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

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A NEW DIALOGUE BETWEEN
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PAUL R. GUGLIUZZA*

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INTRODUCTION

The Supreme Court of the United States rarely grants certiorari in a veterans benefits case. Congress gave the United States Court of Appeals for the Federal Circuit exclusive jurisdiction over veterans appeals in 1988 but, until 2009, the Supreme Court had reviewed only two Federal Circuit veterans decisions. In the 2010 Term, however, the Court decided its second veterans case in less than two years. Although patent lawyers are familiar with a trend of increasing Supreme Court interest in the Federal Circuit’s work, little attention has been paid to the similar, albeit incipient, trend that may be emerging in the field of veterans law.

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

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

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

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

I. THE VETERANS CLAIMS PROCESS AND FEDERAL CIRCUIT JURISDICTION

As of September 30, 2010, 3.2 million veterans received disability compensation from the VA. To obtain disability benefits, an eligible veteran must prove three basic elements: (1) a present disability, (2)
incurrence or aggravation of a disease or injury while in military service, and (3) a causal connection between the present disability and the in-service disease or injury. A veteran may submit a formal claim for benefits online or by submitting a hard-copy form and supporting evidence to a VA regional office (RO). The RO reviews the claim under the “benefit of the doubt” standard. Under this standard, the VA must grant a veteran’s claim if the evidence in favor of and against the claim is approximately equal.

As the benefit of the doubt standard suggests, the claims process is not intended to be adversarial. The VA has a statutory duty to make reasonable efforts to assist a veteran in developing the evidentiary record to support the claim. As part of the duty to assist, the VA must, among other things, obtain relevant medical records for the veteran, provide medical examinations to certain veterans, and notify veterans of the evidence necessary to substantiate their claims.
The VA regional office makes the initial decision about whether a veteran is entitled to benefits. If the RO determines that a veteran has a service-connected disability, it then makes two further determinations. First, it determines the severity of the disability by assigning a “rating,” a percentage that accounts for the impairment of earning capacity of an average veteran suffering from the same disability.\textsuperscript{21} The VA will give a 100\% disability rating, for example, to a veteran suffering from a disability that would render the average veteran completely incapable of holding gainful employment.\textsuperscript{22} The rating determines the amount of monthly benefits paid to the veteran.\textsuperscript{23}

In addition to awarding benefits based on generalizations about the effect of particular disabilities on the average veteran, the system also accounts for the unique circumstances of individual claimants, particularly those who cannot maintain employment. For example, a veteran without a 100\% disability rating may still be considered totally disabled if the VA grants “total disability based on individual unemployability,” called “TDIU” in the parlance of veteran’s law.\textsuperscript{24} To obtain a TDIU rating, the veteran must meet two criteria. First, the veteran must be unable to sustain gainful employment because of a disability connected to military service.\textsuperscript{25} Second, the veteran must have one disability rated at or above 60\% or the veteran must have a combined disability rating\textsuperscript{26} of 70\% or more with one of the disabilities rated at 40\% or more.\textsuperscript{27}

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

\textsuperscript{21} Id. \$ 1155.
\textsuperscript{22} See 38 C.F.R. \$ 4.15 (2010) (explaining the total disability rating).
\textsuperscript{23} See 38 U.S.C. \$ 1114 (providing the rates of monthly compensation for each disability rating). A veteran’s monthly disability payment can range from \$0 (for a disability rated at 0\% impairment of earning capacity) to \$2673 (for a disability rated at 100\%). Id. \$ 1114(a)–(j). Veterans who suffer from particularly severe disabilities are entitled to special compensation beyond the normal disability payment. See id. \$ 1114(k)–(s).
\textsuperscript{24} Veterans Benefits Manual, supra note 9, at 329–30.
\textsuperscript{25} Id. at 329.
\textsuperscript{26} In the case of a veteran who suffers from multiple disabilities, the VA rates each disability separately. Amberman v. Shinseki, 570 F.3d 1377, 1380 (Fed. Cir. 2009). The VA then uses a “combined ratings table” to calculate a single disability rating used to determine the veteran’s monthly payments. See 38 C.F.R. \$ 4.25.
\textsuperscript{27} 38 C.F.R. \$ 4.16(a).
\textsuperscript{28} Id. \$ 3.400.
award, a veteran will, in addition to receiving benefits in the future, usually receive back payments of benefits to compensate for the time it took the VA to decide the claim.\footnote{29} If the regional office determines that a veteran is not eligible for benefits, or if the veteran disagrees with the rating or effective date established by the RO, the veteran may file a notice of disagreement, which initiates an appeal to the Board of Veterans’ Appeals (Board).\footnote{30} Once a veteran files a notice of disagreement, the RO must prepare a statement of the case, which, in essence, forms the record on appeal.\footnote{31} The RO sends the statement of the case to the veteran, along with VA Form 9, the substantive appeal form.\footnote{32} To perfect the appeal to the Board, the veteran must return that form to the RO within sixty days of the date the RO mailed the statement of the case, or within one year of the original RO decision denying the claim, whichever is later.\footnote{33} Before further discussing the claims process, it is important to note that, until the veteran files a notice of disagreement and appeals to the Board, the veteran is prohibited from retaining paid counsel to pursue a claim.\footnote{34} This limitation has, correctly in my view, been criticized.\footnote{35} Although the VA has a statutory duty to assist the veteran and must resolve all doubts in the veteran’s favor, the claims process

\footnote{29. VETERANS BENEFITS MANUAL, supra note 9, at 591; see, e.g., Carpenter v. Principi, 15 Vet. App. 64, 68 (2001) (awarding over $206,000 in past-due benefits).} \footnote{30. See 38 C.F.R. § 3.103(f). The notice of disagreement must be filed within one year from the date that the RO notifies the veteran of its decision. Id. § 20.302(a). As an alternative to filing a notice of disagreement, a veteran may first request that the file be reviewed by a Decision Review Officer at the RO who, in essence, performs a second review of the veteran’s file. HOW DO I APPEAL?, supra note 13, at 4.} \footnote{31. 38 U.S.C. § 7105(d)(1) (2006); see 38 C.F.R. § 19.29 (providing that a statement of the case must contain (1) a summary of evidence in the case, (2) a summary of the applicable law, and (3) the reasons for the RO’s ruling).} \footnote{32. HOW DO I APPEAL?, supra note 15, at 6.} \footnote{33. See 38 C.F.R. § 20.302(b)(1). See generally 38 U.S.C. § 7105(a) (2006) (outlining the procedure for appeal to the Board).} \footnote{34. 38 U.S.C. § 5904(c)(1).} \footnote{35. See, e.g., David R. DiMatteo, Comment, Walters Revisited: Of Fairness, Due Process, and the Future of Veterans’ Fight for the Right to Hire an Attorney, 80 Tul. L. Rev. 975, 976–82 (2006) (collecting criticism of the ban on paid counsel); see also Benjamin W. Wright, The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney, 19 Fed. Cir. B.J. 433, 446–57 (2010) (analyzing the statistical probability that veterans represented by counsel would succeed more often in their appeals); Matthew J. Dowd, Note, No Claim Adjudication Without Representation: A Criticism of 38 U.S.C. § 5904(c), 16 Fed. Cir. B.J. 53, 71–78 (2006) (arguing that the inability to have counsel prior to filing an appeal results in more pro se appeals, which often fail for procedural reasons); John W. Egan, Note, The Department of Veterans Affairs and the Constitutional Implications of Judicial Review: Veterans’ Due Process Right to Hire Counsel, 16 Fed. Cir. B.J. 31, 38–52 (2006) (contending that the prohibition on hiring an attorney violates veterans’ due process rights).}
is inherently adversarial. The government has a scarce resource—benefits funding—that it must allocate among veterans who want it. The VA’s institutional flaws, which are no different than those suffered by any bureaucratic government agency, compound the hostility between veterans and the VA. Furthermore, veterans who seek benefits are frequently persons who could most benefit from expert lawyer help to navigate the system. Disability claims raise complex medical issues and the veteran’s ability to understand those issues might be obstructed by the very disability for which the veteran is applying for benefits.

