

Resolving the Ambiguities in 38 C.F.R. § 3.655: An Analysis of the VA Regulation Governing the Failure to Report for an Examination

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Occasionally, a long-dormant provision in a legal document erupts with new life and new consequences. The most fertile ground for such transformation is language that is initially presumed by courts and other observers to have one particular meaning. That meaning can become solidified as the unquestioned and obvious interpretation without ever having been the subject of detailed analysis using legal tools such as the evaluation of statutory construction and legislative history. Such was the case with the original interpretation of the Second Amendment to the United States Constitution. In a very few brief and superficial opinions, the Supreme Court seemed to adopt the view that the Amendment did not protect an individual right to bear arms.² This interpretation was not seriously challenged by historical or linguistic analysis and became the accepted reading of that provision for over 200 years after ratification of the Amendment. However, after a thorough and careful analysis of the text, the debates regarding its purposes, and the historical context in which it was drafted, legal scholars recognized and demonstrated that the longstanding meaning that had been ascribed to the Amendment was flawed.³ Relying on that scholarship, the Supreme Court held in 2008 that the right to keep and bear arms is in fact an individual right.⁴ That interpretation is now predominant, though its scope and even correctness is still vigorously debated.

In this Article, we will demonstrate a similar development in the interpretation of an infrequently discussed, yet significant, Department of Veterans Affairs (VA) regulation: 38 C.F.R. § 3.655.⁵ Section 3.655 provides guidance in the event a veteran fails to report for a medical examination. The guidance provides for potentially decisive consequences when veterans seeking VA benefits fail to report for requested medical examinations. Until now, there has been no thorough and comprehensive analysis of the provision as a whole. As we demonstrate, the current version of Section 3.655 has not yet been properly understood or implemented. More significantly, the provision itself is flawed. Currently, VA's Regulation Rewrite Project⁶ is underway, which provides an excellent opportunity to improve Section 3.655. We recommend revisions to 38 C.F.R. § 3.655 that will clarify VA procedures for veterans, provide interpretational certainty for legal experts, and improve the efficiency and fairness of the adjudication of veterans' claims.

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² See, e.g., *United States v. Miller*, 307 U.S. 174 (1939).

³ Compare 2 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (2d ed. 1988) (relegating to a footnote the brief discussion indicating that the Second Amendment does not protect an individual right), with 3 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 894-903 & n.221 (3d ed. 2000) (containing a more extensive discussion indicating that the Second Amendment protects an individual right, "admittedly of uncertain scope," of citizens to "possess and use firearms in the defense of themselves and their homes").

⁴ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵ 38 C.F.R. § 3.655 (2014).

⁶ See generally William L. Pine & William F. Russo, *Making Veterans' Benefits Clear: The Regulation Rewrite Project*, 57-JUL FED. LAW. 38, 42 (July 2010) (describing the Regulation Rewrite Project and its goals: "With simpler organization and clearer content, the VA's regulations will be easier to find, understand, and apply. Therefore, the results of the Rewrite Project will, in turn, allow the Department of Veterans Affairs to adjudicate claims more accurately and promptly. This service is what our veterans and their families both need and deserve.").

I. GENERAL PRINCIPLES OF REGULATORY INTERPRETATION

A. General Principles of Interpretation

It is a well-settled principle of jurisprudence that “if the meaning of the regulation is clear from its language, then that is ‘the end of the matter.’”⁷ The VA regulation addressing a failure to report for a requested medical examination⁸ contains, though, at least some ambiguity.⁹ For instance, “original compensation claim” is an undefined term that could mean any of several different things.¹⁰ Moreover, the ambiguities of subsection (b) are magnified, rather than reduced, when read in conjunction with Section 3.655(a).¹¹ Undefined terms (“original compensation claim”)¹² and potentially ambiguous phrases (“entitlement or continued entitlement to a benefit cannot be established or confirmed”)¹³ prevent the plain language of the regulation from ending the matter.¹⁴

When there is ambiguity in the language used in a regulation, the language should be read with an eye toward the regulatory framework it supports.¹⁵ Ambiguity also invests VA’s Secretary with greater

⁷ *Tropf v. Nicholson*, 20 Vet. App. 317, 320 (2006) (quoting *Brown v. Gardner*, 513 U.S. 115, 120 (1994)).

⁸ 38 C.F.R. § 3.655:

(a) *General*. When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination and a claimant, without good cause, fails to report for such examination, or reexamination, action shall be taken in accordance with paragraph (b) or (c) of this section as appropriate. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc. For purposes of this section, the terms *examination* and *reexamination* include periods of hospital observation when required by VA.

(b) *Original or reopened claim, or claim for increase*. When a claimant fails to report for an examination scheduled in conjunction with an original compensation claim, the claim shall be rated based on the evidence of record. When the examination was scheduled in conjunction with any other original claim, a reopened claim for a benefit which was previously disallowed, or a claim for increase, the claim shall be denied.

Id.

⁹ *See, e.g., LaPointe v. Nicholson*, 222 Fed. App’x. 962, 967 (Fed. Cir. Mar. 14, 2007) (Mayer, J., dissenting) (“To begin with, section 3.655(b) is internally inconsistent. . . . In simple terms, the command that the secretary shall decide claims for benefits after considering *all* evidence of record plainly does not admit of per se rules providing for the denial of claims without considering that evidence.”).

¹⁰ *See infra* Section IV.C, discussing whether an “original compensation claim” is the first formal claim for disability compensation (*i.e.*, a veteran’s first, formal claim for service connection), a service connection claim generally (*i.e.*, all claims for service connection other than claims to reopen), or only an established service connection claim (*i.e.*, claims for evaluation of an already service-connected disability, but not including claims for increased evaluations).

¹¹ 38 C.F.R. §§ 3.655(a), (b). For example, how could VA rate claims under subsection (b) when, as previously determined pursuant to subsection (a), the evidence does not show entitlement to the benefit? On first reading, it would appear that all claims in which “entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination” would have to be denied on the basis of the evidence of record where the veteran has failed to report for an examination. *Id.* § 3.655(a). These ambiguities are discussed in further detail in Section IV.A., *infra*.

¹² *Id.* § 3.655(b); *see* discussion *infra* Section IV.C.

¹³ *Id.* § 3.655(a). The question of how various legal principles, including the benefit-of-the-doubt doctrine and VA’s discretion to develop the record, interact in the context of a failure to report for an examination is explored in detail in Section IV, *infra*.

¹⁴ “When terms are not defined, it is a basic principle of statutory interpretation that they are deemed to have their ordinary meaning.” *Nielson v. Shinseki*, 607 F.3d 802, 805-06 (Fed. Cir. 2010) (citing *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), and *Perrin v. United States*, 444 U.S. 37, 42 (1979)). However, the key phrases in Section 3.655, and their component words, are terms of art for which dictionary meanings are, if not useless, nearly so. *See, e.g., BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91–92 (2006) (endorsing use of dictionary meanings to decipher a statutory language); *Lamar v. United States*, 241 U.S. 103, 113 (1916) (same). *But see* MERRIAM-WEBSTER COLLEGIATE DICTIONARY 875 (11th ed. 2005) (defining “original” as: “of, relating to, or constituting an origin or beginning: INITIAL”).

¹⁵ *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”); *cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) (holding that a court must interpret a statute “as a symmetrical and coherent regulatory scheme”); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (noting that it “is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”); *Fed. Trade Comm’n v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959) (stating that, when

authority to interpret a provision to further the underlying purposes of the regulatory scheme established by Congress.¹⁶ Therefore, when interpreting 38 C.F.R. § 3.655, its terms and phrasing should not be viewed in isolation, but rather with an appreciation for Congress's stated goals in establishing and crafting the veterans' benefit system.¹⁷ A primary and omnipresent concern is protecting the individual and collective rights of veterans presenting claims, to include ensuring that veterans obtain all benefits to which they are entitled.¹⁸ The Secretary's obligation to protect the public fisc,¹⁹ while important, cannot trump VA's primary purpose of "car[ing] for him who shall have borne the battle, and for his widow, and his orphan."²⁰

In addition, the regulatory provisions must be read as a cohesive whole, giving effect "to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."²¹ As will be shown below, this canon is of particular significance when reading subsections (a) and (b) of Section 3.655 together.²²

B. Uniquely Pro-Claimant Veterans' Benefit System

"Congress has expressed special solicitude for the veterans' cause," and has created a uniquely pro-claimant system for adjudicating claims for VA benefits.²³ For this reason, "interpretive doubt is to be resolved in the veteran's favor."²⁴ Yet, with respect to the interpretation of regulatory provisions, granting the benefit of the doubt to the veteran only comes into play once the other interpretive principles, including *Chevron/Auer* deference,²⁵ have been applied and the regulatory provision remains ambiguous.²⁶

interpreting regulatory schemes, courts must "fit, if possible, all parts into an harmonious whole").

¹⁶ See *Smith v. Nicholson*, 451 F.3d 1344, 1349 (Fed. Cir. 2006) (citing *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)); *Mason v. Shinseki*, 26 Vet. App. 1, 6 (2012); *Tatum v. Shinseki*, 24 Vet. App. 139, 142 (2010); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984).

¹⁷ See *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328, 1330 (Fed. Cir. 2013) (discussing the "uniquely pro-claimant principles" underlying the veterans' benefit system); *Evans v. Shinseki*, 25 Vet. App. 7, 14 (2011) (stating that the VA system is "veteran-friendly" and "non-adversarial"); *Kouvaris v. Shinseki*, 22 Vet. App. 377, 381 (2009) (noting that the veterans' benefits system is a "veteran-friendly" system).

¹⁸ See, e.g., 38 U.S.C. § 5107(b) (2012) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."); 38 C.F.R. § 3.103 (expressing the Secretary's attempt to navigate between these two goal posts: "[I]t is the obligation of VA . . . to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government

¹⁹ See *Douglas v. Shinseki*, 23 Vet. App. 19, 22 n.1 (2009) (discussing the Secretary's "duty to protect the public fisc"); see also *Brock v. Pierce County*, 476 U.S. 253, 259-60 (1986) (holding that federal agencies have a duty to protect the integrity of the programs they administer and to preserve taxpayer dollars); *Ribaudo v. Nicholson*, 21 Vet. App. 137, 152 (2007) (Schoelen, J., concurring in part and dissenting in part) ("[T]he Secretary plays the role of the guardian of the public fisc."); *Rhodan v. West*, 12 Vet. App. 55, 58 (1998) (Holdaway, J., concurring) ("[I]t must be remembered that the Secretary is not merely representing the departmental interests, he is, in a larger sense, representing the taxpayers of this country and defending the public fisc from the payment of unjustified claims. . . . There is a duty to ensure that, insofar as possible, only claims established within the law are paid. The public fisc and the taxpayer must be protected from unjustified claims."), *vacated sub nom. Haywood v. West*, 251 F.3d 166 (1999).

