

The Law of Veterans' Benefits 2008-2010: Significant Developments, Trends, and a Glimpse into the Future

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INTRODUCTION

The two-year period addressed in this article has been a busy time for the United States Court of Appeals for Veterans Claims (“Veterans Court” or “Court”)² as well as in veterans’ law generally. There is a new Secretary of the Department of Veterans Affairs (“Department” or VA) in a new administration.³ Congress has been active in the area both in passing important legislation⁴ and in engaging in its oversight role.⁵ The Veterans Court celebrated

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² It has been my pleasure to have spoken at the Court’s ninth, tenth, and eleventh judicial conferences. This article concerns the Eleventh Judicial Conference. I also wrote articles based on my presentations at the ninth and tenth judicial conferences. See Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361 (2009) [hereinafter Allen, *Legislative Commission*]; Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483 (2007) [hereinafter Allen, *Significant Developments*].

³ Retired U.S. Army General Eric K. Shinseki was sworn in as the seventh Secretary of the Department of Veterans Affairs (“Department” or VA) on January 21, 2009, after having been nominated to that position by President Barack Obama and confirmed by the United States Senate. See Dep’t of Veterans Affairs, *The Honorable Eric K. Shinseki* (Jan. 2009), <http://www1.va.gov/opa/bios/docs/shinseki.pdf>.

⁴ See, e.g., Veterans’ Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145.

⁵ Activities of the respective committees of the House of Representatives and the Senate with jurisdiction over veterans’ benefits issues are detailed on their websites. See U.S. Senate Committee on Veterans’ Affairs, <http://veterans.senate.gov> (last visited Oct. 10, 2010); House Committee on Veterans’ Affairs, <http://veterans.house.gov> (last visited Oct. 10, 2010).

the twentieth anniversary of its first convening with a wonderful ceremony in October 2009. And not to be outdone, for only the third time, the Supreme Court of the United States (Supreme Court) decided a case originating in the Veterans Court.⁶

As anyone practicing in the area of veterans' law knows all too well, it is impossible to discuss everything of importance that has occurred in the period from 2008 through 2010. One reason, of course, is that "importance" may very well be in the eye of the beholder. More significantly, the reality is that both the Veterans Court and the United States Court of Appeals for the Federal Circuit (Federal Circuit) have remained very busy places. In 2008, the Veterans Court received 4,128 new appeals and decided a total of 4,446 cases.⁷ In 2009, the Veterans Court received 4,725 new appeals and decided a total of 4,379 cases.⁸ In fiscal year 2008, the Federal Circuit received 170 veterans' law cases (plus 3 direct regulatory challenges) and adjudicated a total of 107 cases by way of merits panels.⁹ In fiscal year 2009, the Federal Circuit received 156 appeals in veterans' law cases (plus 1 direct regulatory challenge) and decided 95 cases by merits panels.¹⁰

My goal here is to identify the most significant decisions in veterans' law over the past two years. Recognizing the impossibility of addressing every decision rendered by the Veterans Court and the Federal Circuit during this period, I was able to

⁶ *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009); *see Scarborough v. Principi*, 541 U.S. 401 (2004); *Brown v. Gardner*, 513 U.S. 115 (1994). The Supreme Court of the United States (Supreme Court) will hear a fourth veterans' law case during the October 2010 Term. *See Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *cert. granted*, 130 S. Ct. 3502 (2010). I discuss *Henderson* below. *See infra* Part I.A.i.

⁷ UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf [hereinafter ANNUAL REPORTS].

⁸ *Id.*

⁹ UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, CASELOAD ANALYSIS FY 2008 – FY 2009, *available at* <http://www.cafc.uscourts.gov/images/stories/the-court/statistics/CaseloadAnalysisFY09.pdf>.

¹⁰ *Id.*

capture what most practitioners would agree are the major matters on which these two courts have opined. In this regard, I read and reviewed every precedential decision of the Veterans Court from February 1, 2008 through April 30, 2010 and all Federal Circuit decisions from this period (both precedential and non-precedential) in the area of veterans' law. Finally, I reviewed decisions from the Supreme Court having applicability in the veterans' law area.¹¹

Based on my review of these sources, I grouped the significant developments over the past two years into eleven categories: issues concerning (1) appellate timing (both within the Department and to the Veterans Court) as well as related jurisdictional issues; (2) what constitutes a "claim" under relevant law; (3) the Department's duties of notice to claimants;¹² (4) the Department's duties to assist claimants; (5) medical examinations and evidence; (6) ratings decisions; (7) clear and unmistakable error along with matters concerning the duty to sympathetically read veterans' pleadings; (8) attorneys' fees; (9) claimants' due process rights; (10) the general structure of the system for the award and review of veterans' benefits; and (11) certain miscellaneous, but independently significant, matters. In Part I below, I address each of these categories in turn.¹³

After addressing the specific areas in which there have been significant developments over the past two years, I turn in Part II to distilling the common themes from the various substantive areas I addressed in Part I¹⁴ and highlighting some areas in which I suspect there will be development over the next two years.¹⁵

¹¹ I also reviewed non-judicial sources, including congressional enactments and proposals as well as secondary literature in the area of veterans' law.

¹² This article uses the terms "veteran" and "claimant" interchangeably unless specifically noted.

¹³ See *infra* Part I.A-K.

¹⁴ See *infra* Part II.A.

¹⁵ See *infra* Part II.B.

I. THE SIGNIFICANT DEVELOPMENTS (2008-2010)

A. Timeliness of Appeals (Administrative and Judicial) and Other Jurisdictional Matters

There have been a number of decisions over the past two years dealing with the timeliness of claimants' attempts to appeal adverse benefits determination both within the Department and from the Board of Veterans' Appeals ("Board") to the Veterans Court. This part describes these developments.

i. The Demise of Equitable Tolling

There has been a seismic shift in jurisdictional law in the past two years made most clear by *Henderson v. Shinseki*.¹⁶ In *Henderson*, the Federal Circuit, sitting en banc, overruled its prior decisions that held that the 120-day period in which a person dissatisfied with an adverse Board decision has to appeal to the Veterans Court¹⁷ could be equitably tolled.¹⁸ Affirming a decision from the Veterans Court to the same effect,¹⁹ the 9-3 majority of the en banc Federal Circuit concluded that the Supreme Court's

¹⁶ 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *cert. granted*, 130 S. Ct. 3502 (2010).

¹⁷ 38 U.S.C. § 7266 (2006).

¹⁸ *Henderson*, 589 F.3d at 1220 (overruling *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc) and *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc)).

¹⁹ *See Henderson v. Peake*, 22 Vet. App. 217, 219-21 (2008) (concluding by a split panel that precedent from the United States Court of Appeals for the Federal Circuit (Federal Circuit) concerning equitable tolling had not survived the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007)). In addition to agreeing with the result advocated in Judge Schoelen's dissenting opinion, the three dissenting members of the Federal Circuit were strongly critical of the Veterans Court because it had not followed binding Federal Circuit precedent. *See Henderson*, 589 F.3d at 1230 n.4 (Mayer, J., dissenting) ("The Veteran's [sic] Court seems to have lost sight of its mandate when it took it upon itself to 'overrule' *Bailey* and *Jaquay*. In eradicating equitable tolling based on *Bowles*, the Veterans Court conveniently overlooked the fact that *Bowles* did not cite to, much less overrule, any case involving section 7266(a). Indeed, even the government acknowledges that the Veterans Court acted inappropriately in failing to follow binding precedent of this court on the question of whether equitable tolling applies in Veterans Court proceedings.").

decision in *Bowles v. Russell*²⁰ had effectively undermined the Federal Circuit's equitable tolling jurisprudence.²¹ The Federal Circuit rejected arguments that the unique nature of the veterans' benefits system altered that conclusion.²² The result was that because 38 U.S.C. § 7266(a) provides a statutorily mandated time within which appellate review could be sought it is jurisdictional "and because Congress has not so provided, [the statute] is not subject to equitable tolling."²³

Henderson's significance cannot be overstated. It will mean that claimants with meritorious claims will be precluded from ever having their day in a *court*. While one can say for most "time of review" provisions that a person who misses the deadline within which to file a notice of appeal will lose a right of review, there is a difference between these situations and the one veterans face. In the veterans' benefits arena, the Veterans Court is the first time the judicial apparatus is engaged.²⁴ Moreover, the veteran is moving from the purportedly non-adversarial system in the Department to the adversarial realm of a court. This can easily result in the dissatisfied claimant getting caught in the nip-point of this shift between systems.²⁵ Equitable tolling alleviated that problem to some degree. Without it, the system is far less veteran-friendly.

Since its decision (later affirmed) that *Bowles* undermined the Federal Circuit's equitable tolling jurisprudence, the Veterans Court has issued several other decisions dealing with the issue.

²⁰ 551 U.S. 205 (2007).

²¹ *Henderson*, 589 F.3d at 1212-20.

²² *Id.* at 1219-20.

²³ *Id.* at 1216, 1220.

²⁴ *Id.* at 1213-14. The Federal Circuit considered and rejected this argument as a basis for distinguishing *Bowles*. My point here is not to re-argue the matter. Rather, my goal is to illustrate that whatever its import, as a descriptive matter there are differences between the veterans' benefits system and other areas in which courts have considered the jurisdictional implications of time of review provisions.

²⁵ See, e.g., Allen, *Significant Developments*, *supra* note 2, at 497-502.

The most significant include *Jones v. Peake*,²⁶ *Percy v. Shinseki*,²⁷ *Rickett v. Shinseki*²⁸ and *Irwin v. Shinseki*.²⁹

In *Jones*, the Veterans Court held that *Bowles* precludes the equitable tolling of the 120-day period within which a motion for reconsideration may be filed with the Board, at least to the extent that such filing abates the period within which a dissatisfied claimant must file a Notice of Appeal to the Court.³⁰

In *Percy*, the Veterans Court held that *Bowles* does *not* mean that the 60-day period for filing a substantive appeal to the Board after a Statement of the Case has been issued is jurisdictional and, therefore, not subject to equitable tolling.³¹ However, the Court specifically reserved decision as to whether *Bowles* could ever apply to “proceedings before VA.”³² This point is significant because a holding that *Bowles* applies in the administrative context would only increase the number of situations in which meritorious claims could be erroneously denied with no opportunity for review. While this is not the place to discuss the matter in detail, there are strong arguments to suggest that the concerns underlying *Bowles*, even if properly applied in judicial review of veterans’ benefits determinations, have less weight in the administrative review of such decisions. To take just one example, while one might be able to discount the importance of the pro-claimant administrative system when deciding whether

²⁶ 22 Vet. App. 247 (2008).

²⁷ 23 Vet. App. 37 (2009).

²⁸ 23 Vet. App. 366 (2010).

²⁹ 23 Vet. App. 128 (2009).

³⁰ *Jones*, 22 Vet. App. at 249-50.

³¹ *Percy*, 23 Vet. App. at 43-46 (discussing 38 U.S.C. § 7105(d)(3) (2006)).

³² *Id.* at 45 n.3. It is worth noting, however, that some of the Veterans Court’s language in the case could be read to suggest that certain deadlines in the administrative process might very well be sufficiently akin to judicial notice of appeal provisions to warrant the application of *Bowles*. See *id.* at 44 (“The permissive language of section 7105(d)(3) stands in stark contrast to the statutory language mandating that claimants file a timely [Notice of Disagreement]”); but see *Butler v. Shinseki*, 603 F.3d 922, 926-28 (Fed. Cir. 2010) (Newman, J., concurring) (arguing that at least with respect to 38 U.S.C. § 5110(b) equitable tolling would be available).

equitable tolling should be a part of the *judicial* process, it seems odd to say that Congress intended the *administrative* system to be both pro-claimant and paternalistic yet simultaneously built in mandatory time limits for various activities. This is not to say one could not reach that conclusion. However, I submit it would take different arguments than those that have been made thus far in other contexts.

Finally, the Veterans Court has held that the misfiling of a Notice of Appeal at a place other than the Court does not toll the running of the 120-day period within which to appeal.³³ The Court overturned its earlier holding that equitable tolling principles justified tolling the 120-day period when a Notice of Appeal had been misfiled at the Board.³⁴ Perhaps, these decisions reflect a correct reading of *Bowles*.³⁵ Regardless, it is an indication of the rather bizarre system in which veterans now find themselves. They will have spent their time seeking benefits in a system that is avowedly pro-claimant and in which they are told that the government is there to help. They then make a mistake by giving a document to someone in that same helpful administrative agency. But what they do not fully appreciate is that the rules have changed. In the blink of an eye, they have moved to an adversarial system in which they could see that someone has said “got you” when they make an error. The facts of *Irwin* drive this point home even more forcefully. There, the Veteran misfiled his Notice of Appeal with the Board one month after he received notice of the adverse Board decision.³⁶ This filing was well within the 120-day appeal period. If the Board had returned the document to the Veteran or had filed it with the Court at any time in the three months following the misfiling, there would have been no jurisdictional issue. Yet, without explanation, the

³³ *E.g.*, *Rickett*, 23 Vet. App. at 371; *Irwin*, 23 Vet. App. at 131.

³⁴ *Irwin*, 23 Vet. App. at 130 n.2 (concluding that *Bowles* and *Henderson* had undermined *Bobbitt v. Principi*, 17 Vet. App. 547 (2004)).

³⁵ At least one judge of the Court does not believe this is so. *Rickett*, 23 Vet. App. at 371-76 (Kasold, J., dissenting).

³⁶ *Irwin*, 23 Vet. App. at 128-29.

Board waited until after the 120-day period had expired to send the document to the Veterans Court.³⁷ But none of that made the slightest difference. One can forgive a veteran for being somewhat disenchanted with a system that allows such a result. At the end of the day, however, we await the Supreme Court's resolution of the issue, both for what it will say about equitable tolling as well as what it could potentially tell us about the more general nature of the system of judicial review of veterans' benefits determinations.

ii. Abating the Finality of Board Decisions

There have also been a number of developments concerning events that may occur at the administrative level that abate the finality of a Board decision for appellate purposes. The Court's jurisdiction is tied to a "final decision" of the Board.³⁸ Thus, if a decision lacks finality, the period to appeal does not run. Given the rejection of equitable tolling principles discussed above, decisions concerning the abatement of finality have become even more important than they already were.

Within the past two years, the Veterans Court and the Federal Circuit have held (or reiterated) that the following events abate the finality of a Board decision: (1) the filing of a motion for reconsideration before the Board even if the motion is directed towards only one of several claims;³⁹ (2) VA's failure to follow 38 C.F.R. § 3.156(b) concerning the submission of new and material evidence;⁴⁰ (3) VA's failure to notify a claimant of a right

³⁷ *Id.* at 134-35. It also appears that this factual scenario is not uncommon. *See, e.g.,* Posey v. Shinseki, 23 Vet. App. 406, 411 (2010) (Hagel, J., concurring) ("[I]n far too many cases, the Court receives the Notice of Appeal from VA only after the 120-day appeal period has expired, permitting the Secretary to then move to dismiss the appeals for lack of jurisdiction.").

³⁸ 38 U.S.C. § 7266(a) (2006).

³⁹ Fagre v. Peake, 22 Vet. App. 188, 191 (2008).

⁴⁰ Young v. Shinseki, 22 Vet. App. 461, 468-69 (2009). *But see id.* at 472-75 (Lance, J., concurring) (arguing that VA's failure could allow for an earlier effective date but would not undermine the finality of the Board of Veterans' Appeals' ("Board") decision for purposes of appellate jurisdiction).

to appeal;⁴¹ and (4) the pendency of a motion for reconsideration before the Board so long as that motion does not indicate an intent to seek judicial review (which would make it a misfiled Notice of Appeal).⁴²

iii. Other Matters

There were two other decisions in the relevant period that are worth mentioning in this area of the law. The first is minor. The Federal Circuit held that the “mailbox rule” (providing that there is a presumption of receipt upon proof of mailing) applies to the filing of a Notice of Disagreement just as it does to the filing of a Notice of Appeal.⁴³

The second matter is more complicated and, to some extent, overlaps with the discussion in the following section concerning the definition of a “claim.” In *Tyrues v. Shinseki*,⁴⁴ a Veteran who had served in the Persian Gulf War sought benefits related to two matters: (1) a lung condition and (2) Gulf War Syndrome.⁴⁵ Simplifying matters somewhat, the Board affirmed a denial of entitlement to benefits concerning the lung matter⁴⁶ in 1998 and issued a notice of appellate rights to the Veteran (although the Veteran did not appeal).⁴⁷ The Board also remanded the matter

⁴¹ AG v. Peake, 536 F.3d 1306, 1308-09 (Fed. Cir. 2008).

