

Due Process in the Wake of *Cushman v. Shinseki*: The Inconsistency of Extending a Constitutionally-Protected Property Interest to Applicants for Veterans' Benefits

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INTRODUCTION

In the case of *Cushman v. Shinseki*,² the United States Court of Appeals for the Federal Circuit (Federal Circuit) for the first time addressed whether a Veteran's *application* for VA disability benefits was a property interest protected by the Due Process Clause of the Fifth Amendment of the United States Constitution (Due Process Clause).³ The case opened a Pandora's Box regarding what type of due process must be afforded to a claimant at differing stages of his or her application for Department of Veterans Affairs (VA) disability benefits.

Arguments have been made in support of and against providing a claimant with substantial due process in all circumstances, both before and after the grant of VA benefits. What started with *Cushman's* proposition that "the government failed to fairly apply the existing procedures in his case"⁴ has progressed to a split between whether a claimant is due, at most, "an opportunity to confront and cross-examine adverse witnesses"⁵ and whether he or she should be bound by the current procedure; in other words, that which is good enough for most is good enough for all, and the minimal gains from affording additional due process protections would be outweighed by the additional societal costs.⁶

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² 576 F.3d 1290 (Fed. Cir. 2009).

³ *Id.* at 1292.

⁴ *Id.* at 1299.

⁵ *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

⁶ *Gambill v. Shinseki*, 576 F.3d 1307, 1313 (Fed. Cir. 2009) (Bryson, J., concurring) (citing *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985)).

Some legal scholars have advocated an expansion of the Due Process Clause with respect to applicants for VA benefits in the wake of *Cushman*.⁷ Their arguments presuppose that a claimant for VA benefits has a property interest not only in the ultimate benefit but in the application for the same. Indeed, one legal scholar argues that the *Cushman* holding – that a veteran raising a service connection claim has a due process right to fair adjudication of the claim for benefits – broadens the required procedures necessary to comply with the Due Process Clause on account of the “non-discretionary, statutorily mandated” nature of those benefits.⁸

There is little dispute that this thesis holds true once a claimant for VA benefits *shows* that he or she meets the eligibility requirements for VA benefits and, thus, acquires a property interest in those benefits. However, it remains far from clear whether the claimant can have a legitimate expectation of a property interest at the moment he or she applies for VA benefits, prior to the determination of entitlement. As this article purports to show, the award of VA benefits is only mandatory and non-discretionary once a showing of entitlement is made. Accordingly, in keeping with the decisions of the United States Supreme Court (Supreme Court) and the general principles of administrative law, the Due Process Clause only applies to a VA benefit that the claimant has already been awarded, as prior to such a determination there is no property to take. Therefore, while additional due process protections are necessary where a previously granted benefit is being reduced or eliminated,⁹ to extend such protections to a claimant prior to the actual determination of entitlement and possession of the benefit would arguably be contrary to governing case law and administrative law principles and would create a burden without a benefit.

⁷ See, e.g., Michael P. Allen, Professor at Law, Stetson Univ. Coll. of Law, Remarks at the United States Court of Appeals for Veterans Claims Eleventh Judicial Conference: Due Process and the Veteran: What Is and What Ought to Be (Mar. 5, 2010) (on file with authors) [hereinafter Professor Allen Speech].

⁸ *Id.*

⁹ See 38 C.F.R. §§ 3.105, 3.344 (2009) (indicating the circumstances in which a veteran’s rating may be reduced or severed completely).

In the ensuing pages, we first discuss the *Cushman* opinion, highlighting the facts, issues, and relatively limited holding of that case. We next address the progeny of *Cushman*, including *Gambill v. Shinseki*,¹⁰ focusing on the lack of clarity those cases provide as to when an applicant for VA benefits obtains a property interest in those benefits and, thus, a protected Fifth Amendment right to due process. We then examine the concurrences to the *Gambill* decision, which underscore the two competing views of a claimant's property interest in his or her claim for VA benefits. Thereafter, we explore surrounding case law, including standards and decisions regarding welfare benefits, employment contracts, and Social Security Administration (SSA) disability benefits, which are instructive in determining the scope of the *Cushman* holding and the potential outcome of the question when further considered by the Federal Circuit and the United States Court of Appeals for Veterans Claims (CAVC). We then discuss the basic rights and responsibilities afforded applicants for VA benefits and the due process protections currently provided to applicants for, and recipients of, such benefits. Lastly, we argue that it would be a divergence from established governing case law and administrative law concepts to read *Cushman* as requiring the extension of the Due Process Clause to the application for VA benefits, in the context of both service connection and higher evaluation. We advocate a narrower reading of *Cushman* as indicating that, prior to establishment of entitlement to VA benefits, a claimant is only entitled to fair adjudication of his or her application and that the Due Process Clause is only violated when the claimant shows entitlement to benefits and an adequate remedy is not available under VA's governing statutes and regulations. Moreover, we argue that the current VA procedures provide a claimant with fair adjudication and adequate remedies both before and after establishment of entitlement to benefits.

¹⁰ 576 F.3d 1307 (Fed. Cir. 2009).

I. *CUSHMAN* AND ITS PROGENY

Cushman arose from an appellant's claim for a total rating for compensation based on individual unemployability (TDIU) due to a service-connected back disability.¹¹ That claim was denied in a 1977 decision issued by one of the VA's 57 Regional Offices charged with first-level adjudication of claims for veterans' benefits.¹² In a 1980 decision, the Board of Veterans' Appeals (Board) upheld the Regional Office's denial of TDIU benefits.¹³ The appellant filed a motion for reconsideration, which was denied in 1982.¹⁴ In August 1994, the appellant reapplied for TDIU benefits.¹⁵ This time his claim was granted and benefits were awarded from the date of his most recent claim.¹⁶

Thereafter, the appellant discovered that the record before the Board at the time of its 1980 and 1982 decisions included VA medical records that had been materially altered.¹⁷ Significantly, those medical records had been changed in such a way as to suggest that the Veteran was not unemployable due to his back disability.¹⁸ The appellant's discovery of these altered records prompted him to move to reverse the prior Board decisions. In a motion filed in October 2003, he argued that the altered medical records had understated his back disability and that this error had caused the Board to erroneously deny his TDIU claim.¹⁹ The

¹¹ *Cushman v. Shinseki*, 576 F.3d 1290, 1293 (Fed. Cir. 2009). To qualify for a total rating for compensation based on individual unemployability (TDIU), a veteran must show that he or she has one or more service-connected disabilities that are rated less than totally disabling but nonetheless prevent him or her from obtaining or maintaining gainful employment. 38 C.F.R. § 4.16.

¹² *Cushman*, 576 F.3d at 1293.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1293-94.

¹⁷ *Id.*

¹⁸ *Id.* at 1294.

¹⁹ *Id.* The appellant made two attempts to reverse the prior Regional Office and Board decisions. *Id.* at 1293. However, the Board denied his initial claim on the grounds that the Regional Office's 1977 decision was subsumed by its 1980 and 1982 decisions. *Id.* at 1294.

Board disagreed and ruled that its prior 1980 and 1982 decisions did not reflect specific reliance on the altered medical records and, therefore, it was not possible to prove that consideration of those records was outcome determinative.²⁰ That decision was upheld by the CAVC.²¹

In his appeals to the CAVC and the Federal Circuit, the *Cushman* appellant amended his claim to argue that the prior Board decisions had violated his procedural due process rights under the Fifth Amendment,²² which states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.²³

In this regard, the appellant claimed that the Board's consideration of the altered medical records had effectively denied him a full and fair hearing on the merits of his claim and thereby deprived him of a property interest in the VA benefits he was seeking without due process of law.²⁴

The United States Court of Appeals for Veterans Claims (CAVC) upheld the Board's decision with respect to the 1977 decision. *Id.* That decision was then summarily affirmed by the United States Court of Appeals for the Federal Circuit (Federal Circuit) with the provision that the appellant would be free again to raise his previous claims. *Id.*

²⁰ *Id.* at 1295.

²¹ *Id.*

²² *Id.* at 1295-96.

²³ U.S. CONST. amend. V (emphasis added).

²⁴ *Cushman*, 576 F.3d at 1296.

In addressing the appellant's constitutional challenge, the Federal Circuit first considered the threshold question of whether applicants for VA benefits, who have not yet been found to be entitled to them, possess a property interest in those benefits warranting procedural due process protections under the Fifth Amendment.²⁵

While acknowledging that the Supreme Court had not yet resolved this specific issue,²⁶ the Federal Circuit found persuasive other circuit court holdings that “‘both applicants for and recipients of [service-connected death and disability] benefits possess a constitutionally protected property interest in those benefits.’”²⁷ In addition, the Federal Circuit determined that prior Supreme Court decisions offered relevant guidance by explaining that “‘[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire’ and ‘more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.’”²⁸

The Federal Circuit also looked to Supreme Court case law addressing due process protections in the context of Social Security Administration (SSA) administrative proceedings.²⁹ Specifically, the Federal Circuit observed that SSA and veterans' disability benefits were analogous in the sense that they were not awarded on the basis of need or other discretionary criteria, but, rather, “‘ar[ose] from a source that is independent from the [claim] proceedings themselves.’”³⁰ Moreover, the Federal Circuit noted that both SSA and VA disability claims

²⁵ *Id.* The Federal Circuit noted that in order to allege that the denial of his claim involved a violation of his due process rights, the appellant first had to prove that as a veteran alleging a service-connected disability, he had a constitutional right to a fundamentally fair adjudication of his claim. *Id.*

²⁶ *Id.* at 1296-97 (citing *Lyng v. Payne*, 476 U.S. 926, 942 (1986); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 312, 320 n.8 (1985); *Peer v. Griffith*, 445 U.S. 970 (1980) (Rehnquist, J., dissenting)).

