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Ten Federal Circuit Cases from 2009 That Veterans Benefits Attorneys Should Know

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TEN FEDERAL CIRCUIT CASES FROM 2009
THAT VETERANS BENEFITS ATTORNEYS
SHOULD KNOW*

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“[T]o care for him who shall have borne the battle,
and for his widow, and his orphan”

—Abraham Lincoln¹

* The views set forth in this Area Summary are the views of the Authors and do not necessarily reflect those of JONES DAY or its clients. The Authors would like to thank Kimberly Trimble and Lee Perla for their encouragement and support of this project.

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1. President of the United States of America, Second Inaugural Address (Mar. 4, 1865). This phrase is also the motto of the United States Department of Veterans Affairs. U.S. Dep’t of Veterans Affairs, *The Origin of the VA Motto*, available at <http://www1.va.gov/opa/publications/celebrate/vamotto.pdf>.

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INTRODUCTION

The Federal Circuit is the highest court to which veterans can appeal by right for benefits. In 2009, the Federal Circuit decided eighty-seven veterans cases (twelve percent of its overall docket). Twenty-six of those decisions were precedential opinions. There are approximately 23.4 million veterans in the United States, more than three million of whom receive disability compensation.² And with two ongoing wars, plans to increase the size of the Army and Marine Corps, and recent legislation impacting the veterans claims process,

2. NAT'L CTR. FOR VETERANS ANALYSIS & STATISTICS, VA BENEFITS & HEALTH CARE UTILIZATION, Aug. 3, 2009, available at http://www1.va.gov/vetdata/docs/4X6_summer09_sharepoint.pdf.

the Federal Circuit will likely see an increase in veterans cases in the coming years.³

Part I of this article summarizes the eligibility criteria for veterans benefits and the process by which a veteran's claim reaches the Federal Circuit. Part II explains the jurisdiction of the Federal Circuit with respect to veterans cases. Part III analyzes one Supreme Court and nine Federal Circuit cases from 2009 that are important to veterans benefits practitioners. These cases address, *inter alia*, issues that arise from the Department of Veterans Affairs's duty to assist veterans with their claims, whether veterans have a Fifth Amendment due process right to a claim for benefits, equitable tolling of the deadlines for appealing benefits decisions, and the retroactive assignment of disability ratings.

I. ELIGIBILITY AND THE CLAIMS PROCESS

By the time a veteran's case reaches the Federal Circuit, it has traveled a long road that usually involves multiple medical examinations,⁴ at least one administrative hearing and administrative appeal, and review by a federal appellate court.⁵ But before we summarize that process, it is important to understand who is eligible to begin it.

The Department of Veterans Affairs (VA) defines a veteran as "a person who served in the *active* military, naval, or air service, and who was discharged or released therefrom under conditions *other than dishonorable*."⁶ The "active" portion of the definition is satisfied by anyone in the active duty military. National Guard members and Reservists, however, are not automatically deemed veterans.⁷ They must either be activated for "federal" service (as opposed to service to

3. See, e.g., *What's Ahead for Soldiers in 2010*, ARMY TIMES, Jan. 1, 2010, available at http://www.armytimes.com/news/2010/01/army_fivethings3_010310w/ (discussing the troop surge in Afghanistan, "where more casualties are expected as the troop presence grows"); John Feffer, *Obama: The Goldilocks President*, THE HUFFINGTON POST, Jan. 23, 2010, http://www.huffingtonpost.com/john-feffer/obama-the-goldilocks-pres_b_428971.html (discussing recent increases in the size of the Army and Marine Corps and military spending).

4. Although there are several different types of claims that veterans may file (e.g., survivor benefits, education benefits, etc.), this article focuses only on medical disability claims because they constitute the vast majority of claims for benefits and are thus most pertinent to the Federal Circuit.

5. The United States Court of Appeals for Veterans Claims is the only court that may review decisions of the Board of Veterans Appeals. See *infra* notes 29–34 and accompanying text.

6. 38 U.S.C. § 101(2) (2006) (emphasis added); 38 C.F.R. § 3.1(d) (2009) (emphasis added).

7. 38 C.F.R. § 3.6(b).

their state government)⁸ or be injured or killed during non-federal service.⁹ Accordingly, a member of a Reserve unit that deploys to Afghanistan would meet the requirement, whereas a member of a Reserve unit that mobilizes pursuant to a state order to assist with a natural disaster generally would not.

The other element in the definition of “veteran”—a discharge under conditions other than dishonorable—is not as straightforward as it may seem because, contrary to Hollywood depictions, there are more than just “honorable” and “dishonorable” discharges. Rather, the types of discharge include: (1) honorable discharge; (2) discharge under honorable conditions; (3) discharge under *other than* honorable conditions; (4) bad conduct discharge; and (5) dishonorable discharge.¹⁰ As the names suggest, the first two types of discharge are good; they result in “veteran” status for benefits purposes. The last three types of discharge, however, are bad. In fact, a dishonorable discharge is a bar to attaining the status of veteran for benefits purposes.¹¹ The other two “bad” discharges, however, do not automatically bar a person from obtaining the status of veteran. If a person receives either a discharge under other than honorable conditions or a bad conduct discharge and applies for veterans benefits, the VA adjudicates the facts surrounding the discharge and reviews the applicant’s entire service history to determine eligibility to receive veterans benefits.¹²

Once an applicant attains “veteran” status, the applicant can obtain disability benefits from the VA by demonstrating: “(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service.”¹³

8. *Id.* § 3.7(o)(1) (stating that a person “ordered into service” may be eligible for benefits).

9. 38 U.S.C. § 101(24); 38 C.F.R. § 3.6(a).

10. See BARTON F. STICHMAN ET AL., VETERANS BENEFITS MANUAL § 20.2 (2007).

11. 38 U.S.C. § 101(2); 38 C.F.R. § 3.1(d).

12. 38 C.F.R. § 3.12.

13. *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)); see 38 U.S.C. §§ 1110, 1131 (applying to wartime and peacetime service, respectively, and stating that there is a presumption of sound condition when enrolled for service). There is no statute of limitations for filing claims. Accordingly, some veterans file claims many years after leaving active service, sometimes because they do not begin to experience symptoms until later in life. Obviously, the more time that has passed between active service and filing, the harder it is to prove that a current disability is connected to active service.

The veteran must prove those elements under the “benefit of the doubt” standard.¹⁴ Under that standard, if the evidence regarding a claim is in an “approximate balance of positive and negative . . . the [VA] shall give the benefit of the doubt to the claimant.”¹⁵ The claims process is not meant to be adversarial. To the contrary, the statute imposes a long list of obligations on the VA to assist veterans in presenting their claims by, for example, notifying veterans of evidence necessary to complete their claim and making reasonable efforts to obtain records in the government’s possession.¹⁶

The injury or illness, however, cannot be the result of the veteran’s own willful misconduct or abuse of alcohol or drugs.¹⁷ For example, if an active duty service member robs a bank and during the robbery is shot by the police and paralyzed, the injury would be deemed to be due to the individual’s own misconduct. Accordingly, regardless of the military discharge received, the service member would not be entitled to disability compensation or treatment from the VA for the paralysis.

A claim for disability benefits goes to one of fifty-eight VA Regional Offices, which examines the claim to determine whether the claimant meets the definition of a veteran and whether he or she has a compensable injury or illness related to military service.¹⁸ The VA must presume that the illness is *not* due to the veteran’s own misconduct or drug or alcohol abuse.¹⁹ If there is evidence to suggest that the illness is due to misconduct, the VA may rebut the presumption by a preponderance of the evidence.²⁰ If the claimant is

14. 38 U.S.C. § 5107(b).

15. *Id.*; see 38 C.F.R. § 3.102 (mandating that if a “reasonable doubt arises . . . such doubt will be resolved in favor of the claimant”).

16. See, e.g., Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, § 5103A, 114 Stat. 2096, 2097 (codified as amended at 38 U.S.C. §§ 5102–5103A, 5107). The VA’s duty to assist veterans in filing claims pre-dates the VCAA, but the VCAA was enacted in order to redefine and clarify the VA’s duties.

17. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.301(b).

18. See generally DEP’T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS DEPENDENTS & SURVIVORS (2009), available at <http://www1.va.gov/opa/vadocs/fedben.pdf> (describing the process and requirements for submitting a claim).

19. 38 U.S.C. § 105(a); see, e.g., *Smith v. Derwinski*, 2 Vet. App. 241, 244 (Ct. Vet. App. 1992) (“[B]ecause [the veteran] was in the active naval service, his injuries are deemed to have been in line of duty”); *Shedden v. Principi*, 381 F.3d 1163, 1166 (Fed. Cir. 2004) (noting the presumption that a disease or injury first manifested or aggravated during active duty is service-connected).

20. E.g., *Smith*, 2 Vet. App. at 244 (citing *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (Ct. Vet. App. 1990) (requiring the Government to show by a preponderance of the evidence that the injuries in question were not sustained in the line of duty); *Thomas v. Nicholson*, 423 F.3d 1279, 1284–85 (Fed. Cir. 2005) (“Thus, we find that preponderance of the evidence is the proper evidentiary standard necessary to rebut a § 105(a) presumption”).

deemed a “veteran” under the statute and regulations and has a compensable disability, the Regional Office determines the severity of the disability (expressed as a percentage designed to account for the “average impairments of earning capacity resulting from such injuries in civil occupations”)²¹ and assigns a date in the past that the disability took effect.²² The severity of the disability (i.e., the “rating” percentage) and the effective dates are fertile sources of litigation.

Another fertile source of litigation stems from the VA reducing ratings after the initial rating or denying a veteran’s claim for an increased rating. Because most injuries and illnesses are not static, the VA may conduct follow-up examinations or the veteran may submit a claim for an increased rating. For example, a veteran may qualify for a 70% disability during a certain time interval when his disability is especially potent, but that disability may subsequently improve and be commensurate with only a 40% rating, or vice-versa. The Federal Circuit has noted that, “[o]ver a period of many years, a veteran’s disability claim may require reratings in accordance with changes in . . . his or her physical or mental condition.”²³

The veteran can appeal any portion of the VA’s disability findings (for both initial claims and subsequent ratings)²⁴ by filing with the VA a notice of disagreement.²⁵ The veteran is entitled to retain counsel and to an informal hearing in front of a Decision Reviewing Officer (DRO) at the VA Regional Office.²⁶ If the veteran disagrees with the DRO’s findings, the veteran is entitled to a “formal” appeal to the Board of Veterans’ Appeals (BVA),²⁷ where the veteran may request a

21. 38 U.S.C. § 1155; *see also* 38 C.F.R. pt. 4 (discussing the general policies regarding disabilities ratings).

22. *E.g.*, *Moore v. Shinseki*, 555 F.3d 1369, 1370–71 (Fed. Cir. 2009) (discussing the history of a claim that included several adjustments to the effective date).

23. *Id.* at 1373 (citing 38 C.F.R. § 4.1).

24. *See* 38 U.S.C. § 7104 (stating that all decisions made by the Secretary are subject to review); *see also* 38 C.F.R. § 19.1 (establishing the BVA). *See generally* 38 C.F.R. pt. 19 (outlining the regulations for the BVA).

25. 38 C.F.R. § 20.201.

26. *Id.* § 3.103. Current law prohibits a veteran from retaining paid counsel at any step in the claims process before the notice of disagreement is filed. *See* 38 U.S.C. § 5904(c) (2006) (providing that, with limited exceptions, “a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a notice of disagreement is filed”). This prohibition on representation has been frequently criticized as, among other things, contributing to the inefficiency of the claims process, *see* 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), and costing individual veterans thousands of dollars in benefits, if not more, *see* 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).

