Just How Paternalistic is the VA? An Examination of the Non-Adversarial" Veterans' Benefits System

Nino C. Monea
United States Military Academy at West Point

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Administrative Law Commons

Recommended Citation

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
JUST HOW PATERNALISTIC IS THE VA? AN EXAMINATION OF THE “NON-ADVERSARIAL” VETERANS’ BENEFITS SYSTEM

NINO C. MONEA*

ABSTRACT

The veterans’ benefits system often describes itself as non-adversarial, meaning that the government is supposed to work with the claimant to provide them all benefits they are entitled to, rather than fighting to minimize what they receive. True enough, there are many unique features of the system that help veterans. But many of these features do not work as intended, and rules have developed at all stages that make it harder for veterans to recover. Moreover, as with any human institution, staff fall short, offices get overwhelmed, and gross delays pile up. This Article surveys the numerous ways that the system makes it harder for veterans to prevail and calls into question just how benevolent the process is. It highlights the extreme difficulty of creating a system that is accurate, speedy, and fair.

I. INTRODUCTION .................................................................79
II. THE VETERANS’ BENEFITS SYSTEM ..................................80
   A. Revolutionary Origins .................................................80
   B. The Modern System ..................................................82
III. THE PATERNALISTIC FEATURES OF THE VETERANS’ BENEFITS SYSTEM ...........................................84
   A. Regional Offices ......................................................84
   B. The Board of Veterans’ Appeals .................................87
   C. Court of Appeals for Veterans Claims .......................88
   D. Post-Veteran Court Appeals ......................................90
IV. VETERAN UNFRIENDLY FEATURES OF THE REGIONAL OFFICE.....91

* Assistant Professor of Law, United States Military Academy at West Point. B.S., Eastern Michigan University; J.D., Harvard Law School. All views expressed are those of the author alone and do not represent those of the United States government or any of its components. Thank you to James Tatum for his thoughtful review of this Article, and for the skillful and diligent work of the editors of the West Virginia Law Review.
A. The VA’s Obligation to Help Veterans Has Gotten Weaker
   Over Time ................................................................. 91
B. Formal Rules Get Underenforced ........................................ 93
C. Persnickety Rules Get Over-Enforced .................................... 94
D. Staffing Problems Hinder the VA ........................................... 95
   1. The VA Suffers from Staff Shortages ................................ 95
   2. Employees Are Inadequately Trained ............................... 96
   3. Leadership Failures .................................................... 97
E. Medical Exams Bedevil Veterans ........................................... 98
   1. Veterans Are Forced to Undergo Unnecessary Exams ........ 98
   2. Medical Exams Are Unreliable ..................................... 99
   3. Shoddy Medical Exams Are Hard to Challenge ................. 100
F. Attorneys Are Largely Shut Out of the Process ...................... 101
G. Error Rates Are Worryingly High ........................................ 102

V. VETERAN UNFRIENDLY FEATURES OF THE BOARD .............. 103
A. Staffing Problems ........................................................... 103
   1. Low Staff Leads to Sloppy Work .................................... 103
   2. Leadership Failures .................................................... 104
B. Board Rules that Can Hurt Veterans .................................... 105
   1. Hearings Can be More Adversarial than Intended ............... 105
   2. Inadequate Explanation Rules Can Lead to Needless
      Remands ........................................................................ 105
   3. The Fraudulent Evidence Rule Can Hurt Veterans, but not
      the VA .......................................................................... 106
C. The Board can Ignore Its Own Policies ................................... 107
D. Delays Are Long and Errors Are Prevalent ............................ 108

VI. UNFRIENDLY FEATURES OF THE COURT OF APPEALS FOR
    VETERANS CLAIMS ......................................................... 110
A. The Veteran Court Chose to Adopt Article III Justiciability
   Rules ............................................................................... 111
   1. Jurisdiction .................................................................... 113
   2. Ripeness ........................................................................ 113
   3. Mootness ....................................................................... 114
B. The Veteran Court Has Imported Rules that Ease Its Workload
   at the Expense of Claimants ............................................... 115
   1. Docket Management Rules ............................................ 115
   2. Constitutional Avoidance ............................................. 116
   3. Collateral Estoppel / Issue Preclusion ............................. 117
   4. It Is Unclear How Much Docket Management Rules
      Actually Help .................................................................. 118
C. The Court Refuses to Assert Any Equity Powers ................... 120
D. Overreliance on Single-Judge Decisions ............................... 122
E. The Presumption of Regularity Glosses Over VA Errors......123
F. Small Leniency for Veterans Whose Records are Lost by the VA ..........................................................125
G. Limits on Fact-Finding Lead to Needless Remands..........126
H. Frequent Application of the Harmless Error Rule ..........128
I. Restrictive Class Action Rules..................................................130

VII. CONCLUSION.................................................................131

I. INTRODUCTION

The process by which claimants seek benefits from the Department of Veterans Affairs (the VA) is often called “non-adversarial,” “paternalistic,” or “veteran-friendly.” How well do these assertions hold up? This Article surveys the various stages of the veterans’ benefits process, noting the features designed to be paternalistic and the many ways that the system falls short. In so doing, it attempts to be a comprehensive review of the VA benefits system, rather than focusing on a single aspect. This Article shows that while the system is founded on noble intentions of being accessible to non-lawyers, it often collapses in on itself. Given that Congress recently passed a massive overhaul of the VA benefits system, this topic is especially timely.

In all fairness, the VA often contends with conflicting goals. Qualified veterans must be given all of the benefits to which they are entitled; ineligible veterans must be denied. Due process is paramount; speedy resolutions are of the utmost importance. Veterans must be given nearly infinite opportunities to contest previous denials; backlogged cases must be cleared out. Claims must be handled in a non-adversarial manner so that veterans do not need attorneys; non-attorney VA employees must comprehend and apply decades of case law to their decisions. Cases must be given individualized attention; millions of claims must be processed each year.

Even considering these difficulties, unforced errors and anti-veteran policies may be found at every step of the process. This Article identifies and contextualizes them. It proceeds in six Parts. Part I gives an overview of the veterans’ benefits system, the history that led to the modern system, and how a case proceeds from cradle to grave—and back to cradle again.

Part II details the paternalistic features of the modern system. Some rules are stronger on paper than in practice, but many policies genuinely help veterans. These include greater kindness towards unrepresented parties, free access to (non-lawyer) representation, almost infinite opportunities to appeal, and no VA representative arguing for denial for most of the way through the case.

---

1 Butler v. Principi, 244 F.3d 1337, 1340 (Fed. Cir. 2001).
Part III kicks off the sections examining the veteran-unfriendly policies, starting with the Regional Offices where veterans initiate their claims. Frontline employees who adjudicate claims in the first instance are understaffed, undertrained, and their error rate has increased over time. Their duty to assist veterans has eroded over time, and rules that are meant to help veterans are too often watered down. Medical examiners who opine on veterans’ conditions are frequently under qualified, yet tough to challenge.