⁴² See, e.g., Posey v. Shinseki, 23 Vet. App. 406, 408-09 (2010); Boone v. Shinseki, 22 Vet. App. 412, 413-15 (2009); Kouvaris v. Shinseki, 22 Vet. App. 377, 380-81 (2009).

⁴³ Savitz v. Peake, 519 F.3d 1312, 1314-15 (Fed. Cir. 2008).

⁴⁴ 23 Vet. App. 166 (2009) (en banc).

⁴⁵ *Id.* at 168-70.

⁴⁶ It is worth noting the difficulty of describing the situation in *Tyrues* without using the word “claim.” This difficulty itself speaks volumes concerning the significant developments in this two year period concerning the definition of “claim.” In *Tyrues* itself, the issue was debated, with the majority holding that it made no difference whether these two matters were the same “claim.” *Id.* at 172. Judge Hagel concurred in the judgment but argued that he could reach the result only if the two matters were considered separate and distinct claims. *Id.* at 187, 193 (Hagel, J., concurring in the result and dissenting in part). A general discussion of what concerns a “claim” follows. See *infra* Part I.B.

⁴⁷ *Tyrues*, 23 Vet. App. at 169.

concerning the Gulf War Syndrome for further development.⁴⁸ Eventually, the Board denied compensation related to Gulf War Syndrome and the Veteran appealed that denial to the Veterans Court.⁴⁹ The issue was whether the Court had jurisdiction to consider the Board's decision concerning the lung condition (the condition for which the Board had previously denied entitlement to benefits).⁵⁰

The majority of the en banc Court concluded that it did not have jurisdiction to consider the 1998 Board decision concerning the Veteran's lung condition.⁵¹ The Court found that it did not need to consider whether the two matters constituted a single "claim."⁵² Rather, it held that the key to its decision was that "this Court's jurisdiction is controlled by whether the Board issued a 'final decision' – i.e., denied relief by either denying a claim or a specific theory in support of a claim and provided the claimant with notice of appellate rights."⁵³ Because the 1998 decision was one that denied relief, the Veteran was provided appellate rights with respect to that denial, but since the Veteran did not appeal, the Court held it lacked jurisdiction to consider the matters at issue in that decision.⁵⁴

In reaching this result, the majority also made two other important decisions that touched on prior Veterans Court precedent. First, the majority limited the effect of its 2006 decision in *Roebuck v. Nicholson*⁵⁵ essentially to its facts. In *Roebuck*, the Court had held that it did not have jurisdiction to consider a matter "until the Board issue[d] a final decision denying all theories" when the Board specifically stated that it was making

⁴⁸ *Id.*

⁴⁹ *Id.* at 170.

⁵⁰ *Id.* at 168.

⁵¹ *Id.* at 181.

⁵² *Id.* at 172. As mentioned above, this point was a matter of contention. See *supra* note 46.

⁵³ *Tyrues*, 23 Vet. App. at 178 (quoting 38 U.S.C. § 7266(a) (2006)).

⁵⁴ *Id.* at 180-81.

⁵⁵ 20 Vet. App. 307 (2006).

one decision that addressed a theory in support of the matter but specifically noted that it would issue a second decision that would address another theory in support of the matter.⁵⁶ The *Tyrues* Court concluded that this holding was restricted to such a situation – that is, where the Board specifically indicated that a decision on another matter was forthcoming.⁵⁷ Judges Lance and Schoelen vigorously dissented on this point because, in their view, it gave the Board too much power to control the Court's jurisdiction through the artful phrasing of administrative decisions.⁵⁸

Second, the majority partially overruled *Harris v. Derwinski*⁵⁹ to the extent that the decision held that the Veterans Court did not have *jurisdiction* to review a final Board decision that was “inextricably intertwined” with a non-final decision.⁶⁰ Rather, it held that when claims are intertwined the Veterans Court has the *discretion* to decline to exercise jurisdiction.⁶¹ So long as there was a final Board decision, however, the Veterans Court had jurisdiction over an appeal of that decision.⁶²

While *Tyrues* is certainly a complicated decision, it is also practically quite important. Overruling that part of *Harris* that made the intertwined nature of Board decisions a jurisdictional issue, allows the Court greater flexibility to review certain Board decisions in which there are both remands of certain matters combined with denials of others. At the same time, the way in which the Court distinguished *Roebuck* creates at least the possibility that the Board could manipulate

⁵⁶ *Id.* at 315-16.

⁵⁷ *Tyrues*, 23 Vet. App. at 173 (“Accordingly, *Roebuck* is limited to the situation where the Board, in its decision denying one theory, specifically states that the Board will be issuing, without a remand to the [Regional Office], a second decision on another theory of the same claim. To read *Roebuck* more broadly creates a new exception to the rule of finality and ignores the fact that *Roebuck* explicitly was based on unique circumstances.”).

⁵⁸ *Id.* at 196 (Lance, J. and Schoelen, J., concurring in part and dissenting in part).

⁵⁹ 1 Vet. App. 180 (1991).

⁶⁰ *Tyrues*, 23 Vet. App. at 177.

⁶¹ *Id.* at 177-79.

⁶² *Id.* at 178-79.

the Court's jurisdiction through artful decision-drafting. One thing is clear: the Court will be defining the contours of this new jurisdictional doctrine in the years to come.

B. What Constitutes a “Claim” Under Relevant Law?

One of the most challenging developments over the past two years flows from the numerous decisions of both the Federal Circuit and the Veterans Court concerning what constitutes a “claim” under various sources of law. The answer to this question – or perhaps, questions – has significant ramifications in a number of areas of the law of veterans' benefits, including, for example, whether a given matter has been adjudicated such that revision is only allowed via the submission of new and material evidence⁶³ or by demonstrating clear and unmistakable error in the earlier decision.⁶⁴

During the past two years, the Court has reiterated that there are five elements necessary to establish a “claim” for a service-connected disability: “(1) [c]laimant's status as a veteran; (2) existence of a current disability; (3) nexus between the disability and the veteran's service; (4) degree of disability; and (5) effective date of the disability.”⁶⁵ While the statement of elements required to establish such a claim is clear, the issue is that the Veterans Court (and other entities) have used the term “claim” in varying ways, some of which are inconsistent with others.⁶⁶ This inconsistency, or lack of precision, has been the focus of efforts over the past two years to bring greater logic and predictability to this important question. It may be too early to make an assessment of the success of this endeavor.

⁶³ 38 U.S.C. § 5108 (2006).

⁶⁴ *Id.* § 5109A.

⁶⁵ *Goodwin v. Peake*, 22 Vet. App. 128, 132 (2008) (citing *Dingess v. Nicholson*, 19 Vet. App. 473, 484 (2006)).

⁶⁶ *Rice v. Shinseki*, 22 Vet. App. 447, 451-52 (2009) (“As the judicial review of Agency benefit decisions matures, we now see that the broad definition of ‘claim,’ as used by VA . . . and the Court's fluid use of the term would benefit from an attempt to bring some precision to its use in the future.”).

A good starting point is the Federal Circuit's decision in *Boggs v. Peake*.⁶⁷ *Boggs* concerned how one determined if an earlier adjudication concerned the "same claim" as that presented in a later matter such that the earlier decision could only be reopened by the submission of new and material evidence or challenged on the basis of clear and unmistakable error.⁶⁸ In this case, a Veteran filed a claim in 1955 for hearing loss that was denied on the basis that the Veteran had conductive hearing loss that preexisted his service.⁶⁹ The Veteran did not appeal the denial of this claim.⁷⁰ In 2002, the Veteran filed another application for benefits, this time seeking benefits based on sensorineural hearing loss.⁷¹ Both the Board and the Court held that the 2002 application concerned the same claim as the 1955 application and, therefore, in order to pursue that claim the Veteran needed to submit new and material evidence.⁷²

The Federal Circuit reversed, holding "that the 'factual basis' of a claim for purposes of 38 U.S.C. § 7104(b) is the veteran's disease or injury rather than the symptoms of the veteran's disease or injury."⁷³ The Federal Circuit continued: "[A] properly diagnosed disease or injury cannot be considered the same factual basis as distinctly diagnosed disease or injury. It follows that because § 7104(b) distinguishes claims according to their factual bases, claims based upon distinctly and properly diagnosed diseases or injuries cannot be considered the same claim."⁷⁴ However, the Federal Circuit also cautioned that "a veteran is not entitled to a

⁶⁷ 520 F.3d 1330 (Fed. Cir. 2008).

⁶⁸ *Id.* at 1332.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 1332-33.

⁷² *Id.* at 1333. The Veteran did not allege that there was clear and unmistakable error (CUE) in the 1955 decision.

⁷³ *Id.* at 1335. Title 38 U.S.C. § 7104(b) (2006) notes that "[e]xcept as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." Title 38 U.S.C. § 5108 contains the general provision concerning the submission of new and material evidence.

⁷⁴ *Boggs*, 520 F.3d at 1335.

new claim based upon that same disease or injury [i.e., one denied earlier] merely because he has been misdiagnosed as having a different disease or injury.”⁷⁵ Therefore, in *Boggs*, the Veteran’s 2002 application constituted a new claim because even though the symptoms associated with that application – hearing loss – were the same as the symptoms associated with the 1955 application, the diseases causing those symptoms were distinct (and there was no claim of misdiagnosis).⁷⁶

The Veterans Court first considered *Boggs* in *Clemons v. Shinseki*.⁷⁷ At issue in *Clemons* was whether the Court had jurisdiction to grant a joint motion to remand to the Board when the matters to be remanded, at least in part, concerned an issue the Board had not decided.⁷⁸ Factually, the case involved a Veteran’s application for benefits asserting that he had service-connected posttraumatic stress disorder (PTSD).⁷⁹ There was also medical evidence in the record concerning other mental disorders, although the Veteran did not specifically make claims for benefits based on those other disorders.⁸⁰ The Board ruled against the Veteran as to the PTSD issue but said nothing about the other mental disorders.⁸¹ The Veteran then appealed.⁸²

The Court stated that there was only one claim at issue in the case because, it concluded, “multiple medical diagnoses or diagnoses that differ from the claimed condition do not necessarily

⁷⁵ *Id.* at 1336. The Federal Circuit continued:

Accordingly, if the VA establishes, via medical evidence, (1) that the veteran has been misdiagnosed and (2) that the Board has already denied service connection for the veteran’s properly diagnosed disease or injury, then § 7104(b) will bar the Board from exercising jurisdiction over the veteran’s claim as a new and independent claim.

Id.

⁷⁶ *Id.* at 1335-37.

⁷⁷ 23 Vet. App. 1 (2009).

⁷⁸ *Id.* at 1-2.

⁷⁹ *Id.* at 1.

⁸⁰ *Id.* at 1, 3.

⁸¹ *Id.* at 4.

⁸² *Id.* at 1.

represent wholly separate claims.”⁸³ The Court continued by stating that “[r]easonably, the appellant did not file a claim to receive benefits only for a particular diagnosis, but for the affliction his mental condition, whatever that is, causes him.”⁸⁴ Thus, since in this case there was medical evidence in the record that VA should have followed for more than one disease, all of which had the same symptoms, there was one “claim” for jurisdictional purposes.⁸⁵

The logic of the *Clemons* Court is clear and based in large measure on common sense. The problem is the Court was not writing on a clean slate. It had to contend with *Boggs* and its statement that the key to determining what is the same claim is the diagnosis, not the symptoms.⁸⁶ The Court avoided the broad implications of *Boggs* by essentially limiting it to the procedural context in which that case arose. According to the Court:

Boggs stands for the proposition that, if there is a final agency decision denying a claim based on a particular diagnosis, and subsequently a new and different diagnosis is submitted for VA’s consideration, the second diagnosis must be considered factually distinct from the first and must be considered to relate to a separate claim.⁸⁷

In other words, *Boggs* concerned only those situations in which there had been a final adjudication and the question presented concerned whether a new application was one that had to satisfy the requirements of section 7104(b).

⁸³ *Id.* at 4. The Veterans Court reasoned in this regard that a lay person would generally not be competent to diagnose a medical condition so it would not be reasonable to use a medical diagnosis as the basis for this decision. *Id.* at 4-5.

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* at 3.

⁸⁶ *Boggs v. Peake*, 520 F.3d 1330, 1335 (Fed. Cir. 2008).

⁸⁷ *Clemons*, 23 Vet. App. at 8.

In contrast to the situation in *Boggs*, the *Clemons* Court stressed that it was considering “the scope of a claim when it is first filed by the claimant.”⁸⁸ The Court provided several reasons for its articulation of a different rule for initial applications in contrast to the situation in *Boggs*. For example, it noted that applying the *Boggs* rule to an initial application could often work to the disadvantage of veterans while the *Boggs* rule, in its proper context, was veteran-protective.⁸⁹ The Court also noted that there would be practical problems applying *Boggs* to initial claims. As the Court explained, applying *Boggs* in that situation “would force a veteran to continually file new claims as medical evidence is developed during his initial claim and potentially could require a veteran to accept a later effective date for diagnoses made later in the process.”⁹⁰

Laying *Boggs* and *Clemons* side-by-side, it appears that the phrase “same claim” now has a different meaning depending on the procedural context of a given case. When one is considering only the initial application for benefits, symptoms are the key and diagnoses are irrelevant. Alternatively, when one is considering an application filed at some point after a first application has been finally denied, symptoms are irrelevant and the diagnoses rule the day. In more colloquial terms, while a “rose” may be a “rose” by any other name in literature,⁹¹ a “claim” is not necessarily a “claim” in veterans’ law.

One can criticize the courts for adopting inconsistent definitions of “claim.” But then again, it has been said that “consistency is the hobgoblin of little minds.”⁹² Regardless, however, *Boggs* and *Clemons* standing together would provide

⁸⁸ *Id.* at 7-8 (citing *Ingram v. Nicholson*, 21 Vet. App. 232, 236 (2007)).

⁸⁹ *Id.* at 8.

⁹⁰ *Id.*

⁹¹ See WILLIAM SHAKESPEARE, *ROMEO AND JULIET* 98 (Horace Howard Furness, ed., 15th ed. 1871).

⁹² RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS: FIRST SERIES* (1841), available at <http://www.emersoncentral.com/selfreliance.htm>.

rules capable of application depending on the procedural context. The problem is that it is not entirely clear that the rules will, in fact, be applied in as straightforward a manner as the cases suggest.

In *Velez v. Shinseki*⁹³ the Court was called on to apply *Boggs* in a situation in which that case clearly provided the rule of decision. Simplifying matters somewhat, the Veteran had filed an application for benefits, based in part on an acquired psychiatric condition, including PTSD, which had been denied (and for which there had been no appeal).⁹⁴ The Veteran later filed another application seeking benefits for a nervous disorder.⁹⁵ The question then was whether the subsequent application raised the same claim as the earlier one that had been denied with no appeal.⁹⁶ A basic reading of *Boggs* would suggest that the key to answering the question was whether the two applications concerned different diagnoses.

The Veterans Court adopted a more nuanced approach. It stated as follows:

[W]e conclude that, in determining whether new and material evidence is required, the focus of the Board's analysis must be on whether the evidence presented truly amounts to a new claim "based upon distinctly diagnosed diseases or injuries" or whether it is evidence tending to substantiate an element of a previously adjudicated matter.⁹⁷

The Court reasoned that "[t]o reflexively conclude that the appearance of a new diagnosis is always evidence amounting to a new claim could have the unfortunate side effect of limiting the

⁹³ 23 Vet. App. 199 (2009).

⁹⁴ *Id.* at 201.

⁹⁵ *Id.*

⁹⁶ *Id.* at 201-05.

