

Effects of Representation by Attorneys in Cases before VA: The “New Paternalism”

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INTRODUCTION

There is a recognized difference in the treatment of cases by the United States Court of Appeals for the Federal Circuit (Federal Circuit), the United States Court of Appeals for Veterans Claims (Veterans Court), and the Department of Veterans Affairs (Department or VA) when a claimant seeking VA benefits is represented by counsel.³ This article will provide a historical overview of the treatment of attorneys and pro se claimants,⁴ describe the context in which the differential treatment arises, and discuss the implications of representation by counsel at various levels in the VA claims adjudication process.

The VA adjudication system is unlike any court-based system of claims adjudication. Whereas civil and criminal practice before courts of general jurisdiction is adversarial in nature, the VA adjudicatory system is “uniquely pro-claimant.”⁵ For the entirety of the VA claims adjudication process, the adjudicatory system is nonadversarial.⁶ Rules of evidence that apply in courts of general

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³ *See Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005); *Robinson v. Mansfield*, 21 Vet. App. 545, 554 (2008); *Overton v. Nicholson*, 20 Vet. App. 427, 438 (2006).

⁴ As will be discussed below, the category “pro se claimants” includes claimants represented by veterans’ service organizations (VSOs).

⁵ *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see also Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000).

⁶ 38 C.F.R. § 3.103 (2007) (indicating, “proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to a claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.”).

jurisdiction do not apply in the VA claims adjudication system.⁷ Only when a claim leaves the Department and reaches the Veterans Court does the claims process become adversarial.⁸

The claims process begins when a claimant submits a request for benefits to a VA Regional Office (RO).⁹ Generally, attorney participation is not permitted at this stage of the proceedings,¹⁰ and claims are usually filed *pro se*, or with the assistance of a veterans' service organization as representative. Thus, the initial "pleading," in most cases, is a claim for compensation benefits filed by a veteran. This is significant because, as will be discussed in greater detail below, VA has a duty to "sympathetically read" a claimant's pleadings and "sympathetically develop the [claimant's] claim to its optimum."¹¹ This article will explore what it means to "sympathetically read" and "sympathetically develop" a claim for VA benefits. As detailed below, courts have applied these concepts to *pro se* claimants, but have established a different standard for claimants who are represented by counsel.¹²

Before we undertake a comprehensive examination of the duty to sympathetically read or develop a veteran's claim to its optimum, it is important to note the history of attorney representation before VA. This history is critical because it reveals the paternalistic intent underlying VA benefits adjudication, as well as the suspicion of

⁷ See *id.* §§ 3.103(c)-(d), 20.700.

⁸ See *Reed v. Principi*, 17 Vet. App. 380, 385 (2003); *MacWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992).

⁹ 38 U.S.C. § 5100 (2000) (defining a "claimant" as an individual "applying for, or submitting a claim for, any benefit under the laws administered by the Secretary.").

¹⁰ Attorneys can represent claimants before VA at this stage; however, they are essentially excluded at this point in the process because they are prohibited from being compensated more than \$10.00 for their services. *Pro bono* representation, therefore, is not affected.

¹¹ *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004); *Schroeder v. West*, 212 F.3d 1265 (Fed. Cir. 2000); *Overton v. Nicholson*, 20 Vet. App. 427, 438 (2006).

¹² See *Comer v. Peake*, No. 2008-7013 (Fed. Cir. Jan. 16, 2009).

attorney involvement. As the historical discussion below discloses, as attorney involvement has become more prevalent, increasingly the courts have become the protector of VA paternalism. This “new paternalism” is described in the section below detailing how courts have applied the duty to sympathetically read or develop a veteran’s claim to its optimum.

As will be discussed, from 1862 until the very recent past, there has been an ongoing debate over the value or wisdom of VA’s paternalistic treatment of claimants in the VA adjudication process. This debate included whether there should be judicial review of decisions by the Board of Veterans’ Appeals (BVA or Board), as well as whether attorneys should remain essentially excluded from representing claimants before VA. By the 1980s, the trend was clearly moving away from the paternalistic model and toward greater attorney involvement. In 1988, the Veterans’ Judicial Review Act (VJRA)¹³ was enacted, providing for judicial review of BVA decisions and creating the Veterans Court, allowing attorney representation before that body. This also led to the right to appeal to the Federal Circuit, and ultimately, the United States Supreme Court (Supreme Court).

Many of the policy questions concerning the role of VA paternalism were raised and addressed in a law suit filed in the early 1980s that culminated in a decision by the Supreme Court. For the purposes of introducing many of these arguments and the historical context, we believe a detailed discussion of the Supreme Court’s decision in *Walters v. National Association of Radiation Survivors* is necessary.¹⁴ *Walters* is essential to understanding the debate over the value of the paternalistic model because the majority and dissent candidly address the conflicting policy concerns. Although the *Walters* Court rejected the challenge to the constitutionality of the fee limitation, as will be discussed below, it cited a 1982 United States Senate (Senate) finding that the fee limitation was “no longer tenable,”

¹³ Veterans’ Judicial Review Act [hereinafter VJRA], Pub. L. No. 100-687, 102 Stat. 4105 (1988).

¹⁴ *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985).

but pointed out that the Senate concluded that “until” there was judicial review of BVA decisions, there was no need for attorneys.¹⁵

Following the Supreme Court’s decision, however, the anti-paternalistic trend, which was ascendant, remained strong and resulted in both judicial review and, with it, the easing of attorney exclusion through the right of attorneys to receive Equal Access to Justice Act (EAJA) fees¹⁶ and/or fees based on representation before VA.¹⁷ More recently, legislation was passed permitting attorneys to charge contingency fees for representing claimants at the RO level following the filing of a Notice of Disagreement (NOD) with a VA agency of original jurisdiction decision (RO).¹⁸

We will also discuss the more recent trend, a court-imposed paternalism that applies only to pro se claimants, which we interpret as a reaction to the impact of the first trend. We will refer to this as the “new paternalism.” For many of the reasons identified by the majority in *Walters*, there has been a strong judicial response, which culminated in the Federal Circuit’s decision in *Andrews*, to the “perils” of attorney representation of claimants.

We conclude by discussing the possible ramifications of court-imposed paternalism. We also discuss a “forked approach” with different treatment afforded the claimants depending upon whether they are represented by counsel.

¹⁵ *Id.* at 322 n.10.

¹⁶ See 28 U.S.C. § 2412(d)(1), (2)(F) (2000) (setting forth the requirements for recovery of attorneys’ fees and expenses under the Equal Access to Justice Act [hereinafter EAJA]). Pursuant to EAJA, the Veterans Court will award attorneys’ fees and expenses to a prevailing party, unless the court finds the position of the United States was substantially justified.

¹⁷ 38 U.S.C. § 5904 (c)(1) (2000).

¹⁸ *Id.* (2006).

I. HISTORICAL TREATMENT OF ATTORNEY REPRESENTATION BEFORE VA

A. The Walters Decision

On July 14, 1862, Congress enacted the first limitation on the fees an attorney may charge to represent a veteran.¹⁹ One of the purposes was to “prevent the numerous frauds committed by pension agents upon applicants for pensions....”²⁰ On July 4, 1864, Congress repealed sections 6 and 7 of the 1862 Act and substituted in its place a

¹⁹ Sections 6 and 7 of the Act of July 14, 1862, which authorized a grant of permissions to certain military personnel, provided as follows:

SECTION 6. And be it further enacted, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance, before the Pension Office under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence, five dollars. In cases wherein additional testimony is required by the Commissioner of Pensions, for each affidavit so required and executed and forwarded (except the affidavits of surgeons, for which such agents and attorneys shall not be entitled to any fees,) one dollar and fifty cents.

SECTION 7. And be it further enacted, That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowance under this act, on the condition that he shall receive a per centum upon, or any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offence, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offence.

12 Stat. 568 (1863).

²⁰ CONG. GLOBE, 37th Cong., 2d Sess. 2099, 2101 (1862) (statement of Mr. Harrison).

maximum fee of \$10.00.²¹ In discussing a 1918 amendment to the War Risk Insurance Act, Congress indicated that it was protecting veterans from predatory practices of unscrupulous claims agents and attorneys. A statement in the Congressional Record notes:

It is not the intent of Congress that these mercenary claim-agent leeches should sap the blood of any financial benefit from the Government by putting up these false claims and establishing their right to this 10 per cent commission for doing nothing, and doing what the Government itself intends to do in every individual case.²²

For more than 120 years, attorney fees for assisting veterans and their survivors in prosecuting benefit claims were capped at \$10.00.²³

A legal challenge by several veterans' service organizations, veterans, and a veteran's surviving spouse to the constitutionality of the statutory \$10.00 limit on attorney fees that was allowed to be paid to an attorney or agent representing a claimant before VA reached the Supreme Court in 1985. A district court had issued a countrywide preliminary injunction, finding that the \$10.00 fee limitation set forth in 38 U.S.C. § 3404(c) violated the due process clause of the Fifth Amendment and the First Amendment because it denied veterans and their survivors the opportunity to retain counsel of their choice in pursuing a claim.²⁴ The district court entered a preliminary injunction enjoining the Government from enforcing or attempting to enforce the provisions of 38 U.S.C. §§ 3404-3405. The Supreme Court reversed, with only three Justices finding the fee limitation was unconstitutional.

²¹ *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 at 359-60 (1985) (noting in section 12 of this Act, Congress decided that the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty or other allowance before the pension office "shall not exceed ten dollars." According to the Act, that sum "shall be received by such agent or attorney in full for all services in obtaining such pension, and shall not be demanded or received in whole or in part until such pension shall be obtained....").

²² 56 CONG. REC. 56, 1, 5222 (1918).

²³ See 38 U.S.C. § 3404(c) (1982) (indicating, "such fees...shall not exceed \$10 with respect to any one claim; and...shall not be deducted from monetary benefits claimed and allowed.")

²⁴ *Nat'l Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302 (D. Cal. 1984).

In reaching its decision, the Supreme Court noted that final authority for determining entitlement to VA benefits then rested with an administrative body, the BVA, and that judicial review of decisions was at the time precluded by statute.²⁵ The Supreme Court also observed that, pursuant to 38 U.S.C. § 3404(c), “[t]he Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans’ (sic) Administration.”²⁶ The Supreme Court further noted that under 38 U.S.C. § 3404(c), as in effect in 1982, fees could not exceed \$10.00. There were criminal penalties for any person who charged fees in excess of \$10.00.²⁷

In tracing the history of veterans’ benefits, it observed that Congress began providing veterans pensions in 1789, and that after every conflict since that time had provided for veterans, as well as for their dependents. In this regard, the Supreme Court quoted President Abraham Lincoln, who famously declared that Congress “provided for him who has borne the battle, and his widow and orphan.”²⁸

The Supreme Court noted that VA was created in 1930, and that according to a 1978 report, its regional offices handled approximately 800,000 claims, with approximately 36,000 being appealed to the BVA. The Supreme Court stated, “[a]s might be expected in a system which processes such a large number of claims each year, the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country.”²⁹

The Supreme Court observed that claimants had numerous rights while pursuing a claim, including the right to a hearing,³⁰ ex parte proceedings, with no opposition by a government official,³¹ assistance

²⁵ 38 U.S.C. § 211(a) (1982); *see also Walters*, 473 U.S. at 307 (the Court, citing to *Johnson v. Robison*, 415 U.S. 361 (1974), acknowledged that an exception to the general preclusion of judicial review was a constitutional challenge).

²⁶ *Nat’l Ass’n of Radiation Survivors*, 589 F. Supp. at 1305.

²⁷ 38 U.S.C. § 3405 (1982).

²⁸ *See, e.g., Walters*, 473 U.S. at 309; *see also* The Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/presiden/inaug/lincoln2.htm> (last visited Sept. 1, 2008).

²⁹ *Walters*, 473 U.S. at 309.

³⁰ 38 C.F.R. § 3.103(c) (1984).

