Part.

II. SUPREME COURT REVIEW OF VETERANS BENEFITS DECISIONS

The previous Part outlined the long course that a veteran's benefits claim might follow, winding its way through an administrative agency (the VA), an administrative appeal (before the Board), and judicial review by an Article I court (the Veterans Court) and Article III courts (the Federal Circuit and, possibly, the Supreme Court). But this was not always the process. Until 1988, there was almost no judicial review of veterans benefits determinations.⁶² Congress negated the usual presumption in favor of judicial review of administrative action⁶³ with a statute making the VA's benefits decisions "final and conclusive" and not subject to review by any court or official.⁶⁴ Despite the statutory bar on judicial review of benefits decisions, the Supreme Court permitted court challenges to the

57. *Shinseki v. Sanders*, 129 S. Ct. 1696, 1705 (2009) (quoting 28 U.S.C. § 2111, which codifies the harmless error rule for the Article III courts of appeals) (internal quotation marks omitted).

58. 38 U.S.C. § 7292(a).

59. *Id.* § 7292(d)(1).

60. *Id.* § 7292(d)(2); *Bastien v. Shinseki*, 599 F.3d 1301, 1305 (Fed. Cir. 2010).

61. 28 U.S.C. § 1254(1).

62. FOX, *supra* note 49, at 6–7; Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 43–44 (1994); *History*, U.S. CT. OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/about/History.cfm> (last visited Feb. 28, 2011).

63. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

64. 38 U.S.C. § 211(a) (1988).

constitutionality of VA actions and veterans benefits laws.⁶⁵ Yet the vast majority of the VA's work, determining individual claims for benefits, remained almost entirely immune from judicial review.⁶⁶

In 1988, however, Congress passed the Veterans' Judicial Review Act ("VJRA" or "the Act"), which created a system of judicial review of veterans benefits claims.⁶⁷ The legislation was spurred by general perceptions that VA adjudications lacked consistency and were of poor quality.⁶⁸ The Act created the Veterans Court to review decisions of the Board, and provided that legal issues decided by the Veterans Court could be appealed further to the Federal Circuit.⁶⁹

Because decisions of the Federal Circuit are reviewable on certiorari,⁷⁰ the Act made it possible to appeal (on non-constitutional grounds) a veterans benefits decision all the way to the Supreme Court. Yet, before 2009, the Supreme Court had decided only two veterans cases in the first twenty years of this new framework of judicial review.⁷¹ It is surprising, then, that the Court has decided two additional veterans cases in the past three Terms.

This pattern may seem familiar to those who follow Federal Circuit patent law. It has been well documented that the Supreme Court, after largely ignoring patent decisions for the first twenty years of the

65. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985) (reviewing the constitutionality of a statute that limited to \$10 the fee charged by an attorney in a veterans benefits proceeding); *Cleland v. Nat'l Coll. of Bus.*, 435 U.S. 213, 213 (1978) (per curiam) (entertaining a constitutional challenge to a statute restricting the courses for which veterans educational benefits were available under the GI Bill); *Johnson v. Robison*, 415 U.S. 361, 366–74 (1974) (holding that § 211(a) did not preclude judicial review of a constitutional challenge to the VA's denial of benefits to a conscientious objector); *Hernandez v. Veterans' Admin.*, 415 U.S. 391, 393 (1974) (same); see also *Traynor v. Turnage*, 485 U.S. 535, 543–44 (1988) (permitting judicial review of a claim that the VA wrongly denied a veteran an extension of time within which to use his educational benefits under the GI Bill because execution of the GI Bill was "not the exclusive domain" of the VA).

66. FOX, *supra* note 49, at 11.

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

68. See FOX, *supra* note 49, at 14; Allen, *supra* note 2, at 376–77; Hagel & Horan, *supra* note 62, at 46; James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 253, 255–56 (2010). For years, major veterans groups had actually blocked efforts at introducing judicial review. By 1988, however, the insurgent Vietnam Veterans of America had broken with established veterans groups and "ma[d]e judicial review politically unstoppable" by publicizing the popularity of judicial review among veterans. Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 161–65 (1992).

69. VJRA § 301, 102 Stat. at 4113. The Act also repealed a \$10 statutory limit on attorneys' fees, although veterans were still restricted from obtaining paid representation before the RO and the Board. *Id.* § 104, 102 Stat. at 4108; see *supra* note 36 (discussing the statutory prohibition on paid counsel).

70. 28 U.S.C. § 1254(1) (2006).

71. See *infra* Part II.A.

Federal Circuit's existence, has become exceptionally active in patent law in the past decade.⁷² The recent uptick in Supreme Court veterans cases raises the question of whether we are similarly leaving a laissez faire "first wave" and entering a period of more aggressive Supreme Court oversight.

A. *The First Wave? (1988–2008)*

The two veterans cases decided by the Supreme Court in the first two decades after the enactment of VJRA addressed the same topic: government monetary liability. While all veterans benefits cases are essentially claims against the government for money, what distinguished these cases was that the claims were for compensation beyond what is provided in the typical benefits case.

The first post-VJRA veterans case decided by the Court, the 1994 decision in *Brown v. Gardner*,⁷³ involved a veteran who sought compensation for a lower body injury that, the veteran alleged, was the unintended result of surgery in a VA hospital for a herniated disc.⁷⁴ The question presented was whether, to recover damages for an injury resulting from VA medical treatment, a veteran must prove that the VA was "at fault," i.e., that it acted negligently or carelessly.⁷⁵ The relevant statute provided compensation for "an injury or an aggravation of an injury" that occurred "as the result of" VA medical treatment.⁷⁶ The Court held that the statute did not require the veteran to show fault by the VA.⁷⁷ The Court insisted that the word

72. See, e.g., Castanias et al., *supra* note 4, at 798–816; Rochelle Cooper Dreyfuss, Lecture, *What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787, 792–93 (2010); John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 278 (2002); Timothy B. Dyk, Foreword, *Does the Supreme Court Still Matter?*, 57 AM. U. L. REV. 763, 764–65 (2008); Arthur J. Gajarsa & Lawrence P. Cogswell, III, Foreword, *The Federal Circuit and the Supreme Court*, 55 AM. U. L. REV. 821, 821–23 (2006); John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 658–59 (2009); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1625, 1639–40 (2007). An article in the 2007 Federal Circuit issue of this Journal identified "three waves" of Supreme Court review of Federal Circuit patent cases. Castanias et al., *supra* note 4. In the first wave (1982–94), the Supreme Court took a "hands off" approach to patent law. *Id.* at 798. In a second wave (1995–2002), the Court decided important questions of patent law, but generally affirmed the Federal Circuit. *Id.* at 802–03. Finally, in the current third wave (2002–present), the Court has actively disagreed with the Federal Circuit on questions of patent law, as well as on questions of jurisdiction and procedure in patent cases. *Id.* at 808–10.

73. 513 U.S. 115 (1994).

74. *Id.* at 116.

75. *Id.* at 116–17.

76. *Id.* at 116 (quoting 38 U.S.C. § 1151 (Supp. 1988)) (internal quotation marks omitted).

77. *Id.* at 117.

“injury” did not connote a fault standard and that the “as a result of” language required only a causal connection between the injury and VA treatment.⁷⁸

Ten years later, the Court decided its second post-VJRA veterans case. In *Scarborough v. Principi*,⁷⁹ the veteran prevailed in the Veterans Court, so his attorney applied for fees under the Equal Access to Justice Act (EAJA).⁸⁰ Although the attorney timely filed the fee application, the application did not allege, as required by EAJA, that the government’s litigating position “was not substantially justified.”⁸¹ By the time the attorney realized the mistake, the deadline for filing the application had passed.⁸² The question was whether the attorney could, after the filing deadline, amend the fee application.⁸³

The Court permitted the post-deadline amendment.⁸⁴ It reasoned that the no-substantial-justification requirement was simply a pleading requirement, which was subject to the relation-back doctrine.⁸⁵ That doctrine permits a litigant to cure a defect in the form of a pleading after the filing deadline has passed because the *formally* imperfect filing leaves no doubt about the *substantive* issues to be contested.⁸⁶

Gardner and *Scarborough* were strong candidates for certiorari. Both cases presented questions about the interpretation of statutes imposing financial liability on the federal government.⁸⁷ Moreover, in *Gardner*, the Solicitor General urged the Court to grant certiorari,

78. *Id.* at 117–20. Congress has since amended the relevant statute to require a showing of fault. See 38 U.S.C. § 1151(a) (2006) (requiring claimant to show that injury or death resulted from “carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the [VA]”); see also *infra* Part III.E (discussing 2010 Federal Circuit case applying *Gardner* to acts of omission).

79. 541 U.S. 401 (2004).

80. *Id.* at 408.

81. *Id.* at 409 (quoting 28 U.S.C. § 2412(d)(1)(B)) (internal quotation marks omitted).

82. *Id.* at 409–10.

83. *Id.* at 406.

84. *Id.*

85. *Id.* at 415–16.

86. *Id.* at 415–19; see FED. R. CIV. P. 15(c)(1)(B) (providing that “[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading”).

87. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 248 (8th ed. 2002) (noting that, in cases involving the government, the Court may grant certiorari “where the issues simply concern the construction of a major federal statute” and that “[t]he fact that especially large amounts of money are involved in litigation over the issue of statutory construction may also be a persuasive factor”) (internal quotation marks omitted).

which greatly increased the odds of Supreme Court review.⁸⁸ Although the government opposed review in *Scarborough*,⁸⁹ that case was particularly suitable for certiorari given that the courts of appeals had disagreed on whether an EAJA fee application could be amended after the initial filing deadline had run.⁹⁰ In short, both *Gardner*, which essentially involved a question of federal government tort liability, and *Scarborough*, which presented a clear circuit split on a federal statute of general application, involved issues that the Supreme Court would likely have decided regardless of whether they arose in a veterans case or in some other field.

B. A New Wave? (2009–present)

In the past two years, the Supreme Court has, for the first time, considered issues in veterans cases that do not directly implicate the federal government's financial liability. Instead, both cases decided since 2009 address issues of procedure that, to some extent, apply only to veterans cases.

In its 2009 decision in *Shinseki v. Sanders*,⁹¹ the Court overturned an unusual framework that the Federal Circuit had developed to determine which errors in veterans cases were prejudicial and thus warranted reversal on appeal.⁹² At issue in *Sanders* was the statutory duty of the VA to assist veterans in developing claims. Upon receiving an application for benefits, the VA must notify the veteran of any additional evidence that the VA needs to substantiate the claim.⁹³ The statute also requires the VA to tell the veteran what evidence the veteran must provide and what evidence the VA will attempt to obtain.⁹⁴ In addition, the statute creating the Veterans

88. Brief for the Petitioner at ii, *Brown v. Gardner*, 513 U.S. 115 (1994) (No. 93-1128), 1994 WL 233282; see also STERN ET AL., *supra* note 87, at 221 (noting that “[t]he rate of success for petitions for certiorari filed by the Solicitor General on behalf of the United States is consistently far greater than the overall rate”).

89. See Brief for the Respondent in Opposition at 7, *Scarborough v. Principi*, 541 U.S. 401 (2004) (No. 02-1657), 2003 WL 22428008.

90. See *Scarborough*, 541 U.S. at 410; see also STERN ET AL., *supra* note 87, at 226 (“One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions . . . among the federal courts of appeals.”). Although *Gardner* and *Scarborough* were the Court's only cases arising out of the VJRA judicial review procedure, the Court also encountered veterans law in *Mansell v. Mansell*, a case in which the Court reviewed a decision of a California state court and held that certain military retirement pay was not community property divisible upon divorce. 490 U.S. 581, 594–95 (1989).

91. 129 S. Ct. 1696 (2009).

92. *Id.* at 1700.

93. *Id.* at 1700–01 (citing 38 U.S.C. § 5103A (2006); 38 C.F.R. § 3.159 (2008)); see also *supra* text accompanying notes 17–20 (discussing the duty to assist).

94. *Sanders*, 129 S. Ct. at 1700–01 (citing 38 U.S.C. § 5103; 38 C.F.R. § 3.159).

Court instructs the court to “take due account of the rule of prejudicial error.”⁹⁵ In *Sanders*, the Court reviewed two Federal Circuit decisions that had held certain VA notice errors to be prejudicial, warranting reversal of the agency’s decision.⁹⁶ In so holding, the Federal Circuit had adopted a presumption that *any* notice error is prejudicial and requires reversal unless the VA can show that the error did not affect the “essential fairness” of the proceeding.⁹⁷

The Supreme Court disagreed with the Federal Circuit’s framework, noting that it was too rigid, too complex, and imposed unreasonable burdens on the VA.⁹⁸ The Court emphasized that a “harmless error” framework, whether applied by an Article III court of appeals or by the Veterans Court, must be a “case-specific application of judgment, based upon examination of the record.”⁹⁹

Unlike *Gardner* and *Scarborough*, which resolved medical malpractice and attorneys’ fees issues that arise only in an unusual veterans case, *Sanders* has major significance for ordinary veterans claims, given that over 4000 claims annually are appealed to the Veterans Court.¹⁰⁰ Thus, although it is not beyond dispute, one could argue that the harmless-error question resolved in *Sanders* represented a deeper foray into veterans law than the Court’s prior decisions.

Shortly before this Article went to press, the Court decided its second veterans case in less than two years. At issue in *Henderson v. Shinseki* was whether the 120-day statutory deadline for filing a notice of appeal to the Veterans Court is a “jurisdictional” deadline, which may not be waived by the parties or equitably tolled, or a mere “claims-processing rule,” which may be waived or tolled.¹⁰¹ The en banc Federal Circuit had held, in a 9–3 decision, that the deadline

95. *See id.* at 1701 (quoting 38 U.S.C. § 7261(b)(2)).

96. *Id.* at 1702–03.

97. *Id.* at 1702.

98. *Id.* at 1700.

99. *Id.* at 1705.

100. *See Annual Reports*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, available at http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf [hereinafter VETERANS COURT ANNUAL REPORTS] (noting that, for fiscal year 2009, 4725 new cases were filed in the Veterans Court).

101. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200 (2011); *see also* 38 U.S.C. 7266(a) (2006) (“In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans’ Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed . . .”).

for appealing a Board decision is a jurisdictional requirement.¹⁰² The Supreme Court, in an opinion by Justice Alito, unanimously reversed.¹⁰³

The Court noted that, although the 120-day deadline for appealing to the Veterans Court is established by statute, not all statutory deadlines for appeal are jurisdictional.¹⁰⁴ In the Court's view, the "unique administrative scheme" for reviewing veterans benefits determinations required a contextual inquiry into whether Congress intended the deadline at issue to be jurisdictional.¹⁰⁵ The Court emphasized the pro-veteran, informal, and non-adversarial nature of the veterans benefits system in determining that Congress did not intend the appeal deadline to have jurisdictional consequences.¹⁰⁶

The resolution of the procedural question in *Henderson*, like the holding in *Sanders* overturning the Federal Circuit's harmless-error framework, is directly relevant to veterans cases only. *Henderson* did not, for example, resolve a circuit split over a generally applicable question of procedural law. *Henderson* did, however, implicate a larger debate over which deadlines in federal law are jurisdictional (and hence not subject to waiver or tolling) and which are not.¹⁰⁷ The Court's opinion in *Henderson* will likely provide guidance to future courts addressing similar questions in other areas of law. Yet, like the opinion in *Sanders*, it will not *directly* impact legal analysis in fields besides veterans law.