27. 38 U.S.C. § 7105(d)(3)–(5); 38 C.F.R. § 20.202.

hearing.²⁸ If the veteran disagrees with the BVA, he or she may appeal to the Court of Appeals for Veterans Claims (CAVC).²⁹

The CAVC was established in 1988 pursuant to Article I of the United States Constitution³⁰ to provide an “impartial judicial forum for review of administrative decisions . . . that are adverse to the veteran-appellant’s claim.”³¹ It has “exclusive jurisdiction to review decisions of the [BVA].”³² Despite this nation’s tradition of having courts review administrative agency determinations, there was almost no review of VA determinations before Congress established the CAVC.³³ Veterans may appeal final decisions of the CAVC to the United States Court of Appeals for the Federal Circuit.³⁴

II. FEDERAL CIRCUIT JURISDICTION OVER VETERANS CLAIMS

The Federal Circuit’s jurisdiction in the area of veterans law is narrow but significant. The court has two jurisdictional bases for exercising review. First, the court may hear appeals from decisions of the CAVC, but it may only decide purely legal questions.³⁵ Essentially, the Federal Circuit acts as a secondary appellate court over the CAVC. This makes it the only federal appellate court besides the Supreme Court to review the decisions of another federal appellate court.³⁶ Second, the Federal Circuit has exclusive jurisdiction over challenges to VA rules and regulations under the Administrative Procedure Act.³⁷

As a result of this unique jurisdictional scheme, the Federal Circuit “does not issue very many precedential opinions in the area of veterans law,” but those that it does issue “are usually quite important.”³⁸

28. STICHMAN ET AL., *supra* note 10, § 13.2.

29. 38 U.S.C. § 7252.

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

31. U.S. Court of Appeals for Veterans Claims, Welcome, <http://www.uscourts.cavc.gov> (last visited Apr. 7, 2010).

32. 38 U.S.C. § 7252(a).

33. See STICHMAN ET AL., *supra* note 10, § 15.1.1 (“[D]uring most of the twentieth century decisions of the [VA] . . . were exempt from court review.”). Nothing, however, precluded a veteran from challenging the constitutionality of VA decisions. See *Johnson v. Robinson*, 415 U.S. 361, 367 (1974) (“Plainly, no explicit provision of § 211 (a) bars judicial consideration of appellee’s constitutional claims.”).

34. 38 U.S.C. § 7292.

35. *Id.* § 7292(d).

36. See *infra* note 39.

37. 38 U.S.C. § 7292(c).

38. Chief Judge Glenn Archer, U.S. Court of Appeals for the Federal Circuit, The Third Annual Judicial Conference of the United States Court of Veterans Appeals (Oct. 17–18, 1994), in 8 *Vet. App. CXCI* (1996).

A. *Federal Circuit Review of the Court of Appeals for Veterans Claims*

Federal Circuit review of the CAVC is unusual because the latter is itself an appellate court.³⁹ Perhaps as a partial consequence, very few veterans claims are successfully appealed to the Federal Circuit.⁴⁰ Moreover, the Federal Circuit's jurisdiction over CAVC appeals is limited to review of issues of pure law.⁴¹ Indeed, the Federal Circuit is specifically prohibited from entertaining "a challenge to a factual determination" or "a challenge to a law or regulation as applied to the facts of a particular case," except insofar as such facts present a constitutional issue.⁴² To date, this unusual bar on the Federal Circuit's review of non-constitutional facts in veterans cases has withstood challenges on the rationale that such cases are still given three levels of factual review by administrative bodies and lower courts, including the CAVC.⁴³

The prohibition on reviewing any non-constitutional facts significantly limits the number of veterans appeals heard by the Federal Circuit.⁴⁴ However, the Federal Circuit's appellate jurisdiction over legal issues includes authority to review the validity and proper interpretation of statutes and regulations upon which the CAVC relies in reaching a judgment, as well as the ability to review other legal issues that are not derived from a statute or regulation.⁴⁵ In other words, the Federal Circuit exercises appellate review over *all*

39. See Letter from William P. Greene, Jr., Chief Judge, Court of Appeals for Veterans Claims, to John J. Hall, Chairman, Subcomm. on Disability Assistance & Memorial Affairs, Comm. on Veterans' Affairs, U.S. House of Representatives (June 5, 2007), available at <http://veterans.house.gov/Media/File/110/5-22-07/courtofappealsfollow-up.htm> (discussing the benefits of additional federal appellate review of CAVC decisions); see also 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, 380 (2009) ("[T]here is no other situation in the federal court system in which the decisions of one appellate body are subject to review as of right in another appellate body, other than the Supreme Court").

40. Of the approximately "half of one percent of cases [that] are appealed to the CAVC, . . . the number of veterans appeals that the Federal Circuit hears on the merits is negligible compared to the overall volume of [veterans] claims." James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of VA Adjudication*, 65 ANN. SURV. AM. L. (forthcoming 2010), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=james_ridgway

41. 38 U.S.C. § 7292(a), (d)(1).

42. *Id.* § 7292(d)(2).

43. See, e.g., *Bradley v. Nicholson*, 181 Fed. App'x 989, 994 (Fed. Cir. 2006), cert. denied, 549 U.S. 887 (2006) (holding that the Federal Circuit's limited jurisdiction does not deprive veterans of equal protection).

44. See, e.g., *Archer*, supra note 38, at CLXXXVI–CXCI (noting that "about 80 percent of the [CAVC] cases appealed to our court so far have been jurisdictionally defective").

45. 38 U.S.C. § 7292(a).

questions of law raised in CAVC decisions, including judicially created rules of law, but not over non-constitutional facts.⁴⁶

The Federal Circuit applies a de novo standard of review to legal questions decided by the CAVC and has broad latitude to overturn laws, statutes, regulations, or interpretations thereof, if they are arbitrary, capricious, an abuse of discretion, unconstitutional, contrary to statute, in excess of statutory authority, without observance of procedure required by law, or otherwise not in accordance with law.⁴⁷

The leading practitioners' guide on veterans law identifies three "potential roadblocks" to obtaining Federal Circuit review of legal issues in CAVC decisions.⁴⁸ First, the issue on appeal must be carefully framed as one solely of legal interpretation, rather than application of law to facts.⁴⁹ Second, the issue being appealed is more likely to be heard if it was "relied upon" by CAVC in its decision.⁵⁰ Third, and finally, the issue being appealed generally should have been raised in the lower courts.⁵¹

46. Recent cases illustrate the Federal Circuit's jurisdiction over issues of law, but not fact. *Compare* Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1308 n.5 (Fed. Cir. 2008) (allowing review of a facial challenge to VA regulations), *with* Kokenge v. Nicholson, 179 Fed. App'x 31, 32 (Fed. Cir. 2006) (dismissing a service connection claim because it challenged the application of laws and regulations and not the law or statutes themselves), *and* Kince v. Nicholson, 161 Fed. App'x 938, 941 (Fed. Cir. 2005) (dismissing for want of jurisdiction an appeal claiming alleged misinterpretation of medical records).

47. 38 U.S.C.A. § 7292(d)(1).

48. STICHMAN ET AL., *supra* note 10, § 15.8.1.6–7.

49. *Id.* at 1269–71 (citing *Cook v. Principi*, 353 F.3d 937, 940 (Fed. Cir. 2003)); *see also* *Ferguson v. Principi*, 273 F.3d 1072, 1074 (Fed. Cir. 2001) (noting that the Federal Circuit's jurisdiction does not extend to review of challenges to the application of a law or specific factual determinations); *Madden v. Gober*, 125 F.3d 1477, 1480 (Fed. Cir. 1997) ("Congress has provided that our authority to review the decisions of the Court of Appeals for Veterans Appeals is restricted to entertaining appeals that seek review of the validity of any statute or regulation, or any interpretations thereof, or that raise constitutional controversies.").

50. STICHMAN ET AL., *supra* note 10, at 1271–72. *But see* *Morgan v. Principi*, 327 F.3d 1357, 1363 (Fed. Cir. 2003) (holding that "in a case such as this, in which the decision below regarding a governing rule of law would have been altered by adopting the position being urged, this court has jurisdiction to entertain the matter, even though the issue underlying the stated position was not 'relied on' by the Veterans Court").

51. STICHMAN ET AL., *supra* note 10, at 1272–73. This is a prudential rather than jurisdictional bar, with recognized judicial exceptions in the case of new intervening statutes, novel interpretations of existing law, pro se litigants, and unraised legal issues that are nonetheless necessary to consider a legal issue properly raised below. *Forshey v. Principi*, 284 F.3d 1335, 1338, 1355–57 (Fed. Cir. 2002) (holding that "even when jurisdiction exists, prudential considerations should severely limit the exercise of our authority to consider issues not raised or decided below").

B. Federal Circuit Review of the Department of Veterans Affairs

The Federal Circuit also has jurisdiction to review challenges to VA “regulations, rules of procedure, substantive rules of general applicability, statements of general policy and interpretations of general applicability, including opinions and interpretations [by the Department’s General Counsel].”⁵² This jurisdiction is governed by the review provisions of the Administrative Procedure Act and acts as a relatively expedient alternative to the much lengthier VA administrative appeals process.⁵³ There is, however, one significant statutory exception to the Federal Circuit’s jurisdiction to review VA regulations: the adoption or revision of the VA disability rating schedule may only be reviewed by the Federal Circuit on constitutional grounds.⁵⁴

C. Procedural Limits On Federal Circuit Jurisdiction Over Veterans Claims

Beyond the substantive limitations on the Federal Circuit’s jurisdiction over appeals from the CAVC and direct review of VA rules and regulations, certain procedural practices also affect Federal Circuit jurisdiction over veterans claims. Veterans must appeal judgments of the CAVC within sixty days to be heard by the Federal Circuit.⁵⁵ Additionally, as a general rule, only final decisions of the CAVC can be appealed. In *Williams v. Principi*,⁵⁶ however, the Federal Circuit promulgated a three-part test to allow for very limited appeals of non-final CAVC decisions where the proceeding has been remanded to the Board of Veterans Appeals.⁵⁷ First, there must be “a clear and final decision of a legal issue that . . . is separate from the remand proceedings.”⁵⁸ The CAVC’s final decision on this legal issue must be dispositive—either directly governing the remand proceedings or rendering them unnecessary.⁵⁹ Second, the CAVC’s resolution of the legal issue “must adversely affect the party seeking review.”⁶⁰ Finally, “there must be a substantial risk that the decision

52. STICHMAN ET AL., *supra* note 10, at 1273.

53. See 38 U.S.C. § 502 (2006) (stating that direct challenges to actions of the Secretary of Veterans Affairs may be brought in accordance with 5 U.S.C. §§ 701–06).

54. See *id.*; see also *Nyeholt v. Sec’y of Veterans Affairs*, 298 F.3d 1350, 1353 (Fed. Cir. 2002) (“[A]bsent an express provision that such review is prohibited, we read the legislative history . . . as confirming our view that Congress did not intend to preclude constitutional challenges from review under § 502.”).

55. See, e.g., *Ayers v. Peake*, 274 Fed. App’x 882, 882–83 (Fed. Cir. 2008).

56. 275 F.3d 1361 (Fed. Cir. 2002).

57. *Id.* at 1364.

58. *Id.*

59. *Id.*

60. *Id.*

would not survive a remand, *i.e.*, that the remand proceeding may moot the issue.”⁶¹ All three prongs of the *Williams* test must be met for the Federal Circuit to exercise jurisdiction over a case that has been remanded by the CAVC.⁶²

The Federal Circuit has also adopted a standard to determine when it has jurisdiction in a case with multiple claims remanded by the CAVC, where some claims have been fully decided. Specifically, the court held in *Elkins v. Gober*⁶³ that if the various claims are not intertwined and the exercise of jurisdiction would not “disrupt the orderly process of adjudicat[ing]” the remanded claims, then the fully decided claims may be appealed.⁶⁴

III. ONE SUPREME COURT AND NINE FEDERAL CIRCUIT CASES FROM 2009 THAT VETERANS BENEFITS PRACTITIONERS SHOULD KNOW

The Federal Circuit issued twenty-four precedential veterans law opinions in 2009. Below is a summary and analysis of the cases that are especially important to veterans benefits practitioners because they address particularly important issues or issues that recur frequently. Several cases address, under various fact patterns, the VA’s obligation to assist veterans with their claims, including where a veteran suffers from a psychiatric disorder. Although the VA’s obligation to assist veterans with their claims is not new, the Veterans Claims Assistance Act of 2000 (VCAA) represents Congress’s attempt to clarify the VA’s obligations.⁶⁵ Not surprisingly, the VCAA has triggered much litigation. Other cases discussed below address, *inter alia*, whether a veteran has a Fifth Amendment due process right to a claim for benefits, equitable tolling of the deadline for appeal to the CAVC, the statutory presumptions that accompany every veteran’s claim and the role those presumptions play in establishing a claim, and the retroactive assignment of disability ratings.