Of course, veterans may obtain free help in pursuing their claims from veterans service organizations and law students. But data on the success of veterans appearing before the Board (where veterans are, for the first time in the process, permitted to retain paid counsel) suggest that veterans with attorneys fare quite well. In 2009, the Board allowed 24% of all the claims it decided, remanded 37.3%,
and denied 36.1%. Veterans with attorneys obtained allowance in 22.7% of the cases, remand in 46.4%, and had the claim denied in 28.8%. By comparison, unrepresented veterans fared much worse, having their claims allowed in only 18.7% of cases, remanded in 32.9%, and denied in 46.1%. If veterans were permitted to retain counsel even earlier in the process—before a claim reaches the Board—veterans might have more success before the RO and, as an additional benefit, reduce the workload of the already overworked Board.

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

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

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41. Id.
42. Id.
43. Id. at 3; see also 38 U.S.C. § 7101 (2006) (outlining the composition of the Board).
44. 38 C.F.R. § 19.3(a) (2010). If the Board decides to reconsider its initial decision, the appeal will be considered by a panel of three (in the case of a matter originally heard by a single member) or by an enlarged panel (in the case of a matter originally heard by a panel of members). Id. § 19.11(b); see also id. § 20.1000 (listing the grounds for reconsideration by the Board).
45. 38 C.F.R. § 20.700(c) (“Hearings conducted by the Board are ex parte in nature and nonadversarial.”).
46. Id. § 20.700(b), (e). The hearing may take place at either the VA headquarters in Washington, D.C. or at any other VA office capable of hosting hearings. Id. § 20.705.
47. 38 U.S.C. § 7104(d); 38 C.F.R. § 19.7(b); see also 38 C.F.R. § 19.9(a) (providing that the Board must remand a case to the RO “[i]f further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision”).
to reconsider its decision.\textsuperscript{48} Second, the veteran may return to the RO and seek to reopen the claim. To have a claim reopened, the veteran must present “new and material” evidence supporting the claim.\textsuperscript{49} Third, the veteran may ask either the RO or the Board to review its prior decision because it contained “clear and unmistakable error.”\textsuperscript{50} Unlike a request to reopen, which is based on new evidence, a claim of clear and unmistakable error “must be based on the record and the law that existed at the time of the prior adjudication.”\textsuperscript{51} Finally, the veteran may file an appeal with the United States Court of Appeals for Veterans Claims (Veterans Court).\textsuperscript{52}

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

\textsuperscript{48} See supra note 44 (discussing the Board’s reconsideration procedure).
\textsuperscript{50} There is no time limit on a veteran’s request to reopen a claim. William F. Fox, Jr., \textit{The Law of Veterans Benefits: Judicial Interpretation} 24 (2002).
\textsuperscript{51} Willsey v. Peake, 535 F.3d 1368, 1371 (Fed. Cir. 2008). But, like a request to reopen, a veteran may request revision of a Board decision on the grounds of clear and unmistakable error at any time. See 38 U.S.C. § 7111(d).
\textsuperscript{52} See 38 U.S.C. § 7266(a).
\textsuperscript{53} Id. § 7252(a). The Veterans Court consists of at least three and not more than seven judges who are appointed for fifteen-year terms by the President and confirmed by the Senate. Id. § 7253(a)–(c). Currently, the court has seven judges. \textit{Judges, U.S. Court of Appeals for Veterans Claims}, http://www.uscourts.cavc.gov/about/judges/ (last visited Feb. 28, 2011). The court may decide cases en banc, in panels of three, or, as the court resolves most of its cases, in a decision by a single judge. 38 U.S.C. § 7254(b); see Fox, supra note 49, at 21–22 (noting that over seventy-five percent of cases are decided by a single judge).
\textsuperscript{54} 38 U.S.C. § 7252(a).
\textsuperscript{55} Id. § 7261(a); see also id. § 7261(c) (prohibiting the Veterans Court from retrying de novo any factual findings made by the VA or the Board); cf. 5 U.S.C. § 706(1)–(2) (2006) (provision of the Administrative Procedure Act permitting the courts of appeals to compel agency action unlawfully withheld or to set aside unlawful agency action); Fed. R. Civ. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . .”).
\textsuperscript{56} 38 U.S.C. § 7261(b)(2).
which forbids the Veterans Court from reversing a Board decision if the error did not affect a veteran’s “substantial rights.”

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

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

II. SUPREME COURT REVIEW OF VETERANS BENEFITS DECISIONS

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

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59. Id. § 7292(d)(1).
60. Id. § 7292(d)(2); Bastien v. Shinseki, 599 F.3d 1301, 1305 (Fed. Cir. 2010).
constitutionality of VA actions and veterans benefits laws. Yet the vast majority of the VA’s work, determining individual claims for benefits, remained almost entirely immune from judicial review.

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

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

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

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

66. FOX, supra note 49, at 11.


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


71. See infra Part II.A.
Federal Circuit’s existence, has become exceptionally active in patent law in the past decade. The recent uptick in Supreme Court veterans cases raises the question of whether we are similarly leaving a laissez faire “first wave” and entering a period of more aggressive Supreme Court oversight.


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

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


74. Id. at 116.

75. Id. at 116–17.

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

77. Id. at 117.
“injury” did not connote a fault standard and that the “as a result of” language required only a causal connection between the injury and VA treatment.78

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

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

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

78. Id. at 117–20. Congress has since amended the relevant statute to require a showing of fault. See 38 U.S.C. § 1151(a) (2006) (requiring claimant to show that injury or death resulted from “carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the [VA]”); see also infra Part III.E (discussing 2010 Federal Circuit case applying Gardner to acts of omission).
80. Id. at 408.
81. Id. at 409 (quoting 28 U.S.C. § 2412(d)(1)(B)) (internal quotation marks omitted).
82. Id. at 409–10.
83. Id. at 406.
84. Id.
85. Id. at 415–16.
86. Id. at 415–19; see Fed. R. Civ. P. 15(c)(1)(B) (providing that “[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading”).
87. See Robert L. Stern et al., Supreme Court Practice 248 (8th ed. 2002) (noting that, in cases involving the government, the Court may grant certiorari “where the issues simply concern the construction of a major federal statute” and that “[t]he fact that especially large amounts of money are involved in litigation over the issue of statutory construction may also be a persuasive factor”) (internal quotation marks omitted).
which greatly increased the odds of Supreme Court review.\footnote{88} Although the government opposed review in \textit{Scarborough},\footnote{89} that case was particularly suitable for certiorari given that the courts of appeals had disagreed on whether an EAJA fee application could be amended after the initial filing deadline had run.\footnote{90} In short, both \textit{Gardner}, which essentially involved a question of federal government tort liability, and \textit{Scarborough}, which presented a clear circuit split on a federal statute of general application, involved issues that the Supreme Court would likely have decided regardless of whether they arose in a veterans case or in some other field.

\textbf{B. A New Wave? (2009–present)}

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

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

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


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

\footnote{91. 129 S. Ct. 1696 (2009).}

\footnote{92. \textit{Id.} at 1700.}

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

\footnote{94. \textit{Sanders}, 129 S. Ct. at 1700–01 (citing 38 U.S.C. § 5103; 38 C.F.R. § 3.159).}
Court instructs the court to “take due account of the rule of prejudicial error.” In Sanders, the Court reviewed two Federal Circuit decisions that had held certain VA notice errors to be prejudicial, warranting reversal of the agency’s decision. In so holding, the Federal Circuit had adopted a presumption that any notice error is prejudicial and requires reversal unless the VA can show that the error did not affect the “essential fairness” of the proceeding.