C. *A New Dialogue Between the Supreme Court and the Federal Circuit*

It is too early to conclude whether the Supreme Court has developed a genuine interest in veterans law, or whether the recent increase in veterans cases is simply an anomaly. But whether the

102. *Henderson v. Shinseki*, 589 F.3d 1201, 1212 (Fed. Cir. 2009) (en banc) (citing *Bowles v. Russell*, 551 U.S. 205 (2007)).

103. *Henderson*, 131 S. Ct. at 1206. Justice Kagan was recused. *Id.* at 1207.

104. *Id.* at 1203.

105. *Id.* at 1204.

106. *Id.* at 1205–06.

107. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1241 (2010) (holding non-jurisdictional a requirement of the Copyright Act that a plaintiff register the work before suing for infringement); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132–34 (2008) (holding jurisdictional a time limit on suits filed against the federal government in the Court of Federal Claims); *Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that the time limit for filing a notice of appeal in a civil case is jurisdictional); *see also* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 504 (2006) (holding non-jurisdictional a requirement of Title VII that an employer-defendant have fifteen or more employees); *Kontrick v. Ryan*, 540 U.S. 443, 447 (2004) (holding non-jurisdictional a deadline contained in the Federal Rules of Bankruptcy Procedure for objecting to a debtor's discharge).

increase is a trend or an aberration, it is worthwhile to consider what might be causing the Court's veterans docket to grow. This inquiry is interesting not only as an academic matter. It could also provide insight into which future cases might be strong candidates for Supreme Court review. I do not intend this to be an exhaustive discussion of the factors driving the Court's growing veterans docket. Rather, I offer these preliminary observations simply to lay a foundation for future discourse and to complement emerging scholarship on factors shaping the Supreme Court's current docket.¹⁰⁸

This emerging scholarship has focused on expert Supreme Court advocates as a powerful force in shaping the Court's docket, so the most plausible explanation for the Court's burgeoning veterans docket might similarly involve the lawyers litigating the cases. The Court accepted review in *Sanders* based on the Solicitor General's petition for certiorari.¹⁰⁹ In *Henderson*, the Court granted certiorari based on a petition filed by attorneys from the appellate and Supreme Court practice group at the law firm of Arnold & Porter.¹¹⁰ These experienced Supreme Court litigators stood a much better chance of securing review than the average veterans attorney,¹¹¹ or, as occurs frequently, the veteran proceeding pro se.¹¹²

108. See, e.g., Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 89–90 & n.3 (2009), available at

<http://yalelawjournal.org/2010/01/24/lazarus.html> (suggesting that the Court's docket may be "captured" by "powerful economic interests" represented by an "expert Supreme Court bar" "that know[s] best how to influence the decisionmaking of the Justices at the jurisdictional stage"); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490–91 (2008) [hereinafter Lazarus, *Advocacy Matters*] (similar); see also Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 18, 2010, http://www.nytimes.com/2010/12/19/us/19roberts.html?_r=1&pagewanted=all ("The Roberts court's engagement with business issues has risen along with the emergence of a breed of lawyers specializing in Supreme Court advocacy, many of them veterans of the United States solicitor general's office, which represents the federal government in the court. These specialists have been extraordinarily successful, both in persuading the court to hear business cases and to rule in favor of their clients.").

109. See Petition for a Writ of Certiorari at 7–9, *Peake v. Sanders*, 129 S. Ct. 1696 (2008) (No. 07-1209), 2008 WL 782560.

110. See Petition for a Writ of Certiorari at 2, *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) (No. 09-1036), 2010 WL 688025. Counsel of record on the petition was a former Assistant to the Solicitor General. See *Lisa S. Blatt*, ARNOLD & PORTER LLP, http://www.arnoldporter.com/professionals.cfm?u=BlattLisaS&action=view&id=5409&bio_practice_id=893 (last visited Feb. 28, 2011).

111. See Lazarus, *Advocacy Matters*, *supra* note 108, at 1493–94, 1498–99 (examining how attorneys from the Office of the Solicitor General, armed with expertise and the trust of the Court, created profitable Supreme Court practice groups in private law firms).

112. See VETERANS COURT ANNUAL REPORTS, *supra* note 100, at 1 (noting that, for fiscal year 2009, sixty-eight percent of veterans were self-represented upon filing the

As the *Henderson* case suggests, veterans with non-frivolous claims receive better representation today than ever before. In April 2007, the Federal Circuit Bar Association created a pro bono program matching seasoned Federal Circuit litigators with veterans who have meritorious appeals but no legal counsel.¹¹³ In addition, other veterans organizations have in recent years recruited experienced appellate litigators to handle veterans cases.¹¹⁴ As a result of these efforts, scores of veterans have been represented in the Federal Circuit by firms with extensive experience in that court.¹¹⁵ With expert appellate litigators representing an increasing number of veterans in the Federal Circuit and on certiorari to the Supreme Court, veterans cases could begin to occupy the Court's docket to a greater extent than in the past.¹¹⁶

Fueling the pro bono interest in veterans law and, indirectly, the Court's veterans docket, might be recent, disturbing examples of stress on the veterans benefits system and disarray in the benefits process. *The Washington Post's* high-profile exposé of the Walter Reed Medical Center called widespread attention to the squalid conditions and bureaucratic confusion encountered by many wounded soldiers upon return from battle.¹¹⁷ Since then, many journalists and

appeal, and twenty-eight percent remained unrepresented upon the closure of the case).

113. See *Veterans Pro Bono Initiative*, FEDERAL CIRCUIT BAR ASS'N, 1 (April 2007), available at <http://memberconnections.com/olc/filelib/LVFC/cpages/11/Library/VETERANS%20PRO%20BONO%20PROGRAM%20PDF.pdf> (noting that the program was created because of the increased number of pro se veterans appeals in recent years, a number which may further increase in the future).

114. See Laura Parker, *Lawyers Step Up to Help Veterans Gratis*, U.S.A. TODAY, Nov. 26, 2007, http://www.usatoday.com/news/nation/2007-11-26-valawyers_N.htm (discussing the recruitment efforts of the National Veterans Legal Services Program).

115. See, e.g., *Henderson v. Shinseki*, 589 F.3d 1202, 1220 n.12 (Fed. Cir. 2009) (en banc) (Arnold & Porter LLP), *rev'd*, 131 S. Ct. 1197 (2011); *Moore v. Shinseki*, 555 F.3d 1369, 1379 (Fed. Cir. 2009) (Wiley Rein LLP); *Phillips v. Shinseki*, 581 F.3d 1358, 1361 (Fed. Cir. 2009) (Sidley Austin LLP); *Edwards v. Shinseki*, 582 F.3d 1351, 1352 (Fed. Cir. 2009) (Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P.); *Cushman v. Shinseki*, 576 F.3d 1290, 1291 (Fed. Cir. 2009) (Morrison & Foerster LLP); *Comer v. Peake*, 552 F.3d 1362, 1364 (Fed. Cir. 2009) (Weil, Gotshal & Manges LLP); *Hogan v. Peake*, 544 F.3d 1295, 1295 (Fed. Cir. 2008) (Wilmer Cutler Pickering Hale & Dorr LLP).

116. I do not intend to denigrate the hard work of solo and small-firm practitioners who zealously represent the interests of their veteran clients. My point is only that it is nearly beyond debate that a small number of lawyers—almost invariably associated with large, corporate law firms—have significant influence on the Supreme Court's docket, see *supra* note 108, and that, to the extent those lawyers become more involved in veterans cases, the more likely it is that the Supreme Court's veterans docket will grow.

117. Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/17/AR2007021701172.html>.

commentators have chronicled current and looming challenges for the VA in dealing with veterans returning from Iraq and Afghanistan, problems that are exacerbated by repeat deployments, waning public support for military action, and economic difficulties awaiting veterans at home.¹¹⁸ It is the appalling treatment endured by returning soldiers that has spurred many experienced litigators to lend support to the cause of disabled veterans.¹¹⁹

There are, however, ready responses to the claim that better representation for veterans is driving the growth in veterans cases before the Supreme Court. Importantly, although both *Sanders* and *Henderson* are superficially relevant to veterans cases only, both decisions fit into larger jurisprudential trends at the Court. *Henderson*, for example, can be seen as part of the Court's effort to eliminate so-called drive-by jurisdictional rulings.¹²⁰ Because the characterization of a rule as "jurisdictional" has drastic and potentially wasteful consequences (by requiring the dismissal of a case at an advanced stage of proceedings),¹²¹ the Court has taken great pains in recent years to distinguish jurisdictional rules from substantive-merits rules and claims-processing rules.¹²² Viewed in this light, *Henderson*, which held that the deadline for appealing to the Veterans Court is a mere claims-processing rule, is simply another chapter in this larger jurisprudential narrative.

In addition, *Sanders* could arguably be viewed as one salvo in the Supreme Court's on-going quest to ensure that the Federal Circuit applies the same procedural and remedial rules as other courts, notwithstanding the Federal Circuit's unique subject-matter jurisdiction.¹²³ For example, in recent years, the Supreme Court has overturned the Federal Circuit's inflexible rule that an injunction should automatically follow a finding of patent infringement,

118. See, e.g., Allen, *supra* note 2, at 363 (citing *Washington Post* and *New York Times* commentary); James Dao, *Mental Health Problems Plague Returning Veterans*, N.Y. TIMES, July 17, 2009, at A10 (noting the significant number of Iraq and Afghanistan veterans suffering from mental health problems); Erik Eckholm, *For Veterans, a Weekend Pass from Homelessness*, N.Y. TIMES, July 26, 2009, at A13 (addressing the increasing number of younger veterans from Iraq and Afghanistan who have ended up homeless); see also *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1055 (N.D. Cal. 2008) (dismissing a suit challenging various aspects of veterans benefits system, noting that "[t]he remedies to the problems, deficiencies, delays and inadequacies complained of are not within the jurisdiction of this Court").

119. Parker, *supra* note 114.

120. See Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings"*, 105 NW. U. L. REV. COLLOQUY 184, 184–85 (2011).

121. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

122. Wasserman, *supra* note 120, at 184–85.

123. See Castanias et al., *supra* note 4, at 815.

emphasizing instead that the traditional multi-factor test for injunctive relief should apply.¹²⁴ Similarly, the Supreme Court has ruled that, when reviewing fact-finding by the U.S. Patent and Trademark Office, the Federal Circuit should apply the substantial-evidence standard of the Administrative Procedure Act—the same standard applied by regional circuits reviewing agency fact-finding.¹²⁵ Further examples of the Supreme Court’s disapproval of patent-specific procedural and remedial rules abound.¹²⁶ In the context of this case law, *Sanders*, which held that the Federal Circuit must apply to veterans appeals the same harmless-error standard applied in other fields of law, could be seen as just another example of the Supreme Court insisting that the Federal Circuit use the same procedural and remedial rules as other federal courts.¹²⁷

Working with such a small sample set, it is impossible to confidently predict whether the recent increase in Supreme Court veterans cases is a clear trend or simply an aberration. What is clear, however, is that the foundation for a robust Supreme Court veterans docket is in place. Improved representation for veterans pursuing appeals to the Federal Circuit and the Supreme Court as well as an ever-increasing number of veterans seeking benefits¹²⁸ should give rise to scores of challenging questions of veterans law in the years ahead.

III. THE 2010 VETERANS BENEFITS DECISIONS OF THE FEDERAL CIRCUIT

One trend, however, clearly cuts against projections of a larger number of Supreme Court veterans cases in the years to come. In

124. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391–92 (2006).

125. *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999) (overturning Federal Circuit holding that the clearly erroneous standard applies).

126. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832–34 (2002) (rejecting the argument that the phrase “arising under,” as relevant to the Federal Circuit’s jurisdiction over cases “arising under” the patent laws, should be interpreted differently than the same phrase as relevant to general federal question jurisdiction); *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 810–11 (1986) (per curiam) (emphasizing that the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) applies to district-court factual determinations underlying patent law’s obviousness inquiry).

127. The Supreme Court’s rejection in *Sanders* of the Federal Circuit’s rigid presumption of prejudicial error might also be seen as part of the Supreme Court’s continuing displeasure with the Federal Circuit for favoring rigid, bright-line rules over flexible standards. *See* Gregory A. Castanias, Douglas R. Cole, Jennifer L. Swize, Vaishali Udupa & Tiffany D. Lipscomb-Jackson, *Survey of the Federal Circuit’s Patent Law Decisions in 2010: The Advent of the Rader Court*, 60 Am. U. L. Rev. 845, 855–62 (2011).

128. *See infra* note 501 and accompanying text (noting that the number of claims received annually by the VA has increased from 579,000 to 1,014,000 in 2009).

2010, the Federal Circuit decided only fourteen veterans cases by precedential opinion.¹²⁹ From 2007 to 2009, by contrast, the court annually decided an average of twenty-five veterans cases by precedential opinion.¹³⁰ Notwithstanding the smaller number of precedential decisions, the opinions, as usual, covered a wide range of veterans law issues. Although it is difficult to trace a coherent theme through decisions on such varied topics, many of the decisions reflect a preference for a flexible, standards-based approach to deciding veterans claims. The decisions tend to reject categorical rules, whether those rules were adopted by the Veterans Court (such as a rule automatically rejecting the opinions of physicians who do not review a veteran's in-service medical record),¹³¹ or proposed by claimants (such as a rule that the VA must always provide a medical examination as part of the duty to assist).¹³²

This Part summarizes each one of this year's precedential Federal Circuit veterans rulings. As would be expected in a comprehensive survey, some of the opinions discussed are highly significant for future cases while others are fact-specific and less likely to have long-term doctrinal relevance. Thus, while I provide a summary of each case, I offer more extensive commentary on the decisions that may be important to veterans going forward.

I discuss the cases in the order in which the issues they address would generally be encountered in a benefits proceeding, beginning with the VA's statutory duty to assist a veteran in developing a benefits claim. I then turn to the questions of whether a veteran's disability is connected to military service and, if so, the date on which the benefits award should be effective.¹³³ I conclude by discussing matters of procedure (such as the revision of erroneous claim decisions and the VA's implicit denial of claims it mistakenly leaves pending) and compensation for injuries resulting from VA medical treatment.

129. As might be expected given the Federal Circuit's jurisdiction to review only questions of law in veterans cases, the majority of Federal Circuit non-precedential dispositions were dismissals for lack of jurisdiction. One can confirm this assertion by searching Westlaw's Federal Circuit database (CTAF) for decisions on review from the Veterans Court.

130. See *infra* addendum fig.1 (illustrating the number of precedential veterans opinions issued by the Federal Circuit each year since 2000); see also *infra* addendum fig.2 (noting a similar decrease in the total number of veterans cases decided by the Federal Circuit).

131. *Gardin v. Shinseki*, 613 F.3d 1374, 1378 (Fed. Cir. 2010).

132. *Waters v. Shinseki*, 601 F.3d 1274, 1278–79 (Fed. Cir. 2010).

133. The Federal Circuit in 2010 issued no precedential opinions discussing VA ratings decisions, so this Part does not discuss that significant aspect of VA adjudication.

A. *Duty to Assist*

The Federal Circuit decided three cases in 2010 clarifying the scope of the duty to assist. One case addressed the VA's duty to obtain relevant medical records and a pair of cases discussed the VA's duty to provide medical examinations to help substantiate claims. I discuss each issue in turn.