²⁷ *Id.* (quoting *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588 n.7 (9th Cir. 1992)).

²⁸ *Id.* at 1297 (alteration in original) (citing *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972))).

²⁹ *Id.*

³⁰ *Id.*

were adjudicated based on statutory terms of eligibility, which “provide[d] an absolute right of benefits to qualified individuals.”³¹

In light of the above precedents, the Federal Circuit determined that all applicants for “nondiscretionary, statutorily mandated” VA disability benefits were entitled to them and thus had a property interest in those benefits protected by the Due Process Clause “*upon a showing that [they met] the eligibility requirements set forth in the governing statutes and regulations.*”³²

Significantly, the Federal Circuit did not address what, if anything, an applicant for veterans’ benefits would need to do, as an initial matter, to show that he or she “met the eligibility requirements set forth in the governing statutes and regulations.”³³ It was implicit that the *Cushman* appellant, having already prevailed on his initial claim for TDIU, met the eligibility requirements for VA disability benefits, and thus had a property interest in those benefits, which, in the Federal Circuit’s view, entitled him to due process protections under the Fifth Amendment “where there was *no adequate remedy under existing statutes and regulations* to address the VA’s reliance on an improperly altered medical record.”³⁴ The Federal Circuit proceeded to find that the appellant’s right to a fair hearing had been violated by the Board’s consideration of the altered medical records, and thereupon vacated the CAVC decision upholding the Board’s denial of his claim.³⁵

Cushman’s narrow holding, which turned on the specific and unfortunate facts involving tampered VA medical records, was underscored in another Federal Circuit case decided the following

³¹ *Id.*

³² *Id.* at 1298 (emphasis added).

³³ *Id.*

³⁴ *Guillory v. Shinseki*, 603 F.3d 981, 987 (Fed. Cir. 2010) (emphasis added) (citing *Cushman*, 576 F.3d at 1298).

³⁵ *Cushman*, 576 F.3d at 1300; see Donnie Hachey, *Federal Circuit Determines That Entitlement to Veterans’ Disability Benefits Is a Property Interest Protected by the Due Process Clause of the 5th Amendment*, VETERANS L.J., Winter 2010, at 8.

day: *Gambill v. Shinseki*.³⁶ The appellant in this case, unlike his counterpart in *Cushman*, was appealing the denial of an initial application for VA disability benefits.³⁷ Specifically, he sought VA disability compensation for cataracts, which he contended were service connected because they had been caused by a blow to the head that he suffered during military service.³⁸ After the Regional Office denied his claim, he appealed to the Board, which determined that the VA medical provider who had examined the appellant had not adequately addressed the etiology of his cataracts.³⁹ The Board then requested an additional opinion from a VA ophthalmologist as to whether the appellant's bilateral cataracts were as likely as not the result of an in-service head injury.⁴⁰ The ophthalmologist provided a report summarizing the appellant's medical history, listing the risk factors for cataracts, and opining that he "could find no reports suggesting head trauma was a cause or an associated risk factor in the development of cataracts."⁴¹ On the basis of that VA ophthalmologist's opinion, the Board denied the appellant's claim, notwithstanding his submission of additional medical evidence indicating that, in general, head trauma could cause cataracts.⁴²

The appellant filed an appeal to the CAVC arguing that the Board had violated his rights under the Due Process Clause by not allowing him to submit written interrogatories to the VA ophthalmologist.⁴³ The CAVC denied the claim, and the appellant appealed to the Federal Circuit, once again advancing the argument that, under the Due Process Clause, all applicants for VA disability benefits should be afforded the opportunity to confront adverse medical evidence, including through the use of interrogatories.⁴⁴

³⁶ 576 F.3d 1307 (Fed. Cir. 2009).

³⁷ *Id.* at 1310.

³⁸ *Id.* at 1308.

³⁹ *Id.* at 1309.

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis omitted).

⁴² *Id.* at 1309-10.

⁴³ *Id.* at 1310.

⁴⁴ *Id.*

Interestingly, in reviewing the appellant's claim, the Federal Circuit did not specifically address whether, as an applicant for an initial grant of service connection -- as opposed to an earlier effective date for an existing benefit, as in *Cushman* -- the *Gambill* appellant even met the basic *eligibility requirements set forth in the governing VA statutes and regulations*.⁴⁵ Instead, the Federal Circuit summarily observed that, in light of its holding in *Cushman* that the Due Process Clause applied to VA disability benefit proceedings, the proper question was whether the *Gambill* appellant's due process rights had been violated.⁴⁶ However, the Federal Circuit ultimately declined to answer this question, holding instead that any due process violation in the case was harmless error because, even without the negative medical opinion from the VA ophthalmologist, the *Gambill* appellant would not have prevailed based on the other evidence of record.⁴⁷

This holding is noteworthy because it signals that, even in matters where an applicant for VA disability benefits is found to have a protected property interest triggering procedural due process, any due process violation is inconsequential unless he or she can show that the violation would have made a difference in the outcome of his claim.⁴⁸ In other words, the violation has to be sufficiently egregious without statutory or regulatory remedy, as in *Cushman*, to trigger any protections under the Due Process Clause.

In addition to the main opinion, *Gambill* included two concurrences that are pertinent to this discussion of what due process protections should be afforded applicants for VA disability

⁴⁵ *Id.* at 1310-12; see *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

⁴⁶ *Gambill*, 576 F.3d at 1311.

⁴⁷ *Id.* ("We need not address the broad questions whether the absence of confrontation rights in veterans' benefits cases renders such proceedings fundamentally unfair in general, or whether it could render the proceedings unfair in a particular case, because it is clear that the absence of a right to confrontation was not prejudicial in this case.")

⁴⁸ See, e.g., *Guillory v. Shinseki*, 603 F.3d 981, 987 (Fed. Cir. 2010) (finding in a case involving clear and unmistakable error that there was no due process issue because statutes and regulations provided a sufficient remedy for any error in a previous proceeding).

benefits, *assuming arguendo* that they are entitled to such protections in the first place.

The first concurrence, by Judge Bryson, essentially took a narrow view of what the Due Process Clause required vis-à-vis veterans' claims.⁴⁹ Judge Bryson relied heavily on the Supreme Court's decision in *Walters v. National Ass'n of Radiation Survivors*.⁵⁰ That decision, as summarized by Judge Bryson, "analyzed the veterans' benefits system in detail and concluded that, in light of the informal and pro-claimant nature of that system, the Due Process Clause does not require the same kinds of procedures that would be required in a more conventional adversarial proceeding."⁵¹ Specifically, Judge Bryson explained that *Walters* highlighted that due process "'is a flexible concept'" that does not envision any additional procedural safeguard that "'may be outweighed by the societal cost of providing such a safeguard."⁵² Moreover, *Walters* made clear that a particular form of administrative process was "not constitutionally infirm simply because another process would have been useful in a particular case" and that such a process must instead "'be judged by the generality of cases to which it applies."⁵³

Judge Bryson then launched into a discussion of Supreme Court case law preceding *Walters*, which "characterized the critical components of due process as notice and the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"⁵⁴ He explained that the Supreme Court has set forth three factors that warrant consideration in determining what specific procedures must be provided in particular cases:

⁴⁹ See *Gambill*, 576 F.3d at 1313-24 (Bryson, J., concurring).

⁵⁰ 473 U.S. 305 (1985).

⁵¹ *Gambill*, 576 F.3d at 1313 (Bryson, J., concurring).

⁵² *Id.* (quoting *Walters*, 473 U.S. at 320-21).

⁵³ *Id.* at 1313-14 (quoting *Walters*, 473 U.S. at 330).

⁵⁴ *Id.* at 1314 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

(1) “[T]he 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.”⁵⁵

Applying the above factors to the veterans’ claims process, and emphasizing “Congress’s desire that the proceedings in veterans’ benefits cases be ‘as informal and nonadversarial as possible,’” Judge Bryson determined that the procedures available to VA benefit applicants “to obtain and challenge expert medical opinions provide notice and an opportunity to be heard in a meaningful manner and thus satisfy due process standards.”⁵⁶ Judge Bryson then discussed at length what these statutory and regulatory procedures entailed:

Any veteran or veteran’s representative can bring a claim for service-connected disability to a regional office of the [VA]. No statute of limitations bars the filing of an application for benefits, and the denial of an application has no formal *res judicata* effect (citation omitted). The [VA] is required to notify the claimant and the claimant’s representative of any information and any medical or lay evidence that is needed to substantiate the claim; as part of that notice, the [VA] must indicate which portion of that information and evidence is to be provided by the claimant and which portion the [VA] will attempt to obtain on behalf of the claimant. 38 U.S.C. § 5103A. The claimant has a right to a hearing before the

⁵⁵ *Id.* (quoting *Mathews*, 424 U.S. at 334-35).