²⁰ Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.ourdocuments.gov/doc.php?doc=38&page=transcript>.

²¹ *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

²² See *LaPointe v. Nicholson*, 222 Fed. App'x 962, 967 (Fed. Cir. 2007) (Mayer, J., dissenting) (recognizing that "Section 3.655(b) is not triggered until after the VA has applied 38 C.F.R. § 3.655(a)," but failing to fully appreciate the consequences of the Section 3.655(a) trigger).

²³ *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009); see *Henderson v. Shinseki*, 131 S. Ct. 1197, 1204 (2011).

²⁴ *Brown v. Gardner*, 513 U.S. 115, 118 (1994); see *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("[Veterans'] legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); see also *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (1991).

²⁵ *Smith v. Nicholson*, 451 F.3d 1344, 1350-51 (Fed. Cir. 2006) (applying *Auer v. Robbins*, 519 U.S. 452 (1997), in the context of the veterans' benefit system); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

²⁶ See *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010) ("The mere fact that the particular words of the statute . . . standing alone might be ambiguous does not compel us to resort to the *Brown* canon. Rather, that canon is only applicable after other interpretive guidelines have been exhausted, including *Chevron*.").

This is not to say, of course, that the Secretary is unconstrained by considerations of special solicitude for veterans in drafting the regulations. VA regulations, like all regulations, must be compatible with the authorizing statutes.²⁷ In the veterans' benefit system, the Secretary has specifically provided that veterans receive every benefit to which they are entitled²⁸ as a means of ensuring, as Congress has provided, that the United States government take on the risk of error in determining entitlement.²⁹ These considerations do not prohibit VA from imposing adverse repercussions on veterans who neglect to fulfill their obligations in pursuing a claim for benefits, but they do set important boundaries on any enforcement mechanisms adopted by the Secretary.³⁰ Adherence to the uniquely pro-claimant nature of the veterans' benefit system is essential to any valid interpretation of the regulations addressing a veteran's failure to report for a physical examination.³¹

II. HISTORICAL TREATMENT OF A FAILURE TO REPORT³²

A. Pre-1946: Strict Enforcement of the Duty to Report

There does not appear to have been much question that, in the relatively early days of the modern VA system, veterans were expected to report to examinations when requested and, if they failed to report, their benefits could be suspended until the failure was remedied.³³ The relevant statute was implemented according to its plain language and, thus, veterans were subjected to the enforcement mechanism whenever they "neglect[ed] or refuse[d]" to report for physical examinations.³⁴

²⁷ See, e.g., 38 U.S.C. § 501 (2012).

²⁸ See, e.g., 38 C.F.R. § 3.103(a) (2014) ("[I]t is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.").

²⁹ 38 U.S.C. § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."); see *Gilbert*, 1 Vet. App. at 54 ("It is in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error when, in determining whether a veteran is entitled to benefits, there is an 'approximate balance of positive and negative evidence.'"); 38 C.F.R. § 3.102 (providing that reasonable doubt "will be resolved in favor of the claimant" and defining reasonable doubt as a doubt "which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim").

³⁰ See, e.g., 38 C.F.R. § 17.164 (providing that veterans "eligible for dental treatment on a one-time completion basis only" and who have not "received such treatment within 3 years after filing the application shall be presumed to have abandoned the claim for dental treatment").

³¹ See *Burden v. Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013). This system is, perhaps, more akin to a continental European judiciary's "search for the truth" than to the United States civil and criminal justice systems. See SYBILLE BEDFORD, *THE FACES OF JUSTICE: A TRAVELER'S REPORT* 231 (1961) (providing a journalistic comparison of the adversarial English court system and various continental European court systems: "[W]hat I was looking for in all those law courts was for the best one could do . . . [w]ithin our limitations, and given reasonably good social and political circumstances").

³² For a thorough general history of VA benefits law, including the history of statutory and regulatory changes prior to 1959, see James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 1 (2013).

³³ See, e.g., World War Veterans' Act § 203, Pub. L. No. 68-242 (1924) (providing, in relevant part, that "every person applying for or in receipt of compensation for disability under the provisions of this title . . . shall, as frequently and at such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician designated or approved by the director. . . . If he shall neglect or refuse to submit to such examination, or shall in any way obstruct the same, his right to claim compensation under this title shall be suspended until such neglect, refusal, or obstruction ceases. No compensation shall be payable while such neglect, refusal, or obstruction continues, and no compensation shall be payable for the intervening period.").

³⁴ See U.S. Veterans Bureau, Mem. Op. Gen. Counsel (Aug. 30, 1930) ("It is recommended, therefore, that you find that the claimant neglected within the meaning of Section 203, *supra*, to respond to the requests of the Bureau and that during such period of neglect her right to claim compensation was suspended. It logically follows that she should not be paid compensation for the period in question.").

In the early 1930s, VA promulgated its first regulation relating to failures to report for physical examination.³⁵ The regulation continued two provisions setting forth consequences for a veteran's failure to report for a VA examination, each of which applied to pension claims only.³⁶ The first continued to provide for the suspension of pension benefits already being paid.³⁷ The other enforcement provision, which also applied only in the context of pension benefits, was the first to invoke abandonment as a consequence of a veteran's failure to report for a physical examination.³⁸

These provisions were revised in 1936 to apply to failures to report for physical examinations for either "disability compensation or pension purposes."³⁹ The 1936 revision of VA's Regulation and Procedural Rules was the first to provide different consequences depending on whether the claim was an initial claim for disability compensation or, instead, was a claim for increased disability compensation. If a veteran failed to report for an examination without adequate reason and benefits had not yet been granted, the claim was considered abandoned.⁴⁰ If, on the other hand, a veteran failed to report without adequate reason and benefits had already been awarded, the payment of benefits was suspended.⁴¹ In short, the original consequence of a failure to report was denial of the claim and/or suspension of benefits being paid.

B. 1946-1961: The Modern Regulatory Scheme Begins to Take Shape

New regulations were promulgated in 1946 that replaced the old regulations,⁴² but retained both the consequences of a failure to report for a physical examination and the distinction between initial claims for disability compensation and claims for increased disability compensation. Revisions in 1949 carved out for specialized treatment other subcategories of disability compensation claims where a veteran had failed to report for a physical examination.⁴³ In the case of a failure to report

³⁵ Veterans Reg. No. 2(a), Instruction No. 7 (Jan. 29, 1934) (providing for "action to be taken on failure of veteran to report for physical examination in pension claims").

³⁶ *Id.*

³⁷ *Id.* § at 1 (providing that a veteran's pension would be suspended as of the date of last payment if the veteran, "without adequate reason," failed to report for a physical examination "which is requested for pension purposes").

³⁸ *Id.* at § 3 (establishing that a veteran's failure to report for a physical examination "requested as a result of his claim for increased pension" would deem that claim "abandoned").

³⁹ See VA REG. & PROC. R. 1251(A) (Jan. 25, 1936) (providing for suspension of benefits, whether disability compensation or pension, if a veteran failed to report for a physical examination requested by VA); *Id.* R. 1251(B). (providing that a failure to report for a physical examination, where the examination was "requested as a result of a claim for increased disability compensation or pension," would result in the claim being considered abandoned).

⁴⁰ *Id.* R. 1251(B).

⁴¹ *Id.* R. 1251(A).

⁴² See 13 Fed. Reg. 6997, 7037 (Nov. 27, 1948) (containing the 1946 version of the regulations).

⁴³ See 14 Fed. Reg. 7200 (Nov. 30, 1949) (setting forth revised 38 C.F.R. § 3.251):

Failure to report for physical examination. (a) Upon the failure of a veteran without adequate reason to report for physical examination, requested for disability compensation or pension purposes, the award of disability compensation or pension in course of payment to him will be suspended as of the date of last payment, except as provided in paragraph (b) of this section. The reason given for suspension will be "Failure to report for examination." Any award of compensation or pension concurrently being paid to dependents will also be suspended. (Resumption of payments, see § 3.266.)

(b) Where the veteran has one or more compensable static disabilities and one or more compensable disabilities nonstatic in nature, and without adequate reason fails to report for physical examination, the award will be continued in an amount commensurate with the degree of disability resulting from the static disabilities and suspended only as to the nonstatic disabilities for which the physical examination is primarily requested. The award will be adjusted in accordance with Veterans Regulation No. 2 (a), Part I, paragraph III (b) (38 U.S.C. ch. 12 note). Any award of compensation concurrently being paid to dependents will be readjusted on the basis of the reduced amount payable for the static disabilities. (Resumption of payments, see § 3.266.)

(c) Upon the failure of a veteran to report for physical examination, requested as a result of a claim for increased disability compensation or pension, the claim for the increase will be considered as abandoned. No further action thereupon

for an examination “without adequate reason,” the veteran’s ongoing benefits would, generally, be discontinued, as would any benefits being paid to the veteran’s dependents.⁴⁴ Only so-called “static” disabilities were exempt from the automatic suspension or discontinuance of benefits.⁴⁵ Claims of entitlement to service connection were not directly addressed in these new enforcement provisions, and so VA presumably continued to disallow such claims where the veteran failed to report for an examination in connection with those claims.⁴⁶ Also, provisions were included in the new regulations that permitted the resumption of awards and, if the medical evidence established the existence of the disability at the time of the failure to report, back payment.⁴⁷

Claims to reopen previously disallowed claims of entitlement to service connection were not specifically addressed by the new regulations, but the gap was quickly filled by amendments a year later. The updated regulations treated claims to reopen as abandoned in the case of a failure to report for a physical examination without adequate reason.⁴⁸

C. 1961 to 1990: Failure to Report Is Considered Abandonment of a Claim

The regulatory framework remained largely unchanged until the statutes governing the VA benefit system were revamped in 1957.⁴⁹ As a result of the newly enacted statutes, VA undertook major revisions of its regulations. While final regulations implementing the newly enacted statutes governing the veterans’ benefit system were not promulgated until 1961, VA did make some adjustments in 1959 recognizing a greater need for due process including, specifically, a one-year time period to permit the veteran to comply with a request to submit to a physical examination and enforcement by treating claims as abandoned.⁵⁰

will be taken unless and until a new claim for the increase is filed, and payments on the basis of the new application will be governed by the provisions of Veterans Regulation No. 2 (a), Part I, paragraph II (38 U.S.C. ch. 12 note).

