Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012

James Ridgway, George Washington University

Available at: https://works.bepress.com/james_ridgway/10/
FRESH EYES ON PERSISTENT ISSUES:
VETERANS LAW AT THE FEDERAL CIRCUIT
IN 2012

JAMES D. RIDGWAY

TABLE OF CONTENTS

Introduction .......................................................................................1038
I. Attorney Restrictions and Judicial Review in Veterans Benefits ..............................................................1039
   A. Procedural Whack-a-Mole ................................................1040
   B. How the Game Developed ...............................................1045
      1. The VJRA .....................................................................1045
      2. Financial incentives.....................................................1048
   C. Changing the Game .........................................................1050
      1. The complexity spectrum ...........................................1050
      2. Understanding complexity in the veterans benefits system ..................................................................1052
      3. Better tailoring of attorney incentives .......................1054
II. The 2012 Veterans Law Decisions of the Federal Circuit .....1055
   A. Judicial Review ..................................................................1056
      1. The CAVC’s authority to make initial findings of fact ..............................................................1056
      2. The Federal Circuit’s authority to review non-final CAVC decisions ...........................................1060
      3. Interpretation of CAVC decisions ..............................1065
      4. The right to effective assistance of counsel before the CAVC .....................................................1070
      5. Substitution ....................................................................1072
   B. Service Connection ..........................................................1073
      1. Personality disorders.....................................................1073
      2. Section 1154(b) ................................................................1076
      3. Remarried widows .......................................................1080
   C. Effective Date ....................................................................1083
   D. Amount of Compensation ...............................................1086
      1. Additional benefits for elderly wartime veterans .....1086

* Professorial Lecturer in Law, George Washington University Law School.
INTRODUCTION

New beginnings can be as much about the past as they are about the future. Last year’s article on veterans law in the Federal Circuit noted the extraordinary amount of change occurring in the composition of the court. Instead of speculating about the future, it focused on analyzing the past. A year later, it appears that the future does indeed begin with the past. With a substantially different line-up of judges, practitioners have entered the latest era of the Federal Circuit by revisiting the fundamental role of the courts in veterans law. In 2012, the Federal Circuit addressed numerous cases involving the limits on its authority and that of the Court of Appeals for Veterans Claims (CAVC). Veterans’ representatives have encouraged the Federal Circuit to take a more active role in reviewing individual decisions of the CAVC. They have also argued that the Federal Circuit should prod the CAVC toward reversing the Board of Veterans’ Appeals (BVA) more frequently. In 2012, there was a broad effort by veterans’ representatives to revisit the limits of judicial review. This Article will preface its review of the Federal Circuit’s decisions by considering how efforts to limit attorney representation in the Veterans Judicial Review Act (VJRA) have


2. Id. at 1176 (describing the purpose of the article as providing deep reflection on the “status quo” rather than focus on making predictions about the future).

3. See infra Part II. It should be noted that veterans’ representatives also did much the same thing when the second generation of CAVC judges replaced the first. See Bonhomme v. Nicholson, 21 Vet. App. 40, 44–43 (2007) (per curiam) (rejecting a veteran’s argument that the court should allow new evidence to be submitted on appeal by emphasizing its inconsistency with the role of the court).

4. As noted both last year and in this year’s appendix, appeals to the Federal Circuit are overwhelmingly brought by claimants rather than the government. Ridgway, Changing Voices, infra note 1, at 1231; infra notes 435–36 and accompanying text. Therefore, it is the veterans’ bar that usually defines the issues presented to the Federal Circuit for consideration.

resulted in the current procedure-heavy focus of judicial review. It will also discuss how these limits might be adjusted to address the system’s current problems of complexity and delay.

Part I of this Article will look at the central dynamic that currently drives judicial review of veterans’ benefits and examine how review might be readjusted to better serve veterans. In essence, because attorneys normally become involved only after the agency proceedings are completed and the record is closed, veterans law in the courts overwhelmingly revolves around asserting a procedural error to justify a remand to the Department of Veterans Affairs (VA). The record on appeal is rarely sufficient for reversal, and remand to VA is the only way to submit new evidence. This concentration on procedure over factual development of cases has led to more complex cases, a phenomenon that has contributed to skyrocketing delays in adjudicating claims. Part II of this Article looks at the Federal Circuit’s veterans law decisions in 2012. It pays particular attention to the numerous cases in which veterans law practitioners have pushed against the current limits on judicial review. This Article concludes by offering some thoughts on reform of judicial review in veterans law and on the role of attorneys in shaping issues for consideration by the court. Finally, this Article includes an Addendum, which continues the annual statistical look at veterans law at the Federal Circuit.

I. ATTORNEY RESTRICTIONS AND JUDICIAL REVIEW IN VETERANS BENEFITS

A new beginning is a perfect time to challenge the status quo. There are three relatively new judges on the Federal Circuit, two of whom came to the court in 2011. New judges offer at least the potential of unexpected outcomes in areas that previously may have seemed settled. Therefore, it should not be too surprising that the

---

6. See Veterans for Common Sense v. Shinseki, 644 F.3d 845, 858–60 (9th Cir. 2011) (detailing the severe delays for veterans at the initial filing stage and, even more egregiously, on appeal), rev’d en banc on other grounds, 678 F.3d 1013 (9th Cir. 2012); James D. Ridgway, The Veterans’ Judicial Review Act Twenty Years Later: Assessing the New Complexities of the Veterans Benefits System, 66 N.Y.U. ANN. SURV. AM. L. 251, 268–69 (2010) [hereinafter Ridgway, VJRA Twenty Years Later] (observing that delays have been an ongoing problem since the mid-nineties).


8. Of course, there is much academic debate about how much judges do and should apply stare decisis. See, e.g., Daniel A. Farber, The Rule of Law and the Law of Precedents, 90 MINN. L. REV. 1173, 1173–75 (2006) (discussing the belief of some within the legal community—most notably Justice Scalia—that precedent sometimes
Federal Circuit would see a host of cases challenging the core dynamic of veterans law in 2012.

A. Procedural Whack-a-Mole

The central dynamic of veterans law that developed during the first two decades of judicial review is best described as procedural “whack-a-mole.” As described in detail below, because attorneys historically have not become involved in claims until after the record is closed, veterans’ representatives are limited in their ability to substantively intervene in cases. Accordingly, veterans’ advocates use the courts to create new procedural requirements, which they then use to generate large quantities of remands from the courts to VA, with the hope that on remand, additional evidence can change the outcome. In the meantime, representatives advance more new procedural arguments in preparation for the day when remands based upon the prior issues dry up. Thus, the cycle repeats itself. To understand judicial review of veterans’ claims, it is necessary to understand how the system drives this cycle of ever-growing procedure and repetitive procedural remands.

Long before the judicial review stage, at the beginning of the process, veterans file their claims with VA and proceed through the agency system either pro se or with the assistance of a non-attorney representative from one of the major veterans service organizations (VSOs).


have at least one benefit granted. However, some indeterminate number of claims are denied or granted with a lesser benefit than hoped. Approximately 8% of veterans whose claims are denied appeal within the agency to the BVA. Many succeed on appeal, but approximately 5–10% of BVA decisions are appealed to the CAVC.

It is at the CAVC that the whack-a-mole game begins. In the majority of appeals to the CAVC, counsel become involved for the first time. The crucial aspect to understanding the dynamic of the whack-a-mole game is that the record is already closed at the point when an attorney becomes involved. Therefore, if the record were insufficient to support reversal, then the only option available to the veteran and his or her counsel is to argue that some procedural error requires a remand to the agency, at which point the veteran will have the opportunity to submit additional evidence.

In fact, the available evidence indicates that the record on appeal will very rarely be sufficient to support a credible argument for reversal. This is not surprising. In most cases, reversal requires overcoming the deferential “clear and convincing” standard of review

11. See Ridgway, VJRA Twenty Years Later, supra note 6, at 267 (noting that applicants now have a significantly higher probability of receiving partial benefits upon application since the CAVC was established).
12. VA does not report statistics in a way that makes it possible to accurately determine how many claims are granted or denied. Ridgway, Why So Many Remands?, supra note 10, at 145–48.
13. See id. at 148 (observing that in fiscal year 2006, approximately one in every twelve claims filed was appealed).
14. Id. at 151.
15. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS (2000–2009) [hereinafter CAVC ANNUAL REPORTS 2000–2009], available at http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf (reporting that the percentage of new cases that were pro se at filing varied from 53–70%). This statistic understates the rate at which attorneys first become involved at the CAVC level because it does not capture those appeals in which an attorney was retained for the first time between the issuance of the BVA decision and the filing of the notice of appeal with the CAVC.
16. See 38 U.S.C. § 7261 (2006) (establishing the scope of review of the CAVC and prohibiting it from making factual findings or looking beyond the record that was before the agency); Bonhomme v. Nicholson, 21 Vet. App. 40, 43–44 (2007) (per curiam) (holding it is not the role of the CAVC to act as “a mere procedural reset button where any appellant could obtain unlimited remands simply by submitting some new document to VA”).
17. See Kutscherousky v. West, 12 Vet. App. 369, 371–72 (1999) (per curiam) (detailing the process for introducing new evidence on remand to the agency). However, just because an attorney obtains a remand does not mean that the attorney will necessarily remain on the case and help develop the necessary evidence on remand. In many cases, there may be little or no financial incentives to continue representation. See infra notes 66–70 and accompanying text (comparing the large amount of work for attorneys often required at the remand stage to the limited amount of fees that an attorney could potentially receive for that work).
18. In one sample of 614 decisions, the CAVC reversed the BVA only 6% of the time. Ridgway, Why So Many Remands?, supra note 10, at 155.
afforded to fact finders by the appellate courts.\textsuperscript{19} Overcoming the standard may be particularly difficult in the veterans benefits context because the claim is likely to have been reviewed numerous times within the agency prior to the final denial. In a run-of-the-mill benefits claim, the evidence has been evaluated at the least by the regional office adjudicator who initially denied the claim,\textsuperscript{20} the staff member who prepared the statement of the case in response to the claimant’s notice of disagreement,\textsuperscript{21} the staff counsel at the BVA who prepared the first draft of the appellate decision,\textsuperscript{22} and the veterans law judge who reviewed and signed the BVA decision.\textsuperscript{23} Frequently, a claim will have received even more reviews at the agency level because the claimant submitted new evidence after the initial decision, because the claimant requested a second look at the regional office level by a decision review officer, or because the BVA remanded the claim one or more times for additional development or readjudication.\textsuperscript{24} A reviewing court is more likely to conclude that a mistake was made as to the evaluation of the evidence when it has been reviewed and found insufficient by only one fact-finder (as with a jury or a judge in a bench trial), than when a claim has been reviewed and found insufficient by at least three or four independent fact finders (as with VA).

Because legal issues are reviewed de novo, a veteran has the best chance for a reversal if he argues that the BVA misinterpreted the legal criteria that apply to the benefit that was denied.\textsuperscript{25} However, most appeals involve well-established benefits with undisputed legal criteria.\textsuperscript{26} Even if the appellant has a legal argument and the courts

\textsuperscript{19} See Booton v. Brown, 8 Vet. App. 368, 372 (1995) (“To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish . . . . To be clearly erroneous, then, the [decision being appealed] must be dead wrong . . . .” (quoting Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988))).


\textsuperscript{21} Id. at 158.

\textsuperscript{22} Id. at 160.

\textsuperscript{23} Id.

\textsuperscript{24} See id. at 163–64 (listing options for a claimant if she is dissatisfied with the final BVA decision).

\textsuperscript{25} See, e.g., Sursely v. Peake, 551 F.3d 1351, 1354 (Fed. Cir. 2009) (reviewing a legal question of statutory interpretation raised by a veteran according to a de novo standard).

\textsuperscript{26} Only a sliver of the total number of claims involves legal issues. For example, in fiscal year 2011, the CAVC found that only forty-two appeals presented novel legal issues requiring a panel disposition, while handling 2242 appeals in non-precedential, single-judge decisions. See U.S. Court of Appeals for Veterans
agree with the appellant, the case may still need to be remanded if the BVA never made a factual finding necessary to apply the clarified criteria.27

What is vastly more likely than a plausible argument for reversal is that the attorney will have neither a purely legal issue nor a credible argument that every agency adjudicator who looked at the case clearly erred in weighing the evidence. Instead of receiving a reversal, the attorney will be forced to argue that a procedural error occurred that requires a remand to the agency, where the veteran can submit new evidence.28 Such arguments are fruitful because VA’s adjudication process is supposed to be non-adversarial. VA approaches adjudication with the goal of “fully and sympathetically develop[ing] the veteran’s claim to its optimum before deciding it on the merits.”29 Thus, the volume of procedures to assist veterans and the philosophy behind their interpretation provides ample fodder for arguments for remand that VA did not comply fully with all of the procedures necessary to ensure that the claim at issue was developed to its full potential.30

On the other side of a court case, VA has no power to appeal BVA decisions favorable to the claimant.31 Therefore, the appellate process is not only focused very heavily on procedure, but those procedural arguments that are made at the appellate level almost exclusively contend that VA’s process was insufficient. Thus, the vast majority of the cases before the courts present arguments contending that VA needs to fix some procedural problem.

The long-term effect is to create a game of procedural whack-a-mole. In some fraction of the precedential opinions each year, the

---

28. See supra notes 16–17 and accompanying text.
30. VETERANS BENEFITS MANUAL 918–23 (Barton F. Stichman et al. eds., 2012) (detailing the processes that have developed since the advent of judicial review and elaborating on VA’s procedural duties).
31. 38 U.S.C. § 7266(a) (2006) (providing that BVA decisions may be appealed only by “a person adversely affected”).
courts side with the claimant and find a procedural violation that affects some portion of the claims currently being handled by the agency. Until that problem is fixed, attorneys obtain remands in all the similarly situated cases that are appealed. However, by the time VA has addressed any particular procedural issue (which can take years of follow-on litigation), attorneys have generated new procedural arguments to support the remands necessary to return cases to the agency, where the record is open. From VA’s point of view, even before one procedural mole is whacked down, another pops up. This outcome is practically inevitable because veterans’ representatives have little choice but to keep the cycle going. So long as they predominantly begin representing veterans only after the record is closed, and so long as the cases available to them are unlikely to present any other options as to what errors may be credibly argued, the whack-a-mole game offers the best prospect for winning their clients’ cases.

Incentivizing attorneys to raise particular types of arguments can be either good or bad depending upon the global effect those arguments tend to have on the system at issue. In the case of the veterans benefits system, decades of procedural rulings have increased the complexity of adjudication. It has thus become increasingly difficult for non-attorney claimants and adjudicators to understand the system, and it now takes dramatically longer for VA to issue initial decisions and process appeals. Rarely will procedural rulings be abrogated. Rather, the layers accumulate with predictable, negative consequences for timeliness and flexibility. This buildup of complex procedures has created a paradox inherent in the modern veterans law system: the proliferation of procedures intended to make the system more “veteran friendly” has, in fact,
made the system forbidding to claimants\textsuperscript{35} and caused increasingly painful delays.\textsuperscript{36} This raises the twin questions of whether the current state of affairs was inevitable and what can be done to break the whack-a-mole cycle.

\textbf{B. How the Game Developed}

The judicial review system for veterans claims set up by the VJRA was a compromise with many unusual, if not unique, features. Some of these features were incorporated to placate the major VSOs, which generally opposed judicial review and which were particularly suspicious of attorney involvement in the process.\textsuperscript{37} At first, attorneys were slow to become involved in veterans claims.\textsuperscript{38} Now, however, they represent claimants in the majority of cases at the court level.\textsuperscript{39} In doing so, they have pushed against the limits on judicial review set forth in the VJRA. This section reviews the development of the role of attorneys in judicial review.

\textit{1. The VJRA}

The VJRA ended nearly two centuries during which veterans claims were not subject to judicial review.\textsuperscript{40} Judicial review had been a feature of the original system for adjudicating the claims of Revolutionary War veterans.\textsuperscript{41} However, more than a decade prior to \textit{Marbury v. Madison},\textsuperscript{42} the courts declared the system unconstitutional, beginning what the Supreme Court would later refer to as the “splendid isolation” of veterans benefits claims from judicial review.\textsuperscript{43}

\textsuperscript{35} See Reynolds Holding, \textit{Insult to Injury}, LEGAL AFF., Mar.–Apr. 2005, at 26, 28 (quoting one veteran as saying, “I would start reading these letters with five pages of legal garbage and just give up”).

\textsuperscript{36} See supra note 6 and accompanying text (describing the chronic delays that have plagued the system for almost twenty years).

\textsuperscript{37} See \textit{Paul C. Light, Forging Legislation} 113–14 (1992) (suggesting that American Legion chapters across the country were vocally opposed to judicial review); Laurence R. Helfer, \textit{The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals}, 25 \textit{Conn. L. Rev.} 155, 160–61 (1992) (discussing the “pervasive” power of veterans groups in shaping the veterans benefits system from at least 1940 through the passage of VJRA in 1988).

\textsuperscript{38} See Ridgway, \textit{VJRA Twenty Years Later}, supra note 6, at 261.

\textsuperscript{39} CAVC \textit{Annual Report FY 2011}, supra note 26, at 1 (noting that only 24% of appeals were pro se at disposition).