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

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

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

95. See id. at 1701 (quoting 38 U.S.C. § 7261(b)(2)).
96. Id. at 1702–03.
97. Id. at 1702.
98. Id. at 1700.
99. Id. at 1705.
101. Henderson v. Shinseki, 131 S. Ct. 1197, 1200 (2011); see also 38 U.S.C. 7266(a) (2006) (“In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans’ Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed . . . .”).
for appealing a Board decision is a jurisdictional requirement.\textsuperscript{102} The Supreme Court, in an opinion by Justice Alito, unanimously reversed.\textsuperscript{103}

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

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

\textbf{C. A New Dialogue Between the Supreme Court and the Federal Circuit}

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

\begin{footnotesize}
\textsuperscript{103} Henderson, 131 S. Ct. at 1206. Justice Kagan was recused. \textit{Id.} at 1207.
\textsuperscript{104} \textit{Id.} at 1205.
\textsuperscript{105} \textit{Id.} at 1204.
\textsuperscript{106} \textit{Id.} at 1205–06.
\end{footnotesize}
increase is a trend or an aberration, it is worthwhile to consider what might be causing the Court’s veterans docket to grow. This inquiry is interesting not only as an academic matter. It could also provide insight into which future cases might be strong candidates for Supreme Court review. I do not intend this to be an exhaustive discussion of the factors driving the Court’s growing veterans docket. Rather, I offer these preliminary observations simply to lay a foundation for future discourse and to complement emerging scholarship on factors shaping the Supreme Court’s current docket.\footnote{108}

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

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

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

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113. See Veterans Pro Bono Initiative, Federal Circuit Bar Ass’n, 1 (April 2007), available at http://memberconnections.com/olc/filelib/LVFC/cpages/11/Library/VETERANS%20PRO%20BONO%20PROGRAM%20PDF.pdf (noting that the program was created because of the increased number of pro se veterans appeals in recent years, a number which may further increase in the future).


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

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

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

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

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

119. Parker, supra note 114.


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

123. See Castanias et al., supra note 4, at 815.
emphasizing instead that the traditional multi-factor test for injunctive relief should apply. Similarly, the Supreme Court has ruled that, when reviewing fact-finding by the U.S. Patent and Trademark Office, the Federal Circuit should apply the substantial-evidence standard of the Administrative Procedure Act—the same standard applied by regional circuits reviewing agency fact-finding. Further examples of the Supreme Court’s disapproval of patent-specific procedural and remedial rules abound. In the context of this case law, Sanders, which held that the Federal Circuit must apply to veterans appeals the same harmless-error standard applied in other fields of law, could be seen as just another example of the Supreme Court insisting that the Federal Circuit use the same procedural and remedial rules as other federal courts.

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

III. THE 2010 VETERANS BENEFITS DECISIONS OF THE FEDERAL CIRCUIT

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

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126. See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 832–34 (2002) (rejecting the argument that the phrase “arising under,” as relevant to the Federal Circuit’s jurisdiction over cases “arising under” the patent laws, should be interpreted differently than the same phrase as relevant to general federal question jurisdiction); Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809, 810–11 (1986) (per curiam) (emphasizing that the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) applies to district-court factual determinations underlying patent law’s obviousness inquiry).
128. See infra note 501 and accompanying text (noting that the number of claims received annually by the VA has increased from 579,000 to 1,014,000 in 2009).
2010, the Federal Circuit decided only fourteen veterans cases by precedential opinion.\textsuperscript{129} From 2007 to 2009, by contrast, the court annually decided an average of twenty-five veterans cases by precedential opinion.\textsuperscript{130} Notwithstanding the smaller number of precedential decisions, the opinions, as usual, covered a wide range of veterans law issues. Although it is difficult to trace a coherent theme through decisions on such varied topics, many of the decisions reflect a preference for a flexible, standards-based approach to deciding veterans claims. The decisions tend to reject categorical rules, whether those rules were adopted by the Veterans Court (such as a rule automatically rejecting the opinions of physicians who do not review a veteran’s in-service medical record),\textsuperscript{131} or proposed by claimants (such as a rule that the VA must always provide a medical examination as part of the duty to assist).\textsuperscript{132}

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

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

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

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

\textsuperscript{131} Gardin v. Shinseki, 613 F.3d 1374, 1378 (Fed. Cir. 2010).

\textsuperscript{132} Waters v. Shinseki, 601 F.3d 1274, 1278–79 (Fed. Cir. 2010).

\textsuperscript{133} The Federal Circuit in 2010 issued no precedential opinions discussing VA ratings decisions, so this Part does not discuss that significant aspect of VA adjudication.
A. Duty to Assist

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

1. Medical records

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

The veteran, Julius Golz, served in the Navy from 1969 to 1972. In 1995, the Social Security Administration found that Golz was disabled due to back and leg pain caused by a car accident. The Social Security decision did not discuss any psychiatric or mental health issues. Golz then sought benefits from the VA for service-connected post-traumatic stress disorder. The VA denied the claim and Golz appealed to the Board, asserting that the VA violated its duty to assist by not obtaining the accompanying medical records. The Board affirmed the denial of benefits, noting that it reviewed a copy of the Social Security decision itself, which did not mention a psychiatric disorder, indicating that the accompanying medical records would not be relevant to Golz’s post-traumatic stress disorder claim. The Veterans Court affirmed, as did the Federal Circuit.

136. 590 F.3d 1317 (Fed. Cir. 2010).
137. *Id.* at 1321.
138. *Id.* at 1319.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1319–20.
143. *Id.* at 1320.
144. *Id.* at 1320, 1323.
Writing for the court, Judge Moore began by making clear that the duty to assist requires the VA to obtain only medical records that are relevant to the claim at hand:

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

The court then outlined what it considered to be relevant records:

“Relevant records for the purpose of § 5103A are those records that [1] relate to the injury for which the claimant is seeking benefits and [2] have a reasonable possibility of helping to substantiate the veteran’s claim.”

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

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

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

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145. Id. at 1321 (quoting 38 U.S.C. §§ 5103A(a)(1), (b)(1) (2006)).
146. Id. (citing BLACK’S LAW DICTIONARY 1316 (8th ed. 2004)).
147. Id. at 1322.
148. Id. at 1322–23.
149. Id. at 1323.
150. Id.
151. Id. (emphasizing that the VA must “fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits” (quoting McGee v. Peake, 511 F.3d 1352, 1357 (Fed. Cir. 2008)) (internal quotation marks omitted)).
establish the claim, the VA must retrieve the records.\textsuperscript{152} Given the
court’s emphasis that the relevant inquiry should be resolved in the
claimant’s favor in close cases, the VA should keep the bar for
establishing relevance low.

2. Medical examinations

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

a. Unsupported lay assertions of service connection

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

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

\begin{itemize}
\item \textsuperscript{152} Id. at 1322.
\item \textsuperscript{155} 601 F.3d 1274 (Fed. Cir. 2010).
\item \textsuperscript{156} Id. at 1278–79.
\item \textsuperscript{157} Id. at 1276–77 (citing 38 U.S.C. § 5013A(d)(1)).
\item \textsuperscript{158} Id. at 1275.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\end{itemize}
of diabetes and hypertension. On appeal to the Veterans Court, Waters claimed that the VA did not satisfy its duty to assist because it had not provided a medical examination. The Veterans Court rejected the argument, noting that the only evidence that Waters’s current disability was connected to his military service was Waters’s own statements, and that his lay assertions did not trigger the VA’s duty to provide a medical examination.

The Federal Circuit affirmed in an opinion by Judge Friedman. The court began by reiterating that the VA is required to provide a medical examination only when the examination is “necessary to make a decision on the claim.”

The statute provides a three-part test for determining when an examination is “necessary” to make a decision:

The [VA] shall treat an examination or opinion as being necessary to make a decision on a claim . . . if the evidence of record before the [VA] . . . (A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and (B) indicates that the disability or symptoms may be associated with the claimant’s active military, naval, or air service; but (C) does not contain sufficient medical evidence for the [VA] to make a decision on the claim.

The court emphasized that each subsection imposes its own evidentiary standard, requiring either “competent evidence,” “evidence . . . indicat[ing],” and “medical evidence,” respectively. The court thus faulted the Board for finding that Waters presented no “competent” medical evidence of a nexus between his service and his disability, when the pertinent subsection, subsection B, requires only “evidence . . . indicat[ing]” service connection. But the Federal Circuit found this error to be harmless because the Veterans Court had found that the record contained no evidence of service connection, other than Waters’s own statement. The court rejected Waters’s argument that his lay assertion of service connection,
standing alone, entitled him to a medical examination. The court noted that if it were to accept this argument, it would render superfluous “the carefully drafted statutory standards governing the provision of medical examinations.”