⁵⁶ *Id.* (quoting *Walters*, 473 U.S. at 323-24).

regional office and can appear, either alone or with a representative; the hearing, moreover, is *ex parte*, as there is no representative of the government opposing the claim. 38 C.F.R. § 3.103(a).

At the hearing before the regional office, the claimant is entitled to produce witnesses. 38 C.F.R. § 3.103(c)(2). To assure “clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with intent to refute evidence or to discredit testimony.” *Id.* Any evidence offered by the claimant and any contention or argument a claimant may offer is to be included in the record. *Id.* § 3.103(d). By statute and regulation, it is the obligation of the [VA] to assist the claimant in developing the facts pertinent to the claim. 38 U.S.C. § 5103A; 38 C.F.R. § 3.103(a), (c). And the regional office is required to construe all applications liberally in favor of the veteran. *See* 38 C.F.R. § 3.155(a); *see also Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004). Finally, unlike in many other settings, the claimant is not required to prove the claim by a preponderance of the evidence; instead, the [VA] is instructed to give the benefit of the doubt to the claimant when “there is an approximate balance of positive and negative evidence regarding any issue material to the determination of the matter.” 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102.

Any decision on the veteran’s claim must be in writing; it must advise the claimant of the reasons for the decision; it must include a summary of the evidence considered by the [VA]; and it must provide an explanation of the procedure for obtaining review

of the decision. 38 U.S.C. § 5104; 38 C.F.R. § 3.103(f). If the veteran disagrees with the decision, the regional office will consider whether to resolve the disagreement, such as by granting the benefit sought. If the regional office does not resolve the disagreement, it will prepare a Statement of the Case to assist the claimant in perfecting an appeal to the Board of Veterans' Appeals. 38 U.S.C. § 7105(d)(1); 38 C.F.R. § 3.103(f).

Like the regional office, the Board is required to construe all of the veteran's arguments "in a liberal manner." 38 C.F.R. § 20.202. A claimant has a right to a hearing on appeal before the Board at which the appellant and witnesses may be present. *Id.* § 20.700. Like the hearing before the regional office, the hearing before the Board is "ex parte in nature and nonadversarial," with no government representative present to oppose the appeal. *Id.* § 20.700(c). At the hearing, the proceeding is not governed by the rules of evidence, and the parties are "permitted to ask questions, including follow-up questions of all witnesses but cross-examination will not be permitted." *Id.* If it appears during such a hearing that additional evidence would assist in the review of the questions at issue, the Board may direct that the record be left open so that the appellant may obtain the desired evidence. *Id.* § 20.709. In addition, if necessary evidence cannot be otherwise obtained, the Board may issue a subpoena at the appellant's request to obtain the presence of a witness residing within 100 miles of the place where the hearing is to be held. *Id.* § 20.711. And . . . the Board may obtain a medical opinion from a VHA physician or an independent medical examiner. *Id.* § 20.901; 38 U.S.C. § 7109(a).⁵⁷

⁵⁷ *Id.* at 1315-16.

Judge Bryson then proceeded to comment on additional primary and secondary legal sources supporting his view that “the procedures that are routinely employed in criminal and civil litigation, including rights to counsel and confrontation, are not constitutionally required components of an administrative benefits system, particularly one [such as the veterans’ claims process] that is nonadversarial and pro-claimant in design and operation.”⁵⁸ He also distinguished the statutes governing administrative proceedings in SSA cases from those governing the veterans’ benefit claims process on the basis of Congress’s express intent that VA’s “informal procedures ‘be continued and that the [Administrative Procedure Act] procedures relating to adjudications continue to be inapplicable.’”⁵⁹

Based on his foregoing analysis, Judge Bryson concluded that the Due Process Clause did not entitle applicants to “use interrogatories or other forms of confrontation to challenge medical opinion evidence,” thereby suggesting that no additional protections were required beyond those contemplated in the governing VA statutes and regulations.⁶⁰

In contrast, the second concurring opinion, authored by Judge Moore, alleged that while the *Gambill* appellant was not prejudiced by his inability to serve interrogatories on the VA

⁵⁸ *Id.* at 1321 (Bryson, J., concurring); see *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 851 n.58 (1977) (“[I]t should not routinely be assumed that any decision made without the forms of adversary factfinding familiar to the legal profession is necessarily arbitrary or incorrect.”); see also Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1290-91 (1975) (“There is no constitutional mandate requiring use of the adversary process in administrative hearings unless the Court chooses to construct one out of the vague contours of the due process clause.”).

⁵⁹ *Id.* at 1323 (comparing the Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (1993) to the Explanatory Statement of the Veterans’ Judicial Review Act of 1988, 134 CONG. REC. 31,477 (1988), reprinted in 1988 U.S.C.C.A.N. at 5843, and noting that “Congress made clear at the time of the Veterans’ Judicial Review Act of 1988 that it did not want the provisions of section 7(c) of the Administrative Procedure Act to apply to veterans’ disability compensation proceedings”); see *Veterans’ Judicial Review Act of 1988*, Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.).

⁶⁰ *Gambill*, 576 F.3d at 1324 (Bryson, J., concurring).

physician; as a general matter, confrontation of medical opinion evidence, including through interrogatories, was an essential component of due process with respect to the Veteran's claims.⁶¹ As a rationale for this view, Judge Moore asserted that such means of confrontation were "necessary to help [VA] understand the limitations of the opinions before it, and may be the veteran's only route to undermine what could otherwise be unassailable evidence in favor of denying benefits."⁶²

Judge Moore then proceeded to cite the *Walters* decision for the opposite principle espoused by his colleague, specifically noting that, under *Walters*, "a process must be judged by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them."⁶³ Judge Moore then concluded that the "inverse applies here—a process insufficient for most is insufficient for all."⁶⁴

Judge Moore also referenced a line of other decisions issued by the Supreme Court,⁶⁵ the circuit courts,⁶⁶ and the CAVC⁶⁷ in support of his belief that the "right to confront adverse witnesses is fundamental to American legal process," not just in criminal

⁶¹ *Id.* (Moore, J., concurring).

⁶² *Id.*

⁶³ *Id.* at 1325 n.1 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985)).

⁶⁴ *Id.*

⁶⁵ *Id.* at 1325 (quoting *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)) (citing *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.")).

⁶⁶ *Id.* at 1326 (citing *Townley v. Heckler*, 748 F.2d 109 (2d Cir. 1984); *Wallace v. Bowen*, 869 F.2d 187 (3d Cir. 1989); *Lidy v. Sullivan*, 911 F.2d 1075 (5th Cir. 1990); *Flatford v. Chater*, 93 F.3d 1296 (6th Cir. 1996); *Lonzollo v. Weinberger*, 534 F.2d 712 (7th Cir. 1976); *Coffin v. Sullivan*, 895 F.2d 1206 (8th Cir. 1990); *Solis v. Schweiker*, 719 F.2d 301 (9th Cir. 1983); *Allison v. Heckler*, 711 F.2d 145 (10th Cir. 1983); *Demenech v. Sec'y of Dep't of Health & Human Servs.*, 913 F.2d 882 (11th Cir. 1990)).

⁶⁷ *Id.* at 1329 (citing *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 300 (2008); *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991)).

cases but also in administrative matters, such as SSA disability claims and in the veterans' benefits system.⁶⁸ He emphasized that “[f]or better or worse, we have noted the increasingly adversarial nature of the veterans' benefits system” since *Walters* was decided.⁶⁹

Less than two months after *Cushman* and *Gambill*, the Federal Circuit again addressed the issue of due process protections with respect to veterans' claims. In *Edwards v. Shinseki*,⁷⁰ the Federal Circuit ruled against an appellant seeking an earlier effective date for a grant of service connection for schizophrenia.⁷¹ The appellant had argued that the VA Regional Office that initially denied him benefits for that disability had deprived him of his due process rights by failing to adequately inform him of a VA psychiatric examination.⁷² Specifically, the appellant argued that, “due to his psychiatric disorder he was unable to comprehend the notices sent to him by the R[egional] O[ffice].”⁷³ He further asserted that VA knew of his psychiatric impairment and, thus, was obligated under the Due Process Clause to provide an alternative type of notice tailored to that impairment.⁷⁴

The Federal Circuit disagreed, holding that, while “[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,” the particular facts of this case did not “justify those extraordinary additional protections.”⁷⁵ As a rationale for that view, the Federal Circuit noted the lack of contemporaneous evidence showing that the appellant was unable to understand the notice letters or that VA was aware

⁶⁸ *Id.* at 1325.

⁶⁹ *Id.* at 1328.

⁷⁰ 582 F.3d 1351 (Fed. Cir. 2009).

⁷¹ *Id.* at 1352.