\textsuperscript{41} See id. at 144 (explaining that post-Revolutionary War federal courts rejected the role of adjudicating veterans’ pension claims).

\textsuperscript{42} 5 U.S. (1 Cranch) 137 (1803).

Although Congress revisited the issue and the rationale for the lack of judicial review changed over time, such review was never an essential feature of the system. Rather, the unavailability of judicial review was an historical accident that persisted due to convenience and inertia.

Veterans of the Vietnam War, who strongly believed that judicial involvement would help them in advancing their claims for benefits for post-traumatic stress disorder and conditions related to exposure to Agent Orange, finally overcame that inertia. At the same time, however, several major VSOs, such as the American Legion, the Veterans of Foreign Wars, and Disabled American Veterans, opposed judicial review.

These groups exercised considerable influence over the operations of VA and doubted that judicial review would be beneficial for the system. Although the established VSOs were unable to completely fend off the advent of judicial review, they were able to shape it in a way that they hoped would limit its impact.

One of the principal concerns of the VSOs was how judicial review would impact their role in the adjudication process. During the Civil War era, Congress passed limitations on fees that could be charged for assisting a veteran with a claim. By World War I, the combination of the fee limits and inflation had made attorney involvement in veterans’ claims unprofitable and created a void that was filled by free representation from the VSOs. In fact, providing free representation to veterans became the central recruiting tool for

---

44. See Ridgway, Splendid Isolation Revisited, supra note 40, at 146 n.62 (noting that, when Congress attempted to involve the federal courts in veterans’ benefits through the Invalid Pension Act, the Supreme Court sent a memorial to Congress stating that such a role would be “too burdensome” for the Court).
45. Helfer, supra note 37, at 161–62.
46. Id. at 156; see also Light, supra note 37, at 112–13 (describing the walls of Congress as “clogged with vets in full legislative gear” who opposed judicial review at the urging of the major VSOs).
47. Helfer, supra note 37, at 161.
48. Id. at 168–71.
49. Ridgway, Splendid Isolation Revisited, supra note 40, at 160.
50. Id. at 161; see also Helfer, supra note 37, at 159 (noting how the majority of claimants litigated their claims before VA without legal representation, but rather with the free assistance of non-attorney VSO representatives); Ridgway, Splendid Isolation Revisited, supra note 40, at 172–73 (detailing the rise of the first VSOs); id. at 215 (discussing the Supreme Court’s holding in Walters v. National Association of Radiation Survivors, 473 U.S. 305, 333–34 (1985), that the limitation on attorneys’ fees was not a violation of veterans’ due process rights because veteran-claimants could obtain a suitable “substitute” from VSOs).
VSOs. Therefore, the VSOs fought hard to maintain strict limits on attorney involvement in the VJRA.

The net result was a bill that, although providing for judicial review, also contained many provisions carefully designed to limit attorney involvement in the adjudication process. The VJRA allowed attorneys to accept payment for working on veterans claims only after a claim was appealed to the CAVC. Therefore, under the VJRA, VSOs maintained their virtual monopoly over representation of the vast bulk of claims adjudicated by VA. The VJRA further circumscribed attorney involvement by giving VA the power to review fee agreements for reasonableness in those cases in which an attorney did continue representation after remand from the CAVC. In addition, the VJRA contained no provisions providing that the government would pay attorneys’ fees if a veteran were to prevail in the courts. Congress did not amend the Equal Access to Justice Act (EAJA) to make attorneys’ fees available to such claimants until 1992.

The VJRA’S limits on attorney representation had the desired effect. For the first several years of judicial review, the overwhelming majority of appeals were brought pro se and resolved without any attorney involvement.

51. See LIGHT, supra note 37, at 63–64.
52. See id. at 112–14 (demonstrating how VSOs like the American Legion encouraged veterans to oppose bills that would require more attorney involvement in the processing of their claims through letters warning veterans that attorney involvement would lead to longer delays and negative results); id. at 176–77 (stating that many VSO’s “manufactured letter campaigns based on scare tactics about lawyers’ fees and endless delays”); id. at 235 (explaining how the VJRA’s prohibition on attorneys’ fees prior to a final decision by the BVA all but eliminated attorney involvement in veterans claims).
53. See Helfer, supra note 37, at 171 (describing the VJRA as a “compromise” bill that ultimately favored VSOs by restricting judicial review and limiting attorneys’ roles in the adjudication of veterans claims).
54. Pub. L. No. 100-687, § 104, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.); see also Ridgway, VJRA Twenty Years Later, supra note 6, at 260 (suggesting that, although the VJRA permitted appellants at the CAVC to have legal representation, it did not incentivize attorneys to take veterans’ cases).
55. Ridgway, VJRA Twenty Years Later, supra note 6, at 261 (“In fiscal year 1992 (the first year for which the BVA published statistics), attorneys appeared in only sixty-three of the 33,483 cases decided by the BVA.”).
56. 38 U.S.C. § 5904(c)(3)(A) (2006) (“The [BVA], upon [its] own motion or the request of either party, may review such a fee agreement and may order a reduction in the fee called for in the agreement if the [BVA] finds that the fee is excessive or unreasonable.”).
2.  *Financial incentives*

The structural limits that prevented attorneys from becoming involved prior to judicial review are reinforced by financial realities that make it hard to profit from work at the agency level. In 2006, Congress changed the law to allow attorneys to charge a fee for work done after a veteran filed a notice of disagreement to a regional office decision.\(^\text{59}\) However, this change has had little effect in attracting attorneys to practice before the agency. Five years after the law was passed, the frequency of attorney representation at the BVA has risen by only three percentage points and more than 90% of claimants still did have attorney assistance.\(^\text{60}\)

Attorneys remain a relative rarity in veterans’ cases because the benefits involved are often quite modest and, therefore, the potential contingency fees are not substantial enough to support a law practice. For example, it typically takes less than a year for a veteran to receive an initial decision on a claim.\(^\text{61}\) Assume that an attorney becomes involved at that point and helps the veteran succeed after another year of work and waiting. If the veteran were to be awarded a rating of 10% disabled, which currently pays $123 per month, then a 20% contingency fee (the amount considered presumptively reasonable under VA’s regulations\(^\text{62}\)) on two years of retroactive benefits would yield only approximately $590.\(^\text{63}\) Even if the veteran were to be awarded a rating of 50% disabled, which pays $770 per month, the fee would be only approximately $3696. Such a small amount would not permit more than a couple of days work, which may well be insufficient even to fully review and comprehend the veteran’s claims file, much less leave money to pay for an expert to provide an

---


\(^{61}\) BVA ANNUAL REPORT FY 2011, supra note 60, at 18.

\(^{62}\) According to statute, a 20% fee is presumptively reasonable. 38 U.S.C. § 5904(d) (2006).

\(^{63}\) The number is approximate. The actual amount would be less because retroactive awards are paid based upon the rates in effect for the time periods covered and interest is not awarded on retroactive awards. See Sandstrom v. Principi, 358 F.3d 1376, 1380 (Fed. Cir. 2004).

\(^{64}\) See Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL’Y 285, 294–95 (2004) (detailing the disorganization, complexity, and ever-increasing size of veteran’s claims files at VA and noting how such disarray presents an obstacle to veteran-
opinion on the frequently complex issues of medical diagnosis and causation that are at the heart of most disability claims. Even if the veteran were awarded a 100% disability rating, a contingency fee on two years of work would be only $12,830. Such an amount may be sufficient to permit a reasonable return on an attorney’s time, but in practice, it must be discounted by the probability that the award will be lower or that the claimant will not prevail at all.65

Even for practitioners who first begin to represent veterans at the CAVC, when usually many more than two years have passed, there may be little financial incentive to continue the representation in the likely event of a remand. In 2001, the CAVC ruled in Carpenter v. Principi,66 that an attorney who receives an award of EAJA fees for work performed before the CAVC must reduce any future contingency fee by that amount because all work on the same claims constitutes the same work.67 As a result, an attorney considering whether to continue representation on remand to the BVA must discount the potential contingency fee by the amount of EAJA fees that have already been collected. In fact, nearly all remands result in an EAJA award,68 and therefore Carpenter represents a substantial disincentive for attorneys to follow a case and help develop the evidence necessary to bring it to final resolution before the agency.69 Instead, veterans may well be returned to the agency process without

claimants and their representatives in preparing their case); see also VETERANS BENEFITS MANUAL, supra note 30, § 16.1.2 (describing the typical veteran’s claims file as a “puzzle box”).

65. In recent years, the percentage of BVA decisions that were allowances varied from 21.9% to 28.5%. See BVA ANNUAL REPORT FY 2011, supra note 60, at 23 (providing the results for fiscal years 2008 through 2011). It must be noted that if the claim must be pursued all the way to the BVA, then it is likely that at least two more years will have elapsed waiting for a decision. Id. at 18. However, the extra contingency fee on the longer retroactive award is hardly attractive given the generally low probability of success.


67. Id. at 76.

68. In fiscal year 2011, the CAVC issued 2841 decisions that reversed or remanded the BVA at least in part. See BVA ANNUAL REPORT FY 2011, supra note 60, at 2. At the same time, it awarded EAJA fees in all but twenty-five of the 2652 cases in which fees were sought. Id. at 3. Moreover, given that 24% of cases were still pro se at disposition, id. at 1, it would seem that virtually every remand or reversal in which an attorney was involved resulted in an EAJA award.

69. Carpenter is not the only issue that may make it unattractive to pursue claims at the agency level. If a veteran is indebted to the government, the attorney may be unable to collect any fee at all because that debt will take priority. See Stacy L.Z. Edwards, Note, The Department of Veterans Affairs’ Entitlement Complex: Attorney Fees and Administrative Offset After Astrue v. Ratliff, 63 ADMIN. L. REV. 561, 584–85 (2011) (explaining the court’s holding in Astrue v. Ratliff, 130 S. Ct. 2521 (2010), which established that fees are awarded to the claimant and may be subject to “administrative offset” when a claimant is found to be indebted to the government).
the evidence needed to prevail on their claims, and without an attorney to assist them in obtaining such evidence.70

C. Changing the Game

Many of the Federal Circuit’s decisions this past year touched upon the whack-a-mole dynamic that drives the hamster wheel of veterans law. Veterans’ representatives are clearly frustrated by their inability to bring resolution to cases in the forums in which they can afford to practice. Regardless of whether the courts are the driving force behind this phenomenon, it is well worth examining how the dynamic of attorney involvement can be altered to produce faster and better results for veterans.

The ultimate goal of a new dynamic would be to address the system’s current problems with speed and flexibility by spending less energy adding complexity and more energy resolving individual cases. This goal recognizes that: (1) there is a huge variation in the complexity of claims handled by the system; (2) beyond a certain level of complexity, it becomes more efficient to handle tough cases with tailored efforts, rather than by trying to develop general procedures, especially given the fact that nearly all regional office adjudicators are non-attorneys;71 and (3) the fee system for attorneys in veterans’ benefits cases should be modified to make it profitable for them to work toward resolving those complex cases that are difficult to resolve through generalized procedures. These three key realizations are discussed below.

1. The complexity spectrum

From both a theoretical and a practical perspective, there is significant variation in the complexity of cases handled by the system. On a theoretical level, the system, which handles more than a million claims a year, produces a large body of law that is fractally complex. It is impossible to write appropriate rules in advance to address all the fact patterns that will arise.72 In other words, some portion of the

70. In fact, after Carpenter was decided, the percentage of cases at the BVA in which an attorney was involved declined from 8.5% in fiscal year 2001 to 5.7% in 2006 when the law was changed to allow attorneys to collect a fee without a CAVC remand. Compare Bd. of Veterans’ Appeals, Report of the Chairman: Fiscal Year 2001, at 26 (2002), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2001AR.pdf, with BVA Annual Report FY 2006, supra note 60, at 20.

71. For a discussion on the frontline adjudicators’ perspective, see generally Jeffery Parker, Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication, 1 Veterans L. Rev. 208 (2009).

overall body is noticeably more complex than the whole. Beyond that, if one looks at the portion of difficult cases, a similar portion of them will be even more complex. This subset will again have a further portion of still more complex cases, and the complexity will continue ad nauseam. Although well-designed procedures may be adequate for a large percentage of claims, a noticeable portion will not be easily and accurately resolved by such generalized procedures.

In practice, the increasing complexity of veterans claims is well-recognized and comes from multiple sources. As previously noted, there has been increasing procedural complexity within the veterans benefits system. However, procedural complexity is only one of the contributing types. Veterans claims are largely focused on whether the veteran has a disability that was caused by service. Thus, the accelerating changes in medical knowledge concerning diagnosis and causation are also pushing the system toward ever more complexity.

Modern veterans law has been accumulating since World War I. For decades, Congress and VA have dealt with new situations by creating new benefits, programs, and units within VA. For example, Congress and VA have addressed disability claims related to Agent Orange exposure, Gulf War syndrome, post-traumatic stress disorder (PTSD), and traumatic brain injury by adding unique provisions specific to these problems. This accretion of law, although undertaken with noble intent, has added to the complexity of the system. Although there have been some efforts to update and modernize the governing regulations, major initiatives have lingered (arguing that the law assumes the impossible task of seeking to preempt infinitely complex and evolving combinations of facts that can never be anticipated in tandem prior to their occurrence).

73. Id. at 5–8.
74. See Samuel Arbesman, The Half-Life of Facts: Why Everything We Know Has an Expiration Date 208 (2012) (“[M]any medical schools inform their students that within several years half of what they’ve been taught will be wrong, and the teachers just don’t know which half.”).
77. Id. §§ 1117–1118.
78. 38 C.F.R. § 3.304(f) (2012).
for years without being implemented. Accordingly, there is at least tremendous potential for complexity in a claim for benefits.

2. **Understanding complexity in the veterans benefits system**

Once it is accepted that certain cases cannot be efficiently handled by following a procedural script, the next step is to identify complex claims. Ideally, any changes would be fine-tuned incentives aimed at encouraging attorneys to take on these cases, in which the benefits of attorney involvement outweigh the costs, and would benefit veterans and taxpayers. It makes no sense to pay for attorney services in cases that may be resolved favorably without attorney assistance. Rather, change should be targeted at those difficult cases in which the individualized assistance of a trained attorney would be more efficient than attempting to produce general procedures that are detailed enough to resolve complex issues correctly.

Unfortunately, the actual distribution of complexity within the system is not well understood either in terms of frequency or source. Even some of the most basic information about complexity is lacking. The few hundred veterans benefits cases that the Federal Circuit reviews each year are not necessarily a representative sample of the more than one million such claims that are filed each year. Even if the Federal Circuit were to see a reasonable sample of cases from the CAVC, it is probable that the cases that the CAVC hears are not a representative sample of those that the BVA hears, which in turn are probably not representative of the claims that veterans initially file with VA’s regional offices. Information on whether case law is representative of claims within the larger VA system is critical to evaluating the general effectiveness of VA’s procedures.


81. It is easy to hypothesize that claims related to severe physical combat injuries are more likely to be granted because the connection between the disability and service is obvious, and, therefore, less likely to be appealed to the courts. Conversely, claims involving more subjective diagnoses manifesting years after service seem likely to result in disputes, but whether this hypothesis is true is untested.

82. In fact, it can be quite dangerous to make policy based upon assumptions that the sample presented accurately reflects reality. *See*, e.g., Emanuel Derman, *Models, Behaving. Badly.: Why Confusing Illusion with Reality Can Lead to Disaster, on Wall Street and in Life* (2012) (asserting that the recent financial crisis can be blamed on an over-reliance on inaccurate models of a complex system).
In other areas of law, independent advisory groups\textsuperscript{83} and academics\textsuperscript{84} have collected and analyzed data that direct stakeholders in those areas do not routinely capture and may not be able to analyze without allegations of bias. Unfortunately, veterans law currently lacks a resource for reliable information on many of the complexities that would be important to making well crafted policy. Given the increasing importance of data-driven analyses to legal theory and policy,\textsuperscript{85} an independent source of high-quality data and analysis would be a welcome addition to the landscape of veterans law.

Even though better data would be very useful, it is not hard to find areas in which the current procedures for deciding veterans claims appear inadequate for at least a small portion of unusual cases. For example, in 2010, Federal Circuit Judge Pauline Newman wrote a provocative dissent arguing that, in cases in which a veteran is suffering from a condition so rare that it is impossible to know its causes scientifically with any certainty, a “more likely than not” standard of proof is unjust.\textsuperscript{86} Judge Newman argued that a different standard should be applied “to rare diseases where there is insufficient data and experience to establish a reliable etiology of the disease.”\textsuperscript{87} The nature of the condition at issue in a claim is, of course, just one of the factual variables that may lead to a complex situation in which general rules produce unsatisfactory results. More in-depth analysis will be key to identifying more of the variables that make veterans cases complex.

\textsuperscript{83} For example, the Social Security Advisory Board is a seven-member commission created by Congress in 1994 to provide independent, bipartisan information on matters relating to Social Security benefits. See, e.g., SOC. SEC. ADVISORY BD., A DISABILITY SYSTEM FOR THE 21ST CENTURY 47 (2006), available at http://www.ssab.gov/documents/disability-system-21st.pdf.