³¹ *Id.* § 3.103(a).

by the rating board in developing facts pertinent to the claim,³² and consideration of all evidence offered by the claimant.³³ Further, the Supreme Court pointed out that all reasonable doubts had to be resolved in favor of the claimant.³⁴ Finally, the Supreme Court observed that BVA hearings were subject to the same rules as local agency hearings and were likewise *ex parte*, with no formal questioning or cross examination, and no formal rules of evidence applying.³⁵

The Supreme Court concluded that the process was designed to function throughout with a high degree of informality and solicitude for the claimant. In this regard, the Court noted that there was no statute of limitations, denials had no *res judicata* effect, and claimants had a “quite liberal” time period of up to a year to challenge determinations.³⁶ The Supreme Court added, “[p]erhaps more importantly for present purposes, however, various veterans’ organizations across the country make available trained service agents, free of charge, to assist claimants in developing and presenting their claims.”³⁷ Indeed, the Supreme Court commented that veterans’ service organizations were recognized as an important part of the administrative scheme.³⁸

The Supreme Court noted the district court’s finding that, absent expert legal counsel, claimants “ran a significant risk” of forfeiting their rights because of the highly complex issues involved in some cases.³⁹ The Supreme Court also cited the district court’s conclusion that claimants were simply not equipped to engage in the factual or legal development necessary in some cases.⁴⁰ The Supreme Court questioned,

³² *Id.*

³³ *Id.* § 3.103(b).

³⁴ *Id.* § 3.102.

³⁵ *Id.* § 19.157.

³⁶ *Walters*, 473 U.S. at 311.

³⁷ *Id.*; see also 38 U.S.C. § 3402 (1982).

³⁸ *Walters*, 473 U.S. at 311-12 (citing VA statistics showing that, at the time, 86 percent of claimants before VA were represented by service representatives, 12 percent proceeded pro se, and 2 percent were represented by attorneys).

³⁹ *Id.* at 313.

⁴⁰ *Id.* at 314 (suggesting these might include cases where the disability was slow to develop and “therefore difficult to find service connected, such as the claims associated with exposure to radiation or harmful chemicals as well as other cases...involving difficult matters of medical judgment.”).

however, the extent of complex cases, citing 1982 statistics showing that only 2 percent of BVA cases involved disability claims based on Agent Orange or radiation exposure, as well as whether claimants were equipped to identify errors made by the administrative boards.⁴¹

The Supreme Court observed that the district court found that neither VA officials themselves nor the service organizations were providing the full array of services that paid attorneys might make available to claimants. In this regard, it acknowledged the district court's determination that a heavy caseload and a lack of legal training combined to prevent service representatives from adequately researching a claim, and that it was standard practice to submit "merely" a one to two page brief.⁴² Based on the inability of VA and service organizations to provide a full array of services that an attorney might, the Supreme Court noted the district court's conclusion that the claimants had demonstrated a high risk of "erroneous deprivation" from the process as administered and that the government had failed to show that it would suffer any harm if the statutory fee limitation were lifted.⁴³ The Supreme Court stated that, according to the district court, the only government interest was the "paternalistic" assertion that the fee limitation was necessary to ensure that claimants do not turn substantial portions of their benefits over to "unscrupulous lawyers,"⁴⁴ and that the district court had concluded that the fee limitation violated the First Amendment.⁴⁵

The Supreme Court discussed the Government's interest in enacting the statutes that limited the fee charged by counsel. The Supreme Court stated:

The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system

⁴¹ *Id.*

⁴² *Id.* at 315.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Nat'l Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1323-27 (D. Cal. 1984).

for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.⁴⁶

The Supreme Court noted, “This purpose is reinforced by a similar absolute prohibition on compensation of any service organization representative.”⁴⁷ The Supreme Court also acknowledged Congress’ consideration and rejection of proposals to modify the fee limitation, citing a 1982 Senate report.⁴⁸ With respect to the Government’s “paternalism,” the Supreme Court declared,

There can be little doubt that invalidation of the fee limitation would seriously frustrate the oft-repeated congressional purpose for enacting it. Attorneys would be freely employable by claimants to veterans’ benefits, and the claimant would as a result end up paying part of the award, or its equivalent, to an attorney.⁴⁹

The Supreme Court added, however, that would not be the “only consequence” of striking down the fee limitation “that would be deleterious” to the congressional plan.⁵⁰ The Court stated, “A necessary concomitant of Congress’ desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible.”⁵¹ In this regard, the Supreme Court concluded that the introduction of attorneys would frustrate this goal and said, “[t]he regular introduction of lawyers into the proceedings would be quite unlikely to further this goal.”⁵²

⁴⁶ *Walters*, 473 U.S. at 321; *see also* *United States v. Hall*, 98 U.S. 343, 352-55 (1879).

⁴⁷ *Id.*; 38 U.S.C. § 5902(b)(1) (2000).

⁴⁸ *Walters*, 473 U.S. at 319 (acknowledging although the report stated that the Senate believed that the fee limitation was “no longer tenable,” the Senate concluded that until judicial review of BVA decisions, there was “no need” for attorneys); *see also* S. Rep. No. 97-466 at 50 (1982).

⁴⁹ *Walters*, 473 U.S. at 323.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 324-34.

Citing a case involving the impact of lawyers in probate revocation proceedings, the Supreme Court, quoting its earlier discussion, reiterated, “[L]awyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients’ positions and to contest with vigor all adverse evidence and views.”⁵³ In essence, the Supreme Court concluded that the introduction of attorneys would destroy the informal, paternalistic model and insert, in its place, an adversarial model where the Government would be forced to respond in kind. The Supreme Court added,

Thus, even apart from the frustration of Congress’ principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible. It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.⁵⁴

In dissent, Justice Stevens, writing for himself and Justices Brennan and Marshall, identified the two policy issues supporting the Supreme Court’s holding as: (1) the paternalistic interest of the Government in protecting the veteran from the consequences of his own improvidence; and (2) the bureaucratic interest in minimizing the cost of administering the benefit program. While agreeing that both interests were “legitimate,” the dissent concluded that neither provided an adequate justification for the restraint on liberty imposed by the \$10.00 fee limitation.⁵⁵

⁵³ *Id.* at 324 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973)).

⁵⁴ *Id.* at 326.

⁵⁵ *Id.* at 359 (Stevens, J., dissenting).

After tracing the history of the 1862 statute and the 1864 revision, Justice Stevens concluded that, at the time, the \$10.00 fee was reasonable.⁵⁶ He stated that the legal work involved no more than filling out an appropriate form, and after applying current dollar figures, opined, “[a]t its inception, therefore, the fee limitation had neither the purpose nor the effect of precluding the employment of reputable counsel by veterans.”⁵⁷ He added, “[i]ndeed, the statute then, as now, expressly contemplated that claims for veterans benefits could be processed by ‘agents or attorneys’” and concluded that the statute was aimed at unscrupulous attorneys, which he said was “confirmed” by the provision of criminal penalties.⁵⁸ In this regard, Justice Stevens noted that attorneys who violated the \$10.00 fee limitation could be imprisoned for up to two years of hard labor.⁵⁹ The dissent added that the \$10.00 limitation effectively denied all veterans access to an attorney.⁶⁰ With respect to the impact of the introduction of attorneys, Justice Stevens stated,

As a profession, lawyers are skilled communicators dedicated to the service of their clients. Only if it is assumed that the average lawyer is incompetent or unscrupulous can one rationally conclude that the efficiency of the agency’s work would be undermined by allowing counsel to participate whenever a veteran is willing to pay for his services. I categorically reject any such assumption.⁶¹

⁵⁶ *Id.* at 361 n.4 (where Justice Stevens indicated that \$10.00 at the time the fee limitation was enacted in 1864 was the equivalent of \$580.00 in 1985, and noted that in 1865 the base pay for all military personnel averaged \$231.00 annually. Justice Stevens added that, in 1984, military base pay for all personnel averaged \$13,400.00).

⁵⁷ *Id.* at 361 (Stevens, J., dissenting).

⁵⁸ *Id.*

⁵⁹ *Id.* at 361 (citing 38 U.S.C. § 3405 (1982), which provides as follows:

Whoever (1) directly or indirectly solicits, contracts, charges or receives or attempts to solicit, contract for, charge or receive, any fee or compensation except as provided in sections 3404 and 784 of this title or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him shall be fined not more than \$500.00 or imprisoned at hard labor for not more than two years, or both).

⁶⁰ *Id.* at 362 (Stevens, J., dissenting).

⁶¹ *Id.* at 363 (Stevens, J., dissenting).

Perhaps anticipating legislation providing for attorney representation, and in particular, the recently enacted laws and regulations, Justice Stevens stated,

The paternalistic interest in protecting the veteran from his own improvidence would unquestionably justify a rule that simply prevented lawyers from overcharging their clients. Most appropriately, such a rule might require agency approval, or perhaps judicial review, of counsel fees. It might also establish a reasonable ceiling, subject to exceptions for especially complicated cases. In fact, I assume that the \$10-fee limitation was justified by this interest when it was first enacted in 1864. But time has brought changes in the value of the dollar, in the character of the legal profession, in agency procedures, and in the ability of the veteran to proceed without the assistance of counsel.⁶²

Justice Stevens concluded that the statute was unconstitutional under the Due Process Clause of the Fifth Amendment and the First Amendment because it prevented a veteran from consulting with an attorney of his or her choice in connection with a controversy with the Government.⁶³

The discussion in *Walters* thus recognizes the value of preserving the strong historic paternalistic bonds between VA and pro se claimants seeking VA benefits. *Walters* was issued just prior to the cresting of the first wave, i.e., it was a temporary set back of the anti-paternalistic trend. Shortly thereafter, it was followed by the enactment of the VJRA,⁶⁴ which as noted above created the Veterans Court and provided for judicial review of BVA decisions.

B. Establishment of Judicial Review of VA Benefits Determinations

In 1988, as part of the VJRA, Congress provided for judicial review of administrative decisions on veterans' claims issued by the BVA. Section 104(a) of the VJRA repealed the \$10.00-fee limitation.⁶⁵

⁶² *Id.* at 365 (Stevens, J., dissenting).

⁶³ *Id.* at 368 (Stevens, J., dissenting).

⁶⁴ VJRA, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

⁶⁵ *Id.*; see also *Matter of Smith*, 1 Vet. App. 492, 496 (1991) (tracing the history of the VJRA).

Congress noted at that time that the provisions limiting payment of fees to attorneys have “[f]or all intents and purposes...remained unchanged since 1936.”⁶⁶ The cap, however, was repealed to a limited extent.⁶⁷ The 1988 Act permitted attorneys to charge fees for services to represent clients after the BVA rendered a final decision in the case.⁶⁸ For services rendered prior to that point in the process, the 1988 Act prohibited attorneys from charging claimants for representation.⁶⁹

⁶⁶ H.R. REP. NO. 100-963 (1988), *reprinted in* 1998 U.S.C.C.A.N. 5782, 5797.

⁶⁷ *Id.*; *see also* VJRA, Pub. L. No. 100-687, 102 Stat. 4105, 4108-09 (1988).

⁶⁸ 38 U.S.C. § 3404(c) (1988). Section 3404 of title 38 was amended by striking out subsection (c) and inserting:

(c)(1) In connection with a proceeding before the Veterans’ Administration with respect to benefits under laws administered by the Veterans’ Administration, a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans’ Appeals first makes a final decision in the case. Such a fee may be charged, allowed, or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. The limitation in the preceding sentence does not apply to services provided with respect to proceedings before a court.

(2) A person who, acting as agent or attorney in a case referred to in paragraph (1) of this subsection, represents a person before the Veterans’ Administration or the Board of Veterans’ Appeals after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board at such time as may be specified by the Board. The Board, upon its own motion or the request of either party, may review such a fee agreement and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the United States Court of Veterans Appeals under section 4063(d) of this title.

(d)(1) When a claimant and an attorney have entered into a fee agreement described in paragraph (2) of this subsection, the total fee payable to the attorney may not exceed 20 percent of the total amount of any past due benefits awarded on the basis of the claim.

(2)(A) A fee agreement referred to in paragraph (1) of this subsection is one under which (i) the amount of the fee payable to the attorney is to be paid to the attorney by the Administrator directly from any past-due benefits awarded on the basis of the claim, and (ii) the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant.