Id.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* (setting forth the amended 38 C.F.R. § 3.266):

Resumption of suspended award where veteran subsequently reports for physical examination. If, after suspension of his award, the veteran should subsequently report for physical examination and the evidence clearly establishes to the satisfaction of the rating agency concerned that during the period of his failure to report the disability in fact existed to a compensable degree, an award may be approved effective the date of suspension. However, if the evidence discloses a change in physical condition and that the disability is no longer compensable in degree, no action will be taken to reopen the award during the period of suspension. Where the disability is ratable in a lesser degree, the award under the reduced rating will be effective as of the date of suspension. Where the disability is ratable in a greater degree, the award at the increased rate may be made effective the date of physical examination by the Veterans’ Administration, and from the date of suspension, the effective rate payable on the date of suspension will be awarded: *Provided*, That if the evidence is insufficient to evaluate the disability over any part or the whole of the period intervening between the date of suspension and the date the veteran subsequently reports for examination, such intervening period or periods will be covered by the notation “Evidence insufficient to evaluate from _____ to _____.” The foregoing rules are for application in the adjustments of awards which are partially suspended as provided in § 3.251 (b).

Id.

⁴⁸ See 38 C.F.R. § 3.251(c) (1950).

⁴⁹ See Veterans’ Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83; see also Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105 (recodifying, reorganizing, and expanding Title 38 of the United States Code).

⁵⁰ 24 Fed. Reg. 4338, 4340 (May 29, 1959) (amending 38 C.F.R. § 3.266 to read, in part: “Where the veteran fails without adequate reason to respond to an order to report for physical examination within 1 year from the date of request and payments for a nonstatic condition have been discontinued, the claim for such benefits will be considered abandoned.”).

In 1961, comprehensive regulations implementing the new statute were promulgated.⁵¹ The revamped regulations contained a separate provision permitting VA to treat as abandoned claims where veterans failed to respond within one year to a request for evidence.⁵² These updated provisions explicitly referenced original claims and defined, in part, abandonment as including a failure to report for an ordered examination:

In an original claim or a claim for increase in which no response has been made within 1 year after the request for the evidence or order for physical examination by the Veterans Administration, the claimant's failure or disregard will constitute abandonment of the claim and sufficient grounds for its disallowance. After the expiration of 1 year, further action will not be taken unless a new claim is received. Should the claim be finally established, pension, compensation, or dependency and indemnity compensation shall commence not earlier than the date of filing the new claim.⁵³

Examinations to evaluate disabilities for which compensation had already been allowed, *i.e.*, examinations for the purpose of determining continued entitlement, were treated separately in a new section, 38 C.F.R. § 3.655.⁵⁴

The explicit inclusion in the definition of “abandonment” of a failure to respond to “an order for physical examination” was short-lived, however. In 1962, updates to the regulations regarding abandonment removed any explicit reference to a failure to report for an examination. The new Section 3.158(a) provided that “[w]here evidence requested in connection with an original claim, a claim for increase or to reopen or for the purpose of determining continued entitlement is not furnished within 1 year after the date of request, the claim will be considered abandoned.”⁵⁵

⁵¹ 26 Fed. Reg. 1561 (Feb. 24, 1961) (reorganizing and expanding Title 38 of the Code of Federal Regulations).

⁵² *Id.* at 1571 (codified at 38 C.F.R. § 3.158(a)).

⁵³ *Id.*

⁵⁴ 26 Fed. Reg. 1561, 1599 (Feb. 24, 1961) (codified at 38 C.F.R. § 3.655):

- (a) When a veteran without adequate reason fails to report for physical examination, including periods of hospital observation requested for pension or compensation purposes, the awards to the veteran and any dependents will be discontinued, except as provided in paragraph (b) of this section.
- (b) If the veteran has one or more compensable static disabilities and one or more compensable disabilities nonstatic in nature and without adequate reason fails to report for physical examination, including periods of hospital observation, the awards to the veteran and any dependents will be amended to pay an amount based on the degree of disability of the static disabilities.
- (c) When a veteran has failed to report for physical examination, payment of benefits for a nonstatic disability will be discontinued effective date of last payment. Payments will be resumed effective the day following the date of last payment if the evidence clearly establishes that during the period of his failure to report the nonstatic disability existed in the former compensable degree and the claim was not abandoned and the rating agency confirms and continues the prior evaluation.
- (d) If the examination shows a changed condition and the disability is no longer compensable in degree, the award will not be reopened for the period of discontinuance. Except as to abandoned claims, if a lesser compensable degree of disability is shown the award will be resumed at the lower rate.
- (e) Except as to abandoned claims if the examination shows increased disability, increased disability benefits will not be authorized for any period prior to the date of examination, with the former rate in effect from the day following date of last payment through the day preceding the date of examination.
- (f) If the claim was abandoned, benefits based on a nonstatic disability may be paid from the date of receipt of the veteran's statement that he is willing to report for physical examination if he reports for such examination within 1 year from that date.

Id.

⁵⁵ 27 Fed. Reg. 11,886, 11,887 (Dec. 1, 1962) (codified at 38 C.F.R. § 3.158(a)).

While the above changes might suggest a migration of enforcement provisions relating to ordered examinations to 38 C.F.R. § 3.655(a), this is not how the revised regulations were interpreted. Section 3.655(a) did continue to address failures to report for an examination, but only with respect to examinations in connection with claims for increase, periodic examinations to evaluate “nonstatic” disabilities, and other situations where payments had already been authorized.⁵⁶ In other words, the 1962 revisions make no distinction between original claims, claims to reopen, or claims for an increased rating, but, by context, Section 3.655(a) continued to apply only to evaluations of disabilities that were already service-connected. Service connection claims were, instead, treated as abandoned claims under 38 C.F.R. § 3.655(f) and 38 C.F.R. § 3.158.⁵⁷

These provisions remained in force, with minor revisions, until 1990. Prior to the 1990 changes to Section 3.655, a veteran’s failure to report for an ordered VA examination would result, unless the failure to report was with adequate cause, in denial of the claim. The basis for the denial depended on the type of claim being pursued. Before the 1990 changes, Section 3.655 applied “only to continuing rating decisions and resumptions, not to original claims.”⁵⁸ Thus, prior to 1990, VA would deny, under Section 3.655, continuing disability ratings and claims for resumption of benefits where the Veteran failed to report for a VA examination without good cause.

However, a failure to report for VA examinations in connection with original claims, such as claims for service connection, did not fall under the pre-1990 version of Section 3.655. Instead, failures to report for VA examinations in connection with such claims were dealt with under 38 C.F.R. §§ 3.158, 3.326, 3.327, and 3.329.⁵⁹ In short, VA had the authority to request that a veteran undergo an examination,⁶⁰

⁵⁶ The 1962 revisions of Section 3.655 continued to authorize that payments be “discontinued” and set forth disparate treatment examinations to be ordered with respect to “static” and “nonstatic” disabilities:

- (a) **Discontinuance.** When a veteran without adequate reason fails to report for **Veterans Administration** examination, including periods of hospital observation requested for pension or compensation purposes, the awards to the veteran and any dependents will be discontinued, except as provided in paragraph (b) of this section, **effective date of last payment**.
- (b) **Adjustment for static disabilities.** If the veteran has one or more compensable static disabilities **verified by a Veterans Administration examination** and one or more compensable disabilities nonstatic in nature and without adequate reason fails to report for examination, including periods of hospital observation, the awards to the veteran and any dependents will be amended to pay an amount based on the degree of disability of **such** static disabilities **effective the day following the date of last payment**.
- (c) **Resumption; no change in evaluation.** When payments have been discontinued because of failure to report for examination, payments will be resumed effective the day following the date of last payment if the evidence clearly establishes that during the period of his failure to report the disability existed in the former compensable degree and the claim was not abandoned and the rating agency confirms and continues the prior evaluation.
- (d) **Resumption; reduced evaluation.** If the examination shows a changed condition and the disability is no longer compensable in degree, the award will not be reopened for the period of discontinuance. Except as to abandoned claims, if a lesser compensable degree of disability is shown the award will be resumed at the lower rate.
- (e) **Resumption; increased evaluation.** Except as to abandoned claims, if the examination shows increased disability, increased benefits will be authorized from the date of examination or the date of receipt of a claim for such increase, whichever is earlier, with the former rate in effect from the day following date of last payment through the day preceding the date of the increase in rate.
- (f) **Abandoned claims.** If the claim was abandoned, and the Veteran subsequently states that he is willing to report for examination, benefits may be paid from the date of receipt of the new claim if he reports for such examination within 1 year from date of notice to report.

Id. at 11,890-91 (codified at 38 C.F.R. § 3.655) (changes from 1961 regulation in bold).

⁵⁷ See *id.* at 11,891 (adding a cross-reference to 38 C.F.R. § 3.158, governing abandoned claims).

⁵⁸ *Wamhoff v. Brown*, 8 Vet. App. 517, 520 (1996) (citing 38 C.F.R. § 3.655 (1982)); see also 38 C.F.R. § 3.655 (1982).

⁵⁹ See *Wamhoff*, 8 Vet. App. at 521.

⁶⁰ 38 C.F.R. § 3.326 (authorizing VA to obtain an examination when there was a “reasonable probability of a valid claim”); *id.* § 3.327(b) (requiring the VA to obtain at least one examination “in every case in which compensation benefits [were] awarded”).

the veteran had a duty to submit to the examination,⁶¹ and VA was required to treat a claim as abandoned where the requested evidence was not provided within one year.⁶² As a result, an original claim of entitlement to compensation would be considered abandoned where the veteran failed to submit to a requested examination within one year of the request.⁶³

Importantly, if a service-connection claim was considered abandoned prior to a decision on appeal, the veteran would have to file a new claim, and the effective date of any award would be calculated based on the date of the new claim.⁶⁴ However, if the claim was considered abandoned by the agency of original jurisdiction (AOJ), the new claim would not be treated as a claim to reopen and, therefore, would not be subject to the requirement of new and material evidence.⁶⁵ Rather, the veteran would be returned to the position he was in prior to filing the abandoned claim.⁶⁶ This is a potentially important aspect of the pre-1990 shape of the regulatory landscape.