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

b. Persuasive lay testimony of service connection

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

170. Id. at 1278.
171. Id.
174. Waters, 601 F.3d at 1278.
175. See id. (“At oral argument Waters contended that his conclusory generalized statement that his service illness caused his present medical problems was enough to entitle him to a medical examination under the standard of subsection B. Since all veterans could make such a statement, this theory would . . . require the [VA] to provide such examinations as a matter of course in virtually every veteran’s disability case.”).
177. 606 F.3d 1378 (Fed. Cir. 2010).
178. Id. at 1382.
Quareno Colantonio served in the Army during World War II.\textsuperscript{179} In 1999, he filed a claim with the VA, seeking compensation for a back injury connected to his military service.\textsuperscript{180} Because there was no record of Colantonio having suffered a back injury while in service, the VA denied the claim.\textsuperscript{181} The Board agreed that there was no service connection because the only evidence of an in-service back injury came from Colantonio’s own statements and, in the Board’s opinion, Colantonio lacked competence to provide medical opinion testimony.\textsuperscript{182} The Veterans Court agreed, noting that Colantonio’s lay testimony “cannot provide the requisite medical nexus” and that “[a] lay person is not competent to opine on matters requiring medical knowledge, such as etiology of a condition or nexus.”\textsuperscript{183} On appeal, the Federal Circuit determined that this ruling was inconsistent with Waters and remanded.\textsuperscript{184}

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

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

\begin{itemize}
\item \textsuperscript{179} Id. at 1379.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id. at 1380.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id. (internal quotation marks omitted).
\item \textsuperscript{184} Id. at 1382.
\item \textsuperscript{185} Id. at 1381 (emphasis added).
\item \textsuperscript{186} Id. at 1381–82 (quoting 38 U.S.C. § 5103A(d)(2)(B) (2006)).
\item \textsuperscript{187} Id. at 1382.
\item \textsuperscript{188} Waters v. Shinseki, 601 F.3d 1274, 1278 (Fed. Cir. 2010).
\end{itemize}
But, as the court made clear in *Colantonio*, subparagraph B requires only a “minimal showing” of nexus that can sometimes be satisfied by persuasive lay testimony,\(^{189}\) such as detailed statements of family members, friends, and coworkers regarding the symptoms and history of the disability and the effect of the disability on the veteran.\(^{190}\)

### B. Service Connection

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

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

#### 1. Medical evidence

##### a. Private physicians

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

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189. *Colantonio*, 606 F.3d at 1382.
191. *Id.* at 104.
192. *Id.* at 125; see, e.g., 38 U.S.C. §§ 1111–12, 1116, 1118 (2006) (setting forth various presumptions applicable to benefits proceedings).
193. See *Veterans Benefits Manual*, *supra* note 9, at 125.
194. See 38 U.S.C. § 5125 (“For purposes of establishing any claim for benefits . . . a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits . . . may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.”).
VA may not automatically discount a private physician’s opinion merely because the physician did not review the veteran’s in-service medical record.\textsuperscript{196} Wayne Gardin served in the Air Force from 1959 to 1963.\textsuperscript{197} While in service, he developed symptoms consistent with diabetes.\textsuperscript{198} He was, however, not diagnosed with the disease until 1971, after he had been discharged.\textsuperscript{199}

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

The Federal Circuit noted that the statute expressly permits veterans to submit reports from private physicians\textsuperscript{206} and that the implementing regulation requires only that a physician issuing a report be “qualified through education, training, or experience.”\textsuperscript{207} The Federal Circuit held that the Veterans Court erred by holding that a private physician must review service medical records before opining on service connection.\textsuperscript{208} The court also made clear, however, that a private physician’s failure to review a service medical file may make the expert’s opinion less credible.\textsuperscript{209}

\textsuperscript{195} 613 F.3d 1374 (Fed. Cir. 2010).
\textsuperscript{196} Id. at 1378–79.
\textsuperscript{197} Id. at 1375.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id. at 1376.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 1376–77.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 1377, 1380.
\textsuperscript{206} Id. at 1378 (citing 38 U.S.C. § 5125 (2006)).
\textsuperscript{207} Id. (quoting 38 C.F.R. § 3.159(a)(1) (2009)) (internal quotation marks omitted).
\textsuperscript{208} Id. at 1378–79.
\textsuperscript{209} See id. (noting that “a review of the veteran’s service medical records may have significance to the process of formulating a medically valid and well-reasoned
b. Lay testimony

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

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

Similar to its duty-to-assist decisions in Golz, Waters, and Colantonio, the court in Gardin eschewed bright-line rules governing VA actions and decisions, instead encouraging the VA to engage in a holistic review of the available evidence before making a decision on any issue. The contextual, standards-based approach of Gardin is also consistent with the statute governing the evidence that the VA must opinion,” but that there is no “categorical rule excluding all private medical reports that [do] not include a review of the veteran’s service medical records”) (internal quotation marks omitted) (citing Nieves-Rodriguez v. Peake, 22 Vet. App. 285, 304 (2008)).

210. 492 F.3d 1372 (Fed. Cir. 2007).
211. Id. at 1377.
212. Id. at 1379.
213. Id.
214. Id.
215. Id. at 1379–80.
216. Id. at 1380.
217. See id. (“The Board, as factfinder, had the obligation to determine whether Mr. Gardin’s lay evidence was credible; the Board concluded it was not. . . . Whether the Veterans Court was correct in affirming the Board’s credibility determination is a question of fact beyond this court’s jurisdiction.”).
consider in deciding benefits claims. That statute requires the VA to adopt regulations requiring that in each case where a veteran is seeking service-connection for any disability[,] due consideration shall be given to," among other things, "all pertinent medical and lay evidence." By rejecting categorical rules excluding certain types of evidence, the court in Gardin made clear that "all pertinent . . . evidence" really means all evidence. Evidence from a private physician may not be excluded simply because the physician did not review the veteran’s service medical record. Rather, the failure to review the service record may simply be considered by the VA in determining the persuasiveness of the physician’s report. Likewise, the VA may not require that contemporaneous medical evidence always support lay evidence. Instead, the VA must consider the lay evidence, but may discount the evidence if it is inconsistent with the medical record or is otherwise unpersuasive.

2. Presumed service connection

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

Congress enacted § 1116 as part of the Agent Orange Act of 1991. Section 3 of that Act requires the VA to contract with the

219. Gardin, 613 F.3d at 1379.
220. Id. at 1378.
221. Id.
222. Id. at 1379.
223. Id. at 1380.
225. Id. § 1116(a) (listing non-Hodgkin’s lymphoma, certain forms of soft-tissue sarcoma, chloracne, Hodgkin’s disease, porphyria cutanea tarda, respiratory cancers, multiple myeloma, and type-2 diabetes as qualifying diseases).
226. Id. § 1116(b)–(c).
227. In re Paralyzed Veterans of Am., 392 F. App’x 858, 859, 861 (Fed. Cir. 2010).
National Academy of Sciences to study the relationship between exposure to herbicides used during the Vietnam War and certain diseases.\footnote{Id. \S 3, 105 Stat. at 13.} Under the statute, when the Academy sends a report on certain diseases to the VA, the VA must consider whether a presumption of service connection is warranted for the diseases in the report.\footnote{38 U.S.C. \S 1116(c).} The statute requires the VA to issue proposed regulations setting forth its determination and, within ninety days of issuing the proposed regulations, to issue final regulations.\footnote{Id. \S 1116(c)(2).} On March 25, 2010, the VA issued proposed regulations adopting a presumption of service connection for B-cell leukemia, Parkinson’s disease, and certain types of heart disease.\footnote{See In re Paralyzed Veterans, 392 F. App’x at 859.} The ninety-day deadline for issuing the final rule passed without any action by the VA.\footnote{Id.} Groups of veterans filed a petition for a writ of mandamus with the Federal Circuit, seeking an order compelling the VA to adopt a final rule.\footnote{Id.}

The Federal Circuit granted the writ. The court emphasized that the ninety-day deadline was not merely guidance, but a mandatory statutory requirement that the VA had no discretion to disregard.\footnote{In re Paralyzed Veterans, 392 F. App’x at 860.} Because the veterans’ right to VA action was clear, the court ordered the VA to issue a final regulation within thirty days of its August 2, 2010 order.\footnote{Id.} As discussed in Part IV.A below, the VA issued the final regulation on August 31, 2010.