(B) For purposes of subparagraph (A) of this paragraph, a claim shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted.

(3) To the extent that past-due benefits are awarded in any proceeding before the Administrator, the Board of Veterans’ Appeals, or the United States Court of Veterans Appeals, the Administrator may direct that payment of any attorneys’ fee under a fee arrangement described in paragraph (1) of this subsection be made out of such past-due benefits. In no event may the Administrator withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Administrator, the Board of Veterans’ Appeals, or Court of Veterans Appeals making (or ordering the making of) the award.

⁶⁹ 38 U.S.C. § 5904(c) (2000); *Carpenter Chartered v. Sec’y of Veterans Affairs*, 343 F.3d 1347, 1350 (Fed. Cir. 2003).

When enacting legislation that led to the creation of the Veterans Court, Congress observed that there were two basic purposes to limiting the fee charged by attorneys in representing veterans seeking VA benefits. First, Congress noted a potential risk to veterans by bringing attorneys into the VA benefits system. It described a “perceived threat that agents or attorneys would charge excessive fees for their services....”⁷⁰ It indicated its hesitancy to allow greater fees charged by attorneys due to the relative simplicity of filing applications for benefits.⁷¹ Second, Congress wanted to preserve the fact that VA proceedings were intentionally structured as informal and nonadversarial. Thus, the assistance of attorneys was “not deemed necessary or desirable in the overwhelming majority of cases.”⁷²

In 2006, the President signed legislation providing for attorney participation at a much earlier stage in the VA claims adjudication process.⁷³ The Veterans Benefits, Health Care, and Information Technology Act of 2006 governs the recognition of individuals for the preparation, presentation, and prosecution of claims for benefits before VA.⁷⁴ The legislation modified the point at which an attorney may enter an appearance to represent a claimant for VA benefits. Under 38 U.S.C. § 5904(c) (2000) (as amended), attorneys or accredited agents can charge fees for services rendered after the institution of an NOD.⁷⁵ The legislative history of the law reveals that the assistance of attorneys was deemed desirable due to the legal and medical complexity veterans confronted when presenting claims for VA benefits. In sponsoring Public Law 109-461, Senator Larry Craig commented on how the VA adjudication system remained paternalistic but had grown increasingly complex. He stated, “[e]nhanced legal requirements and layers of procedural steps intended to protect the rights of veterans have increased both the complexity of the system and how long it takes to process a claim.”⁷⁶

⁷⁰ H.R. REP. NO. 100-963 at 16 (1988), *reprinted in* 1998 U.S.C.C.A.N. 5782, 5798.

⁷¹ *Id.* (noting that attorneys would charge fees for services that required “only the preparation and presentation of an application for benefits.”).

⁷² *Id.*

⁷³ Veterans Benefits, Health Care, and Information Technology Act of 2006 [hereinafter VBHC&IT], Pub. L. No. 109-461, 120 Stat. 3403 (2006).

⁷⁴ *Id.*

⁷⁵ 38 U.S.C. § 5904 (c) (2000); Payment of Fees for Representation by Agents and Attorneys, 73 Fed. Reg. 29,852, 29,875-76 (May 22, 2008) (codified at 38 C.F.R. § 14.636).

⁷⁶ 152 CONG. REC. S3896 (daily ed. May 2, 2006) (statement of Senator Craig).

Although stopping short of suggesting that attorneys should be considered necessary in order to obtain VA benefits, Senator Craig noted that “[t]he paternalistic restriction that prevents veterans from hiring counsel may have been advisable 150 years ago, but...there is now no logic to it ‘except history.’”⁷⁷ Thus, the legislative history shows that although paternalistic attitudes remained firmly entrenched in the VA benefits system, there was a 180-degree shift in the conventional wisdom regarding the role of attorney representation. The prevailing view reflected a belief that attorney representation could contribute, rather than detract, from the nonadversarial, paternalistic VA claims adjudication process.

II. WHAT CONSTITUTES “REPRESENTATION”?

At this point, although it is clear that attorney representation is firmly established in the VA benefits system, it is important to discuss and clarify what is meant by the word “representation.” Specifically, in the VA claims adjudication system, does that word connote representation by attorneys, or does it include representation by both attorneys and veterans’ service organizations? This distinction is critical because there is a recognized distinction, as discussed below, in the treatment of claimants who are represented by attorneys.

For some time, it was unclear whether representation by a veterans’ service organization was the equivalent of representation by an attorney. It appeared, however, that representation by a veterans’ service organization was comparable to proceeding pro se. In cases such as *Szemraj v. Principi*,⁷⁸ *Roberson v. Principi*,⁷⁹ and *Moody v. Principi*,⁸⁰ the Federal Circuit characterized the appellants, who were represented by veterans’ service organizations, as “pro se claimants.” Similarly, in *Andrews*, the Federal Circuit was careful to note that the claimant was represented by an attorney and not a veterans’ service organization.⁸¹ In

⁷⁷ *Id.* at S3897 (quoting testimony of an unidentified veterans’ service organization).

⁷⁸ 357 F.3d 1370 (Fed. Cir. 2004).

⁷⁹ 251 F.3d 1378 (Fed. Cir. 2001).

⁸⁰ 360 F.3d 1306 (Fed. Cir. 2004).

⁸¹ Interestingly, in his dissent in *Walters*, Justice Stevens found that there was no reason to believe that the agency’s cost in administration would be increased because a claimant was represented by counsel instead of appearing pro se, suggesting that he considered being represented by a veterans’ service organization within the category of pro se claimants. *Walters v. Nat’l Ass’n of Radiation*

Acciola v. Peake, the Veterans Court requested briefing from the parties as to whether representation by a veterans' service organization was the equivalent of representation by counsel.⁸² Thus, by requesting briefing, the Veterans Court recognized that an ambiguity existed, and it appears that it sought to use the case as a vehicle to place veterans' service organization representation firmly in the pro se category. In the decision, however, the Veterans Court declined to decide the issue. It explained, "the Court need not decide today whether the appellant, represented by a veteran's service organization, is pro se for purposes of sympathetic readings, because VA conceded that it reads all filings sympathetically, regardless of the nature of representation, and did so in this instance."⁸³

Recently, in *Comer v. Peake*, however, the Federal Circuit removed any ambiguity, finding that VA is required to sympathetically and fully construe the filings of a claimant who had the assistance of a veterans' service organization.⁸⁴ The Federal Circuit reasoned that unlike an attorney who has a formal legal education and an ethical obligation to zealously represent a claimant, a veterans' service organization "aide" "is generally not trained or licensed in the practice of law."⁸⁵ Thus, an appellant who is represented by a veterans' service organization must be afforded the same treatment as one who proceeds with no representation, effectively placing veterans' service organization representation in the pro se category.

The significance of what constitutes a "represented" claimant for the purposes of the courts' two-tiered approach regarding the adjudication of veterans' benefit claims was established by the Federal Circuit in *Andrews*.⁸⁶ We believe, therefore, a discussion of *Andrews* is instructive to understanding the impact of this distinction.

In *Andrews*, the veteran filed a pro se claim for benefits in 1981, asserting that he suffered from chronic anxiety, prolonged depression, and an inability to hold a job. Because he failed to report for a scheduled VA examination, the RO denied his claim. In 1983, again acting pro se, the veteran sought to reopen his claim. Additional medical evidence

Survivors, 473 U.S. 305, 363 (1985) (Stevens, J., dissenting).

⁸² *Acciola v. Peake*, No. 06-0542 (oral argument held on July 10, 2008.)

⁸³ *Acciola v. Peake*, No. 06-0542, (U.S. Vet. App. Dec. 1, 2008), slip op. at 7 n.1.

⁸⁴ *Comer v. Peake*, No. 2008-7013 (Fed. Cir. Jan. 16, 2009), slip op. at 10-12.

⁸⁵ *Id.* at 11; see also *Cook v. Brown*, 68 F.3d 447, 451 (Fed. Cir. 1995).

was submitted to the RO, including a report indicating that the veteran had been diagnosed as having post-traumatic stress disorder (PTSD) and stating that he was “unemployed if not unemployable.” The RO granted service connection for PTSD and assigned an initial 10 percent rating. The Federal Circuit noted that the RO “did not treat [the veteran] as raising a claim for individual unemployability (TDIU), and did not discuss the evidence of unemployability.”⁸⁷

In 1984, the veteran submitted a pro se claim for an increased rating. A VA examiner noted that the veteran had held 30 to 40 jobs since returning from Vietnam, had not worked at all in the four years prior to the examination, and could not get along with people. The examiner diagnosed him as having severe and chronic PTSD. In light of the examination report, in January 1985, the RO increased the veteran’s rating to 30 percent. The Federal Circuit observed, however, that the RO again did not treat the veteran as raising a TDIU claim.⁸⁸

In 1995, “this time through counsel,” the veteran filed a claim with VA for revision of the 1983 and 1985 RO decisions based on clear and unmistakable error (CUE).⁸⁹ Before the BVA on the CUE motion, the veteran “argued exclusively” that the 10 and 30 percent ratings were incorrect because the RO had misapplied the rating criteria, arguing that it was not “possible” to assign a 10 percent rating when the medical evidence describes such chronic symptoms and that it was not “possible” to assign a moderate, i.e., 30 percent, rating when the diagnosis of the service-connected disability is severe and chronic.⁹⁰ The Federal Circuit emphasized that at no time did the veteran argue that the RO in 1983 or in 1985 had erred in failing to consider the veteran as having raised a TDIU claim. The BVA denied the CUE claim, finding that the RO had made no legal error and that the veteran’s arguments amounted to an assertion that the RO should have weighed the evidence differently.

⁸⁶ *Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005).

⁸⁷ *Id.* at 1279-80.

⁸⁸ *Id.* at 1279.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1279-80.

The veteran appealed to the Veterans Court, and for the first time argued that VA failed to consider evidence of unemployability in 1983 and 1985 and that such failure was CUE. The Federal Circuit observed, however, that he did so only in the context of arguing that the evidence of unemployability should have led to higher disability ratings for PTSD. In this regard, the Federal Circuit specifically noted that he did not argue that the RO erred in failing to treat his filings as raising a TDIU claim.

After the Veterans Court dismissed the appeal and the Federal Circuit vacated and remanded the Veterans Court's determination, the Veterans Court rejected the veteran's claim that VA failed to consider all the evidence in 1983 and in 1985. The Veterans Court determined that any such error was not outcome determinative. The Veterans Court also distinguished the Federal Circuit's decision in *Roberson*⁹¹ as applying only to CUE cases.⁹²

In *Andrews*, the Federal Circuit affirmed the judgment of the Veterans Court on the basis that the veteran was represented by counsel.⁹³ In doing so, the Federal Circuit, citing its decision in *Szemraj*,⁹⁴ noted that it had explained that *Roberson* requires, "with respect to all pro se pleadings, that VA give a sympathetic reading to the veteran's filings," which included pro se CUE motions.⁹⁵ Indeed, the Federal Circuit declared, "[q]uite simply, the VA's duty to sympathetically read a veteran's pro se CUE motion to discern all potential claims is antecedent to a determination of whether a CUE claim has been pled with specificity."⁹⁶ Significantly, the Federal Circuit explained, "[h]owever, ... [*Roberson*] does not apply to pleadings filed by counsel."⁹⁷ The Federal Circuit added, "[b]ecause it is not disputed that *Andrews* filed his 1995 CUE motion through counsel, *Roberson* is inapplicable here."⁹⁸

⁹¹ 251 F.3d 1378 (Fed. Cir. 2001).

⁹² In *Roberson*, the Federal Circuit held that "[o]nce a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability," the requirement in 38 C.F.R. § 3.155(a) that an informal claim identify the benefit sought on appeal was satisfied and VA had to consider whether the veteran was entitled to a TDIU. *Id.* at 1384.

⁹³ *Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 1998).

⁹⁴ 357 F.3d 1370 (Fed. Cir. 2004).

⁹⁵ *Id.* at 1373.

⁹⁶ *Andrews*, 421 F.3d at 1283.