In *Wamhoff v. Brown*, the CAVC did not ignore the adverse impact on the individual Veteran caused by treating his original claim as abandoned, but noted the Veteran's own choices in failing to fulfill his obligations of cooperation with VA were the "main factors in his claim's being disallowed."⁶⁷ This thread of responsibility, a veteran suffering the costs of failing to meet his or her obligations under the veteran-friendly benefits system, has been a consistent feature of veterans' law from its very inception.⁶⁸

⁶¹ *Id.* § 3.329 (placing an affirmative duty on applicants for compensation or pensions to submit to examinations when required by the VA).

⁶² *See, e.g., id.* § 3.158(a) (providing that a claim is to be treated as abandoned if evidence requested by VA is not received within one year of the request).

⁶³ Importantly, the United States Court of Appeals for Veterans Claims (CAVC) has expressly rejected any interpretation of the current version of 38 C.F.R. § 3.655 that would deem a claim for service connection abandoned when a veteran fails to report for a requested examination. *Kowalski v. Nicholson*, 19 Vet. App. 171, 176-77 (2005). In *Kowalski*, the CAVC noted that specific provisions of regulations typically are given precedence over general provisions and that 38 C.F.R. § 3.655 explicitly addressed the consequences of a failure to report with respect to original compensation claims. *Id.*

⁶⁴ *See, e.g.,* 38 C.F.R. § 3.158(a).

⁶⁵ *Id.* § 3.156(a) (discussing new and material evidence); *but see* *Charles v. Shinseki*, 587 F.3d 1318 (Fed. Cir. 2009) (holding that a subsequent claim that is abandoned does not render an earlier pending claim also abandoned, but also assuming that an abandoned claim would be final if abandoned while on appeal).

⁶⁶ 38 C.F.R. § 3.156(a).

⁶⁷ *Wamhoff v. Brown*, 8 Vet. App. 517, 522 (1996) (citing *Zarycki v. Brown*, 6 Vet. App. 91 (1993)), for the proposition that the "duty to assist in the development and adjudication of a claim is not a one-way street". But note there were additional considerations in *Wamhoff*, including that the record contained no evidence, such as treatment records during the ten years between the original claim and the new claim, to support a finding that the Veteran "should have received benefits throughout that ten-year period." *Wamhoff*, 8 Vet. App. at 522. It is, therefore, possible the CAVC would have looked more favorably on the Veteran's argument if there had been any medical evidence suggesting he qualified for benefits at an earlier date.

⁶⁸ *See* U.S. Veterans Bureau, Mem. Op. Gen. Counsel (Aug. 30, 1930); *Morris v. Derwinski*, 1 Vet. App. 260, 264 (1991) ("In order for the VA to process claims, individuals applying for benefits have a responsibility to cooperate with the agency in the gathering of the evidence necessary to establish allowance of benefits."); *Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991) ("The duty to assist is not always a one-way street."); 38 C.F.R. § 3.159(c)(i) and (ii) (2014) (requiring claimants to "cooperate fully" with VA's efforts to obtain both Federal and non-Federal records, including providing identifying information).

III. IMPETUS FOR CHANGE: DUE PROCESS CONCERNS

In *Zayas v. Veterans Administration*,⁶⁹ a United States District Court held that the automatic reduction of benefits as a result of a failure to report for an examination would violate due process.⁷⁰ The *Zayas* case involved a Veteran suffering from psychological impairments, who failed to report for a scheduled examination.⁷¹ The District Court held that Section 3.655 required a threshold determination of whether the Veteran had failed to report “without adequate reason.”⁷² The District Court found that the language “without adequate reason” necessarily entailed an inquiry into the reasons for the failure to report and that any such inquiry must include the opportunity for a hearing.⁷³ After finding that the Veteran had not had the opportunity for a hearing, the *Zayas* court characterized the reduction of benefits as “automatic” and, so, held that the reduction violated due process.

Notably, this case involved a Veteran who was already service-connected for a psychiatric disability, consequently he may have had property rights in his current stream of payments.⁷⁴ It is beyond the scope of this Article to analyze the constitutional issue of whether prospective entitlement to benefits would be subject to the same rigor of constitutional scrutiny.⁷⁵ Even so, interpretation of the regulatory framework for awarding, denying, and suspending benefits must be informed by an appreciation for the due process concerns associated with adjudicating entitlement to veterans’ benefits.⁷⁶ Resolution of ambiguities in regulatory language and conflicts in the underlying principles involved must always include due regard for veterans’ rights with respect to benefits.⁷⁷

While there may be no direct causal link between the 1987 decision in *Zayas* and the initial proposal in 1989 to change the regulations to include a notice provision prior to discontinuance of benefits for failure to report to a scheduled VA examination, the synchronicity would appear more than coincidental.⁷⁸ In any event, regardless of the causal chain, the changes in 1990 were expressly motivated by due process concerns relating to notice.⁷⁹

⁶⁹ 666 F. Supp. 361 (D.P.R. 1987).

⁷⁰ *Id.* at 366 (“[W]e declare regulation 38 C.F.R. 3.655 constitutional only if the affected veteran is afforded an opportunity to be heard before benefit decisions are taken.”).

⁷¹ *Id.* at 365.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 363 (discussing initial service connection and ultimate award of a 100% disability rating); see *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985) (noting case law establishing that individuals receiving federal government benefits have a constitutionally protected property interest, but leaving open the question whether applicants for benefits who meet the statutory qualifications have a property interest protected by the Due Process Clause); see also Emily Woodward Deutsch & Robert James Burriesci, *Due Process in the Wake of Cushman v. Shinseki: The Inconsistency of Extending a Constitutionally-Protected Property Interest to Applicants for Veterans’ Benefits*, 3 VETERANS L. REV. 220 (2011) (discussing due process requirements in the setting of veterans benefits claims).

⁷⁵ See *Walters*, 473 U.S. at 320 n.8; see also *Mathes v. Hornbarger*, 821 F.2d 439, 441 (7th Cir. 1987) (noting that “vested” benefits are “property rights” protected by the Due Process Clause); but see *Winslow v. Walters*, 815 F.2d 1114, 1117 (7th Cir. 1987) (suggesting no constitutionally protected property right in benefits for which an applicant qualifies, but has not been granted, by holding that the statutory prohibition on judicial review in 38 U.S.C. § 211(a) “clearly deprives a federal court of the power to alter determinations made by the VA regarding disability ratings and entitlements to benefits” (emphasis added)).

⁷⁶ See, e.g., *Gambill v. Shinseki*, 576 F.3d 1307, 1310-11 (Fed. Cir. 2009) (“Although the Supreme Court has declined to address the question whether due process protections apply to the proceedings in which the DVA decides whether veteran-applicants are eligible for disability benefits, we have recently held that the Due Process Clause applies to such proceedings.” (citation omitted)).

⁷⁷ *Id.*; see also 38 U.S.C. § 5107(b) (2012) (mandating that claimants be given the benefit of the doubt).

⁷⁸ 54 Fed. Reg. 45,229, 45,239 (Oct. 30, 1989) (explaining the purpose behind proposed changes to 38 C.F.R. §§ 3.326, 3.327, 3.329, and 3.655: “These amendments clarify the requirement that individuals must report for VA examinations and require VA to issue advance notice before taking adverse action because of failure to report.”).

⁷⁹ See *id.*

IV. CONSEQUENCES FOR FAILURE TO REPORT POST-1990: 38 C.F.R. § 3.655

Currently, 38 C.F.R. § 3.655 sets forth the Secretary's means of enforcing VA's right to require a veteran to provide evidence, including to submit to a medical examination where appropriate.⁸⁰ The Secretary's right to develop the record and resulting authority to impose adverse consequences on veterans who fail to cooperate is not in dispute.⁸¹ The interesting question, then, is how the enforcement mechanism works within the pro-claimant veterans' benefit system.

A. All Claims Are Subject to Subsection (a): A Two-Prong Test

The first prong of the Section 3.655(a) test requires a determination of whether "entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination."⁸² If it is treated as a burden of persuasion,⁸³ there are really only two possible standards for determining whether entitlement to a benefit has not been "established": 1) the greater weight of the evidence of record is against entitlement to the benefit; or 2) the weight of the evidence of record is, at most, in equipoise with respect to entitlement to the benefit.⁸⁴ If the weight is positively in favor of the claim, the veteran has necessarily established his claim, and the claim must be granted.⁸⁵

⁸⁰ 38 C.F.R. § 3.655 (2013); *see* 38 U.S.C. § 5107(a) (establishing that "a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary"); *Jones v. West*, 12 Vet. App. 98, 103-05 (1998) (discussing the 1949 regulations on abandonment and concluding that the 1949 regulations allowed for previously granted benefits to be resumed after compliance, even if over one year, whereas the 1992 regulations treated the failure to report for a period of one year as abandonment resulting in loss of the earlier effective date); *see also Steward v. Principi*, 18 Vet. App. 176 (2002) ("If the petitioner persists in his refusal to submit to an examination, the Secretary may have to deny his claims or, if circumstances warrant, deem them abandoned."); 38 C.F.R. § 17.164 (providing that veterans "eligible for dental treatment on a one-time completion basis only" and who have "not received such treatment within 3 years after filing the application shall be presumed to have abandoned the claim for dental treatment").

⁸¹ *See Douglas v. Shinseki*, 23 Vet. App. 19, 26 (2009) (holding that "the Secretary . . . has an affirmative duty to gather the evidence necessary to render an informed decision on the claim, even if that means gathering and developing negative evidence"); *see also Turk v. Peake*, 21 Vet. App. 565, 570-71 (2008) ("The consequences of failure to present oneself for a medical examination are adequately addressed by VA regulations Consequently, if [a veteran] fail[s] to appear at [a] scheduled examination based on advice or information provided by his counsel, [the veteran has] made an informed evidentiary choice, the possibility of which is assumed by the text of the regulation itself. Counsel and the client assume the risk of such a choice.").