⁹⁷ *Id.* at 204 (citation omitted) (quoting *Boggs v. Peake*, 520 F.3d 1330, 1337 (Fed. Cir. 2008)).

benefits awarded in some claims that would otherwise relate back to prior proceedings.”⁹⁸ Thus, while it is possible to read *Velez* as doing nothing more than applying *Boggs*, it seems more honest to read it as injecting a fair degree of uncertainty into the rule articulated in *Boggs* itself.

But the issue of defining a “claim” is even more complicated because that term may also be implicated in other contexts in which *Boggs* and *Clemons* (whatever those cases may mean) do not apply. For example, in *Rice v. Shinseki*,⁹⁹ the Court considered whether a request for a total disability rating based on individual unemployability (TDIU) amounted to a separate “claim” from a request for benefits based on PTSD.¹⁰⁰ The Court reached the following conclusion:

[A] request for TDIU, whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of the initial adjudication of a claim or, if a disability upon which entitlement to TDIU is based has already been found to be service connected, as part of a claim for increased compensation.¹⁰¹

In the end, the courts have given practitioners (and themselves perhaps) a fair amount of material to work with in terms of what constitutes a single “claim.” Some parts of the doctrine are fairly clear while others are not as well-formed. It is almost certain that we will see further developments in this area during the next two years.

⁹⁸ *Id.*

⁹⁹ 22 Vet. App. 447 (2009).

¹⁰⁰ *Id.* at 448-50.

¹⁰¹ *Id.* at 453-54.

C. The Department's Notice-Related Duties

i. *The Supreme Court Speaks*

Congress has mandated that the Department must provide notice of certain matters to claimants who have applied for benefits.¹⁰² Congress has also provided that when reviewing a benefits determination, the Veterans Court must “take due account of the rule of prejudicial error.”¹⁰³ The Supreme Court weighed in on the interaction of these two statutory duties, and whenever the Supreme Court speaks, its decision is significant.

In *Shinseki v. Sanders*¹⁰⁴ the Supreme Court considered the Federal Circuit's rule that once a claimant established a notice violation, the Secretary bore the burden of establishing that such error was not prejudicial.¹⁰⁵ In a 6-3 decision, the Supreme Court reversed the Federal Circuit's decision, holding that, at least with respect to errors in notice other than those related to the information necessary to substantiate the claims, the claimant should bear the burden of showing that a notice error was harmful.¹⁰⁶ This decision will clearly have a great deal of practical importance as a bottom line matter. Two features of the Supreme Court's reasoning are also instructive for more conceptual purposes.

In reaching its conclusion, the Supreme Court first decided that the statutory prejudicial error provision “requires the Veterans

¹⁰² 38 U.S.C. § 5103(a)(1) (2006 & Supp. II 2008); see 38 C.F.R. § 3.159(b)(1) (2009). Although it pre-dated the Supreme Court's decision discussed in this part, a useful summary of the law concerning the Department's notice obligations can be found in the Veterans Court's decision in *Goodwin v. Peake*, 22 Vet. App. 128, 131-34 (2008).

¹⁰³ 38 U.S.C. § 7261(b)(2) (2006).

¹⁰⁴ 129 S. Ct. 1696 (2009).

¹⁰⁵ *Id.* at 1702-03; see *Sanders v. Nicholson*, 487 F.3d 881, 889 (Fed. Cir. 2007), *rev'd*, *Sanders*, 129 S. Ct. at 1708.

¹⁰⁶ *Sanders*, 129 S. Ct. at 1704-06. The Veterans Court has held that a notice violation related to the evidence necessary to substantiate the claim has the “natural effect” of prejudicing the claimant. *Mayfield v. Nicholson*, 19 Vet. App. 103, 122 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006). This aspect of the doctrine was not at issue in *Sanders*. See *Sanders*, 129 S. Ct. at 1706-07.

Court to apply the same kind of ‘harmless-error’ rule that courts ordinarily apply in civil cases.”¹⁰⁷ This foundational conclusion is important to consider.¹⁰⁸ It suggests, at least to some degree, that the Supreme Court is willing to treat the judicial review of veterans’ benefits determinations as essentially the same as all other types of judicial review. In other words, the Supreme Court assumed that Congress did not intend to create any special solicitude for veterans in terms of the application of harmless error principles.¹⁰⁹ Justice Souter disagreed with this conclusion, arguing that this system is, in fact, different.¹¹⁰ This basic dispute about the very nature of the veterans’ benefits system underlies many of the issues courts and veterans face. It is for that reason that I suggest later in this article that future attention to the fundamental nature of the system is essential.¹¹¹

Another intriguing feature of the Supreme Court’s decision in *Sanders* deals with its attitude towards the Veterans Court’s placement in the system. It is impossible to read *Sanders* without getting the clear impression that the Supreme Court believes that the Veterans Court is often the entity that should be the predominant judicial voice in the area of veterans’ benefits law. Of course, the Supreme Court recognized that the Federal Circuit is a part of the judicial review structure.¹¹² Nevertheless, as to certain matters – such as the development of a framework for determining

¹⁰⁷ *Sanders*, 129 S. Ct. at 1704.

¹⁰⁸ Indeed, once the Supreme Court made this decision, the remainder of its opinion was essentially inevitable. *Id.* at 1704-06 (explaining three respects in which the Federal Circuit’s approach was inconsistent with traditional harmless error analysis).

¹⁰⁹ *Id.* at 1704. To be sure, the majority later stated that the nature of the system “might lead a reviewing court to consider harmful in a veteran’s case error that it might consider harmless in other circumstances.” *Id.* at 1707. From a veteran’s point of view, this recognition is helpful. However, it is far less protective of veterans’ interests than the Federal Circuit’s rule.

¹¹⁰ *Id.* at 1708-10 (Souter, J., dissenting).

¹¹¹ See *infra* Part II.B (discussing future developments). I have also discussed this general issue in previous writings. See Allen, *Legislative Commission*, *supra* note 2, at 387-92; Allen, *Significant Developments*, *supra* note 2, at 514-29.

¹¹² *Sanders*, 129 S. Ct. at 1707 (citing 38 U.S.C. § 7292 (2006), which limits the Federal Circuit’s jurisdiction).

when an error is so likely to be harmful that prejudice is to be presumed – the Supreme Court forcefully stated that “the Federal Circuit is the wrong court to make such determinations.”¹¹³ The Supreme Court went on to state that “the Veterans Court . . . is likely better able than is the Federal Circuit to exercise an informed judgment as to how often veterans are harmed by which kinds of notice errors.”¹¹⁴

In sum, *Sanders* is practically significant because of its reworking of the prejudicial error analysis. The courts will now essentially return to the body of law that existed prior to the Federal Circuit’s alteration of the allocation of establishing a harmful error flowing from a notice defect. The decision is also interesting for its broader points concerning the nature of the current system and the place of the Veterans Court in it.

ii. Other Significant Notice-Related Matters

The Supreme Court tends to steal the limelight when it speaks. *Sanders* is likely, then, to be discussed most prominently concerning notice. But *Sanders* should not blind one to several other highly significant notice-related developments during the past two years.

To begin with, Congress has been involved in notice-related issues during this period. The Veterans’ Benefits Improvement Act of 2008 amended 38 U.S.C. § 5103 in certain respects.¹¹⁵ There has been little judicial interpretation of these congressional changes. Almost certainly, we can expect some decisions in the near future on the impact of these notice-related changes.

¹¹³ *Id.*

¹¹⁴ *Id.* This statement is also consistent with a comment Justice Breyer – the author of the *Sanders* majority opinion – made during the oral argument in the case. Transcript of Oral Argument at 39, *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009) (No. 07-1209), available at 2008 WL 5129089, at *39 (“JUSTICE BREYER: Between me and the Veterans Court, as to who knows best how to work this system, it’s ten to one it’s not me.”).

¹¹⁵ Veterans’ Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 101, 122 Stat. 4145, 4147-48.

Lower courts have also been active in the area. First, the Federal Circuit issued an important decision concerning the content of the required notice in *Vazquez-Flores v. Shinseki*.¹¹⁶ The issue in that case concerned how specific the notice needed to be given a particular veteran's situation.¹¹⁷ The Federal Circuit held that "the notice described in 38 U.S.C. § 5103(a) need not be veteran specific."¹¹⁸ Its reasoning was that "veteran-specific notice cannot be considered 'generic notice,' and generic notice in response to the 'particular type of claim' . . . is all that is required."¹¹⁹ The import of *Vazquez-Flores* is that the notice a veteran receives will be less helpful than it would otherwise be if it contemplated the veteran's specific situation. Of course, there is a balance to be struck between notice and requiring the Department to engage in what has been termed "predecisional adjudication."¹²⁰ The problem is that the Federal Circuit in *Vazquez-Flores* struck the balance in an inappropriate manner. The result is that the pro-claimant notice obligations Congress imposed on the Department become, in some respect at least, far more formalistic (and certainly less substantively helpful) than one suspects Congress intended.¹²¹

The Veterans Court also issued two important notice-related decisions, both of which concern in some sense the timing of notice. In *Gallegos v. Peake*¹²² the Veterans Court held that the same notice body of law developed under section 5103 applies to the special requirements concerning PTSD based on personal assault set forth in 38 C.F.R. § 3.304(f).¹²³ The Court recognized

¹¹⁶ 580 F.3d 1270 (Fed. Cir. 2009).

¹¹⁷ *Id.* at 1275.

¹¹⁸ *Id.* at 1280-81.

¹¹⁹ *Id.* at 1277-78 (citing *Wilson v. Mansfield*, 506 F.3d 1055 (Fed. Cir. 2007) and *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003)).

¹²⁰ *Id.* at 1276.

¹²¹ As noted in the text, Congress has recently amended section 5103. *Vazquez-Flores* did not address these amendments. However, in its brief discussion of them, the Federal Circuit did not appear to be inclined to give the amendment a broad reading. *See id.* at 1278. Time will tell.

¹²² 22 Vet. App. 329 (2008).

¹²³ *Id.* at 335-36.

that the application of its notice-related jurisprudence might be different in the context of such a claim because the Department might not yet be aware that there is an in-service assault issue involved in a claim.¹²⁴ However, the Court made clear that the required notice cannot be made through decisional documents.¹²⁵

Second, in *Goodwin v. Peake*,¹²⁶ in relevant part, the Veterans Court held that notice “as to one set of claims may not be extrapolated to satisfy [section 5103(a)] notice requirements for claims contained in another application or not addressed in the notice documents under review.”¹²⁷ While *Goodwin* was decided prior to both the Supreme Court’s decision in *Sanders* and the Federal Circuit’s decision in *Vazquez-Flores*, both discussed earlier in this section, it does not appear that the Court’s conclusion would be different if it had been made after these cases were decided.

In the end, decisions concerning the Department’s notice obligations are important for two different reasons. Most directly, they are practically significant to veterans and other claimants seeking benefits. Notice can make the difference between knowing what to do and floundering in the system. A defect in notice can also – depending on its harmful or harmless nature – allow one to secure a remand to continue a quest for benefits. Second, however, a discussion of notice obligations requires one to wrestle with the broader issues raised by the pro-claimant nature of the system. As judicial interpretations narrow the notice obligations, it is often difficult to retain faith that the mantra of the pro-claimant system is really much more than a stylized myth.

¹²⁴ *Id.* at 336-37.

¹²⁵ *Id.* at 337-38. Judge Kasold concurred in the result but would not have adopted a bright-line rule that decisional documents can never satisfy the Department’s notice obligations. *Id.* at 340-41 (Kasold, J., concurring).

¹²⁶ 22 Vet. App. 128 (2008).

¹²⁷ *Id.* at 135.

D. The Department's Duties to Assist Claimants

The uniquely pro-claimant nature of the veterans' benefits system is also reflected through congressionally imposed duties on the Department to assist claimants in various respects when they seek benefits.¹²⁸ As with the notice-related matters discussed in the immediately preceding sub-part, decisions concerning the duty to assist are both practically important as well as instructive concerning the nature of the system. As to the latter point, for example, in a recent duty-to-assist case concerning assistance in obtaining records, the Federal Circuit stated that “[i]n close or uncertain cases, the VA should be guided by the principles underlying this uniquely pro-claimant system.”¹²⁹

There are only two decisions of any real note concerning the duty to assist in the relevant period. In *Moore v. Shinseki*¹³⁰ the Federal Circuit held that the duty to assist in obtaining medical records under 38 U.S.C. § 5103A can, depending on the facts present, include records that pre-date the period for which the veteran is seeking disability compensation.¹³¹

In *Golz v. Shinseki*¹³² the Federal Circuit also made clear that the duty to assist the claimant in obtaining records is contextual. The issue in this case concerned Social Security Administration records.¹³³ The Federal Circuit eschewed a bright-line rule concerning this issue. It held instead that “[t]he legal standard for relevance requires VA to examine the information it has related to medical records and if there exists a reasonable possibility that the

¹²⁸ See, e.g., 38 U.S.C. § 5103A (2006) (setting out VA's general duty to assist claimants).

¹²⁹ *Golz v. Shinseki*, 590 F.3d 1317, 1323 (Fed. Cir. 2010). Of course, the Federal Circuit also made clear that “[t]he duty to assist is not boundless in its scope.” *Id.* at 1320.

¹³⁰ 555 F.3d 1369 (Fed. Cir. 2009).

¹³¹ *Id.* at 1372-74. In that regard, the Federal Circuit agreed with Judge Kasold's dissenting opinion in *Moore v. Nicholson*, 21 Vet. App. 211, 220-22 (2009), *rev'd sub nom.* *Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009).

¹³² 590 F.3d at 1317.

¹³³ *Id.* at 1320.

records could help the veteran substantiate his claim for benefits, the duty to assist requires VA to obtain the records.”¹³⁴

E. Matters Related to Medical Examinations and Evidence

As is to be expected given the nature of the veterans' benefits process, there were several important developments in the period under consideration dealing with medical examinations and evidence. This section summarizes the most significant of those developments.

*Nieves-Rodriguez v. Peake*¹³⁵ may be the most significant of the developments in this area. The main issue presented in *Nieves-Rodriguez* was whether VA's duty to assist the claimant required it to advise him that his claims file could be forwarded to the doctors who provided opinions in support of his claims.¹³⁶ The Veterans Court addressed this question, but went much further by determining several points of significance.

First, there is no requirement under the duty to assist to provide, in every instance, the veteran's claims file to a private doctor.¹³⁷ The duty is contextual in that it could arise in a given case if, for example, the doctor asked for the file or indicated that his or her opinion could not be formed without the file or that he or she was otherwise hampered by the lack of the claims file.¹³⁸

Second, the Court noted that the Federal Rules of Evidence did not apply in proceedings before the Board.¹³⁹ However, it also concluded that the principles underlying Rule 702 (dealing with the reliability of expert testimony) were useful in terms of evaluating medical opinions.¹⁴⁰

¹³⁴ *Id.* at 1323.

¹³⁵ 22 Vet. App. 295 (2008).

¹³⁶ *Id.* at 297. The Veterans Court also had to consider the Board's evaluation of the medical opinions at issue in the case. *Id.* at 304-06.

¹³⁷ *Id.* at 300.

¹³⁸ *Id.* at 299-300.

¹³⁹ *Id.* at 302.

¹⁴⁰ *Id.*

Third, based on its conclusion that Rule 702 is a useful tool, the Court stated that “where the Board favors one medical opinion over another, the Court will review the Board’s decision” using three factors derived from the Rule: (1) is the opinion “based upon sufficient facts or data;” (2) is it “the product of reliable principles and methods;” and (3) has the medical professional “applied the principles and methods reliably to the facts of the case.”¹⁴¹

Fourth, the Veterans Court stated the following:

[Whether] the medical expert is suitably qualified and sufficiently informed are threshold considerations; most of the probative value of a medical opinion comes from its reasoning. Neither a VA medical examination report nor a private medical opinion is entitled to any weight in a service-connection or rating context if it contains only data and conclusions.¹⁴²

Finally, in discussing the requirement that the opinion be based on “sufficient facts or data,”¹⁴³ the Court held that “a private medical opinion may not be discounted *solely* because the opining physician did not review the claims file.”¹⁴⁴ The Veterans Court also held that “the Board may not prefer a VA medical opinion . . . *solely* because the VA examiner reviewed the claims file.”¹⁴⁵

Nieves-Rodriguez is demonstrably important as a practical matter on the points it addresses. I believe it is also significant as an example of the Veterans Court at its best. The Veterans

¹⁴¹ *Id.* (citing and comparing FED. R. EVID. 702).