⁹⁷ *Id.*

⁹⁸ *Id.*

Since *Andrews*, both the Federal Circuit and the Veterans Court, citing this decision, have employed a “forked approach,” treating claims filed by counsel differently from those asserted by claimants who proceed pro se, which includes those represented by veterans’ service organizations.⁹⁹ As discussed above, in *Comer*, decided a month after *Acciola*, the Federal Circuit resolved any ambiguity, effectively placing a veterans’ service organization representation in the pro se category.¹⁰⁰

III. GENESIS OF THE SYMPATHETIC READING REQUIREMENT AT THE VETERANS COURT AND THE FEDERAL CIRCUIT

One of the hallmarks of VA’s paternalistic system has been in ensuring the sympathetic development and treatment of veterans’ claims. Drawing upon the congressional history, both the Federal Circuit and the Veterans Court have recognized that VA has a duty to “sympathetically read” a pro se claimant’s pleadings and “sympathetically develop the [pro se] veteran’s claim to its optimum,” but have further held that such duty does not apply to pleadings filed by counsel.¹⁰¹ The statute and regulations governing the VA claims adjudication process are silent, however, with respect to the level of scrutiny of pleadings filed by veteran claimants versus pleadings filed by attorneys. If not expressed in statute or regulation, where did VA’s responsibility to sympathetically read and sympathetically develop a pro se claimant’s claim arise?

As discussed above, the sympathetic reading or development requirement is derived from the general character of the statutory scheme for awarding veterans’ benefits. The Veterans Court, the Federal Circuit,

⁹⁹ See *Johnston v. Nicholson*, 421 F.3d 1285 (Fed. Cir. 2005).

¹⁰⁰ *Comer v. Peake*, No. 2008-7013 (Fed. Cir. Jan. 16, 2009).

¹⁰¹ See *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (holding that VA is required to give a sympathetic reading to a pro se veteran’s filing); see also *Ingram v. Nicholson*, 21 Vet. App. 232, 238 (2007) (recognizing that “[i]t is beyond question that the Secretary has such a duty [to sympathetically read a pro se claimant’s pleadings] and that it applies not just to total disability based on individual unemployability (TDIU) ratings, but also to any claim for benefits.”).

and even the Supreme Court have long recognized that veterans' benefits statutes are "uniquely pro-claimant."¹⁰²

In *Hodge v. West*,¹⁰³ the Federal Circuit elaborated on this principle when it held that the Veterans Court improperly applied a standard used by the Social Security Administration (SSA) to determine whether a prior final denial of a veteran's benefit claim should be reopened.¹⁰⁴ In *Hodge v. West*, the appellant was a veteran who served on active duty from 1941 to 1943. During service, he was treated for arthritis of the left knee and left hip pain. In 1962, he filed a claim seeking service connection for a left knee and hip disability. The claim was denied following a medical evaluation that showed no hip or knee disability. In May 1975, he was diagnosed as having degenerative arthritis of the left knee and hip. He attempted to reopen his claim of service connection in 1992. In denying the claim, the BVA noted that the evidence submitted was new but "[did] 'not create a reasonable possibility...that the outcome of the case would be changed.'"¹⁰⁵

The veteran appealed to the Veterans Court. Applying its definition of new and material evidence first set forth in *Colvin v. Derwinski*,¹⁰⁶ it explained that new and material evidence must be "reasonably likely to change the outcome when viewed in light of all the evidence of record."¹⁰⁷

The Federal Circuit questioned the Veterans Court's "definition of 'material evidence'" and specifically, the Veterans Court's view that material evidence must be likely to change the outcome.¹⁰⁸ It found that in implementing the *Colvin* test, the Veterans Court applied a "definition of 'material evidence'" that was used by the SSA.¹⁰⁹ In doing so, the

¹⁰² See *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (holding veterans statutes must be liberally construed for the benefit of the returning veteran); see also *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

¹⁰³ 155 F.3d 1356 (Fed. Cir. 1998).

¹⁰⁴ *Id.* at 1360.

¹⁰⁵ *Id.* at 1359 (quoting No. 94-01 866, 1996 WL 33636042 (BVA Jan. 19, 1996)).

¹⁰⁶ 1 Vet. App. 171 (1991).

¹⁰⁷ See *Hodge v. Gober*, 15 Vet. App. 398 (1997) (table), *vacated sub nom.* *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998).

¹⁰⁸ *Hodge*, 155 F.3d at 1362.

¹⁰⁹ *Id.*

Federal Circuit found that the Veterans Court impermissibly replaced the agency's judgment with its own and had imposed on veterans a more onerous requirement that was "inconsistent with the general character of the underlying statutory scheme for awarding veterans' benefits."¹¹⁰

In discussing the dissimilarities between VA's statutory scheme for awarding benefits and that of the SSA, the Federal Circuit noted that the uniquely pro-claimant principles applicable to veterans' claims for benefits did not apply to Social Security claimants. Rather, the Federal Circuit stated, "[t]his court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."¹¹¹

Similarly, when Congress created the Veterans Court in 1988, it expressed its intent to preserve and "maintain a beneficial nonadversarial system of veterans benefits."¹¹² It found:

Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.¹¹³

Commenting on the unique purpose of the judicial scheme for awarding veterans' benefits, courts have noted that it "is imbued with special beneficence from a grateful sovereign."¹¹⁴

Although the rationale for the sympathetic treatment of veterans' claims is based on the general character of the statutory scheme for awarding veterans' benefits, the Federal Circuit has cited an additional justification for the differential treatment of pro se claimants. In *Forshey*

¹¹⁰ *Id.*

¹¹¹ *Id.* (citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980)).

¹¹² H.R. REP. NO. 100-963 at 13 (1988), reprinted in 1998 U.S.C.C.A.N. 5782, 5795.

¹¹³ *Id.*

¹¹⁴ *See Padgett v. Nicholson*, 473 F.3d 1364, 1368 (Fed. Cir. 2007) (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michel, J., concurring)); *see also Bobbitt v. Principi*, 17 Vet. App. 547, 550 (2004);

v. Principi,¹¹⁵ the Federal Circuit explored its jurisdictional requirements in the context of a claim for dependency and indemnity compensation (DIC). Specifically, the Federal Circuit considered whether it could properly consider issues not raised on appeal before the Veterans Court. Prior to making that determination, however, the Federal Circuit noted that the claimant was proceeding pro se,¹¹⁶ and suggested that a different standard should be applied. Curiously, the Federal Circuit made no reference to the uniquely pro-claimant nature of VA claims adjudication. Rather, the Federal Circuit explained that the standard for treating pro se claimants differently was a result of the relative complexity of practicing before an administrative agency or before a court of law. In this respect, the Federal Circuit stated,

[I]n situations where a party appeared pro se before the lower court, a court of appeals may appropriately be less stringent in requiring that the issue have been raised explicitly below. In other words, a court of appeals may require less precision in the presentation of the issue to the lower court than it demands of a litigant represented by counsel. This less demanding standard has been repeatedly recognized by the Supreme Court and the courts of appeals.¹¹⁷

The Federal Circuit reasoned that “[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims.”¹¹⁸ Indeed, in *Comer v. Peake*, the Federal Circuit reasoned, “A liberal and sympathetic reading of appeal submissions is necessary because a pro se veteran may lack a complete understanding of the subtle differences in various forms of VA disability benefits and of the sometimes arcane terminology used to describe those benefits.”¹¹⁹

¹¹⁵ *Forshey v. Principi*, 284 F.3d 1335, 1354-55 (Fed. Cir. 2002).

¹¹⁶ The appellant was represented by the Arizona Veterans Service Commission, a veterans’ service organization, in her appeal before VA.

¹¹⁷ *Forshey*, 284 F.3d at 1357.

¹¹⁸ *Id.* (quoting *Hughes v. Rowe*, 449 U.S. 5, 15 (1980)).

¹¹⁹ *Comer v. Peake*, No. 2008-7013 (Fed. Cir. Jan. 16, 2009), slip op. at 9.

In addition to applying the uniquely pro-claimant principles in *Hodge* and *Forshey*, the Federal Circuit and the Veterans Court have applied these principles in other contexts. By way of example, pursuant to the Veterans Claims Assistance Act of 2000 (VCAA),¹²⁰ VA has two duties in assisting a claimant seeking VA benefits, the duty to assist and the duty to notify.¹²¹ We will now discuss the impact of attorney representation as it impacts VA's duties under the VCAA.

A. VA Paternalism –The Duty to Assist

Since its early jurisprudence, the Veterans Court has highlighted VA's duty to assist in the context of an informal, nonadversarial proceeding. Indeed, in *Littke v. Derwinski*,¹²² the Veterans Court commented, “[t]he VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and nonadversarial. An integral part of this system is embodied in the VA's duty to assist the veteran in developing the facts pertinent to his or her claim.”¹²³ Indeed, the Veterans Court described it as the “cornerstone of the veterans' claims process.”¹²⁴ Numerous cases since that time have highlighted VA's duty to liberally interpret pleadings to identify all claims raised by a liberal review of the record.¹²⁵ Further, the law is clear that when VA fails to adjudicate a reasonably raised claim, it generally remains pending unless until there is

¹²⁰ See 38 U.S.C. § 5103 (2000) (amended by 38 U.S.C. § 5103(b) (Supp. III 2003), 5103A (2000)).

¹²¹ *Gordon v. Nicholson*, 21 Vet. App. 270, 276 (2007) (noting the Secretary's duties under the VCAA essentially fall into two categories: collecting evidence that could result in a successful claim, see 38 U.S.C. § 5103A, and giving notice to a claimant).

¹²² 1 Vet. App. 90 (1990).

¹²³ *Id.* at 91.

¹²⁴ *Id.*

¹²⁵ See *Ingram v. Nicholson*, 21 Vet. App. 232, 256-57 (2007); *EF v. Derwinski*, 1 Vet. App. 324, 326 (1991) (holding, “the VA's statutory ‘duty to assist’ must extend its liberal reading [of the record] to include issues raised in all documents or oral testimony submitted prior to the BVA decision.”); see also *Robinson v. Nicholson*, 21 Vet. App. 553 (2008) (observing, “[a]s a nonadversarial adjudicator, the Board's obligation to analyze claims goes beyond the arguments explicitly made.” The court also commented, quoting *Ingram v. Nicholson*, 21 Vet. App. at 256-57, it was the Secretary who knows the provisions of Title 38 and could evaluate whether there is potential under the law to compensate an averred disability based a sympathetic reading of the material in a pro se submission).

either a recognition of the substance of the claim in an RO decision from which a claimant could deduce that the claim was adjudicated.¹²⁶

The Federal Circuit and Veterans Court held, however, that VA had no duty to assist in the absence of a well-grounded claim,¹²⁷ and in *Morton v. West*,¹²⁸ the Veterans Court concluded that “absent the submission... of a well-grounded claim, the Secretary [could not] undertake to assist a veteran in developing [the] facts pertinent to his or her claim.”¹²⁹

In *Schroeder v. West*,¹³⁰ the Federal Circuit noted that VA had denied service connection for a bilateral eye disability and that that case was appealed to the Veterans Court, which affirmed the BVA’s determination to the extent that it denied direct service connection, but vacated the BVA’s decision based on the veteran’s claim that he developed the condition due to in-service exposure to herbicides. In reversing the Veterans Court, the Federal Circuit held that once a veteran¹³¹ had properly made out a well-grounded claim¹³² of service connection for a current disability as a result of a specific in-service occurrence or aggravation of a disease or injury, VA’s duty to assist attached “to the investigation of *all* possible in-service causes of that current disability, including those unknown to the veteran.” (emphasis in original).¹³³

¹²⁶ See *Williams v. Peake*, 521 F.3d 1348 (Fed. Cir. 2008); *Ingram*, 21 Vet. App. at 256-57; see also *Deshotel v. Nicholson*, 457 F.3d 1258, 1262 (Fed. Cir. 2006).

¹²⁷ See *Epps v. Gober*, 126 F.3d 1464 (Fed. Cir. 1997); *Caluza v. Brown*, 7 Vet. App. 498 (1995), *aff’d per curiam*, No. 95-7063, 1996 WL 56489 (Fed. Cir. Feb. 12, 1996) (interpreting 38 U.S.C. § 5107(a) (1994)).