\textsuperscript{84} See, e.g., ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS (2001) (coding and analyzing numerous data sets about the decisions of the federal appellate courts); Michael J. Bommarito et al., An Empirical Survey of the Population of U.S. Tax Court Written Decisions, 30 VA. TAX REV. 523 (2011) (analyzing 11,000 decisions from 1990 to 2008); Scott Dodson, A New Look: Dismissal Rates of Federal Civil Claims, 96 JUDICATURE 119 (2012) (analyzing the results of a survey the authors conducted regarding public knowledge and opinion on license plate recognition technology).


\textsuperscript{87} Id.
3. Better tailoring of attorney incentives

Despite the limitations on our understanding of the complexities of the system, there are still at least two approaches that might assist in refocusing attorney incentives: the ex post facto approach and an approach aimed at incentivizing more involvement at the notice of disagreement stage. The essence of the first approach does not try to identify appropriate cases ex ante, but assumes that cases remanded by the CAVC are complex enough to warrant attorney assistance focused on bringing the case to resolution. Although the accuracy of this assumption is questionable, there is a sense of general justice in providing extra assistance to claims that have lingered long enough to be remanded by the CAVC, which normally does not occur until many years after a veteran first files a claim.

A method to implement this ex post facto approach would be to partially abrogate Carpenter\(^88\) and explicitly provide that if an attorney were to develop new evidence on remand from the CAVC, then that by definition would be different work that does not require an offset in fees. Such a change would not only make it more attractive for attorneys to continue representation, but would also encourage them to help bring the case to resolution rather than perpetuate procedural arguments. However, such a rule would have a limited effect on the system as a whole because the number of cases remanded by the CAVC is still tiny compared to the size of the system. This approach would also do little to change the basic whack-a-mole dynamic that relies on procedural arguments to obtain CAVC remands.\(^89\)

The second, more ambitious approach would seek to make it more attractive for attorneys to become involved at the notice of disagreement stage and to develop the necessary evidence when they do so. One option would be to set a minimum fee that would be paid if an attorney were to obtain evidence that is used to grant the claim. If the contingency fee were insufficient to cover the minimum fee, then VA would cover the rest. Perhaps the $6,000 amount used in Social Security cases would be a reasonable starting point.\(^90\) Better results might be obtained by developing a spectrum of minimum fees

---

88. See supra notes 66–69 and accompanying text.
89. See supra Part I.A.
90. 74 Fed. Reg. 6080–02 (Feb. 4, 2009). The Social Security system uses this as a cap rather than a minimum. Id. Social Security claims are often simpler than veterans claims, and all Social Security claims involve the equivalent of a 100% disability rating, so the cost-benefit analysis involved for attorneys considering representing veterans is substantially different. Nonetheless, $6000 is a potential number to use in starting a conversation in the absence of better information.
to address different categories of complex claims and providing explicit provisions for covering expert medical opinions.

The hard part of this ambitious approach is tailoring the incentives. Not every case is complex and there is no good data on which cases would be more efficiently handled by incentivizing attorneys to assist with their preparation. Although many stakeholders would be concerned with the cost of paying a large new quantity of attorney fees, a key goal would be to set restrictions such that the fees were offset by the costs VA otherwise would have spent on additional development and adjudication.91 One might speculate that those cases in which the complexity justifies increased attorney involvement would include those involving mental conditions (due to the subjective nature of the diagnoses and the difficulty of assigning causation) and cases in which the veteran is first applying for benefits more than a decade after service (due to the likelihood of gaps in the medical record and the difficulty of showing that a remote event caused a disability manifesting many years afterward). In the absence of solid data, trial and error may be the only option in this area.

Veterans benefit decisions handed down by courts in 2012 show an increasing discontent on the part of claimants with the current structure of judicial review. As courts continue to overwhelmingly remand cases to an overburdened VA that has long been losing ground in the struggle to provide veterans with timely and accurate decisions on their claims, each branch of government should consider what can be done to empower attorneys to assist veterans in developing the evidence necessary to bring finality to claims.

II. THE 2012 VETERANS LAW DECISIONS OF THE FEDERAL CIRCUIT

This Part considers the precedential veterans law opinions issued by the Federal Circuit on review of decisions by the CAVC. The Federal Circuit issued sixteen veterans law decisions in 2012, five more than it did in 2011. Calling these decisions “veterans law” decisions is actually something of a misnomer. The simplest way to illustrate the dramatic change in focus that occurred in 2012 is to note that half of those opinions concerned issues related to the rules of judicial review applied by the courts, rather than disputes about

---

91. Of course, another key goal would be to ensure that fees paid by veterans themselves represent a good value for the work performed. For an analysis of the monetary value to claimants of attorney representation, see Benjamin W. Wright, Note, The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney, 19 Fed. Cir. B.J. 433 (2009).
the substance of veterans law. Moreover, not a single decision dealt with the Secretary’s duty to assist claimants in obtaining evidence necessary to substantiate a claim. Thus, 2012 was extraordinary in the degree to which the Federal Circuit’s “veterans law” decisions were about the court process rather than VA’s procedures. As in previous years, the cases are organized in the order in which the issues would normally be encountered in the claims process.

A. Judicial Review

The first step in the process of judicial review is convincing the appellate court to hear the case. In 2012, a remarkable number of Federal Circuit cases struggled with this hurdle.

1. The CAVC’s authority to make initial findings of fact

Perhaps the most common criticism of the CAVC by attorneys who represent veterans is that the court does not reverse as many cases on the facts as it could or should. Appeals filed at the CAVC are overwhelmingly pro se at the start. As discussed above, although most claimants have attorneys by the time of decision, on appeal, counsel frequently argue issues or entire theories of entitlement not presented below. As discussed above, the record is closed before the CAVC and counsel cannot support their new positions with additional evidence. Nonetheless, the veterans’ representatives are often convinced that the available evidence is strong enough to support reversal and are frustrated when claims are remanded by the CAVC for additional fact-finding and development.

Byron v. Shinseki is an example of the type of case that frustrates veterans’ advocates. The appellant, a veteran’s widow, sought service connection for her husband’s death from cancer. Her theory was that her husband was exposed to radiation during his service, and that exposure caused his terminal cancer. The BVA denied service

92. See supra Part I.A (describing the “whack-a-mole” dynamic that occurs in veterans law appeals).

93. See Ridgway, Why So Many Remands?, supra note 10, at 113 (stating that many veterans advocates believe the CAVC is afraid to reverse many BVA decisions); see also Reply Brief for Petitioner at 1, Byron v. Shinseki, 133 S. Ct. 843 (2013) (No. 12-0389), 2012 WL 6100045 (asserting that the tremendous backlog in veterans appeals cases could be alleviated by the court reversing rather than remanding cases like the petitioner’s).

94. See supra note 15.

95. See CAVC Annual Report FY 2011, supra note 26 (stating that only 24% of appeals were pro se at the time of disposition).

96. 670 F.3d 1202 (Fed. Cir. 2012), cert denied, 133 S. Ct. 843.

97. Id. at 1204.

98. Id.
connection after concluding that the cancer was not presumptively related to radiation exposure in service.\textsuperscript{99} On appeal to the CAVC, there was no dispute that there was substantial evidence supporting a finding of service connection on a direct basis and that the BVA erred in failing to address that theory of entitlement.\textsuperscript{100} Rather, the disagreement was over the remedy. The appellant sought reversal, but a single judge of the CAVC remanded the case on the basis that the court could not evaluate the evidence supporting direct service connection in the first instance.\textsuperscript{101}

Judge Moore authored the opinion for the Federal Circuit.\textsuperscript{102} As an initial matter, she held that even though the CAVC had remanded the matter to the agency, the Federal Circuit had jurisdiction to review the case because the ruling adversely affected the widow and would be mooted by not reviewing the remand decision immediately.\textsuperscript{103} On the issue of whether the CAVC could make factual findings on service connection, which the BVA had failed to do, the Federal Circuit stated that the CAVC generally lacks the authority to conduct fact-finding and must remand a claim to the BVA to make such initial determinations.\textsuperscript{104}

The issue in \textit{Byron} was whether the Supreme Court’s subsequent decision in \textit{Gonzalez v. Thomas}\textsuperscript{105} had opened up any room to relax the holding in \textit{Hensley v. West}.\textsuperscript{106} In \textit{Thomas}, the Supreme Court reaffirmed the general principle from the \textit{SEC v. Chenery} cases\textsuperscript{107} that courts must not make determinations reserved for executive agencies.\textsuperscript{108} The \textit{Thomas} Court indicated that there may be exceptions to this principle in “rare circumstances,”\textsuperscript{109} but the Court did not elaborate on these circumstances or make an exception based on the facts before it.\textsuperscript{110} In \textit{Byron}, the Federal Circuit recognized that reversal could be appropriate in cases in which the agency concides

\textsuperscript{99.} \textit{Id.}
\textsuperscript{100.} \textit{Id.}
\textsuperscript{101.} \textit{Id.}
\textsuperscript{102.} \textit{Id.}
\textsuperscript{103.} \textit{Id.} at 1205.
\textsuperscript{104.} \textit{Id.} (stating that “appellate tribunals are not appropriate for an initial fact finding” (quoting \textit{Hensley v. West}, 212 F.3d 1255, 1263 (Fed. Cir. 2000))).
\textsuperscript{105.} 547 U.S. 183 (2006) (per curiam).
\textsuperscript{106.} 212 F.3d 1255, 1263 (Fed. Cir. 2000).
\textsuperscript{107.} \textit{SEC v. Chenery Corp. (Chenery II)}, 332 U.S. 194 (1947); \textit{SEC v. Chenery Corp. (Chenery I)}, 318 U.S. 80 (1943).
\textsuperscript{108.} See \textit{Thomas}, 547 U.S. at 186–87 (explaining that appellate courts, as a general rule, are not allowed to review de novo the determinations of an administrative agency, and that when such review is required the court should remand back to the agency for further inquiry).
\textsuperscript{109.} \textit{Id.} at 186 (quoting \textit{INS v. Ventura}, 537 U.S. 12, 16 (2002) (per curiam)).
\textsuperscript{110.} \textit{Id.} at 187.
the relevant facts on appeal, or in which the reviewing court is conducting a harmless error analysis.\footnote{111} The Byron court stated, however, that “[i]t is not enough that only a few factual findings remain or that the applicant may have a strong case on the merits.”\footnote{112} According to the court, even if the appellant were correct that all of the evidence of the record supported her claim, the CAVC could not assume a fact-finding role reserved for the BVA.\footnote{113}

The outcome of Byron is not particularly surprising because, as the opinion recognized, other circuit courts have interpreted Thomas in ways that do not allow courts to reverse agency decisions for factual reasons.\footnote{114}

Byron also highlights the asymmetrical nature of judicial review. In Akers v. Shinseki,\footnote{115} the Federal Circuit affirmed the CAVC even though it held that the CAVC committed a legal error by citing the “total lack” of evidence supporting the veteran’s argument and citing prior case law to the same effect.\footnote{116} However, Byron makes clear that the strength of the evidence cannot be considered to potentially bring resolution when it favors the claimant rather than the government.

Despite decisions such as Byron, Hensley, and Thomas, the issue of when an appellate court may reverse an agency on consideration of facts not addressed below appears to still have some life in it.\footnote{117} In the realm of veterans law, this issue has staying power because of the clear disconnect between the CAVC’s role and that of the Securities and Exchange Commission in the Chenery cases.\footnote{118} In the Chenery cases, the facts were undisputed and the only contested issue was the agency’s reasoning in setting the policy announced.\footnote{119} The Chenery cases made clear that courts could not affirm an agency decision by substituting their own policy judgments for the invalid policy

\footnotesize{\textit{\begin{itemize}
\item 112. Id. at 1206.
\item 113. Id. at 1205.
\item 114. Id. (citing Calle v. U.S. Att’y Gen., 504 F.3d 1324, 1330 (11th Cir. 2007); Hussain v. Gonzales, 477 F.3d 153, 156–57 (4th Cir. 2007); Sierra Club v. EPA, 346 F.3d 955, 962–63 (9th Cir. 2003)).
\item 115. 673 F.3d 1352 (Fed. Cir. 2012); see infra Part II.C.
\item 116. 673 F.3d at 1359.
\item 117. For example, in January 2013, the Federal Circuit issued yet another precedential decision in this area in a pair of consolidated cases. See Deloach v. Shinseki, 704 F.3d 1370 (2013).
\item 118. This is far from the only area where application of the Chenery cases has proven problematic. See Richard Murphy, Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons, 80 U. Cin. L. Rev. 817 (2012).
\item 119. See Chenery II, 332 U.S. 194, 196–97 (1947) (“It will not do for a court to be compelled to guess at the theory underlying the agency’s action . . . .”).
\end{itemize}}
judgments of the agency below.\textsuperscript{120} Therefore, the Chenery cases protect the separation of powers by preventing courts from making policy judgments reserved to the agency.\textsuperscript{121}

Such a concern is simply not presented in Byron or similar cases reviewed by the CAVC. As in administrative law generally, VA makes policy through regulations\textsuperscript{122} and informal guidance documents.\textsuperscript{123} Adjudications by the BVA do not set policy and, in fact, BVA regulations expressly state that its decisions are not precedential.\textsuperscript{124} Thus, the decisions that the CAVC reviews are wholly different in nature from the decisions that the Court reviewed in Chenery. Although there is no question that neither the CAVC nor the Federal Circuit should be usurping VA’s role in determining which cancers should be presumptively associated with exposure to radiation, it is entirely reasonable to assert that the separation of powers is less of a concern when the courts are presented with an argument that a particular veteran’s cancer was caused by radiation based upon the evidence presented in that case. It could easily be argued that the question of whether the CAVC should make a factual determination in the first instance is more akin to the question of when the courts of general jurisdiction may resolve a factual issue without submitting it to a jury, as is generally required by the Seventh Amendment.\textsuperscript{125} The Federal Circuit should view Byron and similar cases through a framework that is focused on the BVA’s role as a fact finder rather than on VA’s role as a policy maker. Such an analysis might well lead

\textsuperscript{120} See Chenery I, 318 U.S. 80, 95 (1943) (holding that an administrative order is not valid if the agency exceeded its delegated authority in issuing it).

\textsuperscript{121} See Chenery II, 332 U.S. at 196 (asserting that Congress has sought to protect the administrative agencies judgments and that “the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis”); see also Russell L. Weaver, Chenery II: A Forty-Year Retrospective, 40 ADMIN. L. REV. 161, 168 (1988) (stating that in the Chenery cases, the Court wanted to ensure that agencies were free to make rules, lest the administrative process were “stymied”).


to drawing the line as to where reversal is appropriate in a somewhat different—though still highly deferential—place.¹²⁶

2. The Federal Circuit’s authority to review non-final CAVC decisions

Like most appellate courts, the Federal Circuit rarely reviews decisions remanding matters for further proceedings. In some cases, such as Byron, interlocutory review is appropriate. However, a trio of additional cases in 2012 tested the limits of the court’s willingness to hear such appeals.

The Federal Circuit established the criteria for interlocutory review in veterans cases in Williams v. Principi,¹²⁷ which held that the appellant must show: (1) a clear and final decision on the merits of the claim that will govern the remand proceedings; (2) that the decision adversely affects the appellant seeking review; and (3) that the decision may not survive remand.¹²⁸ As to the last element, the precise wording of Williams was that the appellant must show “a substantial risk that the decision would not survive a remand, i.e., that the remand proceeding may moot the issue.”¹²⁹

The veteran in Donnellan v. Shinseki¹³⁰ struggled with this third element. In a panel opinion, the CAVC held that he was not entitled to the presumption of aggravation of his condition because he had no active duty service, but rather only active duty for training.¹³¹ The court then remanded the matter for readjudication to correct an error that had tainted a medical opinion obtained by VA on the issue.¹³² The veteran wished to contest the court’s holding on the aggravation element immediately rather than waiting potentially years for VA to readjudicate his claim and then being forced to appeal to the CAVC again to reach the Federal Circuit.

In an opinion by Judge Bryson, the court rejected the appellant’s attempt to short circuit the remand.¹³³ There was no dispute that the

¹²⁶ One way to draw the line would be to say that the CAVC need not remand if any determination that the evidence was against the claim would be clearly erroneous and any determination that further development was required would also be clearly erroneous. In this regard, it is important to note that although VA is not permitted to look for evidence to deny a claim, Mariano v. Principi, 17 Vet. App. 305, 312 (2003), the agency may develop additional evidence if the record already suggests a theory against entitlement, Douglas v. Shinseki, 23 Vet. App. 19, 24–26 (2009).
¹²⁷ 275 F.3d 1361 (Fed. Cir. 2002).
¹²⁸ Id. at 1364.
¹²⁹ Id.
¹³⁰ 676 F.3d 1089 (Fed. Cir. 2012).
¹³² Id. at 176.
¹³³ See Donnellan, 676 F.3d at 1089 (noting that the remand order did not fall into the narrow exception allowing review).
challenged ruling was a clear and final legal holding or that it adversely affected the appellant.\textsuperscript{134} The appellant’s only argument for immediate review was that if he were to succeed on remand in satisfying the higher burden set out in the CAVC opinion, the issue would not survive.\textsuperscript{135} The court had no trouble dismissing this argument as an “exception [that] would swallow the rule.”\textsuperscript{136} In practically every case that is remanded there is some chance the appellant will still prevail and moot an issue decided by the CAVC. To contain the class of potential interlocutory appeals, \textit{Donnellan} focused on a more precise and restrictive formulation of the third element: “[T]he appellant’s claim must be that he has a legal right not to be subjected to a remand.”\textsuperscript{137} In other words, “the appellant’s argument that he has a right not to be forced to undergo a remand would necessarily and forever be lost if the case is remanded without an opportunity for appellate review of his claim.”\textsuperscript{138} This holding reinforced prior, similar rulings and removed any lingering uncertainty that the probability of success on remand was a factor under the third prong.