¹⁴² *Id.* at 304. Relating to the qualifications of medical experts, the Federal Circuit held during the period under review that a litigant must set forth specific reasons why he or she believes that an expert is not qualified in order to sufficiently raise that issue. *Bastien v. Shinseki*, 599 F.3d 1301, 1306-07 (Fed. Cir. 2010). A general request that an expert provide a statement of his or her qualifications is not enough to raise a challenge to those qualifications. *Id.*

¹⁴³ *Nieves-Rodriguez*, 22 Vet. App. at 302.

¹⁴⁴ *Id.* at 304.

¹⁴⁵ *Id.*

Court was able to resolve a particular case and, more importantly, it established clear guidelines by which the Board and the Regional Office (RO) could adjudicate future claims. This is precisely the role of lawmaker that Congress intended, at least in my estimation.¹⁴⁶

A close second in importance to *Nieves-Rodriguez* is *Jones v. Shinseki*.¹⁴⁷ *Jones* concerned a recurrent problem in the veterans' benefits system: what to do with medical opinions that conclude that a doctor cannot render an opinion concerning the causal link between service and a veteran's current disability without resorting to "mere speculation."¹⁴⁸ The opinion leaves little doubt that the Court is frustrated with the use of this phrase:

[I]t must be clear, from some combination of the examiner's opinion and Board's analysis of the record, that the examiner has not invoked the phrase "without resort to mere speculation" as a substitute for the full consideration of all pertinent and available medical facts to which a claimant is entitled.¹⁴⁹

In the heart of its opinion, the Court – again acting as a teacher of sorts – provides a number of pieces of guidance designed to shape medical opinions (and the review of such opinions in the administrative process). Some of the more salient parts of this guidance are:

In general, it must be clear on the record that the inability to opine on questions of diagnosis and etiology is not the first impression of an uninformed examiner, but rather an assessment arrived at after all due diligence in seeking relevant medical information that may have bearing on the requested opinion. . . .

¹⁴⁶ See also discussion *infra* Part II.A.ii.

¹⁴⁷ 23 Vet. App. 382 (2010).

¹⁴⁸ *Id.* at 384.

¹⁴⁹ *Id.* at 387.

An examiner's conclusion that a diagnosis or etiology opinion is not possible without resort to speculation is a medical conclusion just as much as a firm diagnosis or a conclusive opinion. However, a bald statement that it would be speculative for the examiner to render an opinion as to etiology or diagnosis is fraught with ambiguity. . . . Thus, before the Board can rely on an examiner's conclusion that an etiology opinion would be speculative, the examiner must explain the basis for such an opinion or the basis must otherwise be apparent in the Board's review of the evidence.

The examiner may also have an obligation to conduct research in the medical literature depending on the evidence in the record at the time of examination. The phrase "without resort to speculation" should reflect the limitations of knowledge in the medical community at large and not those of a particular examiner.

Finally, the examiner should clearly identify precisely what facts cannot be determined."¹⁵⁰

These factors provide important guidance for both examiners in rendering opinions and the Board when reviewing them. But the Court also acknowledged that there will be cases – perhaps few in number – in which there will be legitimately inconclusive opinions.¹⁵¹ In such cases, the Court concluded that it would be inappropriate and unnecessary to require the Department to proceed with additional futile exams.¹⁵² In other words, the Department will have fulfilled its duties to the claimant. In the end, *Jones* is a significant decision both for what it decides and the way in which it consciously provides guidance to those working at various points in the administrative system.

¹⁵⁰ *Id.* at 389-90 (citations omitted).

¹⁵¹ *Id.*

¹⁵² *Id.* at 390-91.

Another interesting case is *Polovick v. Shinseki*.¹⁵³ This case dealt with a claimant's attempt to establish service connection for the cause of a veteran's death due to Agent Orange for a disease not listed as one for which there was presumptive service connection.¹⁵⁴ The claimant had tried to establish service connection by submission of a doctor's opinion discussing, in part, statistical correlations between Agent Orange exposure and a given disease.¹⁵⁵ The Court held that "[t]o require the Secretary to grant service connection for disabilities based on the opinion of individual doctors that there is a statistical correlation between Agent Orange exposure and a disease not otherwise on the Secretary's list of diseases presumptively caused by Agent Orange would circumvent the congressional mandate [concerning Agent Orange issues]."¹⁵⁶ The Court continued by noting that statistical evidence can be "a factor to consider when assessing whether the totality of the evidence is sufficient to establish direct service connection, even when the statistical analysis alone would be insufficient to warrant adding a disease [to the presumptive list]."¹⁵⁷ Also, the Court held that the Board could not reject a medical opinion "simply because [it was] based in part on statistical analysis."¹⁵⁸

Another significant development concerned the importance of lay evidence in the context of establishing entitlement to benefits. It is clear that lay evidence can, in certain circumstances, be competent and sufficient to establish a relevant matter.¹⁵⁹ Nevertheless, various entities continue to discount this type of evidence. In the past two years, both the Board and the Veterans Court have been called to

¹⁵³ 23 Vet. App. 48 (2009).

¹⁵⁴ *Id.* at 51.

¹⁵⁵ *Id.* at 50-51.

¹⁵⁶ *Id.* at 53. In addition, the Veterans Court stated that "[i]t would also permit the opinions of individual doctors to trump the collective view of experts on this issue." *Id.* at 53-54.

¹⁵⁷ *Id.* at 54.

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) ("Lay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional." (footnote omitted)).

account in connection with this matter. For example, in *Chotta v. Peake*,¹⁶⁰ the Veterans Court reminded the Board that it had to consider lay testimony concerning observable symptoms.¹⁶¹ The Federal Circuit also had to admonish the Veterans Court concerning lay evidence. In *Davidson v. Shinseki*¹⁶² the Federal Circuit reiterated that nexus evidence cannot be discounted solely because it is not reflected in a medical opinion.¹⁶³ The Federal Circuit also made a point of noting that the Veterans Court had “ignored” relevant precedent in reaching its conclusion.¹⁶⁴ The take away point here is that the relevant decision-maker needs to be aware that lay evidence cannot generally be discounted solely because it is not based on an expert opinion.

F. Ratings-Related Decisions

Both the Veterans Court and the Federal Circuit issued several decisions during the past two years related to ratings. Perhaps the most significant such decision was *Thun v. Shinseki*.¹⁶⁵ The issue in *Thun* concerned when it is appropriate to refer a veteran’s claim to the Director of the Department’s Compensation and Pension Service (C&P) for consideration of an extra-schedular rating pursuant to 38 C.F.R. § 3.321(b)(1).¹⁶⁶ Affirming an earlier Veterans Court decision,¹⁶⁷ the Federal Circuit noted the Veterans Court’s three-part test to determine whether an extra-schedular rating is warranted:

¹⁶⁰ 22 Vet. App. 80 (2008).

¹⁶¹ *Id.* at 85. The Veterans Court also held in *Chotta* that there is no hard and fast rule concerning when a retrospective medical examination is required; the answer to this question is dictated by all the relevant facts and circumstances. *Id.* at 84-85. The Federal Circuit has also addressed when a medical examination is required. In *Waters v. Shinseki*, 601 F.3d 1274 (Fed. Cir. 2010), the Federal Circuit rejected the Veteran’s “theory that medical examinations are to be routinely and virtually automatically provided to all veterans in disability cases involving nexus issues.” *Id.* at 1278-79. Instead, one must meet the relevant standards set forth in 38 U.S.C. § 5103A(d)(2). *Id.* at 1276-78.

¹⁶² 581 F.3d 1313 (Fed. Cir. 2009).

¹⁶³ *Id.* at 1316.

¹⁶⁴ *Id.* at 1314.

¹⁶⁵ 572 F.3d 1366 (Fed. Cir. 2009).

¹⁶⁶ *Id.* at 1367.

¹⁶⁷ *Thun v. Peake*, 22 Vet. App. 111 (2008).

(1) [T]he established schedular criteria must be inadequate to describe the severity and symptoms of the claimant's disability; (2) the case must present other indicia of an exceptional or unusual disability picture, such as marked interference with employment or frequent periods of hospitalization; and (3) the award of an extra-schedular disability rating must be in the interest of justice.¹⁶⁸

Thun's real import may be less in an identification of the relevant grounds for referral and more in its holdings concerning the manner in which the showing is to be made. The Federal Circuit rejected Mr. *Thun*'s argument that so long as there was a "plausible" basis for referral under the relevant standard, the Board or the RO was required to make the referral.¹⁶⁹ The Federal Circuit held that the Department's interpretation of the relevant regulations was reasonable.¹⁷⁰ That interpretation was that the RO and the Board had the authority to refuse to refer a given case for an extra-schedular rating if either entity determined that the relevant criteria had not been met.¹⁷¹ Challenges to this determination could be mounted in an appeal to the Veterans Court.¹⁷² Finally, on a technical matter, we know from the Veterans Court's decision in *Thun* that a gap between a veteran's income and what he or she could have earned absent the service-connected disability does not establish, standing alone, that a referral for extra-schedular consideration is appropriate.¹⁷³

The Veterans Court returned to the general *Thun* issue in *Anderson v. Shinseki*.¹⁷⁴ The question in *Anderson* concerned what impact a decision of the RO or Board to refer a matter under 38 C.F.R. § 3.321(b)(1) has on the Director of C&P's decision

¹⁶⁸ *Thun*, 572 F.3d at 1368; *Thun*, 22 Vet. App. at 115-17.

¹⁶⁹ *Thun*, 572 F.3d at 1368-70.

¹⁷⁰ *Id.* at 1369-71.

¹⁷¹ *Id.* at 1370.

¹⁷² *Id.* at 1371.

¹⁷³ *Thun*, 22 Vet. App. at 116-17.

¹⁷⁴ 22 Vet. App. 423 (2009).

to award an extra-schedular rating.¹⁷⁵ In other words, once such a referral has been made, *must* the Director assign an extra-schedular rating?¹⁷⁶ The Veterans Court held that the Director is not bound by a decision to refer a matter under *Thun*'s framework, particularly the first two of its elements.¹⁷⁷ Such determinations are not final agency decisions favorable to the veteran.¹⁷⁸ If the Director should disagree that an extra-schedular rating is appropriate, that decision would be reviewable by the Board.¹⁷⁹

Taken together, *Thun* and *Anderson* are practically important decisions whenever there is a possibility to seek an extra-schedular rating. They (1) establish the criteria the RO and Board are to use to make a decision to refer a matter to the Director of C&P; (2) make clear that the RO and Board are not required to refer a matter on a plausible basis, rather the referring entity must be convinced that such a referral is authorized; and (3) explain the impact of a referral on the Director of C&P, which in reality amounts to no impact at all. These are important principles to have in place even if one may disagree with them.

Before leaving the ratings arena, two other decisions are worth at least passing reference for their technical holdings. First, in *Amberman v. Shinseki*,¹⁸⁰ the Federal Circuit interpreted 38 C.F.R. § 4.14 (concerning the "Avoidance of Pyramiding"): "We agree with the Veterans Court that two defined diagnoses constitute the same disability for purposes of section 4.14 if they have overlapping symptomatology."¹⁸¹ Second, in *Reizenstein v. Shinseki*,¹⁸² the Federal Circuit held that the provisions of 38 C.F.R.

¹⁷⁵ *Id.* at 426-27.

¹⁷⁶ *Id.* at 427.

¹⁷⁷ *Id.* at 427-29; *see id.* at 430-32 (Schoelen, J., concurring) (arguing that once a referral is made, the Director must assign an extra-schedular rating).

¹⁷⁸ *Id.* at 427-28.

¹⁷⁹ *Id.*

¹⁸⁰ 570 F.3d 1377 (Fed. Cir. 2009).

¹⁸¹ *Id.* at 1381.

¹⁸² 583 F.3d 1331 (Fed. Cir. 2009).

§ 3.343(a), which precludes the reduction in a rating without a medical examination showing improvement, do not apply to staged ratings.¹⁸³

**G. Matters Concerning Clear and Unmistakable Error
(and Sympathetically Reading Claims)**

Certainly one of the most difficult areas in veterans' law concerns when a final agency decision may be revised based on "clear and unmistakable error" (CUE).¹⁸⁴ Of course, the law concerning CUE is challenging in its own right. Moreover, as with certain of the other areas discussed in this article, one often confronts tensions inherent in the nature of the veterans' benefits system (for example, the competing desires for finality of decisions and ensuring that veterans receive the benefits to which they are entitled) when dealing with CUE. There was one particular development in the area of CUE in the past two years that is worth extended discussion. This development also touches on a separate concept in the veterans' benefits area concerning the manner in which certain veterans' benefits applications (or other "pleadings") must be read.

In *Acciola v. Peake*¹⁸⁵ the Veterans Court had to consider the intersection of two distinct, although related, strands of decisions in the veterans' benefits system.¹⁸⁶ The first strand concerns the sympathetic reading of a pro se veteran's pleadings. In a nutshell, the Federal Circuit has made clear "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 As an aside,

¹⁸³ *Id.* at 1338. *But see id.* at 1338-39 (Mayer, J., dissenting) (arguing that the Department's interpretation of the regulation was not controlling because it essentially ignored the plain language).

¹⁸⁴ 38 C.F.R. § 3.105(a) (2009).

¹⁸⁵ 22 Vet. App. 320 (2008).

¹⁸⁶ *Id.* at 325-26.

¹⁸⁷ *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (alteration in original) (quoting

although a very important one, the Federal Circuit subsequently extended the sympathetic reading requirement to veterans assisted in the claims process by representatives of Veterans' Service Organizations ("VSOs")¹⁸⁸ as well as to veterans represented by counsel.¹⁸⁹ The Federal Circuit also concluded that the sympathetic reading requirement applied to pro se (and VSO assisted) veterans' filings at the Board not just to filings before the RO.¹⁹⁰ In any event, as it related to CUE, the Federal Circuit has stated, although perhaps not all that clearly as to its application, that the sympathetic reading canon applies in at least some fashion to CUE motions.¹⁹¹ The second strand of law at issue in the case concerned the requirement that allegations of CUE must be pled "with some degree of specificity."¹⁹²

These two strands of decisions have the potential to lead to outcomes that have the perverse result of harming veterans in what appears to be an unintended manner in connection with CUE motions. As Judge Davis noted in *Acciola*:

[I]t is harder in the context of CUE motions [than in the context of an original claim] to define what amounts to a sympathetic reading because broadly reading CUE motions is a double-edged sword. While a broad

Roberson v. Principi, 251 F.3d 1378, 1384 (Fed. Cir. 2001)). In *Acciola*, the Veterans Court commented that the distinction between represented and unrepresented veterans for purposes of the sympathetic reading rule "is apparently solely a creation of the Federal Circuit for which this Court finds no legislative or regulatory support." 22 Vet. App. at 326 n.1. This comment was written before the Federal Circuit's decisions extending the duty to sympathetically read pleadings that are discussed in the text. It is an interesting comment nevertheless because it is relatively rare for "inferior" courts to make such comments concerning the courts that will review their decisions. See Allen, *Significant Developments, supra* note 2, at 523-26 (discussing certain tensions between the Federal Circuit and the Veterans Court).

¹⁸⁸ *Comer v. Peake*, 552 F.3d 1362, 1369-70 (Fed. Cir. 2009).

¹⁸⁹ *Robinson v. Shinseki*, 557 F.3d 1355, 1359-60 (Fed. Cir. 2009). The Federal Circuit also noted, however, that if the record contains no evidentiary support for a theory of recovery "there is no reason for the Board to address or consider such a theory," available only through a sympathetic reading of a pleading. *Id.* at 1361.

¹⁹⁰ *Comer*, 552 F.3d at 1367-70.

¹⁹¹ *Andrews v. Nicholson*, 421 F.3d 1278, 1282-83 (Fed. Cir. 2005).