⁸² 38 C.F.R. § 3.655(a) (providing, in relevant part: "When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination . . . action shall be taken in accordance with paragraph (b) or (c) of this paragraph as appropriate."). There is some question in the case law and in Board of Veterans' Appeals (Board) decisions as to whether this is merely a preliminary determination and thus, once made, the merits will not be considered based on all of the evidence of record. *See LaPointe v. Nicholson*, 222 Fed. App'x 962, 967 (2007) (Mayer, J., dissenting) (finding this to be the correct interpretation, but arguing that the regulation so interpreted is invalid). The Regulation Rewrite Project seems to have assumed this is the case as well, as they propose removing this sentence to eliminate the first prong of the Section 3.655(a) test. *See VA Compensation and Pension Regulation Rewrite Project*, 78 Fed. Reg. 71,042, 71,080 (Nov. 27, 2013) ("The preamble to initially proposed § 5.103 stated that part 5 would not repeat § 3.655(a) because it is unnecessary. To clarify, that statement correctly applies only to the first sentence of § 3.655(a)." (citation omitted)). As discussed more thoroughly below, this cure seems only to compound the patient's ills.

⁸³ *See Skoczen v. Shinseki*, 564 F.3d 1319, 1323-25 (Fed. Cir. 2009) (explaining the meanings of the terms "burden of proof," "burden of persuasion," and "burden of production" in the context of the veterans' benefit system).

⁸⁴ *See, e.g., Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (1990) (recognizing and instructing that veterans are to be given the benefit of the doubt). Of course, this is assuming there is no burden of production or that the burden of production has been met. However, as will be discussed below, the test in 38 C.F.R. § 3.655(a) relating to establishment of a claim is better read as referring to the burden of production rather than the burden of persuasion.

⁸⁵ *See id.*

i. Interpretation One: The Evidence Must Be Against the Claim

Under this interpretation, a veteran would prevail if he has produced any favorable evidence on each of the elements of his claim and the record contains no unfavorable evidence.⁸⁶ Thus, even if the RO or, on appeal, the Board found the proffered evidence insufficient,⁸⁷ there would not be evidence against the claim, and the veteran would prevail. This interpretation seems to shift the balance too far towards the veteran, beyond merely a “benefit of the doubt,” and instead places an affirmative burden on VA to rebut a claim⁸⁸ without giving VA means to develop evidence. Requiring affirmative evidence against the claim corners VA into an untenable position.⁸⁹

More fundamentally, this interpretation necessarily robs the remainder of Section 3.655 of any bite. If the evidence is against the claim, which is a prerequisite to reaching subsection (b) under this interpretation, any distinction between claims in subsection (b) is irrelevant. All claims will be denied under subsection (b). If the decision-maker reaches subsection (b) with respect to an “original compensation claim,” the evidence of record must be affirmatively against the claim, and, when rating the claim on the evidence of record, it will be denied.⁹⁰ For all other claims, including “any other original claim,” subsection (b) specifies that the claims “shall be denied.”⁹¹ This view must be

⁸⁶ The point being that, under this interpretation, if the evidence is not against the claim, the regulations permit no adverse consequences for a veteran’s failure to report. Veterans could miss scheduled examinations for a good reason, a bad reason, or no reason at all, and, as long as the weight of the available evidence was not affirmatively against the claim, VA could not deny the claim. As the solution to missed examinations without good cause, an infinite regress of rescheduled examinations is extremely unsatisfying from both a theoretical and a practical standpoint. See *Porter v. Miller*, 155 F.2d 88, 89 (2d Cir. 1946) (rejecting a similarly circular interpretation of regulations under the Emergency Price Control Act: “we are back again where we started, embarked upon an infinite regress which makes nonsense”); accord *STEPHEN HAWKING, A BRIEF HISTORY OF TIME 1* (10th anniv. ed. 1998) (“A well-known scientist (some say it was Bertrand Russell) once gave a public lecture on astronomy. He described how the earth orbits around the sun and how the sun, in turn, orbits around the center of a vast collection of stars called our galaxy. At the end of the lecture, a little old lady at the back of the room got up and said: ‘What you have told us is rubbish. The world is really a flat plate supported on the back of a giant tortoise.’ The scientist gave a superior smile before replying, ‘What is the tortoise standing on?’ ‘You’re very clever, young man, very clever,’ said the old lady. ‘But it’s turtles all the way down!’”).

⁸⁷ See, e.g., 38 C.F.R. §§ 3.100 (delegating fact-finding authority), 3.103 (describing veterans’ procedural and appellate rights); see also *Turk v. Peake*, 21 Vet. App. 565, 570 (2008) (recognizing VA’s fact-finding authority).

⁸⁸ There are situations in which Congress has specifically mandated that a veteran prevails unless VA rebuts the claim. See, e.g., 38 U.S.C. § 105 (2012) (directing that an “injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty” under particular circumstances); 38 U.S.C. § 1154(b) (2012) (providing a presumption in favor of combat veterans that may be rebutted only by clear and convincing evidence). These situations are limited, and rightfully so, given the danger that the VA process would become, in practice if not in theory, adversarial. See, e.g., *Mariano v. Principi*, 17 Vet. App. 305, 312 (2003) (holding that VA may not order additional development for the sole purpose of obtaining evidence unfavorable to a claimant). If every disability compensation claim is to be presumed valid without probative evidence of record against the claim, express language to that effect should be placed in the regulations to put veterans and VA adjudicators on notice so that they may act accordingly.

⁸⁹ After all, VA has a duty to assist the veteran in obtaining the evidence necessary to substantiate the veteran’s claims. 38 U.S.C. § 5103A(d); *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006); 38 C.F.R. § 3.159(c)(4). If the veteran’s burden is met simply by filing a claim, any development would risk the generation of evidence against the claim, which would convert a successful claim into an unsuccessful one. This type of adversarial development is disfavored. See, e.g., *Austin v. Brown*, 6 Vet. App. 547, 552-53 (1994) (cautioning against developing the record for the purpose of obtaining negative evidence).

⁹⁰ One other possibility, however, is that the treatment of “original compensation claims” in subsection (b) is a special case whereby, despite the weight of the evidence being against one part of the claim, the claim can still be “rated” based on the evidence of record. Specifically, claims for disability compensation, generally, comprise two parts: (1) entitlement to service connection, and (2) an evaluation of the degree of disability. See *Turk*, 21 Vet. App. at 569 (holding that a claim for an increased initial rating is a continuation of the “original claim” for entitlement to service connection). The implications of this reading will not be fully discussed here, but, for instance, the weight of the evidence could be against only, say, a compensable rating (or a particular rating, e.g., 40%) and not against an underlying finding of service connection. It would thus make sense to grant service connection and rate the level of disability based on the evidence of record, possibly resulting in a noncompensable rating. A veteran would then be able to obtain a higher rating by submitting additional evidence or appearing for a medical examination, which is similar to the way the pre-1961 regulations worked. See discussion *infra* Part II.

⁹¹ 38 C.F.R. § 3.655(b) (2014).

rejected because it renders the subsection's differentiation between an "original compensation claim" and "any other original claim" meaningless.⁹²

The logical friction created by this possible reading eliminates it as a contender for the best interpretation,⁹³ a conclusion bolstered by the difficult position it puts VA in with respect to developing a claim.⁹⁴

ii. Interpretation Two: Veteran Denied the Benefit of the Doubt

An alternative construction of the first prong of Section 3.655(a) is that the enforcement mechanisms in subsection (b) apply where the veteran has met his ordinary evidentiary burden, that is, the evidence is in equipoise. It is doubtful this interpretation is viable given the statutorily mandated reasonable doubt standard, and, also problematically, this interpretation would subject noncompliant veterans to punitive measures.⁹⁵ The Secretary does have the authority to impose some adverse consequences on veterans who fail to cooperate, but increasing the burden of persuasion does not seem to fit with the pro-claimant nature of the veterans' benefit system, nor does it seem necessary given alternative constructions of the phrase.⁹⁶ In short, if the first prong of subsection (a) relates to whether the evidence is sufficient to satisfy the burden of persuasion only, a more demanding burden of persuasion is a heavy-handed, and possibly unauthorized, means of balancing the prerogative of the Secretary to develop the evidentiary record with veterans' freedom to take their chances as the record stands.⁹⁷

iii. Interpretation Three: Is Too Little Ever Enough?

The above analysis establishes that, if the Section 3.655(a) analysis of whether a claim has been "established" is treated as a question of whether the burden of persuasion has been met, then only the first proposed interpretation is consistent with the benefit-of-the-doubt standard⁹⁸ (*i.e.*, a denial of benefits for failure to report for an ordered examination would be permissible only if the evidence of record was positively against the claim).⁹⁹ Under this view, even a mere scintilla of

⁹² See *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").

⁹³ See *Corley*, 556 U.S. at 314.

⁹⁴ To reiterate, the Secretary's directive has been to grant all benefits to which a veteran is entitled, a directive entirely consistent with, and perhaps required by, the statutory framework enacted by Congress. See, e.g., 38 U.S.C. § 5107(b); *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990) ("It is in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error when, in determining whether a veteran is entitled to benefits, there is an 'approximate balance of positive and negative evidence.'"); 38 C.F.R. § 3.103 ("[I]t is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government."); see also *Austin*, 6 Vet. App. at 552 (holding that VA is bound to develop a claim in "an impartial, unbiased, and neutral manner," which suggests that VA generally should not be put in the position of seeking evidence to disprove a claim).

⁹⁵ The measures would be punitive because veterans, stripped of the benefit of the doubt, would be placed in a worse position than if VA had never attempted to "assist" them by requesting an examination. While proper incentives may be useful, we cannot see a valid argument for the imposition of punishment when a veteran chooses not to cooperate. *Accord* 38 C.F.R. § 3.103(a); *LaPointe v. Nicholson*, 222 Fed. App'x 962, 967 (2007) (Mayer, J., dissenting).

⁹⁶ See *Turk*, 21 Vet. App. at 570-71 (approving the imposition of adverse consequences for a failure to cooperate, but only where the veteran is put on notice so that he or she can make a fully informed decision); see also *Austin*, 6 Vet. App. at 552 (cautioning against adversarial development and, impliedly at least, punitive measures to obtain compliance with VA's efforts to develop the record).