⁷² *Id.* at 1353.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1355.

of his inability to comprehend them.⁷⁶ Therefore, the Federal Circuit determined that VA “would have had no reason to take the extraordinary course of undertaking proceedings to appoint a guardian or to schedule additional hearings.”⁷⁷

Judge Rader in *Edwards* also took the unusual step of writing separately to discuss the implications of *Cushman*.⁷⁸ While noting that the holding in *Edwards* was consistent with *Cushman*’s application of due process protections to claimants seeking veterans’ benefits, Judge Rader nonetheless took issue with *Cushman*’s finding of “‘property interest[s] protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.’”⁷⁹

In this regard, Judge Rader emphasized that the Supreme Court deliberately refrained from finding that “‘applicants for [government] benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.’”⁸⁰ He then asserted that in *Cushman* the Federal Circuit had “stepped beyond the bounds set by the Supreme Court for property rights and due process protections.”⁸¹ The rationale for Judge Rader’s view will be addressed in further detail below, in the section examining the statutes and regulations governing claimants for VA benefits and what property rights, if any, derive from those provisions.

II. THE SURROUNDING LAW AND CONTRASTING LEGAL SITUATIONS

Cushman and its progeny, while attempting to answer an issue regarding VA disability compensation law, were not issued in a legal vacuum. Review of the surrounding law indicates that

⁷⁶ *Id.* at 1356.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1356-58 (Rader, J., additional views).

⁷⁹ *Id.* at 1356 (quoting *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009)).

⁸⁰ *Id.* at 1356-57 (quoting *Lyng v. Payne*, 476 U.S. 926, 942 (1986)).

⁸¹ *Id.* at 1357.

the general issue of whether an applicant is entitled to protection pursuant to the Due Process Clause during the application process has been considered by basic administrative law principles and specifically in regard to applications for SSA disability benefits. As discussed above, the concurrences in *Gambill* highlight the salient points regarding whether the Due Process Clause applies to applications for VA benefits. However, further investigation into the administrative law underpinnings of the due process afforded applicants for government benefits is beneficial to understanding the nature of the present issue.

In the rubric of the Administrative Procedure Act (APA), VA's actions in determining the eligibility of a claimant for service-connected benefits or for a higher evaluation for a previously granted benefit fall under the APA's definition of adjudication and, therefore, would fall underneath the principles and requirements for agency adjudication, either formal or informal.⁸² The adjudicative nature of VA's review of a claimant's eligibility to receive benefits is a formal, on-the-record determination because the statutes authorizing VA's actions require that the claimant be afforded, at the appellate level before the Board, a decision supported by reasons and bases, based upon findings of fact and a hearing, if desired.⁸³

In the case of *Wong Yang Sung v. McGrath*,⁸⁴ the Supreme Court "concluded that due process required an adjudicatory hearing in deportation of an alien" and that this required a hearing held in a trial-type manner under the APA.⁸⁵ However, review of the relevant sections of the APA reveals that, while an employee of an agency who presides over a hearing and determination may not "consult a person or party on a fact in issue, unless on notice and

⁸² See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 653 (Aspen Law & Business 5th ed. 2002) (discussing the breadth of the APA's definition of "adjudication").

⁸³ See *id.* at 654; 38 U.S.C. § 7104 (2006).

⁸⁴ 339 U.S. 33 (1950), *modified by* 339 U.S. 908 (1950).

⁸⁵ BREYER ET AL., *supra* note 82, at 654; *Wong Yang Sung*, 339 U.S. at 50-51.

opportunity for all parties to participate,” participation does not necessarily have to include *ex post facto* submission of questions to the investigator.⁸⁶

The existing case law supports the concept that once an individual has been determined to be entitled to a benefit or is in receipt of a benefit *based solely upon economic need*, the beneficiary must be afforded a fair evidentiary hearing *prior to the termination* of the benefit.⁸⁷ However, even under the circumstances of terminating such a benefit, an individual that is in receipt of benefits is not entitled to a judicial or quasi-judicial trial, just a *fair hearing*.⁸⁸ When addressing the question of the due process that is required by the Due Process Clause in the context of termination of a benefit, the Supreme Court has stated that an opportunity to confront and cross-examine adverse witnesses must be provided.⁸⁹ However, the existing case law offers little or no support for the concept that an individual is entitled to an evidentiary hearing prior to establishment of entitlement to a benefit.⁹⁰ To the contrary, as noted above, the relevant cases have indicated that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”⁹¹

⁸⁶ 5 U.S.C. § 554(d)(1); *see id.* §§ 554-556.

⁸⁷ *See* BREYER ET AL., *supra* note 82, at 798-812; *see also* *Goldberg v. Kelly*, 397 U.S. 254 (1970) (terminating welfare benefits by finding a lack of continued eligibility); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972) (refusing to renew a contract for employment).

⁸⁸ *See* BREYER ET AL., *supra* note 82, at 798-812; *Goldberg*, 397 U.S. at 261.

⁸⁹ *Goldberg*, 397 U.S. at 259.

⁹⁰ *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976). We note that in *Board of Regents*, the Supreme Court indicated first that *Goldberg* stood for the proposition that once an individual is receiving a benefit, due process must be afforded prior to termination of the benefit. *Bd. of Regents*, 408 U.S. at 577. The Supreme Court continued to state that an evidentiary hearing was necessary in the *Goldberg* case even though entitlement had not been established regarding *continued* entitlement to welfare benefits which can be distinguished from *initial* entitlement to benefits. *Id.*

⁹¹ *Cushman v. Shinseki*, 576 F.3d 1290, 1297 (Fed. Cir. 2009) (quoting *Bd. of Regents*, 408 U.S. at 577).

There are few cases that discuss the applicability of the Due Process Clause in the context of VA benefits. In *Walters*, the Supreme Court held that fee limitations imposed by the statute establishing VA's adjudicatory process did not violate the Due Process Clause.⁹² As set forth briefly above, the Supreme Court noted that the concept of "due process" is flexible and that it varies "depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur."⁹³ Continuing, the Supreme Court stated that the question was one of "fundamental fairness" and that the Fifth Amendment does not require that "the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error."⁹⁴ Lastly, the Supreme Court observed that the actual protection to be gained by additional due process must be weighed against the societal cost of providing the protection.⁹⁵ The Supreme Court noted that the appropriate test to be applied to claims for VA benefits was the due process standard set forth in *Mathews* regarding applications for SSA benefits.⁹⁶ This test was described by the Supreme Court as requiring that "a court . . . consider the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedural safeguards, and the government's interest in adhering to the existing system."⁹⁷ The Supreme Court further remarked that the rules and the inherent risks associated with the truth-finding process should be considered as applied to the whole of cases and not the exceptions.⁹⁸

Specific to the facts in *Walters*, the Supreme Court determined that the government interest at issue was that VA claimants have the ability to apply for benefits without having to

⁹² *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 333-34 (1985).

⁹³ *Id.* at 320 (citing *Mathews*, 424 U.S. at 334; *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

⁹⁴ *Id.* (omission in original) (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)).

⁹⁵ *Id.* at 320-21 (citing *Mathews*, 424 U.S. at 348).

⁹⁶ *Id.* at 321.

⁹⁷ *Id.* (citing *Mathews*, 424 U.S. at 335).

⁹⁸ *Id.* (citing *Mathews*, 424 U.S. at 344).

incur the cost, either out of pocket or by reducing the award granted, of hiring an attorney to prosecute their claim.⁹⁹ The VA system of benefits was intentionally made as simple, informal, and nonadversarial as possible to further the goal of not requiring an attorney.¹⁰⁰ The Supreme Court held that the governmental interest involved was to be afforded great weight in the circumstances of the attorney fees.¹⁰¹

Turning to the next step in the *Mathews* test regarding the likelihood of erroneous deprivation, the Supreme Court found that the success rates of attorneys and non-attorney representatives were similar and, therefore, “[n]either the difference in success rate nor the existence of complexity in some cases is sufficient to warrant a conclusion that the right to retain and compensate an attorney in VA cases is a necessary element of procedural fairness under the Fifth Amendment.”¹⁰²

The Supreme Court next commented upon its decision in *Goldberg v. Kelly*, stating that it was distinguishable from *Walters* because the welfare payments at issue in *Goldberg* were different from VA benefits and that VA disability compensation was more akin to the SSA disability benefit addressed in *Mathews*.¹⁰³ The Supreme Court reasoned that since the VA system was non-adversarial and the decision maker had a duty to assist the claimant, there was considerably less need for applicants in VA cases to be represented by counsel.¹⁰⁴ In sum, the Supreme Court in *Walters* held, using the *Mathews* test, that the Due Process Clause was not violated by the fee limitations prescribed in the VA statute.¹⁰⁵

However, the Supreme Court, in generating the *Mathews* test, noted that “[t]he essence of due process is the requirement that ‘a person in jeopardy of serious *loss* (be given) notice of the

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 323-24.

¹⁰¹ *Id.* at 326.

¹⁰² *Id.* at 331.

¹⁰³ *Id.* at 333.

¹⁰⁴ *Id.* at 333-34.