1. *Medical records*

The statutory duty to assist requires the VA to make "reasonable efforts" to help a veteran obtain the evidence needed to establish the claim for benefits.¹³⁴ In making "reasonable efforts," the VA is not required to obtain all of the veteran's medical records. Rather, the VA need only obtain records that are relevant to the claim.¹³⁵ In *Golz v. Shinseki*,¹³⁶ the Federal Circuit elaborated on which medical records are considered relevant, holding that the VA need only obtain records that relate to the injury for which the veteran is seeking benefits and that have a "reasonable possibility" of helping to substantiate the claim.¹³⁷

The veteran, Julius Golz, served in the Navy from 1969 to 1972.¹³⁸ In 1995, the Social Security Administration found that Golz was disabled due to back and leg pain caused by a car accident.¹³⁹ The Social Security decision did not discuss any psychiatric or mental health issues.¹⁴⁰ Golz then sought benefits from the VA for service-connected post-traumatic stress disorder.¹⁴¹ The VA denied the claim and Golz appealed to the Board, asserting that the VA violated its duty to assist by not obtaining the medical records accompanying the Social Security decision.¹⁴² The Board affirmed the denial of benefits, noting that it reviewed a copy of the Social Security decision itself, which did not mention a psychiatric disorder, indicating that the accompanying medical records would not be relevant to Golz's post-traumatic stress disorder claim.¹⁴³ The Veterans Court affirmed, as did the Federal Circuit.¹⁴⁴

134. 38 U.S.C. § 5103A(a)(1) (2006).

135. *McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008).

136. 590 F.3d 1317 (Fed. Cir. 2010).

137. *Id.* at 1321.

138. *Id.* at 1319.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1319–20.

143. *Id.* at 1320.

144. *Id.* at 1320, 1323.

Writing for the court, Judge Moore began by making clear that the duty to assist requires the VA to obtain only medical records that are relevant to the claim at hand:

There can be no doubt that Congress intended VA to assist veterans in obtaining records for compensation claims, but it is equally clear that Congress only obligated the VA to obtain “relevant” records. The duty to assist requires the Secretary to make reasonable efforts to obtain “evidence necessary to substantiate the claimant’s claim for a benefit.”¹⁴⁵

The court then outlined what it considered to be relevant records: “Relevant records for the purpose of § 5103A are those records that [1] relate to the injury for which the claimant is seeking benefits and [2] have a reasonable possibility of helping to substantiate the veteran’s claim.”¹⁴⁶

The court noted that the Social Security decision, which primarily addressed claims of back pain, did not indicate that the proceeding examined Golz’s mental health.¹⁴⁷ Because the Veterans Court applied the correct legal standard in assessing the relevance of the Social Security medical records (whether the records were related to Golz’s mental health or might help establish his claim), the Federal Circuit affirmed.¹⁴⁸

The opinion also contained important guidance for the VA and the Veterans Court in applying the “relevance” standard. The court emphasized that a record’s relevance cannot always be determined without reviewing the record itself.¹⁴⁹ The VA must “examine the information it has related to [the] medical records” and obtain the records if there is a “specific reason” to believe that the record contains pertinent information.¹⁵⁰ “In close or uncertain cases,” the court cautioned, “the VA should be guided by the principles underlying this uniquely pro-claimant system.”¹⁵¹

The standards-based approach of *Golz* makes plain that the VA has no rigid obligation to obtain medical records that, judging by the information the VA possesses, appear irrelevant. But if the information suggests a *reasonable possibility* that the records *could* help

145. *Id.* at 1321 (quoting 38 U.S.C. §§ 5103A(a)(1), (b)(1) (2006)).

146. *Id.* (citing BLACK’S LAW DICTIONARY 1316 (8th ed. 2004)).

147. *Id.* at 1322.

148. *Id.* at 1322–23.

149. *Id.* at 1323.

150. *Id.*

151. *Id.* (emphasizing that the VA must “fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits” (quoting *McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008)) (internal quotation marks omitted)).

establish the claim, the VA must retrieve the records.¹⁵² Given the court's emphasis that the relevant inquiry should be resolved in the claimant's favor in close cases, the VA should keep the bar for establishing relevance low.

2. *Medical examinations*

The statutory duty to assist also requires the VA to provide the veteran with a medical examination when necessary to make a decision on a claim for benefits.¹⁵³ Obtaining a VA-provided medical examination is often crucial to establishing a claim for service-connected benefits. Without a VA-provided examination, the veteran must pay for the specialized opinion of a private physician. Moreover, the private physician will likely be unfamiliar with the veteran's service medical record and the evidentiary standards unique to veterans claims.¹⁵⁴ In 2010, the Federal Circuit decided a pair of cases that, taken together, show that it is difficult, but not impossible, for a veteran to obtain a VA medical examination based solely on the veteran's own assertions of service connection, as opposed to medical evidence of service connection.

a. *Unsupported lay assertions of service connection*

In *Waters v. Shinseki*,¹⁵⁵ the Federal Circuit held that the duty to assist does not require the VA to grant medical examinations "routinely and virtually automatically."¹⁵⁶ Rather, the VA must grant a medical examination only when the claimant satisfies a three-part test set forth in the statute.¹⁵⁷

George Waters was diagnosed with paranoid schizophrenia while serving on active military duty.¹⁵⁸ After Waters left the service, he was diagnosed with hypertension, depression, and diabetes.¹⁵⁹ Waters sought compensation from the VA for these newly diagnosed disabilities, claiming that antipsychotic drugs administered during service caused his hypertension and diabetes.¹⁶⁰ The VA denied the claims, finding that there was no competent evidence of connection between Waters's in-service schizophrenia and his current diagnoses

152. *Id.* at 1322.

153. 38 U.S.C. § 5103A(d)(1) (2006).

154. *See Duenas v. Principi*, 18 Vet. App. 512, 521 (2004) (Hagel, J., concurring).

155. 601 F.3d 1274 (Fed. Cir. 2010).

156. *Id.* at 1278–79.

157. *Id.* at 1276–77 (citing 38 U.S.C. § 5013A(d)(1)).

158. *Id.* at 1275.

159. *Id.*

160. *Id.*

of diabetes and hypertension.¹⁶¹ On appeal to the Veterans Court, Waters claimed that the VA did not satisfy its duty to assist because it had not provided a medical examination.¹⁶² The Veterans Court rejected the argument, noting that the only evidence that Waters's current disability was connected to his military service was Waters's own statements, and that his lay assertions did not trigger the VA's duty to provide a medical examination.¹⁶³

The Federal Circuit affirmed in an opinion by Judge Friedman.¹⁶⁴ The court began by reiterating that the VA is required to provide a medical examination only when the examination is "necessary to make a decision on the claim."¹⁶⁵ The court pointed out that the statute provides a three-part test for determining when an examination is "necessary" to make a decision:

The [VA] shall treat an examination or opinion as being necessary to make a decision on a claim . . . if the evidence of record before the [VA] . . . (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 [VA] to make a decision on the claim.¹⁶⁶

The court emphasized that each subsection imposes its own evidentiary standard, requiring either "competent evidence," "evidence . . . indicat[ing]," and "medical evidence," respectively.¹⁶⁷ The court thus faulted the Board for finding that Waters presented no "competent" medical evidence of a nexus between his service and his disability, when the pertinent subsection, subsection B, requires only "evidence . . . indicat[ing]" service connection.¹⁶⁸ But the Federal Circuit found this error to be harmless because the Veterans Court had found that the record contained no evidence of service connection, other than Waters's own statement.¹⁶⁹ The court rejected Waters's argument that his lay assertion of service connection,

161. *Id.*

162. *Id.* at 1276.

163. *Id.*

164. *Id.* at 1275.

165. *Id.* at 1276 (quoting 38 U.S.C. § 5103A(d)(1) (2006)) (internal quotation marks omitted).

166. *Id.* at 1276–77 (quoting 38 U.S.C. § 5103A(d)(2)) (internal quotation marks omitted).

167. *Id.* at 1277.

168. *Id.*

169. *Id.* at 1277–78.

standing alone, entitled him to a medical examination.¹⁷⁰ The court noted that if it were to accept this argument, it would render superfluous “the carefully drafted statutory standards governing the provision of medical examinations.”¹⁷¹

Yet Waters’s argument finds support in the plain language of subsection B, which mandates a medical examination if there is “evidence . . . indicat[ing]” service connection.¹⁷² Given that subsection A explicitly modifies the word “evidence” with the adjective “competent,” the omission of any modifier in subsection B appears to require only *some* evidence, “competent” or not.¹⁷³ The Federal Circuit’s interpretation, however, reflects concerns about upsetting Congress’s intent and about the consequences of a literal reading of subsection B.¹⁷⁴ If one were to read subsection B as requiring only “some” evidence of service connection, any veteran who asserted service connection, even without any persuasive evidence, would likely be entitled to a medical examination.¹⁷⁵ If Congress had intended for claimants to receive medical examinations practically on demand, it would not have drafted the statute to allow for medical examinations only when “necessary” to decide a claim.¹⁷⁶ Perhaps Congress, through a more carefully drafted definition of the term “necessary,” could have saved the court the trouble of interpreting around the statute’s plain language.

b. Persuasive lay testimony of service connection

Although the court in *Waters* held that a veteran may not receive a medical examination based on an unsupported assertion of service connection, the Federal Circuit, in its 2010 decision in *Colantonio v. Shinseki*,¹⁷⁷ clarified that sufficiently persuasive lay testimony can, standing alone, entitle a veteran to a medical examination.¹⁷⁸

170. *Id.* at 1278.

171. *Id.*

172. 38 U.S.C. § 5103A(d)(2)(B) (2006).

173. Compare *id.* § 5103A(d)(2)(A) (requiring “competent evidence” of a “current disability”), with *id.* § 5103A(d)(2)(B) (requiring “evidence . . . indicat[ing]” possible service connection).

174. *Waters*, 601 F.3d at 1278.

175. See *id.* (“At oral argument Waters contended that his conclusory generalized statement that his service illness caused his present medical problems was enough to entitle him to a medical examination under the standard of subsection B. Since all veterans could make such a statement, this theory would . . . require the [VA] to provide such examinations as a matter of course in virtually every veteran’s disability case.”).

176. 38 U.S.C. § 5103A(d)(1).

177. 606 F.3d 1378 (Fed. Cir. 2010).

178. *Id.* at 1382.

Quareno Colantonio served in the Army during World War II.¹⁷⁹ In 1999, he filed a claim with the VA, seeking compensation for a back injury connected to his military service.¹⁸⁰ Because there was no record of Colantonio having suffered a back injury while in service, the VA denied the claim.¹⁸¹ The Board agreed that there was no service connection because the only evidence of an in-service back injury came from Colantonio's own statements and, in the Board's opinion, Colantonio lacked competence to provide medical opinion testimony.¹⁸² The Veterans Court agreed, noting that Colantonio's lay testimony "cannot provide the requisite medical nexus" and that "[a] lay person is not competent to opine on matters requiring medical knowledge, such as etiology of a condition or nexus."¹⁸³ On appeal, the Federal Circuit determined that this ruling was inconsistent with *Waters* and remanded.¹⁸⁴

The court noted that the Veterans Court's ruling could be interpreted to mean "that a veteran's lay testimony can *never* be sufficient in itself to satisfy the nexus requirement in section 5103A(d)(2)(B)."¹⁸⁵ Such a ruling, the Federal Circuit noted, would conflict with *Waters*, which made clear that subsection B requires only evidence "indicat[ing] that the disability . . . may be associated with . . . military . . . service" and does not necessarily require "competent medical evidence" to establish a nexus between service and a later disability.¹⁸⁶ The court concluded: "We reiterate the interpretation of subparagraph B adopted in *Waters*: that medically competent evidence is not required in every case to 'indicate' that the claimant's disability 'may be associated' with the claimant's service."¹⁸⁷

It is often not possible to establish, through lay evidence, a nexus between a current disability and military service. But the Federal Circuit's 2010 decisions in *Golz*, *Waters*, and *Colantonio* reflect an effort to balance the interests of veterans, who might not be able to afford persuasive medical evidence, with a desire to protect the scarce medical resources of the VA. In some cases, like *Waters*, the lay evidence may be too self-serving to warrant a VA medical exam.¹⁸⁸

179. *Id.* at 1379.

180. *Id.*

181. *Id.* at 1380.

182. *Id.*

183. *Id.* (internal quotation marks omitted).

184. *Id.* at 1382.

185. *Id.* at 1381 (emphasis added).

186. *Id.* at 1381–82 (quoting 38 U.S.C. § 5103A(d)(2)(B) (2006)).

187. *Id.* at 1382.

188. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010).

But, as the court made clear in *Colantonio*, subparagraph B requires only a “minimal showing” of nexus that can sometimes be satisfied by persuasive lay testimony,¹⁸⁹ such as detailed statements of family members, friends, and coworkers regarding the symptoms and history of the disability and the effect of the disability on the veteran.¹⁹⁰

B. Service Connection

As this discussion of *Waters* and *Colantonio* suggests, the required nexus between the current disability and military service is typically established through medical evidence: a statement by a physician expressly connecting the veteran’s disability to military service.¹⁹¹ For certain veterans suffering from certain diseases, however, Congress and the VA have adopted legal presumptions that the diseases are service connected, obviating the need for the veteran to present evidence of a nexus.¹⁹² For veterans whose claims are subject to these presumptions, the VA must show that a particular veteran’s disease is *not* service connected.¹⁹³

In summarizing the Federal Circuit’s 2010 decisions on principles of service connection, I first discuss cases addressing the medical evidence necessary to establish the required connection between a current disability and military service. I then address cases examining the presumptions for establishing service connection. Finally, I discuss a series of cases that discuss principles of service connection as applied to a range of different disabilities that are not presumed to be service connected.

1. Medical evidence

a. Private physicians

While veterans often rely on reports by VA physicians to establish service connection, they may also submit evidence from private physicians.¹⁹⁴ In *Gardin v. Shinseki*,¹⁹⁵ the Federal Circuit held that the

189. *Colantonio*, 606 F.3d at 1382.

190. See VETERANS BENEFITS MANUAL, *supra* note 9, at 895–96.

191. *Id.* at 104.

192. *Id.* at 125; see, e.g., 38 U.S.C. §§ 1111–12, 1116, 1118 (2006) (setting forth various presumptions applicable to benefits proceedings).

193. See VETERANS BENEFITS MANUAL, *supra* note 9, at 125.

194. See 38 U.S.C. § 5125 (“For purposes of establishing any claim for benefits . . . a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits . . . may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.”).

VA may not automatically discount a private physician's opinion merely because the physician did not review the veteran's in-service medical record.¹⁹⁶

Wayne Gardin served in the Air Force from 1959 to 1963.¹⁹⁷ While in service, he developed symptoms consistent with diabetes.¹⁹⁸ He was, however, not diagnosed with the disease until 1971, after he had been discharged.¹⁹⁹

The VA denied his initial claim for benefits because his service records did not indicate treatment for diabetes.²⁰⁰ To establish a nexus between his service and diabetes, Gardin then submitted (1) lay testimony by his family and friends stating that he had diabetes around the time of discharge and (2) medical reports by three physicians summarizing Gardin's history of diabetes.²⁰¹ The Board found the lay testimony not credible because it conflicted with the medical evidence.²⁰² The Board also found Gardin's medical evidence not credible.²⁰³ The Board rejected the report of one particular physician because the report did not indicate that the doctor reviewed Gardin's "actual service medical records."²⁰⁴ The Veterans Court affirmed, but the Federal Circuit vacated that ruling.²⁰⁵

The Federal Circuit noted that the statute expressly permits veterans to submit reports from private physicians²⁰⁶ and that the implementing regulation requires only that a physician issuing a report be "qualified through education, training, or experience."²⁰⁷ The Federal Circuit held that the Veterans Court erred by holding that a private physician *must* review service medical records before opining on service connection.²⁰⁸ The court also made clear, however, that a private physician's failure to review a service medical file may make the expert's opinion less credible.²⁰⁹

195. 613 F.3d 1374 (Fed. Cir. 2010).