⁹⁷ See, e.g., *Turk*, 21 Vet. App. at 570-71.

⁹⁸ See 38 U.S.C. § 5103A; *Gilbert* 1 Vet. App. at 53-56.

⁹⁹ Recall that an examination need not be ordered at all unless there is at least some competent, probative evidence in support of the claim. See, e.g., 38 U.S.C. § 5103A(d)(2) (setting forth circumstances under which VA's duty to assist includes providing a medical examination or obtaining a medical opinion). Of course, there is some open ground between the amount of favorable evidence that requires VA to provide an examination on one hand and the amount of favorable evidence that, nonetheless, permits VA to request an examination on the other.

evidence would be sufficient to permit the grant of entitlement to service connection for a disability despite a veteran's failure to report for an examination without good cause.¹⁰⁰

However, veterans do have a burden of production,¹⁰¹ and, the authors of this Article submit, the first prong of the test under subsection (a) requires a determination that either the burden of production has not been met or, alternatively, that the burden of production has been met but the evidence of record is nevertheless against the claim. This reading is consistent with the fact that VA has the discretion to order an examination even where there is some evidence suggesting entitlement to the benefit sought.¹⁰² In other words, a proper reading of Section 3.655 requires recognition that “there is room for play in the joints” between VA's duty to assist and its discretion to develop the record, that is, between what is compelled and what is permitted.¹⁰³

While veterans have a duty to cooperate in VA's efforts to fully develop the evidence, they also have a choice regarding the extent to which they fulfill that obligation. For instance, a veteran may choose, subject to the consequences set forth in the regulation, not to report for an examination requested by VA.¹⁰⁴ Inherent in the acknowledgement of potential adverse consequences for a failure to report is the idea that the mere possibility of a current disability and a causal nexus between the disability and active service may not be enough to “establish entitlement to a benefit.”¹⁰⁵ After all, VA may, despite at least some favorable evidence, deny a veteran's claim.¹⁰⁶ The potential for adverse consequences is the

¹⁰⁰ For instance, a single piece of evidence of very little probative value would tilt the balance to the veteran, such as a single conclusory statement from a physician such as: “It is my opinion the Veteran's right ankle condition could be related to his active service.” However, the regulations and any interpretation of them are constrained by statute. The statutory framework sets lower limits on the amount of evidence adequate to establish a claim. *See, e.g.*, 38 U.S.C. § 5103A(d)(2)(C) (noting the necessity of “sufficient medical evidence for the Secretary to make a decision on the claim” which necessarily implies that a modicum of favorable evidence is not enough); *McLendon v. Nicholson*, 20 Vet. App. 79, 84-85 (2006) (recognizing that evidence may “indicate” an association, but still not be enough to “establish a medical nexus”). Principles from civil law also suggest that a single piece of favorable evidence is not necessarily enough to tilt the scales of justice even in the absence of any evidence against the claim. *See, e.g.*, *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1323 (Fed. Cir. 2009) (holding that, despite the requirement that federal courts considering motions for summary judgment resolve “all reasonable inferences and construe the evidence in the light most favorable to the non-moving party,” the non-moving party, to defeat summary judgment, must show that the evidence is sufficient for a reasonable fact finder to reach a conclusion in her favor; “a mere scintilla of evidence will not suffice.”).

¹⁰¹ *See, e.g.*, *Skoczen v. Shinseki*, 564 F.3d 1319, 1325 (Fed. Cir. 2009) (holding that claimants have a responsibility to present and “support” their claims for disability benefits and that the law imposes evidentiary responsibilities on the claimant as well as on VA).

¹⁰² *See Douglas v. Shinseki*, 23 Vet. App. 19, 26 (2009) (holding that “the Secretary . . . has an affirmative duty to gather the evidence necessary to render an informed decision on the claim, even if that means gathering and developing negative evidence”); *Austin v. Brown*, 6 Vet. App. 547, 553 (1994) (recognizing discretion of VA to develop the record).

¹⁰³ *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) (noting, in the context of the First Amendment: “Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”); *see also Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“Our decisions recognize that ‘there is room for play in the joints’ between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.” (citation omitted)).

¹⁰⁴ *See Turk*, 21 Vet. App. at 570-71 (“The consequences of failure to present oneself for a medical examination are adequately addressed by VA regulations . . . It is not a ‘manipulation of the record’ for a claimant to choose one option from among those presented by a VA regulation. Failure to attend a scheduled VA compensation examination . . . exposes a veteran to the possibility of an adverse finding of fact that can be overturned only by the Court's determination that the finding was clearly erroneous—a difficult burden to meet. . . . Consequently, if [a veteran] fail[s] to appear at [a] scheduled examination based on advice or information provided by his counsel, [the veteran has] made an informed evidentiary choice, the possibility of which is assumed by the text of the regulation itself. Counsel and the client assume the risk of such a choice.”).

¹⁰⁵ We recognize that claimants' burden of production was reduced by the Veteran's Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000), which removed the “well-grounded claim” requirement from 38 U.S.C. § 5107. Claimants' burden of production was not eliminated, however, because the statute still requires a claimant to “present *and support* a claim for benefits.” 38 U.S.C. § 5107(a) (emphasis added).

¹⁰⁶ Again, there must be at least some favorable evidence to even trigger VA's duty to provide an examination. *See McLendon v. Nicholson*, 20 Vet. App. 79, 81-82 (2006); *see also Colantonio v. Shinseki*, 606 F.3d 1378, 1382 (Fed. Cir. 2010) (holding that, while medically competent evidence is not required in every case, “there may be instances . . . in which the lay evidence falls short of satisfying the statutory standard,” which, if met, requires VA to provide a medical examination); *Waters v. Shinseki*, 601 F.3d 1274, 1278-79 (Fed. Cir. 2010) (holding that VA need not provide a VA examination based only on conclusory, generalized lay statements suggesting a nexus between a current disability and service). However, in

only thing that ensures VA has any powers of enforcement in exercising its discretion to further develop an incomplete record.¹⁰⁷

And adverse consequences are the only means of ensuring that claimants, who have a positive duty to cooperate with VA's efforts to develop the record,¹⁰⁸ fulfill those obligations. Establishing a claim, then, involves not only providing some favorable evidence, but providing sufficient favorable evidence to warrant a decision in the claimant's favor.¹⁰⁹ Any other view would either render inconsequential Section 3.655(b)'s disparate treatment of claims (some decided on the evidence, others denied) or, alternatively, would withhold veterans' statutorily mandated benefit of the doubt.¹¹⁰

iv. Second Prong: Lack of Good Cause

A finding of a lack of good cause in missing a scheduled examination, or a lack of adequate reason, has been a required prerequisite to implementing VA's enforcement mechanisms since at least the 1930s.¹¹¹ While the terminology has shifted, the requirement has been consistent, and its beneficial purposes need little elaboration. The language of this prong of the provision, to the extent there is any ambiguity, has been provided with additional clarity through definitions and examples.¹¹² Further, good cause considerations have little effect on the subsection (b) provisions with which this Article is primarily concerned.

conducting that initial analysis, the evidence is presumed to be competent and credible. *McLendon*, 20 Vet. App. at 83 (“The types of evidence that ‘indicate’ that a current disability ‘may be associated’ with military service include, but are not limited to, medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits . . .”). Thus, even taking the most generous view to the veteran of the quantum of evidence necessary to establish entitlement to a benefit, VA may conclude that evidence sufficient to trigger an examination is not, after all, sufficiently credible or probative to establish entitlement to the requested benefit. *Id.* at 84; see *Waters*, 601 F.3d at 1277 (noting three separate “evidentiary guidelines” in 38 U.S.C. § 5103A(d)(2), including the need for some probative evidence in favor of a causal nexus but the possibility of a lack of “sufficient medical evidence” to decide the claim). Put differently, even though VA has an obligation to help veterans meet their burden of production, veterans who fail to cooperate with VA in developing evidence for their claims may be subject to denial without further assistance. See, e.g., *Skoczen*, 564 F.3d at 1325; *Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991) (“The duty to assist is not always a one-way street.”).

¹⁰⁷ To be sure, nothing in either the statutes or the regulations conferring discretionary authority on VA countenances punitive enforcement of its requests that veterans undergo medical examinations. See *Austin*, 6 Vet. App. at 552 (“[B]asic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner.”). The line between punishment and proper incentivizing may be fine, but it must exist for there to be a practical effect flowing from the delegation to VA of the authority to develop an incomplete record. If there is no such line, or the VA has no means of enforcing its authority, a veteran would be vested with the actual control of development of the record. This is plainly at odds with the current state of the law. *Id.* (recognizing VA's authority to develop the record despite some positive evidence so long as the development is undertaken in “an impartial, unbiased, and neutral manner”).

¹⁰⁸ See, e.g., *Wood*, 1 Vet. App. at 193; see also 38 C.F.R. § 3.159(c)(1)(i) (2014) (“The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.”); 38 C.F.R. § 3.159(c)(1)(ii) (“If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.”).

¹⁰⁹ See, e.g., *Skoczen*, 564 F.3d at 1325.

¹¹⁰ 38 U.S.C. § 5107(b).

¹¹¹ See World War Veterans' Act § 203, Pub. L. No. 68-242 (1924) (requiring a finding of “neglect, refusal, or obstruction” of an ordered examination); 38 C.F.R. § 3.251 (1949) (requiring a finding that any failure to report for physical examination was “without adequate reason”); 38 C.F.R. § 3.655 (1962) (continuing to require a finding that a failure to report was “without adequate reason”); 38 C.F.R. § 3.655 (1991) (changing the terminology to “without good cause”).

¹¹² 38 C.F.R. § 3.655(a) (2013) (“Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc.”).