61. *Id.*

62. *See, e.g.*, *Vazquez-Flores v. Shinseki*, 580 F.3d 1270, 1272, 1275 (Fed. Cir. 2009) (determining that the court had jurisdiction over the appeal because the legal issues on appeal meet each prong laid out in *Williams*); *Myore v. Principi*, 323 F.3d 1347, 1353 (Fed. Cir. 2003) (holding that there was no final appealable order because there was no substantial risk that the issue would not survive remand and, therefore, dismissing the appeal).

63. 229 F.3d 1369 (Fed. Cir. 2000).

64. *Id.* at 1375–76 (quoting *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

65. *See supra* note 16 and accompanying text (discussing the obligations laid out in the VCAA).

We begin with the Supreme Court's opinion in *Shinseki v. Sanders*,⁶⁶ which reversed the Federal Circuit's decision in *Sanders v. Nicholson*.⁶⁷

A. *Shinseki v. Sanders*

The VA claims process is unique compared to most other federal agency proceedings. Instead of opposing claims or remaining neutral, the VA has a duty to assist veterans in developing benefits claims.⁶⁸ The VCAA is one codification of that duty and is mirrored in VA regulations, which direct the VA to provide claimants with notice of: (1) what further information is necessary to substantiate the claim ("Type One" notice); (2) what portions of that information the VA will obtain for the claimant ("Type Two" notice); and (3) what portions the claimant must obtain ("Type Three" notice).⁶⁹ At the time of the Federal Circuit's *Sanders* decision, the regulations also required the VA to tell the claimant that he or she could submit any other relevant information that the claimant had available ("Type Four" notice).⁷⁰

Sanders concerned competing frameworks, one used by the CAVC and another used by the Federal Circuit, for addressing errors in providing these four types of notice. The Supreme Court found the Federal Circuit's framework for addressing VA notice deficiencies to be "too complex and rigid," with presumptions that "impose[d] unreasonable evidentiary burdens," and conflicted with "established [statutory] law."⁷¹

Sanders involved two veterans with different medical conditions, but who both alleged that they had received insufficient notice from the VA. Petitioner Woodrow Sanders was a veteran of World War II who claimed that a bazooka explosion in 1944 precipitated blindness in his right eye years later.⁷² Although his 1945 service discharge examination showed near-perfect vision, Sanders filed a claim for disability benefits after a 1948 eye examination revealed an inflammation causing near blindness.⁷³ The VA denied the claim in 1949 for lack of a service connection.⁷⁴ At Sanders's urging, the VA

66. 129 S. Ct. 1696 (2009).

67. 487 F.3d 881 (Fed. Cir. 2007), *rev'd sub nom.* *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009).

68. See 38 U.S.C. § 5103(a) (2006).

69. 38 C.F.R. § 3.159(b) (2009).

70. *Sanders*, 129 S. Ct. at 1700–01 (citing 38 C.F.R. § 3.159(b)(1)).

71. *Id.* at 1700.

72. *Id.* at 1701.

73. *Id.*

74. *Id.*

reopened his claim in 1992 and, following a medical examination, denied it again.⁷⁵ Another medical examination and BVA review followed, resulting in another denial.⁷⁶ On appeal, the CAVC found merit in Sanders's arguments that the VA failed to provide proper Type Two notice (evidence the VA will obtain) and Type Three notice (evidence Sanders had to obtain).⁷⁷ The CAVC held, however, that the errors were harmless because Sanders had not identified what different evidence he would have produced or asked the VA to produce.⁷⁸

The second petitioner, Patricia Simmons, applied for disability benefits for a claimed service-related hearing loss in her left ear following her discharge from active duty in April 1980.⁷⁹ In November 1980, the VA denied her claim on the basis that the injury was not sufficiently severe.⁸⁰ The VA reopened the claim in 1998 after Simmons provided medical records showing further hearing loss in her left ear, along with allegedly related hearing loss in her right ear.⁸¹ Following additional hearing examinations, however, the VA once again concluded that Simmons's hearing loss in her left ear was not severe enough to qualify for benefits and that the hearing loss in her right ear was unrelated to service and not severe enough to qualify for benefits.⁸² The BVA affirmed; Simmons appealed to the CAVC.⁸³ On appeal, Simmons also alleged a lack of notice by the VA regarding a scheduled medical examination as well as a Type One notice error for failing to tell her what further information was needed to substantiate her claim.⁸⁴ The CAVC found merit in both of her claims and held both errors to be prejudicial.⁸⁵

The Federal Circuit consolidated the cases and held that when the VA's notice to a claimant is deficient in any respect, the error is presumed to be prejudicial.⁸⁶ The Federal Circuit further held that it is the VA's burden to show that the error did not affect the essential fairness of the adjudication, either by demonstrating actual knowledge of the defect by the claimant or that the benefit could not

75. *Id.* at 1702.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1703.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1702-04.

have been awarded as a matter of law.⁸⁷ Under this framework, the Federal Circuit ruled in favor of both petitioners, reversing the CAVC's decision against Sanders and affirming the judgment in favor of Simmons.⁸⁸

The Supreme Court found the Federal Circuit's "presumption of prejudice" framework legally inconsistent with the statutory requirement that the CAVC "take due account of the rule of prejudicial error."⁸⁹ Writing for the Court, Justice Breyer concluded that the statutory "prejudicial error" edict compelled application of the "same kind of 'harmless-error' rule that courts ordinarily apply in civil cases."⁹⁰ In the majority's view, this interpretation was bolstered by congruity between the statutory language governing the CAVC and an identical provision in the Administrative Procedure Act, as well the CAVC's legislative history.⁹¹

Adopting this familiar "harmless-error" rule, the Supreme Court found the Federal Circuit's framework to be flawed on three grounds.⁹² First, the Court held that the Federal Circuit effectively created a mandatory presumption that deviated from the typical case-specific application of judgment.⁹³ Second, the Court found that the Federal Circuit imposed an unreasonably high evidentiary burden on the VA to prove a lack of prejudice, noting that requiring the government to demonstrate a claimant's state of mind was "difficult, perhaps impossible."⁹⁴ Finally, the Court faulted the Federal Circuit for requiring the VA, rather than the claimant, to explain why the error was harmless.⁹⁵ Under the Court's view, the party that seeks to set aside a ruling typically bears the burden of demonstrating prejudice.⁹⁶ Consequently, the Court struck down the Federal Circuit's framework and reversed the Federal Circuit's judgment regarding Sanders, while remanding the Simmons proceeding.⁹⁷

Two implications of *Sanders* are particularly noteworthy for practitioners of veterans law. First, VA failures to provide notice will

87. *Id.* at 1702–03.

88. *Id.* at 1703.

89. *Id.* at 1704 (citing 38 U.S.C. § 7261(b)(2) (2006)).

90. *Id.*; see 28 U.S.C. § 2111 (2006) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

91. *Sanders*, 129 S. Ct. at 1704.

92. *Id.*

93. *Id.* at 1704–05.

94. *Id.* at 1705.

95. *Id.*

96. *Id.*

97. *Id.* at 1708.

not result in a presumption in favor of veterans. Rather, veterans will bear the burden of demonstrating prejudicial error. Second, CAVC biases in assessing prejudicial error will guide the success of claims. Under CAVC precedent, Type One notice errors (further information required to substantiate a claim) are more likely to be prejudicial whereas Type Two (evidence the VA will obtain) and Type Three (evidence the veteran must obtain) notice errors are not.⁹⁸ As a result, veterans will likely have a higher success rate at the CAVC with Type One notice errors than with others.

*B. Henderson v. Shinseki*⁹⁹

In this divisive and highly significant case, the Federal Circuit addressed the issue of equitable tolling where a claimant wishes to appeal a final decision of the BVA to the CAVC.¹⁰⁰ Under 38 U.S.C. § 7266(a), veterans have a 120-day deadline following the mailing of a notice of decision from the BVA to appeal that decision to the CAVC.¹⁰¹ Longstanding Federal Circuit precedent had allowed the CAVC to toll this 120-day deadline for equitable reasons, effectively creating a good-cause exception to the statutory deadline.¹⁰² The sole issue decided in *Henderson* was whether cases allowing equitable tolling were still valid in light of the Supreme Court's 2007 decision in *Bowles v. Russell*, which held that the timely filing of a notice of appeal in a civil case was a jurisdictional requirement not subject to equitable tolling.¹⁰³

Henderson held that the 120-day statutory deadline for appeals to the CAVC is a notice of appeal, or time of review, provision in a civil case, which is jurisdictional and therefore cannot be tolled without congressional authorization.¹⁰⁴ In reaching this conclusion, the Federal Circuit explicitly overruled two prior decisions, *Bailey v. West*¹⁰⁵ and *Jaquay v. Principi*,¹⁰⁶ which had collectively established the authority of the CAVC to permit tolling in actions filed before it.¹⁰⁷ In explaining this reversal, the *Henderson* majority concluded that

98. *See id.* at 1703 (noting that “Type One notice error has the ‘natural effect of producing prejudice’”).

99. 589 F.3d 1201 (Fed. Cir. 2009) (en banc).

100. *Id.* at 1205.

101. 38 U.S.C. § 7266(a) (2006).

102. *Henderson*, 589 F.3d at 1203 (discussing cases that permitted equitable tolling under 38 U.S.C. § 7266(a)).

103. *Id.*; *Bowles v. Russell*, 551 U.S. 205, 206–07 (2007).

104. *Id.* at 1220.

105. 160 F.3d 1360 (Fed. Cir. 1998).

106. 304 F.3d 1276 (Fed. Cir. 2002).

107. *Henderson*, 589 F.3d at 1203.

those cases “have been overtaken by subsequent authority, specifically, *Bowles*, where the Supreme Court unequivocally stated that ‘the timely filing of a notice of appeal in a civil case is a jurisdictional requirement’ and that it had ‘no authority to create equitable exceptions to jurisdictional requirements.’”¹⁰⁸

Daniel Henderson served on active duty from 1950 to 1952.¹⁰⁹ Following a diagnosis of paranoid schizophrenia, he was discharged and received a 100% disability rating.¹¹⁰ Due to a need for in-home care, Henderson filed a claim for monthly compensation with the VA in August of 2001.¹¹¹ The Regional Office denied that claim, and Henderson appealed to the BVA, which denied the claim on August 30, 2004.¹¹² Henderson appealed the BVA’s denial to the CAVC on January 12, 2005—fifteen days after the 120-day statutory period had run.¹¹³ Henderson explained to the CAVC that the “failure to timely appeal was a direct result” of his medical condition and requested equitable tolling under *Bailey*.¹¹⁴ In March of 2006, a single judge of the CAVC held that equitable tolling was inappropriate and dismissed Henderson’s appeal.¹¹⁵ The Supreme Court then decided *Bowles*, and a divided three-judge panel of the CAVC relied on *Bowles* to once again dismiss Henderson’s claim as untimely.¹¹⁶ The en banc Federal Circuit affirmed the CAVC decision and overruled *Bailey* and *Jaquay*.¹¹⁷

The Federal Circuit commenced its analysis in *Henderson* by reviewing *Bailey* and *Jaquay*. In *Bailey*, an en banc Federal Circuit interpreted the § 7266(a) 120-day notice of appeal provision as a “time of review provision,” which was typically construed as “mandatory and jurisdictional.”¹¹⁸ However, the court relied on the Supreme Court’s decision in *Irwin v. Department of Veterans Affairs*,¹¹⁹ which dealt with an ostensibly analogous statute of limitations, to hold that equitable tolling was not barred in the absence of

108. *Id.* at 1220 (citing *Bowles*, 551 U.S. at 214).

109. *Id.* at 1203.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1204.

115. *Id.*

116. *Id.*

117. *Id.* at 1203.