¹⁹² *Acciola*, 22 Vet. App. at 325 (internal quotation marks omitted) (citing *Pierce v. Principi*, 240 F.3d 1348, 1355 (Fed. Cir. 2001) (quoting *Fugo v. Brown*, 6 Vet. App. 40, 44 (1993))).

reading can lead to faster adjudication of CUE theories and can expedite receipt of benefits if the motion is successful, it also has the potential to have broad res judicata effects as to motions that are denied.¹⁹³

In what I view as a decision firmly rooted in the realities of the system, the Veterans Court adopted a nuanced approach to determining whether a given theory of CUE should be impliedly read to be part of a veteran's claim. The Court "recognize[d] that the difficult task of sympathetically reading CUE motions must apply common sense to balance reasonable assistance to veterans against undue burdens on the Secretary and the negative consequences of sympathetically raising weak CUE arguments only to deny them."¹⁹⁴ Thus, it appears to have opted for a flexible standard in this area instead of a bright line rule. While such an approach has the downside of less predictability *ex ante*, it allows room for greater fairness *ex post*.¹⁹⁵ *Acciola*, then, is not only an important case in terms of reconciling competing doctrinal rules, it is also an excellent example of how a court should approach the development of the law in the unique context of veterans' benefits.

H. Matters Concerning Attorneys' Fees

There were also a number of decisions in the past two years concerning attorneys' fees awards. Most of these developments concern fee awards under the Equal Access to Justice Act ("EAJA") although there was one significant case dealing with the award of fees pursuant to a contingency agreement at the Department. Each area is dealt with separately in the following subpart.

¹⁹³ *Id.* at 326.

¹⁹⁴ *Id.* at 327.

¹⁹⁵ Adopting a flexible approach does not mean that the Veterans Court refused to provide any concrete guidance in the area of CUE. For example, it held that "a sympathetic reading of a CUE motion can fill in details where the theory is not fully fleshed out, but it cannot supply a theory that is absent." *Id.* at 326. In addition, the Veterans Court made clear that "[m]erely citing a general entitlement statute or regulation . . . provides no allegation of error that could be developed as a specific theory of CUE." *Id.* at 328.

i. EAJA Matters

Through EAJA Congress has provided that a “prevailing party” in litigation against the government, including in the context of veterans’ benefits, may receive his or her reasonable attorneys’ fees and expenses incurred in connection with such litigation.¹⁹⁶ There were a number of developments concerning EAJA matters. In *Richlin Security Service Co. v. Chertoff*¹⁹⁷ the Supreme Court reversed a Federal Circuit decision that had held that paralegal services were recoverable only at the rate of cost to the firm billing the client and not at the prevailing market rates for paralegals.¹⁹⁸ The Supreme Court held that paralegal services may be recovered at prevailing market rates.¹⁹⁹ The Veterans Court subsequently applied *Richlin* in the context of EAJA recoveries.²⁰⁰ The Supreme Court also heard argument this Term in a case raising the issue of whether an EAJA award is the property of the client or of the lawyer and a decision has since been rendered.²⁰¹ The Veterans Court also held that EAJA fees are available in actions concerning claims related to National Service Life Insurance.²⁰²

In addition, under EAJA, a prevailing party must file its application for fees and other expenses “within thirty days of final judgment in the action.”²⁰³ In the context of a situation in which an appeal to the Federal Circuit has been dismissed, the Veterans Court concluded that its judgments become final for EAJA purposes when an appeal to the Federal Circuit is dismissed – whether voluntarily

¹⁹⁶ 28 U.S.C. § 2412(b) (2006).

¹⁹⁷ 553 U.S. 571 (2008).

¹⁹⁸ *Id.* at 573, 590.

¹⁹⁹ *Id.* at 590.

²⁰⁰ *Garrison v. Peake*, 22 Vet. App. 192, 193-94 (2008).

²⁰¹ See Transcript of Oral Argument, *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010) (No. 08-1322), available at 2010 WL 603696; *Astrue*, 130 S. Ct. at 2524 (holding that an Equal Access to Justice Act (“EAJA”) award is the property of the client). The Federal Circuit had previously held that EAJA fees were the property of the client. *FDL Techs., Inc. v. U.S.*, 967 F.2d 1578, 1581 (Fed. Cir. 1992).

²⁰² *Gordon v. Peake*, 22 Vet. App. 265, 273-74 (2008).

²⁰³ 28 U.S.C. § 2412(d)(1)(B) (2006).

or not – and when the time to seek certiorari expires.²⁰⁴ Another requirement under EAJA is that a prevailing party must assert in its fee application that the government's position "was not substantially justified."²⁰⁵ The Veterans Court has held that all a prevailing party must do is *allege* the lack of substantial justification; it need not *prove* the point.²⁰⁶ Once the allegation is made, the burden shifts to the Secretary to demonstrate that his position was substantially justified.²⁰⁷

The Veterans Court also reiterated that it "has never held that an EAJA application is per se unreasonable because the monetary amount sought for attorney work outweighs the amount actually recovered by the veteran; but instead, the Court has used its discretion to determine what is a reasonable fee under the circumstances in each case."²⁰⁸ In *Phillips v. Shinseki*²⁰⁹ the Federal Circuit also made two related EAJA holdings. First, it held that "an EAJA claim survives the death of the veteran, regardless of whether the EAJA application was actually filed by the veteran-claimant prior to his death."²¹⁰ Second, a representative of an estate may be substituted in order to pursue an EAJA claim even if the representative does not have an accrued benefits claim.²¹¹

There was an additional EAJA-related development that requires a bit more explanation. In this regard, recall that in many respects the system for the review of veterans' benefits decisions is in two parts. One is the system within the Department. The other is judicial review of that administrative determination. Much as there

²⁰⁴ See *Kidney v. Shinseki*, 22 Vet. App. 367, 371-72 (2009) (adopting a rule concerning EAJA matters before the Federal Circuit, as articulated in *Impresa Construzioni Geom. Domenico Garufi v. U.S.*, 531 F.3d 1367, 1372 (Fed. Cir. 2008)).

²⁰⁵ 28 U.S.C. § 2412(d)(1)(B).

²⁰⁶ *Groves v. Shinseki*, 23 Vet. App. 90, 93 (2009).

²⁰⁷ *But see id.* at 93-94 (noting that if the prevailing party elects to argue more than a mere allegation of a lack of substantial justification, the party cannot mislead the Secretary such that the Secretary relies on the additional information to his detriment).

²⁰⁸ *Padgett v. Shinseki*, 23 Vet. App. 306, 313 (2009).

²⁰⁹ 581 F.3d 1358 (Fed. Cir. 2009).

²¹⁰ *Id.* at 1368.

²¹¹ *Id.*

are two types of proceedings, there are also different mechanisms by which a claimant's attorney may be paid for his or her work.

At the administrative level, an attorney is currently allowed to charge a fee to a veteran for work performed after a Notice of Disagreement has been filed.²¹² A person representing a veteran in the administrative process must file a copy of a fee agreement with the Secretary.²¹³ A representative is limited to charging a fee that is not excessive and is otherwise reasonable.²¹⁴ As is true outside the veterans' benefit system, such a fee may be on a fee-for-service basis or on a contingency model. A representative using the contingency model may elect to contract with a veteran to have the representative's fee paid directly out of past due benefits awarded the veteran; but if a representative makes such an election the agreed upon fee must not exceed twenty percent of the total amount of such past due benefits.²¹⁵

A veteran may also be represented by paid counsel once he or she appeals a benefits determination in the judicial system. Similar to the system in place concerning practice before the Board, counsel must file any fee agreement with the Veterans Court at the time the appeal is filed.²¹⁶ In addition, counsel may agree to be paid either in a fee-for-service basis or based on a contingency arrangement. No matter the arrangement, the fee charged must not be excessive or otherwise unreasonable.²¹⁷ And counsel may also be compensated for work at the judicial level through EAJA.²¹⁸

²¹² 38 U.S.C. § 5904(c)(1) (2006). This provision was added as a part of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101(c)(1), 120 Stat. 3403, 3407.

²¹³ 38 U.S.C. § 5904(c)(2).

²¹⁴ *Id.* § 5904(c)(3). Decisions of the Board concerning the reasonableness of attorneys' fees may be appealed to the Veterans Court. *See id.* § 7263(d). The Veterans Court's decision on such matters "is final and may not be reviewed in any other court." *Id.*

²¹⁵ *Id.* § 5904(d).

²¹⁶ *Id.* § 7263(c).

²¹⁷ *Id.* § 7263(d). As with matters concerning fees charged at the administrative level, the Veterans Court's decision concerning the excessiveness or reasonableness of fees at the judicial level "is final and may not be reviewed in any other court." *Id.*

²¹⁸ 28 U.S.C. § 2412(d).

This dual system of compensation methods has led to a question of whether a lawyer who receives both an EAJA award through his or her client and has a contingency fee arrangement with the client must offset the EAJA award against the contingency payment. The doctrinal foundation in this area is that an attorney is not allowed to “double-dip” by receiving both EAJA fees and a contractual payment from a veteran for the “same work.”²¹⁹ As the Veterans Court stated succinctly nearly a decade ago, “a fee agreement allowing an attorney to collect and retain both an EAJA fee as well as a fee from the client for the same work is ‘unreasonable’ pursuant to 38 U.S.C. §§ 5904 and 7263.”²²⁰ Thus, as two respected commentators have summarized: “[A]ttorneys may keep an EAJA award of fees and expenses only if the court award exceeds the amount of fees and expenses owed to the attorney by the claimant – the lesser of the two benefits must be refunded to the claimant.”²²¹

Given this doctrinal foundation, it is critical to define what constitutes the “same work” for purposes of the rule. While the Veterans Court initially took a narrow view of what constituted the “same work,”²²² in *Carpenter v. Principi*,²²³ an en banc court took a broader view; it held that “the representation of a claimant in pursuit of a claim at all stages of the adjudication process is the ‘same work,’ regardless of the tribunal before which it is performed.”²²⁴ The Veterans Court specifically held in *Carpenter* that “a fee which includes both an EAJA award plus a contingency fee for work performed before the [Veterans] Court, Board, and VA on the same claim such that the fee is enhanced by an EAJA award

²¹⁹ *Carpenter v. Principi*, 15 Vet. App. 64, 72-73 (2001) (en banc).

²²⁰ *Id.* at 73; *see id.* at 75 (“[W]e must be particularly vigilant in construing fee agreements to protect the veteran from the drafting of a fee agreement which might unintentionally, or intentionally, deprive a veteran of his rights under the law.”).

²²¹ VETERANS BENEFITS MANUAL 1583 (Barton F. Stichman & Ronald B. Abrams eds., 2009).

²²² *See, e.g., Shaw v. Gober*, 10 Vet. App. 498, 504 (1997) (“[T]he double-payment proscription would have no application to the payment of fees under the EAJA and under the fee agreement where the legal work done in connection with those fees is not the same.”), *overruled by Carpenter*, 15 Vet. App. at 64.

²²³ 15 Vet. App. at 64.

²²⁴ *Id.* at 76.

is unreasonable pursuant to [relevant law].”²²⁵ Thus, in that case an EAJA fee awarded for work done at the Veterans Court was required to be offset against the fee to which the lawyer was entitled based on the recovery of past-due benefits recovered on remand.²²⁶

The Veterans Court returned to the offset issue in 2009 with its decision in *Jackson v. Shinseki*.²²⁷ It reaffirmed *Carpenter*’s core holding and rationale.²²⁸ In addition, *Jackson* extended *Carpenter* in two significant respects. First, the Veterans Court held that work performed before the Federal Circuit constitutes the “same work” for purposes of *Carpenter*’s EAJA offset rule.²²⁹ As the Court made clear, “all work performed to secure an award of past-due benefits, regardless of the tribunal in which it is performed is the ‘same work’ for the purposes of EAJA.”²³⁰ So, as matters stand now, a lawyer’s involvement at all stages of the administrative/judicial system for work performed to secure a veteran benefits will be the “same work” and EAJA offset rules will apply.

Jackson’s second extension of *Carpenter* concerned whether the EAJA fees associated with the fee petition itself were part of the “same claim” such that an offset was required.²³¹ The Veterans Court held that “work performed in defense of the EAJA application constitutes the same work as that performed in pursuit of past-due benefits before the Board, the Court, and the Federal Circuit, as EAJA is just one component part of the larger civil action against the government.”²³² Therefore, an offset was

²²⁵ *Id.*

²²⁶ *Id.* The issue would not arise if benefits were awarded for work solely performed at the Veterans Court. There is unanimous – or at least nearly unanimous – agreement that an EAJA fee duplicates a contingency fee based on benefits awarded by the Veterans Court. The issue arises when the EAJA fee is related to a remand and then benefits are awarded in the remanded proceedings.

²²⁷ 23 Vet. App. 27 (2009).

²²⁸ *Id.* at 31-34.

²²⁹ *Id.* at 34.

²³⁰ *Id.*

²³¹ *Id.* at 35-36.

²³² *Id.* at 36.

required in order to ensure that the fee the lawyer received was not unreasonable.²³³

Jackson is important for the sole reason that it further defines the interaction between EAJA and other means of recovering fees. After all, lawyers need to be paid for the work they do. The decision is important for a broader reason as well. As lawyers become more involved in the complete process of the award and review of veterans' benefits determinations, Congress and the Court are going to need to be cognizant of changes that may need to be made to existing doctrine. In particular, I believe that the *Jackson/Carpenter* rule was correct for the cases in which it was developed – relatively large dollar recoveries which allowed the attorney successfully obtaining benefits after a remand to recover for work done in the administrative system in addition to work done in the judicial system to secure a remand.²³⁴ For example, assume that the EAJA award was \$5,000 based on a Court decision resulting in a remand. After remand, the veteran receives past due benefits of \$200,000. In that scenario, the lawyer's contingency fee (assuming 20%) would be \$40,000. After EAJA offset, the fee remains at \$35,000. Now take a small dollar case in which we will again assume that a lawyer secures a remand and is awarded \$5,000. After remand, the client is awarded \$10,000 in past due benefits. Here, the lawyer's contingency fee will be \$2,000. If the EAJA offset rule is applied, the lawyer takes no part of the past due benefits. She will essentially have worked for free on remand, or at least one can make the argument she has.

The reality of the above examples does not mean that the Court was incorrect in *Carpenter* and *Jackson*. It does mean, in my view, that if the Court cannot craft a rule by which small dollar cases can be folded into the EAJA offset world, then Congress may need

²³³ *Id.*

²³⁴ For example, in *Carpenter* the past due benefits award was \$206,017. *Carpenter v. Principi*, 15 Vet. App. 64, 68 (2001) (en banc). In *Jackson*, the past due benefits awarded were \$50,746. *Jackson*, 23 Vet. App. at 28.

to consider whether it needs to adopt an “EAJA-like” system for work done at the administrative level. At the very least, *Jackson* is significant for bringing this issue to the forefront in the past two years.

ii. Non-EAJA Matters

There was also a significant decision concerning attorneys’ fees in the past two years that did not concern EAJA. As described by the Court, the issue in *Lippman v. Shinseki*²³⁵ concerned the question: “When an attorney is discharged by a claimant prior to the conclusion of an appeal taken from the initial disability rating assigned, what is the proper framework for determining reasonable attorney fees under a qualifying fee agreement?”²³⁶ The Court made a number of important holdings in *Lippman*.

First, the Court recognized that “[i]t is certainly a claimant’s right to discharge his attorney, but termination of representation does not terminate an attorney’s right under a valid contract to collect fees for work performed prior to the termination that resulted in the claim being resolved ‘in a manner favorable to the claimant.’”²³⁷ Second, it held that the portion of the Secretary’s regulation (38 C.F.R. § 14.636(h)(3)(i)) requiring continued representation of the claimant during the phase of the claim ultimately resulting in the award of benefits in order to recover fees is unreasonable and, therefore, invalid.²³⁸ Third, turning to what the correct rule should be, the Court essentially adopted the rule from *Scates v. Principi*²³⁹ governing the situation in which a claimant discharges a lawyer after the initial decision on the claim but prior to the appeal of the decision.²⁴⁰ The Court reasoned that the central inquiry is one of “reasonableness” based on principles

²³⁵ 23 Vet. App. 243 (2009).

²³⁶ *Id.* at 244.

²³⁷ *Id.* at 252 (quoting 38 U.S.C. § 5904(d)(2)(B) (2006)).

²³⁸ *Id.* at 252-53.

²³⁹ 282 F.3d 1362 (Fed. Cir. 2002).