¹⁰⁵ *Id.* at 334.

case against him and opportunity to meet it.”¹⁰⁶ The Supreme Court further reiterated that “[i]n assessing what process is due . . . substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.”¹⁰⁷ Additionally, the Supreme Court held that an *evidentiary hearing* was not required prior to termination of disability benefits because, in part, the applicant must demonstrate continued eligibility.¹⁰⁸

Workers’ compensation and welfare, while distinguishable from the VA disability compensation system, are also instructive to understanding what due process protections should be afforded claimants for VA benefits.

The workers’ compensation structure provides an insurance payment for an injury incurred on the job; payments are made regardless of need, and the protections vary from state to state. There are three broad categories of recovery under workers’ compensation: (1) medical and related expenses; (2) disability benefits; and (3) death benefits.¹⁰⁹ The first category includes payment for expenses incurred in treating the injury.¹¹⁰ The second category is designed to provide compensation for the loss of earnings or earning power determined on the basis of either medical loss or wage loss theories, or some combination thereof.¹¹¹ These benefits may be paid weekly, monthly, or as a lump sum and are based on a statutory formula. Lastly, the third category includes provisions for the dependents of a deceased worker.¹¹²

¹⁰⁶ *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) (emphasis added) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

¹⁰⁷ *Id.* at 349 (citing *Arnett v. Kennedy*, 416 U.S. 134, 202 (1973) (White, J., concurring in part and dissenting in part)).

¹⁰⁸ *Id.* at 335-37, 349.

¹⁰⁹ 4 LEX K. LARSON, *LARSON’S WORKERS’ COMPENSATION LAW* § 80.01 (2007).

¹¹⁰ 5 *id.* § 94.02.

¹¹¹ 4 *id.* §§ 80.02, 80.05.

¹¹² 5 *id.* § 98.01.

Importantly, the medical loss and wage loss theories of determining compensation for the loss of earnings attempt to compensate the injured worker for lost earnings or earning power.¹¹³ Under the medical loss theory, certain schedules exist for certain losses providing a predetermined amount for a particular loss, regardless of earnings capacity.¹¹⁴ The wage loss theory attempts to compensate the injured worker based upon the actual earnings lost due to the injury.¹¹⁵ An injured worker may be classified as temporary partial, temporary total, permanent partial, or permanent total depending upon the severity and nature of the injury and/or disability sustained.¹¹⁶ In addition, some jurisdictions have added compensation for disfigurement.¹¹⁷

By way of similarity, the VA benefits system can be termed a medical loss system in that it attempts to provide the Veteran with a payment intended to make the Veteran whole based upon average earning capacity as set by regulation.¹¹⁸ The ratings “represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations.”¹¹⁹ The system is designed to compensate for functional impairment and is flexible to take into account the fluctuations of a veteran’s condition over time.¹²⁰ Disputed workers’ compensation claims are, like VA benefits claims, processed through administrative proceedings rather than by the courts in most jurisdictions and there is judicial review of the decisions made by the administrative organization.¹²¹

¹¹³ 4 *id.* §§ 80.02, 80.05.

¹¹⁴ *Id.* §§ 86.01, 86.02.

¹¹⁵ *Id.* §§ 80.02, 80.05.

¹¹⁶ *Id.* §§ 80.03, 80.04.

¹¹⁷ *Id.* § 88.01.

¹¹⁸ 38 C.F.R. § 4.1 (2009).

¹¹⁹ *Id.*

¹²⁰ *Id.* §§ 4.1, 4.10.

¹²¹ See generally 4 LARSON, *supra* note 109.

However, there are substantial differences between the VA benefits system and workers' compensation. For example, workers' compensation claimants are held to a statute of limitations, whereas claimants for VA benefits may apply at any point after separation from service.¹²² Moreover, the workers' compensation system has been called a type of "no fault" insurance, while the VA benefits system does not function as a type of insurance program but rather is a system based upon the status of the applicant as a veteran or as a dependent of a veteran.¹²³

In regard to welfare payments, as noted above, the Supreme Court has ruled that VA compensation and disability benefits are more similar to SSA benefits because the benefits are not predicated on need.¹²⁴ In addition, the Supreme Court has observed that there is little discretion in the granting of welfare benefits as the entitlement is based largely on having an income below a certain mark.¹²⁵ As such, an applicant for VA benefits cannot have the same reliance on the benefits as an applicant for welfare benefits, as he or she must demonstrate entitlement.¹²⁶

In total, the Supreme Court may have stated it best in *Lyng v. Payne*,¹²⁷ holding that applicants for VA and other government benefits are not entitled to Fifth Amendment property right protections merely by applying for such benefits.¹²⁸ Moreover, applicants for VA benefits arguably are less in need of constitutional due process protections than claimants for other types of government benefits in light of the nonadversarial nature of the VA claims process, discussed below.

¹²² Compare 4 *id.* § 80.03[7], with 38 U.S.C. §§ 1110, 1131 (2006).

¹²³ Compare 4 LARSON, *supra* note 109, § 80.02, with 38 U.S.C. §§ 101, 1310, 1312.

¹²⁴ *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 332-33 (1985).

¹²⁵ *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

¹²⁶ See *Walters*, 473 U.S. at 332-33; *Goldberg*, 397 U.S. at 262; 38 U.S.C. § 5107(a).

¹²⁷ 476 U.S. 926 (1986).

¹²⁸ *Id.* at 942.

III. DUE PROCESS AND CLAIMS FOR SERVICE CONNECTION

We now turn to the key question of when the Due Process Clause invests an entitlement to a property interest in VA benefits. As the Federal Circuit has observed, such “[e]ntitlements derive from ‘an independent source such as state law,’ that is, statutes or regulations.”¹²⁹ Thus, it is necessary to look at the provisions governing VA benefits, found under Title 38 of the U.S. Code and Chapter 38 of the Code of Federal Regulations, to ascertain at what point in the claims process, if any, a claimant comes to possess a property interest in VA benefits.

As noted in the introduction, some legal scholars interpret *Cushman* to hold that a property interest attaches at the moment a claimant first applies for veterans’ benefits.¹³⁰ However, arguably the governing VA statutes and regulations afford a property interest, and therefore due process protections, only after a party shows that he or she meets the legal criteria to prevail on a claim for VA benefits.

As noted by Judge Rader in his separate opinion in *Edwards*, the governing VA statutes and regulations “do not create legitimate property” for claimants seeking VA benefits “but only offer benefits for those who qualify.”¹³¹ Indeed, those governing provisions require claimants to meet specific requirements prior to obtaining VA benefits.¹³²

A claimant must first show that he or she is a Veteran or is otherwise eligible to obtain VA benefits; for example, as a Veteran’s dependent or as the surviving spouse of a deceased Veteran.¹³³

¹²⁹ *Cook v. Principi*, 318 F.3d 1334, 1351 (Fed. Cir. 2002) (Gajarsa, J., dissenting) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

¹³⁰ See Professor Allen Speech, *supra* note 7; *Cook*, 318 F.3d at 1351 (Gajarsa, J., dissenting).

¹³¹ *Edwards v. Shinseki*, 582 F.3d 1351, 1358 (Fed. Cir. 2009) (Rader, J., additional views).

¹³² See *Cushman v. Shinseki*, 576 F.3d 1290, 1297 (Fed. Cir. 2009).

¹³³ *E.g.*, 38 U.S.C. §§ 101, 1110, 1131, 1311, 1313 (2006).

Moreover, even assuming a claimant can show he or she is eligible to obtain VA benefits, receipt of such benefits is not a foregone conclusion. Notwithstanding the paternalistic nature of the VA benefits system, which affords qualified claimants the benefit of the doubt in proving entitlement to benefits,¹³⁴ such claimants are still required “to present and support a claim for benefits under laws administered by [VA].”¹³⁵ Indeed, claimants face a “burden of persuasion, in that the evidence must rise to a state of equipoise for the claimant to win.”¹³⁶

For example, a claimant seeking an initial grant of service connection must show, at a minimum, that he or she has a current disability that is at least as likely as not caused or aggravated by an in-service event or injury or is otherwise related to a period of qualifying active military service.¹³⁷ Similarly, as discussed below, a claimant seeking increased compensation for a service-connected disability must show that the disability has worsened to an extent warranting a higher rating under the VA rating schedule or an extraschedular rating.¹³⁸

Moreover, applicants for VA benefits are far from idle bystanders with respect to the burden of developing the necessary evidence to support their claims for adjudication. Even affording these applicants every benefit of the doubt, as required by VA’s governing statutes and provisions, they still face an initial burden of proof. This burden was expressly acknowledged by the CAVC in its discussion of the “benefit of the doubt” rule in *Gilbert v. Derwinski*:

¹³⁴ *Id.* § 5107(b); see *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1991); Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases before VA: The “New Paternalism,”* 1 VETERANS L. REV. 2, 4 (2009).

¹³⁵ 38 U.S.C. § 5107(a); see *Skoczen v. Shinseki*, 564 F.3d 1319, 1323 (Fed. Cir. 2009).

¹³⁶ *Skoczen*, 564 F.3d at 1324 (internal quotation marks omitted).

¹³⁷ *Dingess v. Nicholson*, 19 Vet. App. 473, 484 (2006).