196. *Id.* at 1378–79.

197. *Id.* at 1375.

198. *Id.*

199. *Id.*

200. *Id.* at 1376.

201. *Id.*

202. *Id.*

203. *Id.* at 1376–77.

204. *Id.*

205. *Id.* at 1377, 1380.

206. *Id.* at 1378 (citing 38 U.S.C. § 5125 (2006)).

207. *Id.* (quoting 38 C.F.R. § 3.159(a)(1) (2009)) (internal quotation marks omitted).

208. *Id.* at 1378–79.

209. *See id.* (noting that "a review of the veteran's service medical records may have significance to the process of formulating a medically valid and well-reasoned

b. Lay testimony

In addition to using the testimony of physicians, a veteran may submit the testimony of lay witnesses to establish service connection. In its 2007 decision in *Jandreau v. Nicholson*,²¹⁰ the Federal Circuit held that lay evidence can be sufficient to establish a medical diagnosis when: “(1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional.”²¹¹

In *Gardin*, the case discussed immediately above, the veteran also claimed that the Veterans Court had erroneously required contemporaneous medical evidence before considering lay evidence to be credible.²¹² The Veterans Court had affirmed the Board’s decision to discount the lay statements of Gardin’s family and friends because they were based on Gardin’s own statements, vague, and inconsistent with other evidence.²¹³ On appeal, the Federal Circuit agreed with Gardin that, in light of *Jandreau*, the Board may not require contemporaneous medical evidence before considering lay evidence to be credible.²¹⁴ The Federal Circuit determined, however, that the Board had not required contemporaneous medical evidence.²¹⁵ Rather, the Board had found, as a matter of fact, that the statements were not credible.²¹⁶ Whether the Board had correctly weighed the evidence was a question of fact beyond the Federal Circuit’s jurisdiction.²¹⁷

Similar to its duty-to-assist decisions in *Golz*, *Waters*, and *Colantonio*, the court in *Gardin* eschewed bright-line rules governing VA actions and decisions, instead encouraging the VA to engage in a holistic review of the available evidence before making a decision on any issue. The contextual, standards-based approach of *Gardin* is also consistent with the statute governing the evidence that the VA must

opinion,” but that there is no “categorical rule excluding all private medical reports that [do] not include a review of the veteran’s service medical records”) (internal quotation marks omitted) (citing *Nieves-Rodriguez v. Peake*, 22 Vet. App. 285, 304 (2008)).

210. 492 F.3d 1372 (Fed. Cir. 2007).

211. *Id.* at 1377.

212. *Gardin*, 613 F.3d at 1379.

213. *Id.*

214. *Id.*

215. *Id.* at 1379–80.

216. *Id.* at 1380.

217. *See id.* (“The Board, as factfinder, had the obligation to determine whether Mr. Gardin’s lay evidence was credible; the Board concluded it was not. . . . Whether the Veterans Court was correct in affirming the Board’s credibility determination is a question of fact beyond this court’s jurisdiction.”).

consider in deciding benefits claims. That statute requires the VA to adopt regulations “requiring that in each case where a veteran is seeking service-connection for any disability[,] due consideration shall be given to,” among other things, “*all* pertinent medical and lay evidence.”²¹⁸ By rejecting categorical rules excluding certain types of evidence, the court in *Gardin* made clear that “all pertinent . . . evidence” really means *all* evidence.²¹⁹ Evidence from a private physician may not be excluded simply because the physician did not review the veteran’s service medical record.²²⁰ Rather, the failure to review the service record may simply be considered by the VA in determining the persuasiveness of the physician’s report.²²¹ Likewise, the VA may not require that contemporaneous medical evidence always support lay evidence.²²² Instead, the VA must consider the lay evidence, but may discount the evidence if it is inconsistent with the medical record or is otherwise unpersuasive.²²³

2. *Presumed service connection*

The veterans statute lists a wide variety of diseases that are presumed to be service connected when suffered by certain veterans, such as former prisoners of war.²²⁴ For Vietnam veterans, Congress has taken a more complex approach. In 38 U.S.C. § 1116, Congress listed certain diseases that are associated with herbicides used during the Vietnam War and are presumed to be service connected for Vietnam veterans.²²⁵ But Congress also ordered the VA, on an ongoing basis, to consider whether scientific evidence warrants expanding the list of diseases presumed to be service connected.²²⁶ In one important non-precedential Federal Circuit case decided in 2010, the court ordered the VA to comply with its duty to issue regulations under this statute.²²⁷

Congress enacted § 1116 as part of the Agent Orange Act of 1991.²²⁸ Section 3 of that Act requires the VA to contract with the

218. 38 U.S.C. § 1154(a) (2006) (emphasis added).

219. *Gardin*, 613 F.3d at 1379.

220. *Id.* at 1378.

221. *Id.*

222. *Id.* at 1379.

223. *Id.* at 1380.

224. *See* 38 U.S.C. § 1112(b) (2006).

225. *Id.* § 1116(a) (listing non-Hodgkin’s lymphoma, certain forms of soft-tissue sarcoma, chloracne, Hodgkin’s disease, porphyria cutanea tarda, respiratory cancers, multiple myeloma, and type-2 diabetes as qualifying diseases).

226. *Id.* § 1116(b)–(c).

227. *In re* Paralyzed Veterans of Am., 392 F. App’x 858, 859, 861 (Fed. Cir. 2010).

228. *See* Pub. L. No. 102-4, § 2, 105 Stat. 11, 11–13 (1991).

National Academy of Sciences to study the relationship between exposure to herbicides used during the Vietnam War and certain diseases.²²⁹ Under the statute, when the Academy sends a report on certain diseases to the VA, the VA must consider whether a presumption of service connection is warranted for the diseases in the report.²³⁰ The statute requires the VA to issue proposed regulations setting forth its determination and, within ninety days of issuing the proposed regulations, to issue final regulations.²³¹ On March 25, 2010, the VA issued proposed regulations adopting a presumption of service connection for B-cell leukemia, Parkinson's disease, and certain types of heart disease.²³² The ninety-day deadline for issuing the final rule passed without any action by the VA.²³³ Groups of veterans filed a petition for a writ of mandamus with the Federal Circuit, seeking an order compelling the VA to adopt a final rule.²³⁴

The Federal Circuit granted the writ. The court emphasized that the ninety-day deadline was not merely guidance, but a mandatory statutory requirement that the VA had no discretion to disregard.²³⁵ Because the veterans' right to VA action was clear, the court ordered the VA to issue a final regulation within thirty days of its August 2, 2010 order.²³⁶ As discussed in Part IV.A below, the VA issued the final regulation on August 31, 2010.

3. *Post-traumatic stress disorder*

Another major regulatory development in veterans law this year was the VA's amendment of the regulation defining the evidence required to establish service connection for a claim of post-traumatic stress disorder (PTSD).²³⁷ As discussed below, the amendment eliminated a requirement that the veteran provide corroborating

229. *Id.* § 3, 105 Stat. at 13.

230. 38 U.S.C. § 1116(c).

231. *Id.* § 1116(c)(2).

232. *See In re Paralyzed Veterans*, 392 F. App'x at 859.

233. *Id.*

234. *Id.* Mandamus is an extraordinary writ by which a court may, among other things, compel a government official to take an action that has been unlawfully withheld. In the field of patent law, the Federal Circuit has recently made waves by aggressively using mandamus to compel the U.S. District Court for the Eastern District of Texas to transfer infringement cases to more convenient fora. *See* Paul R. Gugliuzza, *The New Federal Circuit Mandamus 1-5* (Feb. 18, 2011) (unpublished manuscript), *available at*

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734419.

235. *In re Paralyzed Veterans*, 392 F. App'x at 860.

236. *Id.*

237. *Stressor Determinations for Posttraumatic Stress Disorder*, 75 Fed. Reg. 39,843 (July 13, 2010) (to be codified at 38 C.F.R. pt. 3).

evidence of an in-service stressor if the claimed stressor is related to the fear of hostile military or terrorist activity and is consistent with the veteran's military service.²³⁸

In *Arzio v. Shinseki*,²³⁹ the Federal Circuit made clear that, to establish service connection for PTSD, a veteran must satisfy the three-part test set forth in 38 C.F.R. § 3.304(f), unless a more specific standard applies (such as the standard in the amended regulation).²⁴⁰ Section 3.304(f) requires the veteran to provide medical evidence that the veteran has been diagnosed with PTSD, medical evidence supporting a link between the current PTSD symptoms and a stressor that occurred while in service, and credible evidence that the claimed stressor actually occurred.²⁴¹

Michael Arzio served in the Army and Navy from 1959 to 1962.²⁴² He did not participate in combat while in service.²⁴³ In 1990, Arzio sought compensation from the VA for PTSD.²⁴⁴ The VA noted that Arzio was indeed receiving treatment for PTSD, but found that Arzio had not provided evidence of the in-service stressors that he claimed occurred, as is required by § 3.304(f).²⁴⁵ On appeal, Arzio argued that he could establish service connection for PTSD without proving an in-service stressor.²⁴⁶ He claimed that a more general standard set forth in 38 C.F.R. § 3.303 provided an alternative means for establishing service connection for PTSD.²⁴⁷

But § 3.303 is, as the court noted, “a broad regulatory provision addressing general service connection principles.”²⁴⁸ Rather than providing a substantive standard for establishing PTSD, § 3.303 simply states that “[s]ervice connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces.”²⁴⁹ Section 3.304 itself makes clear that “[t]he *basic* considerations relating to service connection are stated in § 3.303,” and that § 3.304 contains *specific* “criteria” for evaluating claims of service connection for certain

238. See *infra* Part IV.A.

239. 602 F.3d 1343 (Fed. Cir. 2010).

240. *Id.* at 1347.

241. 38 C.F.R. § 3.304(f) (2010).

242. *Arzio*, 602 F.3d at 1344.

243. *Id.*

244. *Id.* at 1345.

245. *Id.*

246. *Id.*

247. *Id.* at 1345–46.

248. *Id.* at 1346.

249. *Id.* (quoting 38 C.F.R. § 3.303 (2010)).

disabilities, including PTSD.²⁵⁰ As the Federal Circuit noted, “when sections 3.303 and 3.304 are read together, it is evident that they do not provide alternative methods of establishing service connection, but instead work in tandem to delineate the circumstances under which a veteran can establish service connection for PTSD.”²⁵¹ Under basic principles of regulatory construction, “the specific requirements of section 3.304(f) . . . take precedence over the general principles related to service connection set forth in section 3.303.”²⁵²

Arzio thus establishes that specific regulatory provisions defining service connection trump the general standard of § 3.303. This rule does not, however, always operate to the veteran’s detriment. For example, the court in *Arzio* discussed *Combee v. Brown*,²⁵³ a case in which the Federal Circuit held that § 3.303 and § 3.311, which establishes a presumption of service connection for certain illnesses related to the testing or use of atomic weapons, provide *alternative* means of establishing service connection for those illnesses.²⁵⁴ Thus, under *Combee* and *Arzio*, any regulation that *relaxes* the requirements for establishing service connection for certain classes of veterans should be construed as an *alternative* means of establishing service connection for PTSD.

4. *Rare diseases*

In veterans cases, the Federal Circuit lacks jurisdiction to review fact-finding or the application of law to fact by the Veterans Court or the VA.²⁵⁵ This includes the determination of whether a veteran’s death or disability is connected to military service.²⁵⁶ In *Bastien v. Shinseki*,²⁵⁷ the court dismissed an appeal that challenged the VA’s determination that a rare form of cancer was not connected to in-service radiation exposure.²⁵⁸ A dissenting opinion by Judge Newman, however, raised an important question about the legal standard for determining service connection in the case of rare diseases.²⁵⁹

250. 38 C.F.R. § 3.304(a) (emphasis added).

251. *Arzio*, 602 F.3d at 1347.

252. *Id.*

253. 34 F.3d 1039 (Fed. Cir. 1994).

254. *Arzio*, 602 F.3d at 1348 (citing *Combee*, 34 F.3d at 1043–44).

255. 38 U.S.C. § 7292(d)(2) (2006).

256. *Waltzer v. Nicholson*, 447 F.3d 1378, 1380 (Fed. Cir. 2006).

257. 599 F.3d 1301 (Fed. Cir. 2010).

258. *Id.* at 1303, 1307.

259. *See id.* at 1308 (Newman, J., dissenting) (arguing that the correct legal standard for determining whether a rare disease was caused by military service “is not whether a preponderance of evidence establishes that causation was more likely than

During his military service, Robert Bastien worked on experiments that tested the effects of radiation on monkeys.²⁶⁰ Bastien placed the monkeys in a nuclear reactor where they were exposed to radiation and removed the monkeys after exposure.²⁶¹ About twenty years after he left the service, Bastien died of pneumonia resulting from Waldenström's macroglobulinemia, a rare blood cancer.²⁶² Bastien also had been diagnosed with rare forms of lymphoma.²⁶³

Bastien and, later, his widow, sought benefits for Mr. Bastien's illness and death, which they asserted were caused by Mr. Bastien's in-service exposure to radiation.²⁶⁴ Mrs. Bastien and the VA presented conflicting evidence to the Board.²⁶⁵ Mrs. Bastien offered the testimony of two doctors.²⁶⁶ One testified that her husband's cancer "could be related to radiation exposure," and another testified that it was "plausible" that in-service radiation exposure caused Mr. Bastien's illness and death.²⁶⁷ The VA, on the other hand, presented the testimony of two doctors who contended, respectively, that it was "unlikely" or "extremely unlikely" that Mr. Bastien's radiation exposure caused his cancer.²⁶⁸ The Board determined that the testimony of the VA witnesses had greater probative value, and denied the claim.²⁶⁹ The Veterans Court affirmed.²⁷⁰

On appeal, the Federal Circuit held that it lacked jurisdiction to consider the cause of Mr. Bastien's death.²⁷¹ Writing for the court, Judge Friedman noted that Mrs. Bastien's main argument was that the Board gave too much weight to the VA's expert opinions and not enough weight to her experts' evidence.²⁷² This argument, Judge

not, but whether it is medically possible that the in-service activity caused the cancer").

260. *Id.* at 1303 (majority opinion).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 1303–04 (also describing the remainder of Mrs. Bastien's evidence, which included her own calculations of the doses of radiation her husband received and a letter from a private nuclear engineering company).

268. *Id.* at 1304.

269. *Id.*

270. *See id.* at 1305 (observing that the Board is responsible for "review[ing] and assess[ing] the credibility and probative value of the evidence of record" and that the Board's justifications for crediting the VA's experts over the widow's experts were "plausible and therefore not clearly erroneous").

271. *Id.* at 1305–06.