118. *Id.* at 1206 (citing *Stone v. INS*, 514 U.S. 386, 405 (1995)).

119. 498 U.S. 89 (1990) (holding that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should apply to suits against the United States).

congressional expression to that effect.¹²⁰ *Jaquay* cemented the effect of *Bailey* by applying this equitable tolling exception to grant relief to a veteran who incorrectly filed a motion for reconsideration of his final BVA decision with the VA rather than the CAVC.¹²¹

Against this backdrop of settled case law, the *Henderson* court (a nine-judge majority of the Federal Circuit) held that the Supreme Court's opinion in *Bowles* mandated a revision of precedent.¹²² In *Bowles*, a U.S. district court permitted a federal habeas petitioner seventeen days to file a notice of appeal—three days more than allowed by statute and under the Federal Rules of Appellate Procedure.¹²³ The Supreme Court held that the statutory limit on the period for appeal was more than a “claim-processing rule”; it was mandatory and jurisdictional.¹²⁴ Applying *Bowles* to the issue in *Henderson*, the Federal Circuit majority concluded that *Bowles* had abrogated the holding of *Bailey*, which permitted equitable tolling of the deadline for appeal to the CAVC.¹²⁵ Accordingly, the court held, § 7266(a) is a time of review provision and timely filing a notice of appeal is a jurisdictional requirement.¹²⁶

The *Henderson* decision carries enormous implications for practitioners of veterans law. While the decision only affects appeals to the CAVC, it is significant nonetheless because, as Judge Mayer noted in dissent, “[i]t is the veteran who incurs the most devastating service-connected injury who will often be the least able to comply with rigidly enforced filing deadlines.”¹²⁷ Given its harsh and controversial result, *Henderson* (as well as *Bowles*) may be subject to future judicial or legislative revision. Currently, however, the *Henderson* decision repudiates more than a decade of judicial support for equitable tolling in appeals to the CAVC, and imposes an inflexible requirement of compliance with the 120-day deadline for appeals under § 7266(a).

120. *Henderson*, 589 F.3d at 1206 (citing *Bailey v. West*, 160 F.3d 1360, 1364 (Fed. Cir. 1998, *overruled by Henderson*, 589 F.3d 1201)).

121. *Id.* at 1203 (citing *Jaquay v. Principi*, 304 F.3d 1276, 1278 (2002)).

122. *Id.* at 1216.

123. *Id.* at 1209 (citing *Bowles v. Russell*, 551 U.S. 205, 207 (2007)).

124. *Bowles*, 551 U.S. at 213.

125. *Henderson*, 589 F.3d at 1220.

126. *Id.* In reaching its decision, the *Henderson* court rejected three arguments: (1) that § 7266(a) was analogous to a statute of limitations provision rather than a jurisdictional time review provision and therefore was governed by *Irwin* rather than *Bowles*; (2) that *Bowles* should be limited to Article III courts and not be extended to Article I courts, such as the CAVC; and (3) that the unique, pro-claimant nature of the veterans system precluded the stringent application of a time of review provision. *Id.* at 1210–20.

127. *Id.* at 1221 (Mayer, J., dissenting).

C. *Cushman v. Shinseki*¹²⁸

Cushman presented the Federal Circuit with a constitutional question of first impression: whether a veteran has a Fifth Amendment due process right to fair adjudication of a claim for disability benefits.¹²⁹ The court held that a veteran has a constitutionally protected property interest in a benefits claim and that the VA violated *Cushman*'s due process rights when the agency based a benefits decision on an improperly altered medical record.¹³⁰

Philip *Cushman* served in the Marine Corps in the Vietnam War.¹³¹ While he was in Vietnam, a sandbag fell on his back, damaging his spine.¹³² In 1974, *Cushman* applied for disability benefits due to his back injury, and received a 60% disability rating.¹³³ In 1976, after his injury forced him to resign from his job at a flooring store, *Cushman* visited a VA Outpatient Clinic for reassessment of his condition.¹³⁴ In the last entry of *Cushman*'s medical record, the VA doctor describing *Cushman*'s back condition wrote: "Is worse + must stop present type of work."¹³⁵ *Cushman* filed a request for total disability based upon individual unemployability (TDIU) in May 1977.¹³⁶ The VA Regional Office denied the request in July 1977 and, in April 1980, the BVA affirmed, noting that "the evidence fail[ed] to show the presence of symptomology which would preclude sedentary employment."¹³⁷ In 1982, *Cushman* petitioned the BVA to reconsider its 1980 decision. The BVA reconsidered the decision and, based on the same evidentiary record, reaffirmed it.¹³⁸

In 1997, however, *Cushman* discovered that the medical record upon which the Regional Office and the BVA relied in denying his request for TDIU differed from the medical record on file at the VA Outpatient Clinic.¹³⁹ Specifically, the doctor's last entry had been altered to read: "Is worse + must stop present type of *work, or at least [] bend [] stoop lift.*"¹⁴⁰ The altered record also contained an additional

128. 576 F.3d 1290 (Fed. Cir. 2009).

129. *Id.* at 1292.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1292–93 (internal quotation marks omitted).

136. *Id.* at 1293.

137. *Id.* (internal quotation marks omitted). The VA eventually granted *Cushman* a TDIU rating in 1994. *Id.*

138. *Id.*

139. *Id.* at 1293–94.

140. *Id.* (internal quotation marks omitted, emphasis added by the court, brackets added by the court to indicate illegible or stray marks).

entry stating that Cushman “says he is applying for reevaluation of back condition.”¹⁴¹ When Cushman learned of the altered record, he challenged the 1977 Regional Office decision and the BVA’s 1980 and 1982 decisions as containing clear and unmistakable error.¹⁴² After protracted proceedings, the BVA and the CAVC rejected Cushman’s claim of error, and he appealed to the Federal Circuit.¹⁴³

In a unanimous opinion by Judge Prost, the Federal Circuit vacated the decision of the CAVC.¹⁴⁴ After rejecting the government’s motion for voluntary remand or, in the alternative, for mandatory mediation,¹⁴⁵ the court turned to the constitutional issues: (i) whether a veteran, like Cushman, has a property interest in an unadjudicated application for benefits, and (ii) if so, whether the presence of the altered record violated Cushman’s due process right to a fundamentally fair hearing.¹⁴⁶ As for the first issue, the court noted that, under established Supreme Court case law, an applicant for government benefits has a protected property interest if the applicant “ha[s] a legitimate claim of *entitlement*” to the benefits sought.¹⁴⁷ However, the applicant does *not* have a protected property interest “if government officials may grant or deny [the application] in their *discretion*.”¹⁴⁸ Noting that the statutes outlining the benefits available to veterans “provide an *absolute right* of benefits to qualified individuals,”¹⁴⁹ the court concluded that a veteran who meets the eligibility criteria¹⁵⁰ has a property interest protected by the Fifth Amendment’s Due Process Clause.¹⁵¹

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

142. *Id.* at 1294; *see also* 38 U.S.C. § 5109A (2006) (outlining the standards for clear-and-unmistakable-error review).

143. *See Cushman*, 576 F.3d at 1294–95.

144. *Id.* at 1292.

145. *See id.* at 1295–96. The court determined that a remand to the BVA for reconsideration of its 1980 and 1982 decisions would “not guarantee Mr. Cushman adequate relief” and that court-ordered mediation was not appropriate because the government had initially *opposed* mediation as an alternative to appeal. *Id.*

146. *See id.* at 1296–1300.

147. *Id.* at 1297 (quoting *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005)) (emphasis added, internal quotation marks omitted).

148. *Id.* (quoting *Castle Rock*, 545 U.S. at 756) (emphasis added, internal quotation marks omitted).

149. *Id.* (emphasis added); *see* 38 U.S.C. § 1110 (2006) (“For disability resulting from personal injury suffered or disease contracted in line of duty . . . during a period of war, the United States *will pay* to any veteran thus disabled and who was discharged or released under conditions other than dishonorable . . . compensation as provided in this subchapter . . .”) (emphasis added).

150. As noted above, these criteria are (1) present disability; (2) in-service occurrence or aggravation; and (3) causal nexus between the present disability and the disability incurred or aggravated in service. *See supra* Part I.

151. *Cushman*, 576 F.3d at 1297–98 (emphasis added); *see also id.* at 1298 (“Veteran’s disability benefits are nondiscretionary, statutorily mandated benefits.

Because Cushman indisputably met the eligibility criteria for veteran's benefits, the court next considered whether the VA had violated Cushman's due process right to a fair adjudication of his claim. Relying on both criminal and civil cases holding improper alteration of medical evidence to be due process violations, the court easily determined that the VA had violated Cushman's Fifth Amendment rights.¹⁵² The court also determined that the VA's consideration of the altered document was sufficiently prejudicial to warrant appellate relief because "[t]he altered document was the only piece of medical evidence that addressed Mr. Cushman's then current employability."¹⁵³ The court thus vacated the CAVC's decision and remanded with instructions that the BVA conduct a de novo review of Cushman's 1977 TDIU request.¹⁵⁴

For veterans benefits practitioners, the crucial holding of *Cushman* is that a veteran has a constitutionally protected property interest in a claim for disability benefits. Accordingly, even if the process used by the government to adjudicate benefits claims generally provides a constitutionally adequate process (i.e., the process is not subject to a facial attack), that process must still be applied in a fundamentally fair manner in *each and every case*.¹⁵⁵ *Cushman* makes clear that a veteran whose claim for benefits was not adjudicated in a fundamentally fair manner—if, for example, the proceeding was prejudicially tainted by the admission of improper evidence or the suppression of favorable evidence—has a constitutional right to seek readjudication of the claim in a manner that satisfies due process.

D. *Holton v. Shinseki*¹⁵⁶

Veterans who apply for disability benefits receive certain statutory presumptions that ease their burden of proving the essential elements of a disability claim. (As noted, these essential elements are: (1) a present disability, (2) in-service incurrence or aggravation of a disease or injury, and (3) a causal relationship between the two.)

A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes or regulations.").

152. See *id.* at 1300 (citing *Grillo v. Coughlin*, 31 F.3d 53, 56–57 (2d Cir. 1994); *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997)).

153. *Id.*

154. *Id.*

155. See *id.* at 1299–1300 ("The procedural framework for adjudicating claims must be sufficient for the large majority of a group of claims in order to be constitutionally adequate for all. A *fundamentally fair adjudication within that framework, however, is constitutionally required in all cases*, and not just in the large majority.") (internal citation omitted, emphasis added).

156. 557 F.3d 1362 (Fed. Cir. 2009).

One presumption is that the veteran's in-service injury occurred in the line of duty and was not due to the veteran's own misconduct.¹⁵⁷ Another presumption is that the veteran was "of sound condition" (i.e., had no disease or injury) when he or she entered the military.¹⁵⁸ At times, veterans have tried to stretch these legal presumptions to fill evidentiary gaps in their claims. Because this is a common argument, cases containing it normally do not garner special attention from the Federal Circuit. In *Holton*, however, one veteran added a twist: He claimed that the "line of duty" presumption required the VA to instruct the physician conducting the medical nexus opinion to presume that the veteran suffered the injury in service and to state an opinion "only as to whether the current disability was related to that presumed [in-service] injury."¹⁵⁹ The court in *Holton* rejected that argument, however, and confirmed that the "line of duty" presumption does not require an examining physician to presume the existence of an asserted in-service injury when providing a medical nexus opinion.¹⁶⁰

Holton was a consolidation of two appeals, those of John Holton and Denver Bryant, in which the CAVC affirmed the denial of their claims for disability compensation.¹⁶¹ The Federal Circuit affirmed the CAVC.¹⁶²

1. Holton

Holton served in the United States Coast Guard from 1968 to 1972.¹⁶³ In 2002, he filed a claim with the VA for disability relating to a fractured pelvis.¹⁶⁴ The VA Regional Office denied the claim because his military medical records showed no evidence of any pelvic injury.¹⁶⁵ Holton brought the claim because, years after his service ended, he began experiencing pain in his right hip and buttocks.¹⁶⁶ A 2002 x-ray showed a pelvic fracture.¹⁶⁷ Holton surmised that the fracture was the result of him slipping and falling on ship during his service thirty years earlier.¹⁶⁸ On appeal to the BVA, the

157. 38 U.S.C. § 105(a) (2006).