¹³⁸ 38 C.F.R. § 3.321(a), (b) (2009). An extraschedular rating in compensation cases is provided in exceptional cases where the schedular evaluations are found to be inadequate based upon “an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.” *Id.* § 3.321(b)(1).

It is important that note be taken of some of the limits of the “benefit of the doubt” rule. It does not apply during the process of submitting or gathering evidence. The statute provides that it becomes an issue only “after consideration of all evidence and material of record.” Moreover, the rule does not apply to each and every issue; by its terms, it applies only to “the merits of an issue *material to the determination of the matter.*” Finally, the rule does not ease the veteran’s initial burden of proof. Read together, § 3007(a) and (b) establish and allocate chronological obligations. Pursuant to § 3007(a) the initial obligation rests with the veteran: “A person who submits a claim . . . shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded.” Under § 3007(b) the “benefit of the doubt” rule does not shift “from the claimant to the [Secretary]” the initial burden to submit a facially valid claim. Thus, the submission of a facially valid claim is necessary; inherently incredible allegations of injury would obviously not suffice. Once a veteran’s initial burden is met, the Secretary is then obligated under § 3007(a) to “assist such a claimant in developing the facts pertinent to the claim.” When all of the evidence is assembled, the Secretary, or his designee, is then responsible for determining whether the evidence supports the claim or is in relative equipoise, with the veteran prevailing in either event, or whether a fair preponderance of the evidence is against the claim, in which case the claim is denied.¹³⁹

We recognize that since the advent of the Veterans’ Claims Assistance Act of 2000 (VCAA), which followed *Gilbert*, VA is required to provide claimants with considerably more assistance

¹³⁹ *Gilbert*, 1 Vet. App. at 55 (citations omitted). 38 U.S.C. § 3007 was later revised and replaced with 38 U.S.C. § 5107 (2006).

in proving their claims.¹⁴⁰ In particular, the VCAA requires VA to “make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant’s claim for a benefit.”¹⁴¹ Nevertheless, the VCAA has not eliminated the claimants’ evidentiary burden, as observed by the Federal Circuit in *Skoczen v. Shinseki*, a case decided shortly before *Cushman*:

Section 5107(a) is silent as to the quantum of evidence necessary to grant a veteran’s benefit claim. Section 5107(b), however, instead squarely addresses this issue, and we have previously interpreted subsection (b). Under subsection (b), the claimant enjoys what is termed the “benefit of the doubt rule,” or alternatively what may be thought of as an “equality of the evidence” standard (as opposed to the more common ‘preponderance of the evidence’ standard applied in most civil contexts). That is, we can think of this standard as a “burden of persuasion” in that the evidence must rise to a state of equipoise for the claimant to “win.” But, at the same time, it may be misleading to call it a traditional burden, which usually rests entirely on a single party in a proceeding. In the veterans’ claims adjudication process, the responsibility for developing evidence may, at certain times during the process, reside on both the claimant and VA.

. . . . True, a claimant generally does not shoulder all the responsibility of providing evidentiary support for his or her benefits claim The claimant, however, will at times have some responsibility to submit

¹⁴⁰ 38 U.S.C. § 5103A.

¹⁴¹ *Skoczen*, 564 F.3d at 1325 (quoting 38 U.S.C. § 5103A(a)(1)); *see also* *Moore v. Shinseki*, 555 F.3d 1369, 1372 (Fed. Cir. 2009) (noting that the duty to assist requires VA to attempt to obtain a claimant’s service treatment records); *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 419 F.3d 1317, 1318-19 (Fed. Cir. 2005) (noting that where necessary VA’s duty to assist includes providing a medical examination).

evidence corroborating his eligibility for a claimed benefit The notification and response scheme created by [the VCAA] contemplates situations in which the claimant will be responsible for producing the evidence to prove eligibility for the benefit. An example would be records of a veteran's private physician.

...
Additionally, 38 U.S.C. § 5124 authorizes VA to accept the claimant's statement-as opposed to some independent documentation – "as proof of the existence of any relationship" relating to the claim, such as marriage, dissolution of a marriage, birth of a child, and death of any family member. In this instance, the statute plainly requires the claimant to submit proof of the relationship issue, albeit the proof required is merely the claimant's statement. Again contemplating a claimant's ability to submit evidence, section 5125 instructs that, when a claimant submits a private physician's report "in support of a claim for benefits," VA may accept that report "without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim."¹⁴²

In sum, the threshold eligibility requirements that an applicant must meet to establish eligibility for VA benefits, combined with the evidentiary burden he or she then shoulders in proving the claim, signal that not all claimants will succeed in acquiring benefits. Indeed, entitlement to VA assistance in proving a claim, even under the new VCAA regime, is not to be confused with entitlement to VA benefits, which presumes that

¹⁴² *Skoczen*, 564 F.3d at 1324-26 (citations omitted).

enough competent evidence exists to support the claim. VA's duty to assist does not translate to a duty to grant a claim where the preponderance of the evidence weighs against it.¹⁴³

For the foregoing reasons, it would seem disingenuous to presume that every claimant for VA benefits has "a legitimate claim of entitlement" in those benefits, which, as noted in *Cushman* and *Edwards*, is the prerequisite set forth by the Supreme Court for attachment of a property interest.¹⁴⁴ It follows that each and every claimant should not be presumed to have a property interest in VA benefits under the Due Process Clause. To presume otherwise would effectively mean that every claimant would have a property interest in a potential future benefit to which he or she might very well be found not to be entitled.

Moreover, to afford claimants a property interest in VA benefits they are not qualified to receive would arguably be a meaningless exercise under the Due Process Clause. This is because unqualified claimants are not entitled to a remedy for any breach of due process since such a breach amounts to harmless error. Indeed, this was the case in *Gambill*, where the failure of the appellant's service connection claim effectively mooted any discussion of whether he was entitled to serve interrogatories on a VA physician under the Due Process Clause.¹⁴⁵

The outcome in *Gambill* illustrates why any extension of property interests prior to an initial award of VA benefits would not amount to a substantive expansion of due process rights

¹⁴³ 38 U.S.C. § 5107; *Gilbert*, 1 Vet. App. at 55 (holding, in pertinent part, that if a preponderance of the evidence is against the claim, the claim is denied).

¹⁴⁴ *Cushman v. Shinseki*, 576 F.3d 1290, 1297 (Fed. Cir. 2009); *Edwards v. Shinseki*, 582 F.3d 1351, 1356-57 (Fed. Cir. 2009) (citing *Lyng v. Payne*, 476 U.S. 926, 942 (1986)).

¹⁴⁵ *Gambill v. Shinseki*, 576 F.3d 1307, 1311 (Fed. Cir. 2009) ("We need not address the broad questions whether the absence of confrontation rights in veterans' benefits cases renders such proceedings fundamentally unfair in general, or whether it could render the proceedings unfair in a particular case, because it is clear that the absence of a right to confrontation was not prejudicial in this case.").

for the majority of claimants seeking VA benefits. While such claimants could allege, as the *Gambill* appellant did, that their due process rights had been violated, they would not be entitled to a remedy absent a showing that, but for the particular due process violation, they would have prevailed in obtaining VA benefits. In other words, they would have to show something more than mere willingness to apply for VA benefits in order for the Due Process Clause to have any meaning with respect to their claims. This “something more” amounts to a showing of threshold eligibility and evidentiary production. Indeed, only then do applicants for VA benefits come to possess “a legitimate claim of entitlement” to those benefits such that a property interest arises and due process protections become necessary to ensure that their claims are adjudicated fairly.

How, then, does this view reconcile with *Cushman*? As noted above, the Federal Circuit in *Cushman* clearly held that applicants for VA disability benefits possessed a property interest protected by the Due Process Clause “upon a showing that [they met] the eligibility requirements set forth in the governing statutes and regulations.”¹⁴⁶ These provisional requirements alluded to in *Cushman*, which applicants must meet to be afforded due process protections, are tantamount to the *something more* discussed above which distinguishes mere applicants for VA benefits from applicants who are demonstrably qualified to receive those benefits. Interpreted in this manner, *Cushman* is not inconsistent with the view that property interests in VA benefits do not attach at the moment a claimant applies for benefits but, rather, at the moment he or she shows that he or she meets the statutory and regulatory criteria necessary to prevail on the claim.

Nor is this view inconsistent with the holdings of other federal circuit courts with respect to SSA retirement benefits. The judge in *Edwards* filed an additional views section noting that

¹⁴⁶ *Cushman*, 576 F.3d at 1298 (emphasis added).

many federal circuit courts have found SSA claimants to have a property interest in retirement benefits.¹⁴⁷ Significantly, however, that interest is predicated on their contributions to the SSA payment program throughout their working lives.¹⁴⁸ Indeed, as the *Edwards* judge observed:

Social security reimbursement usually vests early in a worker’s career. A worker has a legitimate expectation and reliance upon contributions to that program as entitlements to retirement payments. Social security differs from programs like veterans benefits that specify tests for eligibility. Rather, social security claimants—unlike applicants for veterans’ benefits—have paid into the retirement system with an expectation of recovery of investments.¹⁴⁹

The *Edwards* judge then proceeded to contrast the SSA program with the VA claims process, in which “[b]efore demonstrating an entitlement to benefits, a veteran must first prove an injury or condition sustained as a result of their service.”¹⁵⁰ The judge added that “[w]ithout such a showing, no ‘entitlement’ arises.”¹⁵¹ He concluded that “this hurdle to benefits defeats any claim to property protections during eligibility inquiries,”¹⁵² thus arguing squarely against any entitlement to due process rights at the moment a claimant applies for VA benefits.