272. *Id.*

Friedman noted, was an impermissible challenge to the evaluation and weighing of evidence.²⁷³

Dissenting, Judge Newman identified a legal error that, in her view, corrupted the VA's and the courts' analyses.²⁷⁴ She noted that the Board's decision and the majority's ruling assumed that the proper standard for determining service connection was whether the radiation exposure was "more likely than not" to have caused Mr. Bastien's rare cancer.²⁷⁵ But, Judge Newman noted, "the cause of Waldenstrom's macroglobulinemia is not known," and "all of the medical witnesses, whichever side retained them, stated that it was not possible to know whether Mr. Bastien's . . . cancer was traceable" to his in-service radiation exposure.²⁷⁶

Because it was impossible to determine what caused Mr. Bastien's rare disease, Judge Newman proposed a different evidentiary standard for service connection in claims involving rare diseases.²⁷⁷ Instead of a preponderance of the evidence standard, she proposed a standard that asked "whether it is medically possible that the in-service activity caused the cancer."²⁷⁸ This lower standard would apply, Judge Newman wrote, "when the disease is sufficiently rare that adequate data to prove or disprove causation do not exist."²⁷⁹

Judge Newman's analysis is persuasive. The lower standard she proposed accords with the pro-claimant ideal of the veterans benefits system. More importantly, her "medical possibility" standard is consistent with Congress's mandate that factual doubt in benefits proceedings be resolved in favor of the veteran.²⁸⁰ The VA's own regulations provide that when the evidence "does not satisfactorily prove or disprove" the "service origin" of the claimed disability, the doubt should be resolved in the veteran's favor.²⁸¹ In the case of a disease whose cause is unknown, it seems as if the VA is resolving doubt *against* the veteran when it credits medical opinions stating

273. *Id.* at 1306. The Federal Circuit also rejected Mrs. Bastien's argument that the Board erred by not requiring the VA to affirmatively establish the qualifications of its medical experts. *Id.*

274. *See id.* at 1307–08 (Newman, J., dissenting).

275. *Id.* at 1308.

276. *Id.* at 1307–08.

277. *Id.* at 1308.

278. *Id.*

279. *Id.*

280. *Id.*; *see also* 38 U.S.C. § 5107(b) (2006) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a [claim for benefits], the [VA] shall give the benefit of the doubt to the claimant.").

281. 38 C.F.R. § 3.102 (2010).

that service connection is “unlikely” over medical opinions stating that service connection is “plausible.”

5. *Dental conditions*

Under 38 U.S.C. § 1712(a)(1)(C), veterans are entitled to outpatient services for dental conditions that are “due to combat wounds or other service trauma.”²⁸² In *Nielson v. Shinseki*,²⁸³ the Federal Circuit held that “service trauma . . . does not include the intended result of proper medical treatment.”²⁸⁴

Thomas Nielson served in the Air Force in the 1950s.²⁸⁵ During his service in the Korean War, he had most of his teeth extracted, apparently because of an infection.²⁸⁶ In 1991, Nielson sought new dentures from the VA under § 1712(a)(1)(C), claiming that he needed them because of “service trauma.”²⁸⁷ Relying on an opinion of the VA general counsel that “‘service trauma’ does not include the intended effects of treatment provided during the veteran’s military service,” the Board rejected Nielson’s claim.²⁸⁸ The Veterans Court and the Federal Circuit both affirmed.²⁸⁹

Citing dictionary definitions of “trauma,” the Federal Circuit first concluded that the word referred to “an injury or wound to a living body caused by the application of external force or violence.”²⁹⁰ The court noted that the act of pulling teeth, an external physical force, could fit this definition.²⁹¹ The court concluded, however, that Congress did not intend to include proper medical treatment in the definition of trauma.²⁹²

The court first noted that if it were to construe “trauma” to include any injury suffered during service, it would render the word “service” superfluous, because the first portion of the statute already requires the injury to be connected to service.²⁹³ Moreover, the court emphasized that the general phrase “service trauma” should be

282. 38 U.S.C. § 1712(a)(1)(C).

283. 607 F.3d 802 (Fed. Cir. 2010).

284. *Id.* at 804 (internal quotation marks omitted).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* (internal quotation marks omitted) (citing General Counsel Precedent Opinion, Dental Care Eligibility—*Nielson v. Brown*, 7 Vet. App. 22 (1994), VAOPGCPREC 5-97 (Jan. 22, 1997)).

289. *Id.* at 805, 809.

290. *Id.* at 806 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2432 (unabr. ed. 1961)).

291. *Id.*

292. *Id.*

293. *Id.*

interpreted to refer to the same kind of injuries as those that preceded the phrase in the statute.²⁹⁴ In the court's view, Congress's use of the preceding phrase "combat wounds" suggested that "service trauma" should likewise cover only injuries incurred while performing military duties.²⁹⁵

C. *Effective Date*

When the VA awards benefits, it also sets an effective date for the benefits payments. The effective date chosen by the VA is a fruitful source of litigation because it determines the amount of back payments due to a veteran.²⁹⁶ In 2010, the Federal Circuit dealt with many issues related to effective dates, from the special rule granting an early effective date for claims filed within one year of the veteran's discharge, to rulings increasing or decreasing benefits compensation.

1. *Claims filed within one year of discharge*

The setting of the effective date is left by statute to the VA's judgment.²⁹⁷ Under the VA's regulations, the effective date is normally the later of the date the veteran filed the claim or the date the claim arose.²⁹⁸ The only specific statutory requirement is that the effective date must be no earlier than the date on which the veteran applied for benefits.²⁹⁹ If, however, the veteran files for benefits within one year of the date of the veteran's discharge, 38 U.S.C. § 5110(b)(1) provides that the effective date is the day following the date of discharge.³⁰⁰

In *Butler v. Shinseki*,³⁰¹ the court rejected a veteran's argument that, even though he filed his claim more than one year after discharge, the effective date should be the day after discharge under § 5110(b)(1).³⁰² In reaching this conclusion, the court, in an alternative holding that spurred another separate opinion from

294. *See id.* at 807 (citing the interpretive canon of *eiusdem generis*).

295. *Id.*

296. *See supra* notes 28–29 and accompanying text.

297. *See* 38 U.S.C. § 5110(a) (2006) ("Unless specifically provided otherwise in this chapter, the effective date of an award . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.").

298. 38 C.F.R. § 3.400 (2010).

299. 38 U.S.C. § 5110(a).

300. *Id.* § 5110(b)(1).

301. 603 F.3d 922 (Fed. Cir. 2010) (*per curiam*).

302. *Id.* at 926.

Judge Newman, ruled that the one-year period of § 5110(b)(1) is not subject to equitable tolling.³⁰³

In 1992, Navy veteran Steven Butler filed a claim for a “foot condition,” specifically, a callus on his right foot.³⁰⁴ The VA granted service connection effective July 22, 1992, the date Butler filed his claim.³⁰⁵ Butler appealed to the Board, seeking to have the effective date changed under § 5110(b)(1) to the day after his discharge in November 1990.³⁰⁶ Butler claimed that he had attempted to file his claim within one year of his discharge, but had been told by VA personnel that he could not do so because his discharge was not honorable.³⁰⁷ Butler had thus waited to file his claim until he successfully challenged the nature of his discharge.³⁰⁸ In a 1998 ruling, the Board denied Butler’s request for an earlier effective date.³⁰⁹

Three years later, on February 26, 2001, Butler filed a claim for service connection for hallux valgus³¹⁰ of both feet. On December 23, 2003, a VA physician diagnosed Butler with hallux valgus of both feet and observed callus formation on Butler’s left foot.³¹¹ Accordingly, the VA awarded service connection for hallux valgus, effective February 26, 2001 (the date Butler filed his claim) and for calluses of the left foot, effective December 23, 2003 (the date of the VA examination).³¹²

Butler appealed to the Board, claiming that “the effective date for all of his foot conditions should be the day after his discharge, and in any event no later than July 22, 1992, the date of the actual filing of his original claim.”³¹³ The Board affirmed the effective dates set by

303. *See id.* at 926–28 (Newman, J., concurring) (arguing that equitable tolling is available under § 5110(b)(1) under certain circumstances).

304. *Id.* at 923 (majority opinion).

305. *Id.*

306. *Id.*

307. *Id.* 38 C.F.R. § 3.400(b)(2)(i), the regulation that implements 38 U.S.C. § 5110(b)(1), provides that, if the VA receives a claim within one year of “separation from service,” the effective date will be that day following separation or the date the claim arose, whichever is later. 38 C.F.R. § 3.400(b)(2)(i) (2010). The regulation defines “separation from service” as “separation under conditions other than dishonorable.” *Id.*

308. *Butler*, 603 F.3d at 923.

309. *Id.* at 924.

310. *Id.* Hallux valgus is a condition in which the big toe deviates inward toward the baby toe. *See Foot and Ankle Conditions: Hallux Valgus (Bunion Deformity)*, THE INSTITUTE FOR FOOT & ANKLE RECONSTRUCTION AT MERCY, http://www.mdmercy.com/footandankle/conditions/bigtoe/hallux_valgus.html (last visited Feb. 22, 2011) (describing the condition and treatment options).

311. *Butler*, 603 F.3d at 924.

312. *Id.*

313. *Id.*

the VA, noting that Butler had not raised the issue of hallux valgus until he filed his claim on February 26, 2001, and that he had never specifically claimed the left-foot calluses.³¹⁴ As for Butler's argument that he had been misled into not filing his claim within one year of discharge, the Board noted that the record did not reveal any communication from Butler showing an intent to file his 1992 claim earlier.³¹⁵

The Veterans Court affirmed, noting that, even if VA personnel had misled Butler into delaying filing, the one-year deadline of § 5110(b)(1) could not be equitably tolled.³¹⁶ The court cited the Federal Circuit's decision in *Andrews v. Principi*,³¹⁷ which held that the one-year period was not tolled by VA's unlawful failure to notify a veteran, at the time of discharge, of the benefits to which he was entitled.³¹⁸

In a per curiam opinion, the Federal Circuit affirmed the Veterans Court's decision in *Butler*.³¹⁹ The court first determined that Butler's equitable tolling argument implicated the VA's unreviewable fact-finding.³²⁰ The court reasoned as follows: the only foot conditions at issue in the Federal Circuit appeal were the 2001 and 2003 claims for hallux valgus and left-foot calluses, respectively.³²¹ The VA had found, as a factual matter, that neither of these conditions were included in the July 22, 1992 claim for "foot condition."³²² So, even if the July 22, 1992 claim "were treated as if it had been filed within one year of [Butler's] discharge, . . . this would not change the effective dates for any of the foot conditions at issue [on] appeal."³²³ Thus, to grant Butler relief would require overturning the VA's factual determination that the claims on appeal were not included in the 1992 claim, an action the Federal Circuit is powerless to take.³²⁴

The court also noted an alternative ground for its holding, stating that the ruling of the Veterans Court was supported by the Federal

314. *Id.*

315. *Id.* at 924–25.

316. *Id.* at 925.

317. 351 F.3d 1134 (Fed. Cir. 2003).

318. *Id.* at 1136.

319. *Butler*, 603 F.3d at 923.

320. *Id.* at 926.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*; see 38 U.S.C. § 7292(d)(2) (2006) (providing that the Federal Circuit may not review factual determinations).

Circuit's holding in *Andrews* "that equitable tolling is not available under 38 U.S.C. § 5110(b)(1)."³²⁵

In a concurring opinion, Judge Newman disagreed with this alternative holding. She noted that *Andrews* involved the VA's failure to notify a veteran of available benefits, whereas *Butler* involved affirmative, erroneous advice allegedly given to the veteran.³²⁶ Judge Newman argued that "[t]he giving of actual misinformation in response to specific inquiry has been held to warrant equitable tolling, depending on the circumstances."³²⁷ Judge Newman also pointed out that the one-year period in § 5110(b)(1) is not a "jurisdictional" time limit for which equitable tolling is forbidden.³²⁸ She emphasized that the statute does not limit the time within which a veteran can bring a claim for service connection; it affects only the effective date if the VA finds service connection.³²⁹ Therefore, § 5110(b)(1) is, in Judge Newman's view, a "nonjurisdictional claim-processing rule" that may be tolled when affirmative misinformation is given to a veteran.³³⁰

Butler, like the Supreme Court's recent decision in *Henderson*,³³¹ implicates a broader discussion about the equitable leeway that should be afforded persons pursuing redress in court or before an administrative agency. Based on the text of the statute, and under the reasoning employed by the Court in *Henderson*, it seems that Judge Newman has the better view of whether the one-year deadline of § 5110(b)(1) is subject to equitable tolling. As she correctly noted, the statute does not withdraw all power from the VA to award benefits if the claim is not filed within one year of discharge.³³² It simply mandates that the effective date be later than it would have been if the veteran had filed the claim earlier. Because the statute does not limit the VA's authority to hear a claim, the one-year deadline seems to be non-jurisdictional.

Before the Supreme Court decided *Henderson*, there might have been an argument that, under *Bowles v. Russell*, the time limit in § 5110(b)(1) is jurisdictional simply because it is found in a federal

325. *Butler*, 603 F.3d at 926 (citing *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003)).

326. *Id.* at 926 (Newman, J., concurring).

327. *Id.* at 927 (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

328. *Id.*

329. *Id.*

330. *Id.*

331. *See supra* Part II.B (discussing *Henderson*).

332. *Butler*, 603 F.3d at 927 (Newman, J., concurring).

statute.³³³ But, in *Henderson*, the Supreme Court explicitly rejected the argument that all statutory filing deadlines are jurisdictional, emphasizing that the deadline in *Bowles* was for an appeal from one court to another—a situation where filing deadlines had long been recognized as jurisdictional.³³⁴ Section 5110(b)(1), unlike the statute in *Bowles*, does not provide a court-to-court appeal deadline. And, as noted, it does not appear on its face to limit the VA's authority. It thus seems to be a claims-processing rule that is subject to tolling, just as Judge Newman argued. In all events, this is a question that, as Judge Newman noted, warranted further analysis than the court's opinion gave it.

2. Awards of increased compensation

As a general rule, if the VA increases a veteran's disability compensation, the increased award is effective the date the veteran applied for increased benefits.³³⁵ Under 38 U.S.C. § 5110(b)(2), however, an increased compensation award is effective on the date the increased disability became ascertainable, if the veteran applied for an increase in benefits within one year of that date.³³⁶ In *Gaston v. Shinseki*,³³⁷ the Federal Circuit made clear that the application for increased benefits *must* be filed within one year of the increase in disability for a veteran to be eligible for the earlier effective date.³³⁸

Chester Gaston had been receiving benefits for PTSD and other disabilities for nearly a decade when, in March 1999, he filed a claim for total disability based on individual unemployability³³⁹ and an increased rating for PTSD.³⁴⁰ Social Security records showed that Gaston's condition had worsened in 1994, but the VA granted Gaston increased ratings with an effective date of March 1999—the date on

333. *Accord* *Henderson v. Shinseki*, 589 F.3d 1201, 1219 (Fed. Cir. 2009) (en banc) (citing *Bowles v. Russell*, 511 U.S. 205, 211 (2007)) (“The time limit [for appealing to the Veterans Court] is set out statutorily, a crucial point for the Supreme Court in determining which of such limits are jurisdictional and which are not.”), *rev'd*, 131 S. Ct. 1197 (2011); *see Bowles*, 511 U.S. at 210 (noting “the jurisdictional significance of the fact that a time limitation is set forth in a statute”).

334. *Henderson*, 131 S. Ct. at 1202–03.

335. 38 U.S.C. § 5110(a) (2006).

336. *Id.* § 5110(b)(2).

337. 605 F.3d 979 (Fed. Cir. 2010).

338. *Id.* at 984.

339. *See supra* notes 24–27 and accompanying text (discussing the criteria for establishing a claim of total disability based on individual unemployability).