¹²⁸ 12 Vet. App. 477, 486 (1999).

¹²⁹ *Id.* This holding was overturned by the enactment of the VCAA.

¹³⁰ 212 F.3d 1265 (Fed. Cir. 2000).

¹³¹ The veteran was represented by Paralyzed Veterans of America, a veterans’ service organization, in his appeal before VA.

¹³² See 38 U.S.C. 5107(a) (1994); *Epps v. Gober*, 126 F.3d 1464 (Fed. Cir. 1997). As noted above, this requirement was repealed by the enactment of the VCAA. See Veterans Claims Assistance Act of 2000 [hereinafter VCAA], Pub. L. No. 106-475, § 3(a), 114 Stat. 2096 (codified as amended at 38 U.S.C. §§ 5103, 5103A (2000)).

¹³³ See *Schroeder*, 212 F.3d at 1271; see also *McGee v. Peake*, 511 F.3d 1352 (Fed. Cir. 2008) (noting VA’s “obligation to... ‘sympathetically develop [a] claim to its optimum’” and the “statutory duty to assist.”).

The intersection of the Federal Circuit’s decision in *Andrews*, which set in motion this forked approach to the adjudication of VA claims based on whether the claimant was represented by counsel, and its decision in *Schroeder*, which provides that a claim must be considered on all theories, including those unknown to the veteran, took place in *Robinson v. Mansfield*.¹³⁴

In *Robinson*, the veteran was discharged from active duty in April 1988. In November 1988, he filed a claim of service connection for peptic ulcer disease, which was granted, effective the day following his separation from service. In December 1998, the veteran filed claims seeking service connection for heart and thyroid conditions, and reported that they had their onset in February 1996. In September 1999, the RO denied service connection for heart disease and a hypothyroid condition as secondary to his service-connected peptic ulcer disease. In November 1999, the veteran filed an NOD challenging the RO’s determinations on the ground that his heart and thyroid conditions were secondary to his service-connected peptic ulcer disease. The NOD was submitted together with a letter from his attorney, John F. Cameron, informing VA that attorney Cameron was representing him in the prosecution of his appeal.

In October 2001, the BVA remanded the case for VA examinations to determine the nature, severity, and etiology of his thyroid and cardiovascular disorders. The BVA instructed the examiner to opine whether either condition was related to his peptic ulcer disease. In May 2004, the BVA denied service connection on a secondary basis for heart disease and thyroid disability based on a November 2002 VA examination report that found no relationship between his peptic ulcer disease and “the two later arising diseases.”¹³⁵ The BVA did not consider whether direct service connection was warranted for either condition.

On appeal to the Veterans Court, the veteran argued that the BVA violated *Schroeder* by failing to adjudicate whether he was entitled to service connection on a direct basis for heart disease and thyroid

¹³⁴ 21 Vet. App. 545 (2008), *appeal filed sub nom.*, *Robinson v. Peake*, No. 08-7095 (Fed. Cir. Apr. 21, 2008).

¹³⁵ *Id.*

disability. In a February 2007 order, the Veterans Court sought briefing on two questions. The first question involved whether representation by counsel before the Agency was a factor to consider in determining whether the Veterans Court should apply the exhaustion doctrine to affirm a BVA decision rather than adjudicate or remand a new theory of entitlement that was first raised on appeal. The second question was whether representation by counsel before the Agency had any effect on the Veterans Court's analysis of whether VA fulfilled its obligation to consider and decide all issues reasonably raised by the claim.¹³⁶

The veteran responded that the Veterans Court could not impose an exhaustion requirement. He also asserted that the Veterans Court should not treat differently appellants represented by counsel and "unrepresented" appellants and argued that the Federal Circuit's decision in *Andrews* should be read narrowly to apply only in the context of CUE claims.¹³⁷

By contrast, the Secretary argued that the Veterans Court could apply the exhaustion doctrine. With respect to the Federal Circuit's decision in *Andrews*, the Secretary asserted that whether an appellant was represented by counsel was relevant in assessing the Secretary's obligation to read claims sympathetically. In addition, the Secretary pointed out that the veteran had been represented by counsel for the entire six years that his appeal was pending before VA and that at no time did he raise a direct service connection argument.

The Veterans Court concluded that the veteran's reliance on *Schroeder* was misplaced. The Veterans Court also declared that the fact that Mr. Robinson had been represented by counsel since November 1999 compelled the Veterans Court to conclude that the BVA did not err in failing to discuss entitlement to disability benefits on a direct basis. While acknowledging the Secretary's duty to interpret pleadings liberally, the Veterans Court concluded that the BVA was not required to sua sponte

¹³⁶ *Id.* at 549.

¹³⁷ The veteran's argument shows his attorney's recognition that, since *Andrews*, courts had created a distinction between cases prosecuted by an attorney and those who proceed pro se.

raise and reject “all possible” theories of entitlement. Rather, the BVA only committed error in failing to discuss a theory of entitlement that was raised either by the appellant or by the evidence of record.¹³⁸

The Veterans Court agreed with the Secretary that the veteran’s failure to assert the direct service connection claim in the six years he was represented by counsel before VA was significant. The Veterans Court, citing *Andrews*, stated, that the “presence of attorney Cameron throughout the appeals process before the Agency is a significant factor that solidifies our conclusion.”¹³⁹ Further, in *Robinson*, the Veterans Court indicated that it was not unreasonable to conclude that an appellant’s attorney is acting with full authority and knowledge of his client and thus, to attribute to his client the attorney’s actions and communications.¹⁴⁰

The Veterans Court concluded that there was nothing in Mr. Robinson’s appeal to the BVA, prepared by his attorney, that the BVA could have been expected to liberally construe or read sympathetically to determine that he was seeking to have his claim adjudicated on a direct basis. In addition, the Veterans Court found that he had not offered any reason why counsel could not have argued the theory of direct service connection while the appeal was pending before VA.

The majority’s holding prompted a vigorous dissent by Judge Schoelen, who argued that the majority had misinterpreted *Schroeder*. Indeed, Judge Schoelen declared,

I am alarmed by the majority’s decision, in concluding that this case need not be remanded for a Board decision in the first instance and in rejecting the appellant’s argument made to the Court, to accord such significance to the fact that the appellant was represented by an attorney during the appeal process. To be clear, I do not wish to condone or endorse actions by attorneys that might hamper their clients’ efforts to secure benefits,

¹³⁸ *Robinson*, 21 Vet. App. at 553, *appeal filed sub nom.*, *Robinson v. Peake*, No. 08-7095 (Fed. Cir. Apr. 21, 2008).

¹³⁹ *Id.* at 554 (citing its decision in *Overton v. Nicholson*, 20 Vet. App. 427, 438 (2006) for the proposition that a claimant’s representation by counsel is a factor that must be considered in determining, for the purpose of notice, whether the claimant was prejudiced).

¹⁴⁰ *Id.* at 554 (citing *Overton*, 20 Vet. App. at 438-39).

nor actions that hinder proper function of VA's adjudicatory system. Nevertheless, neither the Secretary nor the majority cites any statutory or regulatory authority for the conclusion that represented appellants should be treated differently from their unrepresented counterparts in VA's development of evidence. There is simply no basis in law to justify narrowing VA's duty to assist with the development of claims, based on the majority's artificial distinction between represented and unrepresented claimants.¹⁴¹

Judge Schoelen also argued that the majority's decision created a "perverse incentive" for claimants to elect not to engage attorneys to represent them before VA despite recent legislation permitting claimants to hire attorneys much earlier in the process than previously allowed¹⁴² Judge Schoelen added,

Mr. Robinson, as a result of the majority's decision in his case, received less favorable treatment from this Court than he would have received had he represented himself before the Agency. This result presents a peculiar conundrum for any claimant

¹⁴¹ *Id.* at 564 (Schoelen, J., dissenting); *see also* *Acciola v. Peake*, No. 06-0542, (U.S. Vet. App. Dec. 1, 2008), slip op. at 7 n.1 (Observing that the distinction between representation by counsel and pro se representation in sympathetically reading a claimant's filings "is apparently solely a creation of the Federal Circuit for which this Court finds no legislative or regulatory support.")

¹⁴² *Id.* at 564-65 (Schoelen, J., dissenting); *see* VBHC&IT, Pub. L. No. 109-461, 120 Stat. 3403, 3407-08 (2006). Prior to this legislation, unless a final BVA decision was issued with respect to the claim and the agent or attorney was retained not later than one year following the date of the BVA decision, attorney fees were limited to \$10.00. Under this Act and the implementing regulations, codified at 38 C.F.R. § 14.636, agents and attorneys are permitted to charge fees for representation provided after the agency of original jurisdiction has issued a decision on a claim, the NOD was filed as to that decision on or after June 20, 2007, and the agent or attorney has complied with the power of attorney and fee agreement requirements outlined in the final rule.

seeking benefits in a purportedly nonadversarial, manifestly pro-claimant adjudicatory system.¹⁴³

Thereafter, in *Turk v. Peake*,¹⁴⁴ the Veterans Court again confronted the issue of whether VA's duty to assist was impacted by the veteran's representation by counsel. In *Turk*, the RO granted the veteran's claim of service connection for PTSD and assigned an initial 50 percent rating for the condition based on the private medical evidence submitted by the veteran.¹⁴⁵ Because VA determined that the private medical evidence was not adequate for rating his psychiatric disability, VA determined that a VA psychiatric examination was necessary to adjudicate his appeal, and specifically notified him through counsel that he was scheduled for a VA examination and that his failure to report might have an adverse consequence on his appeal, to include the possible denial of his claim.¹⁴⁶

Based on the advice of his attorney, the veteran failed to report for the scheduled examination.¹⁴⁷ The Veterans Court held that VA had fulfilled its duty to assist by informing him of the evidence needed to substantiate his claim and by attempting "on multiple occasions" to schedule examinations aimed at gathering the necessary information. After noting that the failure to attend a VA examination exposes a veteran to the possibility of an adverse finding of fact, the Veterans Court declared, "[e]xcept perhaps in extreme examples of incompetence or bad faith, the Court's concern on appeal is whether VA appropriately applied a VA regulation, rather than what advice counsel gave his client with regard to attending the examination or the potential consequences of his failure to attend."¹⁴⁸ Significantly, the Veterans Court added, any advice given by counsel must be presumed to be given with a knowledge of the state of the record and of the legal

¹⁴³ *Id.* at 564 (Schoelen, J., dissenting).

¹⁴⁴ 21 Vet. App. 565, 567 (2008).

¹⁴⁵ *Id.* at 567 (where the RO initially granted a 30 percent rating but during the course of the appeal the rating was increased to 50 percent, effective the date of claim).

¹⁴⁶ *Id.*; *cf.* *Connolly v. Derwinski*, 1 Vet. App. 566, 569 (1991) (indicating a veteran must be advised of the importance of appearing for a VA examination so that he could make an informed decision as to whether to report).

¹⁴⁷ *Turk*, 21 Vet. App. at 567 (finding no dispute that the veteran received notice of the time, date and location of the VA examinations and the requirement that he report for the evaluations).

¹⁴⁸ *Id.* at 570.

consequences and practical realities that might flow from the advice given. Consequently, if Mr. Turk failed to appear at the scheduled examination based on advice or information provided by his counsel, Mr. Turk 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.¹⁴⁹

Thus, based on *Robinson* and *Turk*, it is clear that a claimant's representation by counsel affects VA's obligations with regard to developing his or her claim. His or her representation by an attorney also obliges the claimant to assume the risks that he or she takes on the advice of counsel.

B. VA Paternalism - The Duty to Notify

Pursuant to statute and regulation, VA has numerous duties to notify a veteran of the information and evidence necessary to substantiate a claim for benefits.¹⁵⁰ This section will not discuss the requirements of VA's duty to notify. Instead, we will focus on whether the Veterans Court has determined that claimants who are represented by counsel should be treated differently in determining whether they are prejudiced by a VA notice error.

¹⁴⁹ *Id.* at 570-71.