158. *Holton*, 557 F.3d at 1366–67.

159. *Id.* at 1368.

160. *Id.* at 1369.

161. *Id.* at 1364.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

only evidence that Holton presented to support his claim of a slip and fall during service was the testimony of a former Coast Guardsman with whom he served.¹⁶⁹ His former shipmate testified that the ship they were on was frequently in heavy seas and that it was “highly likely” that Holton was injured on the ship.¹⁷⁰ The BVA rejected the claim and Holton appealed to the CAVC.¹⁷¹

The CAVC remanded (on the parties’ joint motion) to the BVA in order to get a “medical nexus opinion” regarding the likelihood that Holton’s pelvic fracture was connected to his service.¹⁷² The examining physician concluded that “[i]t would be speculative at best to say” Holton’s current injury is related to an incident that occurred almost thirty years ago.¹⁷³ Accordingly, the Regional Office rejected the claim, and the BVA again affirmed, reasoning that the record failed to include “‘even a scintilla’ of competent medical evidence showing a nexus” between Holton’s current injury and his service.¹⁷⁴ The CAVC affirmed.¹⁷⁵

Holton appealed to the Federal Circuit, arguing that the VA failed to apply or misinterpreted two statutory presumptions applicable to veterans disability claims.¹⁷⁶ The first presumption was the “line-of-duty” presumption codified in 38 U.S.C. § 105(a).¹⁷⁷ It states in relevant part:

An injury or disease incurred during active . . . service will be deemed to have been incurred in line of duty and not the result of the veteran’s own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active [service], whether on active duty or on authorized leave, unless such injury or disease was a result of the person’s own willful misconduct . . .¹⁷⁸

The court noted that this presumption has two important components. First, it relieves the veteran of demonstrating that he or she was “at work” when the injury occurred.¹⁷⁹ So long as he or she was in active status, “a service member’s workday never ends.”¹⁸⁰

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1365.

174. *Id.*

175. *Id.* at 1366.

176. *Id.*

177. *Id.*

178. *Id.* (citing 38 U.S.C. § 105(a) (2006)).

179. *Holton*, 557 F.3d at 1366.

180. *Id.*

Second, it relieves the veteran of the burden to demonstrate that he or she was not engaged in misconduct at the time of the injury.¹⁸¹ Rather, the VA must present evidence to rebut the presumption.¹⁸²

The second relevant statutory presumption was the “presumption of sound condition.”¹⁸³ This presumption relieves the veteran of the burden of proving that he or she was healthy at the time of joining the military.¹⁸⁴ This obviously is most beneficial to a person who begins to show symptoms of an injury or illness while on active duty because there can be no conclusion other than that the injury or illness occurred while on active duty.

The court rejected Holton’s attempts to stretch both presumptions to establish his claim for benefits. It held that neither presumption relieves veterans from demonstrating that their current disability is related to an in-service injury or disease, as Holton failed to do.¹⁸⁵ “While the section 105(a) presumption establishes that an injury or disease that was incurred during service was incurred in the line of duty, *it is irrelevant* to the question whether that in-service injury or disease is *causally related* to the veteran’s current disability.”¹⁸⁶ Holton’s arguments that the VA did not properly apply these presumptions to his claim were not novel ones. The court has addressed similar arguments in recent years.¹⁸⁷ The court has consistently held that “if a claimant does not show ‘a causal relationship between his in-service and post-service medical problems,’ the section 105(a) presumption ‘cannot fill that gap and, therefore, is irrelevant.’”¹⁸⁸

As noted, Holton added a twist to his presumption argument. He claimed that the § 105(a) presumption requires the VA to instruct the physician conducting the medical nexus opinion to presume that Holton suffered a pelvis injury while in-service and then to offer an

181. *Id.*

182. *See, e.g.,* Smith v. Derwinski, 2 Vet. App. 241, 244 (Ct. Vet. App. 1992) (concluding that the BVA must establish denial of a claim due to willful misconduct by a preponderance of the evidence).

183. 38 U.S.C. §§ 1111, 1132 (applying to wartime and peacetime service, respectively).

184. *Holton*, 557 F.3d at 1367.

185. *Id.* at 1369.

186. *Id.* at 1367 (emphases added) (citing *Dye v. Mansfield*, 504 F.3d 1289, 1292 (Fed. Cir. 2007)).

187. *See, e.g., Dye*, 504 F.3d 1289, 1290 (affirming the CAVC’s holding that, in the absence of any connection between the veteran’s current problems and those he incurred while in service, the presumption of service connection is inapplicable); *Shedden v. Principi*, 381 F.3d 1163, 1166 (Fed. Cir. 2004) (holding that § 105(a) creates a rebuttable presumption of service connection).

188. *Holton*, 557 F.3d at 1368 (quoting *Dye*, 504 F.3d at 1292).

opinion solely as to whether his current injury is related to the presumed in-service injury.¹⁸⁹ The court disagreed, noting that the VA has a duty to provide a medical examination but that nothing requires that the physician “presume the existence of an asserted in-service injury when providing a medical nexus opinion.”¹⁹⁰

2. Bryant

Holton also addressed the appeal of Denver Bryant, who served on active duty in the United States Army from 1943 to 1963.¹⁹¹ In 1962, an ophthalmologist examined Bryant because he complained of eye irritation and seeing halos around lights.¹⁹² During the exam, the only evidence that there was anything wrong came from a tonometer measurement that showed “increased intra-ocular pressure in both eyes.”¹⁹³ The physician noted in his medical record, however, that the tonometer appeared to be defective.¹⁹⁴ Nevertheless, because no other tonometer was available, Bryant was diagnosed with acute glaucoma.¹⁹⁵ Just one week later, however, another tonometer was available, and the physician concluded that Bryant did not have glaucoma.¹⁹⁶ Further, there was no evidence of glaucoma in Bryant’s exit physical from the Army or during exams for the next two decades.¹⁹⁷ In 1990, however, a VA physician diagnosed Bryant with “uncontrolled open-angle glaucoma.”¹⁹⁸

In 1996, based on that diagnosis, Bryant filed a claim for disability compensation with the VA.¹⁹⁹ He pointed to the 1962 glaucoma diagnosis as evidence of an in-service disease.²⁰⁰ The Regional Office and BVA denied his claim, reasoning that the original diagnosis was due to the faulty tonometer.²⁰¹ Bryant appealed to the CAVC and argued that the BVA either misinterpreted or failed to apply the statutory presumptions discussed above.²⁰²

Bryant argued that “it is enough for a veteran to put forth *some* evidence of an in-service injury or disease—no matter how little or

189. *Id.*

190. *Id.* at 1368–69.

191. *Id.* at 1365.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 1366.

how credible—to trigger section 105(a).”²⁰³ The court disagreed, citing *Madden v. Gober*.²⁰⁴ *Madden* addressed 38 U.S.C. § 1112, which states that, if a veteran has symptoms of certain chronic diseases within one year after leaving the military, it is presumed that the veteran contracted the disease while in active service.²⁰⁵ The veteran in *Madden*, similar to Bryant, argued that “any” evidence put forth should trigger the service connection presumption.²⁰⁶ The *Madden* court disagreed, and held that the BVA must evaluate the cumulative evidence.²⁰⁷ The *Holton* court applied the same principle and ruled that “[s]ection 105(a) cannot serve as a substitute for affirmative evidence that a veteran incurred an injury or disease during service.”²⁰⁸

*E. Amberman v. Shinseki*²⁰⁹

Amberman presented the Federal Circuit with a rare opportunity to interpret 38 C.F.R. § 4.14,²¹⁰ which addresses the VA’s practice of “pyramiding”—combining the rating for multiple disabilities that have the same symptoms, rather than separately rating those similar disabilities.²¹¹ In *Amberman*, the court held that, on the facts presented, the VA properly refused to assign separate ratings for bipolar affective disorder and post-traumatic stress disorder (PTSD) because of the overlapping symptoms of the two disabilities.²¹²

Patricia Amberman served on active duty in the Army from 1977 to 1980.²¹³ In 1993, the VA assigned her a 30% disability rating for bipolar affective disorder.²¹⁴ After six additional years of proceedings at the VA, the BVA granted Amberman service connection for PTSD.²¹⁵ On remand, the Regional Office assigned a 70% disability rating for bipolar disorder and a separate, noncompensable rating for PTSD.²¹⁶ After another appeal to the BVA and another remand, “the [Regional Office] determined that it had committed clear and

203. *Id.* at 1370.

204. *Id.* (citing *Madden v. Gober*, 125 F.3d 1477 (Fed. Cir. 1997)).

205. 38 U.S.C. § 1112 (2006).

206. *Madden*, 125 F.3d at 1480.

207. *Holton*, 557 F.3d at 1370.

208. *Id.*

209. 570 F.3d 1377 (Fed. Cir. 2009).

210. 38 C.F.R. § 4.14 (2008).

211. *Id.* at 1380–81.

212. *Id.* at 1378–79.

213. *Id.* at 1379.

214. *Id.*

215. *Id.*

216. *Id.*

unmistakable error by rating the two disorders separately.”²¹⁷ Accordingly, the Regional Office rated the disorders together and assigned a 70% disability rating.²¹⁸ The BVA affirmed in relevant part, holding that the lack of “distinguished manifestations” between Amberman’s bipolar disorder and PTSD justified the combined rating.²¹⁹ Because separate (and sufficiently severe) ratings for Amberman’s two disorders could have entitled her to special monthly compensation, she appealed to the Federal Circuit.²²⁰

In a unanimous opinion by Judge Gajarsa, the Federal Circuit affirmed.²²¹ The court first acknowledged the general rule that “separately diagnosed injuries are *rated individually* . . . then combined into a single [disability] rating” “based on the entire person of the veteran.”²²² The court noted, however, that 38 C.F.R. § 4.14 sets forth an exception to that general rule.²²³ Section 4.14 states that “[t]he evaluation of the *same disability* under various diagnoses is to be avoided.”²²⁴ In other words, as the court explained, section 4.14 “caution[s] against making multiple awards for the same physical impairment simply because that impairment could be labeled in different ways.”²²⁵ Amberman’s primary argument on appeal was that bipolar affective disorder and PTSD are not “the same disability” under section 4.14 and therefore should be rated separately.²²⁶

Emphasizing that “[i]t is the veteran’s overall disability that is relevant,”²²⁷ the court endorsed the CAVC’s holding in *Esteban v. Brown*²²⁸ that “two defined diagnoses constitute the same disability for purposes of section 4.14 if they have overlapping symptomology.”²²⁹ Turning to Amberman’s case, the court noted that “the Veterans Court found that there were no manifestations of one mental disorder that were not also manifestations of the other.”²³⁰ In other

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1379 n.1 (citing 38 U.S.C. § 1114(s) (2006)).

221. *Id.* at 1378.

222. *Id.* at 1380 (emphasis added).

223. *Id.*

224. 38 C.F.R. § 4.14 (2008) (emphasis added); *see Amberman*, 570 F.3d at 1380.

225. *Amberman*, 570 F.3d at 1380.

226. *Id.*

227. *Id.*

228. 6 Vet. App. 259, 262 (Ct. Vet. App. 1994) (holding that facial disfigurement, scars, and muscle damage did not constitute the “same disability” under section 4.14 because each diagnosis dealt with different symptoms) (cited in *Amberman*, 570 F.3d at 1381).

229. *Amberman*, 570 F.3d at 1381.