In sum, under our reading of *Cushman*, *Gambill*, *Edwards*, and other relevant case law, applicants for VA benefits, as distinct from applicants for certain types of other government benefits, such as Social Security retirement, are not automatically afforded a property interest and, therefore, due process rights under the

¹⁴⁷ *Edwards*, 582 F.3d at 1358 (Rader, J., additional views).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citing *Flemming v. Nestor*, 363 U.S. 603, 609-10 (1960)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

Fifth Amendment. Rather, VA claimants must first show that they meet the threshold eligibility and evidentiary standards required to obtain such benefits. At this point the benefits will be granted and property interests will attach.

Naturally, once property interests attach, they remain for as long as the beneficiary is found to be legally entitled to VA benefits. It follows that individuals who are currently in receipt of VA benefits are entitled to Fifth Amendment due process protections before any benefit can be reduced or eliminated. This constitutional law distinction between the rights of applicants who have not yet demonstrated the eligibility requirements for VA benefits and current VA beneficiaries is mirrored in VA's governing statutes and regulations. Indeed, these provisions essentially afford fewer protections to claimants seeking initial VA benefits and greater protections to those who are trying to hold onto the benefits they currently have.

IV. DUE PROCESS AND CLAIMS FOR HIGHER EVALUATION

In the context of claims of entitlement to service connection, as discussed above, it is clear that a claimant is not in receipt of the benefit at the time of application and once service connection has been granted due process protections apply prior to termination. However, the question of whether the Due Process Clause extends protection to claims of entitlement to a higher evaluation for a disability for which an individual has already been awarded benefits must also be considered.

Claims for entitlement to a higher evaluation break into two forms, entitlement to a higher initial evaluation where the VA beneficiary contends that the evaluation awarded immediately following the grant of service connection is insufficient, and entitlement to an increased evaluation where the beneficiary asserts that an existing evaluation of a disability no longer

adequately compensates for the disability because of worsening of symptoms.¹⁵³ Extension of the concepts of *Cushman* and *Gambill* indicate that consideration must be given to whether a beneficiary has an established property interest protected by the Due Process Clause in seeking entitlement to a higher evaluation.

Extrapolation of the arguments regarding service connection claims to applications for higher evaluations indicates that until a claimant is granted entitlement to a particular evaluation, he or she does not have an established property interest in the higher, as yet unawarded, evaluation.

The relevant case law dictates that, for the entire period implicated by a claim of entitlement to a higher evaluation, VA may assign one or multiple evaluations based upon identifiable symptoms of severity over discrete intervals of time.¹⁵⁴ A single evaluation for the entire period at issue is neither necessary nor desired in circumstances where there is clear evidence that the condition has worsened or improved at various stages during the period on appeal. This is commonly called a “staged” evaluation.¹⁵⁵

In *Singleton v. Shinseki*¹⁵⁶ the CAVC took up the issue of whether the VA improperly reduces an evaluation without proper due process when it assigns an initial staged disability where a period of a higher evaluation is followed by a period of a lesser evaluation.¹⁵⁷ In *Singleton* the claimant was awarded service connected benefits for posttraumatic stress disorder and schizophrenia.¹⁵⁸ The applicant was assigned an initial evaluation of 50 percent disabling, effective from April 11, 1980, to December 9, 1980; 100 percent disabling, effective from December 10, 1980, to October 31, 1991; 70 percent

¹⁵³ See *Fenderson v. West*, 12 Vet. App. 119 (1999); *Francisco v. Brown*, 7 Vet. App. 55 (1994).

¹⁵⁴ See *Hart v. Mansfield*, 21 Vet. App. 505, 509-10 (2007); *Fenderson*, 12 Vet. App. at 125-26.

¹⁵⁵ See *Fenderson*, 12 Vet. App. at 126; *Hart*, 21 Vet. App. at 509-10.

¹⁵⁶ 23 Vet. App. 376 (2010).

¹⁵⁷ *Id.* at 377.

¹⁵⁸ *Id.*

disabling, effective from November 1, 1991, to December 28, 2000; and 100 percent disabling, effective from December 29, 2000.¹⁵⁹

The beneficiary argued that “in its assignment of staged disability ratings, [the VA] improperly ‘reduced’ to 70 [percent] disabling, the 100 [percent] disability rating assigned from December 10, 1980, to October 31, 1991.”¹⁶⁰

VA argued that in assigning an initial staged rating, “there is no danger that a veteran will be deprived of income that he or she is accustomed to using to meet day-to-day expenses.”¹⁶¹ In addition, VA relied on the Federal Circuit’s holding in *Reizenstein v. Shinseki*,¹⁶² which held that the procedural protections afforded to protect VA beneficiaries from the reduction of total disability ratings “were not applicable to staged disability ratings because such protections were intended to apply prospectively, rather than retrospectively, to those veterans who had become dependent upon the benefits deriving from a total disability rating.”¹⁶³ It was further noted that a beneficiary, after adjudication of the staged rating, would receive a lump sum payment for the prior time period and, therefore, would not become dependent upon the payments.¹⁶⁴ Therefore, the protections afforded to a beneficiary in receipt of a particular evaluation did not extend to an applicant who was being initially evaluated. The CAVC noted that the purpose of the relevant regulation was “to protect veterans who are dependent on the monthly compensation that accompanies their total disability rating from a sudden and arbitrary reduction in their benefits that could jeopardize their ability to pay for day-to-day necessities.”¹⁶⁵ The CAVC affirmed VA’s interpretation that “the procedural protections of the regulation are inapplicable to retroactively assigned staged disability ratings.”¹⁶⁶

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 379.

¹⁶² 583 F.3d 1331 (Fed. Cir. 2009).

¹⁶³ *Singleton*, 23 Vet. App. at 378-79 (citing *Reizenstein*, 583 F.3d at 1337).

¹⁶⁴ *Id.* at 379.

¹⁶⁵ *Id.* (quoting *Reizenstein*, 583 F.3d at 1337).

¹⁶⁶ *Id.* at 380.

The *Singleton* and *Reizenstein* cases shed light on the CAVC and the Federal Circuit's consideration of property interests assigned in VA disability evaluations by indicating that a VA applicant who is not yet in receipt of compensation payments does not have a vested property interest in the particular evaluation because the applicant has not had a chance to become dependent upon the payments.¹⁶⁷ However, as discussed below, once a beneficiary is in receipt of a particular evaluation for his or her disability and is receiving payments from VA, he or she is protected from reduction and termination of compensation payments until extensive notice and due process protections have been satisfied.¹⁶⁸

In sum, the CAVC in *Singleton* and the Federal Circuit in *Reizenstein* held, in essence, that a VA applicant does not have a property interest in any period of a staged evaluation, covering a period for which he or she seeks a higher evaluation or directly following the initial grant of service-connected benefits, which may include periods of higher evaluation followed by lower evaluation because there is no reliance upon the award, and the reduction and/or termination of an award or evaluation after establishment and a period of reliance.¹⁶⁹ In view of this precedent, it would be inapposite to read *Cushman* and *Gambill* as providing property interests in service connection prior to award and reliance on the benefits. As such, it remains that before establishment of entitlement to a benefit or reliance on a level of benefits is established, there can be no property interest invoking the Due Process Clause.

V. CURRENT DUE PROCESS PROTECTIONS

The last several pages have addressed why, under *Cushman* and other governing law, mere applicants for VA benefits are not entitled to due process protections under the Fifth Amendment.

¹⁶⁷ See *id.* at 379-80; *Reizenstein*, 583 F.3d at 1337.

¹⁶⁸ 38 C.F.R. §§ 3.105, 3.951, 3.952, 3.957 (2009).

¹⁶⁹ See *Singleton*, 23 Vet. App. at 379-80; *Reizenstein*, 583 F.3d at 1337.

Nevertheless, they arguably receive equivalent, if not greater, protections under VA's governing statutes and regulations both prior to and after being awarded entitlement to a requested benefit.

Prior to a finding of entitlement to a requested benefit, specific duty to assist provisions ensure that a VA claimant is provided with both a helping hand towards showing entitlement and a shield from erroneous denial. As Judge Bryson observed in his *Gambill* concurrence, all VA claimants are entitled to "notice and an opportunity to be heard in a meaningful manner," which are precisely the protections guaranteed by the Fifth Amendment Due Process Clause.¹⁷⁰

In addition, a claimant is entitled to representation at all levels of the claims process, assistance in obtaining all government records and other pertinent evidence in support of a given claim, and a hearing before a VA adjudicator at any point following the initial denial of his or her claim at the Regional Office level. Indeed, as noted in *Skoczen*, this affirmative duty to obtain evidence extends to all forms of government records, including military, labor, and social security records.¹⁷¹ Moreover, under the VCAA, VA's efforts to obtain such records are expected to "continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile."¹⁷²

With respect to the duty to notify, the *Skoczen* judge added:

Section 5103(a) requires VA to notify the veteran of "any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." With the notice, VA "shall indicate which portion of that information and evidence, if any, is to be provided by the

¹⁷⁰ *Gambill v. Shinseki*, 576 F.3d 1307, 1315 (Fed. Cir. 2009) (Bryson, J., concurring).