¹⁵⁰ In general, upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C. § 5103(a) (2000 & Supp. V 2005); 38 C.F.R. § 3.159(b) (2007), *as amended by* Department of Veterans Affairs Assistance in Developing Claims, 73 Fed. Reg. 23,353, 23,256 (Apr. 30, 2008). The notice must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim, (2) that VA will seek to provide, and (3) that the claimant is expected to provide. *Id.* This notice must generally be provided prior to an initial unfavorable decision on a claim by the agency of original jurisdiction [hereinafter AOJ]. *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Pelegri v. Principi*, 18 Vet. App. 112 (2004). VA's notice requirements apply to all five elements of a claim, including: (1) veteran status, (2) existence of a disability, (3) a connection between the veteran's service and the disability, (4) degree of disability, and (5) effective date of the disability. *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). Notice errors are presumed prejudicial unless VA shows that the error did not affect the essential fairness of the adjudication. To overcome the burden of prejudicial error, VA must show "(1) that any defect in notice was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not possibly have been awarded as a matter of law." *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), *cert. granted sub nom. Peake v. Sanders*, 128 S. Ct. 2935 (2008).

In *Janssen v. Principi*,¹⁵¹ a pre-*Andrews* case, the Veterans Court affirmed a November 1999 BVA decision adjudicating several claims, including one denying the veteran's claim of entitlement to an evaluation in excess of 30 percent for his PTSD. Significantly, in discussing whether an appellant could waive the benefit of the rights "guaranteed to him under the Veterans Claims Assistance Act of 2000 (VCAA),"¹⁵² the Veterans Court noted that the veteran through counsel had appealed the determination. The Veterans Court added that while the appeal was pending at the Veterans Court, given the enactment of the VCAA, it had invited all parties that had appeals pending before the Veterans Court at the time of or filed after the enactment of the VCAA to address the VCAA's applicability to their claims.¹⁵³ In response, the appellant indicated his desire to abandon all claims except for his PTSD claim. The Veterans Court also construed his response as attempting to waive application of the VCAA to his PTSD claim. The veteran filed a response in which he clarified that he was expressly waiving the Veterans Court's consideration of the VCAA to his PTSD claim. The Veterans Court thereafter declared, "We hold that in cases such as this, where the appellant is represented by counsel, whom the Court presumes to be versed in the facts of the case and to know and to understand the law as it relates to those facts, the appellant can waive this Court's consideration of such rights on appeal."¹⁵⁴

Following *Andrews*, the Veterans Court has addressed whether a different standard exists for VA to satisfy its duty to notify in cases where the claimant is represented by an attorney. In *Overton v. Nicholson*,¹⁵⁵ the veteran sought increased ratings for his service-connected right knee and left knee disabilities, a compensable evaluation for his tinea versicolor, and a total disability rating based on individual unemployability due to service-connected disabilities (TDIU). In September 2002, the BVA denied each of these claims. On appeal to the Veterans Court, the veteran asserted that the BVA erred in finding that he received adequate notice under 38 U.S.C. § 5103(a). The Secretary disagreed, arguing that the veteran

¹⁵¹ 15 Vet. App. 370 (2001).

¹⁵² 38 U.S.C. §§ 5103, 5103A (2000 & Supp. V 2005).

¹⁵³ *Cf.* *Hayslip v. Principi*, 364 F.3d 1321, 1325 (Fed. Cir. 2004) (noting that BVA decision is final the date it is issued, and section 3(a) of the VCAA is not retroactively applicable); *see also* *Kuzma v. Principi*, 341 F.3d 1327, 1328 (Fed. Cir. 2003).

¹⁵⁴ *Janssen*, 15 Vet. App. at 374.

¹⁵⁵ 20 Vet. App. 427 (2006).

received adequate notice through a May 2001 notice letter and a June 2002 Supplemental Statement of the Case (SSOC). Alternatively, the Secretary asserted that any inadequacy in the notice was not prejudicial.

The *Overton* Court held that the BVA erred in relying on a Statement of the Case (SOC), and SSOC and a previous BVA decision to conclude that adequate section 5103(a) notice had been provided. The Veterans Court further held, however, that in taking due account of prejudice, the BVA's error as to the veteran's right and left knee and TDIU claims was nonprejudicial.¹⁵⁶ Because the Veterans Court could not determine that the BVA's error as to the tinea versicolor claim was not prejudicial, the Veterans Court vacated the BVA's decision on that claim.¹⁵⁷

The Veterans Court noted that service connection for right knee disability, left knee disability, and tinea versicolor was granted by VA in February 1987, and that in September 1993, the veteran, who was represented by the same counsel who was prosecuting the current appeal, sought increased ratings for his knee disabilities as well as a TDIU. In October 1994, the RO denied these claims, and in October 1995, confirmed and continued the denial of these claims, as well as his claim for a compensable rating for his tinea versicolor. The veteran did not perfect an appeal.

In June 1998, VA again denied the veteran's claims for increased ratings for his right and left knee disabilities and a TDIU. The veteran appealed, and in December 2000, the BVA remanded the claims for further development and adjudication. In May 2001, the RO sent Mr. Overton and his counsel a letter pursuant to the VCAA advising him of VA's expanded duty to notify on how to substantiate his pending claims for increased ratings for his right and left knees and for a TDIU. No mention was made of the veteran's tinea versicolor claim.

The May 2001 letter notified the veteran that to establish an increased evaluation, the evidence need to indicate that he had symptoms and findings showing that his service-connected disabilities had worsened and now met the criteria for a higher evaluation. The letter stated that the evidence could be medical records and reports as well as lay statements. Neither the veteran nor his attorney responded to the letter.

¹⁵⁶ *Id.* at 441-43.

¹⁵⁷ *Id.* at 443-44.

In a June 2002 SSOC, the RO notified the veteran that his claims for increased ratings for his right and left knees and a TDIU, as well as for a higher rating for his tinea versicolor, were denied. Although the veteran did not raise any issue with regard to notice, the BVA found that VA had satisfied its duty to notify through various communications with the veteran.¹⁵⁸ The Veterans Court disagreed, citing the Federal Circuit's decision in *Mayfield v. Nicholson*,¹⁵⁹ and held that the BVA erroneously relied on various documents that were unrelated to section 5103(a) notice to conclude that the veteran had received adequate section 5103(a) and section 3.159(b) notice prior to the RO's June 2002 decision. Thus, assuming notice error, the Veterans Court proceeded to determine whether that error was prejudicial.

In doing so, the Veterans Court discussed in detail the effect of having representation by counsel before VA. The Veterans Court, citing the Federal Circuit's decisions in *Andrews v. Nicholson* and *Johnston v. Nicholson*, stated, "[t]here is a recognized difference in some contexts in the treatment of cases by VA and by the [Veterans] Court that is based on whether a claimant is represented by counsel."¹⁶⁰ The Veterans Court added, "[a] claimant's representation by counsel does not alleviate VA's obligation to provide compliant notice; however, that representation is a factor that must be considered when determining whether that appellant has been prejudiced by any notice error."¹⁶¹ The Veterans Court explained,

VA communications to the claimant and his or her counsel, the claimant's actions and communications to VA, and the counsel's actions and communications to VA will signal whether, under the circumstances of each case, it has been demonstrated that the appellant had a meaningful opportunity to participate effectively in the processing of his or her claim. Furthermore, an attorney has the ethical duties of communicating with the client and of zealously representing the client's interest.¹⁶²

¹⁵⁸ *Id.* at 432. The BVA cited an August 1998 Statement of the Case [hereinafter SOC], Regional Office [hereinafter RO] letters dated in December 2000 and May 2001, and the June 2002 Supplemental SOC [hereinafter SSOC].

¹⁵⁹ 444 F.3d 1328 (Fed. Cir. 2006).

¹⁶⁰ *Overton v. Nicholson*, 20 Vet. App. 427, 438 (2006).

¹⁶¹ *Id.*

¹⁶² *Id.* (citing ABA MODEL RULES OF PROF'L CONDUCT R. 1.3, 1.4 (2004)).

The Veterans Court concluded, “[t]herefore, it is not unreasonable to conclude that an appellant’s attorney is acting with the full authority and knowledge of his client and thus, to attribute to his client the attorney’s actions and communications.”¹⁶³

In discussing the application of the rule of prejudicial error, the Veterans Court noted that the veteran, through counsel, argued as to all four claims that the BVA erred by finding that adequate notice had been provided because none of the documents relied upon by the BVA provided him with the specific information on what evidence he needed to provide to substantiate his claims, and thus the lack of that information compromised the essential fairness of the adjudication.¹⁶⁴ Presuming notice error, the Veterans Court noted that the burden shifted to the Secretary to demonstrate a lack of prejudice in terms of the fairness of the adjudication and opportunity for Mr. Overton’s meaningful participation in the processing of his claims.

As to his right and left knee claims, the Veterans Court pointed out that the veteran, through counsel, initially sought increased rating for these disabilities in September 1993. The Veterans Court observed that at that time his counsel “recited the specific regulations and diagnostic codes that he felt VA should consider in adjudicating his claim, and stated that his ‘disability had increased in severity’ and that he was experiencing ‘pain, weakness[,] and functional loss.’”¹⁶⁵ The Veterans Court observed that in October 1994, the RO denied his claims seeking ratings in excess of 10 percent for each knee, and in doing so had explained, “[i]n determining evaluations for disability involving the knee, consideration is given to objective evidence of limitation of flexion and extension, subluxation, lateral instability, painful motion, weakness and radiological findings demonstrating joint abnormality.”¹⁶⁶ The veteran disagreed, and in October 1995, the RO

¹⁶³ *Id.* at 438-39.

¹⁶⁴ *Overton* was decided before *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), which held that failure to provide adequate notice as to all elements necessary to substantiate a claim is presumptively prejudicial. In addition, recently, for claims pending before VA on or after May 30, 2008, 38 C.F.R. § 3.159 was amended to eliminate the requirement that VA request that a claimant submit any evidence in his or her possession that might substantiate the claim. See Department of Veterans Affairs Assistance in Developing Claims, 73 FR 23,353, 23,256 (Apr. 30, 2008).

¹⁶⁵ *Overton*, 20 Vet. App. at 440.

¹⁶⁶ *Id.*

increased the evaluation of his right knee to 20 percent and continued the 10 percent rating for his left knee. The Veterans Court noted, “That decision described the criteria used to determine knee disability ratings in general, the specific requirements for the rating Mr. Overton was seeking, and why his disability picture did not warrant higher ratings than those assigned.”¹⁶⁷

From 1995 through 2002, the veteran, through counsel, on numerous occasions received detailed information from VA as to the criteria necessary for a higher rating and why his conditions did not warrant increased evaluations.¹⁶⁸ In May 2001, prior to its June 2002 denial of the veteran’s claims, the RO sent him, through counsel, a letter advising him of the enactment of the VCAA and detailing the new notice requirements as they applied to his claim. The letter notified him of the types of medical and lay evidence that might substantiate his claims and that VA might schedule him for an examination and informed him that the evidence had to show that his disabilities worsened and now met the criteria for a higher rating. The RO indicated that that could be shown by medical evidence reflecting that his disabilities had become worse or more disabling. The Veterans Court noted that he was thereafter issued an SSOC that explained the requirements for increased ratings and how it applied to his claims. Based on the above, the Veterans Court concluded that the veteran, through counsel, was afforded a meaningful opportunity to participate in the adjudication of his claims seeking higher ratings for his knee disabilities.

As to his TDIU claim, the Veterans Court noted that when applying for the benefit in September 1993, his counsel cited 38 C.F.R. § 4.16 and that, due to his service-connected disabilities, the veteran was unable to work. His attorney had also requested that his case be sent to the Director of the Compensation and Pension Service for extra-schedular consideration pursuant to 38 C.F.R. § 4.16(b). The Veterans Court observed that the requirements for a TDIU were set forth on the pre-printed TDIU application, and that the RO’s June 1998 decision denying the claim informed him and his counsel that a TDIU was denied because the veteran was not found to be unable to secure or follow a substantially gainful occupation due to his service-connected disabilities. The RO also pointed out that his disabilities did not satisfy the

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* The Veterans Court cited the 1995 SOC that detailed the relevant diagnostic codes, the 1998 rating decision and the 2000 BVA remand.

schedular criteria contained in 38 C.F.R. § 4.16(a) and that his case was not submitted for extra-schedular consideration because there were no exceptional factors or circumstances associated with his disablement.