230. *Id.*

words, the two disorders had *completely* “overlapping symptomology” and therefore “constitue[d] the same disability for purposes of section 4.14.”²³¹ This determination by the CAVC was a factual finding that the Federal Circuit was not permitted to disturb.²³² Thus, the court affirmed the combined rating for bipolar disorder and PTSD.²³³

For veterans benefits practitioners, it is important to note that the Federal Circuit’s holding does not preclude bipolar disorder and PTSD from being assigned separate ratings in an appropriate case. The Federal Circuit made clear that decisions about pyramiding are to be made on a case-by-case basis, and it explicitly acknowledged that “bipolar affective disorder and PTSD *could* have different symptoms and it could therefore be improper in some circumstances for the VA to treat these separately diagnosed conditions as producing only the same disability.”²³⁴ Thus, a practitioner whose client suffers from multiple disabilities that can have overlapping symptoms is wise to develop a factual record that emphasizes the divergent manifestations of those disabilities *in his or her particular client*. Under *Amberman*, a record of “different symptoms”²³⁵ or “distinguished manifestations”²³⁶ could justify separate ratings for each disability, and possibly enhanced benefits for the veteran.

F. *Vazquez-Flores v. Shinseki*²³⁷

This case related to the type of notice that the VA must provide when it denies a benefits claim. The court consolidated the appeals of two veterans, Angel Vazquez-Flores and Michael Schultz, who applied to the VA for an increase in their disability ratings.²³⁸ The VA and BVA denied their claims, but the CAVC held that the VA failed to provide adequate notice and remanded both cases.²³⁹ The VA appealed to the Federal Circuit, which vacated the CAVC decision.²⁴⁰

231. *Id.*

232. *Id.*; see 38 U.S.C. § 7292(d)(2) (1958) (establishing that, with the exception of constitutional issues, the federal courts of appeals cannot review “a challenge to a factual determination”).

233. *Amberman*, 570 F.3d at 1381.

234. *Id.* (second emphasis added).

235. *Id.*

236. *Id.* at 1379.

237. 580 F.3d 1270 (Fed. Cir. 2009).

238. *Id.* at 1272.

239. *Id.*

240. *Id.*

1. Vazquez-Flores

Vazquez-Flores served on active duty in the United States Army from 1963 to 1965 and again from 1966 to 1969.²⁴¹ After he was discharged, he received a 30% disability rating for nephrolithiasis (i.e., kidney stones)—the maximum rating for kidney stones under the VA’s diagnostic manual.²⁴² It is possible however, for a veteran to use other, similar codes to obtain a higher rating. For example, even though kidney stones can only receive a maximum of 30%, nephrolithiasis can, in certain circumstances, be classified as “hydronephrosis,” which when severe can in turn be classified as “renal dysfunction.”²⁴³ If hypertension causes renal dysfunction, it can be rated anywhere from 40% to 60%.²⁴⁴

In 1994, Vazquez-Flores filed a claim to increase his rating, which the VA denied.²⁴⁵ Vazquez-Flores appealed to the BVA, which denied his appeal and found that the notice the VA provided to Vazquez-Flores regarding its denial of his claim was sufficient.²⁴⁶ The notice referenced diagnostic codes for nephrolithiasis, hydronephrosis, and renal dysfunction, but not hypertension.²⁴⁷ He then appealed to the CAVC, where he argued that the VA’s notice was deficient because it failed to inform him that he could seek to codify his illness under a different code and thus potentially be eligible for a higher rating.²⁴⁸ The CAVC held that the VA failed to properly notify Vazquez-Flores because it did not tell him how to substantiate a claim for an increased rating and because the notice was generally “confusing.”²⁴⁹

2. Schultz

Schultz served on active duty during the 1980s and 1990s and received a 20% disability rating for a right shoulder injury, and a 10% disability rating for a disability in both knees.²⁵⁰ In 1997, he applied for an increased rating but the VA denied his claim.²⁵¹ The VA notified Schultz of the denial and informed him that, in order to receive a higher rating, he must submit evidence that his injury had

241. *Id.*

242. *Id.*; see 38 C.F.R. § 4.115b (2009).

243. *Vazquez-Flores*, 580 F.3d at 1272.

244. *Id.*; see 38 C.F.R. § 4.115.

245. *Vazquez-Flores*, 580 F.3d at 1272.

246. *Id.*

247. *Id.*

248. *Id.* at 1272–73.

249. *Id.* at 1274.

250. *Id.*

251. *Id.*

“become worse or more disabling.”²⁵² Schultz underwent additional medical exams and resubmitted his claim to the BVA, which denied his claim and found that the VA’s notice was sufficient.²⁵³ Schultz appealed to the CAVC, which relied on Vazquez-Flores’s case²⁵⁴ in holding that the VA failed to provide sufficient notice under 38 U.S.C. § 5103(a) because the notice “did not inform [Schultz] that he should submit evidence describing the effects of his worsened condition on his employability and daily life.”²⁵⁵ Moreover, the CAVC reasoned that the notice should have informed Schultz that his knee injury could be evaluated under codes that assigned ratings for “limitation of motion” or other factors, even though his initial rating did not reference any other codes.²⁵⁶

3. *On appeal*

a. *Notice*

The Federal Circuit began with the CAVC’s holding regarding what constituted sufficient notice. The CAVC held that a proper notice should include:

[A] review of the previously assigned [disability code] and disability rating, and a commonsense assessment whether the criteria for a higher rating under the assigned or a cross-referenced [disability code] includes criteria that would not be satisfied by the claimant demonstrating a noticeable worsening or increase in severity of the disability and the effect of that worsening . . . on the claimant’s employment and daily life (such as a specific measurement or test result). If it does, then general notice of that criteria must be provided to the claimant.²⁵⁷

In other words, the VA would have to give veterans notice of alternate disability codes that could potentially apply to them and explain to veterans how to prove the codes’ applicability.

The VA appealed both cases because, it argued, such a requirement would essentially require the VA to review each veteran’s case at a level of detail that is not required by Federal Circuit decisions in *Paralyzed Veterans of America v. Secretary of Veterans Affairs*²⁵⁸

252. *Id.*

253. *Id.*

254. *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (Ct. Vet. App. 2008), *vacated*, *Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (2009).

255. *Vazquez-Flores*, 580 F.3d at 1274 (internal quotations omitted).

256. *Id.* at 1274–75.

257. *Id.* at 1275–76 (internal quotations and citations omitted).

258. 345 F.3d 1334 (Fed. Cir. 2003) (addressing a general challenge to 38 C.F.R. § 3.159(b)(1), a regulation promulgated after enactment of the VCAA).

and *Wilson v. Manfield*.²⁵⁹ The VA would have to think of every conceivable diagnostic code that the veteran could apply for, and then tell the veteran how to satisfy that particular code and every medical test that the veteran could take to prove his or her condition had worsened.²⁶⁰

The Federal Circuit agreed with the VA, holding that *Wilson* and *Paralyzed Veterans* “put to rest the notion” that the VA is required to provide notice that is “veteran-specific.”²⁶¹ Rather, the VA need only provide a generic notice that is “claim-specific” (i.e., depending whether the claim is an initial claim for benefits or a claim for an increased rating). In the court’s view, this claim-specific notice need only inform the veteran why the claim was rejected and provide an opportunity to submit additional evidence.²⁶²

b. Daily life

In addition to appealing the CAVC’s holding that sufficient notice should include alternative diagnostic code criteria, the VA also appealed the CAVC’s holding that proper notice should include evidence regarding how the veteran’s disability affects his or her “daily life.”²⁶³ The CAVC held: “[T]he Secretary [must] notify the claimant that, to substantiate a claim, the claimant must provide, or ask the Secretary to obtain . . . evidence demonstrating a worsening . . . of the disability and the effect that worsening has on the claimant’s employment *and daily life*.”²⁶⁴

The VA argued that the “daily life” requirement is inconsistent with the statute, which requires the VA to rate disabilities based on a veteran’s average reduced capacity to earn a living in the civilian world.²⁶⁵ Moreover, the VA argued that Congress never defined “disability,” and thus the VA’s interpretation of the term should receive *Chevron* deference.²⁶⁶ The VA has defined “disability” to mean “impairment in earning capacity.”²⁶⁷

259. 506 F.3d 1055 (Fed. Cir. 2007) (addressing a veteran-specific challenge to 38 U.S.C. § 5103(a)).

260. See Brief for Respondent-Appellant at 21, *Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009) (No. 2008-7115) (explaining the VA’s general notice responsibilities and distinguishing those responsibilities from case-specific ones).

261. *Vazquez-Flores*, 580 F.3d at 1277.

262. *Id.*

263. *Id.* at 1278.

264. *Id.* (alteration in original) (internal quotations and citations omitted).

265. *Id.* at 1279 (quoting 38 U.S.C. § 1155 (2006)).

266. *Id.*; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

267. 38 C.F.R. § 4.1 (2009).

The veterans countered that the “daily life” requirement is contained in 38 C.F.R. § 4.10, which states that the “basis of disability evaluations is the ability of the body as a whole . . . to function under the ordinary conditions of *daily life* including employment.”²⁶⁸

The Federal Circuit agreed with the VA, reasoning that the portion of regulations that use the term “daily life” govern “policies and procedures for conducting VA medical examinations,” which are not considered part of the ratings schedule because “the rating schedule consists only of those regulations that establish disabilities and set forth the terms under which compensation shall be provided.”²⁶⁹ “Thus, while the effects of a disability . . . are arguably relevant to a doctor conducting a medical examination, those effects are not relevant to a disability rating made by a ratings specialist.”²⁷⁰

In sum, *Vazquez-Flores* holds that notice under 38 U.S.C. § 5103(a) need not be veteran-specific.²⁷¹ Accordingly, the VA need not suggest every potential disability code or list every possible medical test that a veteran could procure to prove his claim. Rather, it need only be a generic notice that tells the veteran “why his claim was rejected and [provides] an opportunity to submit additional relevant evidence.”²⁷² Likewise, the VA need not consider how a veteran’s disability affects his or her “daily life” unless it affects the ability to earn a living.²⁷³

The court’s holding illustrates two important points for practitioners. First, despite the VA’s duty to assist a veteran with his or her claim, no veteran or veteran’s attorney should rely on the VA for research or presume that what the VA says is the only answer. Rather, veterans and attorneys should research the diagnostic codes to see if the veteran’s disability can be codified under an alternate code or cross-referenced. Second, if a veteran’s disability impacts his or her daily life, the time to bring that up is during the medical exam. In the context of a claim, any reference to how the disability impacts the veteran’s daily life must be closely tied to the veteran’s reduced capacity to earn a living.

268. *Vazquez-Flores*, 580 F.3d at 1279 (quoting 38 C.F.R. § 4.10).

269. *Id.* at 1280 (quoting *Martinak v. Nicholson*, 21 Vet. App. 447, 451–52 (Ct. Vet. App. 2007)).

270. *Id.*

271. *Id.* at 1280–81.

272. *Id.* (quoting *Wilson v. Mansfield*, 506 F.3d 1055, 1061 (Fed. Cir. 2007)).

273. *See id.* at 1279 (holding that 38 U.S.C. § 1155 focuses on earning capacity).

G. Moore v. Shinseki²⁷⁴

In *Moore*, the Federal Circuit examined the VA's duty to assist veterans with their claims pursuant to the VCAA. Specifically, the court addressed the VA's obligation to obtain relevant medical records.²⁷⁵ The Federal Circuit vacated the decision of the CAVC, which had affirmed the BVA.²⁷⁶

Dwayne Moore served on active duty from May 1988 to February 1991.²⁷⁷ During his service, he was admitted to a psychiatric hospital for lacerating his own wrists.²⁷⁸ A psychiatrist diagnosed him with "a severe personality disorder which render[ed] him a danger to himself and/or others" and recommended an "expeditious" separation from the service.²⁷⁹ In 1992, Moore filed a claim for disability related to his psychiatric disorder, which the VA denied.²⁸⁰ In 1996, one VA examiner concluded that "the event leading up to the veteran's discharge was a single episode that was now resolved."²⁸¹ In 1999, however, the VA assigned Moore a 10% disability rating (based on the 1996 examination) retroactive to September 16, 1992.²⁸² Moore appealed to the BVA, which in 2004 assigned him a rating of 30% from January 1997 to August 7, 2002 and 50% from August 8, 2002 onward.²⁸³ The BVA concluded, however, that he did not rate higher than 10% from 1992 to January 1997 because "he suffered from only 'mild social and industrial impairment' during that period."²⁸⁴

Moore appealed all of his ratings to the CAVC, arguing that the VA, *before* making any determination with respect to his disability rating, had an "affirmative obligation, pursuant to 38 U.S.C. § 5103A, to obtain the medical records" from the psychiatric hospital to which he was committed while he was on active duty.²⁸⁵ The CAVC disagreed, reasoning that even if the VA had obtained the records, they would not have helped.²⁸⁶ Moreover, the issue as the CAVC saw

274. 555 F.3d 1369 (Fed. Cir. 2009).