3. Post-traumatic stress disorder

Another major regulatory development in veterans law this year was the VA’s amendment of the regulation defining the evidence required to establish service connection for a claim of post-traumatic stress disorder (PTSD).\footnote{Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843 (July 13, 2010) (to be codified at 38 C.F.R. pt. 3).} As discussed below, the amendment eliminated a requirement that the veteran provide corroborating

\begin{itemize}
  \item \textbf{229.} Id. \S 3, 105 Stat. at 13.
  \item \textbf{230.} 38 U.S.C. \S 1116(c).
  \item \textbf{231.} Id. \S 1116(c)(2).
  \item \textbf{232.} See In re Paralyzed Veterans, 392 F. App’x at 859.
  \item \textbf{233.} Id.
  \item \textbf{234.} Id. Mandamus is an extraordinary writ by which a court may, among other things, compel a government official to take an action that has been unlawfully withheld. In the field of patent law, the Federal Circuit has recently made waves by aggressively using mandamus to compel the U.S. District Court for the Eastern District of Texas to transfer infringement cases to more convenient fora. See Paul R. Gugliuzza, The New Federal Circuit Mandamus 1–5 (Feb. 18, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734419.
  \item \textbf{235.} In re Paralyzed Veterans, 392 F. App’x at 860.
  \item \textbf{236.} Id.
\end{itemize}
evidence of an in-service stressor if the claimed stressor is related to the fear of hostile military or terrorist activity and is consistent with the veteran’s military service. 238

In Arzio v. Shinseki,239 the Federal Circuit made clear that, to establish service connection for PTSD, a veteran must satisfy the three-part test set forth in 38 C.F.R. § 3.304(f), unless a more specific standard applies (such as the standard in the amended regulation). 240

Section 3.304(f) requires the veteran to provide medical evidence that the veteran has been diagnosed with PTSD, medical evidence supporting a link between the current PTSD symptoms and a stressor that occurred while in service, and credible evidence that the claimed stressor actually occurred. 241

Michael Arzio served in the Army and Navy from 1959 to 1962. 242 He did not participate in combat while in service. 243 In 1990, Arzio sought compensation from the VA for PTSD. 244 The VA noted that Arzio was indeed receiving treatment for PTSD, but found that Arzio had not provided evidence of the in-service stressors that he claimed occurred, as is required by § 3.304(f). 245 On appeal, Arzio argued that he could establish service connection for PTSD without proving an in-service stressor. 246 He claimed that a more general standard set forth in 38 C.F.R. § 3.303 provided an alternative means for establishing service connection for PTSD. 247

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

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238. See infra Part IV.A.
239. 602 F.3d 1343 (Fed. Cir. 2010).
240. Id. at 1347.
241. 38 C.F.R. § 3.304(f) (2010).
242. Arzio, 602 F.3d at 1344.
243. Id.
244. Id. at 1345.
245. Id.
246. Id.
247. Id. at 1345–46.
248. Id. at 1346.
249. Id. (quoting 38 C.F.R. § 3.303 (2010)).
disabilities, including PTSD. As the Federal Circuit noted, “when sections 3.303 and 3.304 are read together, it is evident that they do not provide alternative methods of establishing service connection, but instead work in tandem to delineate the circumstances under which a veteran can establish service connection for PTSD.”

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

4. Rare diseases

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

250. 38 C.F.R. § 3.304(a) (emphasis added).
251. Arzio, 602 F.3d at 1347.
252. Id.
253. 34 F.3d 1039 (Fed. Cir. 1994).
254. Arzio, 602 F.3d at 1348 (citing Combee, 34 F.3d at 1043–44).
257. 599 F.3d 1301 (Fed. Cir. 2010).
258. Id. at 1305, 1307.
259. See id. at 1308 (Newman, J., dissenting) (arguing that the correct legal standard for determining whether a rare disease was caused by military service “is not whether a preponderance of evidence establishes that causation was more likely than
During his military service, Robert Bastien worked on experiments that tested the effects of radiation on monkeys. Bastien placed the monkeys in a nuclear reactor where they were exposed to radiation and removed the monkeys after exposure. About twenty years after he left the service, Bastien died of pneumonia resulting from Waldenström’s macroglobulinemia, a rare blood cancer. Bastien also had been diagnosed with rare forms of lymphoma.

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

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

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260. Id. at 1303 (majority opinion).
261. Id.
262. Id.
263. Id.
264. Id.
265. Id.
266. Id.
267. Id. at 1303–04 (also describing the remainder of Mrs. Bastien’s evidence, which included her own calculations of the doses of radiation her husband received and a letter from a private nuclear engineering company).
268. Id. at 1304.
269. Id.
270. See id. at 1305 (observing that the Board is responsible for “review[ing] and assess[ing] the credibility and probative value of the evidence of record” and that the Board’s justifications for crediting the VA’s experts over the widow’s experts were “plausible and therefore not clearly erroneous”).
271. Id. at 1305–06.
272. Id.
Friedman noted, was an impermissible challenge to the evaluation and weighing of evidence.273

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

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

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

273. Id. at 1306. The Federal Circuit also rejected Mrs. Bastien’s argument that the Board erred by not requiring the VA to affirmatively establish the qualifications of its medical experts. Id.
274. See id. at 1307–08 (Newman, J., dissenting).
275. Id. at 1308.
276. Id. at 1307–08.
277. Id. at 1308.
278. Id.
279. Id. 280. Id.; see also 38 U.S.C. § 5107(b) (2006) (“When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a [claim for benefits], the [VA] shall give the benefit of the doubt to the claimant.”).
281. 38 C.F.R. § 3.102 (2010).
that service connection is “unlikely” over medical opinions stating that service connection is “plausible.”

5. **Dental conditions**

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

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

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

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

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283. 607 F.3d 802 (Fed. Cir. 2010).
284. Id. at 804 (internal quotation marks omitted).
285. Id.
286. Id.
287. Id.
288. Id. (internal quotation marks omitted) (citing General Counsel Precedent Opinion, Dental Care Eligibility—*Nielson v. Brown*, 7 Vet. App. 22 (1994), VAOPGCPREC 5-97 (Jan. 22, 1997)).
289. Id. at 805, 809.
290. Id. at 806 (quoting *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 2432 (unabr. ed. 1961)).
291. Id.
292. Id.
293. Id.
interpreted to refer to the same kind of injuries as those that preceded the phrase in the statute. In the court’s view, Congress’s use of the preceding phrase “combat wounds” suggested that “service trauma” should likewise cover only injuries incurred while performing military duties.

C. Effective Date

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

1. Claims filed within one year of discharge

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

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

294. See id. at 807 (citing the interpretive canon of ejusdem generis).
295. Id.
296. See supra notes 28–29 and accompanying text.
297. See 38 U.S.C. § 5110(a) (2006) (“Unless specifically provided otherwise in this chapter, the effective date of an award . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.”).
298. 38 C.F.R. § 3.400 (2010).
300. Id. § 5110(b)(1).
301. 603 F.3d 922 (Fed. Cir. 2010) (per curiam).
302. Id. at 926.
Judge Newman, ruled that the one-year period of § 5110(b)(1) is not subject to equitable tolling.\(^\text{303}\)

In 1992, Navy veteran Steven Butler filed a claim for a “foot condition,” specifically, a callus on his right foot.\(^\text{304}\) The VA granted service connection effective July 22, 1992, the date Butler filed his claim.\(^\text{305}\) Butler appealed to the Board, seeking to have the effective date changed under § 5110(b)(1) to the day after his discharge in November 1990.\(^\text{306}\) Butler claimed that he had attempted to file his claim within one year of his discharge, but had been told by VA personnel that he could not do so because his discharge was not honorable.\(^\text{307}\) Butler had thus waited to file his claim until he successfully challenged the nature of his discharge.\(^\text{308}\) In a 1998 ruling, the Board denied Butler’s request for an earlier effective date.\(^\text{309}\)

Three years later, on February 26, 2001, Butler filed a claim for service connection for hallux valgus\(^\text{310}\) of both feet. On December 23, 2003, a VA physician diagnosed Butler with hallux valgus of both feet and observed callus formation on Butler’s left foot.\(^\text{311}\) Accordingly, the VA awarded service connection for hallux valgus, effective February 26, 2001 (the date Butler filed his claim) and for calluses of the left foot, effective December 23, 2003 (the date of the VA examination).\(^\text{312}\)

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

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

\(^{304}\) Id. at 929 (majority opinion).