²⁴⁰ *Lippman*, 23 Vet. App. at 253 (citing *Scates*, 282 F.3d at 1365).

of quantum meruit.²⁴¹ Finally, it made clear that the phrase “on the basis of the claim” in section 5904 “means a complete claim, from the initial rating assigned to the resolution of any appeal taken regarding matters that affect the amount of benefits awarded (i.e., disability rating and effective date).”²⁴²

I. Due Process of Law

There have been several developments during the past two years dealing with the rights of claimants in connection with the veterans' benefits process. As highlighted in this sub-section, several of these developments will likely have significant implications in the years to come.

The starting point is the Constitution's requirement that a person cannot “be deprived of life, liberty, or property, without due process of law.”²⁴³ It has long been accepted that, in certain contexts, the Due Process Clause has applications in the arena of veterans' benefits. For example, the Clause certainly applies in various ways when the government seeks to deprive a veteran of benefits to which he or she has already been deemed to be entitled.²⁴⁴ At several points early in the period addressed in this article, courts recognized that it was an open question to what extent the Due Process Clause applied to a veteran *before* he or she had established an entitlement to benefits.²⁴⁵

²⁴¹ *Id.*

²⁴² *Id.* at 255.

²⁴³ U.S. CONST. amend. V.

²⁴⁴ *See, e.g.,* Cushman v. Shinseki, 576 F.3d 1290, 1296 (Fed. Cir. 2009) (“It is well established that disability benefits are a protected property interest and may not be discontinued without due process of law.”); Lamb v. Peake, 22 Vet. App. 227, 231 (2008) (“An essential principle of due process is that deprivation of a protected interest must ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” (quoting Mullane v. Centr. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950))).

²⁴⁵ *See, e.g.,* Mansfield v. Peake, 525 F.3d 1312, 1319 (Fed. Cir. 2008) (raising, but not deciding, whether potential entitlement to benefits was a property interest); Barrett v. Shinseki, 22 Vet. App. 457, 459-61 (2009) (concluding that there was no due process violation without deciding whether an applicant for benefits had a protected property interest).

It is worth considering for a moment what has prompted veterans to seek resort in the Due Process Clause. The reality is that veterans have increasingly claimed that the VA adjudicatory process is not, in reality, a nonadversarial one. They have raised such challenges in attacks on the system in federal district courts.²⁴⁶ They have pressed similar complaints in appeals to the Veterans Court.²⁴⁷ And Federal Circuit judges have debated the extent to which the system remains nonadversarial such that constitutional protections are necessary.²⁴⁸ The point is that it is these very real questions concerning the fundamental nature of the veterans' benefits system that have provided the impetus to discuss the constitutional issue. So, in many respects one can see the issue as a symptom of a larger problem that needs to be addressed.²⁴⁹

The Federal Circuit answered the open question concerning the application of due process principles prior to the establishment of entitlement to benefits in a truly watershed decision, *Cushman v. Shinseki*.²⁵⁰ In *Cushman*, the Federal Circuit stated, "we find that a veteran alleging a service-connected disability has a due process right to fair adjudication of his claim for benefits."²⁵¹ Before discussing the Federal Circuit's reasoning, it is worth underscoring the monumental importance of the decision. Before *Cushman*, there was certainly a principle of "fair adjudication" implied through the various procedural devices contained in Title 38.²⁵² This principle

²⁴⁶ *E.g.*, *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1086-89 (N.D. Cal. 2008).

²⁴⁷ *See, e.g.*, *Young v. Shinseki*, 22 Vet. App. 461, 471-72 (2009) (finding that VA violated the principles of fair adjudication when it failed to provide the Veteran with copies of certain portions of his claims file prior to the Board's decision even after the Veteran had made repeated requests for such evidence); *Del Rosario v. Peake*, 22 Vet. App. 399, 407-08 (2009) (discussing the Veteran's argument that the use of hearsay before the Board violated his rights).

²⁴⁸ *See, e.g.*, *Gambill v. Shinseki*, 576 F.3d 1307, 1315-20 (Fed. Cir. 2009) (Bryson, J., concurring) (arguing in favor of the non-adversarial nature of the system); *id.* at 1326-28 (Moore, J., concurring) (noting that in reality the system does not appear to be non-adversarial).

²⁴⁹ I also discuss this point below. *See infra* Part II. I have also written about it elsewhere. *See generally* Allen, *Legislative Commission*, *supra* note 2.

²⁵⁰ 576 F.3d 1290 (Fed. Cir. 2009).

²⁵¹ *Id.* at 1292.

²⁵² *See, e.g.*, *Reeves v. West*, 11 Vet. App. 255, 260-61 (1998) (finding that an educational benefits statute did not violate the equal protection component of the Due Process Clause

really amounted only to one of legislative grace. Veterans have many powerful supporters in the legislature, so significant anti-veteran changes to adjudicatory processes would be unlikely. Nevertheless, the legislature remained largely in control. *Cushman* fundamentally altered the state of affairs. Now, the question of what process is due is one of *constitutional* law. As such, courts will have the final say.²⁵³ I do not believe that the potential for this shift in the nature of procedural protections can be overstated.

Returning to the decision itself, the Federal Circuit recognized that the Supreme Court had not yet held that an applicant for benefits had a protected property interest in the benefits the applicant was seeking.²⁵⁴ The Federal Circuit, however, determined that in the context of veterans' benefits, the situation was more akin to that in which one was being deprived of an entitlement rather than a garden variety situation in which one merely was seeking a discretionary benefit.²⁵⁵ Specifically, the Federal Circuit held "[v]eteran's disability benefits are nondiscretionary, statutorily mandated benefits. A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations."²⁵⁶ As such, the Federal Circuit's conclusion flowed naturally – the Constitution's due process protections applied in full.²⁵⁷

Before exploring how *Cushman* has already been applied and how it may be applied in the future, it is worth underscoring the controversial nature of the decision on the Federal Circuit

of the Fifth Amendment); *Thurber v. Brown*, 5 Vet. App. 119, 122-23 (1993) (discussing a regulatory provision that requires VA to inform a veteran of an opinion obtained by the Board and provide the veteran with an opportunity to be heard).

²⁵³ To be sure, Congress could change the state of affairs for those persons not yet in the military by altering the benefits structure, which as explained above, was the basis for the Federal Circuit's decision that there was a property right triggering application of the Due Process Clause. However, given the political realities associated with veterans' affairs, such a change seems highly unlikely.

²⁵⁴ *Cushman*, 576 F.3d at 1296.

²⁵⁵ *Id.* at 1296-98.

²⁵⁶ *Id.* at 1298.

²⁵⁷ *Id.*

itself first. For example, in *Edwards v. Shinseki*,²⁵⁸ Judge Rader concurred in his own majority opinion to express his disagreement with *Cushman*.²⁵⁹ As he colorfully put it, “I perceive that this court has run before the Supreme Court sounded the starting gun on property rights for applicants.”²⁶⁰ In addition, Judge Bryson has also expressed skepticism about the need for due process protections in the situation *Cushman* addressed.²⁶¹ Of course, *Cushman* remains the law. However, one gets the sense that it is not as settled as it may appear reading *Cushman* standing alone.

Having established that veterans have a protected property interest in veterans’ benefits to which they seek entitlement, the next constitutional question is to what process veterans are due.²⁶² The Supreme Court has articulated a three prong balancing test to make this judgment. In *Mathews v. Eldridge*²⁶³ the Supreme Court instructed courts to make this assessment by considering: (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”²⁶⁴ Thus, it seems likely that the Veterans Court and the Federal Circuit will need to apply this framework to assess various due process based challenges to procedures used in connection with the awarding of veterans’ benefits.²⁶⁵

²⁵⁸ 582 F.3d 1351 (Fed. Cir. 2009).

²⁵⁹ *Id.* at 1356-58 (Rader, J., concurring).

²⁶⁰ *Id.* at 1358.

²⁶¹ *Gambill v. Shinseki*, 576 F.3d 1307, 1313-15 (Fed. Cir. 2009) (Bryson, J., concurring).

²⁶² The Due Process Clause only applies if one has a protected life, liberty or property interest in the matter at hand. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *Cushman*, 576 F.3d at 1296 (“To raise a due process question, the claimant must demonstrate a property interest entitled to such protections.”).

²⁶³ 424 U.S. 319 (1976).

²⁶⁴ *Id.* at 335.

²⁶⁵ *See Gambill*, 576 F.3d at 1314 (Bryson, J., concurring) (discussing the framework

Through the end of April 2010, the Federal Circuit has addressed three constitutional questions since holding that the Due Process Clause applies to veterans seeking benefits. These decisions are, in many respects, the initial brush strokes in this area. While the entire picture is not yet clear, these individual strokes provide a sense of what the picture may eventually look like. In *Cushman*, the Federal Circuit held that the consideration of an altered document in the adjudication of the Veteran's claim was a violation of his due process rights.²⁶⁶ In *Gambill v. Shinseki*²⁶⁷ the Federal Circuit considered the question of whether a veteran is constitutionally entitled to confront any physician who submits a medical opinion contrary to his interests.²⁶⁸ The Veteran argued that at a minimum he had a constitutional right to submit written interrogatories to the physician.²⁶⁹ The Federal Circuit declined to answer this question because it deemed any violation to have been non-prejudicial in this case.²⁷⁰ Thus, this issue remains open for adjudication. However, it is significant to note that one member of the panel in *Gambill* agreed with the Veteran, stating that, at a minimum, the submission of interrogatories would likely be required by due process.²⁷¹ Another panel member reached the conclusion that due process did not mandate such a procedure.²⁷²

Finally, in *Edwards*, the Federal Circuit noted “[i]n some circumstances, a mentally disabled applicant, known to be so disabled by VA, may receive additional protections while pursuing an application for benefits.”²⁷³ The Veteran did not prevail because he had not submitted sufficient evidence of his incompetence during the relevant period.²⁷⁴ Thus, it is not clear how the Federal

developed in *Mathews*, 424 U.S. 319); *id.* at 1330 (Moore, J., concurring) (same).

²⁶⁶ *Cushman*, 576 F.3d at 1300.

²⁶⁷ 576 F.3d at 1307.

²⁶⁸ *Id.* at 1310-11.

²⁶⁹ *Id.* at 1311.

²⁷⁰ *Id.* at 1312-13.

²⁷¹ *Id.* at 1324, 1330 (Moore, J., concurring).

²⁷² *Id.* at 1313 (Bryson, J., concurring).

²⁷³ *Edwards v. Shinseki*, 582 F.3d 1351, 1355 (Fed. Cir. 2009).

²⁷⁴ *Id.* at 1356.

Circuit envisions this aspect of due process should play out, including what “additional protections” might be constitutionally required.

As these cases make clear, we are just at the beginning of the constitutional journey *Cushman* dictates.²⁷⁵ While the precise contours of that journey cannot be determined, one thing is certain: It will be an interesting trip.²⁷⁶

J. Structural Matters

There have been a number of developments during the past two years that can be grouped together because they, in one way or another, deal with some aspect of the unique structure by which veterans’ benefits are awarded and reviewed. While this type of grouping may, in some sense, be artificial, I believe that the veterans’ benefits system is so unusual, that decisions dealing with its structure are worthy of their own separate discussion. The decisions in this group have been divided into four sub-categories, each of which is discussed in turn below.

²⁷⁵ See *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). An area in which due process principles could play a significant role concerns the Department’s actions discussed above dealing with misfiled Notices of Appeal to the Veterans Court. See *supra* Part I.A.i. Judge Kasold has specifically made the connection between the lack of procedures within the Department for dealing with such misfiling and *Cushman*. See *Rickett v. Shinseki*, 23 Vet. App. 366, 372 (2010) (Kasold, J., dissenting); see also *Posey v. Shinseki*, 23 Vet. App. 406, 414 (2010) (Lance, J., concurring) (“The perception [that the Department is intentionally delaying forwarding misfiled Notices of Appeal] will persist until such time as the Secretary develops uniform practices and procedures dealing with misfiled [Notice of Appeals]. The frequency of the problem would suggest that there may be confusion in instructions given to veterans.”).

²⁷⁶ An example of the twists and turns that may come can be found in a conclusory statement near the end of the Federal Circuit’s opinion in *Guillory v. Shinseki*, 603 F.3d 981 (Fed. Cir. 2010). *Guillory* concerned a Veteran’s appeal rejecting his assertion of CUE in an earlier decision. *Id.* at 983. After rejecting the Veteran’s other claims of error, the Federal Circuit noted that the Veteran had also raised a due process question under *Cushman*. *Id.* at 987-88. It rejected this claim as well, stating, “[H]ere there is no due process issue since, unlike the situation in *Cushman*, the statutes and regulations provide an adequate remedy for any error that occurred in prior proceedings.” *Id.* If this statement means that the Federal Circuit concluded that the procedures in place met constitutional standards, it is unremarkable (and also not particularly helpful because it provides no explanation for this finding). However, it can also be read to suggest that since there was a procedure in place the due process requirement was automatically satisfied. Such an explanation would be remarkable and, if true, would seriously undermine the power of *Cushman*.

i. The General Nature of the VA Adjudicatory System

One of the most striking things about the body of decisional law produced during the past two years is how frequently disputes arise concerning the fundamental nature of the system by which benefits are awarded and reviewed at the administrative level. There simply is no agreement about whether that system remains non-adversarial in practice even if it is meant to be so in theory.²⁷⁷ Examples of this point abound in the case law. In the Supreme Court's decision in *Shinseki v. Sanders*, much of Justice Souter's dissent was focused on the unique nature of the veterans' benefits system.²⁷⁸ And even Justice Breyer's majority opinion, which ruled against the Veteran, "recognize[d] that Congress has expressed special solicitude for the veterans' cause."²⁷⁹ The same dispute can be seen in the Federal Circuit. In decisions dealing with both the abrogation of the equitable tolling rules and the newly imposed constitutional due process strictures, judges have debated whether the system remains non-adversarial in fact.²⁸⁰ And it is present in Veterans Court cases as well.²⁸¹

²⁷⁷ This issue has not gone unnoticed. See Allen, *Legislative Commission*, *supra* note 2, at 378-80; Allen, *Significant Developments*, *supra* note 2, at 526-28. Other commentators have also discussed the issue of whether the system is truly non-adversarial. See generally Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285 (2004); Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism,"* 1 VETERANS L. REV. 2 (2009); James Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. (forthcoming 2010) (on file with author); Rory E. Riley, *Preservation, Modification, or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1 (2008).

²⁷⁸ *Shinseki v. Sanders*, 129 S. Ct. 1696, 1708-10 (2009) (Souter, J., dissenting).

²⁷⁹ *Id.* at 1707.

²⁸⁰ See, e.g., *Henderson v. Shinseki*, 589 F.3d 1201, 1230-33 (Fed. Cir. 2009) (Mayer, J., dissenting) (discussing equitable tolling); *Gambill v. Shinseki*, 576 F.3d 1307, 1313-24 (Fed. Cir. 2009) (Bryson, J., concurring) (discussing due process and arguing in favor of the non-adversarial nature of the system); *id.* at 1324-30 (Moore, J., concurring) (discussing due process and noting that in reality the system does not appear to be non-adversarial).

²⁸¹ See, e.g., *Tyrues v. Shinseki*, 23 Vet. App. 166 (2009) (en banc) (highlighting the different views of various judges on the system's pro-claimant nature and what that pro-claimant nature meant for matters before the Court). See *supra* Part I.A.iii (discussing *Tyrues*).

This point is not merely academic. It has real world consequences in how cases are decided. For example, in *Robinson v. Shinseki*,²⁸² the Federal Circuit put great weight on the increased availability of lawyers in the VA adjudicatory system when it held that the sympathetic reading presumption should now apply to represented veterans as well as those veterans proceeding pro se (or those assisted by VSO representatives).²⁸³ Similarly, one wonders how the Due Process Clause could have any meaningful application in a system in which there truly is no adversarial relationship between the government and veterans.²⁸⁴

The fundamental point here is that it is startling, to say the least, that there is such a dispute about the very nature of the system over which Congress instituted judicial review more than twenty years ago. It is precisely for this reason a commission to study the overall system of veterans' benefits should be undertaken.²⁸⁵ Without such a comprehensive consideration, the confusion will simply continue in the future.²⁸⁶

Even if one discounts the statements concerning the putative non-adversarial nature of the administrative process, decisions over the past two years are telling in terms of the very real problems in that process. For example, the Federal Circuit has referred to the process veterans face as the “labyrinthine corridors of the veterans’ adjudicatory system.”²⁸⁷ In this same case, the Federal Circuit commented on the veteran’s “seemingly

²⁸² 557 F.3d 1355 (Fed. Cir. 2009).