The Veterans Court noted that the veteran was advised of the criteria again in the July 1998 SOC, and in December 2000, the BVA remanded the claim for VA examinations to determine the severity of his bilateral knee disabilities and an assessment of whether they rendered him unable to engage in or maintain employment.¹⁶⁹ The Veterans Court also pointed out that the May 2001 VCAA letter did not notify the veteran or his counsel of the criteria necessary to substantiate his TDIU claim.

Based on the above, the Veterans Court concluded that any section 5103(a) notice error was not prejudicial because throughout the adjudication process VA had provided the veteran and his attorney the opportunity to participate meaningfully in the adjudication of his TDIU claim. In reaching this determination, the Veterans Court stated that the record disclosed that the veteran, through his counsel, had demonstrated an awareness of the relevant regulations and criteria for a TDIU rating. The Veterans Court held that based on the various predecisional communications, and taking into consideration the veteran's representation by counsel "from the filing of the claim throughout the adjudication process," the record showed that he had an opportunity to meaningfully participate in the adjudication of his TDIU claim.

As to his tinea versicolor claim, the Veterans Court noted that the May 2001 VCAA notice letter "explicitly listed" the veteran's claims as seeking service connection for a neuropsychiatric disorder, entitlement to increased ratings for his right and left knee disabilities and to a TDIU, i.e., there was no mention of his tinea versicolor claim. The Veterans Court acknowledged, however, the Secretary's argument that it was not unreasonable to believe that the veteran understood that he needed to show that his tinea versicolor had worsened and thus he was not prejudiced.

Because the letter did not mention the veteran's tinea versicolor claim, the Veterans Court held that it could not be considered informative

¹⁶⁹ *Id.* at 431. The veteran was also scheduled for a VA examination to determine the severity of his tinea versicolor.

as to the claim.¹⁷⁰ The Veterans Court held that although the general information in the letter regarding his increased rating claims was equally true for his tinea versicolor claim, there was nothing in the letter notifying him of that fact. The Veterans Court also indicated that although the October 1995 and June 1998 rating decisions informed him of the criteria for disability ratings of zero and 10 percent, he was never adequately informed of the evidence necessary to substantiate his claim. Thus, notwithstanding his representation by counsel, the Veterans Court held that the Secretary had not met his burden of showing that the veteran was able to meaningfully participate in the adjudication of his claim.¹⁷¹ The Veterans Court vacated the BVA's determination on this issue and remanded the matter to VA.

Significantly, Judge Lance, who “fully” concurred with the majority's discussion of how the Veterans Court should take due account of the role of prejudicial error, strongly disagreed with the majority's “narrow view of the effect that representation by counsel before VA has on a claimant's opportunity to meaningfully participate in the adjudication of his or her claim.”¹⁷² He also dissented from the majority's remand of the tinea versicolor claim. In Judge Lance's opinion, the fact that Mr. Overton was represented by the same attorney since 1993 in pursuit of his increased rating and TDIU claims was “dispositive.”¹⁷³

Judge Lance agreed with the majority that a claimant's representation by counsel did not relieve the Secretary from his statutory obligation to provide the required section 5103(a) notice to the claimant and his or her representative. Judge Lance, however, disagreed with the impact that attorney representation had in determining whether a claimant had a meaningful opportunity to participate in the adjudication of his or her claim should the Veterans Court find a notice error.¹⁷⁴ Judge Lance cited the American Bar Association's Model Rules of Professional Conduct for the propositions that lawyers must provide competent

¹⁷⁰ *Id.* at 443.

¹⁷¹ *Id.* at 444.

¹⁷² *Id.* (Lance, J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.* Judge Lance stated that the majority limited the effect of attorney representation and only attributed to the claimant “the attorney's actions and communications.”

representation, which requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. He concluded that the majority's view ignored an attorney's professional and ethical responsibilities, as well as the reality that the relationship between an attorney and the client he or she represents is one of agent and principal and that it was "'highly impracticable' to distinguish between clients and attorneys in assessing the client's responsibility for how his attorney pursues a case."¹⁷⁵ Judge Lance added, "[i]t is precisely because of the nature of the attorney-client relationship and the attorney's specialized knowledge and experience that I cannot endorse the majority's view which seemingly requires counsel to demonstrate his competence before we attribute his knowledge to a claimant."¹⁷⁶

Significantly, discussing the impact of the Federal Circuit's decision in *Andrews* on VA's obligation to provide compliant notice, Judge Lance declared,

The Federal Circuit's recent decision in *Andrews, supra*, makes clear that represented claimants in the VA adjudication system are treated differently than those who are proceeding pro se. The Federal Circuit held, without any qualification, that VA's duty to sympathetically read a claimant's pleadings does not apply to pleadings filed by counsel. *Andrews*, 421 F.3d at 1283. Given this distinction already drawn by the Federal Circuit, I do not think it unreasonable to further attribute to a claimant his or her attorney's knowledge of the relevant law and what information and evidence is necessary to substantiate a claim.¹⁷⁷

Judge Lance added that he recognized that where an attorney's involvement was so limited or too late in the process, that VA's failure to provide section 5103(a) notice would have affected the claimant's ability to participate meaningfully in the adjudication of his or her claim.¹⁷⁸ Here, because of Mr. Overton's continuous representation by counsel, he would find that he had a meaningful opportunity to participate in the adjudication

¹⁷⁵ *Id.* at 445 (Lance, J., dissenting).

¹⁷⁶ *Id.* at 445.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

of his claim and dissented from the Veterans Court's remand of the veteran's tinea versicolor claim.¹⁷⁹

Finally, in *Medrano v. Nicholson*,¹⁸⁰ the Veterans Court affirmed a BVA decision that denied service connection for PTSD. In *Medrano*, the claimant was represented by counsel. The veteran received untimely content-complying VCAA notice; however, in response to the notice, his attorney affirmatively "indicated...that the [veteran] had no further evidence to submit."¹⁸¹ Citing *Andrews* and *Overton*, the Veterans Court concluded that counsel's statement relieved the Secretary of the burden of issuing an SSOC reflecting VA's readjudication of the claim following the compliant notice.¹⁸²

Based on the foregoing, it is apparent that representation by counsel significantly impacts the Department's notice obligations. In proceedings at the Veterans Court, much, of course, appears to depend on the panel. Judge Lance, through his majority opinion in *Medrano* and his dissents in *Overton* and *Gordon*, underscores the potential benefit of attorney representation for VA. By contrast, Judge Schoelen is, at a minimum, resistant to charging claimants with the knowledge of their attorneys, as reflected in her opinion in *Gordon* and her concurrence in *Medrano*. Thus, Judges Lance and Schoelen represent opposite poles on the spectrum, and it bears close watching to see where the remaining five members of the Veterans Court cast their lots because the Veterans Court's jurisprudence, and the impact of attorney representation, hangs in the balance.

Further, Judge Lance's dissents raise the question of whether notice could really ever be defective in a case where the veteran is represented by an attorney. Thus, VA must pay close attention to the

¹⁷⁹ See also *Dalton v. Nicholson*, 21 Vet. App. 23 (2007); cf. *Gordon v. Nicholson*, 21 Vet. App. 270, 283 (2007) (Schoelen, J.) (concluding that there was nothing in the actions of the claimant's former counsel, who represented her from May 2001 until the date of the BVA's October 17, 2002, decision, "that demonstrate that the [claimant] had a meaningful opportunity to participate effectively in the processing of her claim."). The dissenting judge in *Gordon*, however, would have held that the claimant had a meaningful opportunity to participate in the appeal. *Id.* at 284 (Lance, J., dissenting).

¹⁸⁰ 21 Vet. App. 165 (2007).

¹⁸¹ *Id.* at 168.

¹⁸² *Id.* at 173.

evolution of this line of cases because if Judge Lance’s view becomes the prevailing doctrine of the Veterans Court, it seems likely that even in the absence of appropriate VCAA notice, a claimant who is represented by counsel would be unable to show that he or she was prejudiced, thus making it much more likely that the BVA’s decision would be affirmed.

C. Other Applications

In the context of a claim alleging CUE in a VA determination, the Federal Circuit in *Roberson v. Principi*¹⁸³ explored whether a VA claimant had filed a claim before the RO for a TDIU. In *Roberson*, in 1982, the veteran filed a claim for service connection for PTSD. In doing so, he alleged that he had been unemployed due to PTSD for almost a year. In 1984, a VA RO granted service connection for PTSD and assigned a 70 percent disability evaluation. The veteran later asserted that the 1984 RO decision contained CUE because VA breached its duty to assist by failing to infer and develop a TDIU claim. Before the Federal Circuit, the Veterans Court noted that while a breach of the duty to assist cannot form the basis for a finding of CUE, the duty to assist under 38 U.S.C. § 5107, is separate from VA’s mandate to fully develop the veteran’s claim.

Turning to whether the veteran filed a claim for TDIU, the Federal Circuit found that a specific claim for TDIU was not required. It held that “[o]nce a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability,” VA must consider that the veteran has filed a claim for TDIU.¹⁸⁴ In so holding, the Federal Circuit noted that Congress has mandated “that the VA is to fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits.”¹⁸⁵

Similarly, in *Szemraj v. Principi*,¹⁸⁶ the Federal Circuit considered whether the duty to sympathetically read a pro se claimant’s pleadings applied to a pending claim alleging CUE. The appellant had filed a claim seeking service connection for a nervous condition—obsessive compulsive

¹⁸³ 251 F.3d 1378 (Fed. Cir. 2001).

¹⁸⁴ *Id.* at 1384.

¹⁸⁵ *Id.* at 1383 (citing *Norris v. West*, 12 Vet. App. 413, 420 (1999)).

¹⁸⁶ 357 F.3d 1370 (2004).

disorder. The RO denied the claim finding that the disability claimed was a “constitutional or developmental abnormality” rather than a condition resulting from military service. On appeal to the BVA, the appellant requested a psychiatric evaluation by a board of three psychiatrists. In 1989, the BVA denied the claim and in doing so also denied the request for additional psychiatric examination. In 1999, the appellant filed a motion alleging CUE in the August 1989 BVA decision. He argued that the BVA failed to apply the one year post-service presumption of service connection provided by 38 C.F.R. §§ 3.307 and 3.309. The BVA rejected the CUE claim, and on appeal to the Veterans Court, the appellant argued that pursuant to the Federal Circuit’s holding in *Roberson*, VA had a duty to fully and sympathetically develop the veteran’s claim to its optimum. The Veterans Court rejected that argument, finding that *Roberson* only applied to “a pending non-CUE claim.”

The Federal Circuit disagreed with the Veterans Court’s interpretation of its holding in *Roberson*. It noted that its decision was “not limited to its particular facts.” Rather, it held that *Roberson* required “with respect to all pro se pleadings, that the VA give a sympathetic reading to the veteran’s filings by ‘determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.’”¹⁸⁷ Specific to a claim for CUE, however, there was no duty on the part of VA to reconcile conflicting evidence before adjudication or develop evidence of the veteran’s theory. Moreover, the Federal Circuit noted that the BVA specifically considered application of §§ 3.307 and 3.309 in its decision. Accordingly, although the Federal Circuit found that the Veterans Court erred in its interpretation of *Roberson*, the error was harmless.

Although it is clear that the duty to sympathetically review pleadings is applicable to claims in which there is a motion for CUE, conversely in *Johnston v. Nicholson*,¹⁸⁸ the Federal Circuit limited this duty when an appellant is represented by counsel. In *Johnston*, in 1970, the veteran was awarded service connection for a leg wound and assigned a 10 percent disability rating. In 1987, he was awarded service connection for PTSD and assigned a 100 percent rating. In 1988, the RO reduced the veteran’s disability evaluation for PTSD from 100 to 70 percent. The

¹⁸⁷ *Id.* at 1373 (quoting *Roberson*, 251 F.3d at 1384).