\(^{305}\) Id.

\(^{306}\) Id.

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

\(^{308}\) Butler, 603 F.3d at 923.

\(^{309}\) Id. at 924.


\(^{311}\) Butler, 603 F.3d at 924.

\(^{312}\) Id.

\(^{313}\) Id.
the VA, noting that Butler had not raised the issue of hallux valgus until he filed his claim on February 26, 2001, and that he had never specifically claimed the left-foot calluses.\footnote{Id.} As for Butler’s argument that he had been misled into not filing his claim within one year of discharge, the Board noted that the record did not reveal any communication from Butler showing an intent to file his 1992 claim earlier.\footnote{Id. at 924–25.}

The Veterans Court affirmed, noting that, even if VA personnel had misled Butler into delaying filing, the one-year deadline of § 5110(b)(1) could not be equitably tolled.\footnote{Id. at 925.} The court cited the Federal Circuit’s decision in Andrews v. Principi,\footnote{351 F.3d 1134 (Fed. Cir. 2003).} which held that the one-year period was not tolled by VA’s unlawful failure to notify a veteran, at the time of discharge, of the benefits to which he was entitled.\footnote{Id. at 1136.}

In a per curiam opinion, the Federal Circuit affirmed the Veterans Court’s decision in Butler.\footnote{Butler, 603 F.3d at 923.} The court first determined that Butler’s equitable tolling argument implicated the VA’s unreviewable fact-finding.\footnote{Id. at 926.} The court reasoned as follows: the only foot conditions at issue in the Federal Circuit appeal were the 2001 and 2003 claims for hallux valgus and left-foot calluses, respectively.\footnote{Id.} The VA had found, as a factual matter, that neither of these conditions were included in the July 22, 1992 claim for “foot condition.”\footnote{Id.} So, even if the July 22, 1992 claim “were treated as if it had been filed within one year of [Butler’s] discharge, . . . this would not change the effective dates for any of the foot conditions at issue [on] appeal.”\footnote{Id. at 926.} Thus, to grant Butler relief would require overturning the VA’s factual determination that the claims on appeal were not included in the 1992 claim, an action the Federal Circuit is powerless to take.\footnote{Id.}

The court also noted an alternative ground for its holding, stating that the ruling of the Veterans Court was supported by the Federal
Circuit’s holding in *Andrews* “that equitable tolling is not available under 38 U.S.C. § 5110(b)(1).”\(^{325}\)

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

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

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

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325.  *Butler*, 603 F.3d at 926 (citing Andrews v. Principi, 351 F.3d 1134 (Fed. Cir. 2003)).
326.  *Id.* at 926 (Newman, J., concurring).
327.  *Id.* at 927 (citing Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990)).
328.  *Id.*
329.  *Id.*
330.  *Id.*
331.  *See supra* Part II.B (discussing *Henderson*).
But, in Henderson, the Supreme Court explicitly rejected the argument that all statutory filing deadlines are jurisdictional, emphasizing that the deadline in Bowles was for an appeal from one court to another—a situation where filing deadlines had long been recognized as jurisdictional. Section 5110(b)(1), unlike the statute in Bowles, does not provide a court-to-court appeal deadline. And, as noted, it does not appear on its face to limit the VA’s authority. It thus seems to be a claims-processing rule that is subject to tolling, just as Judge Newman argued. In all events, this is a question that, as Judge Newman noted, warranted further analysis than the court’s opinion gave it.

2. Awards of increased compensation

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

Chester Gaston had been receiving benefits for PTSD and other disabilities for nearly a decade when, in March 1999, he filed a claim for total disability based on individual unemployability and an increased rating for PTSD. Social Security records showed that Gaston’s condition had worsened in 1994, but the VA granted Gaston increased ratings with an effective date of March 1999—the date on
which he filed the claim for an increase.\textsuperscript{341} Gaston appealed the effective date, but the Federal Circuit affirmed.\textsuperscript{342}

The court noted that § 5110(b)(2) is an exception to the general rule that increases in rating are made effective on the date the veteran files the claim.\textsuperscript{343} Specifically, that section states: “The effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date.”\textsuperscript{344} Gaston argued that “the Veterans Court misconstrued 38 U.S.C. § 5110(b)(2) by limiting it to cases in which ... an increase in ... disability occurred during the one year prior to the claim.”\textsuperscript{345} Under Gaston’s proffered interpretation, “if there is evidence that an increase occurred during or before the one year prior to the veteran’s claim, the effective date for increased compensation” could be as much as one year from the date the veteran filed the claim.\textsuperscript{346} Gaston pointed out that his Social Security records showed that his condition had worsened in 1994.\textsuperscript{347} Because his disability had increased before he filed his claim, Gaston claimed that he was entitled to an effective date of March 25, 1998—one year from the date he filed his claim.\textsuperscript{348}

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

\begin{thebibliography}{9}
\bibitem{341} Id. at 980–81.
\bibitem{342} Id. at 980.
\bibitem{343} Id. at 982 (citing 38 U.S.C. § 5110(a) (2006)).
\bibitem{344} 38 U.S.C. § 5110(b)(2).
\bibitem{345} \textit{Gaston}, 605 F.3d at 982.
\bibitem{346} Id.
\bibitem{347} Id. at 981.
\bibitem{348} Id. at 981–82.
\bibitem{349} Id. at 983 (quoting 38 U.S.C. § 5110(b) (2) (2006)).
\bibitem{350} \textit{Gaston}, 605 F.3d at 983 & n.2.
\bibitem{351} Id.
\end{thebibliography}
Accordingly, the court concluded: “[T]he only reasonable construction of 38 U.S.C. § 5110(b)(2) is that a veteran’s claim for increased disability compensation must be filed within one year of an increase in the disability, as shown by the evidence, in order to obtain an effective date earlier than the date of the claim.”

3. Reduction of benefits

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

William Wanless had been collecting disability compensation for various injuries suffered during his service in the Army. In 1993, an Oklahoma jury convicted him of first-degree murder, a felony. The court sentenced Wanless to life in prison without parole, and the VA reduced his monthly compensation under § 5313. In 1998, Wanless was transferred to a prison owned and operated by Corrections Corporation of America, a for-profit company that operates prisons under contract with the Oklahoma Department of Corrections. Wanless sought to have his benefits reinstated, arguing that he was no longer “incarcerated in a Federal, State, or local penal institution.” The Board and the Veterans Court rejected Wanless’s claim, and the Federal Circuit affirmed.

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

352. Id. at 984.
354. 618 F.3d 1333 (Fed. Cir. 2010).
355. Id. at 1334.
356. Id.
357. Id.
358. Id.
359. Id. at 1334–35.
360. Id. at 1335; 38 U.S.C. § 5313(a) (2000).
361. Wanless, 618 F.3d at 1334.
362. Id. at 1337.
to the legislative history of the statute, which, in the court’s view, clearly expressed a purpose to correct the problem of providing tax-free benefits to criminals who are maintained in prison at the expense of taxpayers. Third, the court relied on a 2006 “clarifying” amendment to the statute, which broadened the category of facilities covered by § 5313 to include “Federal, State, local, or other penal institution[s] or correctional facilit[ies].” Finally, the court deferred under *Skidmore v. Swift & Co.* to an opinion of the VA’s General Counsel, which had concluded that § 5313 should cover privately operated prisons.