B. Subsection (b): Maintains Claim-Specific Treatment

Section 3.655(b) calls for different treatment of various types of claims including “an original compensation claim,” “any other original claim,” “a reopened claim for a benefit which was previously disallowed,” and “a claim for increase.”¹¹³ The CAVC has noted the importance of the distinction between “original compensation claims” and claims for “an increased rating.”¹¹⁴ In *Turk*, the CAVC held that, when a veteran appeals the initial rating assigned in connection with a grant of service connection, the claim remains an “original compensation claim.”¹¹⁵ However, an error in characterizing a veteran’s claim is harmless error where the Board has “evaluated the medical evidence of record and explained why it was insufficient to warrant a [higher] disability rating.”¹¹⁶

Of course, under the view of the authors of this Article, mischaracterization of an “original compensation claim” will inevitably produce such “harmless” error. Under the most natural reading of 38 C.F.R. § 3.655(a), which makes no distinction between types of claims, reasons and bases explaining why the evidence of record is insufficient to establish entitlement to a claim would be necessary whether the claim was for service connection or a higher disability rating.¹¹⁷

C. Subsection (b): Three Reasonable Interpretations of “Original Compensation Claim”

Prior to the 1990 changes, Section 3.655 did not apply to failures to report for an examination in the context of a claim of entitlement to service connection.¹¹⁸ Rather, as already discussed, a failure to report for an examination scheduled for the purpose of developing those claims was dealt with under Section 3.158.¹¹⁹ The new language, however, explicitly references “original compensation claim[s].”¹²⁰ Any application of Section 3.655(b) requires, therefore, a definition of “original compensation claim.”

i. Interpretation One: It Means What It Says

The plain language of “original compensation claim” is unambiguous if its individual components are read according to their definitions. VA’s definitional regulation indicates that the terms “claim” and “application” are interchangeable and defines them as “a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit.”¹²¹ An “original claim” is defined as an “initial formal application on a form prescribed by the Secretary.”¹²² The term “compensation” means “a monthly payment made by the Secretary to a veteran because

¹¹³ *Id.* § 3.655(b); *see Turk v. Peake*, 21 Vet. App. 565, 569 (2008) (“Thus, § 3.655(b) creates a distinction between original compensation claims, which are rated on the evidence of record, and other classes of claims, which are summarily denied.”).

¹¹⁴ *Turk*, 21 Vet. App. at 569-70.

¹¹⁵ *Id.* at 570.

¹¹⁶ *Id.*

¹¹⁷ *See supra* Section IV.A.i.

¹¹⁸ *See supra* Section IV.A.iv.

¹¹⁹ *See, e.g., Wamhoff*, 8 Vet. App. at 520-22.

¹²⁰ 38 C.F.R. § 3.655(b) (2014).

¹²¹ *Id.* § 3.1(p); *see* 38 U.S.C. § 5110(b)(2)(B) (2012) (“For purposes of this paragraph, an original claim is an initial claim filed by a veteran for disability compensation.”); 38 C.F.R. § 20.3(f) (defining “claim” as an “application made under title 38, United States Code, . . . for entitlement to Department of Veterans Affairs benefits or for the continuation or increase of such benefits, or the defense of a proposed agency adverse action concerning benefits”).

¹²² 38 C.F.R. § 3.160(b); *see also* 38 U.S.C. § 5101(a)(1) (directing that a specific claim form prescribed by the Secretary “must be filed in order for benefits to be paid or furnished to any individual under the laws administered” by VA); 38 C.F.R. § 3.151(a) (same).

of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957.”¹²³

An “original compensation claim” is, then, the initial formal application, on a form prescribed by the Secretary, for monetary benefits based on a service-connected disability.¹²⁴ In other words, it is the initial formal claim of entitlement to compensation based on a service-connected disability and the initial evaluation of that disability.¹²⁵

Obviously, such a claim is distinguishable from “any other original claim,” a “reopened claim,” and a “claim for increase.”¹²⁶ A “claim for increase” must relate, if it relates to the issue of service connection at all, to an already service-connected disability.¹²⁷ A “reopened claim” is plainly not an original claim for service connection (or for any other benefit), but is a subsequent claim for benefits after the initial claim was denied.¹²⁸ That leaves “other original claims,” which by definition and immediate context cannot be initial formal claims for compensation, such as the initial formal claim for service connection. But what are they?

“Original claim” is, as noted above, a defined term.¹²⁹ The United States Court of Appeals for the Federal Circuit has held that, “[u]nder the rule of *ejusdem generis*, which means ‘of the same kind,’ where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.”¹³⁰ The principle also applies “where a general term follows one expressly set forth specific term.”¹³¹ The most obvious interpretation, then, is that the term “original compensation claim” refers to “original claims” that are for “compensation.”¹³² The more general “other original claims” would consist of initial, formal claims for benefits other than compensation.¹³³

¹²³ 38 U.S.C. § 101(13); *see* 38 C.F.R. § 3.4.

¹²⁴ To be complete, it would also include the initial formal application, on a form prescribed by the Secretary, for monetary benefits to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957.

¹²⁵ *See Turk v. Peake*, 21 Vet. App. 565, 570 (2008) (holding that, where an initial rating decision granting service connection and assigning a disability rating never became final due to an appeal of the initial disability rating, the claim for an increased initial rating “should have been classified as an ‘original compensation claim’”).

¹²⁶ 38 C.F.R. § 3.655(b) explicitly treats such claims differently than “original compensation claims.”

¹²⁷ *See, e.g.*, 38 C.F.R. § 3.157(b) (“Once a formal claim for pension or compensation has been allowed or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree, receipt of one of the following will be accepted as an informal claim for increased benefits or an informal claim to reopen.”).

¹²⁸ *See, e.g.*, 38 U.S.C. § 5108 (discussing disallowed claims).

¹²⁹ 38 C.F.R. § 3.160(b) (defining “original claim” as an “initial formal application on a form prescribed by the Secretary,” which for practical purposes means a claim submitted on VA Form 21-526).

¹³⁰ *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1308 (Fed. Cir. 2001) (quoting *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)).

¹³¹ *Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1292 (Fed. Cir. 2008).

¹³² “Compensation” is also a defined term. *See* 38 U.S.C. § 101(13) (“The term ‘compensation’ means a monthly payment made by the Secretary to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957.”); *see also* 38 U.S.C. § 5103A(d) (titled “Medical Examinations for Compensation Claims” but clarifying in the substantive provisions that the subsection applies only to “disability compensation”). Thus, the term would likely include Dependency and Indemnity Compensation (DIC) benefits for service-connected death under 38 U.S.C. § 1310 and DIC benefits for medical negligence under 38 U.S.C. § 1151. *See, e.g.*, *Trafter v. Shinseki*, 26 Vet. App. 267, 275-77 (2013) (holding that the duty to assist provisions of 38 U.S.C. § 5103A(d) relating to examinations in connection with “compensation” claims also apply to § 1151 claims).

¹³³ For instance, other original claims would likely include claims for nonservice-connected pension benefits, special benefits for spina bifida under U.S.C. § 1805, and other non-compensation benefits.

This interpretation leaves no term in subsection (b) referring to non-original compensation claims, such as informal claims for service connection or formal, but not original, claims for service connection. The only options consistent with the regulatory text would be to treat such claims as abandoned¹³⁴ or to go back to the interpretive drawing board to find a place to fit those claims into Section 3.655.

There is a dearth of court decisions discussing 38 C.F.R. § 3.655, particularly the meaning of “original compensation claim” as the term is employed in subsection (b). Those cases that do touch on the issue have not adopted the straightforward interpretation offered above.¹³⁵

ii. Interpretation Two: Any Claim of Entitlement to Disability Compensation, But Not Other Claims for Compensation

“Original compensation claim” could instead mean any claim for entitlement to service connection for a disability, whether the claim is the first, formal claim for compensation; an informal claim for compensation; or a second, third, or later formal claim for compensation. This interpretation is, if not required by case law, at least consistent with it. For instance, in *Turk v. Peake*, the CAVC held that a claim for an increased initial rating is still part of the “original compensation claim” and, therefore, must be decided on the evidence of record when the provisions of Section 3.655(b) are applied.¹³⁶

The benefit of this interpretation is that it encompasses formal and informal, as well as original and subsequent, claims for disability compensation.

However, there are several problems with this interpretation. One problem is that it imposes on the phrase “original compensation claim” a meaning that is not intuitive from the terms with which it is comprised. As discussed in the previous section, “original claim” and “compensation” both have definite meanings that are incompatible with this interpretation. Another problem is that singling out claims for disability compensation for particularly favorable treatment (*i.e.*, rating based on the evidence rather than summary denial) makes little sense in the grander scheme of veterans’ benefit law.¹³⁷

iii. Interpretation Three: Any Claims for Compensation Other Than Claims to Reopen and Claims For Increase

Whereas the prior interpretations ignored the statutory and regulatory definitions of both “original claims” and “compensation,” a third alternative would be to recognize “original compensation claims” as including claims for all types of compensation, but not limited to “original claims” as that term is generally defined. This interpretation has the advantage of being more consistent with current definitions of the component parts of the operative phrase. Yet, it still fails to comport with the plain

¹³⁴ 38 C.F.R. § 3.158(a).

¹³⁵ For instance, in *Turk v. Peake*, 21 Vet. App. 565 (2008), the CAVC discussed the definition of “original compensation claim,” but not in the context of whether it applies only to an initial, formal claim for compensation. Rather, the particular definitional point at issue was whether, after service connection has been granted, a veteran’s claim of entitlement to a higher initial rating is still part of the “original compensation claim” asserting entitlement to service connection, or instead is a “claim for increase” subject to summary denial under Section 3.655(b). *Id.* at 569-70. The facts are sufficiently muddled that reading an implicit rejection of the interpretation of “original compensation claim” as only “initial, formal” claims would not be warranted. Specifically, although the service connection claim at issue was not the first service connection claim filed by the Veteran, the September 2003 claim at issue was “added” to the Veteran’s initial June 2003 claim and so could have been considered part of the initial, formal claim of entitlement to service connection. *Id.* at 566. In other words, *Turk* need not be wrong for the plain reading of “original compensation claim” to be right.

¹³⁶ *Id.* at 570.

¹³⁷ See 38 U.S.C. § 5107(b) (discussing benefit of the doubt); 38 C.F.R. § 3.103(a) (discussing procedural due process and appellate rights).

reading of the term “original,” it appears contrary to the Secretary’s intended meaning, and no court has adopted this more expansive interpretation.¹³⁸ Given at least three strikes against it, this interpretation is a poor candidate for advancing, and its full consequences will not be considered. The fact that this interpretation is at least as plausible as the interpretation currently in vogue highlights the main concern of this Article: current Section 3.655 is a shaky edifice subject to numerous attacks on interpretational and policy grounds. Improvements can and should be made.