Part IV is about the Board of Veterans Appeals, an independent body within the VA. The Board is also understaffed and unschooled in medicine. Delay haunts every part of the system, but nowhere is it more pronounced at the Board, where it can take years for a case to be heard. The vast majority of Board decisions get overturned on appeal, and the Board may ignore its own policies when it denies claims.

Part V focuses on the Court of Appeals for Veterans Claims. Created from legislative whole cloth and given a long leash to establish its own internal procedures, the court time and time again chose to imitate federal courts—even when its policies hurt veterans and are a poor fit for the unique nature of the veterans’ benefits system. Beyond procedural rules, the court has substantive case law that stymies veterans on a wide swath of topics. Part VI concludes.

Some eye-catching facts that will be elaborated upon in this Article include:
- A typical veterans’ benefits case can take longer than the U.S. involvement in World War II,
- As many as three-quarters of initial denials may be erroneous,
- Over four-fifths of Board decisions are reversed on appeal,
- In the supposedly veteran-friendly system, claims can be rejected when they are just one day overdue,
- The Waco Regional Office reviewed 18,700 appeals with only eight Decision Review Officers on staff,
- There are roughly 168,000 backlogged claims,
- Of the millions of benefit claims, only 0.001% receive equity relief from the Secretary of Veteran Affairs,
- One-seventh of all published opinions by the Court of Appeals for Veterans Claims deny relief because of “harmless” error,
- Problems have persisted even over a period where the VA budget doubled and the number of veterans fell by nearly half.

II. THE VETERANS’ BENEFITS SYSTEM

A. Revolutionary Origins

The U.S. system for compensating veterans following service has humble beginnings. When the Continental Congress adopted pension legislation in 1776, it did not provide a funding mechanism, and only 3,000 veterans ever
drew payments. On top of that, for a time, soldiers were not even paid regular salaries. In 1781, Congress promised a more meaningful pension for officers only to prevent a mass exodus, but many soldiers doubted the ability of the government to make good on its word. They had good reason. The Continental Congress promised to take care of soldiers wounded in the Revolutionary War to entice men to join, but after achieving independence, the Articles of Confederation Congress did not have the money to pay. By 1783, a mutinous mob of soldiers demanding pensions forced Congress to flee from its then-seat in Philadelphia.

After the Constitution was ratified, the First Congress passed a law that decreed that the federal government would continue paying state pensions to wounded and disabled veterans, but only for one year. This sort of piecemeal, temporary approach went on for several years. It was not until 1818 that Congress passed a permanent pension for Revolutionary War vets, and even then, it was only for the indigent and only paid out between $8 and $20 per month.

Low as that may have been, Congress did not anticipate the surge of claims that would follow, and it quickly moved to slash benefits and clamp down on fraud. Finally, in 1832, Congress passed a generally applicable pension for those who fought for America’s independence, along with widows and

---


4 Id.


9 Act of Mar. 18, 1818, Pub. L. 15-19, 3 Stat. 410 (providing a pension for those who “by reason of his reduced circumstances in life, shall be, in need of assistance from his country for support.”).

10 Blakemore, supra note 5.
orphans—49 years after the Battle of Yorktown had effectively ended the war. By that point, the average pensioner was 67 years old and only lived to draw payment for five years or fewer. Many veterans were rejected because of missing discharge papers, service records, or other irregularities, just as widows were rejected for failure to provide proof of marriage. Health care for veterans was non-existent; the Army would not open a veterans’ facility until 1851. But the system grew with time, and by the end of the 19th century, a third of the federal budget went to pensions.

**B. The Modern System**

The Department of Veterans Affairs is the second largest of the 15 cabinet agencies. It has a budget of $200 billion, schedules 32.7 million appointments a year, fields 140 million phone calls annually, and receives ten million online contacts per month. To process these inquiries, the VA has 348 contact centers, hundreds of websites, and dozens of databases. Within the larger VA, the Veterans Benefits Administration (VBA) adjudicates and distributes benefits. The VBA has 56 Regional Offices comprised of 15,000 employees and pays out about $130 billion in annual benefits to roughly six million people. The average veteran has 5.95 disabilities, with the most common conditions being tinnitus (2.5 million), knee issues (1.47 million), hearing loss (1.37 million), and PTSD (1.2 million).

Vets begin the process of applying for benefits by filing with Regional Offices, sometimes called the Agency of Original Jurisdiction. Frontline

---

12 Short, *supra* note 3.
13 *Id.*
14 Blakemore, *supra* note 5.
15 *Id.*
16 Collier & Early, *supra* note 2, at 3.
18 *Id.* at 12.
21 *Id.* at 71.
22 *Id.*
adjudicators are called Rating Veterans Service Representatives (RVSR), and more senior Decision Review Officers (DROs) sit above them.\textsuperscript{23}

These raters use Diagnostic Codes to assess what level of compensation a veteran is owed, as laid out in Title 38 of the Code of Federal Regulations, Chapter I, Part 4. For example, a veteran who suffered from burn wounds would use Diagnostic Code 7800.\textsuperscript{24} The code defines “characteristics of disfigurement” from burns as things like scars or skin texture abnormalities.\textsuperscript{25} If a veteran has one disfigurement, they get 10\% compensation; two or three will get 30\%; four or five will get them 50\%; and six or more will get them 80\%.\textsuperscript{26} If a veteran is 10\% disabled, they get $123 per month, scaling up to $2,673 per month for 100\% disability.\textsuperscript{27}

Veterans dissatisfied with the rating they get from the Regional Office may appeal to the Board of Veteran Appeals (the Board).\textsuperscript{28} Both the Regional Office and the Board can engage in fact-finding.\textsuperscript{29} If the Board remands a case for additional development—usually to consider new evidence that was submitted after the case made it to the Board—it is handled by the Appeals Management Center in Washington, D.C.\textsuperscript{30}

Up to the appeal, everything takes place within the VA bureaucracy—the appeal is before an independent court that is not controlled by VA leadership. As will be described in greater detail below, the pre-appeal phase is known as non-adversarial, paternalistic, or veteran-friendly. In theory, the VA is supposed to be working with the veteran to figure what benefits they are rightly owed to them, not poised in opposition to them.