The second case in the trilogy was \textit{Ebel v. Shinseki}.\textsuperscript{139} The appellant in \textit{Ebel} was a widow seeking service connection for her husband’s death from malignant melanoma.\textsuperscript{140} She asserted that his exposure to extreme sunlight or to Agent Orange while serving two tours in Vietnam caused his cancer.\textsuperscript{141} During the development of the claim, a VA medical examiner opined that it was at least as likely as not that the veteran’s death was related to service, but he failed to clearly articulate the basis for that conclusion.\textsuperscript{142} The BVA noted that the National Academy of Science had never found sufficient evidence to warrant creating a presumption that melanoma is related to service in Vietnam and found the doctor’s opinion inadequate.\textsuperscript{143} On appeal, the CAVC held that the BVA had erred in rejecting the direct service connection evidence by relying on the fact that VA had refused to find the condition entitled to presumptive service connection.\textsuperscript{144} On this

\begin{thebibliography}{9}
\bibitem{134} \textit{See id.} at 1091 (stating that Mr. Donnellan acknowledged this fact).
\bibitem{135} \textit{Id.}
\bibitem{136} \textit{Id.} at 1093.
\bibitem{137} \textit{Id.} at 1092.
\bibitem{138} \textit{Id.}
\bibitem{139} 673 F.3d 1337 (Fed. Cir. 2012).
\bibitem{140} \textit{Id.} at 1339.
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{Id.}
\bibitem{143} \textit{Id.}
\bibitem{144} \textit{Id.}
\end{thebibliography}
basis, the CAVC remanded for the BVA to weigh the evidence properly.\(^{145}\)

At the Federal Circuit, the widow argued that the CAVC erred in remanding the claim to the BVA because the medical evidence was sufficient to grant the claim.\(^{146}\) However, in an opinion by Judge Prost, the Federal Circuit held that the appeal failed the first Williams factor because the essential dispute was factual rather than legal.\(^{147}\) The opinion further noted that this defect was jurisdictional because “[t]o hold otherwise would lead to the odd result that an appeal could satisfy the first condition under Williams—that there was a clear and final decision of a legal issue—but not the jurisdictional statute limiting our jurisdiction to questions of law.”\(^{148}\) In reaching this conclusion, the opinion emphasized that reviewing the allegation would require weighing the evidence of record to determine whether it was as strong as alleged.\(^{149}\) Aside from this flaw, the court also noted—as it had in Donnellan—that accepting the appellant’s argument “would cause the allegedly narrow exception under Williams to swallow our strict rule of finality.”\(^{150}\)

The issue that arose in Ebel and Donnellan resurfaced shortly thereafter in Duchesneau v. Shinseki.\(^{151}\) Again, the only dispute was as to the third element. The appellant in Duchesneau was seeking a compensable disability rating for a shoulder injury.\(^{152}\) One of the issues she argued below to the CAVC was that she was entitled to two separate ratings for limitation of forward and side arm movement.\(^{153}\) The CAVC rejected this argument, but remanded the matter on other grounds for the BVA to consider whether the veteran might be entitled to a single disability rating.\(^{154}\)

The appellant’s argument in Duchesneau was the opposite of that made by the veteran in Donnellan. Duchesneau asserted that remand might render her legal claim moot because VA would have the opportunity to develop additional evidence that she was not entitled to any additional rating.\(^{155}\) Judge Prost, writing for a panel that included Judge Linn from the Donnellan panel, concluded that the

\(^{145}\) Id. at 1340.
\(^{146}\) Id. at 1341.
\(^{147}\) Id.
\(^{148}\) Id.
\(^{149}\) Id. at 1339–40.
\(^{150}\) Id. at 1341 n.1.
\(^{151}\) 679 F.3d 1349 (Fed. Cir. 2012).
\(^{152}\) Id. at 1351.
\(^{153}\) Id.
\(^{154}\) Id. at 1352.
\(^{155}\) Id. at 1353.
Federal Circuit could not review the CAVC’s decision. Similar to Donnellan, Duchesneau held that the risk that the appellant “may win or lose on the facts . . . without regard to the Veterans Court’s interpretation” . . . [w]as not enough to create a substantial risk that the Veterans Court’s interpretation would evade review. The court, citing Williams and Donnellan, made the same distinction between independent issues and issues involving the right to not be subjected to a remand. Indeed, the opinion even quoted Donnellan for the proposition that to “accept [Ms. Duchesneau’s] framing of the exception to the rule against review of remand orders, the exception would swallow the rule.”

One interesting aspect of the Donnellan, Ebel, and Duchesneau trio is how they all gave short shrift to Adams v. Principi. In Adams, the Federal Circuit agreed to hear an appeal of a CAVC remand. The CAVC determined that the medical opinion rebutting the presumption of soundness was inadequate and remanded for clarification. The Federal Circuit agreed to entertain the veteran’s appeal. It first presented this situation by stating, If Mr. Adams is correct on the merits that he has a right to judgment without a remand, the order of the Veterans Court requiring him to undergo a remand before obtaining appellate relief would defeat the very right he asserts, i.e., his right to an immediate judgment without the necessity of a remand.

After citing cases involving claims of qualified immunity and double jeopardy, the opinion concluded that that “this case is appealable . . . because the remand deprives Mr. Adams of his claimed right to a decision in his favor on the record as it now stands.” Nonetheless, the court rejected the argument on the merits after concluding that the CAVC acted properly in remanding the issue.

156. Id. at 1354.
157. Id. at 1353–54 (quoting Myore v. Principi, 323 F.3d 1347, 1352 (Fed. Cir. 2003)).
158. Id. at 1354.
159. Id. at 1354 (alteration in original) (quoting Donnellan v. Shinseki, 676 F.3d 1089, 1093 (Vet. App. 2012)).
160. 256 F.3d 1318 (Fed. Cir. 2001).
161. Id.
162. Id. at 1320.
163. Id.
164. Id. at 1321.
165. See id. (reasoning that the issue might become moot after further proceedings in the BVA).
166. Id. at 1321–22 (stressing that because the evidence before the BVA was subject to differing interpretations, it was permissible for the court to remand the case so that the BVA could obtain clarification as to “import of the evidence”).
None of the 2012 Federal Circuit cases dwelled extensively on the language in *Adams* suggesting that a veteran may have a right to “an immediate judgment without the necessity of a remand.”167 *Donnellan* quoted the expansive language of *Adams* in setting forth the relevant law,168 but never returned to *Adams* in its analysis.

The proper interpretation of *Adams* recently became a contentious issue at the CAVC,169 and so the Federal Circuit may well be called upon to revisit it more fully in the near future. *Ebel* plainly misstated the facts of *Adams* by asserting that the case was unique in that “the veteran had already established entitlement to compensation based on a presumptive service connection.”170 In reality, the issue of the veteran’s entitlement was precisely what was remanded in *Adams*. *Duchesneau* framed *Adams* as an issue of whether the CAVC had the authority to order the remand at issue.171 This analysis may be somewhat more helpful, but it ultimately fails to address the broad language of *Adams* or explain why the question of the CAVC’s authority was a legal issue in *Adams*, but a factual one in *Ebel*.

Ultimately, the outcomes of *Donnellan*, *Ebel*, and *Duchesneau* are unlikely to put the issue of the scope of interlocutory review to rest permanently. The CAVC consistently remands two-thirds to three-quarters of all appeals it reaches on the merits.172 Evidence does not support the assertion that its reversal rate is unusually low.173 Nonetheless, the high rate of remands, coupled with the increasingly lengthy agency process, will continue to create pressure for interlocutory review by the Federal Circuit. Cases such as *Byron* and *Adams* offer a glimmer of hope for those who wish to continue to tilt at that particular windmill, but only Congress has the authority to engineer substantially greater involvement by the Federal Circuit in CAVC remands.

---

167. Id. at 1321.
169. See *Horn v. Shinseki*, 25 Vet. App. 231, 245–45 (2012) (discussing a division among a CAVC panel regarding the extent to which *Adams* requires the CAVC to reverse benefits decisions involving the ‘presumption of soundness’ condition without affording the Secretary the opportunity to fully develop evidence on the issue). The dissent argued that *Adams* necessitated a remand for the development of additional evidence on the issue. Id. at 249–50 (Lance, J., dissenting).
173. See *Ridgway, Why So Many Remands?,* supra note 10, at 58–59 (interpreting that various statistical analyses of the CAVC’s reversal rates confirm the view that the CAVC’s remand rate is relatively high).
3. Interpretation of CAVC decisions

Even when the CAVC makes a final decision, Federal Circuit review is not assured due to statutory limitations on the court’s jurisdiction. Two of the Federal Circuit’s opinions in 2012 addressed the difficulties associated with these limitations. A key part of the difficulty surrounding the limitations on the Federal Circuit’s jurisdiction to review CAVC decisions is the fact that the court must distinguish between issues of law and the mere application of law based upon the limitless variety of language from which the CAVC may choose in expressing its ruling.

The first of the two cases facing this difficulty was *Githens v. Shinseki*. In *Githens*, the appellant and the government disagreed as to whether the CAVC had even made the ruling that the appellant wished to challenge. The case began when the veteran filed a motion asserting clear and unmistakable error (CUE) in a prior VA regional office decision denying her total disability based on an individual unemployability (TDIU) rating. There was no dispute that the VA regional office erred in calculating that her combined disabilities did not qualify her for consideration of TDIU on a schedular basis. However, the single-judge decision from the CAVC agreed with the BVA that the error did not affect the outcome of the decision.

At the Federal Circuit, the parties disagreed over how to interpret the CAVC’s opinion. The appellant argued that the CAVC had denied relief based upon a ruling that TDIU is not appropriate when the claimant’s non-service-connected disabilities cause unemployment. The government argued that the CAVC’s memorandum decision had correctly recognized that TDIU may be awarded regardless of the presence of non-service-connected disabilities, so long as the service-connected disabilities separately combine to make the claimant unemployable.

In Judge Reyna’s first opinion in an appeal of a CAVC decision, the Federal Circuit agreed with the government’s interpretation of the decision below. To reach this conclusion, the Federal Circuit

---

175. 676 F.3d 1368 (Fed. Cir. 2012).
176. Id. at 1371–72.
177. Id. at 1369–70.
178. Id. at 1369–71.
179. Id. at 1371.
180. Id.
reviewed several factors. First, it noted that the issue was not argued
to the CAVC, and therefore concluded that any such ruling would
have been sua sponte.182 Second, the court held that it was not
apparent that the precise interpretation urged by the appellant was
crucial to the outcome reached by the single judge.183 Third, the
opinion noted that other articulations of the law in the decision did
not support the appellant’s interpretation.184 Finally, the opinion
noted that “a series of cases” from the CAVC had consistently
interpreted the TDIU regulations as the appellant had suggested.185
Based upon these factors, the opinion concluded that the single
judge had not made the ruling asserted and, as a result concluded
that the Federal Circuit did not have “jurisdiction over an issue of
interpretation that does not exist.”186

The Githens court’s approach in interpreting a non-precedential
decision of the CAVC is notable. Non-precedential decisions form
the overwhelming majority of the CAVC’s dispositions and the bulk
of the cases resulting in precedential opinions by the Federal
Circuit.187 It is exceptional to see so much attention paid to
determining what the CAVC actually held. In particular, it is
noteworthy that in resolving any ambiguity in the decision, the
opinion cited other recent single-judge decisions addressing the same
issue. The court resolved any ambiguity in the single-judge decision
before the court by assuming that it must be following well-
established CAVC precedent. Moreover, neither party cited the
recent CAVC single-judge decisions in their briefs to the Federal
Circuit.188

King v. Shinseki189 was the second case in which the Federal Circuit
delved into the interpretation of a single-judge CAVC memorandum
decision. The essential question in King was the same as that in

182. Githens, 676 F.3d at 1372.
183. Id.
184. Id.
186. Id. at 1372.
187. Ridgway, Changing Voices, supra note 1, at 1229–32.
188. See Claimant-Appellant’s Brief, Githens, 676 F.3d 1368 (No. 2010-7129), 2010 WL 5311502, at *iv (failing to cite any of the cases cited in Githens in the table of authorities); Brief for the Respondent-Appellee, Githens, 676 F.3d 1368 (No. 2010-7129), 2011 WL 882040, at *II (similarly failing to cite any of the cases cited in Githens); Reply Brief of the Appellant, Githens, 676 F.3d 1368 (No. 2010-7129), 2011 WL 1748709, at *ii (merely mentioning Pratt v. Derwinski, 3 Vet. App. 269 (1992)).
189. 700 F.3d 1339 (Fed. Cir. 2012).
Githens. Did the CAVC decision actually make the legal holding that the appellant wished to challenge? Specifically, in King, the veteran asserted that the CAVC erred in categorically discounting the lay testimony that he and his wife offered.\footnote{Id. at 1340.} In a trilogy of decisions beginning with Buchanan v. Nicholson\footnote{451 F.3d 1331 (Fed. Cir. 2006).} in 2006, the Federal Circuit held that lay testimony on medical issues cannot be completely ignored in every case, and that a specific determination must be made in each claim as to the value of the testimony.\footnote{Id. at 1335.} In Jandreau v. Nicholson,\footnote{492 F.3d 1372 (Fed. Cir. 2007).} the court clarified that a “layperson will be competent to identify the condition where the condition is simple, for example a broken leg, and sometimes not, for example, a form of cancer.”\footnote{Id. at 1377 n.4.} This line of cases culminated with Davidson v. Shinseki,\footnote{581 F.3d 1313 (Fed. Cir. 2009).} which reiterated that the CAVC erred when it stated categorically that a valid medical opinion was required to establish nexus, and that claimant was “not competent to provide testimony as to nexus because she was a layperson.”\footnote{Id. at 1316.}

King involved a claim for bilateral hip and back conditions he believed were related to his bilateral service-conducted knee conditions.\footnote{King v. Shinseki, 700 F.3d 1339, 1340–41 (Fed. Cir. 2012).} The veteran had served for two years in the early 1970s, but did not have any recorded treatment for his conditions for two decades afterward.\footnote{Id. at 1341–43.} In 1998, he testified at a VA hearing that after his time of service he put more weight on his hips to avoid feeling more pain in his already hurting knees and back; his abnormal gait was a way to “overcompensate because [he did not] want to have pain there.”\footnote{Id.} The veteran also submitted a letter from his wife describing the deterioration of his physical condition over the previous decades.\footnote{Id. at 1341–42.} In 2000, VA obtained a medical opinion that the veteran’s problems were age related, and the veteran countered this opinion with a private medical opinion attributing his conditions to his military service.\footnote{Id. at 1341–42.} In 2006 and 2008, VA sought two more medical opinions, both of which concluded that the veteran’s conditions were not related to service.\footnote{Id. at 1342.} During a hearing before BVA, the veteran
and his wife testified that his problems began shortly after service. In King, the BVA considered this lay evidence, but found that given the declarants’ lack of the “requisite medical training, expertise, or credentials,” this evidence was incompetent and lacked probative value. On review, the CAVC “acknowledged that lay evidence may be used to establish medical causation,” but stated that the BVA is “not required to accept all lay statements as definitive proof of a service-connection claim.”

In the King opinion, Chief Judge Rader, joined by Judge Wallach, rejected the veteran’s challenge to the CAVC decision. The opinion reviewed the holdings of Buchanan, Jandreau, and Davidson, but then noted that it must be “presumed [that] the [BVA]’s decision was based on the entire record.” The opinion also noted the BVA’s careful analysis of the reasons why the three negative medical opinions were more probative than the favorable medical opinion submitted by the veteran and the CAVC’s favorable review of that finding. Although it cited Jandreau and Davidson, the opinion also observed that the CAVC explicitly noted that Mr. King’s wife lacked the requisite medical training or expertise to render a diagnosis and therefore could not offer a “competent opinion as to medical causation.” Chief Judge Rader concluded that the CAVC had applied the correct law and dismissed the appeal because the issue of whether that law had been applied correctly was beyond the Federal Circuit’s jurisdiction.

Judge O’Malley rather vehemently dissented from the majority’s interpretation of the proceedings below. In her view, “[t]hough it tries mightily, the majority cannot rewrite the decisions below.” Judge O’Malley read the BVA’s discussion of the lay evidence as an impermissible blanket rejection of the type that the Federal Circuit had previously reversed in Buchanan, Jandreau, and Davidson. She criticized the majority for claiming that it did not “ignore the precedent of Jandreau,” for failing to cite to Jandreau and its progeny, and for instead citing to contrary case law which Jandreau had overruled. She further noted that the BVA had used language

203. Id. at 1344.
204. Id. at 1345–44.
205. Id. at 1344–45 (citing Gonzales v. West, 218 F.3d 1378, 1380–81 (Fed. Cir. 2000)).
206. Id. at 1345.
207. Id.
208. Id. at 1346.
209. Id. at 1346 (O’Malley, J., dissenting).
210. Id.
211. Id. at 1346–47.
212. Id. at 1347. The statement that the CAVC “failed to cite Jandreau and its
strikingly similar to the language it used in Davidson. Accordingly, she concluded that the CAVC “erred as a matter of law by endorsing the BVA’s refusal to consider the Kings’ lay testimony.”