V. THE REGULATION REWRITE PROJECT¹³⁹ AND PROPOSED 38 C.F.R. § 5.103

VA is currently engaged in a large-scale project to revamp all of the regulations specifying the responsibilities and duties of both veterans and VA with respect to claims for benefits.¹⁴⁰ The updated regulations will be set forth in a new Part 5 of Title 38 of the *Code of Federal Regulations*.¹⁴¹ The proposed changes maintain the distinction in Section 3.655(b) between an “original compensation claim” on one hand and, on the other, “any other original claim,” a “reopened claim,” and a “claim for increase.”¹⁴²

In a fascinating exchange, a commenter, who presciently anticipated the issues discussed in this Article, proposed eliminating any distinction between original and other claims.¹⁴³ The commenter also noted that the regulations do not define “other original claim” or “new claim,” thereby creating unnecessary ambiguity.¹⁴⁴ The commenter noted that revisions would ensure that the terms used can be understood easily by claimants and “fit within the regulatory framework.”¹⁴⁵ The purposes mirror, almost exactly, the stated goals of the Regulation Rewrite Project.¹⁴⁶

¹³⁸ See, e.g., *Harvey v. Nicholson*, 23 Vet. App. 325 (2007) (implicitly accepting the Board’s interpretation of “original compensation claim” as excluding an “original claim” for pension benefits).

¹³⁹ See generally *Pine & Russo*, *supra* note 6, at 42 (describing the Regulation Rewrite Project and its goals: “With simpler organization and clearer content, the VA’s regulations will be easier to find, understand, and apply. Therefore, the results of the Rewrite Project will, in turn, allow the Department of Veterans Affairs to adjudicate claims more accurately and promptly. This service is what our veterans and their families both need and deserve.”).

¹⁴⁰ Duties of VA, 70 Fed. Reg. 24,680, 24,680 (proposed May 10, 2005) (to be codified at 38 C.F.R. pt. 5) (describing the purpose of the Regulation Rewrite Project as “to reorganize and rewrite in plain language its disability compensation and pension regulations relating to the duties of VA and the rights and responsibilities of claimants and beneficiaries. These revisions are proposed as part of VA’s rewrite and reorganization of all of its compensation and pension regulations in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants, beneficiaries, and VA personnel in locating and understanding these regulations”).

¹⁴¹ *Id.*

¹⁴² *Id.* at 24,685 (“Current § 3.655(b) provides for two possible consequences of a claimant’s or beneficiary’s failure to report for a scheduled VA examination. If an ‘original disability compensation claim’ is pending and a claimant fails to report for an examination, VA will decide the claim based upon the evidence of record. If, however, ‘any other original claim,’ a ‘reopened claim,’ or a ‘claim for increase’ is pending and a veteran fails to report for a scheduled VA examination, VA denies the claim. We propose to retain this distinction in proposed paragraph (b) [of Section 5.103].”).

¹⁴³ VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. 71,042, 71,080-81 (proposed Nov. 27, 2013) (to be codified at 38 C.F.R. pts. 3, 5).

¹⁴⁴ *Id.* at 71,081.

¹⁴⁵ *Id.*

¹⁴⁶ See Duties of VA, 70 Fed. Reg. at 24,680 (“We plan to organize the part 5 regulations so that all provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this organization will allow claimants, beneficiaries, and their representatives, as well as VA personnel, to find information relating to a specific benefit more quickly than the organization provided in current part 3.”).

While the response to the commenter suggests that clarification is unnecessary,¹⁴⁷ courts have had trouble deciphering the meaning of the language of Section 3.655,¹⁴⁸ and the rewritten regulations change one of the ambiguous terms in an apparent attempt to improve the uncertainty the commenter identified.¹⁴⁹ In addition, the proposed Part 5 contains an updated definitional provision, proposed § 5.57(b), which creates a new definition for “original claim.”¹⁵⁰ Also, the respondents proposed to eliminate the term “new claim” from proposed § 5.103(b).¹⁵¹ These definitional solutions eliminate some of the problems we and the commenter have identified; however, they do not address the structural defects in 38 C.F.R. § 3.655.

Disparate treatment of various classes of claims is retained in the proposed § 5.103(b). The explanation for treating a failure to report for an examination differently depending on the type of claim at issue relies on the relative likelihood that summary denial would be inappropriate with respect to disability compensation claims.¹⁵² If the merits of summary denial for certain classes of claims depend on the presumption that “medical information is likely to be lacking and indispensable,” then summary denial is indeed inconsistent with VA’s statutory mandate.¹⁵³ “Likely,” after all, entails “possibly not.”

This problem of potentially constitutional proportions is magnified by the drafters’ proposed elimination of the first sentence of current 38 C.F.R. § 3.655(a) in the new 38 C.F.R. § 5.103.¹⁵⁴ Recall that the first sentence of subsection (a) requires, as a first step, that the adjudicator determine that the evidence of record is not sufficient to establish entitlement to the benefit sought. Rather than ensuring that all evidence, even late-submitted evidence, will be reviewed prior to a summary denial, elimination of that provision will take out the only step prior to summary denial where the evidence of record is considered by VA with respect to the merits of the claim. Congress has not authorized this truncation of the adjudication process.¹⁵⁵

¹⁴⁷ See, e.g., VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. at 71,081 (“The commenter asserted there is no logical reason to distinguish between original and other claims. We interpret the comment to mean that VA should treat a failure without good cause to report for a VA examination the same whether the examination is for an original disability compensation claim or for any other claim. . . . There are good and practical reasons to treat the failure to report for an examination in an original claim for disability compensation differently than in other claims.”).

¹⁴⁸ See *LaPointe v. Nicholson*, 222 Fed. App’x 962, 967 (Fed. Cir. 2007) (Mayer, J., dissenting) (“To begin with, section 3.655(b) is internally inconsistent. . . . In simple terms, the command that the secretary shall decide claims for benefits after considering *all* evidence of record plainly does not admit of per se rules providing for the denial of claims without considering that evidence.”).

¹⁴⁹ Compare 38 C.F.R. § 3.655(b) (2014) (employing the term “original compensation claim”), with *Duties of VA*, 70 Fed. Reg. at 24,690 (setting forth proposed 38 C.F.R. § 5.103 and changing “original compensation claim” to “original disability compensation claim,” but failing to acknowledge the shift in nomenclature). The change in verbiage suggests, if not an admission, then recognition that the term “original compensation claim” is potentially ambiguous. While the term “disability compensation claim” evokes a statutory phrase, it is still sufficiently ambiguous that a definition would be helpful, especially to lay veterans. See 38 U.S.C. § 5110 (2012) (using the term “original claim”).

¹⁵⁰ VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. at 71,081 (“We defined ‘original claim’ in § 5.57(b) as ‘the first claim VA receives from an individual for disability benefits, for death benefits, or for monetary allowance under 38 U.S.C. chapter 18.’”).

¹⁵¹ *Id.* (“We have not defined the term ‘new claim.’ Based on this comment, we are removing the term from § 5.103(b)(2).”).

¹⁵² *Id.* (“Evidence sufficient to decide whether a disability is service connected is likely to be of record without the examination, for example, in the case of a battlefield amputee or a veteran who contracted a presumptively service-connected chronic disease. Even though the evidence of record might be uninformative about the current extent of disability, it is practicable and efficient to decide such a claim on the evidence of record without the examination, even at the risk of an imprecise initial rating. In contrast, current medical information is likely to be lacking and indispensable to deciding the other types of claims named in the regulation.”).

¹⁵³ *Id.*; see, e.g., *LaPointe*, 222 Fed. App’x at 967 (Mayer, J., dissenting) (arguing that an interpretation allowing for summary denial without considering the merits based on all the evidence of record is not permitted and that Section 3.655 should be invalidated).

¹⁵⁴ VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. at 71,080 (“The preamble to initially proposed § 5.103 stated that part 5 would not repeat § 3.655(a) because it is unnecessary. To clarify, that statement correctly applies only to the first sentence of § 3.655(a).” (citation omitted)).

¹⁵⁵ See 38 U.S.C. § 5107(b) (2012) (discussing benefit of the doubt).

In addition, the justification for the proposed retention of subsection(b)'s special treatment of disability compensation claims is that, in some cases, some veterans will be able to establish service connection, but will not have sufficient evidence to accurately evaluate their disabilities. There is no need to retain ambiguous language for purposes unstated in, and not obvious from, the regulation text.

VI. CONCLUSION

We have demonstrated that there are multiple plausible interpretations of 38 C.F.R. § 3.655, and that the interpretation that currently holds sway is inconsistent with the text, legislative history, and overarching statutory scheme informing the regulation. Under the best interpretation of 38 C.F.R. § 3.655, the evidence of record must be evaluated with respect to every claim as a preliminary step in determining whether to impose consequences on a claimant for failure to report for a requested medical examination. Whether or not our interpretation is adopted, this step must occur in every case. Further, current Section 3.655(b) contains almost irreconcilable ambiguities, and even the most straightforward reading leaves haphazard holes in the enforcement mechanism.

The solutions put forward by the Regulation Rewrite Project are incomplete. While eliminating some areas of ambiguity, the suggested adjustments expose veterans to the risk of having their claims denied without VA having considered their claims on the merits at any point. We propose that, instead of trying to salvage the summary denial provisions, new 38 C.F.R. § 5.103 provide simply that, where a veteran fails without good cause to report for a medical examination in connection with a claim for benefits, VA will adjudicate the claim based on the evidence of record.¹⁵⁶ Our proposed provision provides easy to understand consequences when a veteran considers whether to report for an examination. Our proposed provision ensures that, while VA will not foist “assistance” onto unwilling veterans, no veteran will have a claim summarily denied without full consideration of the evidence that is already of record. Finally, our proposed provision will promote the uniform and efficient adjudication of claims involving veterans who failed to report for a requested medical examination without good cause.

¹⁵⁶ We do not propose any changes to the provisions, in either current 38 C.F.R. § 3.655 or in new 38 C.F.R. § 5.103, relating to proposed reductions or discontinuance of current benefits. Those provisions serve an important function, contain detailed provisions protecting veterans' due process rights, and have been a consistent part of VA regulations, with adjustments, for nearly a century. A detailed analysis of those provisions is beyond the scope of this Article.