Finally, there is judicial review. This phase is more adversarial, as there is a representative for the VA advocating for a denial or limitation of benefits.\textsuperscript{31} First is the Court of Appeals for Veterans Claims (the Veteran Court), followed by the Court of Appeals for the Federal Circuit, and lastly, the United States Supreme Court.\textsuperscript{32}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Simcox, \textit{supra} note 19, at 677.
\item \textsuperscript{24} 38 C.F.R. § 4.118 (2023).
\item \textsuperscript{25} \textit{Id}.
\item \textsuperscript{26} \textit{Id}.
\item \textsuperscript{27} 38 U.S.C.A. § 1114 (West 2023).
\item \textsuperscript{28} \textit{Id} § 7105.
\item \textsuperscript{29} Jeffrey D. Parker, \textit{As A Matter of Fact: Reasserting the Role of Basic Facts in Veterans Court Jurisprudence}, 65 ST. LOUIS L.J. 291, 297–98 (2021).
\item \textsuperscript{30} Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the House Committee on Veterans Affairs, 114th Cong. 5–6 (2015) [hereinafter Veterans’ Dilemma] (statement of Beth McCoy).
\item \textsuperscript{31} See 38 U.S.C.A. § 7263 (West 2023).
\item \textsuperscript{32} \textit{Id} §§ 7252, 7292.
\end{itemize}
\end{footnotesize}
III. THE PATERNALISTIC FEATURES OF THE VETERANS’ BENEFITS SYSTEM

Let it not be said that the VA does nothing to earn its reputation as non-adversarial. Indeed, at every phase in the process, there are special rules that few other civil litigants enjoy. Some rules do not fully live up to their reputation, but many are truly beneficial.

A. Regional Offices

Congress intended to create a system where the VA is “actually engaged in a continuing dialog with claimants in a paternalistic, collaborative effort to provide every benefit to which the claimant is entitled.”33 Nowhere is this truer than at the agency phase.34

Starting with the initial application for benefits, unrepresented veterans are entitled to have their submissions read sympathetically,35 though claims can get a sympathetic reading even when the veteran has counsel.36 A sympathetic reading means that the VA can make clarifying modifications to help an argument along.37 In addition to official records, the VA will also accept statements from friends, family, clergy, and coworkers who can attest to when a condition developed or got worse.38 Various provisions reduce what must be submitted to make a claim for benefits, treat an application for one benefit as an application for multiple benefits, and accept older versions of forms in some circumstances.39 Veterans must provide very specific directions to withdraw a claim, ensuring they do not thoughtlessly abandon a case.40

Veterans have many routes to receiving compensation. “The goal of the entire rating process is to appropriately compensate veterans.”41 Easing this goal, the definition of “disability” that agency raters will be applying to veterans has grown considerably over time.42 In the 1920s, there were only about a dozen

36 Robinson v. Shinseki, 557 F.3d 1355, 1359 (Fed. Cir. 2009).
42 Engel & Wolfe, supra note 2, at 361.
specified major disabilities, all of which were ghastly injuries, such as losing an entire arm or leg, total deafness, or total blindness. Now there are hundreds of diagnostic codes set out in Section 4 of Title 38 of the Federal Code of Regulations, meaning that all sorts of injuries will qualify for compensation. For veterans whose disabilities do not fall under any of the prescribed diagnostic codes, they can seek extra-scheduler compensation, which can be for anything. In addition to standard disability rates, a number of conditions also qualify for special monthly compensation on top, such as loss of a hand, foot, or eye. Whatever the medical profile of the veteran, the VA has a duty to maximize benefits for which the veteran is eligible, and to exhaust all possible conditions on the rating schedule.

The system is meant to be accessible to lay people. Because many veterans will never have lawyers, the VA has an obligation to make their rules and processes understandable to non-lawyers. Rules exist to try and prevent lawyers from taking advantage of veterans with unreasonably high fees. If a veteran wishes to have representation, but does not wish to bear the costs of an attorney, they can retain the assistance of a Veteran Service Organization without cost. These organizations are approved by Congress and have special status within the VA, including office space to meet with veterans.

Perhaps the most widely touted boon to veterans is the VA’s duty to assist them in developing their claim. If a claimant expresses an intent to file, the VA must furnish the necessary forms, and explain what is necessary to fix an incomplete claim. In giving notice of what is necessary to establish a claim, the VA must explain what the VA will attempt to find, and what the veteran must produce. VA responsibilities include helping to obtain medical and service

45 38 U.S.C.A. § 1114(k) (West 2023). Benefits were also less generous. Awards maxed out at $100 per month, or $1,700 in today’s dollars. See id. Recall that the present max is about $2,700 per month.
48 38 U.S.C.A §§ 5904, 7263 (West 2023); 38 C.F.R. § 14.636 (2023). As will be discussed later, these policies may end up hurting veterans by making it harder from them to obtain representation.
49 Simcox, supra note 19, at 680.
50 Id.
52 Id. § 5103(a).
records and providing medical examinations to substantiate claims.\textsuperscript{53} If the VA is incapable of performing the medical exam, it will get an independent provider.\textsuperscript{54} Sometimes, multiple examinations must be provided.\textsuperscript{55} Claimants can also petition to have a subpoena issued to help gather relevant evidence.\textsuperscript{56} The duty to assist includes seeking clarification on unclear evidence,\textsuperscript{57} and is supposed to be more than a passive role.\textsuperscript{58}

Once the factfinding is complete, the Regional Office will make a determination about eligibility for benefits. When the evidence is in approximate balance, the veteran is supposed to be given the benefit of the doubt.\textsuperscript{59} Certain types of claims, such as exposure to herbicides, are presumed to be service connected.\textsuperscript{60} A service connection for a disability is presumed for former prisoners of war, those who served at Camp Lejeune for certain times, and those who served in Southwest Asia during the Gulf War.\textsuperscript{61} The VA amended its rules to eliminate the requirement for corroborative evidence of a stressor where a VA mental health expert has diagnosed PTSD and the stressor is related to the veteran’s fear of hostile military or terrorist activity.\textsuperscript{62} All service members are presumed to enter in good health, except for issues documented when they joined.\textsuperscript{63} This prevents the VA from claiming that health conditions were merely not recorded in the entry physical.\textsuperscript{64} Relatedly, the presumption of service incurrence holds that if any injury arises while in the military, it is presumed to have been in the line of duty, not due to personal misconduct.\textsuperscript{65}

Decisions by the Regional Office must explain the issues adjudicated, the evidence considered, favorable findings, elements not satisfied, how to obtain

\begin{itemize}
  \item \textsuperscript{53} Id. § 5103A(c); 38 C.F.R. § 3.159 (2022). The duty to assist also applies if the veteran files a supplemental claim. 38 U.S.C.A. § 5108 (West 2023).
  \item \textsuperscript{54} 38 U.S.C.A. § 5109 (West 2023).
  \item \textsuperscript{56} 38 C.F.R. § 20.709 (2023).
  \item \textsuperscript{58} Martinez v. Wilkie, 31 Vet. App. 170, 178 (2019).
  \item \textsuperscript{59} 38 U.S.C.A § 5107(b) (West 2023); 38 C.F.R. § 4.3 (2023) (noting that “[i]t is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation.”).
  \item \textsuperscript{60} See 38 C.F.R. § 3.307 (2023); 38 C.F.R. § 3.308 (2023); 38 C.F.R. § 3.309 (2023).
  \item \textsuperscript{62} 38 C.F.R. § 3.304(f) (2023); Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39843, 39843 (July 13, 2010) (final rule) (codified at 38 C.F.R. § 3.304(f)(3) (2023)).
  \item \textsuperscript{63} 38 U.S.C.A. § 1111 (West 2023).
  \item \textsuperscript{64} Gilbert v. Shinseki, 26 Vet. App. 48, 52 (2012).
  \item \textsuperscript{65} Simmons v. Wilkie, 30 Vet. App. 267, 276 (2018).
\end{itemize}
evidence used to make decisions, and criteria that must be satisfied to grant relief. Favorable findings are binding on future hearings, and even the Veteran Court will not reverse favorable findings of fact for the claimant. No such rule protects unfavorable findings, which may be appealed to both a more senior official within the Regional Office, and then to the Board. Review by the senior official will be done without deference to the initial determination.