Githens and King are a very interesting pair of cases because all three of the Federal Circuit’s recently appointed judges participated in one or the other, and two of those judges wrote opinions. When faced with ambiguity, Judges Reyna and Wallach tended toward interpreting CAVC decisions as not violating well-established law. In contrast, Judge O’Malley’s approach is strikingly more aggressive in placing the burden on the CAVC to show unambiguously that it was applying the correct law. Although a general rule for resolving ambiguity on the part of the CAVC would be helpful given how vital this kind of resolution can be to the outcome of a case, neither Githens nor King articulated such a rule. It is not apparent that the court has ever been asked to adopt a general rule of this nature, but given the court’s analysis of the meaning of “review” expressed in Gonzales v. West, such an argument might gain traction if it were to be made.

progeny,” id., seems plainly incorrect as the CAVC decision states, “a claimant’s lay testimony may be sufficient to establish one or more of the elements of a claim for service connection.” King v. Shinseki, No. 09-2176, 2011 WL 1042185, at *5 (Vet. App. 2009); see also Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (vacating a decision of this Court that “stated categorically that a ‘valid medical opinion’ was required to establish nexus, and that [a lay person] was ‘not competent’ to provide testimony as to nexus’); Jandreau v. Nicholson, 492 F.3d 1372, 1376–77 (Fed. Cir. 2007) (holding that “[l]ay evidence can be competent and sufficient to establish a diagnosis when . . . a lay person is competent to identify the medical condition” and providing, as an example, that a layperson would be competent to identify a condition such as a broken leg, but would not be competent to identify a form of cancer).

213. King, 700 F.3d at 1347 n.1 (O’Malley, J., dissenting).

214. Id. at 1348. This phrasing is particularly interesting. It is unclear how the Federal Circuit can conclude that the CAVC erred in “endorsing” a portion of a BVA decision without treading into the forbidden territory of reviewing the CAVC’s application of the law to the facts of a particular case. As has been noted in the past, the Federal Circuit occasionally appears to bypass decisions of the CAVC and review the underlying BVA decisions directly, but it has not squarely explained when such analysis is within the scope of its review. See Ridgway, Changing Voices, supra note 1, at 1193–96 (discussing Menegassi v. Shinseki, 658 F.3d 1379, 1383 (Fed. Cir. 2011), in which the court assessed whether an error by the CAVC was prejudicial). The dissent in that case argued that the case should have been remanded to the BVA because the Federal Circuit could not make a determination as to what the BVA would have decided had it applied the correct standard in the first place. Id. at 1384–85 (Dyk, J., dissenting).


216. See, e.g., King, 700 F.3d at 1347–48 (O’Malley, J., dissenting) (decrying the use of overruled law in the CAVC opinion).

217. 218 F.3d 1378, 1380–81 (Fed. Cir. 2000).
4. The right to effective assistance of counsel before the CAVC

The final case addressing an issue related to judicial review concerned the quality of representation at the CAVC level. It is well established that in the criminal context, the Sixth Amendment guarantees defendants the right to assistance from counsel that meets the minimum standards of professional representation.\footnote{See Strickland v. Washington, 466 U.S. 668, 684–87 (1984) (holding that criminal defendants have a right to the effective assistance of counsel).} In \textit{Strickland}, the Court held that criminal defendants have a right to the effective assistance of counsel.\footnote{Id. at 685–86.} Many have pushed to expand this right beyond the criminal arena. In \textit{Pitts v. Shinseki},\footnote{700 F.3d 1279 (Fed. Cir. 2012).} the Federal Circuit rejected an attempt to expand this right into the arena of veterans claims. Judge Bryson, joined by Judges Dyk and Prost, stated clearly that “the Constitution does not guarantee effective representation of counsel in connection with veterans’ benefits appeals before the CAVC.”\footnote{Id. at 1281.}

The outcome of \textit{Pitts} was predictable, as appellants have achieved little success in expanding \textit{Strickland} beyond the area of criminal law, and numerous decisions have rejected the assertion of a general right to effective assistance of counsel in civil cases, especially where property interests are at stake.\footnote{Id. at 1284 (citing Nelson v. Boeing Co., 446 F.3d 1118, 1119 (10th Cir. 2006); Slavin v. Comm’r, 932 F.2d 598, 601 (7th Cir. 1991); Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985) (per curiam); Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980) (per curiam)).} A notable exception has been deportation proceedings, in which some federal courts of appeals have held that given the liberty interest of the individual subject to the removal proceeding, that individual has a right to effective assistance of counsel.\footnote{\textit{Pitts}, 700 F.3d at 1285 (listing cases holding that this right exists in the context of removal hearings).}

The appellant in \textit{Pitts} grounded his argument in the assertion that “the interests at stake in a veteran’s disability benefits claim are sufficiently important to the claimant that such cases should be treated like removal proceedings, and not like other civil cases involving only property interests.”\footnote{Id. at 1286.} The court rejected this argument and analogized the interests at stake in veteran benefit claims to other benefits, such as Social Security disability payments.
and welfare assistance, benefits for which claimants have no right to the effective assistance of counsel.\footnote{225}

Despite Pitts’ predictable result, it solicits two observations. First, if the right to effective assistance of counsel were extended to any form of monetary government benefit, it would be very difficult to limit it to veterans law. Veterans law is often considered to be in a bubble and the Federal Circuit has emphasized the unique nature of this area.\footnote{226} Yet, the constitutional issues that arise in veterans law cases often have implications on other areas of the law.\footnote{227} Considering Pitts in the context of the recent same-sex marriage cases, one must wonder if advocates of an expansive view of constitutional rights have begun to notice that few appellants are as sympathetic as disabled veterans. For a savvy crusader, veterans law would be a tempting place to look for a beachhead in expanding constitutional interpretations.

Second, Pitts is another example of how the Federal Circuit dealt with attempts to fundamentally reengineer the dynamic of judicial review in 2012. It is impossible to determine whether counsel has been effective in a particular case without delving deeply into the complexities of a case. However, the Federal Circuit’s restrictions on conducting factual review in veterans cases do not apply to constitutional issues. Thus, a different holding in Pitts could have opened the door to a much more searching form of review in many appeals from the CAVC, which could have led to a substantial change in the relationship between the courts.\footnote{228}


\footnote{226. See, e.g., Hodge v. West, 155 F.3d 1356, 1362–64 (Fed. Cir. 1998) (criticizing the CAVC for looking to the Social Security system for guidance in interpreting procedural provisions in the veterans benefits system).}

\footnote{227. See Ridgway, \textit{Changing Voices}, supra note 1, at 1181–82 (speculating that the Federal Circuit and another circuit could issue conflicting rulings on the constitutionality of veterans benefits for same-sex spouses).}

\footnote{228. Whether such arguments would be fruitful is a matter of speculation that depends heavily on the actual quality of representation veterans receive before the CAVC. There has been no study of this issue. Nonetheless, it is not difficult to find recent CAVC decisions commenting on the poor performance of counsel. See, e.g., Harrison v. Shinseki, No. 11-0567, 2012 WL 2888743, at *1 (Vet. App. July 16, 2012) (reminding counsel of the professional responsibility to conduct research and review the record before advancing meritless arguments); Schmidt v. Shinseki, No. 10-0877, 2012 WL 2402691, at *1 n.1 (Vet. App. June 27, 2012) (reminding counsel of the professional responsibility to conduct research and review the record before advancing meritless arguments); Steward v. Shinseki, No. 10-1630(E), 2011 WL 3667655 (Vet. App. Aug. 23, 2011) (warning counsel that subsequent frivolous petitions could result in sanctions); \textit{see also} \textit{MODEL RULES OF PROF’L CONDUCT R. 1.1} (2012) (defining and discussing competence).}
5. Substitution

Substitution was the final issue of judicial review addressed by the Federal Circuit in 2012. Until 2008, a claim for benefits died with the veteran. When a veteran died with a pending claim, certain survivors were permitted to file a separate claim for “accrued benefits” asserting entitlement to the unpaid benefits that would have been payable had the veteran been awarded benefits. However, an accrued benefits claimant was required to start the claim process from the beginning at the regional office level, the substitute could not submit additional evidence in support of the claim beyond that which was on file at the date of the veteran’s death. The practice of the courts when a veteran died was to vacate the BVA decision and dismiss the appeal so that the non-final BVA decision would not have any preclusive effect on a future accrued benefits claim.

At the Federal Circuit, the veteran in Reeves v. Shinseki died three days after filing his notice of appeal. His widow filed a timely motion to be substituted in the appeal under Federal Rule of Appellate Procedure Rule 43(a)(1). The government objected and argued that she could not properly be substituted until she demonstrated that she had filed a claim for accrued benefits. In an opinion by Judge Mayer, the Federal Circuit agreed that substitution required the movant to show standing as well as meet the technical requirements of Rule 43. The court concluded, however, that the widow’s “motion to be substituted for her husband qualifies as an informal claim for accrued benefits” and, thus, that no separate claim was necessary. Noting the government’s concern regarding the ability of the Federal Circuit “to make factual findings on whether an individual qualifies as an appropriate accrued benefits claimant,” the Federal Circuit concluded that, because the widow’s status in this


230. See 38 U.S.C. § 5121 (2006) (defining “accrued benefits” as unpaid benefits that would have been payable to the veteran had they been awarded).


232. Id. at 54–55.

233. 682 F.3d 988 (Fed. Cir. 2012). In addition to the substitution issue discussed here, Reeves also included an unrelated substantive ruling that is addressed separately below. See infra Part II.B.2.

234. Id. at 992.

235. Id.

236. Id. at 993.

237. Id. at 992–93.

238. Id. at 993.

239. Id. at 994.
case was not in doubt, it did not need to seek fact finding by VA before proceeding. 240 Perhaps more importantly, the court noted that its ruling was coming more than a year after the veteran’s death and, therefore, that denying the motion would leave the widow without a claim and beyond the time to file one. 241

Reeves is consistent with a long line of cases in which the Federal Circuit has endeavored to make the claims process as foolproof as possible. Particularly in the arena of equitable tolling, the court has consistently held that any good faith attempt to make a filing must be accepted, regardless of whether the claimant satisfied technical requirements that the court deems unnecessarily burdensome. 242 From this perspective, the court’s decision in Reeves was foreseeable.

B. Service Connection

The Federal Circuit decided three cases addressing the substance of disability compensation in 2012. As with several of the cases discussed above, two of these cases involved attempts to revisit areas that could easily have been viewed as settled prior to the most recent decisions. In one case, the court made a ruling that was consistent with a long line of precedent. In the other, however, the court muddied the waters in a divided opinion over a sharp dissent asserting that the majority was ignoring well-established law.

1. Personality disorders

In general, compensation is payable to veterans for disabilities resulting from injury or disease suffered while in the line of duty. 243 Conversely, certain conditions such as congenital or developmental defects are defined by regulation as noncompensable pre-existing

240. Id. The court did not hesitate to note that its ruling “does not mean that on remand VA cannot have Mrs. Reeves file additional paperwork if necessary to confirm her status as the appropriate accrued-benefits beneficiary before awarding her any benefits.” Id. at 994 n.4.

241. Id. at 995 n.5. At this point, the opinion uses particularly sharp quotations from Comer v. Peake, 552 F.3d 1362, 1369 (Fed. Cir. 2009), and Barrett v. Nicholson, 466 F.3d 1038, 1044 (Fed. Cir. 2006), that could be read as implying that the government’s opposition to the motion was unjust. However, it is not apparent that the government would have had any continuing objection had the widow responded by simply filing her claim with the regional office.

242. See, e.g., Durr v. Nicholson, 400 F.3d 1375, 1380–83 (Fed. Cir. 2005) (rejecting the CAVC’s requirement that a notice of appeal contain the claimant’s address, telephone number, and VA claims file number); Santana-Venegas v. Principi, 314 F.3d 1293, 1298 (Fed. Cir. 2002) (holding that the misfiling of a notice of appeal at VA regional office from which the claim originated tolled the 120 day judicial appeal period).

conditions. This regulation specifically identifies personality disorders as one such pre-existing condition.

In *Morris v. Shinseki*, the court faced a complicated argument from a veteran seeking to avoid the clear language of VA’s regulation on pre-existing conditions. The veteran in *Morris* complained of psychiatric symptoms and was discharged in 1964 after serving a little over two months in the Army. When he filed a claim for compensation for a psychiatric condition in 1966, he asserted that he had suffered a nervous breakdown in basic training due to mental and physical abuse by a drill sergeant. The regional office rejected his claim, finding that his mental condition existed prior to service and was not aggravated by it. In 1986, the veteran submitted new evidence to reopen his claim, but in 1988 the BVA denied the claim on the basis that the veteran’s disability was a personality disorder that was by definition not compensable.

The proceedings on appeal began in 2004 when the veteran filed a motion asserting CUE in the 1988 BVA decision. The veteran argued that he should have been compensated, regardless of the evidence in his service records indicating that his condition was a personality disorder, because the BVA should have relied on the statutory presumptions of service connection and sound condition to find the disability compensable. The BVA rejected the CUE motion after concluding that the evidence supported a finding that the veteran had a personality disorder and that neither the line-of-duty presumption nor the presumption of sound condition could circumvent the bar on compensation for a personality disorder. On appeal, the CAVC agreed with the BVA in a single-judge decision.

In a lengthy opinion by Judge Schall, the Federal Circuit also rejected the appellant’s CUE argument. The length of the decision

---

244. 38 C.F.R. § 3.303(c) (2012).
245. Id.
246. 678 F.3d 1346 (Fed. Cir. 2012).
247. Id. at 1347.
248. Id.
249. Id.
250. Id. at 1348.
251. Id. at 1349.
252. Id. (explaining that the veteran’s argument rested on 38 U.S.C. § 1110, 1111 (2006)).
253. Id. at 1350.
254. Id. at 1350–51.
255. See id. at 1354–56 (finding the lower tribunals did not err in denying appellant’s claims for compensation and finding the presumption of soundness inapplicable).
was notable because counsel for the appellant had been unsuccessfully presenting variations of the same arguments for years. Indeed, the opinion largely cited prior chapters in the saga of the same counsel’s attempts to challenge the accepted interpretations of the line-of-duty presumption and the presumption of sound condition. Although the court elaborated at length, the essence of its opinion was that the core components of the veteran’s argument had previously been rejected in Shedden v. Principi, Terry v. Principi, and Conley v. Peake. Ultimately, the outcome of Morris was the same as those of prior opinions: personality disorders are not legally compensable, and because Mr. Morris sought compensation for a personality disorder, no further examination into causality was required.

Judge Dyk wrote separately, although he agreed with the court’s opinion. He emphasized that the statutory terms of “injury” and “disease” were ambiguous. Thus, Judge Dyk wrote that, under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. the Secretary’s interpretations of the regulation were entitled to deference. Judge Dyk’s statement is notable as yet another example of an opinion discussing how to resolve ambiguity in a veterans benefits statute by mentioning either Chevron or Brown v. Gardner, but not both, and without attempting to reconcile the tension between them.

Perhaps the most interesting aspect of the opinion in Morris is the fact that the Federal Circuit exercised its jurisdiction and interpreted the authorities at issue without regard for the procedural posture of the case as a CUE issue. In its decision, the Federal Circuit noted that “[a] determination that there was CUE must be based on the

257. 381 F.3d 1163.
258. 340 F.3d 1378.
259. 543 F.3d 1301.
260. Morris, 678 F.3d at 1354.
261. Id. at 1356 (Dyk, J., concurring).
262. Id.
264. Morris, 678 F.3d at 1356 (Dyk, J., concurring).
record and the law that existed at the time of the prior adjudication in question.”

As a result of this standard, “a recent or novel interpretation of law cannot be used to support a CUE motion, because any interpretation would not change what the law was understood to mean at the time of the original decision.”

Although the court could have simply dismissed Morris’s incredibly convoluted argument, as a novel interpretation not clearly accepted by VA in 1988, it took great pains to set forth his argument in a more comprehensible manner.

2. Section 1154(b)

For veterans seeking compensation for injuries that occurred in combat, 38 U.S.C. § 1154(b) is a crucial tool in successfully prosecuting claims. Combat records often do not contain details or mention the specific injuries suffered by individual members of a unit. The statute provides that

[i]n the case of any veteran who engaged in combat . . . , the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such . . . .

This World War II-era framework is confusing because it refers to the evidence being “sufficient proof of service-connection,” yet mentions only “evidence of service incurrence or aggravation of such injury or disease.”

The former phrase suggests that the provision makes the evidence identified sufficient by itself to grant a compensation claim, but the later phrase indicates that the provision applies only to the

267. Morris, 678 F.3d at 1351 (emphasis added) (quoting Wilsey v. Peake, 535 F.3d 1368, 1371 (Fed. Cir. 2008)).


269. Indeed, the court hedged its bets as to whether it had even properly interpreted the argument by summarizing it with the following disclaimer: “In short, we understand Mr. Morris to be saying the following . . . .” Morris, 678 F.3d at 1352.