¹⁸⁸ 421 F.3d 1285 (Fed. Cir. 2005).

veteran appealed the rating reduction, and in 1989, the BVA upheld the reduction of the disability rating, despite the fact that there was evidence of record suggesting that the veteran was not capable of maintaining employment.

In 2001, with assistance of counsel, the claimant filed a claim alleging CUE. He argued that the BVA failed to apply 38 C.F.R. § 4.16(c)¹⁸⁹ pertaining to the assignment of a 100 percent schedular evaluation when certain criteria are met. The BVA found that § 4.16(c) was not applicable to the veteran's case, and therefore, found no CUE in the 1989 decision. On appeal to the Veterans Court, the appellant alleged that the 1989 BVA decision failed to consider another provision of the regulations, namely, 38 C.F.R. § 4.16(b). The Veterans Court held that the appellant had failed to raise the issue of the applicability of 4.16(b) to the BVA, and thus the BVA did not clearly and unmistakably err in failing to address the issue. The Veterans Court also noted its interpretation of *Roberson* as not applying to CUE claims.

Before the Federal Circuit, the appellant argued that because there was evidence of unemployability, VA should have read his claim sympathetically and considered whether the appellant was entitled to a TDIU. The Federal Circuit again disagreed with the Veterans Court as to the scope of its decision in *Roberson*. It noted, again, that under *Roberson*, VA had a duty to sympathetically read a CUE motion that is filed pro se. The Federal Circuit, noted, however, that motions for CUE, by regulation, must be plead with specificity.¹⁹⁰ Because the veteran was represented by counsel, and because he did not raise the argument based on 38 C.F.R. § 4.16(b), the Federal Circuit held that the sympathetic pleading rule announced in *Roberson* was inapplicable to the appellant's claim. Accordingly, the Federal Circuit affirmed the Veterans Court's decision.

¹⁸⁹ 38 C.F.R. § 4.16(c) (1989) (at that time allowing for the assignment of a 100 percent schedular evaluation when "...the only compensable service-connected disability is a mental disorder assigned a 70 percent evaluation, and such mental disorder precludes a veteran from securing or following a substantially gainful occupation."), repealed, effective October 8, 1996. See 61 FR 52700 (Oct. 8, 1996).

¹⁹⁰ 38 C.F.R. § 20.1404(b) (2007) (indicating a CUE "...motion must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error.").

Although there is a specific pleading requirement for a claim alleging CUE,¹⁹¹ the Veterans Court in *Canady v. Nicholson*¹⁹² held that the interpretation of the specificity requirement varied depending upon whether the veteran was proceeding pro se or was represented by counsel.¹⁹³ In *Canady*, in 1991 the BVA denied a claim for service connection for PTSD on the basis that the veteran lacked a diagnosis of the disability. In April 1993, he submitted new evidence in support of his claim and the RO granted service connection. In November 1999, the veteran alleged CUE in the April 1991 BVA decision. In dismissing the claim, the BVA found that “the allegations [of CUE] [did] not set forth clearly and specifically the...alleged errors of fact or law in the [April 1991 BVA] decision....”¹⁹⁴

The veteran appealed the decision to the Veterans Court, which, citing *Andrews*, found that the BVA “failed to take into consideration [the requirement] to read a pro se request for revision sympathetically.”¹⁹⁵ The Veterans Court noted that the “requirement to sympathetically read the pleadings of a pro se claimant applies even though regulations set forth specific pleading requirements.”¹⁹⁶ Applying the holding to the facts of the case, the Veterans Court questioned whether a sympathetic reading might obviate the requirement for a claim of CUE that the claimant set forth what the “manifestly different outcome” would be but for the CUE. The Veterans Court indicated that the “manifestly different outcome” could be “implied” from the pro se claimant’s pleadings.¹⁹⁷ Accordingly, the BVA decision was set aside and remanded for additional findings consistent with the Veterans Court’s decision.

Recently, in *Edwards v. Peake*, the Veterans Court addressed whether the sympathetic pleading requirement applied to applications for waiver of a debt.¹⁹⁸ In November 1999, VA informed the claimant that it had overpaid her pension benefits because she failed to report all of her

¹⁹¹ *Id.*; *Fugo v. Brown*, 6 Vet. App. 40 (1993); *but see Simmons v. Principi*, 17 Vet. App. 104 (2003).

¹⁹² 20 Vet. App. 393 (2006).

¹⁹³ *Id.* at 401.

¹⁹⁴ *Id.* at 397.

¹⁹⁵ *Id.* at 401.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 402.

¹⁹⁸ *Edwards v. Peake*, 22 Vet. App. 57, 60 (2008).

income. She was advised of her right to request a waiver of the debt and that such request must be submitted in writing within 180 days. In May 2000, proceeding pro se, she submitted three statements. In one statement she requested reinstatement of her pension benefits. In the second statement, she requested a recalculation of her pension, and in the third statement, she requested postponement of further processing concerning the overpayment so she could submit additional documentation. She was subsequently notified by letter of an additional overpayment in the amount of \$12,347. Thereafter, she requested waiver of the indebtedness.¹⁹⁹

In denying the claim, the BVA determined that the May 2000 submissions did not constitute requests for waiver because they did not “use the word waiver nor...use any word or group of words that could be construed as a synonym with waiver.”²⁰⁰

Before the Veterans Court, VA argued that the May 2000 submission should not be entitled to a sympathetic reading because a request for a waiver of debt was not a claim for benefits, and there was no duty to assist associated with a waiver request. The Veterans Court assumed for argument’s sake that the duty to assist did not apply to requests for waiver. Nevertheless, the Veterans Court held that the “duty to sympathetically read submissions is tied to the pro se status of the appellant when filing pleadings before the Secretary in actions related to benefits, and not whether the pleadings specifically seek benefits.”²⁰¹ Accordingly, the Veterans Court vacated the Board’s decision and remanded the matter for VA to sympathetically consider whether the appellant’s statements constituted a waiver request.²⁰²

¹⁹⁹ *Id.* at 59.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 60.

²⁰² *Id.* (remanding the case to the BVA rather than reversing its decision despite finding that the sympathetic pleading requirement applies to claims for waiver and noting that the BVA must make factual findings as to whether the May 2000 documents constituted a timely request for waiver. The question as to whether a sympathetic reading raises a claim remains a factual question that is purely the province of VA to make).

CONCLUSION

As discussed above, historically, limitation of fees charged by attorneys resulted in the de facto exclusion of attorneys from the VA adjudication process. The purpose was to ensure that veterans were not forced to share their monetary compensation benefits with attorneys, who were viewed with suspicion. The fear was that an attorney might prey on an unsuspecting veteran who was seeking the mercy of a grateful nation.

The initial easing of attorney exclusion came through the 1988 enactment of the VJRA, which provided for judicial review of BVA decisions, created the Veterans Court, and permitted attorneys to charge fees for services to represent clients after BVA rendered a final decision in a case. In the years since the enactment of the VJRA, a recognized difference in treatment of claims by pro se claimants and claimants represented by counsel has evolved and was solidified by the Federal Circuit in *Andrews* in 2005.²⁰³ Although it is without statutory or regulatory basis, the result has been a “forked” approach to the adjudication of VA claims based on whether the claimant is represented by counsel.

It is clear that VA has a duty to sympathetically read and develop a pro se claimant’s claim for VA benefits. For those claimants who are not represented by counsel, courts have essentially reaffirmed the historical vision of the Department and have established a “new paternalism” that essentially mirrors the framework and adjudicatory environment set up by Congress in the 1860s and governed the adjudication of veterans benefits claims from that time until the recent introduction of attorneys into the VA adjudication process.

Arguably, those claimants who select attorneys give up the benefits of a paternalistic atmosphere of an informal and nonadversarial

²⁰³ As discussed above, since *Andrews*, the Federal Circuit has divided claimants into two categories, those represented by attorneys and those prosecuting their claims pro se. Among the appellants characterized as appearing pro se are those claimants in *Roberson*, *Szemraj*, and *Moody*, all of whom were represented by veterans’ service organizations. The Veterans Court has likewise singled out claimants represented by attorneys, citing *Andrews* as the authority for the distinction. In doing so, the Veterans Court, has cited the American Bar Association’s Model Rules of Professional Conduct for (e.g., *Robinson* and *Overton*) as justifying such a distinction; this rule does not apply to veterans’ service organizations.

process. The attorney's role is to serve as the claimant's advocate and by virtue of his or her training and experience bring his or her knowledge to bear on the development and adjudication of a claim. That attorney will also likely inject an adversarial tone into the adjudication process. Under these circumstances, courts have determined that with an attorney as an advocate, there is no longer the same need to provide notice or to liberally read the record for claims and theories of recovery, nor is there a need to liberally read or sympathetically develop a claim to its optimum.

In light of the 2006 legislation providing for the participation of attorneys at the RO level once an NOD has been filed,²⁰⁴ VA will likely be confronted with a marked increase in the percentage of claimants who are represented by counsel. This will no doubt have consequences on the Department's adjudication of claims at both the RO and BVA level.

Given the case law that has emerged since the Federal Circuit's decision in *Andrews*, however, we think that attorney representation may have significant benefits for the Department. First, attorneys will be able to guide claimants through the statutory and regulatory framework applicable to claims for VA benefits and be candid with claimants as to the likelihood of their prevailing on the merits, thus potentially discouraging the filing or prosecution of meritless claims. In addition, VA will be able to charge those claimants with knowledge, or presumed understanding, that their attorneys have or should possess in knowing the elements necessary to substantiate the claim.

Further, due to the different treatment afforded to claimants for VA benefits who are represented by counsel, there may be implications affecting the number of cases decided by VA and the volume of cases remanded by BVA and the courts for additional development. Since the enactment of the VCAA, the courts have remanded a large number of cases based on a breach of either VA's duty to notify or duty to assist.²⁰⁵ Without

²⁰⁴ See VBHC&IT, Pub. L. No. 109-461, 120 Stat. 3403. A new VA regulation implemented the attorney representation element of this Act. Payment of Fees for Representation by Agents and Attorneys, 73 Fed. Reg. 29,852, 29,875-76 (May 22, 2008) (codified at 38 C.F.R. § 14.636).

²⁰⁵ For example, in Fiscal Year 2007, BVA remanded 35.4% of appeals to the Agency of Original Jurisdiction. See B.V.A., REP. OF THE CHAIRMAN, FISCAL YEAR 2007 at 19 (2008).

excusing any such error on the part of VA, if a claimant is represented by counsel, attorney representation would be central to the prejudicial error analysis. The increased participation of attorneys earlier in the process, and to a greater extent, may lead to fewer duty to notify remands.²⁰⁶ This should result in more final VA adjudications, especially at the BVA level, thus ensuring that more veterans are served and claimants will have their claims adjudicated in a more timely fashion. This in turn will lead to a greater efficiency within the system and a better use of government resources.

The increased participation of attorneys may also result in far fewer duty to assist remands from the Veterans Court. Arguably, VA will not be required to investigate theories of recovery not advanced by the attorney, although suggested by a liberal reading of the record, as the claimant may be limited to the theory of recovery affirmatively argued by counsel.²⁰⁷ In addition, because they have attorneys, claimants will be charged with the knowledge that failure to assist in substantiating their claims by not reporting to VA examinations²⁰⁸ or not providing authorizations to release their private medical records could negatively impact the adjudication of their claims.²⁰⁹

In light of the above, veterans, and other claimants seeking VA benefits, should carefully weigh the pros and cons of attorney representation before choosing an attorney to prosecute their claims.

²⁰⁶ For example, there may be no need to remand cases for notice that does not comport with the requirements of *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008). *c.f.* *Overton*, 20 Vet. App. 427 (2006).

²⁰⁷ *Robinson v. Mansfield*, 21 Vet. App. 545 (2008), *appeal filed sub nom.*, *Robinson v. Peake*, No. 08-7095 (Fed. Cir. Apr. 21, 2008).

²⁰⁸ *Turk v. Peake*, 21 Vet. App. 565, 570 (2008).

²⁰⁹ *Cf. Connolly v. Derwinski*, 1 Vet. App. 566 (1991).