B. The Board of Veterans’ Appeals

The Board has a degree of independence from the rest of the VA because it is led by a direct presidential appointee, and this chair makes the recommendations for other Board members. In addition, the Board conducts its review without deference to the Regional Office.

Claimants can appear in-person for Board hearings at its principal office in Washington D.C., or if they do not wish to travel, go to the nearest Regional Office and attend the hearing through video conference. Once there, they can testify, call witnesses, submit other evidence, or present oral argument. Consistent with legislative intent, hearings are conducted under a non-adversarial ruleset. This means no cross examination of witnesses, no strict evidentiary code, and no representative from the VA submitting contrary evidence or arguing for denial.

Rules exist to ensure the Board has sound logic for its decisions. The Board is obligated to provide a statement of reasons or bases for its decisions, so much so that a claimant will know the “precise basis” of the Board’s determination. It must explain how it arrived at its credibility determinations.

66 38 U.S.C.A. § 5104(b) (West 2023).
67 Id. § 5104A.
70 Id. § 5104B(e).
71 Id. § 7101(a).
72 Id. § 7101A(a).
74 See 38 U.S.C.A. § 7107(c) (West 2023); 38 C.F.R. § 20.702 (2023).
75 38 C.F.R. § 20.700(c) (2023); 38 C.F.R. § 20.701 (2023); 38 C.F.R. § 20.708 (2023).
76 Legislative history surrounding the creation of the modern benefits system said that “[i]n such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to the burden of proof.” Veterans’ Dilemma, supra note 30, at 90.
77 38 C.F.R. § 20.700(c) (2023).
If the Board uses a phrase like “sedentary” employment, it must explain what this means; the court will not assume the term has its ordinary meaning. Objective medical evidence cannot be deemed more probative than lay evidence without a specific explanation as to why. It must also give reasons for discounting favorable evidence. The Board cannot rely on its own medical judgment. And the Board may not assume that an absence of evidence is evidence of absence, unless there is a proper foundation in the record to do so.

C. Court of Appeals for Veterans Claims

While appellate review is more adversarial than the rest of the process, there are still pro-veteran features to appeals. Appeals cost little or nothing for the veteran. Only veterans can appeal adverse findings to the Veteran Court, not the VA. So in all cases, the veteran can only stand to see their situation improve.

Courts have recognized that “entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment.” The Veteran Court has recognized that claimants have a fundamental (albeit not necessarily Constitutional) right to fairness in the proceedings. This includes a reasonable notice about new evidence the Board is considering, and the opportunity to respond to it, that “evidence be procured by the agency in an impartial, unbiased, and neutral manner,” notifying claimants of deadlines for submissions, and notifying the claimant’s duly authorized representative. When new definitions of disabilities are adopted midway through an appeal, the

---

86 Id. § 7252; Morgan v. Wilkie, 31 Vet. App. 162, 166 (2019) (citing 38 U.S.C.A § 7261(a)(4) (West 2023)). Technically, the statute authorizes the court to review adverse findings, but does not expressly forbid reviewing pro-claimant findings. Yet the court has held it is “clearly without authority to reverse” pro-claimant findings. Roberson v. Principi, 17 Vet. App. 135, 139 (2003).
87 Cushman v. Shinseki, 576 F.3d 1290, 1298 (Fed. Cir. 2009).
88 Smith v. Wilkie, 32 Vet. App. 332, 337 (2020) (“[E]ven in situations where no particular procedural process is required by statute or regulation, the principle of fair process may nonetheless require additional process.”).
VA can apply whichever version is more favorable to veterans with pending claims.\textsuperscript{93} And there is a canon of interpretation that rules should be liberally construed to favor servicemembers.\textsuperscript{94} Unrepresented veterans can and do win at the appellate level.\textsuperscript{95} A fifth of all appeals are filed by unrepresented claimants, and half of them never retain an attorney.\textsuperscript{96}

Decisions are to be rendered as quickly as practicable in all cases,\textsuperscript{97} but extra care is given to remanded cases, as the veteran already had to trudge through the system once. Remanded cases are entitled to expedited review,\textsuperscript{98} get priority determination over new cases,\textsuperscript{99} are supposed to require a “critical examination of the justification” for the Board’s decision,\textsuperscript{100} and entitle the claimant to present additional evidence and arguments to justify a grant of benefits.\textsuperscript{101} The Board must consider these new arguments.\textsuperscript{102}

Outside of the substantive rules applied on appeal, there are several beneficial features. Because veterans may receive partial relief and still appeal other issues, they can receive disability payments while going through the appellate process.\textsuperscript{103} About 72\% of veterans get some level of compensation while going through appeal.\textsuperscript{104} A majority of appellants are getting 50\% disability or more while their cases work through the system.\textsuperscript{105} Veterans can and do continue appealing even after getting 100\% disability, if they, say, want multiple conditions certified as 100\% disabling or seek an earlier effective date for payment.\textsuperscript{106} In addition, veterans are able to simultaneously seek and receive Social Security disability benefits, a practice known as “double dipping,”

\footnotesize

\begin{itemize}
  \item \textsuperscript{95} E.g., Foreman v. Shulkin, 29 Vet. App. 146, 147 (2018).
  \item \textsuperscript{97} 38 U.S.C.A. § 7267(a) (West 2023).
  \item \textsuperscript{98} Id. § 5109B.
  \item \textsuperscript{99} Veterans’ Dilemma, supra note 30, at 11.
  \item \textsuperscript{100} Fletcher v. Derwinski, 1 Vet. App. 394, 397 (1991).
  \item \textsuperscript{101} Quarles v. Derwinski, 3 Vet. App. 129, 141 (1992).
  \item \textsuperscript{102} Smith v. Wilkie, 32 Vet. App. 332, 340 (2020).
  \item \textsuperscript{103} Veterans’ Dilemma, supra note 30, at 5.
  \item \textsuperscript{104} Id.
  \item \textsuperscript{105} Id. at 9–10.
  \item \textsuperscript{106} Id. at 10.
\end{itemize}
something about a quarter of all VA beneficiaries do.\textsuperscript{107} This means that even if a veteran has a long appeal, many will get partial benefits while they wait.