²⁸³ *Id.* at 1360 (“Indeed, it would defeat the congressional purpose of increasing the availability of much needed attorney assistance if direct appeal attorney filings were read in a less sympathetic light than pro se filings.”). The Federal Circuit’s logic in *Robinson* closely tracked the position Judge Schoelen had advanced in her dissent in the Veterans Court. *Robinson v. Peake*, 21 Vet. App. 545, 564 (2008) (Schoelen, J., dissenting).

²⁸⁴ See *supra* Part I.I (discussing due process issues).

²⁸⁵ See Allen, *Legislative Commission*, *supra* note 2, at 387-92 (advocating for a study that would “evaluat[e] the current state of appellate review of veterans’ benefits determinations and mak[e] recommendations concerning changes that might be made to that system”).

²⁸⁶ *Id.* at 388.

²⁸⁷ *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009).

interminable struggle to obtain disability benefits,”²⁸⁸ and noted that “[t]he VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him.”²⁸⁹ Such statements should cause one to raise a suspicious eyebrow.²⁹⁰

Perhaps the most fitting way to conclude this sub-part is with a case that is, in many respects, totally unremarkable. It is, however, a case that takes one step back and forces us to think about the VA system. In *Hawkins v. Shinseki*²⁹¹ the Veteran had filed a claim in late 1990 for certain issues concerning exposure to Agent Orange (an herbicide).²⁹² It appears that his case, like many others, bounced around the system through a series of remands.²⁹³ He eventually sought a writ of mandamus in the Veterans Court.²⁹⁴ The Federal Circuit affirmed the denial of the writ.²⁹⁵

What is interesting about *Hawkins* is that, by happenstance, United States District Judge Claudia Wilken of the United States District Court for the Northern District of California was sitting by designation on the panel.²⁹⁶ Her reaction to the situation Mr. Hawkins faced is fascinating, and she expressed her bafflement by the process in her dissent.²⁹⁷ Specifically, she discussed the “repeated errors which have prolonged the decision-making process” and recognized the cycle of remands.²⁹⁸ She

²⁸⁸ *Id.* at 1372.

²⁸⁹ *Id.* at 1369.

²⁹⁰ Unfortunately, and significantly, these are not isolated sentiments. For example, in another case the Federal Circuit commented that “[i]t [was] shameful that the VA yet again failed in its duty to assist the veteran and, at best, poor judgment by the Department of Justice in defending the VA’s actions.” *Moore v. Shinseki*, 555 F.3d 1369, 1375 (Fed. Cir. 2009).

²⁹¹ No. 2009-7068, 357 Fed. Appx. 295, 2009 WL 4547196 (Fed. Cir. Dec. 7, 2009).

²⁹² *Id.* at 296, 2009 WL 4547196, at **1 (Wilken, D.J., dissenting).

²⁹³ *Id.*

²⁹⁴ *Id.* at 295-96, 2009 WL 4547196, at **1.

²⁹⁵ *Id.* at 296, 2009 WL 4547196, at **1.

²⁹⁶ *Id.* at 295 n. *, 2009 WL 4547196, at n. *.

²⁹⁷ *Id.* at 296-97, 2009 WL 4547196, at **1-2 (Wilken, D.J., dissenting).

²⁹⁸ *Id.* at 296, 2009 WL 4547196, at **1.

argued in favor of granting a narrowly tailored writ to expedite adjudication of the claim with the Federal Circuit retaining jurisdiction.²⁹⁹ Of course, the majority (constituting two Federal Circuit judges) rejected the claim in an unpublished, non-precedential opinion.³⁰⁰ For Judges Mayer and Rader, the case was just not that unusual.³⁰¹

I think that it would behoove all of us to try to see the system through the eyes of those like Judge Wilken, people not intimately involved in the process. I am not arguing that her position in *Hawkins* was correct.³⁰² Rather, it is simply that her amazement at a system in which claims can remain pending for nineteen years with time still to go is an amazement that we should all try to embrace.³⁰³ This would help us to remember that the system to which many of us have devoted a significant part of our professional lives is one that many people find difficult to understand. While it may be because those other people have not taken the *time* to understand the system, it may also be because the system truly does not make sense.

ii. Relations Between the Veterans Court and the Secretary

As I have noted in previous writings, there has been a certain tension at times between the Secretary and the Court.³⁰⁴ The past two years show that the tension has continued but that the Secretary is trying to show greater respect to the Court. Taking the positive development first, in *Vazquez-Flores v. Peake*,³⁰⁵ the

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *See id.* at 296-97, 2009 WL 4547196, at **1-2.

³⁰³ It is a hackneyed reference, but it really does make one think of the literary lawsuit *Jarndyce v. Jarndyce* that remained pending in England's Chancery Court for generations. *See* CHARLES DICKENS, *BLEAK HOUSE* 7-10 (George Ford & Sylvere Monod eds., W.W. Norton & Co., Inc. 1977) (1853).

³⁰⁴ *See, e.g.,* Allen, *Legislative Commission*, *supra* note 2, at 381-83; Allen, *Significant Developments*, *supra* note 2, at 512-14.

³⁰⁵ 22 Vet. App. 91 (2008).

Secretary sought from the Court a stay of the Court's decision in that matter while the Secretary appealed to the Federal Circuit.³⁰⁶ The Court denied the request.³⁰⁷ The significance of this case is that twice in the past several years, the Secretary showed a profound lack of respect for the Court by seeking effectively to unilaterally stay other Court decisions.³⁰⁸ Such disrespect by executive officials of judicial orders is something largely unheard of in American law. The fact that the Secretary has now accepted the Court's authority is a significant, and positive, sign.³⁰⁹

On the other hand, there are also indications that there is still room for improvement in terms of the Secretary's attitude toward the Court. A prime example is *Pousson v. Shinseki*.³¹⁰ In this case, the Secretary had, for unexplained reasons, failed to file the designation of record ("DOR") despite numerous extensions of time.³¹¹ The delay was so significant that the Court ultimately sanctioned the Secretary, ordering him "to pay the reasonable attorney fees and costs associated with the adjudication of this matter, as approved by the Court."³¹² Along the way, the Court also commented on the Secretary's "gross lack of diligence"³¹³ and his "cavalier attitude toward preparing the DOR and adhering to the Court's Rules."³¹⁴ The Secretary's refusal to follow basic Court rules is reflective of an attitude by the government towards a court that is extraordinary.

³⁰⁶ *Id.* at 91-92. The earlier decision was *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008). That decision was eventually reversed by the Federal Circuit. See *Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009). The substantive implications of this decision were discussed earlier in this article. See *supra* Part I.C.

³⁰⁷ *Vazquez-Flores*, 22 Vet. App. at 97.

³⁰⁸ See *Ribaudo v. Nicholson*, 20 Vet. App. 552, 553 (2007) (en banc); *Ramsey v. Nicholson*, 20 Vet. App. 16, 20-21 (2006).

³⁰⁹ See *Vazquez-Flores*, 22 Vet. App. at 97.

³¹⁰ 22 Vet. App. 432 (2009).

³¹¹ *Id.* at 434-35.

³¹² *Id.* at 438-39.

³¹³ *Id.* at 438.

³¹⁴ *Id.*

In sum, the past two years have been a mixed bag in terms of the relationship between the Court and the Secretary. There have been signs of greater respect in some areas, but there have also been troubling indications that the Secretary continues to deal with the Court in a manner inconsistent with that court's role in the American system of government.

iii. The Board's Authority

*McBurney v. Shinseki*³¹⁵ was a significant decision concerning certain aspects of the Board's authority to make factual determinations.³¹⁶ The Court first reiterated that the "Board, as the final trier of fact, is not constrained by favorable determinations below."³¹⁷ This point was not a new one.³¹⁸ The Court went on to consider whether the Board was bound by the parties' stipulations.

The Court began by noting that "[i]mplicit or express agreements between VA and claimants (not involving the Board or courts) remain subject to the Board's de novo review on appeal."³¹⁹ However, the Court cautioned that the Board cannot "wholly ignore signed, written agreements entered into between parties with the authority to do so."³²⁰ Summarizing its position, the Court held that "the Board has a duty to ensure compliance with agreements between VA and a claimant, or explain why such terms will not be fulfilled."³²¹

³¹⁵ 23 Vet. App. 136 (2009).

³¹⁶ There are numerous decisions that could be included under this general heading. *McBurney* is discussed here because it does not fit into any other grouping but is, nevertheless, an important decision.

³¹⁷ *McBurney*, 23 Vet. App. at 139.

³¹⁸ *Id.* at 139-40.

³¹⁹ *Id.* at 140.

³²⁰ *Id.*

³²¹ *Id.*

*iv. Appellate Jurisdiction of the Supreme Court
and the Federal Circuit*

The final structural development concerns the appellate jurisdiction of the Supreme Court and the Federal Circuit. As practitioners in this area well know, the Federal Circuit's jurisdiction to review Veterans Court decisions is limited by statute.³²² Except in constitutional cases, the Federal Circuit's jurisdiction is limited to questions of law.³²³

I have discussed in other writings that this appellate structure is odd.³²⁴ In reviewing decisions for this article, it was striking how often a panel of the Federal Circuit had to wrestle with questions such as whether a given dispute involved a question of law, over which jurisdiction would be proper, or the nebulous concept of the application of law to facts over which there would be no jurisdiction.³²⁵ And beyond that, one could cite at times what appear to be endless examples of Federal Circuit panels writing non-precedential opinions dismissing cases for a lack of jurisdiction.³²⁶ It simply makes no sense to have a federal

³²² 38 U.S.C. § 7292(d)(1) (2006).

³²³ *Id.* § 7292(d)(2).

³²⁴ *See, e.g.*, Allen, *Significant Developments, supra* note 2, at 523-26.

³²⁵ *See, e.g.*, Comer v. Peake, 552 F.3d 1362, 1366 (Fed. Cir. 2009) (holding that the Federal Circuit treats “the application of law to undisputed fact as a question of law” (quoting Conley v. Peake, 543 F.3d 1301, 1304 (Fed. Cir. 2008))); Ellington v. Peake, 541 F.3d 1364, 1371-72 (Fed. Cir. 2008) (holding that the court lacked jurisdiction over whether the Veterans Court was correct that the VA did not violate its obligation to sympathetically read the veteran's pleadings); Wood v. Peake, 520 F.3d 1345, 1350-52 (Fed. Cir. 2008) (concluding in a 2-1 decision that the court lacked jurisdiction to consider whether a given error was harmless because the matter involved the application of law to fact).

³²⁶ *See, e.g.*, Jackson v. Shinseki, No. 2009-7041, 324 Fed. Appx. 901, 905, 2009 WL 1257143, at **3 (Fed. Cir. June 5, 2009); Cole v. Shinseki, No. 2008-7106, 309 Fed. Appx. 399, 402, 2009 WL 260776, at **2 (Fed. Cir. Feb. 5, 2009); Rolling v. Peake, No. 2008-7025, 306 Fed. Appx. 601, 602, 2009 WL 59172, at **1 (Fed. Cir. Jan. 12, 2009); Rayburn v. Peake, No. 2008-7089, 306 Fed. Appx. 580, 582, 2009 WL 32411, at **2 (Fed. Cir. Jan. 7, 2009); Haralson v. Peake, No. 2008-7100, 315 Fed. Appx. 258, 261, 2008 WL 4810054, at **2 (Fed. Cir. Nov. 5, 2008); Julaton v. Peake, No. 2006-7074, 314 Fed. Appx. 305, 307, 2008 WL 4187958, at **2 (Fed. Cir. Sept. 9, 2008); Shultz v. Peake, No. 2008-7066, 304 Fed. Appx. 865, 866, 2008 WL 4890227, at **1 (Fed. Cir. Nov. 14, 2008).

appellate court spending so much time and energy making jurisdictional determinations. Whatever else one might say about the role of the Federal Circuit in the veterans' benefits process, it seems clear to me that it is time to consider whether, at a minimum, steps should be taken to address the drain on judicial resources flowing from the current structure of review.³²⁷

A final appellate jurisdiction point concerns the Supreme Court's decision in *Shinseki v. Sanders*. As discussed above, in *Sanders* the Supreme Court reversed the Federal Circuit and held that normal harmless error rules should apply in most cases in which there is a notice error.³²⁸ What is interesting about *Sanders* from a jurisdictional perspective is that the majority concluded its opinion by reviewing the Veterans Court's assessment of whether the given errors alleged in the case were actually harmless.³²⁹ I would have thought that such a consideration was at most the application of law to fact. If so, then the Federal Circuit would not have had appellate jurisdiction over that question and, one would have assumed, neither would the Supreme Court. Perhaps the Supreme Court simply did not attend to this jurisdictional feature of the case. On the other hand, it is also possible that the Supreme Court does not feel itself bound by the same jurisdictional limitations imposed on the Federal Circuit. Given the rarity with which the Supreme Court deals with veterans' law issues, this is probably not a significant point. It does, however, underscore the oddity of the appellate review structure in this area.

K. Miscellaneous Matters

Finally, there were also several developments over the past two years that were significant for one reason or another, but that do not fit neatly into any category. This section briefly mentions (in no particular order) such "miscellaneous" decisions of import.

³²⁷ See Allen, *Legislative Commission*, *supra* note 2, at 398-409 (discussing different ways in which the Federal Circuit's role could be restructured).

³²⁸ *Shinseki v. Sanders*, 129 S. Ct. 1696, 1704-06 (2009); see *supra* Part I.C.i (discussing *Sanders*).

³²⁹ *Sanders*, 129 S. Ct. at 1707-08.

In *Hyatt v. Shinseki*³³⁰ the Federal Circuit returned to the issue of substitution of parties in Veterans Court litigation.³³¹ The Federal Circuit held:

[T]he Veterans Court erred to the extent that it suggested that Mrs. Hyatt lacked standing because the judgment she sought to have reissued would not result in an imminent entitlement to benefits. The proper question is whether her accrued benefits claim would be “adversely affected” if the judgment on Mr. Hyatt’s appeal was not reissued nunc pro tunc as of his date of death.³³²

Thus, all other things being equal, substitution will be more likely in similar cases in the future. In *Ellington v. Peake*³³³ the Federal Circuit affirmed a Veterans Court decision that 38 C.F.R. § 3.310 does not require that a secondary service-connected condition receive the same effective date as the primary condition because the section deals only with entitlement to benefits not matters such as ratings or effective dates.³³⁴ In *Holton v. Shinseki*³³⁵ the Federal Circuit held that the presumptions under 38 U.S.C. § 105(a), that an in-service injury was incurred in the line of duty, and under 38 U.S.C. §§ 1111 & 1132, regarding soundness, apply only to establishing that there was an in-service injury or disease.³³⁶ These presumptions do not obviate the need for the veteran to show that there was, in fact, an injury or disease in the first place.³³⁷ In *Skoczen v. Shinseki*³³⁸ the Federal Circuit affirmed a Veterans Court decision that 38 U.S.C. § 5107(a) does not eliminate a claimant’s responsibility to submit evidence to support his or her claim.³³⁹

³³⁰ 566 F.3d 1364 (Fed. Cir. 2009).

³³¹ *Id.* at 1365.

³³² *Id.* at 1369.

³³³ 541 F.3d 1364 (Fed. Cir. 2008).

³³⁴ *Id.* at 1369-71.

³³⁵ 557 F.3d 1362 (Fed. Cir. 2009).

³³⁶ *Id.* at 1368-71.

³³⁷ *Id.* at 1370-71.

³³⁸ 564 F.3d 1319 (Fed. Cir. 2009).

³³⁹ *Id.* at 1328-29.