340. *Gaston*, 605 F.3d at 980.

which he filed the claim for an increase.³⁴¹ Gaston appealed the effective date, but the Federal Circuit affirmed.³⁴²

The court noted that § 5110(b)(2) is an exception to the general rule that increases in rating are made effective on the date the veteran files the claim.³⁴³ Specifically, that section states: “The effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date.”³⁴⁴ Gaston argued that “the Veterans Court misconstrued 38 U.S.C. § 5110(b)(2) by limiting it to cases in which . . . an increase in . . . disability occurred during the one year prior to the claim.”³⁴⁵ Under Gaston’s proffered interpretation, “if there is evidence that an increase occurred during *or before* the one year prior to the veteran’s claim, the effective date for increased compensation” could be as much as one year from the date the veteran filed the claim.³⁴⁶ Gaston pointed out that his Social Security records showed that his condition had worsened in 1994.³⁴⁷ Because his disability had increased before he filed his claim, Gaston claimed that he was entitled to an effective date of March 25, 1998—one year from the date he filed his claim.³⁴⁸

Gaston’s argument is untenable based on the language of the statute, and the Federal Circuit rejected it for three main reasons. First, the court pointed out that the statute specifies that the effective date shall be the date an increase in disability occurred *only if* the VA receives the application “within one year [of that] date.”³⁴⁹ Second, the Federal Circuit noted that eleven other subsections in § 5110 provide for earlier effective dates for claims filed within one year of an event and that it was “equally difficult to read these other provisions as allowing earlier effective dates for claims filed more than one year after the specified event.”³⁵⁰ Finally, the court discussed the legislative history of § 5110(b)(2) and noted that the purpose of the section “was to provide veterans a one-year grace period for filing a claim following an increase in a service-connected disability.”³⁵¹

341. *Id.* at 980–81.

342. *Id.* at 980.

343. *Id.* at 982 (citing 38 U.S.C. § 5110(a) (2006)).

344. 38 U.S.C. § 5110(b)(2).

345. *Gaston*, 605 F.3d at 982.

346. *Id.*

347. *Id.* at 981.

348. *Id.* at 981–82.

349. *Id.* at 983 (quoting 38 U.S.C. § 5110(b)(2) (2006)).

350. *Gaston*, 605 F.3d at 983 & n.2.

351. *Id.*

Accordingly, the court concluded: “[T]he only reasonable construction of 38 U.S.C. § 5110(b)(2) is that a veteran’s claim for increased disability compensation must be filed within one year of an increase in the disability, as shown by the evidence, in order to obtain an effective date earlier than the date of the claim.”³⁵²

3. *Reduction of benefits*

While precedential Federal Circuit veterans cases frequently deal with efforts by veterans to increase their disability benefits, sometimes the VA reduces the benefits paid to a veteran. For example, until it was amended in 2006, 38 U.S.C. § 5313 reduced the benefits of veterans who were convicted of felonies and “incarcerated in a Federal, State or local penal institution.”³⁵³ In *Wanless v. Shinseki*,³⁵⁴ the Federal Circuit held that, under this prior version of § 5313, a veteran’s benefits may be reduced even if the veteran is incarcerated in a privately operated prison.³⁵⁵

William Wanless had been collecting disability compensation for various injuries suffered during his service in the Army.³⁵⁶ In 1993, an Oklahoma jury convicted him of first-degree murder, a felony.³⁵⁷ The court sentenced Wanless to life in prison without parole, and the VA reduced his monthly compensation under § 5313.³⁵⁸ In 1998, Wanless was transferred to a prison owned and operated by Corrections Corporation of America, a for-profit company that operates prisons under contract with the Oklahoma Department of Corrections.³⁵⁹ Wanless sought to have his benefits reinstated, arguing that he was no longer “incarcerated in a Federal, State, or local penal institution.”³⁶⁰ The Board and the Veterans Court rejected Wanless’s claim, and the Federal Circuit affirmed.³⁶¹

The court offered four reasons for interpreting former § 5313 to include privately operated prisons. First, the court pointed out that the statute’s language “focuses on a veteran’s incarceration . . . in any facility and does not distinguish between government-operated prisons and privately operated prisons.”³⁶² Second, the court looked

352. *Id.* at 984.

353. 38 U.S.C. § 5313(a) (2000).

354. 618 F.3d 1333 (Fed. Cir. 2010).

355. *Id.* at 1334.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at 1334–35.

360. *Id.* at 1335; 38 U.S.C. § 5313(a) (2000).

361. *Wanless*, 618 F.3d at 1334.

362. *Id.* at 1337.

to the legislative history of the statute, which, in the court's view, clearly expressed a purpose to correct the problem of providing tax-free benefits to criminals who are maintained in prison at the expense of taxpayers.³⁶³ Third, the court relied on a 2006 "clarifying" amendment to the statute, which broadened the category of facilities covered by § 5313 to include "Federal, State, local, or *other* penal institution[s] or *correctional facilit[ies]*."³⁶⁴ Finally, the court deferred under *Skidmore v. Swift & Co.*³⁶⁵ to an opinion of the VA's General Counsel, which had concluded that § 5313 should cover privately operated prisons.³⁶⁶

D. Procedural Matters

As the cases discussed in this Article have suggested, veterans cases often have a tortured procedural history, working their way through various administrative bodies and courts. It is therefore not surprising that some of the Federal Circuit's most significant veterans decisions in 2010 addressed matters of procedure. Of import in 2010 were rules permitting a veteran to challenge a previously final benefits decision on the ground that it contained clear and unmistakable error and rules providing that the VA can implicitly decide pending claims that are not specifically mentioned in a VA decision.

1. Clear and unmistakable error

In stark contrast to the principles of res judicata that govern litigation in court, a veteran may, at any time, seek revision of a final decision by a VA regional office or by the Board. To have the decision revised, the veteran must show that it contained "clear and unmistakable error," referred to as "CUE" in the jargon of veterans law.³⁶⁷ For example, a veteran might challenge in a CUE proceeding a prior RO ruling as to the effective date of the veteran's award. This CUE proceeding would begin before the RO. Once the RO decides the CUE claim, the veteran could appeal to the Board. On this

363. *Id.* at 1337–38.

364. *Id.* at 1338 (emphasis altered); 38 U.S.C. § 5313(a) (2006).

365. 323 U.S. 134, 140 (1944) (holding that an informal agency judgment is entitled to judicial deference depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

366. *Wanless*, 618 F.3d at 1338.

367. *See* 38 U.S.C. §§ 5109A(a), 7111(a) (VA decisions and Board decisions, respectively).

appeal, the veteran may not challenge as containing CUE, say, an earlier RO ruling as to the veteran's disability rating. Rather, the appeal will be limited to the effective-date CUE claim. To have the disability rating reviewed for CUE, the veteran must file a new CUE claim with the RO. This rule is similar to the waiver rule of appellate procedure in civil and criminal litigation: a party may not raise an argument on appeal that the party did not raise in the court or agency below.³⁶⁸

In *Guillory v. Shinseki*,³⁶⁹ the Federal Circuit confronted a complex fact pattern that presented an issue of whether a veteran was attempting to raise a new claim of CUE on appeal.³⁷⁰ The court determined that the veteran had preserved his CUE claim throughout the protracted proceedings, and reversed a ruling by the Veterans Court.³⁷¹

As noted, the VA rates disabilities on a scale of 0% to 100%, and payments increase with increases in disability rating.³⁷² Extraordinarily disabled veterans who already have a 100% disability rating may be eligible for an additional award of "special monthly compensation," often called "SMC" for short.³⁷³ SMC awards vary based on the severity of the veteran's disability.³⁷⁴ Moreover, when a veteran needs "regular aid and attendance," the veteran may be eligible for additional SMC.³⁷⁵

The veteran in *Guillory*, John Guillory, served in the Army during the Vietnam War, where he suffered multiple injuries from a gunshot wound.³⁷⁶ In 1967, the VA granted Guillory a 100% disability rating for brain trauma and awarded SMC.³⁷⁷ In 1992, the VA granted service connection and a 100% disability rating for a seizure disorder.³⁷⁸ This additional disability qualified Guillory for additional SMC as well as for aid and attendance compensation, effective May 1991 (the date of the seizure diagnosis).³⁷⁹

368. GREGORY A. CASTANIAS & ROBERT H. KLONOFF, FEDERAL APPELLATE PRACTICE AND PROCEDURE 47-49 (2008).

369. 603 F.3d 981 (Fed. Cir. 2010).

370. *Id.* at 984-85.

371. *Id.* at 987.

372. See 38 U.S.C. §§ 1114, 1155; *supra* Part I.

373. *Guillory*, 603 F.3d at 983 (citing 38 U.S.C. § 1114(k)-(s)).

374. *Id.* (citing 38 U.S.C. § 1114(l)-(o)).

375. *Id.* (citing 38 U.S.C. § 1114(r)(1)).

376. *Id.* at 984.

377. *Id.*

378. *Id.*

379. *Id.*

In 1997, Guillory requested review of his file for CUE, claiming that he was entitled to aid and assistance from the time of his original rating in 1967.³⁸⁰ Among other things, Guillory alleged that the VA erred (1) by failing to compensate him for lost use of his hips, thighs, and buttocks and (2) by failing to recognize that he suffered from a seizure disorder prior to 1991.³⁸¹ In a 2003 decision, the Board rejected these arguments.³⁸² The Veterans Court remanded, however, noting that the Board did not discuss a medical record from 1975 that appeared to diagnose Guillory with a seizure disorder.³⁸³

On remand, the Board concluded that “there was no evidence that Guillory’s seizure disorder was severe enough to warrant a 100% disability rating prior to 1991.”³⁸⁴ The Veterans Court affirmed the Board’s decision that no CUE occurred.³⁸⁵ The Veterans Court also noted that, because the remanded 2003 Board decision did not discuss Guillory’s hips/thighs/buttocks claim, the Board did not err by ignoring that claim on remand.³⁸⁶ Moreover, because the Board did not discuss that claim, the Veterans Court ruled that it did not have jurisdiction to address it.³⁸⁷

On appeal, the Federal Circuit dismissed Guillory’s argument that the VA committed CUE with regard to the seizure disorder.³⁸⁸ These determinations, the Federal Circuit concluded, were based on unreviewable questions of fact.³⁸⁹

The Federal Circuit, however, reversed the Veterans Court’s jurisdictional determination.³⁹⁰ The government had asserted that Guillory’s hips/thighs/buttocks CUE claim was a new argument that Guillory must bring through a new proceeding.³⁹¹ The court noted, however, that Guillory had always made two separate arguments for special monthly compensation, one that related to his seizure disorder and another that related to his lower body.³⁹² Thus, the court concluded, “this is not a case where the veteran raised for the

380. *Id.*

381. *Id.*

382. *Id.* at 985.

383. *Id.*

384. *Id.*

385. *Id.* at 986.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* at 987.

391. *Id.* at 986–87 (citing *Andre v. Principi*, 301 F.3d 1354, 1357–58 (Fed. Cir. 2002)).

392. *Id.* at 987.

first time on appeal a new claim of CUE, separate and distinct from the claims that the Board addressed below.”³⁹³

2. *Implicit denial rule*

A claim for benefits remains pending until it is finally adjudicated by the VA.³⁹⁴ If the VA leaves a claim pending, the claim may be addressed when the agency adjudicates a subsequent claim.³⁹⁵ Because the earlier claim remained pending, the effective date for any resulting award of benefits will be the effective date applicable to the earlier claim.³⁹⁶ Under the “implicit denial rule,” however, a subsequent denial of a claim that is identical to a prior, unresolved claim terminates the pending status of the prior, unresolved claim.³⁹⁷ In two cases in 2010, the Federal Circuit clarified the application of the implicit denial rule, holding that the adjudication of a formal claim for benefits implicitly resolves a pending informal claim for benefits³⁹⁸ and that even if a claim remains unresolved by the Board on appeal (rather than before the RO), a subsequent appellate decision by the Board can implicitly resolve that claim.³⁹⁹

a. *Informal claims*

While veterans may file a formal claim for benefits by submitting the appropriate form to the VA,⁴⁰⁰ the agency considers many other actions to be “informal” claims.⁴⁰¹ Under 38 C.F.R. § 3.155(a), for example, *any* communication from a veteran that shows an intent to apply for benefits is considered an informal claim.⁴⁰² In addition, once the VA has allowed a formal claim for benefits, any medical evidence that the VA receives, including an exam conducted at a VA facility, is treated as an informal claim for increased benefits.⁴⁰³

In *Munro v. Shinseki*,⁴⁰⁴ the veteran, Philip Munro, suffered from a service-connected granuloma (inflammation) on his left lung and non-service-connected obstructive pulmonary disease.⁴⁰⁵ After the VA

393. *Id.*

394. *Adams v. Shinseki*, 568 F.3d 956, 960 (Fed. Cir. 2009).

395. *Id.*

396. *Id.*

397. *Munro v. Shinseki*, 616 F.3d 1293, 1297 (Fed. Cir. 2010).

398. *Id.* at 1297.

399. *Jones v. Shinseki*, 619 F.3d 1368, 1369 (Fed. Cir. 2010).

400. 38 U.S.C. § 5101(a) (2006).

401. *See* 38 C.F.R. §§ 3.155, 3.157 (2010).

402. *Id.* § 3.155(a).

403. *Id.* § 3.157(b).

404. 616 F.3d 1293 (Fed. Cir. 2010).

405. *Id.* at 1295.

awarded him benefits for the granuloma, Munro underwent pulmonary tests at a VA medical center in 1995 and 1997.⁴⁰⁶ These tests showed that Munro suffered from severe obstructive airways disease, severe obstructive pulmonary disease, and was permanently disabled.⁴⁰⁷ In September 1997, Munro formally sought an increased disability rating, but the VA denied it because the diagnoses were unrelated to Munro's service-connected granuloma.⁴⁰⁸ In 2003, Munro filed another formal claim for total disability based on individual unemployability (TDIU), which the VA granted effective March 31, 2003, the date of his formal claim.⁴⁰⁹

On appeal, Munro sought an earlier effective date, arguing that the informal claims initiated by his 1995 and 1997 VA medical examinations were still pending when the VA granted him TDIU in 2003.⁴¹⁰ Munro argued that the effective date of the TDIU claim should be 1995, or 1997 at the latest.⁴¹¹

The Federal Circuit rejected this argument under the implicit denial rule. The court noted that "the implicit denial rule is, at bottom, a notice provision."⁴¹² The standard is "whether [a VA decision] provided sufficient information for a reasonable claimant to know that he would not be awarded benefits for his asserted disability."⁴¹³

Thus, a VA decision need not expressly discuss a pending claim for that claim to be deemed denied. In Munro's case, the informal claims and the formal claim were identical—for an increased rating due to his lone service-connected disability, granuloma of the left lung.⁴¹⁴ Accordingly, the decision denying Munro's September 1997 formal claim also implicitly denied the pending informal claims.⁴¹⁵

Practical concerns largely justify this application of the implicit denial rule. Veterans receiving medical benefits regularly visit VA hospitals, creating scores of informal claims.⁴¹⁶ From an administrative perspective, it would be burdensome and inefficient to require the VA to explicitly discuss every single informal claim in its

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* at 1295–96.

411. *Id.*

412. *Id.* at 1299.