\textbf{D. Post-Veteran Court Appeals}

The Veteran Court has been described as a “court of last resort” because most claims end there.\textsuperscript{108} True enough, but for the intrepid claimant, the process is far from over. Even if the Veteran Court does not agree with the claimant, they may appeal to the Federal Circuit and ultimately the Supreme Court.\textsuperscript{109} This works out to six levels of direct review: an initial claims processor, a more senior official at the Regional Office, the Board, the Veteran Court, the Federal Circuit, and the Supreme Court. Once appeals are exhausted, veterans may collaterally attack prior decisions if they can show clear and unmistakable error.\textsuperscript{110}

More broadly, litigation does not have a defined endpoint, regardless of what court hears a claim. “A veteran has no obligation to file a claim as soon as they discover a disability.”\textsuperscript{111} There are no statutes of limitations to bring claims, and no limits on how many appeals may be filed.\textsuperscript{112} The standard to reopen a case—submitting new and material evidence—is a low one.\textsuperscript{113} Almost all cases involve medical disability determinations, and medical conditions evolve, presenting ample grounds appeal based on new facts.\textsuperscript{114}

Veterans are allowed to apply for benefits, get denied, decline to appeal, reapply for the same benefits years later, then prevail.\textsuperscript{115} One spouse was able to file for benefits three separate times, get rejected each time, decline to appeal each time, and then on the fourth try, finally get relief.\textsuperscript{116} Another claimant was allowed to challenge a Board decision that occurred 50 years ago.\textsuperscript{117}

\begin{flushleft}
\textsuperscript{107} Engel & Wolfe, \textit{supra} note 2, at 360. For what it is worth, the Social Security disability process is also supposed to be conducted in an “informal, non-adversary manner,” without a representative for the government advocating for denial. \textit{Id.} at 361.
\textsuperscript{109} 38 U.S.C.A. § 7292(c) (West 2023).
\textsuperscript{110} \textit{Id.} § 5109A(a).
\textsuperscript{112} McClean, \textit{supra} note 2, at 280.
\textsuperscript{113} 38 C.F.R. § 3.156(a) (2023).
\textsuperscript{114} \textit{Veterans’ Dilemma, supra} note 30, at 7.
\textsuperscript{115} \textit{E.g.}, Hembree v. Wilkie, 33 Vet. App. 1, 2–3 (2020).
\textsuperscript{117} Perciavalle v. Wilkie, 32 Vet. App. 59, 63, 67 (2019).
\end{flushleft}
veteran passes away, their family may be able to carry on the torch.\textsuperscript{118} Small wonder the final Civil War Pension did not terminate until 2020.\textsuperscript{119}

All this shows is that veterans do receive a number of perks that ordinary plaintiffs lack. Congress tried to create a claimant-friendly system, and in some respects, it succeeded. But as the following sections demonstrate, the VA benefits system suffers from a number of shortcomings. Taken together, they arguably subsume the pro-veteran features.

IV. \textbf{VETERAN UNFRIENDLY FEATURES OF THE REGIONAL OFFICE}

This Part and the following two Parts will detail the many features of the veterans’ benefits system that are unfriendly towards veterans. This does not mean every adverse rule was designed to hurt veterans—some may have even been intended to help—but they have the effect of making things harder for claimants.

These veteran-unfriendly features are all the more troublesome because servicemembers have no alternative to the VA. Federal case law has stripped vets of the right to sue the government in tort for injuries incurred in service.\textsuperscript{120} What is more, many veterans are indigent and lack access to private health care providers, further increasing their dependency on the VA.\textsuperscript{121} And certain benefits are still insulated from judicial review. Disabled veterans seeking aid for caregivers receive a “medical determination” about eligibility from the VA, which exempts it from judicial review or due process.\textsuperscript{122}

\textbf{A. The VA’s Obligation to Help Veterans Has Gotten Weaker Over Time}

Congress recently passed the Veterans Appeals Improvement and Modernization Act of 2017 (Modernization Act). Although the legislation has a number of reforms designed to reduce the backlog of cases—which will help veterans by speeding up the process—it comes at the cost of less generous protections. The law shortened the VA’s duty to assist to only the initial determination, rather than up through the Board decision.\textsuperscript{123} It carved out

\textsuperscript{118} E.g., Casey v. Wilkie, 31 Vet. App. 260, 261 (2019).
\textsuperscript{119} Ian Shapira, \textit{She Was the Last American to Collect a Civil War Pension — $73.13 a Month. She Just Died.}, WASH. POST (June 4, 2020, 12:09 PM), https://www.washingtonpost.com/history/2020/06/04/she-was-last-american-collect-civil-war-pension-7313-month-she-just-died/. About 50 people still get pension benefits from the 1898 Spanish-American War. Id.
\textsuperscript{120} Jennifer D. Oliva, \textit{Representing Veterans}, 73 SMU L. REV. F. 103, 104 (2020).
\textsuperscript{121} McClean, supra note 2, at 286.
\textsuperscript{122} Yelena Duterte, \textit{Splendid Isolation: VA’s Failure to Provide Due Process Protections and Access to Justice to Veterans and Their Caregivers}, 29 J. L. & POL’y 1, 8–9 (2020).
\textsuperscript{123} \textit{SENATE REPORT, MODERNIZATION ACT OF 2017, supra} note 34, at 5–6.
exceptions where the veteran does not need to be notified of what evidence they must submit to substantiate their claim.\textsuperscript{124} And it got rid of the VA’s obligation to submit a Statement of the Case, which was supposed to summarize the issues on appeal for the veteran.\textsuperscript{125}

In 2015, the VA revised a number of regulations to require standardized forms, rather than prior practice of accepting whatever the veteran sent. Regulations also removed the term “informal claim,” which, as the name implies, was a way to file for benefits without following any particular strictures of form.\textsuperscript{126} Anything could constitute a Notice of Disagreement so long as it expressed dissatisfaction with a decision by the VA and a desire to contest the result.\textsuperscript{127} The VA used to accept medical exams, hospitalization reports, or state institutional clinical records as informal claims for increased benefits.\textsuperscript{128} The old version of the rule also accepted these things as informal claims to reopen a case.\textsuperscript{129} Recent proposed regulatory changes also tried to make it harder for a veteran to raise a secondary service connection claim, only to be walked back due to public outcry.\textsuperscript{130}

These changes were intended to streamline the process, not to disadvantage veterans. A congressional committee report on the legislation that slackened the duty to assist made clear the rules changes were made with the expectation that the “VA will place greater emphasis on correctly fulfilling the duty to assist at the regional offices and will aggressively seek to detect and correct duty to assist errors during later review.”\textsuperscript{131} The report further stated that the committee “expects and intends that VA will operate under the new appeals framework in a veteran-friendly manner.”\textsuperscript{132}

As generous as pro-claimant rules on the book can be, they have fallen short in practice. This is not to say they are all fluff. For many years, non-lawyers had great success representing veterans in the VA system, which demonstrates one did not need a law degree to navigate it.\textsuperscript{133} In recent times, however, disparity

\textsuperscript{124} Id. at 4.