271. Id. (emphasis added).
second element of a claim, which requires an in-service injury or disease.272

After disposing of the substitution issue discussed above, the substantive portion of Reeves turned to arguments about the precise effect of this provision. The veteran in Reeves saw heavy combat as a mortar crewman during his three years of service in World War II.273

In 1981, thirty-six years after service, he applied for benefits for hearing loss, stating: “During my service I experienced a hearing loss due to firing [an] 81 mm mortar,” and “[m]y hearing, especially the right ear, has been deteriorating ever since my active duty.”274 He also submitted medical records indicating that he had been diagnosed with “nerve-type hearing loss in 1962.”275 During the processing of that claim, the veteran also testified that “he had first noticed his hearing loss in the summer of 1946.”276 The BVA denied the claim in 1983, however, because Reeves’ first clinical recording of hearing impairment was nearly two decades after serving in the military and, thus, too remote to attribute the condition to his service.277

Eventually, VA reopened and granted the veteran’s claim in 2004 after he submitted additional medical evidence documenting treatment for hearing loss from 1946 to 1954.278 The veteran then filed a motion asserting CUE in the 1983 decision in hopes of obtaining compensation for the period from 1983 to 2004.279 The veteran’s theory was that the BVA had failed to properly apply the § 1154(b) presumption for that period.280 In 2006, a BVA decision rejected this argument, stating that the presumption did not apply because “actual evidence of noise exposure . . . was available.”281 The BVA decision on appeal further noted that, under the law as it existed in 1983, the BVA panel included a doctor and that the issue

272. The three central elements of a compensation claim are as follows: (1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disability. Shedden v. Principi, 381 F.3d 1163, 1167 (Fed. Cir. 2004); see also Hickson v. West, 12 Vet. App. 247, 253 (1999); Caluza v. Brown, 7 Vet. App. 498, 506 (1995), aff’d, 78 F.3d 604 (Fed. Cir. 1996).
274. Id.
275. Id.
276. Id.
277. See id. at 991 (noting that Reeves’s “earliest clinical recording of hearing impairment was by [Reeves’] private physician in November 1962”).
278. Id.
279. Id.
280. Id.
281. Id.
of causation was decided against the veteran’s claim based upon the medical expertise of that doctor. 282 On appeal, the CAVC agreed with the BVA that the veteran’s argument amounted to a mere disagreement with how the evidence had been weighed. 283

Judge Mayer’s opinion, which Judge Moore joined, is confusing. Initially, the opinion asserted that the government argued there was no CUE in the 1983 BVA decision due to the immaterial impact the combat presumption provision would have had if it had been applied in the case. 284 However, the opinion failed to identify what error the government conceded, and the government’s brief does not appear to contain either a concession of an error or an argument that any error was harmless. 285 In fact, the government’s central argument was that “Davidson v. Shinseki . . . explained that 38 U.S.C. § 1154(b) . . . applies only in determining whether the second element has been met, i.e., whether a disease or injury was incurred or aggravated in service.” 286

Without addressing Davidson, the majority opinion stated that “[t]he fundamental flaw in the government’s argument is that it conflates the question of whether Reeves was exposed to acoustic trauma with the issue of whether he suffered permanent hearing loss while on active duty.” 287 According to the majority, § 1154(b) applies not only to the question of whether a veteran suffered acoustic trauma, but also “to the separate question of whether he also suffered permanent hearing loss while on active duty.” 288 In other words, the presumption applies not only to the cause of the disability but also to “the disability itself.” 289 In the logic of the majority opinion, “[i]f [the veteran] had been able to use the § 1154(b) presumption to show that he incurred a permanent hearing disability in service, it presumably would have been far easier for him to establish that there was a nexus . . . .” 290 Accordingly, the majority remanded for the CAVC to “reevaluate” the claim. 291

Judge Bryson dissented, citing numerous Federal Circuit and CAVC decisions supporting the government’s interpretation of the

282. Id.
283. Id. at 992.
284. Id.
286. Id. at *28 (internal citation omitted).
287. Reeves, 682 F.3d at 998–99.
288. Id. at 999.
289. Id.
290. Id.
291. Id. at 1000.
meaning of § 1154(b). Judge Brys asserted that § 1154(b) is concerned only with injuries or diseases incurred while in service, and not whether the veteran has disabilities that are caused by these earlier in-service injuries or diseases. Judge Bryson criticized the majority’s analysis for “conflating the separate requirements to show in-service injury and to show nexus with a current disability.”

Each of the formulations articulated by the majority indicates that applying § 1154(b) would lead to the presumption that the veteran’s hearing loss was “permanent.” However, if the veteran’s hearing loss in service were actually permanent, then there would be no need to offer any proof of nexus because nexus is presumed when the symptoms of the disability have existed since service. Thus, if the majority meant what it said, then it should have simply reversed and awarded benefits rather than remanding for a separate evaluation of the nexus issue.

The majority opinion may be attributable in part to the fact that Judge Mayer himself is a combat veteran and a recipient of the Bronze Star, like the veteran in Reeves. Based upon his familiarity with combat, he might have been particularly incredulous that VA would have denied a hearing loss claim from a veteran with such obvious exposure to repetitive acoustic trauma. However, VA’s tendency to require corroborating medical evidence of treatment to document post-service disabilities in many situations was not struck down by the Federal Circuit until 2006, when the Federal Circuit stated that “the lack of contemporaneous medical evidence should not be an absolute bar to the veteran’s ability to prove his claim of entitlement to disability benefits based on . . . competent lay evidence.” In light of this 2006 development, the majority’s questioning of the 1983 decision can be viewed as an attempt to apply recent case law retroactively rather than an attempt to interpret § 1154.

Aside from creating confusion as to the previously settled meaning of § 1154, Reeves is notable because—like Morris—it ignored the CUE posture of the case. As in Morris, the appellant was arguing for a

292. Id. at 1002 (Bryson, J., dissenting) (quoting Leonhardt v. Shinseki, 463 F. App’x 942, 946 (Fed. Cir. 2012)).
293. Id. at 1002.
294. See 38 C.F.R. § 3.303(b) (2012) (“With chronic disease shown as such in service . . . subsequent manifestations of the same chronic disease at any later date, however remote, are service connected.”).
novel interpretation of a statute. The fact that the panel was divided on the argument should have been enough by itself to demonstrate that the interpretation being offered was not clear and unmistakable. The appeal could have been denied on that ground regardless of what the outcome would be on direct review.

The point is hardly academic. Ignoring the principle that a new interpretation of a statute “does not retroactively invalidate every prior, final decision based upon the prior understanding of the law,” creates serious problems. Hearing impairment is the most common disability for which veterans file compensation claims and determining whether hearing loss was caused by service—even applying the benefit of the doubt standard—is difficult. Taking Reeves at face value, hundreds of thousands—if not millions—of hearing loss claims dating back to World War II could be challenged for CUE because VA did not presume at the time that acoustic trauma suffered during service was permanent.

3. Remarried widows

If a veteran dies of causes that are found to be connected to service, that veteran’s surviving spouse may be awarded dependency and indemnity compensation (DIC) benefits. VA has historically defined the term “surviving spouse” as one who “has not remarried.” In 2003, Congress enacted legislation to address its concern that this definition was discouraging some older surviving spouses from remarrying. The result was an exception for those surviving spouses who remarry after the age of fifty-seven.

298. Hearing impairments are easily the most frequent condition for which claims are granted. In fiscal year 2011 alone, more than 840,000 veterans were serviced connected for tinnitus and more than 700,000 were service connected for hearing loss. PTSD was third at approximately 500,000. See Veterans Benefit Admin., Annual Benefits Report: Fiscal Year 2011 5 (2012), available at http://www.vba.va.gov/REPORTS/abr/2011_abr.pdf.
303. 38 U.S.C. § 103(a)(2)(B) (“The remarriage after age 57 of the surviving spouse of a veteran shall not bar the furnishing of [DIC] benefits to such person as the surviving spouse of the veteran.”).
In *Frederick v. Shinseki*\(^{304}\) the Federal Circuit interpreted the 2003 Act’s effect on those who had remarried while over the age of fifty-seven, but did so prior to the passage of the Act. The Act provided that, “[i]n the case of an individual who but for having remarried would be eligible for benefits” benefits would be awarded only if the claimant “submits an application for such benefits . . . not later than the end of the one-year period beginning on the date of the enactment of this Act.”\(^{305}\) The appellant in *Frederick* was the widow of a veteran who had lost her DIC benefits in 1986 after remarrying.\(^{306}\) In late 2007, she wrote to VA seeking reinstatement of her benefits.\(^{307}\) VA denied her claim because she had not applied within one year of the new law.\(^{308}\)

On appeal to the CAVC, the widow argued that she was not required to reapply for benefits.\(^{309}\) Specifically, she argued that the statute required an application for DIC be filed by a specific date, and she met that requirement because her original application from 1970 met that requirement.\(^{310}\) The one-year requirement, she contended, applied only to surviving spouses who had never applied for DIC prior to remarrying.\(^{311}\)

In a panel opinion by Chief Judge Kasold, the CAVC agreed that the law “does not create a one-year ‘window’ in which to submit an application.”\(^{312}\) Instead, “the language very clearly creates only an end date by which an application must be submitted.”\(^{313}\) In the court’s view, Congress’s intent was clear because, “in the same Public Law in which Congress created this end-date provision, it amended another statutory provision dealing with veterans benefits by replacing an explicitly provided window, . . . with an end-date provision similar to the end-date provision applicable here.”\(^{314}\) The CAVC also noted that VA had never created an application for reinstatement of DIC benefits subsequent to the passage of the law,\(^{315}\) and that its interpretation was consistent with the generally pro-claimant spirit of the veterans benefits system.\(^{316}\)

---

304. 684 F.3d at 1265–66.
306. *Frederick*, 684 F.3d at 1265.
307. *Id.* at 1266–67.
308. *Id.* at 1267.
310. *Id.*
311. *Id.*
312. *Id.* at 338.
313. *Id.*
314. *Id.*
315. *Id.* at 339.
316. *Id.* at 339–40.
In an opinion by Judge Clevenger, the Federal Circuit disagreed with the CAVC. First, the court strongly emphasized that the limitation was written in the present tense. The court rejected the CAVC’s drafting argument on the grounds that the change referenced was merely a “technical correction” that extended a window filing requirement rather than replacing it. The Federal Circuit also noted that an additional section of the law “states that the Secretary is not obligated to readjudicate a claim that ‘is not submitted during the one-year period.’” As a result, the Federal Circuit concluded that the language was not ambiguous and ruled that the survivor had not filed a timely claim.

Judge Reyna dissented. In his view, the CAVC are “specialists in this area of law,” and decided the case correctly when it concluded that the Act provided only an end date for filing applications rather than a window. In Judge Reyna’s view, the issue was resolved by the plain language of the statute, which did not use any terms clearly describing a one-year window. He found the verb tense to be insignificant because, in his view, common rules of grammar and congressional usage supported the CAVC’s interpretation of the Act. In addition, Judge Reyna noted that even if the language of the statute were ambiguous, “any interpretive doubt [should] be resolved in the veteran’s favor.”

One notable aspect of Frederick was the majority’s citation to the House and Senate manual on legislative drafting. Professor Victoria Nourse has recently argued that courts fail to appreciate Congress’s internal rules when interpreting the statutes it has

---

318. Id. at 1271.
320. Id. at 1273.
321. Id. (Reyna, J., dissenting). This comment is interesting because it shows a level of respect for the CAVC that is not often expressed by the Federal Circuit. Taken with his analysis in Githens, supra notes 182–88 and accompanying text, Judge Reyna may be moving toward a distinctive approach to reviewing CAVC decisions.
322. Frederick, 684 F.3d at 1274 (Reyna, J., dissenting).
323. Id.
324. Id. at 1275.
325. Id. at 1276 (citing Brown v. Gardner, 513 U.S. 115, 117–18 (1994)). Judge Reyna does not mention Chevron in his dissent, which makes it an interesting contrast to Judge Dyk’s concurrence in Morris, which stated that even if the statute at issue in that case were ambiguous, then the court would owe deference to the Secretary under Chevron. See supra notes 261–66 and accompanying text.
326. See Frederick, 684 F.3d at 1270 (citing OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL § 103(a) (1997); OFFICE OF THE LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE §§ 102(c), 351(f) (1995)).
The majority’s citation to Congress’s rules in *Frederick*, therefore, is a positive sign from Professor Nourse’s perspective. However, the majority failed to recognize Nourse’s additional recommendations, as the court cited legislative history without providing context or identifying the role of the speaker. Judge Reyna dismissed the legislative history cited by the majority as merely a single quotation expressing an idea that “was rejected by Congress, as evidenced that the Act was passed containing language that goes the other way.” Upon closer inspection, the legislative history at issue, a statement by the chairman of the Senate Veterans Affairs Committee announcing the compromise reached with the House of Representatives, was made just prior to the Senate’s passage of the bill in its final form. In that context, the statement that remarried spouses would have one year to “apply for the reinstatement” of their benefits is extremely strong evidence that the majority’s interpretation of the enacted language was correct. By not fully exploring the legislative history, the majority missed an opportunity to perhaps sway the dissent.

**C. Effective Date**

The effective date for a reopened claim generally can be no earlier than the filing of the application to reopen based upon new and material evidence, but because of the informal nature of the claims process, determining when a claimant first attempted to reopen a claim can be difficult. Applicants are not required to use VA forms in filing a claim, and forms intended for other purposes can be interpreted as claims if they express the requisite intent. Frequently, effective date disputes involve claimants’ representatives sifting through years of past correspondence in a file, searching for any document that could plausibly be asserted as an application prior to the one recognized by VA. In *Akers v. Shinseki*, the Federal

---


328. *Id. at* 109–10.

329. *Id. at* 118.

330. *Frederick*, 684 F.3d at 1276 (Reyna, J., dissenting).


332. Nourse, *supra* note 327, at 98–99 (asserting that “later textual decisions trump earlier ones”).


334. *See* Brokowski v. Shinseki, 23 Vet. App. 79, 84–85 (2009) (noting that a communication or action indicating an intent to apply for one or more benefits may be interpreted as an informal claim); *see also* 38 C.F.R. § 3.155(a) (2012) (same).

335. 673 F.3d 1352 (Fed. Cir. 2012).
Circuit addressed a key issue in identifying informal applications to reopen: whether the correspondence must include or proffer the existence of some new evidence.

The appellant in Akers was a widow seeking DIC benefits. After VA denied her initial claim, she filed a notice of disagreement but did not file her substantive appeal in time to perfect her appeal to the BVA. The BVA eventually reopened the appellant’s claim and granted her benefits. In an attempt to secure an effective date prior to the recognized application to reopen, she argued that her untimely Substantive Appeal should have been recognized as an application to reopen. The BVA held that the appeal could not be viewed as an informal application to reopen because it did not express any such intent. The CAVC affirmed the BVA’s finding, but in doing so included a statement that the Substantive Appeal could not have been an application to reopen because it was not accompanied by any new evidence.

Before the Federal Circuit, the widow argued that the CAVC’s new evidence requirement was legally erroneous. Initially, the government responded that the Federal Circuit lacked jurisdiction because the CAVC’s decision, supported by an independent factual finding, contained no expression of the requisite intent needed for the Substantive Appeal.

In an opinion by Judge Linn, the court began by rejecting the government’s jurisdictional argument, stating, “it is apparent that the Veterans Court based its holding not exclusively on that fact finding, but also on its interpretation of 38 C.F.R. § 3.156 and implicitly the statutory provision it implements, 38 U.S.C. § 5108.” The court’s curt dismissal of the government’s argument is troubling because it fails to address the contention that the CAVC’s decision was supported by an independent basis—that the substantive appeal contained no expression of an intent to reopen. The opinion cites no authority suggesting that the requisite intent is not an independent requirement, nor is it apparent why it would not be. In

336. Id. at 1354.
337. Id.
338. Id.
339. Id.
340. Id.
341. Id. at 1355.
342. Id.
343. Id. at 1355–56.
344. Id. at 1356.
failing to address this argument, the court seemed to be reaching to address an issue that was irrelevant to the outcome.

In fact, the court focuses on seemingly irrelevant issues throughout the Akers opinion. For example, the opinion listed the three elements of an informal claim generally, even though these elements do not include a requirement to submit or proffer evidence. Additionally, the court turned to the issue of whether a claim to reopen must be based upon new and material evidence, as stated by the CAVC. Chiefly, the opinion relied upon the explicit duties that VA has to notify a claimant seeking reopening and to assist them in developing new and material evidence. The Akers court observed that these duties would be of limited use if some new evidence were already required as an element of reopening. Moreover, the court noted that, in this case, the appellant’s assigned effective date was based upon an application that did not appear to have been accompanied by new evidence when the appellant submitted it.

Thus, the court concluded that VA understood the difference between applying to reopen a claim and actually reopening a claim. Nonetheless, the court concluded that the error in the single-judge CAVC decision was harmless because—as the government had argued—there was a “total lack” in the substantive appeal of “evidence of any kind showing an intent to reopen her previously decided claim.”

Judge Lourie concurred in the result. In his view, both the statute and the regulation plainly conditioned the reopening of a claim on the submission of new and material evidence. Therefore he contended that the CAVC decision was correct and that an informal claim to reopen “must, at minimum, indicate an intent to submit the required new and material evidence.” Despite endorsing the articulation in the memorandum decision, Judge Lourie focused on the expression of intent rather than a requirement for an actual submission or proffer.