275. *Id.* at 1370.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 1370–71.

284. *Id.* at 1371.

285. *Id.* Section 5103A was added by the VCAA in 2000. 38 U.S.C. § 5103A (2006).

286. *Moore*, 555 F.3d at 1371.

it was not the records when Moore was hospitalized, but his condition from September 1992 (his discharge) forward.²⁸⁷ The CAVC also pointed out that the record included a “description of [Moore’s] in-service symptoms,” which had been prepared within two weeks after he left the psychiatric ward, and that Moore had failed to show how the missing records would be “meaningfully different” from what the VA already had in its possession.²⁸⁸ Judge Kasold dissented, reasoning that the psychiatric hospital records were “relevant on their face” and should have been obtained and reviewed prior to the VA making a determination.²⁸⁹

Moore appealed to the Federal Circuit, again arguing that § 5103A required the VA to get his medical records from the psychiatric hospital before rendering a disability determination, and that the VA misinterpreted § 5103A in finding his past medical records irrelevant.²⁹⁰ The court agreed with Moore and attacked the CAVC’s reasoning that “the only pertinent issue was the degree of Moore’s disability after September 16, 1992” and that the psychiatric hospital records “were not relevant because they pre-dated the period for which he sought disability compensation.”²⁹¹ For support, the court cited the VA’s own regulations, which specifically require the VA “to assess a disability in ‘relation to its history.’”²⁹² “Over a period of many years, a veteran’s disability claim may require reratings in accordance with changes in . . . physical or mental condition. It is thus essential . . . that each disability be viewed in relation to its history.”²⁹³ The court explained that consideration of an illness’s entire history is “particularly important in the context of psychiatric disorders ‘[because they] abate and recur.’”²⁹⁴ Accordingly, when rating a veteran with psychiatric disorders, the VA must base its decision on “all the evidence of record that bears on occupational and social impairment rather than solely on the examiner’s assessment of the level of disability at the moment of examination.”²⁹⁵

In response to the government’s argument that not getting the record constituted harmless error, the court noted that the VCAA requires the VA to “obtain all of the veteran’s relevant service medical

287. *Id.*

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

289. *Id.*

290. *Id.* at 1372.

291. *Id.*

292. *Id.* at 1373 (quoting 38 C.F.R. § 4.1 (2009)).

293. *Id.* (quoting 38 C.F.R. § 4.1).

294. *Id.*

295. *Id.* (quoting 38 C.F.R. § 4.126(a)).

records.”²⁹⁶ The record, the court noted, did not demonstrate that the VA made any effort to get Moore’s records from the psychiatric hospital.²⁹⁷ The court also was not pleased that at oral argument, Moore’s counsel advised the court that he had obtained the missing records that day and that they had been “‘lost in the bowels’ of the National Personnel Records Center.”²⁹⁸ This revelation prompted the court to note that “[b]ecause many veterans lack the knowledge and resources necessary to locate relevant records, Congress has appropriately placed the burden on the VA to ensure that all relevant service medical records are obtained and fully evaluated.”²⁹⁹ The court did not stop there: “It is shameful that the VA yet again failed in its duty to assist the veteran and, at best, poor judgment by the Department of Justice in defending the VA’s actions.”³⁰⁰

Similar to its “harmless error” argument, the government argued that, even if it had obtained Moore’s psychiatric hospital records, he would not have received a higher rating.³⁰¹ However, the court “fail[ed] to understand how the government, without examining the [psychiatric hospital] records, can have any idea as to whether they would, or would not, support Moore’s claim for an increased disability rating.”³⁰² The court agreed with Judge Kasold’s CAVC dissent that the records were “relevant on their face” because they pertained to his current disability.³⁰³ “Such records could potentially call into question the VA’s conclusion that Moore suffered from only ‘mild social and industrial impairment’ and was therefore entitled to no more than a 10 percent disability rating in the period after September 1992.”³⁰⁴

Moore illustrates important points about obtaining records. First, the court’s insistence that the actual records be obtained as opposed to relying on a summary of those records demonstrates how important the records are in deciding claims. The leading treatise for veterans benefits practitioners states that obtaining records is “the most important factor” to being an effective advocate.³⁰⁵ In some cases, the obstacle to obtaining that information is that the VA tried

296. *Id.* at 1374; see 38 U.S.C. § 5103A (2006) (codifying the VA’s duty to assist claimants).

297. *Moore*, 555 F.3d at 1374.

298. *Id.*

299. *Id.* at 1374–75.

300. *Id.* at 1375.

301. *Id.*

302. *Id.* (citing *McGee v. Peake*, 511 F.3d 1352, 1358 (Fed. Cir. 2008)).

303. *Id.*

304. *Id.*

305. STICHMAN ET AL., *supra* note 10, § 1.1.1.

but could not locate the records. *Moore* was unique in that the VA: (1) did not attempt to locate the records; (2) argued that it had no duty to locate the records; and (3) argued that the records were irrelevant. Second, practitioners should be aware of record “summaries.” The VA relies heavily on “summaries” of records because it has so many cases to adjudicate. But just like in the “telephone” game, potentially important information gets left out or altered every time someone summarizes a medical record. Accordingly, veterans and their attorneys should insist that the originals be obtained (and should look for them on their own, as *Moore*’s counsel did), and should read them thoroughly to ensure that the summaries do not omit material information.

H. *Walch v. Shinseki*³⁰⁶

While *Moore* addresses what actions VA is required to affirmatively take to fulfill the duty to assist, *Walch* demonstrates the limitations on that duty. In *Walch*, the Federal Circuit held that the VA’s duty does not extend to forwarding sua sponte certain medical evidence to a veteran’s private physician if the veteran is also in possession of that evidence.³⁰⁷

Richard Walch served on active duty from 1954 to 1957.³⁰⁸ Walch’s military medical records indicated that during his service he was treated for injuries to his left knee on two occasions.³⁰⁹ His discharge physical, however, showed that his knee had healed.³¹⁰ This was also the conclusion shortly after Walch was discharged and when he filed for disability compensation related to his left knee.³¹¹ The VA denied the claim because it found “no orthopedic condition.”³¹² Walch did not appeal, making the decision final. In 1966, Walch injured his left knee and broke his tibia during a softball game.³¹³ His prognosis was “generally good,” but the doctor noted the “possibility of long-term arthritis in the [left] knee.”³¹⁴

In 1992, Walch sought to reopen his claim.³¹⁵ He submitted evidence from private physicians who had treated him for left knee

306. 563 F.3d 1374 (Fed. Cir. 2009).

307. *Id.* at 1375.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

problems over the years including moderate degenerative arthritis and a total knee replacement, and the hospital report from his 1966 softball injury.³¹⁶ In deciding to reopen Walch's claim, the BVA relied on a letter from Walch's physician that concluded that there was a likelihood that Walch's current osteoarthritis was connected to his two in-service knee injuries.³¹⁷ It submitted his reopened case to the VA Regional Office for further development and assigned one of its physicians, Dr. James Burton, to review the case.³¹⁸

After reviewing the file, Dr. Burton concluded that there was a greater than 50% chance that Walch's osteoarthritis was related to the traumatic injury he incurred in 1966 while playing softball and not a greater than 50% chance that it was related to his two in-service knee injuries.³¹⁹ He presented this conclusion in a six-page report in which he summarized all of the relevant medical evidence.³²⁰ Walch's private physician, Dr. Michael Sousa, also submitted a letter to the BVA that the BVA found lacking on several grounds.³²¹ Although his letter mentioned Walch's two in-service injuries, it did not describe them.³²² Moreover, Dr. Sousa failed to consider Walch's traumatic softball injury.³²³ Accordingly, the BVA relied on Dr. Burton's opinion and denied Walch's claim.³²⁴ Walch appealed to the CAVC.³²⁵

On appeal, Walch argued that the VA had a duty to sua sponte forward his entire claim file to his private physician, Dr. Sousa, before giving more weight to Dr. Burton's opinion.³²⁶ The CAVC disagreed. It conceded that if Dr. Sousa had stated that he could not provide a complete analysis without such records, the VA might have been obligated to send him the file—but this had not occurred.³²⁷ Moreover, the BVA assigned less weight to Dr. Sousa's opinion because he failed to mention the traumatic softball injury, which was detailed in private medical records that Walch either had or could have released to Dr. Sousa without any assistance from the VA.³²⁸

316. *Id.* at 1375–76.

317. *Id.* at 1376.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at 1376–77.

Walch appealed to the Federal Circuit, where he argued that the CAVC misinterpreted the VA's duty to assist veterans with their claims pursuant to 38 U.S.C. § 5103A(a)-(c)³²⁹ by holding that the VA does not have a duty to sua sponte forward all medical records in its possession to a veteran's private physician.³³⁰

The court disagreed with Walch, viewing his argument as trying to extend § 5103A too far.³³¹ Section 5103A(a)(1) obliges the VA to "make reasonable efforts to assist a claimant *in obtaining evidence* necessary to substantiate the claimant's claim."³³² That includes obtaining the veteran's military medical record, records from treatment they received at VA hospitals, or other relevant records held by the federal government.³³³ It also extends to private records that the claimant authorizes the VA to obtain.³³⁴ It does *not*, however, "require the VA to provide the veteran with evidence that is already in his possession" because "[t]he VA's duty to assist is not an unbounded obligation."³³⁵

Walch leaves no doubt that, despite the VA's long list of statutory obligations to assist veterans with their claims, there are limits. The facts of *Walch* were such that the VA was able to obtain a strongly-worded opinion limiting its obligations.³³⁶

However, there will likely be cases that test *Walch's* holding. It is not difficult to imagine scenarios where active duty service members and veterans receive treatment from private physicians but it is unclear who has which records. For example, if a service member gets sick while on vacation and is not near a military hospital, he or she is authorized to get treatment at the nearest emergency room. Many times, those private records do not become part of the service member's military medical record. Similarly, if a service member or veteran requires treatment that is not available at certain bases or VA hospitals, he or she will often be referred to a civilian physician with the required skill set. Again, those private records may fall through

329. See 38 C.F.R. § 3.159(c)(1)-(3) (2009) (regulation implementing 38 U.S.C. § 5103A).

330. *Walch*, 563 F.3d at 1377.

331. *Id.*

332. *Id.* (emphasis added) (quoting 38 U.S.C. § 5103A(a)(1) (2006)).

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 1378. The court left an interesting question undecided. The VA argued that, had it sua sponte forwarded Walch's claim file to a private physician without receiving a request from either Walch or the physician, it would have violated the Health Portability and Accountability Act and the VA's own privacy regulations. See *id.* at 1378 n.3.

the cracks and not become part of the veteran's military records. In such cases, if the veteran has those records in his or her possession, *Walch* holds that the VA has no duty to sua sponte obtain those records and provide them to the veteran's private physician. However, unless the veteran submits the records to the VA as part of his claims file, it is unclear how the VA will determine whether the veteran in fact has the records.

I. Military Order of the Purple Heart of the USA v. Secretary of Veterans Affairs³³⁷

As noted above, the Federal Circuit has exclusive jurisdiction not only over appeals from decisions of the CAVC, but also over petitions for review challenging VA regulations, rules, and statements of policy.³³⁸ These petitions for review are governed by the standards of the Administrative Procedure Act (APA).³³⁹ In *Purple Heart*, the Federal Circuit granted a petition for review and vacated a VA rule that subjected certain large awards to enhanced scrutiny without the knowledge or participation of the veteran.³⁴⁰

On August 27, 2007, the VA issued a directive, "Fast Letter 07-19," to all Regional Offices.³⁴¹ The directive applied to Regional Office decisions that either (a) awarded lump sums of \$250,000 or more or (b) had a retroactive effective date of eight years or more.³⁴² It required these so-called "Extraordinary Awards" to be sent to the director of the Compensation and Pension (C&P) Service for "final determination."³⁴³ In addition, the directive stated that the Regional Office decision granting the extraordinary award should not be disclosed to the veteran, that the veteran should not be told that the C&P review occurred, and that the veteran should not be told if the C&P Service reduced the original award.³⁴⁴ Veterans organizations petitioned the Federal Circuit for direct review.³⁴⁵ They argued that the C&P procedure was contrary to law and therefore invalid under

337. 580 F.3d 1293 (Fed. Cir. 2009).