\textsuperscript{125} Id. at 12. Admittedly, the VA took this obligation lackadaisically to begin with, so losing it was no great tragedy. Simcox, supra note 19, at 705 (noting that rather than actually explaining the applicable laws and regulations, the VA would simply photocopy up to 50 pages from the Code of Federal Regulations and mail them to veterans).

\textsuperscript{126} See Cogburn v. McDonald, 809 F.3d 1232, 1236 (Fed. Cir. 2016).


\textsuperscript{128} Bailey v. Wilkie, 33 Vet. App. 188, 201 n.7 (2021); 38 C.F.R. § 3.157 (2023) (reserved by 79 Fed. Reg. 57696 (Sept. 25, 2014)).

\textsuperscript{129} 38 C.F.R. § 3.157 (2023) (reserved by 79 Fed. Reg. 57696 (Sept. 25, 2014)).


\textsuperscript{131} SENATE REPORT, MODERNIZATION ACT OF 2017, supra note 34, at 5–6.

\textsuperscript{132} Id. at 3.

in success rates for represented and unrepresented veterans is growing, indicating it is becoming harder to file a claim without a lawyer. A possible explanation for this may be the shrinking reach of the duty to assist.

**B. Formal Rules Get Underenforced**

In all walks of life, rules on the books sometimes go unenforced. The VA is no exception. As well-intentioned as the duty to assist is, it does not always get the job done. Sometimes, the VA fails to even obtain medical records from within the VA system. Violations of the duty to assist do not amount to clear and unmistakable errors, so if a veteran does not discover them until after their appeal, they are out of luck. The situation is bad enough that a leading treatise on veteran law said that advocates “cannot rely upon the VA to assist in gathering the necessary evidence on a claim.” Even if a veteran is able to reapply, a wrongful denial can add years to their quest for benefits, and by delaying the date benefits start, it might reduce the number of payments the veteran receives.

Examples of slapdash litigation abound. VA may deny a claim on the same day that it sends notice to veterans that their claim is missing evidence, or send up to 50 pages of the Code of Federal Regulations rather than succinctly explaining the applicable laws in a case. There have been reports that when veterans indicated they would like a call from the VA when they filed an appeal, the VA would then call the veteran and try to convince them to drop their case. For example, veteran Felipe Sanchez had two claims: one for PTSD, and one for neuropathy. A VA employee called him and told him that if he dropped one claim, the other would be approved. The thrust of this allegation was corroborated by a VA employee and a newspaper investigation.

---

134 Oliva, *supra* note 120, at 122 (noting that veterans with lawyers were 5.6% more likely to prevail than veterans with non-lawyer representation in 2008, but that number rose to 9% in 2018).
137 Oliva, *supra* note 120, at 119–20 (citations omitted).
138 Simcox, *supra* note 19, at 704–05.
139 *Veterans’ Dilemma, supra* note 30, at 92–93 (“Just last month there was a newspaper article about Vietnam Veterans being called by the VA employees from the Houston VA Regional Office and pressured to drop their claim.”).
141 Id.
142 Id.
Veterans may not avail themselves of the manifold appellate benefits they possess simply because they do not understand what was decided or were not told one piece of evidence could be crucial to winning their case. Advocates complain that the rule of ties going to the veteran is only applied when the evidence overwhelmingly favors the veteran. No matter how generous rules are, they are of no help if they are not followed.

There may also be technical failures that undermine the VA’s mission to provide benefits to deserving veterans. Well into the twenty-first century, the VA was still heavily paper-based and relying on WWII-era processing and disability paradigms. A 2012 Government Accountability Office study found that not all VA facilities used electronic scheduling, as was required by policy. It was also found that appointment wait times reported by the VA were unreliable, with inconsistencies in how dates were recorded and how wait times were measured. In an internal audit in 2018, the VA was unable to evaluate the accuracy of its wait time data.

C. Persnickety Rules Get Over-Enforced

On the opposite end of the spectrum, trivial rules can be enforced to the utmost—rules that could easily be overlooked based on the circumstances. Pre-2019, when a veteran received an unfavorable ruling from a Regional Office, they had to submit a Notice of Disagreement on VA Form 21-0958. On February 19, 2019, a new law went into effect, and along with it, the required form became VA Form 10182. Marine Corps veteran Walter Hall was told in 2018 to submit (then-current) VA Form 21-0958, which he did on February 19, 2019—the same day the new law went into effect. Rather than allowing a one-

---

143 Id.
144 Stacey-Rae Simcox, Thirty Years of Veterans Law: Welcome to the Wild West, 67 U. KAN. L. REV. 513, 521 (2019). This reinforces the Supreme Court’s general observation that it has never been able to “uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.” Dickinson v. Zurko, 527 U.S. 150, 163 (1999).
147 Id. at 4.
148 Id.
150 Id. at 331.
151 Id.
day grace period, the VA sat on the form for most of the year then told him his claim was dismissed for filing the wrong form.\footnote{152}{Id.}

Marine Corps veteran Marion Aldridge missed the deadline by a wider margin: he was six months late in filing a notice of appeal to the Veteran Court.\footnote{153}{Aldridge v. McDonald, 837 F.3d 1261, 1262–63 (Fed. Cir. 2016).} But it is hard to blame him. In a four-month period around the time he should have filed, he lost his mother, sister, and grandchild, and had to care for his elderly father and grief-stricken daughter, all while working.\footnote{154}{Id. at 1266 (Newman, J., dissenting).} It was not deemed a good enough reason for the Veteran Court or the Federal Circuit to extend the deadline.\footnote{155}{Id. at 1266.}

\section*{D. Staffing Problems Hinder the VA}

\subsection*{1. The VA Suffers from Staff Shortages}

The VA is comprised of people, and if those people are not equipped to do their jobs well, veterans will suffer. As of 2018, there were 45,000 vacancies at the VA, with the lion’s share being for healthcare jobs, which naturally means it will be harder for the VA to process cases and take care of veterans.\footnote{156}{The State of the VA: Hearing, supra note 17, at 42. Of the 45,000 vacancies, 40,000 were at the Veterans Health Administration (VHA), not the Veterans Benefits Administration, which handles claims. Id. Yet fewer people at the VHA mean that examining and diagnosing veterans is harder, which in turn mucks up the benefits process. For example, if the Board orders an exam be performed by a medical specialist, but it is instead done by a nurse practitioner, the case might stall out because Board’s specific instructions were not followed. See Veterans’ Dilemma, supra note 30, at 27.} The slower a veteran receives healthcare treatment and diagnoses, the slower their quest for benefits will likely be.