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

414. *Id.*

415. *Id.*

416. *See id.* at 1300.

decisions.⁴¹⁷ Moreover, the consequence of the VA's failure to discuss any one informal claim would be an unwarranted windfall. The veteran would be granted an effective date that is the date of the unaddressed informal claim, even though the VA will have likely denied a subsequent formal claim that relates to that same disability. Munro, for example, had only one service-connected disability, the left-lung granuloma.⁴¹⁸ His 1995 and 1997 informal claims related to that disability.⁴¹⁹ In 1997, the VA explicitly rejected a formal claim for an increased rating of that disability.⁴²⁰ Although the VA increased Munro's disability rating in 2003, it would be an unwarranted windfall to the veteran to make that increase retroactive to the date of the informal claims in 1997 (or 1995), just because the 1997 VA decision—which related to the same disability as the informal claims—did not discuss Munro's 1995 and 1997 visits to the VA medical center.

b. Unresolved appeals

While claims, both formal and informal, remain pending before the RO until they are definitively adjudicated, claims also remain pending on appeal until adjudicated by the Board. In another notable decision this year, the Federal Circuit held, in *Jones v. Shinseki*,⁴²¹ that a claim that is pending in appellate status cannot be resolved by a subsequent RO adjudication. Only a subsequent Board decision can resolve the veteran's claim.⁴²²

In September 1973, Clabon Jones filed a claim for "nerves," which he claimed was a service-connected illness.⁴²³ The RO denied the claim.⁴²⁴ Jones filed a notice of disagreement, but the RO never issued a statement of the case, as it is required by statute to do.⁴²⁵ Accordingly, Jones's claim remained pending in "appellate" status.⁴²⁶ In 1985, Jones requested that his claim be reopened and that he be granted service connection for PTSD.⁴²⁷ The RO denied the request and, on appeal, the Board denied service connection for a nervous

417. *See id.*

418. *Id.* at 1299.

419. *Id.*

420. *Id.*

421. 619 F.3d 1368 (Fed. Cir. 2010).

422. *Id.* at 1373.

423. *Id.* at 1369.

424. *Id.*

425. *Id.*; see 38 U.S.C. § 7105(a), (d)(1) (2006).

426. *Munro*, 619 F.3d at 1371.

427. *Id.* at 1370.

condition, including PTSD.⁴²⁸ In 1991, however, the VA granted Jones service connection for PTSD with an effective date of May 1989, the date Jones had filed another request to reopen.⁴²⁹

Jones appealed the effective date, claiming that the denial of his 1973 claim was not final because the RO never provided a statement of the case.⁴³⁰ The Board rejected Jones's appeal, stating that the Board's 1986 decision denying service connection for PTSD implicitly resolved the 1973 claim.⁴³¹ Both the Veterans Court and the Federal Circuit affirmed.⁴³²

The Federal Circuit agreed with Jones that, because the 1973 claim remained pending on appeal, it could not be resolved by a subsequent RO decision.⁴³³ It could only be resolved by a subsequent Board decision.⁴³⁴ The 1986 Board decision rejected a PTSD claim that was, in the view of the Veterans Court, identical to the 1973 claim for "nerves."⁴³⁵ The Federal Circuit held that this factual determination was outside the scope of its review.⁴³⁶

The court thus applied the notice standard to determine whether the implicit denial rule was satisfied:

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.⁴³⁷

In the court's view, the fact that the Board had denied a claim identical to the 1973 claim provided Jones with sufficient notice that the 1973 claim for "nerves" had been denied.⁴³⁸

E. Claims Arising from VA Medical Treatment

In addition to providing benefits for injuries related to military service, the veterans statute provides benefits for injuries arising from VA medical treatment. Specifically, 38 U.S.C. § 1151(a)(1)(A) entitles a veteran (or the veteran's dependents) to benefits if the cause of the veteran's disability or death was "carelessness,

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 1371.

432. *Id.* at 1371, 1374.

433. *Id.* at 1373.

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the [VA] in furnishing” medical treatment.⁴³⁹ Congress enacted § 1151(a)(1)(A) in response to the Supreme Court’s decision in *Brown v. Gardner*,⁴⁴⁰ which held that the prior version of the statute did not require a claimant to show fault by the VA.⁴⁴¹

The claim in *Gardner* arose out of errors that occurred during surgery for a herniated disc at a VA hospital.⁴⁴² In *Roberson v. Shinseki*,⁴⁴³ the widow of a veteran sought benefits under the same, prior version of § 1151, claiming that the VA’s failure to diagnose her husband’s cancer entitled her to benefits.⁴⁴⁴ Before the VA, Mrs. Roberson and the VA presented conflicting evidence about whether the VA physicians should have discovered Mr. Roberson’s cancer during his final visit to a VA facility.⁴⁴⁵ (Physicians discovered the cancer during Mr. Roberson’s subsequent treatment at a private facility.) The Board rejected Mrs. Roberson’s evidence and the Veterans Court affirmed, noting that Mrs. Roberson had not shown that the VA “should have diagnosed” her husband’s cancer prior to the actual diagnosis in the private facility.⁴⁴⁶

On appeal, Mrs. Roberson argued that the Veterans Court’s conclusion conflicted with *Gardner* because it introduced an element of fault into the analysis: whether the physicians *should have diagnosed* her husband’s cancer.⁴⁴⁷ The Federal Circuit rejected this argument and affirmed the Veterans Court.⁴⁴⁸ The Federal Circuit pointed to a key distinction between *Gardner* and the case at hand: *Gardner* involved an act of commission, botched surgery, while *Roberson* involved an act of omission, the failure to diagnose the veteran’s cancer.⁴⁴⁹ In a case involving an act of commission, like *Gardner*, it is possible for a claimant to meet the burden as to causation (by

439. 38 U.S.C. § 1151(a)(1)(A) (2006).

440. 513 U.S. 115 (1994).

441. *Id.* at 119; *see supra* Part II.A (discussing the Supreme Court’s decision in *Gardner*).

442. *Gardner*, 513 U.S. at 116.

443. 607 F.3d 809 (Fed. Cir. 2010), *cert. denied*, 79 U.S.L.W. 3141 (U.S. 2011).

444. *Id.* at 811.

445. *See id.* at 812 (comparing Mrs. Roberson’s evidence, a 1998 letter written by Mr. Roberson’s doctor, to the government’s evidence, statements by VA physicians asserting that “[i]t is impossible to say if [Mr. Roberson] could have been cured if the disease had been detected earlier”).

446. *Id.* at 813.

447. *Id.* at 814.

448. *Id.* at 817.

449. *Id.* at 815.

showing that VA treatment caused an injury), but not negligence (by not showing that the VA physician failed to act with ordinary care).⁴⁵⁰

By contrast, in an omission case like *Roberson*, the court suggested that “the only way to show causation is to demonstrate that the VA failed to diagnose when it should have.”⁴⁵¹ In other words, in a failure-to-diagnose case, a fault standard (whether the VA *should have* diagnosed the disease) is the only way to ensure the requirement of a causal connection between the treatment and the injury is met.⁴⁵² As the Federal Circuit explained, “[w]ithout a showing that the VA should have diagnosed a condition, the VA would be subject to insuring for every possible condition that a veteran has, even if unrelated to . . . VA treatment.”⁴⁵³

Based solely on the plain language of the prior version of § 1151, the Federal Circuit’s conclusion is at least debatable. The question under the statute is simply whether the injury occurred “as the result of” the VA’s failure to act.⁴⁵⁴ Even if the VA physicians maintained a high level of care, injuries could still “result” from the physicians’ failure to take certain actions. For example, it might be customary in the medical community to provide only an x-ray to investigate certain symptoms. But a particular veteran might be suffering from an injury detectable only by an MRI. If this injury becomes more severe, it might be said that the increased severity is a “result” of the VA not conducting the MRI to detect the injury, even if no physician of ordinary skill and judgment would have ordered the MRI.

As the Federal Circuit noted, however, this reading of the statute would make the VA the insurer of practically any injury that a veteran developed while in VA care, even if a reasonable physician would not have diagnosed the injury.⁴⁵⁵ Plainly, Congress did not intend for the VA to be responsible for any injury a veteran might incur.⁴⁵⁶ Yet, as we have seen in other cases, the Federal Circuit would not have been required to interpret around the language of the statute had Congress drafted it more carefully. In any event, the issues raised in *Roberson* should not arise under the new version of § 1151, which explicitly requires the claimant to show that the VA was at fault.⁴⁵⁷

450. *Id.*

451. *Id.*

452. *See id.*

453. *Id.* at 815–16.

454. 38 U.S.C. § 1151 (Supp. V 1988).

455. *Roberson*, 607 F.3d at 815–16.

456. *Id.*

457. 38 U.S.C. § 1151(a)(1)(A) (2006).

Like many of the cases discussed in this part, *Roberson* is emblematic of the difficult balance the Federal Circuit tries to strike in nearly every veterans case—reconciling the rights of injured or disabled veterans (or their survivors) with the reality of an overworked, underfunded, bureaucratic agency. While, as discussed in the next Part, veterans law is occasionally altered by congressional legislation or regulations issued by the VA, the bulk of veterans law is made in the case-by-case adjudication of individual benefits claims. The Federal Circuit has, and will continue to have, an important role in ensuring that the benefits system strikes a fair balance between deserving veterans and the preservation of scarce VA resources.

IV. VETERANS LAW IN THE EXECUTIVE AND LEGISLATIVE BRANCHES

Although this Article has mainly focused on legal developments in the judicial branch, the corpus of veterans law is a product of all three branches of the federal government. This part provides a brief overview of the year's significant developments in the executive and legislative branches.

A. Executive Branch

In 2010, the VA made three major regulatory changes. First, as discussed above in connection with the *Paralyzed Veterans* case,⁴⁵⁸ the VA—at the insistence of the Federal Circuit—expanded the list of health problems that the VA will presume to be connected to in-service exposure to Agent Orange or other herbicides used during the Vietnam War.⁴⁵⁹ Under the new regulation, the following diseases will be presumed to be service connected for veterans who served in Vietnam between January 1962 and May 1975: hairy-cell leukemia, other chronic B-cell leukemias, Parkinson's disease, and ischemic heart disease.⁴⁶⁰ The VA has stated that it expects more than 150,000 new claims to be filed within twelve to eighteen months of adoption of the new regulation.⁴⁶¹ It also has planned to review approximately 90,000 previously denied claims by Vietnam veterans for possible service connection under the new regulation.⁴⁶² Veterans who have

458. See *supra* Part III.B.2.

459. Diseases Associated with Exposure to Certain Herbicide Agents, 75 Fed. Reg. 53,202 (Aug. 31, 2010) (to be codified at 38 C.F.R. pt. 3).

460. *Id.* at 53,216; see also 38 C.F.R. § 3.307(a)(6) (2010) (setting forth presumption of service connection for certain diseases for certain Vietnam veterans).

461. VA Publishes Final Regulation to Aid Veterans Exposed to Agent Orange, U.S. DEP'T OF VETERANS AFFAIRS (Aug. 30, 2010), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=1945>.

462. *Id.*

previously filed claims based on Agent Orange exposure could be eligible for retroactive payments based on those claims.⁴⁶³ In the first six weeks after the amended regulation became effective, the VA reviewed more than 28,000 claims related to Agent Orange exposure.⁴⁶⁴

Second, the VA established new presumptions of service connection for nine infectious diseases associated with service in Southwest Asia (including Iraq) and Afghanistan.⁴⁶⁵ Under the amended regulation, the VA will presume diseases such as malaria, the West Nile virus, and tuberculosis, among others, to be service connected⁴⁶⁶ for veterans who served in the Persian Gulf at any time after August 2, 1990⁴⁶⁷ and in Afghanistan at any time after September 19, 2001.⁴⁶⁸

Finally, in a move that attracted significant attention from the popular media, the VA relaxed the requirements for certain veterans seeking benefits for PTSD.⁴⁶⁹ Specifically, the amended regulation no longer requires corroborating evidence that the in-service stressor claimed by the veteran actually occurred if the claimed stressor is related to fear of hostile military or terrorist activity, a VA physician confirms that the stressor supports a diagnosis of PTSD, and the stressor is consistent with the circumstances of the veteran's service.⁴⁷⁰ The amended regulation should relieve veterans from proving that a specific traumatic event (such as a bombing or firefight) occurred, so long as the veteran served in a war zone and in a role consistent with the event that allegedly caused the condition.⁴⁷¹

B. Legislative Branch

Congress also made important changes to the law of veterans benefits this year. First, the high-profile economic stimulus bill, the American Recovery and Reinvestment Act, gave well over \$1 billion to

463. *Id.*

464. *VA Processes First Claims for New Agent Orange Presumptives*, U.S. DEP'T OF VETERANS AFFAIRS (Dec. 17, 2010), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2022>.

465. Presumptions of Service Connection for Persian Gulf Service, 75 Fed. Reg. 59,968, 59,971 (Sept. 29, 2010) (to be codified at 38 C.F.R. pt. 3).

466. *Id.*

467. 38 C.F.R. § 3.2(i) (2010).

468. Presumptions of Service Connection for Persian Gulf Service, 75 Fed. Reg. at 59,971.

469. See, e.g., James Dao, *V.A. Is Easing Rules to Cover Stress Disorder*, N.Y. TIMES, July 8, 2010, at A1 (discussing the new PTSD regulation).

470. Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843 (July 13, 2010) (to be codified at 38 C.F.R. pt. 3).

471. Dao, *supra* note 469, at A1.

the VA.⁴⁷² The VA allocated much of this funding to improving energy efficiency in VA facilities and also embarked on many projects to improve VA medical facilities and cemeteries.⁴⁷³

Congress also expanded veterans' eligibility for reimbursement by the VA for emergency medical treatment in a non-VA facility.⁴⁷⁴ The House report accompanying this bill stated that, while the VA is required to reimburse a veteran for emergency treatment in non-VA facilities,⁴⁷⁵ the VA under then-current law was not paying for emergency treatment in non-VA facilities if the veteran had third-party insurance that paid any portion of the treatment costs.⁴⁷⁶ For example, if a veteran had an automobile insurance policy with minimal health insurance coverage, the VA would not reimburse the veteran for the remaining expenses of emergency care.⁴⁷⁷ The new law allows the VA to reimburse a veteran for treatment in a non-VA facility, even if the veteran has insurance that would pay a portion of the emergency care.⁴⁷⁸

In addition, Congress passed the Veterans' Benefits Act of 2010.⁴⁷⁹ Among other things, the law extends and enhances the life insurance available to veterans,⁴⁸⁰ increases the VA-provided burial and funeral expenses for certain veterans,⁴⁸¹ and increases the benefits for veterans with lost limbs, veterans with traumatic brain injuries, and the surviving spouses of veterans with dependent children under age eighteen.⁴⁸²

Finally, Congress approved the annual cost-of-living adjustment for veterans benefits.⁴⁸³ But because the consumer price index did not increase in 2010, benefits payments will not increase.⁴⁸⁴

472. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 199.

473. *VA Tops \$1B Mark in Recovery Act Distributions*, U.S. DEP'T OF VETERANS AFFAIRS (Oct. 15, 2010), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=1982>.

474. Act of Feb. 1, 2010, Pub. L. No. 111-137, 123 Stat. 3495.

475. 38 U.S.C. § 1725 (2006).

476. H.R. REP. NO. 111-55, at 2 (2009).

477. *Id.* at 2-3.

478. Pub. L. No. 111-137, § 1, 123 Stat. at 3495.

479. Veterans' Benefit Act of 2010, Pub. L. No. 111-275, 124 Stat. 2864.

480. *See id.* §§ 402, 407, 124 Stat. at 2879-81 (including an extension of the duration of group life insurance for totally disabled veterans and an opportunity for certain veterans to increase the amount of life insurance).