¹⁷¹ *Skoczen v. Shinseki*, 564 F.3d 1319, 1325 (Fed. Cir. 2009).

¹⁷² 38 U.S.C. § 5103A(b)(3) (2006).

claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.”¹⁷³

Arguably, these provisions provide at least as much *duty to assist*, if not more, than the Due Process Clause requires. Indeed, this was recognized by the Federal Circuit most recently in *Guillory v. Shinseki*.¹⁷⁴ There, the Federal Circuit determined that the appellant’s due process rights under the Fifth Amendment had not been violated because, “unlike the situation in *Cushman*, the statutes and regulations provide an adequate remedy for any error that occurred in the prior proceedings.”¹⁷⁵ In this regard, we assert that VA’s governing provisions would have provided a remedy for the *Cushman* appellant as well, had they been observed. Indeed, the due process violation noted in *Cushman* – tampering with VA medical records – was a clear violation of VA’s duty to assist under the VCAA.¹⁷⁶

Moreover, VA law provides that applicants for VA benefits face a much lower burden of proof than claimants in other types of administrative adjudications.¹⁷⁷ This reduced evidentiary standard functions as an effective safeguard against the risk of procedural unfairness in the VA claims process.¹⁷⁸

The statutory and regulatory protections effectively ensure that applicants for VA benefits receive as much if not more due process than they would assuming they had a vested property interest under the Fifth Amendment. Our view, that such a property interest does not exist, only serves to underscore the largess of the procedural protections afforded under *VA’s uniquely pro-claimant system*.¹⁷⁹

¹⁷³ *Skoczen*, 564 F.3d at 1325.

¹⁷⁴ 603 F.3d 981, 987-88 (Fed. Cir. 2010).

¹⁷⁵ *Id.*

¹⁷⁶ See 38 U.S.C. §§ 5103(a), 5103A.

¹⁷⁷ *Gambill v. Shinseki*, 576 F.3d 1307, 1315 (Fed. Cir. 2009) (Bryson, J., concurring).

¹⁷⁸ *Id.* at 1313-16.

¹⁷⁹ *Id.* at 1316-18.

Once an applicant has been awarded benefits, the claimant, now an adjudged entitled beneficiary, will develop a reasonable reliance on the continuance of these benefits. Dependence on VA benefits to meet daily needs may then implicate the protections afforded by the Due Process Clause.¹⁸⁰ VA provides additional procedural protections for recipients of benefits when it seeks to reduce or sever benefits.¹⁸¹

These governing regulations provide that severance of service connection will be accomplished “only where evidence establishes that [service connection] is clearly and unmistakably erroneous” with the burden of proof on VA.¹⁸² Clear and unmistakable error has been defined as an error that is undebatable and which, if it were not made, would manifestly change the outcome at the time it was made if either the correct facts were not before the adjudicator or the statutory or regulatory provisions in existence at the time were incorrectly applied.¹⁸³ The regulations also state that “[w]hen severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons.”¹⁸⁴ The VA beneficiary will be notified with detailed reasons for the proposed severance and given 60 days to demonstrate that severance should not take place and/or *request a predetermination* hearing, and *only after this* will severance be accomplished.¹⁸⁵ The severance will only be “effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires.”¹⁸⁶ In addition, statute and regulation provide that, in general, once service connection has been in effect for 10 years or more, it may not be severed.¹⁸⁷

¹⁸⁰ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (emphasis added) (noting that “termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits”).

¹⁸¹ 38 C.F.R. § 3.105(d), (e) (2009).

¹⁸² *Id.* § 3.105(d).

¹⁸³ See *Phillips v. Brown*, 10 Vet. App. 25, 31 (1997); *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994); *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc).

¹⁸⁴ 38 C.F.R. § 3.105(d).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ 38 U.S.C. § 1159 (2006); 38 C.F.R. § 3.957.

Similarly, when VA seeks to reduce an evaluation assigned for a particular disability, special due process procedures are triggered. When a reduction of an evaluation is considered warranted, the relevant regulation requires the following actions:

[A] rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons [and] [t]he beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefore, and will be given 60 days for the presentation of additional evidence to show that compensation payments should be continued.¹⁸⁸

Lastly, if no evidence is received, then another rating action will be issued and the reduced evaluation will take effect no earlier than “the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires.”¹⁸⁹ In addition, the beneficiary is entitled to a predetermination hearing if requested within 30 days of the date of the notice of the proposed reduction.¹⁹⁰

Once a beneficiary has been in receipt of benefits at a particular rating for five or more years then the rating is considered to be stabilized and additional requirements must be met prior to reducing the evaluation.¹⁹¹ After five years, in addition to the above requirements, VA must provide the beneficiary with a full and complete examination, in comparison with the examination that was relied upon to grant the evaluation, prior to reduction, and reduction will not be effected unless the examination reveals sustained, material improvement.¹⁹² In addition, after a particular

¹⁸⁸ 38 C.F.R. § 3.105(e).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* § 3.105(i).

¹⁹¹ *Id.* § 3.344(c).

¹⁹² *Id.* § 3.344(a).

evaluation has been in effect for 20 years or more, then ordinarily it may not be reduced.¹⁹³

The special protections triggered by an attempt to sever or reduce a beneficiary's entitlement make clear that VA provides protections in excess of those *required* by the Due Process Clause's provision for a *fair hearing* as these due process protections focus the burden of proof on the Government. As such, VA regulations more than comply with the Due Process Clause.

CONCLUSION

Cushman has introduced the argument that the Due Process Clause may apply in the context of applications for VA benefits, and subsequent cases have indicated that the issues of whether and how much due process must be afforded a claimant at differing stages of his or her application for benefits is far from resolved. However, we maintain that although VA benefits are nondiscretionary, mandatory, and statutory in nature, the governing statutes and regulations indicate that a vested interest in benefits does not begin until after a showing of entitlement. There is little potential for any *reliance* by an applicant upon any benefit, either entitlement to service connection or a higher evaluation, prior to receipt of the benefit and this reliance forms the foundation upon which the existing cases turn.¹⁹⁴ Accordingly, we interpret *Cushman* and its progeny as holding that applicants for VA benefits do not obtain a property interest in those benefits, and thus protection under the Due Process Clause, prior to showing that they meet the eligibility requirements set forth under VA's governing statutes and regulations.

¹⁹³ *Id.* § 3.951(b).

¹⁹⁴ *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970) (finding that due process procedures must be followed when terminating welfare benefits).

As discussed above, the current VA procedures provide claimants with the advantage of a VA duty to assist as well as a favorable standard of review, which grants them benefits based upon a showing that they are at least as likely as not entitled to them. Moreover, current VA beneficiaries receive additional procedural safeguards prior to severance of service connection or reduction of evaluations, including the need for clear and unmistakable evidence to sever service connection and stabilization of both service connection and benefit ratings. In this fashion, the requirement for a *fair hearing*, as contemplated by the Due Process Clause, is more than satisfied, both for claimants who have not yet demonstrated entitlement to VA benefits and, thus, do not qualify for due process protections, and for current VA beneficiaries, who arguably do come under these protections. Consequently, the requirements for due process set forth in *Cushman* are more than fulfilled under current VA law.

Lastly, the most recent case that has addressed the Due Process Clause bolsters our interpretation of *Cushman*. In *Guillory*, the Federal Circuit observed that “[w]e have held that veteran’s benefits are a protected property interest under the Fifth Amendment, because they are statutorily mandated and nondiscretionary in nature.”¹⁹⁵ However, the Federal Circuit went on to state that the due process violation in *Cushman* was based upon a lack of an adequate remedy “to address the VA’s reliance on an improperly altered medical record.”¹⁹⁶ The Federal Circuit then distinguished *Guillory* from *Cushman* finding no due process violation because unlike in *Cushman* an adequate remedy existed in the statutes and regulations to address the issue before them (namely, asserting a clear and unmistakable error claim with the prior denial).¹⁹⁷

¹⁹⁵ *Guillory v. Shinseki*, 603 F.3d 981, 987 (Fed. Cir. 2010) (citing *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009)).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 987-88.

By inference, not only did the Federal Circuit in *Guillory* indicate that the holding in *Cushman* was limited to the narrow circumstance where a remedy did not exist in VA statutes and regulations, it also did not find a property interest in a claimant's application for VA benefits. Under this narrow reading, the current procedural protections satisfy the requirements of the Due Process Clause because they afford, generally, an adequate remedy for a claimant. Indeed, it may be stated that the claimant in *Cushman* prevailed without additional due process protections.

For the foregoing reasons, to read *Cushman* and its progeny to require more due process protections than already afforded, both prior to and after establishment of entitlement to benefits, is inconsistent with the prior holdings of the Supreme Court on benefits and the general principles of administrative law.