The benefits review system is also terribly understaffed. At the Waco Regional Office, there were 18,700 appeals but only eight Decision Review Officers (DRO),\footnote{157}{Id. at 31.} the senior officials who review initial benefits determinations. That works out to 2,300 appeals per DRO, the highest in the country in 2015, when the national average was 640.\footnote{158}{Id.}

Staffing problems persist despite increases in funding over the years. A 2014 congressional hearing observed that during the same period where the budget of the VA has increased from $100 billion to $160 billion, the number of

\begin{footnotes}
\footnote{152}{Id.} \footnote{153}{Aldridge v. McDonald, 837 F.3d 1261, 1262–63 (Fed. Cir. 2016).} \footnote{154}{Id. at 1266 (Newman, J., dissenting).} \footnote{155}{Id. at 1266.} \footnote{156}{The State of the VA: Hearing, supra note 17, at 42. Of the 45,000 vacancies, 40,000 were at the Veterans Health Administration (VHA), not the Veterans Benefits Administration, which handles claims. Id. Yet fewer people at the VHA mean that examining and diagnosing veterans is harder, which in turn mucks up the benefits process. For example, if the Board orders an exam be performed by a medical specialist, but it is instead done by a nurse practitioner, the case might stall out because Board’s specific instructions were not followed. See Veterans’ Dilemma, supra note 30, at 27.} \footnote{157}{Id. at 31.} \footnote{158}{Id.}
\end{footnotes}
veterans in the country decreased from 26 million to 21.8 million. As the number of total veterans fell, the number of veterans treated by the VA went up by 17%, despite a 60% increase in budget. By 2018, the VA’s budget was $200 billion, and the number of veterans had fallen to 17.9 million. In 2008, the VA secured the largest ever single-year increase in funding ($4.8 billion) which enabled 1,300 new Veteran Benefits Administration employees to be hired—which followed previous funding cycles that allowed it to hire 1,700 new employees. One would expect that stress on the system would ease with more dollars spent on fewer veterans and more employees to handle them, but problems remain.

2. Employees Are Inadequately Trained

In its earlier days, the VA relied on the expertise of its adjudicators to rate claims. Decisions were made by a three-person “rating board” that consisted of a medical specialist, a legal specialist, and an occupational specialist. No more. Frontline claims processors today are expected to be generalists with little to no expertise, undermining their ability to correctly diagnose veterans. An inspector general report found that the shift from specialist to generalist claims processors hurt veterans, especially those with

---

159 Metrics, Measurements and Mismanagement in the Board of Veterans’ Appeals: Hearing Before the Subcomm. on Oversight and Investigation, 113th Cong. 22 (2014) [hereinafter Mismanagement: Hearing] (statement of Joe Violante, National Legislative Director, Disabled American Veterans).

160 Id.

161 Id.

162 The State of the VA: Hearing, supra note 17, at 7.

163 Veteran Population Declines, U.S. CENSUS BUREAU (June 2, 2020), https://www.census.gov/library/visualizations/2020/comm/veteran-population-declines.html. It is expected that the veteran population will fall to 12 million by 2045, and that veteran ages will be more evenly distributed by then. NAT’L CTR. FOR VETERANS ANALYSIS & STATS., VetPop Infographic (May 3, 2019), https://va.gov/vetdata/docs/Demographics/VetPop_Infographic_2019.pdf. Currently, there are more veterans in their 60s or 70s because of the surge of veterans produced by the Vietnam War. Id.


166 Nomination Hearing of Denis R. McDonough to be Sec’y of the Dep’t of Veterans Affs.: Hearing Before the Committee on Veterans’ Affs., 107th Cong. 52–53 (2021) [hereinafter McDonough Hearing] (statement for the record provided by the American Federation of Government Employees, AFL-CIO).
complex cases.\textsuperscript{167} Claim processors may also be given inadequate training on certain subjects such as sexual trauma.\textsuperscript{168}

This is all the harder given most are lower-level federal employees with only a few years on the job and lack specialized training in medicine or access to medical consultants.\textsuperscript{169} And the way these employees are evaluated prizes speed over accuracy. The VA’s evaluation structure for employees rewarded quantity of claims adjudicated rather than the quality of those adjudications.\textsuperscript{170} For the purposes of evaluation, all cases are treated equally, regardless of complexity, and call center employees are pushed to move through calls quickly.\textsuperscript{171} Claim processors get credit for churning through cases even if their decision are later reversed as erroneous on appeal.\textsuperscript{172} Employees do not get counseling if their cases get reversed.\textsuperscript{173}

These sorts of staff problems may explain why there has been a longstanding problem of inconsistency between regional offices. A 2005 report documented high variance between different Regional Offices and the size of their awards. For example, in 2003, a veteran in Illinois could expect to receive $6,802, while a veteran with similar disability in New Mexico could expect $10,852.\textsuperscript{174} The variance between these two states increased to $7,500 and $12,500 over time.\textsuperscript{175} Variance of this rough magnitude has existed for decades.\textsuperscript{176}

3. Leadership Failures

Of course, ultimate responsibility rests with leadership at the VA, not its lowest level employees. Sadly, there were credible concerns in the recent past that career VA employees were punished for being whistleblowers, either fired

\textsuperscript{167} Id. at 53.
\textsuperscript{169} \textbf{DISABILITY CLAIMS MODERNIZATION ACT: H.R. REP., supra note 145}, at 10–11 (noting that it takes two to three years to train a rater who will stay on the job for an average of five years).
\textsuperscript{170} Id. at 5–6. This is not a new problem. In the 1980s, employees on the Board could get a 5% raise if they completed 40 cases per week, and some spent only eight minutes per case. \textbf{134 CONG. REC. 27792} (daily ed. Oct. 3, 1988) (statement of Reporter James J. Florio).
\textsuperscript{171} \textbf{McDonough Hearing, supra note 166}, at 53.
\textsuperscript{172} \textbf{DISABILITY CLAIMS MODERNIZATION ACT: H.R. REP., supra note 145}, at 6.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 10.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
or shunted to less important positions without cause.\(^\text{177}\) A 2008 congressional report found that “despite the benefit of numerous well-informed and detailed reports . . . VA leadership has consistently failed to implement most of the stated recommendations for reform and to develop its own strategic plan” to reduce backlogs.\(^\text{178}\) Such a culture means that it would be harder for agency failures to be brought to light and rectified. The VA has also been marred by scandals in recent years, though not all of them are attributable to the Veterans Benefit Administration.\(^\text{179}\)

\section*{E. Medical Exams Bedevil Veterans}

\subsection*{1. Veterans Are Forced to Undergo Unnecessary Exams}

Very often, a medical exam is necessary to diagnose a veteran’s conditions.\(^\text{180}\) As part of its duty to assist, the VA may have to provide a medical exam, known as a Compensation and Pension examination, C&P exam for short.\(^\text{181}\) The VA system did about two million such exams in a 16-month period between 2017 and 2018, about half done by VA staff and the other half done by outside contractors.\(^\text{182}\)