345. Id. at 1357. To qualify as an informal claim, a communication must (1) be in writing; (2) indicate an intent to apply for benefits; and (3) identify the benefits sought. See Rodriguez v. West, 189 F.3d 1351, 1354 (Fed. Cir. 1999).
346. Akers, 673 F.3d at 1358.
347. Id.
348. Id. at 1359.
349. Id. at 1358–59.
350. Id. at 1359.
351. Id. at 1360 (Lourie, J., concurring).
352. Id.
353. Id.
354. Id. at 1359 n.1 (majority opinion). In this regard, the majority critiqued the concurrence as articulating a distinction without a difference. Id.
Akers is a notable example of the court stretching to reach an issue that was immaterial to the outcome in a non-precedential CAVC decision. Not only was the challenged statement at most harmless error, but the actual effective date award in this case demonstrated that VA was not applying the law in the way that the appellant was arguing would be incorrect. Thus, it is not clear what purpose was served in addressing the appellant’s substantive argument—much less in publishing an opinion on it—when the result appeared to have no effect on the case at hand, VA practice, or the case law of the CAVC.

D. Amount of Compensation

The Federal Circuit’s decisions in the area of compensation continued with the theme of revisiting well-worn issues rather than considering entirely new ones. In one case, the court heard an appeal by the government on an issue in which the government had previously withdrawn an appeal on the same issue. In the other, it again ignored the CUE posture of a case to make a legal ruling on the merits of a novel argument made in a collateral attack.

1. Additional benefits for elderly wartime veterans

Most veterans who receive compensation are rated on a scale of 0–100% disabled, but there are a variety of additional benefits that may be available to severely disabled veterans who meet specified requirements. Some of these provisions date to at least the World War I era, if not earlier.355 In some cases, the true origins of the statutory provisions are obscure and the language used has aged to the point at which its meaning is something less than plain. In 2012, the only en banc decision of the CAVC that was reviewed by the Federal Circuit involved one such provision.

Under 38 U.S.C. § 1513, the “permanent and total disability requirement” that normally attaches to pensions defined in § 1521 is waived for wartime veterans age sixty-five or over.356 Section 1521,


356. 38 U.S.C. § 1513(a) (2006). Section 1513 is consistent with a long history of providing pensions to elderly veterans of wartime service. Prior to the creation of a uniform benefits system for all veterans, special provisions for elderly wartime veterans were routinely passed decades after a conflict was over. See Ridgway, Splendid Isolation Revisited, supra note 40, at 142, 150 n.98, 166.
however, refers to veterans having “a disability rated as permanent and total.” In Chandler v. Shinseki, the Federal Circuit considered whether the different phrasings of § 1513 and § 1521 represent distinctly different requirements or simply an artifact of their long history.

The saga of Chandler started in 2006 with a different CAVC opinion, Hartness v. Nicholson. Hartness was the first CAVC opinion to address the interaction of §§ 1513 and 1521. Hartness was also one of the first major decisions of the second generation of CAVC judges to address the friction between Gardner and Chevron.

In Hartness, a panel of the CAVC ruled that § 1513 waived the requirement to have “a disability rated as permanent and total” as articulated in § 1521(e). In doing so, the CAVC followed the same rhetorical track as the Supreme Court’s decision in Gardner by insisting that the language of the statute was plain, but buttressing its conclusion by noting that the rule of veteran-friendly interpretation would resolve any doubt.

The first interesting aspect of Chandler is the procedural path that the case took to the Federal Circuit. VA appealed Hartness after it was decided in 2006. The government then filed an unopposed motion to withdraw the Federal Circuit appeal before the briefs were filed. One month after the appeal was withdrawn, the VBA issued an informal guidance letter directing front-line adjudicators not to apply Hartness in cases in which the veteran was already receiving benefits under § 1521 prior to turning sixty-five years old. The terse letter, which offered no justification in its single sentence of guidance, had the effect of denying a benefit to totally disabled veterans that was available to veterans who were not totally disabled.
The CAVC decision in *Chandler* strongly rebuked VA’s action, warning that it was improper to use a guidance letter “to ignore the reasoning and holding of *Hartness* in cases that were not factually identical in lieu of pursuing an appeal,” and stating that “nonacquiescence by the Secretary is not a legitimate tactic for dealing with opinions with which he may disagree.”

On review, the Federal Circuit reversed the CAVC’s en banc decision in *Hartness* in a panel opinion by Chief Judge Rader, which was joined by Judge Moore. The opinion noted the CAVC’s reliance on *stare decisis*, but essentially ignored the issue of whether VA could decline to apply *Hartness*. Instead, the opinion focused on the language and structure of § 1513 and § 1521 to conclude that two phrases in question must have different meanings. In the view of the Federal Circuit, “§ 1513(a) only eliminates the permanent and total disability requirement in § 1521(a), which applies to all § 1521 subsections.” To the extent that some subsections of § 1521 have additional requirements, such as the requirement that the veteran must have “a disability rated as permanent and total,” the Federal Circuit found the different phrasing meaningful. Therefore, it concluded, § 1513 allows a wartime veteran over the age of sixty-five to be treated as totally disabled, but does not entitle that veteran to be treated as having a single disability that is itself rated as permanent and total.

The most interesting aspect of *Chandler* is the extent to which it shows that the enduring tension between *Gardner* and *Chevron* is no

---

367. *Id.*
368. *Id.* at 30.
369. Chandler v. Shinseki, 676 F.3d 1045, 1045 (Fed. Cir. 2012). The third member of the panel was Judge Ann Aiken, a district judge from Oregon sitting by designation. *Id.* The opinion indicated that she “concurred in the result,” but she did not write separately. *Id.*
370. *Id.* at 1047. The opinion’s two-sentence analysis of the issue is a complete non sequitur: “At the outset, this court detects no waiver of a challenge to *Hartness* in this case. This court has the authority to correct a statutory interpretation of the Veterans Court when it was ‘relied on’ to decide a case—even when it was not contested below.” *Id.* (citing Forshey v. Principi, 284 F.3d 1335, 1350 (Fed. Cir. 2002) (en banc)). Whether the Federal Circuit had authority to review the issue under its jurisdictional statute is separate from whether it should decline to hear the issue because the government forfeited its right of review by withdrawing its earlier appeal. As has been noted elsewhere, one of the costs of the two-tier system of judicial review is the uncertainty caused by the Federal Circuit’s ability to hear issues years after they were decided by the CAVC. In *Chandler*, the Federal Circuit bypassed a golden opportunity to address this concern and offer guidance.
371. *Chandler*, 676 F.3d at 1050.
372. *Id.*
373. *Id.*
closer to being resolved. The issue presented in Chandler was very similar to the one presented in 2011 in Guerra v. Shinseki. The competing opinions of the Federal Circuit and the CAVC in Chandler are also very reminiscent of the competing opinions in Guerra. Guerra involved special compensation beyond the 100% level and similar language involving a requirement that a veteran have a “service-connected disability rated as total.” In Guerra, both sides relied upon the plain language of the statute before falling back on their favored interpretive tiebreaker without resolving the tension between Gardner and Chevron. Although the Federal Circuit opinion in Chandler did rely on Chevron, the fact that four members of the CAVC found that the plain language of the statute compelled the opposite conclusion suggests that the language is actually ambiguous. Nothing in the Federal Circuit’s opinion in Chandler clarifies why the government’s interpretation of the ambiguity should be favored over the veteran-friendly interpretation. The Supreme Court denied the petition for certiorari filed in Guerra, so this critical issue is no closer to being resolved.

The courts did not discuss another interesting aspect of Chandler: the amount of money involved. After Hartness was decided, the decision was targeted repeatedly for abrogation due to the massive amount of money necessary to implement its ruling. When the House Veterans’ Affairs Committee needed nearly a billion dollars to pay for benefits for Filipino veterans of World War II, it proposed to cover the costs of the legislation by recouping the extra $965 million dollars that was due to be paid under Hartness. The aggregate

374. See supra notes 263–66 and accompanying text. This issue was addressed at length in last year’s article. See Ridgway, Changing Voices, supra note 1, at 1204 (noting that despite the uncertainty and support for the petition, the Supreme Court denied certiorari); see also Jellum, supra note 266, at 59 (noting the divide in authority and the absence of guidance from the Supreme Court).


376. 38 U.S.C. § 1114(s) (2006); see Guerra, 642 F.3d at 1052.

377. Guerra, 642 F.3d at 1052 (Gajarsa, J., dissenting) (drawing a different conclusion than the majority on the plain meaning of the statute); see also Ridgway, Changing Voices, supra note 1, at 1292-04 (noting the rejection of the deferential approach of Chevron and the Federal Circuit’s preference for Gardner).

378. In his opinion concurring with the CAVC majority, Judge Davis alone took the position that the language was ambiguous and expressly relied on Gardner to resolve the ambiguity. Chandler v. Shinseki, 24 Vet. App. 23, 31 (2010) (Davis, J., concurring), rev’d, 676 F.3d 1045 (Fed. Cir. 2012).


amounts of money involved in veterans benefits issues are not often discussed by either the courts or academic commentators, but they can be substantial. These factors can generate political interest that may be overlooked when trying to understand the dynamics of veterans law.  

Chandler was a billion dollar decision, yet the face of the opinion portrays no hint of the magnitude of the money involved.

2. Special monthly compensation

A rating of 100% disabled is not the limit of compensation available to severely injured veterans. In fact, there are many additional forms of special monthly compensation, including aid and attendance benefits that may be awarded under what is now 38 U.S.C. § 1114. These forms of aid have a long history and have changed somewhat over the years. The issue presented in Guillory v. Shinseki was whether a regional office had committed CUE in 1967 when it awarded the veteran some special monthly compensation benefits for his severe combat wounds, but not enough to qualify him for aid and attendance.

In an opinion by Judge Dyk, the Federal Circuit held that the single-judge decision had correctly interpreted the version of the special monthly compensation provisions in effect at the time. Initially, the opinion rejected the government’s argument that the Federal Circuit lacked jurisdiction because the appeal was essentially a factual dispute about the application of the law. The court held that, to the extent that the appellant was arguing that the CAVC misinterpreted the meaning of the statutory provisions from 1967, the court had “rule of law” jurisdiction.

The appellant’s argument on the merits pertained to his eligibility for special monthly compensation under § 311(o) of the 1967 version of the statute. That subsection applied to a veteran if he or she “suffered disability under conditions which would entitle him to two

---

382. For example, the CAVC’s opinion in Chandler did note that “the Court’s decision in Hartness has not gone unnoticed in Congress,” which it also cited as an additional reason to defer further action on the issue to the political process. Chandler, 24 Vet. App. at 30.


384. 669 F.3d 1314 (Fed. Cir. 2012).

385. Id. at 1316.

386. Id. at 1320.

387. Id. at 1317–18.

388. Id. at 1318.
or more of the rates provided in one or more subsections (l) through (n) of [the statutory section], no condition being considered twice in the determination.\textsuperscript{389} The essence of the appellant’s position was that he could combine one provision regarding the loss of the use of his legs, and another regarding the loss of the use of his foot, without counting either condition twice.\textsuperscript{390} The opinion swiftly dismissed this argument, noting that such a conclusion would render one of the special monthly compensation provisions regarding the loss of both legs meaningless because the veteran would always qualify for a different, more favorable provision by the application of that interpretation.\textsuperscript{391} 

Despite the seemingly routine nature of the court’s jurisdictional ruling in \textit{Guillory}, it is the most interesting aspect of the opinion. As in \textit{Morris} and \textit{Reeves},\textsuperscript{392} the court ignored the CUE context of the case and addressed the legal issue de novo.\textsuperscript{393} However, the omission is more noticeable in \textit{Guillory} because the issue of jurisdiction was contested. In \textit{Guillory}, the court curtly cited two cases for the proposition that it had jurisdiction to review interpretations of law,\textsuperscript{394} but neither of those cases reviewed the meaning of statutes in a CUE context.\textsuperscript{395} It is not clear that the Federal Circuit’s “rule of law” jurisdiction is as simple in a collateral attack as it is in a direct appeal. The fact that a determination of CUE must be based upon the historical interpretation of the law, regardless of whether the courts later disagree as to its actual meaning, suggests that in many CUE claims the dispute over the law’s meaning is factual rather than legal.\textsuperscript{396} This nuanced issue will have to be addressed in a future Federal Circuit decision.

---

\textsuperscript{389}. \textit{Id.} (quoting 38 U.S.C. § 314(o) (1964)).

\textsuperscript{390}. \textit{Id.}

\textsuperscript{391}. \textit{Id.} at 1319. The Court went on to quickly reject several additional arguments using established law because they were based upon law post-dating VA’s decision, not previously raised, or based upon factual issues. \textit{Id.} at 1319–20.

\textsuperscript{392}. \textit{See supra} notes 246–69, 233–42 and accompanying text.

\textsuperscript{393}. \textit{Guillory}, 669 F.3d at 1318.

\textsuperscript{394}. \textit{Id.} (citing Wilson v. Principi, 391 F.3d 1203, 1208 (Fed. Cir. 2004); Morgan v. Principi, 327 F.3d 1357, 1363 (Fed. Cir. 2003)).

\textsuperscript{395}. \textit{Wilson} was a dispute over attorney fees. \textit{Wilson}, 391 F.3d at 1204. \textit{Morgan} was a direct appeal of a decision that the veteran had not filed a timely appeal of a prior regional office decision. \textit{Morgan}, 327 F.3d at 1358.

\textsuperscript{396}. However, this was not the argument made by the government in contesting jurisdiction in \textit{Guillory}. In \textit{Guillory}, the government asserted that the appeal concerned only the application of the law to the facts. Brief for Respondent-Appellee, Guillory v. Shinseki, 669 F.3d 1314 (Fed. Cir. 2012) (No. 2011-7047), 2011 WL 2532884, at *21–29.
E. Accrued Benefits

Unfortunately, many veterans die waiting for their benefits claims to be decided or their awards to be distributed. The veterans benefits system has a statute that explicitly defines the extent to which unpaid benefits may be paid to a veteran’s heirs at the time of that veteran’s death. Under that law, such benefits are paid, in order of preference, to the veteran’s spouse, children, or dependent parents. Aside from those relations enumerated in the statute, “only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial.”

The final case in the roster of the Federal Circuit’s 2012 veterans law opinions revisited this well settled area of law. The veteran in Youngman v. Shinseki was deemed incompetent to handle his own finances several years before his death. Shortly before his death, he was awarded approximately $350,000, representing nearly twenty years of retroactive benefits. The benefits were not immediately paid because the veteran’s fiduciary had resigned prior to the award. The appellant in Youngman was appointed by VA as the veteran’s fiduciary nine days after the award decision. It took an additional two months for her to complete the certification and bonding process. The veteran died three weeks before this process was completed.

After his death, the fiduciary attempted to claim the unpaid benefits on behalf of the veteran’s cousins, who were his heirs. VA denied the claim because cousins are not among the enumerated relations under § 5121. In a single-judge decision, the CAVC concluded that the statute was controlling and that the claim could not be paid.

On appeal to the Federal Circuit, the fiduciary argued that because the veteran’s entitlement was fully vested at the time of his death and because the benefits would have been paid by VA but for the delay

398. Id. § 5121(a)(6).
399. 699 F.3d 1301 (Fed. Cir. 2012).
400. Id. at 1302.
401. Id.
402. Id.
403. Id.
404. Id. VA appointed the fiduciary on May 12, 2005; however, the fiduciary was certified and bonded until July 27, 2005.
405. Id. at 1302–03.
406. Id. at 1303.
407. Id.
408. Id.
caused by the change in fiduciaries, her claim on behalf of the veteran’s cousins was distinguishable.\footnote{Id.} In an opinion by Judge Newman, the court had little trouble rejecting this argument. The court noted that there was no basis in the statute for treating a fiduciary differently from any other person wishing to serve as a substitute in a claim after a veteran’s death.\footnote{Id.} Moreover, the court noted that there was no reason why individuals that Congress clearly excluded from collecting accrued benefits under normal circumstances should prevail simply because of a procedural quirk caused by the need for a fiduciary in a particular case.\footnote{Id.}

On its face, \textit{Youngman} is a simple, straight-forward decision. What is most notable about it is the lack of commentary on the delay in the fiduciary appointment that occurred. Issues with VA’s fiduciary process have begun to attract significant scrutiny in recent years.\footnote{See, e.g., \textit{Reforming VA’s Flawed Fiduciary System: Hearing Before the Subcomm. on Oversight \\& Investigations of the H. Comm. on Veterans Affairs}, 112th Cong. (Feb. 9, 2012), available at http://veterans.house.gov/hearing/reforming-va%E2%80%99s-flawed-fiduciary-system (addressing the shortcomings of the VA fiduciary system); \textit{U.S. Gov’t Accountability Office, GAO-10-241, Improved Compliance and Policies Could Better Safeguard Veterans’ Benefits} (2010) (describing concerns that VA is not properly protecting beneficiaries’ assets in the fiduciary program); \textit{Office of Inspector Gen., Dept’ of Veterans Affairs, Audit of the Fiduciary Program’s Effectiveness in Addressing Potential Misuse of Beneficiary Funds}, Rep. No. 09-01999-120 (2010) (revealing that VA’s lack of stringent regulation over the fiduciary program fails to protect incompetent beneficiaries).} Moreover, the CAVC held in 2011 that VA’s fiduciary appointment decisions were subject to judicial review.\footnote{Freeman v. Shinseki, 24 Vet. App. 404, 417 (2011) (per curiam).} Thus, issues more directly related to problems with VA’s fiduciary system may soon come before the court.\footnote{For a preview of the types of issues that may be presented, see Solze v. Shinseki, No. 12-1512, 2012 WL 4801411 (Vet. App. Oct. 10, 2012) (alleging that VA violated due process by not appointing a fiduciary in a timely manner).}

### CONCLUSION

The year 2012 saw a rather dramatic shift in the focus of the Federal Circuit’s veterans law decisions. As discussed above, this shift is not surprising in retrospect. The change in membership naturally invited veterans advocates to revisit the fundamental dynamics of the Federal Circuit’s review in search of new opportunities. How long this shift will last remains to be seen. Given how little traction these attempts found, it would not be surprising to see the focus shift back to VA in 2013. If the focus does shift away from the courts and back
to VA, it will not be because the underlying issues driving for greater intervention have been resolved.