481. *Id.* § 501, 124 Stat. at 2881.

482. *Id.* §§ 601-02, 124 Stat. at 2885-88.

483. Veterans' Compensation Cost-of-Living Adjustment Act of 2010, Pub. L. No. 111-247, § 2, 124 Stat. 2623, 2623; *see also* H.R. REP. NO. 111-452, at 2 (2010) (noting that Congress has passed cost-of-living adjustments for veterans every year since 1976).

484. *Under the Law No Social Security COLA for 2011*, SOC. SEC. ADMIN., (Oct. 15, 2010), <http://www.ssa.gov/pressoffice/pr/2011cola-pr.htm>; *see also* Cost-of-Living

CONCLUSION

It is a busy time in veterans benefits law, both in the usual fora—the VA, the Veterans Court, the Federal Circuit, and Congress—and in a not-so-usual forum—the Supreme Court of the United States. Whether or not the Supreme Court will maintain its involvement in veterans law is unclear. As suggested in this Article, however, a modest docket of veterans cases in the near future is not out of the question.

One thing that seems certain is that veterans' demands on the benefits system will continue to increase. Although President Obama has declared an end to combat operations in Iraq⁴⁸⁵ and has stated a plan for a limited withdrawal of U.S. troops from Afghanistan in 2011,⁴⁸⁶ the foundation for future stress on the benefits system has already been laid. Nearly 6,000 soldiers have been killed and another 42,000 have been wounded in the Iraq and Afghanistan conflicts.⁴⁸⁷ Many of these soldiers, as well as their spouses and children, will call upon the veterans benefits system for the rest of their lives. And, when they are unable to obtain the benefits they seek, some of them will turn to the courts. These cases will continue to present the Federal Circuit, and perhaps the Supreme Court, with challenging questions of veterans law for decades to come.

Adjustment Act § 2(c), 124 Stat. at 2623 (tying increase in veterans benefits to Social Security cost-of-living adjustment).

485. See Helene Cooper & Sheryl Gay Stolberg, *Obama Declares an End to Iraq Combat Mission*, N.Y. TIMES, Sept. 1, 2010, at A1 (noting that 49,700 American troops remain in Iraq and that the same number of troops will remain through at least summer 2011).

486. Helene Cooper & David E. Sanger, *U.S. Will Widen War on Militants Inside Pakistan*, N.Y. TIMES, Dec. 17, 2010, at A1.

487. *DOD Casualty Reports*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/casualty.pdf> (last updated Mar. 3, 2011).

ADDENDUM

As in other annual surveys of the Federal Circuit's jurisprudence,⁴⁸⁸ I provide a statistical addendum summarizing the year's decisions. This addendum provides an empirical snapshot of the Federal Circuit's veterans opinions, both in 2010 and over the past decade. While further data gathering and analysis is certainly possible, this addendum provides a brief, objective overview of the Federal Circuit's approach to deciding veterans cases.

Table 1: Results of Precedential Veterans Opinions, January 1, 2010 to December 31, 2010

<i>Result</i>	<i>Number of Cases</i>
Affirmed	11
Dismissed in part, reversed in part, and remanded	1
Vacated and remanded	2
Total	14

To illustrate the extent of the Federal Circuit's agreement (or disagreement) with the decisions of the Veterans Court, Table 1 summarizes the decretal language of the Federal Circuit's published veterans opinions in 2010.⁴⁸⁹ Most of the Federal Circuit's precedential veterans opinions (as well as its unpublished decisions)⁴⁹⁰ uphold the Veterans Court's determination, either by affirming on the merits or dismissing for lack of jurisdiction. In 2010, 78.6% (11 of 14) of the Federal Circuit's published veterans opinions affirmed the Veterans Court's determination. Although this is obviously a small sample, this affirmance rate is appreciably higher than the 62% affirmance rate for published opinions by regional circuit courts of appeals reviewing district court or agency

488. See, e.g., Kenneth R. Adamo, Gregory A. Castanias, Mark N. Reiter & Lawrence D. Rosenberg, *Survey of the Federal Circuit's Patent Law Decisions in 2000: Y2K in Review*, 50 AM. U. L. REV. 1435, 1699–706 (2001) (2001 patent law survey); Castanias et al., *supra* note 4, at 975–85 (2006 patent law survey); Castanias et al., *supra* note 127, at 1056 (2010 patent law survey).

489. Decretal language is the portion of the opinion (usually the final line) that states the court's formal order. Castanias et al., *supra* note 4, at 984 n.1565 (citing Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 BROOK. L. REV. 727, 727 (2005)).

490. See *supra* note 129 (noting that most of the Federal Circuit's 2010 non-precedential veterans decisions dismissed cases for lack of jurisdiction).

determinations.⁴⁹¹ Whether the Federal Circuit consistently affirms the Veterans Court at a rate higher than the regional circuits affirm the district courts and uphold the actions of administrative agencies could be an interesting question for future research.

Table 2: Precedential Veterans Opinions by Judge, January 1, 2010 to December 31, 2010

<i>Judge</i>	<i>Number Authored</i>	<i>Number on Panel</i>	<i>Percentage Authored</i>	<i>Number of Separate Opinions</i>	<i>Number Authored Generating Separate Opinions</i>
Rader	0	3	0.0%	0	0
Newman	0	5	0.0%	2	0
Lourie	0	1	0.0%	0	0
Michel	0	0	—	0	0
Bryson	1	7	14.3%	0	0
Gajarsa	2	3	66.7%	0	0
Linn	0	1	0.0%	0	0
Dyk	4	6	66.7%	0	0
Prost	0	4	0.0%	0	0
Moore	1	4	25.0%	0	0
Friedman	2	2	100%	0	1
Archer	0	0	—	0	0
Mayer	1	3	33.3%	0	0
Plager	1	1	100%	0	0
Clevenger	0	1	0.0%	0	0
Schall	0	0	—	0	0
Per Curiam	1	—	—	—	1
Visiting	1	1	100%	0	0
Total	14	42	—	2	2

491. ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 40 (2001). Kuersten and Songer's sample set covers the years 1925 through 1996. *Id.* at 58–61 tbl.2.9.

Table 2 provides a snapshot of which judges wrote and participated in the Federal Circuit's precedential veterans decisions in 2010. The first column ("number authored") indicates the number of precedential majority opinions in veterans cases drafted by each judge.⁴⁹² The second column ("number on panel") indicates for how many precedential veterans decisions each judge was on the panel. The number in the second column includes decisions for which each judge was the opinion author. Judge Plager, for example, was on the panel for one precedential veterans decision in 2010, and he wrote the opinion.

The third column ("percentage authored") shows the percentage of precedential veterans decisions that a judge participated in for which the judge authored the majority disposition. The fourth column ("number of separate opinions") indicates the number of separate opinions (concurrences or dissents) authored by each judge in veterans cases. The final column ("number authored generating separate opinions") indicates which judges authored the majority opinions that generated those separate opinions.

Because the Federal Circuit randomly assigns cases and judges to panels,⁴⁹³ one would expect that each of the court's active judges would hear a roughly equal number of veterans cases and that each judge would participate in and author a roughly equal number of precedential decisions. Yet three of the court's judges, Judges Gajarsa, Dyk, and Friedman, wrote over half of the court's published veterans opinions in 2010.

Again, this sample of opinions is too small to support any definitive conclusions. The data does, however, replicate trends that other commentators have found in Federal Circuit patent cases. Data collected in 2006, for example, showed that Judge Dyk was more likely than most of his colleagues to participate in a precedential decision, suggesting that he was particularly likely to request that the panel publish its disposition.⁴⁹⁴ In addition, data from that same year suggested that Judge Newman was the most likely of her colleagues to

492. Individual Federal Circuit judges drafted twelve of the fourteen precedential veterans opinions in 2010. One opinion was issued per curiam, *Butler v. Shinseki*, 603 F.3d 922, 923 (Fed. Cir. 2010), and Judge David Folsom, Chief Judge of the U.S. District Court for the Eastern District of Texas, wrote the panel's opinion in *Roberson v. Shinseki*, 607 F.3d 809, 810 (Fed. Cir. 2010).

493. FED. CIR. INTERNAL OPERATING PROCEDURE 3(1) (Nov. 14, 2008); see also FED. CIR. R. 47.2(b) (providing that each judge should hear cases from a cross-section of the court's subject-matter jurisdiction).

494. *Castanias et al.*, *supra* note 4, at 977. See generally FED. CIR. INTERNAL OPERATING PROCEDURE 10(6) (outlining the procedure for a judge to request that the panel issue a precedential opinion).

draft a separate opinion in a patent case.⁴⁹⁵ Likewise, in the court's 2010 veterans decisions, Judge Newman was the *only* judge to issue a separate opinion.⁴⁹⁶

Although some scholars have empirically studied the behavior of the Federal Circuit's judges in addressing particular substantive questions,⁴⁹⁷ I am not aware of any study that has examined the behavior of individual judges across the court's subject-matter jurisdiction.⁴⁹⁸ This may also be a fruitful avenue for future research. Such a project could reveal whether individual judges use consistent analytical methods in all types of cases.⁴⁹⁹

495. Castanias et al., *supra* note 4, at 977; *see also* Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOYOLA L.A. L. REV. 801, 820 (2010) (noting that, in 2008 and 2009, Judge Newman filed the largest number of dissents among the judges on the court).

496. Judge Newman also dissented from the court's first precedential veterans opinion of 2011. *Hargrove v. Shinseki*, 629 F.3d 1377, 1379 (Fed. Cir. 2011) (Newman, J., dissenting).

497. *See, e.g.*, Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 491–94 (2007) (studying the court's veterans benefits decisions); John R. Allison & Mark A. Lemley, *How Federal Circuit Judges Vote in Patent Validity Cases*, 27 FLA. ST. U. L. REV. 745, 745–46 (2000) (studying the court's patent validity decisions); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105 (2004) (studying the court's claim construction decisions).

498. *Cf.* Cotropia, *supra* note 495, at 815–17 (collecting data on Federal Circuit dissent and en banc practice, some of which was not limited to patent cases).

499. Wagner and Petherbridge, for example, identified two judicial approaches to patent claim construction: (1) the proceduralist approach, which uses a hierarchy of sources to determine meaning, with the plain language of the claim being paramount, and (2) the holistic approach, which looks to varied interpretive clues to determine the claim's meaning in the particular circumstances presented. Wagner & Petherbridge, *supra* note 497, at 1133–34. It would be interesting to see if, in veterans cases, judges who employ a proceduralist claim construction method prefer clear rules, such as the presumption of harmless error rejected by the Supreme Court in *Sanders*, and if judges who employ a holistic approach to claim construction emphasize a standards-based approach to benefits claims, emphasizing that the VA should take into account all the information before it, an approach used in this year's decisions on the duty to assist and service connection. *See supra* Part III.A–B (examining the Federal Circuit's 2010 duty-to-assist and service-connection decisions).

Figure 1: Precedential Opinions Reviewing the Court of Appeals for Veterans Claims, 2000 to 2010

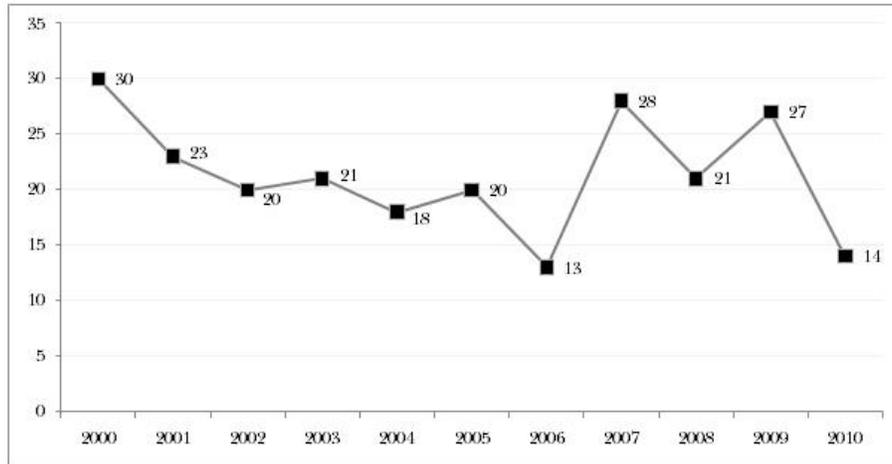
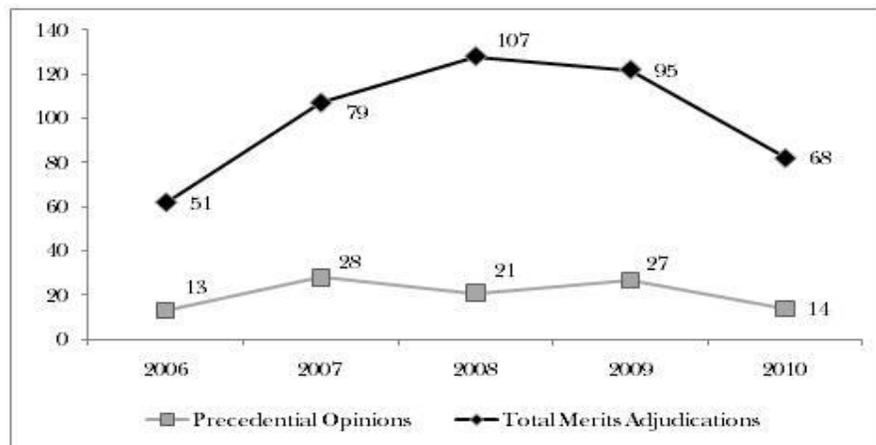


Figure 1 depicts the number of precedential veterans opinions issued by the Federal Circuit each year since 2000. It makes clear that the court issued an unusually low number of precedential veterans opinions in 2010 after issuing a relatively high number of veterans opinions in the three-year period from 2007 through 2009.

Figure 2: Precedential Veterans Opinions Compared to Total Number of Decisions Reviewing the Court of Appeals for Veterans Claims, 2006 to 2010



To put the decline of precedential opinions in context, Figure 2 compares, for the last five years, the number of precedential veterans opinions to the total number of veterans cases decided by Federal Circuit merits panels.⁵⁰⁰ Figure 2 shows that, not only did the number of precedential veterans opinions decline in 2010, the total number of veterans cases decided on the merits declined as well. Given that, over the past ten years, the number of claims received by the VA annually has increased 75% (from 579,000 in 2000 to 1,014,000 in 2009),⁵⁰¹ one would not expect the number of Federal Circuit veterans opinions to trend downward. If a downward trend continues, this, too, might be an interesting area for future investigation, especially if it contrasts with an increased number of Supreme Court veterans cases.

500. I obtained the number of adjudications from data compiled by the Federal Circuit itself. *See Statistics*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/the-court/statistics.html> (last visited Feb. 22, 2011) (scroll down to “Caseload, By Category,” then click on the hyperlinks for “Table of data to accompany pie charts”). The annual data collected by the Federal Circuit corresponds to the court’s fiscal year (October 1 to September 30), while the data I have collected on the number of precedential opinions (from Westlaw) corresponds to the calendar year (January 1 to December 31). While this data does not match precisely, it still gives a helpful picture of trends in the Federal Circuit’s veterans docket.

501. *White House Seeks \$125 Billion for Veterans in 2011*, U.S. DEP’T OF VETERANS AFFAIRS, (Feb. 1, 2010), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=1848>.