### D. Procedural Matters

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

#### 1. Clear and unmistakable error

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

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363. *Id.* at 1337–38.
364. *Id.* at 1338 (emphasis altered); 38 U.S.C. § 5313(a) (2006).
365. 323 U.S. 134, 140 (1944) (holding that an informal agency judgment is entitled to judicial deference depending on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).
367. *See* 38 U.S.C. §§ 5109A(a), 7111(a) (VA decisions and Board decisions, respectively).
appeal, the veteran may not challenge as containing CUE, say, an
earlier RO ruling as to the veteran’s disability rating. Rather, the
appeal will be limited to the effective-date CUE claim. To have the
disability rating reviewed for CUE, the veteran must file a new CUE
claim with the RO. This rule is similar to the waiver rule of appellate
procedure in civil and criminal litigation: a party may not raise an
argument on appeal that the party did not raise in the court or
agency below. 368

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

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

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

368. GREGORY A. CASTANIAS & ROBERT H. KLONOFF, FEDERAL APPELLATE PRACTICE
369. 603 F.3d 981 (Fed. Cir. 2010).
370. Id. at 984–85.
371. Id. at 987.
372. See 38 U.S.C. §§ 1114, 1155; supra Part I.
373. Guillory, 603 F.3d at 983 (citing 38 U.S.C. § 1114(k)–(s)).
374. Id. (citing 38 U.S.C. § 1114(l)–(o)).
375. Id. (citing 38 U.S.C. § 1114(r)(1)).
376. Id. at 984.
377. Id.
378. Id.
379. Id.
In 1997, Guillory requested review of his file for CUE, claiming that he was entitled to aid and assistance from the time of his original rating in 1967. Among other things, Guillory alleged that the VA erred (1) by failing to compensate him for lost use of his hips, thighs, and buttocks and (2) by failing to recognize that he suffered from a seizure disorder prior to 1991. In a 2003 decision, the Board rejected these arguments. The Veterans Court remanded, however, noting that the Board did not discuss a medical record from 1975 that appeared to diagnose Guillory with a seizure disorder.

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

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

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

380. Id.
381. Id.
382. Id. at 985.
383. Id.
384. Id.
385. Id. at 986.
386. Id.
387. Id.
388. Id.
389. Id.
390. Id. at 987.
391. Id. at 986–87 (citing Andre v. Principi, 301 F.3d 1354, 1357–58 (Fed. Cir. 2002)).
392. Id. at 987.
first time on appeal a new claim of CUE, separate and distinct from the claims that the Board addressed below. 393

2. Implicit denial rule

A claim for benefits remains pending until it is finally adjudicated by the VA. 394 If the VA leaves a claim pending, the claim may be addressed when the agency adjudicates a subsequent claim. 395 Because the earlier claim remained pending, the effective date for any resulting award of benefits will be the effective date applicable to the earlier claim. 396 Under the “implicit denial rule,” however, a subsequent denial of a claim that is identical to a prior, unresolved claim terminates the pending status of the prior, unresolved claim. 397

In two cases in 2010, the Federal Circuit clarified the application of the implicit denial rule, holding that the adjudication of a formal claim for benefits implicitly resolves a pending informal claim for benefits 398 and that even if a claim remains unresolved by the Board on appeal (rather than before the RO), a subsequent appellate decision by the Board can implicitly resolve that claim. 399

a. Informal claims

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

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

393. Id.
395. Id.
396. Id.
397. Munro v. Shinseki, 616 F.3d 1293, 1297 (Fed. Cir. 2010).
398. Id. at 1297.
402. Id. § 3.155(a).
403. Id. § 3.157(b).
404. 616 F.3d 1293 (Fed. Cir. 2010).
405. Id. at 1295.
awarded him benefits for the granuloma, Munro underwent pulmonary tests at a VA medical center in 1995 and 1997.\textsuperscript{406} These tests showed that Munro suffered from severe obstructive airways disease, severe obstructive pulmonary disease, and was permanently disabled.\textsuperscript{407} In September 1997, Munro formally sought an increased disability rating, but the VA denied it because the diagnoses were unrelated to Munro’s service-connected granuloma.\textsuperscript{408} In 2003, Munro filed another formal claim for total disability based on individual unemployability (TDIU), which the VA granted effective March 31, 2003, the date of his formal claim.\textsuperscript{409}

On appeal, Munro sought an earlier effective date, arguing that the informal claims initiated by his 1995 and 1997 VA medical examinations were still pending when the VA granted him TDIU in 2003.\textsuperscript{410} Munro argued that the effective date of the TDIU claim should be 1995, or 1997 at the latest.\textsuperscript{411}

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

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

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

406. Id.
407. Id.
408. Id.
409. Id.
410. Id. at 1295–96.
411. Id.
412. Id. at 1299.
413. Id. (alteration in original).
414. Id.
415. Id.
416. See id. at 1300.
decisions.\textsuperscript{417} Moreover, the consequence of the VA’s failure to discuss any one informal claim would be an unwarranted windfall. The veteran would be granted an effective date that is the date of the unaddressed informal claim, even though the VA will have likely denied a subsequent formal claim that relates to that same disability. Munro, for example, had only one service-connected disability, the left-lung granuloma.\textsuperscript{418} His 1995 and 1997 informal claims related to that disability.\textsuperscript{419} In 1997, the VA explicitly rejected a formal claim for an increased rating of that disability.\textsuperscript{420} Although the VA increased Munro’s disability rating in 2003, it would be an unwarranted windfall to the veteran to make that increase retroactive to the date of the informal claims in 1997 (or 1995), just because the 1997 VA decision—which related to the same disability as the informal claims—did not discuss Munro’s 1995 and 1997 visits to the VA medical center.

\begin{itemize}
\item[b.] \textit{Unresolved appeals}
\end{itemize}

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

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

\textsuperscript{417.} See \textit{id.}
\textsuperscript{418.} \textit{Id. at} 1299.
\textsuperscript{419.} \textit{Id.}
\textsuperscript{420.} \textit{Id.}
\textsuperscript{421.} 619 F.3d 1368 (Fed. Cir. 2010).
\textsuperscript{422.} \textit{Id. at} 1373.
\textsuperscript{423.} \textit{Id. at} 1369.
\textsuperscript{424.} \textit{Id.}
\textsuperscript{425.} \textit{Id.; see} 38 U.S.C. § 7105(a), (d)(1) (2006).
\textsuperscript{426.} \textit{Munro}, 619 F.3d at 1371.
\textsuperscript{427.} \textit{Id. at} 1370.
condition, including PTSD. In 1991, however, the VA granted Jones service connection for PTSD with an effective date of May 1989, the date Jones had filed another request to reopen. Jones appealed the effective date, claiming that the denial of his 1973 claim was not final because the RO never provided a statement of the case. The Board rejected Jones’s appeal, stating that the Board’s 1986 decision denying service connection for PTSD implicitly resolved the 1973 claim. Both the Veterans Court and the Federal Circuit affirmed. The Federal Circuit agreed with Jones that, because the 1973 claim remained pending on appeal, it could not be resolved by a subsequent RO decision. It could only be resolved by a subsequent Board decision. The 1986 Board decision rejected a PTSD claim that was, in the view of the Veterans Court, identical to the 1973 claim for “nerves.” The Federal Circuit held that this factual determination was outside the scope of its review.