338. See *supra* Part II.B.

339. See 38 U.S.C. § 502 (2006) ("An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit."); see also Administrative Procedure Act, 5 U.S.C. §§ 701–706 (describing the principles of judicial review of agency actions).

340. See *Purple Heart*, 580 F.3d at 1294.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 1294–95.

345. *Id.* at 1294.

the APA³⁴⁶ because it excluded the veteran from knowing about and participating in the proceeding, and because the VA adopted the procedure without public notice and an opportunity for comment.³⁴⁷

A divided panel of the Federal Circuit, in an opinion by Judge Newman, granted the petition and set aside the C&P review procedure.³⁴⁸ The court first rejected two threshold arguments raised by the VA. First, the VA contended that the petition was moot because the VA had since issued a new directive, “Fast Letter 08-24,” which altered some of the terminology used in the original directive.³⁴⁹ However, because the C&P review *procedure* from the original directive was unchanged, the court ruled that the petition was not moot.³⁵⁰ In addition, the VA asserted that the new C&P procedure was not subject to Federal Circuit review because it was not a “rule” as defined in the APA.³⁵¹ But the court rejected this argument, too, writing that the procedural change at issue was “a change in existing law or policy which affects individual rights and obligations,” and was therefore a “rule” subject to judicial review.³⁵²

Turning to the substance of the challenge, three VA regulations weighed heavily on the court’s determination that the C&P review process was contrary to law and therefore invalid:

- 38 C.F.R. § 3.103(a), which provides claimants with, among other things, the right to a hearing, and imposes on the VA “the obligation . . . to assist a claimant in developing the facts pertinent to the claim”;
- 38 C.F.R. § 3.103(c)(1), which entitles a claimant “to a hearing at any time on any issue involved in a claim” before a VA employee with “original determinative authority” over the issue involved; and
- 38 C.F.R. § 3.103(c)(2), which explains that the purpose of the hearing under subsection (c)(1) is to provide the

346. See 5 U.S.C. § 706(2)(A) (2006) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

347. *Purple Heart*, 580 F.3d at 1294.

348. *Id.*

349. *Id.* at 1295.

350. *Id.* at 1296 (“Since the procedures of Fast Letter 07-19 continue unchanged, and there has been no cessation of the challenged conduct, the appeal is not mooted.”).

351. *Id.*; see also 5 U.S.C. § 551(4) (providing that “‘rule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”).

352. *Purple Heart*, 580 F.3d at 1296 (quoting *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991) (internal quotations omitted)).

claimant with an opportunity to present additional pertinent evidence and arguments “in person.”³⁵³

The court first noted that, under the new C&P procedure, “the veteran does not have a hearing in the presence of the persons who now have final decisional authority for regional office decisions,” in direct contravention of subsection (c)(1).³⁵⁴ Because of the lack of hearing, and because the veteran would not be told of any reduction in the award resulting from C&P review, the court also determined that the new procedure deprived the veteran of his right under subsection (c)(2) to present additional evidence and arguments in support of his claim.³⁵⁵ In addition, the court emphasized that the new procedure did not provide “in person” interaction with the “deciding official,” i.e., the C&P reviewer, as required by subsection (c)(2).³⁵⁶ Finally, the court rejected the argument that the C&P procedure was permitted by 38 U.S.C. § 5109A, which permits the VA to challenge any decision of the Regional Office.³⁵⁷ The court observed that review under § 5109A is for “clear and unmistakable error” only, whereas the C&P procedure “require[d] no deference to the regional office.”³⁵⁸ The court thus concluded that the new C&P procedure was “not in accordance with law,”³⁵⁹ granted the petition for review, and vacated the procedure set forth in Fast Letters 07-19 and 08-24.³⁶⁰

Judge Schall concurred in the court’s ruling that the petition was not moot, but dissented from the remainder of Judge Newman’s opinion. He first contended that the “extraordinary award procedure” (EAP) set forth in the Fast Letters was “a rule of agency procedure, which is exempted from notice and comment requirements” by the APA.³⁶¹ Judge Schall also viewed the EAP procedure as consistent with § 5109A because that section, in his view, applies the clear-and-unmistakable-error standard only to *final* decisions of the Regional Office, and does not preclude “de novo internal review of *draft* rating decisions.”³⁶² Finally, Judge Schall

353. *See id.* at 1296–97 (citing 38 C.F.R. § 3.103 (2009)).

354. *Id.* at 1297.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. 5 U.S.C. § 706(2)(A) (2006).

360. *Purple Heart*, 580 F.3d at 1297–98.

361. *Id.* at 1298–99 (Schall, J., dissenting); *see* 5 U.S.C. § 553(b)(A) (providing that public notice is not required for “rules of agency organization, procedure, or practice”).

362. *Purple Heart*, 580 F.3d at 1299 (Schall, J., dissenting) (emphasis added).

contended that the EAP procedure was not contrary to the governing regulations because (i) the veteran retained the right to a hearing before the Regional Office; (ii) this hearing would still occur “in person”; and (iii) the VA’s duty to assist was unhampered, as the Regional Office could still explain the issue and suggest that the veteran submit additional evidence.³⁶³

However, the difficulty with the position adopted by Judge Schall is that, as he acknowledged, “the policy guidance provided by the C&P Service . . . apparently binds the Regional Office.”³⁶⁴ So, after the C&P Service has reduced an award, any in-person hearing before the Regional Office is relatively meaningless—any “decision-making authority” retained by the Regional Office after C&P review is largely pro forma.³⁶⁵ While the Regional Office could certainly still “suggest the submission of additional evidence . . . which would be of advantage to the claimant’s position,” any subsequent “extraordinary” award based on this additional evidence would return to the C&P Service for further review.³⁶⁶ So, while it could be argued that the veteran’s ongoing interaction with the Regional Office satisfies the letter of section 3.103(c)(1)’s requirement of an “in person” hearing before a VA employee who has “original determinative authority,” that section’s spirit is certainly unfulfilled when the actual decision-making authority rests with the C&P Service.

Although the Federal Circuit has rejected the VA’s first effort at heightening the scrutiny given to large awards as both procedurally and substantively flawed, the VA is certainly free to correct the errors identified by the court and to try to implement, through notice-and-comment rulemaking, a process for reviewing extraordinary awards that complies with the law. Given that the pre-*Purple Heart* C&P review process resulted in the reduction of proposed benefits in the “vast majority” of cases subject to review,³⁶⁷ practitioners should be mindful of the possibility for future rulemaking on this topic, and should regularly monitor the Federal Register for new rules and regulations published by the VA.³⁶⁸

363. *Id.* at 1300–01.

364. *Id.* at 1300.

365. *Id.* at 1300–01; *cf. id.* at 1300 (“A claimant whose file qualifies for the EAP is free to request a hearing and to submit evidence ‘in person’ to the RO at any time while a claim is pending, including before and after C&P Service review.”).

366. *Id.* at 1301 (alteration in original).

367. *See id.* at 1297 n.2 (majority opinion) (quoting *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1076–77 (N.D. Cal. 2008)) (internal quotations omitted) (reporting on C&P’s review of approximately 800 rating decisions to determine if benefits should be awarded retroactively).

368. For free-of-charge access to the VA’s recently published regulations, see Dep’t

*J. Reizenstein v. Shinseki*³⁶⁹

Reizenstein presented another question of administrative law. It addressed a VA regulation governing the reduction of total disability ratings. The VA had interpreted this regulation as inapplicable in the context of total disability ratings awarded as part of a retrospective staged rating.³⁷⁰ The court in *Reizenstein* considered whether the VA's position was properly entitled to *Chevron* deference,³⁷¹ and, if so, whether the VA's interpretation of the regulation was reasonable. The Federal Circuit determined that the VA's position was entitled to deference and that the agency's interpretation was reasonable.³⁷²

Reizenstein served on active duty in three branches of the armed forces at intermittent periods between 1968 and 1981.³⁷³ In 1996, Reizenstein filed a benefits claim for post-traumatic stress disorder (PTSD).³⁷⁴ The VA denied this claim in 1997 but, following treatment at a VA medical center in 1998, Reizenstein was diagnosed with a number of conditions, including PTSD.³⁷⁵ Reizenstein thereafter appealed his 1997 denial and the VA retroactively assigned a 30% disability rating beginning in November 1996.³⁷⁶ Reizenstein appealed this decision and the BVA awarded him a retrospective staged award in March 2006.³⁷⁷ In relevant part, this retrospective award afforded Reizenstein a 100% disability rating from March 22, 1998, to May 5, 1999, but then reduced the rating to 30% from May 6, 1999 through the present.³⁷⁸ The BVA premised its decision to reduce the disability rating on a May 6, 1999 mental health treatment note that documented a reduction in the severity of Reizenstein's condition.³⁷⁹ Reizeinstein again challenged the BVA's decision on several grounds, one of which was the apparent conflict between the May 6, 1999 reduction from a 100% disability rating and a VA regulation, 38 C.F.R § 3.343(a), which forbids reductions from total

of Veterans Affairs, VA Regulations, <http://www1.va.gov/orpm/page.cfm?pg=47> (last visited Mar. 10, 2010).

369. 583 F.3d 1331 (Fed. Cir. 2009).

370. *Id.* at 1335.

371. *Id.*; see *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

372. *Id.* at 1338.

373. *Id.* at 1333.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

disability ratings without a medical examination: “Total disability ratings, when warranted by the severity of the condition and not granted purely because of hospital, surgical, or home treatment, or individual unemployability will not be reduced, in the absence of clear error, without examination showing material improvement in physical or mental condition.”³⁸⁰

On appeal, the CAVC noted that the VA enacted section 3.343(a) to protect veterans who were completely dependent on disability benefits from arbitrary reductions.³⁸¹ The CAVC held that it would not advance that purpose to apply the regulation in the context of staged ratings, which provide retrospective lump-sum payments. The CAVC therefore determined that section 3.343(a) did not apply to Reizenstein’s claim.³⁸²

The Federal Circuit affirmed.³⁸³ It found that section 3.343(a), as an interpretation by the VA of its own regulations, was entitled to broad deference, even greater than that typically afforded to an agency’s construction of a statute.³⁸⁴ Under this framework, the court found the government’s interpretation of section 3.343(a) to be reasonable.³⁸⁵

The holding of *Reizenstein* should put practitioners of veterans law on notice that challenges to retroactive reductions of total disability ratings are difficult to establish. More generally, it illustrates the difficulty of challenging VA interpretations of the department’s own regulations.

CONCLUSION

The Federal Circuit and the Supreme Court decided many important veterans law cases in 2009. In *Sanders*, the Supreme Court made a rare but significant foray into the field, holding that it is the veteran’s burden, not the VA’s, to prove that the VA’s failure to provide notice was prejudicial. The Federal Circuit decided a wide range of legal questions, holding, *inter alia*, that veterans have a Fifth Amendment due process right to a claim for benefits; that there is no equitable tolling of the 120-day deadline to appeal a BVA decision to the CAVC; that the VA need not provide separate ratings for diseases with overlapping symptoms; and that the VA need not provide notice

380. *Id.* at 1334 (quoting 38 C.F.R. § 3.343(a) (2009)).

381. *Id.*

382. *Id.*

383. *Id.* at 1338.

384. *Id.* at 1336.

385. *Id.* at 1337.

that is specific to each veteran. Also, under various fact patterns, the court elaborated on the VA's statutory duty to assist veterans in developing their claims. In the years to come, an aging population of veterans from the Korean and Vietnam Wars, as well as veterans from the on-going military actions in Iraq and Afghanistan, will continue to present the Federal Circuit with challenging and significant questions of veterans benefits law.