In *Adams v. Shinseki*³⁴⁰ the Federal Circuit returned to its decision concerning when claims will be deemed to have been implicitly denied when the Department rules on a different claim.³⁴¹ First, the Federal Circuit appeared to approve of the Veterans Court's interpretation in *Ingram v. Nicholson*³⁴² of the Federal Circuit's general rule.³⁴³ Second, the Federal Circuit provided a list of certain non-exclusive factors to consider when deciding whether a claim has been implicitly denied, including (1) the nature of the veteran's submissions (i.e., do they refer to both relevant conditions); (2) the physical relationship of the conditions to one another; (3) the legal relatedness of the claims; and (4) the timing of the submission of the claims (but cautioned that there is no bright-line rule requiring that the claims be submitted at the same time or in the same application).³⁴⁴ In *Jones v. Shinseki*³⁴⁵ the Veterans Court held that "where an appellant places a claim for one disability into appellate status by virtue of [a Notice of Disagreement], that claim is resolved by a later *appellate* adjudication of a subsequent claim where both claims stem from the same underlying disorder and the claimed disabilities are identical or substantially similar."³⁴⁶ In *Douglas v. Shinseki*³⁴⁷ the Veterans

³⁴⁰ 568 F.3d 956 (Fed. Cir. 2009).

³⁴¹ *Id.* at 961-64 (discussing *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006)); *Deshotel*, 457 F.3d at 1261 ("Where the veteran files more than one claim with the [Regional Office] at the same time, and the [Regional Office's] decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run.").

³⁴² 21 Vet. App. 232 (2007).

³⁴³ *Adams*, 568 F.3d at 961-62 (discussing the Veterans Court's elaboration of the "implicit denial" rule).

³⁴⁴ *Id.* at 963-64.

³⁴⁵ 23 Vet. App. 122 (2009).

³⁴⁶ *Id.* at 126. The Federal Circuit made related points in this period as well. *See, e.g.*, *Charles v. Shinseki*, 587 F.3d 1318, 1323 (Fed. Cir. 2009) ("Abandonment of a non-final and non-appealable later claim cannot render final an adjudicated earlier claim in which the agency failed to act."); *Williams v. Peake*, 521 F.3d 1348, 1351 (Fed. Cir. 2008) ("[A] subsequent final adjudication of a claim which is identical to a pending claim that had not been finally adjudicated terminates the pending status of the earlier claim. The later disposition, denying the claim on its merits, also decides that the earlier identical claim must fail."). Needless to say, *Jones*, *Charles*, and *Williams* interact in at least some respects with the matters discussed above concerning the definition of a "claim." *See supra* Part I.B.

³⁴⁷ 23 Vet. App. 19 (2009).

Court provided important guidance concerning the rule that it “would not be permissible for VA to undertake such additional development if a purpose was to obtain evidence against an appellant’s case.”³⁴⁸ The *Douglas* Court cautioned that one needs to read this statement in context because the Secretary “has an affirmative duty to gather the evidence necessary to render an informed decision on the claim, even if that means gathering and developing negative evidence, provided he does so ‘in an impartial, unbiased, and neutral manner.’”³⁴⁹ Finally, in *Roberts v. Shinseki*,³⁵⁰ an en banc Veterans Court held that when benefits are severed for fraud, the Department is not required to follow the procedure set forth in 38 C.F.R. § 3.105(d).³⁵¹

II. PAST TRENDS AND A GLIMPSE OF THE FUTURE

Section I discussed in some detail the significant developments in veterans’ law over the past two years. In this Section, I first highlight certain broad trends or connections between and among the individual developments. Many of these points have been made or referred to in the discussion of the specific developments. It is useful, however, to take a moment to step back after being enmeshed in the specifics. Then, the Section turns to a brief consideration of the types of developments we may see in the future.

A. Trends/Connections

There were several trends, or thematic connections, among the individual developments of the past two years. This part of the article discusses the four most interesting of them.

³⁴⁸ *Id.* at 25 (quoting *Mariano v. Principi*, 17 Vet. App. 305, 312 (2003)).

³⁴⁹ *Id.* at 26 (quoting *Austin v. Brown*, 6 Vet. App. 547, 553 (1994)).

³⁵⁰ 23 Vet. App. 416 (2010).

³⁵¹ *Id.* at 424-29. Judges Hagel and Schoelen dissented on this point. *Id.* at 432-40.

i. "This Stuff is Hard."

Several years ago, I had the pleasure of teaching a short, but intense, course in Veterans' Benefits Law with Judge Hagel and Judge Schoelen. It was a remarkable experience in many ways. One of the students in the class came up to me about half-way through the one-week class. He looked distraught. He opened his mouth and all that came out was an almost plaintiff cry: "This stuff is hard." He then turned and walked away.

This former student's succinct description of veterans' benefits law came back to me while I was preparing this article. There is no doubt that many of the concepts that are involved in the law of veterans' benefits are difficult both conceptually and practically. Take for example how one defines a claim.³⁵² While this definitional exercise seems easy, it is not a simple matter to articulate a definition of this critical term. Other examples to which one could point concern how one sympathetically reads pleadings and how the rules concerning the pleading of CUE work with the general sympathetic reading cannon.³⁵³

My point here is not to give us all a pat on the back for working in such a difficult area. Rather, I think the difficulty in the law highlights a couple of broader points that may be worth remembering. First, it underscores the amount of work that the Veterans Court and Federal Circuit have done over the past twenty years to create a body of law where there was effectively nothing on which to build. I have mentioned this issue before,³⁵⁴ but it is something that should not be forgotten.

Second, and more practically significant, the difficulty in the law is something that should be kept in mind because of the large number of veterans proceeding pro se in the system. While

³⁵² This issue is discussed above. *See supra* Part I.B.

³⁵³ These issues are discussed above as well. *See supra* Part I.G.

³⁵⁴ *See, e.g.,* Allen, *Legislative Commission*, *supra* note 2, at 372-73.

it is true that the role of lawyers in the administrative system is increasing,³⁵⁵ it remains the case that a large percentage of veterans represent themselves in at least some aspects of the process.³⁵⁶ Thus, I believe that courts should be cognizant that they are making rules that will often be applied by non-lawyers. It may not be possible to make the rules less complicated, but when it is possible to do so, the pro se representation issues should counsel for the simple approach. At the very least, the courts should take pains to ensure that their opinions are as clear as possible. And this clarity should not be focused on precision for a lawyer's eyes. The clarity should be, to the extent possible, for the man or woman on the street.

ii. The Veterans Court's Instructional Role

When I first wrote about the Veterans Court several years ago, I discussed the different roles it played in terms of resolving disputes on the one hand and developing the law on the other.³⁵⁷ I argued that despite the Court's massive caseload, it should devote more effort to the development of the law.³⁵⁸ The past two years saw significant examples of the Court focusing on such development.

In some cases, the Court saw an area of the law that appeared to be confused. It then sought to inject clarity. For example, the Court's work to define "same claim" illustrates this point.³⁵⁹ Of course, it is often not possible to clarify a given area with a single opinion or even several. But it is significant that the Court has begun the process.

In a slightly different vein, the Court also appeared consciously to provide guidance to the Board and ROs about the decision-making process. This is a critical step because it builds on an important success of the Court's first twenty years – enhancing

³⁵⁵ I discuss this point as a trend over the past two years below. See *infra* Part II.A.iv.

³⁵⁶ For example, in 2009, claimants were pro se in 68% of cases at the Veterans Court at the time of filing and claimants remained pro se in 28% of cases at the time of closure. See ANNUAL REPORTS, *supra* note 7.

³⁵⁷ See Allen, *Significant Developments*, *supra* note 2, at 514-22.

³⁵⁸ *Id.*

³⁵⁹ See *supra* Part I.B (discussing developments concerning "same claim").

administrative decision-making both in its quality and its predictability.³⁶⁰ Prime examples of decisions falling into this category are *Nieves-Rodriguez*, concerning the standards by which to judge medical evidence, and *Jones*, concerning inconclusive medical opinions.³⁶¹

iii. Questions about the Nature of the Administrative System

One of the most striking trends I observed over the past two years was the debates in the courts concerning the fundamental nature of the administrative portion of the system for the award and review of veterans' benefits determinations. I highlighted this point above with references to several examples of such discussions in opinions of both the Federal Circuit and the Veterans Court.³⁶²

Such basic disagreements about the nature of the administrative process make the entire system fundamentally unstable. The fact that one can distill from the body of decisions produced in the past two years a dispute about such a critical matter suggests that Congress needs to become engaged to reconsider the nature of the system over which it established judicial review two decades ago.³⁶³

iv. The Role of Lawyers in the System

A final strand of commonality underlying the significant developments of the past two years concerns the increased attention to the role of lawyers in the system. This development is in reality a subset of the point discussed above concerning the

³⁶⁰ See, e.g., Allen, *Legislative Commission*, *supra* note 2, at 376-77 (discussing improvements in administrative decisions since the inception of judicial review).

³⁶¹ See *supra* Part I.E (discussing developments concerning medical examination and evidence matters).

³⁶² See *supra* Part I.I (discussing issue in the context of due process matters).

³⁶³ I have argued elsewhere that Congress should take the opportunity of the Court's twentieth anniversary to conduct a review of the entire veterans' benefits process, from the application for benefits at the Regional Office (RO), through and including the role of the Article III Federal Circuit in the process. See generally Allen, *Legislative Commission*, *supra* note 2.

adversarial nature of the administrative system. However, it has a distinct feel in many respects because the matters on which the courts are called to opine tend to be concrete.

One can see this trend in the significant attorney fee matters the courts have addressed.³⁶⁴ The courts have struggled to find ways to accommodate the needs of veterans while also ensuring that attorneys are compensated for their work. As I noted, the Court may not have struck the right balance for all cases,³⁶⁵ but it has begun the serious exploration of the issue.

Another example of this trend is the Federal Circuit's decision to extend the sympathetic reading canon to submissions of veterans represented by counsel.³⁶⁶ The Federal Circuit's rationale for doing so was tied *directly* to congressional efforts to make counsel more available to veterans before the agency.³⁶⁷ Thus, the case recognizes the reality that whether the system remains non-adversarial or not, lawyers will be present in increasing numbers. And the courts are going to have to determine how that reality affects the rest of the system.

B. Future Developments

Based on the developments of the past two years, as well as a broader consideration of the trends in the law of veterans' benefits over the past several years, it is possible to make certain predications about likely developments in the near term future. I discuss my thoughts about the future in this sub-section.

First, on a narrow point, it seems highly likely that Congress will address the Federal Circuit's decision in *Henderson* eliminating equitable tolling of the time within which a veteran

³⁶⁴ See *supra* Part I.H (discussing developments concerning attorneys' fees).

³⁶⁵ See *id.*

³⁶⁶ *Robinson v. Shinseki*, 557 F.3d 1355, 1360 (Fed. Cir. 2009).

³⁶⁷ *Id.*

must file a notice of appeal to the Veterans Court.³⁶⁸ I suspect that Congress will amend 38 U.S.C. § 7266 in one way or another to specifically provide that the time to appeal may be tolled under certain circumstances.³⁶⁹ I am strongly in favor of such an amendment. As I have argued before, the movement from a purportedly non-adversarial process before the agency to the adversarial system of judicial review is a major cause of difficulties for veterans.³⁷⁰ The doctrine of equitable tolling is one way in which a negative aspect of the transition can be ameliorated.

Second, there is absolutely no doubt that there will be developments concerning the Federal Circuit's decision in *Cushman* applying the Due Process Clause to veterans' claims seeking benefits.³⁷¹ These developments could come in a variety of ways. First, they will likely be prompted by lawyers representing veterans. These lawyers will no doubt be scouring their cases to identify potential due process claims. This type of activity is precisely what we expect lawyers to do when representing their clients. The arguments lawyers raise will then be considered by the various adjudicators in the system, including the Board, the Veterans Court,³⁷² and the Federal Circuit. Thus, while one cannot

³⁶⁸ See *supra* Part I.A.i (discussing *Henderson* and equitable tolling). The Supreme Court will also play a role as it has elected to review Mr. Henderson's case. See *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *cert. granted*, 130 S. Ct. 3502 (2010).

³⁶⁹ There are a number of different ways in which Congress could amend 38 U.S.C. § 7266 (2006) to include equitable tolling. One possibility would simply be to include a new subsection (e) stating: "The time for appeal set forth in sub-section (a) above shall be subject to principles of equitable tolling." This amendment could also be more specific in terms of adopting the body of law that existed in the Federal Circuit and the Veterans Court prior to *Henderson*. I believe the general approach would be sufficient to accomplish the goal. I expect that if the statute were amended in a general way, the courts would simply put back into place the various rules that were displaced by *Henderson*.

³⁷⁰ See, e.g., Allen, *Significant Developments*, *supra* note 2, at 526-28.

³⁷¹ See *supra* Part I.I (discussing due process issues).

³⁷² I would expect that a related effect of the application of procedural due process principles at the Veterans Court in particular will be an increase in the number of cases decided by a panel, if not by the Court sitting en banc. The reason is that single judge adjudication is meant to be limited to situations in which, in relevant part, the decision "does not establish a new rule of law" or "does not apply an established rule of law to a novel fact situation." VET. APP. INTERNAL OPERATING P. II(b) (1) & (3); see *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990) (initially setting forth the factors

say for sure what the issues will be, one can say with confidence that there will be due process developments.

The downside of developments in the law coming as a result of the process I have just described is that they will come in a piecemeal fashion. They will be driven by the arguments of lawyers in particular cases. Of course, this is how the law often develops in constitutional law.³⁷³ However, there is a possible avenue for development in this area that could avoid at least some of the case-by-case approach.³⁷⁴ The Department could embrace *Cushman* and review its adjudicatory procedures with an understanding that the Due Process Clause now applies. In other words, it could take a look at the adjudicatory process from start to finish with an eye toward developing procedures that comport with the full panoply of constitutional procedural due process rights. Such a review, if it were to occur, should include representatives of all the relevant constituencies to ensure that the Department has the benefit of the views of veterans as well as Department adjudicators. I believe that such a systemic approach to the issue would make the growth of the law in this area far smoother than the case-by-case approach standing alone. I confess, however, that I am not confident that the Department will necessarily take such a proactive approach. I sincerely hope that it does.³⁷⁵

A third likely future development concerns the work done by the Federal Circuit and the Veterans Court dealing with the

for single judge adjudication now included in the Court's internal operating procedures). Since the Due Process Clause did not apply in this area before *Cushman*, it seems that each allegation of constitutional error would be at a minimum the application of a rule to new facts. Indeed, I would argue that each such allegation would best be seen as establishing a new rule of law.

³⁷³ See, e.g., Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (arguing the existence of a constitutionally based common law).

³⁷⁴ Case-by-case development will occur no matter what because lawyers will need to raise due process issues in connection with the cases they bring to the various adjudicatory bodies in the system.

³⁷⁵ In addition, such an effort will provide essential guidance for RO adjudicators who, one expects, will now be required to consider and resolve arguments based on constitutional principles.

definition of “claim.”³⁷⁶ I have explained above that there were a number of decisions on this topic³⁷⁷ and that the courts are likely only at the beginning of their journey in this area.³⁷⁸ While it is possible that developments in this area could come through congressional action, it seems far more likely that the courts will carry the laboring oar.

Finally, I fully expect to see continued attention focused on the nature of the veterans’ benefits system as a whole. Any reader making it to this point in this article cannot have done so without recognizing that the structure of the system from application through appellate judicial review is the proverbial elephant in the room. At times it almost appears to be the backdrop in front of which all else is played out. The President, Congress, and the courts owe it to America’s veterans to think long and hard about the system through which these people receive the benefits they are due.

CONCLUSION

As the foregoing discussion demonstrates, the past two year period has been one of significant growth in the law of veterans’ benefits. It is equally clear that interesting times lie ahead. But one should not lose sight of the central purpose that animates all that is done in this area. Everyone involved in this process is truly the modern embodiment of President Lincoln’s call to support those who served (and sometimes died) for this Nation.³⁷⁹

³⁷⁶ See *supra* Part I.B (discussing cases attempting to define what constitutes a “claim” in various contexts).

³⁷⁷ *Id.*

³⁷⁸ See *supra* Part II.A (discussing trends in decisions concerning the general development of the law).

³⁷⁹ See Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.nationalcenter.org/LincolnSecondInaugural.html>.