This observation is not necessarily a criticism. The dynamic is driven primarily by choices made in the design of the VJRA, rather than by its execution. Although many have imagined a more interventionist role for the courts, no one has recognized the role of the restrictions on attorneys in driving a dynamic that has led the system to greater complexity and delay. By setting up a system in which attorneys have little choice but to perpetually argue for increased procedural burdens on VA, the VJRA set in motion the dynamic that currently frustrates practitioners on all sides of veterans law.

Despite these problems, it is not necessarily true that anyone is to blame. For their part, veterans’ representatives who perpetuate the whack-a-mole dynamic have only been responding to the legal restrictions and financial incentives that constrain them. Neither should the drafters of the VJRA be blamed. It is difficult to accurately predict the consequences of tinkering with a complex system. Indeed, from another perspective, the VJRA has been a huge success. Since its passage, claimants are far more likely to be awarded at least some benefits, and the average award is higher as well. Moreover, external critics of VA have declared judicial review to be an unabashed success in steering VA toward more predictable and lawful decision making.

The real challenge after more than two decades of judicial review by the Federal Circuit is to admit that the fundamental complaint is shifting toward the problems of delay and complexity. These difficulties have been increasing steadily for years and show no signs of abating. Therefore, it makes sense to ask whether the changes wrought by the VJRA need to be revisited to better address this new reality.

The two essential innovations of the VJRA were judicial review and attorney involvement. Each of these has potential for calibration. First, shifting judicial review away from increasing complexity and toward bringing resolution will require more closely examining the Chenery cases and confronting the question of whether judicial review of the facts of individual veterans benefits cases really implicates the

---

415. See Ridgway, VJRA Twenty Years Later, supra note 6, at 266–67 (noting that, since the passage of the VJRA, VA has granted over 30% more claims for disability compensation and paid roughly 59% more in compensation).

416. See id. at 282–83 (asserting that judicial review of VA decisions is living up to expectations).
same type of separation-of-powers concerns that are present when reviewing agency policy making decisions.

Second, courts can only react to the issues raised to them. To truly refocus the system on bringing timely resolution to claims, it will be necessary to alter the financial incentives of the attorneys who practice veterans law. There is little reason to doubt that those who represent veterans for a living would gladly spend less time arguing about procedure and more time developing evidence if it were financially feasible to do so. The question then becomes how the system might be adjusted to attack the problems of delay and complexity. In the meantime, it seems likely that 2013 will see advocates begin to shift away from the unsuccessful attempt to re-imagine judicial review and back to the procedural arguments that consumed so much of the Federal Circuit’s energy in previous years.
ADDENDUM

This section provides an empirical overview of the past year along with cumulative totals. To the extent that these tables and graphs use the same format, the detailed explanations of the data will not be repeated here. As noted last year, “there is a great deal of room for additional data gathering and analysis.”

Table 1: Results of Precedential Veterans Opinions, January 1, 2012 to December 31, 2012

<table>
<thead>
<tr>
<th>Result</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissed</td>
<td>5 (4)</td>
</tr>
<tr>
<td>Affirmed</td>
<td>8 (8)</td>
</tr>
<tr>
<td>Reversed</td>
<td>3 (4)</td>
</tr>
<tr>
<td>Vacated and remanded</td>
<td>0 (0)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>16</strong></td>
</tr>
</tbody>
</table>

Table 1 summarizes the outcomes of the veterans law cases at the Federal Circuit in terms of the court’s agreement with the CAVC. This year, the stated outcomes varied noticeably from a more nuanced evaluation of the results. The first numbers in the table above reflect the decreetal language of the opinions. The parenthetical numbers reflect a more substantive evaluation of the Federal Circuit’s analysis. First, although Akers was technically affirmed, it was on the basis of harmless error. Therefore, it can be fairly labeled a reversal of the CAVC’s analysis. Second, the dismissal orders in Githens and King do not reflect the degree to which the Federal Circuit scrutinized the analysis of CAVC decision in each case and, thus, could fairly be called affirmances. Finally, Pitts was technically an affirmance, but the court essentially concluded that it would not hear the ineffective assistance argument that the appellant wished to make. Therefore, it can be thought of as a dismissal.

Taking the opinions at face value, the Federal Circuit agreed with the CAVC in 72.7% (8 of 11) of the appeals that were not dismissed. Looking at the more nuanced numbers, the Federal Circuit agreed with the CAVC in only 66.7% (8 of 12) of the opinions that examined

418. This table does not include decisions addressing attorney fee disputes under EAJA.
419. See supra notes 174–217 and accompanying text (explaining that the dismissal orders in Githens and King deemphasize the court’s close analysis of the opinions by the CAVC, and exploring why the CAVC did not make the ruling that the appellant had sought).
the lower court’s analysis. This is the same rate as last year (10 of 15), and still above the average general affirmance rate for regional circuits reviewing district court and agency decisions.  

420. See Ridgway, Changing Voices, supra note 1, at 1224 (stating that the average rate is 62%).

421. This table does not include EAJA decisions.


Table 2: Precedential Veterans Opinions by Judge, January 1, 2012 to December 31, 2012

<table>
<thead>
<tr>
<th>Judge</th>
<th>Number Authored</th>
<th>Number on Panel</th>
<th>Percentage Authored</th>
<th>Number of Separate Opinions</th>
<th>Number Authored Generating Separate Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rader</td>
<td>2</td>
<td>5</td>
<td>40.0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Newman</td>
<td>1</td>
<td>4</td>
<td>25.0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lourie</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Bryson</td>
<td>2</td>
<td>3</td>
<td>66.7</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Linn</td>
<td>1</td>
<td>5</td>
<td>20.0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Dyk</td>
<td>1</td>
<td>2</td>
<td>50.0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Prost</td>
<td>2</td>
<td>3</td>
<td>66.7</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Moore</td>
<td>2</td>
<td>4</td>
<td>50.0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>O’Malley</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Reyna</td>
<td>1</td>
<td>4</td>
<td>25.0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Wallach</td>
<td>1</td>
<td>2</td>
<td>50.0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Mayer</td>
<td>1</td>
<td>1</td>
<td>100.0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Plager</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Clevenger</td>
<td>1</td>
<td>1</td>
<td>100.0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Schall</td>
<td>1</td>
<td>2</td>
<td>50.0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Gajarsa</td>
<td>0</td>
<td>0</td>
<td>—</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Guest Judge</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Per</td>
<td>0</td>
<td>—</td>
<td>—</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Total   16  42  —  6  6
As in 2011, the distribution of authorship of veterans law opinions was very balanced. 423 Twelve different judges authored sixteen veterans law opinions, and no judge authored more than two opinions. The overall participation was also quite even, with each active judge participating in at least two panels, but no judge participating in more than five.

It is noticeable that the number of separate opinions in 2012 was greater than in 2010 and 2011 combined. 424 In particular, two of the court’s three newest members (O’Malley and Reyna) wrote dissents, while the other (Wallach) wrote an opinion that sparked a concurrence. Furthermore, each of the three opinions written by a judge on senior status resulted in a separate statement. This result differs from the previous two years in which none of the opinions by a senior judge was accompanied by a dissent or concurrence.

423. See Ridgway, Changing Voices, supra note 1, at 1225–26 (noting that eight different judges authored eleven veterans opinions in 2011, and no judge wrote more than two).

424. See id. at 1227 (stating that there were only five separate opinions written in 2010 and 2011 combined).
Table 3: Precedential Veterans Opinions by Judge, January 1, 2010 to December 31, 2012

<table>
<thead>
<tr>
<th>Judge</th>
<th>Number Authored</th>
<th>Number on Panel</th>
<th>Percentage Authored</th>
<th>Number of Separate Opinions</th>
<th>Number Authored Generating Separate Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rader</td>
<td>3</td>
<td>12</td>
<td>25.0%</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Newman</td>
<td>1</td>
<td>11</td>
<td>9.1%</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Lourie</td>
<td>0</td>
<td>3</td>
<td>0%</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Bryson</td>
<td>5</td>
<td>13</td>
<td>33.3%</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Linn</td>
<td>3</td>
<td>9</td>
<td>33.3%</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Dyk</td>
<td>6</td>
<td>13</td>
<td>46.2%</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Prost</td>
<td>4</td>
<td>10</td>
<td>40.0%</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Moore</td>
<td>4</td>
<td>11</td>
<td>36.4%</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>O’Malley</td>
<td>2</td>
<td>5</td>
<td>40.0%</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Reyna</td>
<td>1</td>
<td>4</td>
<td>25.0%</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Wallach</td>
<td>1</td>
<td>2</td>
<td>50.0%</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Mayer</td>
<td>2</td>
<td>4</td>
<td>50.0%</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Plager</td>
<td>1</td>
<td>4</td>
<td>25.0%</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Clevenger</td>
<td>2</td>
<td>4</td>
<td>50.0%</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Schall</td>
<td>1</td>
<td>2</td>
<td>50.0%</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Gajarsa426</td>
<td>2</td>
<td>5</td>
<td>40.0%</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Guest Judge</td>
<td>0</td>
<td>1</td>
<td>0%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Per Curiam</td>
<td>1</td>
<td>—</td>
<td>—</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

| Total      | 39              | 113             | —                   | 11                          | 10427                                       |

Another year of evenly distributed authorships has moved the numbers further away from the early trends that Paul Gugliuzza observed in his 2010 article in this journal on this subject.428 First,  

425. This table does not include EAJA decisions.  
427. The total number of separate opinions does not match this total because statistics for judges that completed their service prior to January 1, 2012, have been omitted.  
Judge Dyk no longer has a noticeable lead over the rest of the court in the likelihood of being on a panel issuing a published opinion in a veterans law case.\footnote{See Ridgway, Changing Voices, supra note 1, at 1228 (noting that other Federal Circuit judges have been on a similar number of panels as Judge Dyk issuing a published opinion in a veterans case).} He has still authored more opinions than any other judge (6), but there are now five other judges who have authored at least half as many. Currently, the most noticeable deviation from the norm is Judge Lourie, who has not written a single veterans law opinion in the last three years. Moreover, he has served on only three panels that have issued a precedential opinion. Every other judge that has been in active service for the entirety of the last three years has been on at least triple that number.

Second, Judge Newman did not author any of the six separate opinions this year; thus, her total of three is less prominent now,\footnote{See id. (noting that as of 2011, Judge Newman wrote more than half of all the separate opinions written on veterans cases).} even though Judge Dyk is the only other judge to have authored more than one such opinion.

Table 4: Precedential Veterans Opinions by Type of CAVC Decision and Appellant, January 1, 2012 to December 31, 2012\footnote{This table does not include EAJA decisions.}

<table>
<thead>
<tr>
<th>Type of CAVC Opinion</th>
<th>Number of Cases</th>
<th>Appealing Party (Veteran/Secretary)</th>
<th>Result (Affirmed/Not Affirmed/Dismissed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>En Banc</td>
<td>1</td>
<td>0/1</td>
<td>0/1/0</td>
</tr>
<tr>
<td>Panel</td>
<td>4</td>
<td>3/1</td>
<td>2/1/1</td>
</tr>
<tr>
<td>Single Judge</td>
<td>11</td>
<td>11/0</td>
<td>6/1/4\footnote{This number includes the Githens and King cases. See supra note 419 and accompanying text (noting that Githens and King were single-judge CAVC decisions).}</td>
</tr>
<tr>
<td>Total</td>
<td>16</td>
<td>14/2</td>
<td>8/3/5</td>
</tr>
</tbody>
</table>

In 2012, the overwhelming majority of veterans law appeals once again stemmed from single-judge decisions, consistent with the overwhelming dominance of such dispositions below.\footnote{See Ridgway, Changing Voices, supra note 1, at 1229 (noting that, of the eleven veterans benefits cases heard in 2010 and 2011, seven of the opinions were decided by a single judge).} It is noticeable that this year more than a third of the appeals of single-judge decisions were dismissed for lack of jurisdiction. Nonetheless, it remains true that a clear majority of time that the Federal Circuit is
making law, it is reviewing CAVC cases that were not intended to make law.\textsuperscript{434}

Unlike in 2011, when every appeal was by claimants,\textsuperscript{435} the Secretary appealed two CAVC decisions in 2012 and, more importantly, won both cases (\textit{Chandler} and \textit{Frederick}).\textsuperscript{436} Both of these cases were precedential decisions of the CAVC. These facts support the notion that VA is a sophisticated litigant that can identify CAVC decisions that are both important to appeal and winnable. It is also notable that both appeals involved substantive entitlement issues rather than procedural issues. One could speculate that VA would be more concerned with procedural decisions that affect its ability to efficiently process more than one million claims a year, rather than entitlement issues such as in \textit{Chandler}, which are more likely to be noticed and addressed legislatively should Congress disagree with how a benefit is defined.

\textit{Table 5: Precedential Veterans Opinions by Type of CAVC Decision and Appellant, January 1, 2011 to December 31, 2012}\textsuperscript{437}

<table>
<thead>
<tr>
<th>Type of CAVC Opinion</th>
<th>Number of Cases</th>
<th>Appealing Party (Veteran/Secretary)</th>
<th>Result (Affirmed/Not Affirmed/Dismissed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>En Banc</td>
<td>4</td>
<td>3/1</td>
<td>2/2/0</td>
</tr>
<tr>
<td>Panel</td>
<td>5</td>
<td>4/1</td>
<td>3/1/1</td>
</tr>
<tr>
<td>Single Judge</td>
<td>18</td>
<td>18/0</td>
<td>12/2/4</td>
</tr>
<tr>
<td>Total</td>
<td>27</td>
<td>25/2</td>
<td>17/5/5</td>
</tr>
</tbody>
</table>

A tantalizing trend emerges after examining the aggregate data for 2011 and 2012. The CAVC is least likely to be affirmed when an en banc decision is reviewed. The data set is still quite small, but this would be a very interesting result if it were to persist. Given that en banc opinions of the CAVC represent the combined wisdom of all the judges specializing in veterans law, one might speculate that the Federal Circuit would be somewhat more hesitant to reject the CAVC’s judgments in such cases, yet that does not appear to be the case.

\textsuperscript{434} See \textit{id.} (explaining that in nearly every case reviewed by the Federal Circuit, the CAVC panel was not bound by the single-judge review below).
\textsuperscript{435} See \textit{id.} at 1231 (stating that the claimant was the appellant in all eleven veterans cases heard by the Federal Circuit in 2011).
\textsuperscript{437} This table does not include EAJA decisions.
Figure 1 shows that the number of precedential veterans law opinions issued by the Federal Circuit is slowly rising again. Arguably, the filling of three vacancies may have increased the amount of judicial energy available for producing published opinions, but if that were the main cause of the rise, then the numbers may flatten or decline as again soon as the court’s docket is filled with cases focused on digesting the myriad of changes brought to the patent system by the America Invents Act.439

438. This table includes EAJA decisions because they are included in the data from prior to 2011 and in the comparative data.

439. See Robert A. Armitage, Understanding the America Invents Act and Its Implications for Patenting, 40 AIPLA Q.J. 1, 10 (2012) (explaining that the Federal Circuit will inevitably hear more patent cases because the America Invents Act permits individuals to appeal to the Federal Circuit regarding any issue that could be raised as a defense to patent infringement in the courts).
Figure 2: Precedential Veterans Opinions Compared to Total Number of Dispositions by Judges Reviewing the CAVC, 2006 to 2012

Figure 2 compares the precedential opinions reviewing decisions of the CAVC to the total number of appeals from the CAVC disposed of by judges of the Federal Circuit. Given that, in 2011, four of the published opinions reviewing CAVC decisions addressed EAJA rather than veterans law, 2012 represents a noticeable jump from 11 to 16 opinions on review of the CAVC’s non-EAJA decisions. The number of dispositions and opinions, however, continues to be down substantially from a few years ago. Nonetheless, it is not clear if this decrease is related to decline in productivity by the CAVC. After operating with unfilled vacancies for years, three new judges were appointed to the CAVC in 2012. The increase from six to nine active judges on that court may well lead to an increase in productivity and appealed decisions over the next few years.

440. This table includes EAJA decisions because they are included in the data from prior to 2011 and in the comparative data.