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

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

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

**E. Claims Arising from VA Medical Treatment**

In addition to providing benefits for injuries related to military service, the veterans statute provides benefits for injuries arising from VA medical treatment. Specifically, 38 U.S.C. § 1151(a)(1)(A) entitles a veteran (or the veteran’s dependents) to benefits if the cause of the veteran’s disability or death was “carelessness,
negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the [VA] in furnishing” medical treatment.\footnote{38 U.S.C. § 1151(a)(1)(A) (2006).} Congress enacted § 1151(a)(1)(A) in response to the Supreme Court’s decision in \textit{Brown v. Gardner},\footnote{513 U.S. 115 (1994).} which held that the prior version of the statute did not require a claimant to show fault by the VA.\footnote{Id. at 119; see supra Part II.A (discussing the Supreme Court’s decision in \textit{Gardner}).}

The claim in \textit{Gardner} arose out of errors that occurred during surgery for a herniated disc at a VA hospital.\footnote{\textit{Gardner}, 513 U.S. at 116.} In \textit{Roberson v. Shinseki},\footnote{607 F.3d 809 (Fed. Cir. 2010), cert. denied, 79 U.S.L.W. 3141 (U.S. 2011).} the widow of a veteran sought benefits under the same, prior version of § 1151, claiming that the VA’s failure to diagnose her husband’s cancer entitled her to benefits.\footnote{Id. at 811.} Before the VA, Mrs. Roberson and the VA presented conflicting evidence about whether the VA physicians should have discovered Mr. Roberson’s cancer during his final visit to a VA facility.\footnote{See id. at 812 (comparing Mrs. Roberson’s evidence, a 1998 letter written by Mr. Roberson’s doctor, to the government’s evidence, statements by VA physicians asserting that “[i]t is impossible to say if [Mr. Roberson] could have been cured if the disease had been detected earlier”).} (Physicians discovered the cancer during Mr. Roberson’s subsequent treatment at a private facility.) The Board rejected Mrs. Roberson’s evidence and the Veterans Court affirmed, noting that Mrs. Roberson had not shown that the VA “should have diagnosed” her husband’s cancer prior to the actual diagnosis in the private facility.\footnote{Id. at 813.}

On appeal, Mrs. Roberson argued that the Veterans Court’s conclusion conflicted with \textit{Gardner} because it introduced an element of fault into the analysis: whether the physicians should have diagnosed her husband’s cancer.\footnote{Id. at 814.} The Federal Circuit rejected this argument and affirmed the Veterans Court.\footnote{Id. at 817.} The Federal Circuit pointed to a key distinction between \textit{Gardner} and the case at hand: \textit{Gardner} involved an act of commission, botched surgery, while \textit{Roberson} involved an act of omission, the failure to diagnose the veteran’s cancer.\footnote{Id. at 815.} In a case involving an act of commission, like \textit{Gardner}, it is possible for a claimant to meet the burden as to causation (by
showing that VA treatment caused an injury, but not negligence (by not showing that the VA physician failed to act with ordinary care). 450

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

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

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

450. Id.
451. Id.
452. See id.
453. Id. at 815–16.
455. Roberson, 607 F.3d at 815–16.
456. Id.
Like many of the cases discussed in this part, Roberson is emblematic of the difficult balance the Federal Circuit tries to strike in nearly every veterans case—reconciling the rights of injured or disabled veterans (or their survivors) with the reality of an overworked, underfunded, bureaucratic agency. While, as discussed in the next Part, veterans law is occasionally altered by congressional legislation or regulations issued by the VA, the bulk of veterans law is made in the case-by-case adjudication of individual benefits claims. The Federal Circuit has, and will continue to have, an important role in ensuring that the benefits system strikes a fair balance between deserving veterans and the preservation of scarce VA resources.

IV. VETERANS LAW IN THE EXECUTIVE AND LEGISLATIVE BRANCHES

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

A. Executive Branch

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

458. See supra Part III.B.2.
460. Id. at 55,216; see also 38 C.F.R. § 3.307(a)(6) (2010) (setting forth presumption of service connection for certain diseases for certain Vietnam veterans).
462. Id.
previously filed claims based on Agent Orange exposure could be eligible for retroactive payments based on those claims. In the first six weeks after the amended regulation became effective, the VA reviewed more than 28,000 claims related to Agent Orange exposure.

Second, the VA established new presumptions of service connection for nine infectious diseases associated with service in Southwest Asia (including Iraq and Afghanistan). Under the amended regulation, the VA will presume diseases such as malaria, the West Nile virus, and tuberculosis, among others, to be service connected for veterans who served in the Persian Gulf at any time after August 2, 1990 and in Afghanistan at any time after September 19, 2001.

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

B. Legislative Branch

Congress also made important changes to the law of veterans benefits this year. First, the high-profile economic stimulus bill, the American Recovery and Reinvestment Act, gave well over $1 billion to
the VA. The VA allocated much of this funding to improving energy efficiency in VA facilities and also embarked on many projects to improve VA medical facilities and cemeteries.

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

In addition, Congress passed the Veterans’ Benefits Act of 2010. Among other things, the law extends and enhances the life insurance available to veterans, increases the VA-provided burial and funeral expenses for certain veterans, and increases the benefits for veterans with lost limbs, veterans with traumatic brain injuries, and the surviving spouses of veterans with dependent children under age eighteen.

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

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477. Id. at 2–3.
480. See id. §§ 402, 407, 124 Stat. at 2879–81 (including an extension of the duration of group life insurance for totally disabled veterans and an opportunity for certain veterans to increase the amount of life insurance).
481. Id. § 501, 124 Stat. at 2881.
482. Id. §§ 601–02, 124 Stat. at 2885–88.
CONCLUSION

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

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

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

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


ADDENDUM

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

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

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<tr>
<th>Result</th>
<th>Number of Cases</th>
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<tr>
<td>Affirmed</td>
<td>11</td>
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<tr>
<td>Dismissed in part, reversed in part, and remanded</td>
<td>1</td>
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<tr>
<td>Vacated and remanded</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>14</strong></td>
</tr>
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</table>

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


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

490. See *supra* note 129 (noting that most of the Federal Circuit’s 2010 non-precedential veterans decisions dismissed cases for lack of jurisdiction).
Whether the Federal Circuit consistently affirms the Veterans Court at a rate higher than the regional circuits affirm the district courts and uphold the actions of administrative agencies could be an interesting question for future research.

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

<table>
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<tr>
<th>Judge</th>
<th>Number Authored</th>
<th>Number on Panel</th>
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<th>Number Authored Generating Separate Opinions</th>
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</tr>
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Table 2 provides a snapshot of which judges wrote and participated in the Federal Circuit’s precedential veterans decisions in 2010. The first column (“number authored”) indicates the number of precedential majority opinions in veterans cases drafted by each judge. The second column (“number on panel”) indicates for how many precedential veterans decisions each judge was on the panel. The number in the second column includes decisions for which each judge was the opinion author. Judge Plager, for example, was on the panel for one precedential veterans decision in 2010, and he wrote the opinion.

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

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

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

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

493. Fed. Cir. Internal Operating Procedure 3(1) (Nov. 14, 2008); see also Fed. Cir. R. 47.2(b) (providing that each judge should hear cases from a cross-section of the court’s subject-matter jurisdiction).

494. Castanias et al., supra note 4, at 977. See generally Fed. Cir. Internal Operating Procedure 10(6) (outlining the procedure for a judge to request that the panel issue a precedential opinion).
draft a separate opinion in a patent case. Likewise, in the court’s 2010 veterans decisions, Judge Newman was the only judge to issue a separate opinion.496

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


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

499. Wagner and Petherbridge, for example, identified two judicial approaches to patent claim construction: (1) the proceduralist approach, which uses a hierarchy of sources to determine meaning, with the plain language of the claim being paramount, and (2) the holistic approach, which looks to varied interpretive clues to determine the claim’s meaning in the particular circumstances presented. Wagner & Petherbridge, supra note 497, at 1133–34. It would be interesting to see if, in veterans cases, judges who employ a proceduralist claim construction method prefer clear rules, such as the presumption of harmless error rejected by the Supreme Court in Sanders, and if judges who employ a holistic approach to claim construction emphasize a standards-based approach to benefits claims, emphasizing that the VA should take into account all the information before it, an approach used in this year’s decisions on the duty to assist and service connection. See supra Part III.A–B (examining the Federal Circuit’s 2010 duty-to-assist and service-connection decisions).
Figure 1: Precedential Opinions Reviewing the Court of Appeals for Veterans Claims, 2000 to 2010

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

Figure 2: Precedential Veterans Opinions Compared to Total Number of Decisions Reviewing the Court of Appeals for Veterans Claims, 2006 to 2010
To put the decline of precedential opinions in context, Figure 2 compares, for the last five years, the number of precedential veterans opinions to the total number of veterans cases decided by Federal Circuit merits panels. Figure 2 shows that, not only did the number of precedential veterans opinions decline in 2010, the total number of veterans cases decided on the merits declined as well. Given that, over the past ten years, the number of claims received by the VA annually has increased 75% (from 579,000 in 2000 to 1,014,000 in 2009), one would not expect the number of Federal Circuit veterans opinions to trend downward. If a downward trend continues, this, too, might be an interesting area for future investigation, especially if it contrasts with an increased number of Supreme Court veterans cases.

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