Unfortunately, in many other cases, exams are unnecessary but still required. Many veterans receive health care exclusively through the VA, so the VA already has their complete medical history.\(^\text{183}\) Yet when they file for a new condition or increase, they have to receive a C&P exam to verify their condition, the same as a newcomer to the system.\(^\text{184}\) Veterans may thus have to wait several months to receive a C&P examination so that a VA doctor can verify a condition that was already diagnosed by a VA doctor, and the exam itself may only be five

\begin{flushleft}
\footnotesize
\textsuperscript{177} Assessing Whether VA Is on Track to Successfully Implement Appeals Reform: Hearing Before the Comm. on Veterans’ Affs., 115th Cong. 3 (2018) (statement of Mark Takano, Acting Ranking Member).
\textsuperscript{178} DISABILITY CLAIMS MODERNIZATION ACT: H.R. REP., supra note 145, at 3.
\textsuperscript{179} Simcox, Thirty Years After Walters, supra note 19, at 726 (noting that VA medical centers were covering up wait times for care, hiding claims in filing cabinets, and wrongfully marking files with “no action necessary”).
\textsuperscript{180} See id. at 678.
\textsuperscript{181} Yelena Duterte, Duty to Impair: Failure to Adopt the Federal Rules of Evidence Allows the VA to Rely on Incompetent Examiners and Inadequate Medical Examinations, 90 UMKC L. REV. 511–12 (2022).
\textsuperscript{182} Id. at 512.
\textsuperscript{184} Id.
\end{flushleft}
Likewise, a veteran may need to get an exam even if they received a definitive medical evaluation while still serving in the military. According to testimony by Walter Tafe, director of the Director of Burlington County Military and Veterans Service, at a 2012 congressional hearing on the topic, at least half of all C&P exams are unnecessary.

2. Medical Exams Are Unreliable

Few quality controls exist for medical examiners. They do not have an obligation to explain their reasons and bases. This can enable skimpy exams. A proper medical exam means reviewing a claims file that can be thousands of pages long and should take hours, yet some complete the process in a few minutes. A typical examiner will give seven or eight exams a day, giving multiple opinions per exam. Compounding this issue, there are no specific methods or standards for the exams, almost no training required to perform an exam for the VA, and no requirement that exams be performed by a relevant specialist: an opinion on, say, multiple sclerosis (a condition of the central nervous system) could be provided by a neurologist, cardiologist, dermatologist, or physician’s assistant. This is not hypothetical. One veteran experiencing inflammation of the lungs and lymph glands had his exam (which concluded his condition lacked a service connection) performed by a VA physician who specialized in family practice.

Perhaps unsurprisingly, one study found that when courts reviewed medical examiners’ opinions, they found an error 76% of the time. Perhaps it is the fact that veterans cannot effectively challenge medical examiners, which allows incompetent examiners to continue unchecked. The VA has also admitted that over a seven-year period, unqualified examiners performed 24,000 traumatic brain injury evaluations.

185 Id. at 11, 13.
186 Id. at 12. In a 2018 congressional hearing, the VA claimed it was working to connect its systems with the Department of Defense to better share health information about veterans. The State of the VA: Hearing, supra note 17, at 8.
187 Efficiency Hearing, supra note 183, at 11.
189 Simcox, Thirty Years After Walters, supra note 19, at 715.
190 McClean, supra note 2, at 291–292.
191 Duterte, Duty to Impair, supra note 181, at 513, 519.
192 McClean, supra note 2, at 289.
194 Id. at 600.
Undoubtedly, some of the policies are because the VA has to process millions of medical exams every year. But the Social Security Administration processes even more medical exams and does it with more procedural protections for claimants.\footnote{McClean, supra note 2, at 308.}

3. Shoddy Medical Exams Are Hard to Challenge

The VA gets to select who will perform the C&P exam, and is responsible for ensuring that the examiner is qualified.\footnote{Duterte, Duty to Impair, supra note 181, at 519.} However, the VA is not required to affirmatively establish a medical examiner’s qualification unless there is evidence that would cast doubt upon their competence.\footnote{Cox v. Nicholson, 20 Vet. App. 563, 569 (2007).} Adjudicators rarely scrutinize examiners for competence, and may not even need to bother learning their specialty.\footnote{Duterte, Duty to Impair, supra note 181, at 519.} Examiners are instructed by the VA not to make statements regarding their lack of skill or training.\footnote{Id.} All this created a presumption of competence for medical providers.\footnote{Rizzo v. Shinseki, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (“Absent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician’s qualifications . . . .”).} This presumption was overturned in 2019, but veterans are still required to raise the issue of competence, rather than having the VA affirmatively establish the qualifications of its own witnesses.\footnote{Francway v. Wilkie, 940 F.3d 1304, 1307 n.1 (Fed. Cir. 2019).} In other contexts, civil or criminal, the burden of qualifying the expert rests on the party calling them.\footnote{Cobb, supra note 193, at 579.}

Requiring the VA to present evidence of its experts’ qualifications would be “illogical” and exacerbate delays, according to the Veteran Court.\footnote{Fears v. Wilkie, 31 Vet. App. 308, 316 (Vet App. 2019), aff’d, 843 F. App’x 256 (Fed. Cir. 2021) (quoting Parks v. Shinseki, 716 F.3d 581, 585 (Fed. Cir. 2013)).} The Veteran Court has said the presumption “is a simple rule.”\footnote{Id. at 314.} The presumption may be simple to articulate, but it can be difficult to rebut. Even though examiners are essentially expert witnesses called by the government, the VA does not automatically provide an examiner’s credentials to a veteran; typically it is nothing more than name, phone number, and other such basic information.\footnote{Cobb, supra note 193, at 594.}
More is only provided if the veteran raises the issue.\textsuperscript{206} And the Federal Circuit has declined to say that veterans have a right to send interrogatories to medical examiners.\textsuperscript{207}

The Board has inconsistently applied case law from the Federal Circuit.\textsuperscript{208} Even if outside sources strongly suggest a physician is incompetent, if the issue is not raised before the Board, it is a moot point.\textsuperscript{209} Unrepresented claimants have the same obligation to lodge an objection.\textsuperscript{210}

If the issue of competency is raised, it gets a deferential review. The adequacy of a medical exam is reviewed under a “clearly erroneous” standard of review, which means conclusions will be affirmed unless the court has a “definite and firm conviction that a mistake has been committed.”\textsuperscript{211} This is identical to the standard of review that normal courts use to assess factual findings.\textsuperscript{212} If a veteran prevails and gets an exam overturned for being inadequate, it can prove a pyrrhic victory, as kicking a case back for an additional exam can add as much as 1,700 days to an appeal.\textsuperscript{213}

\textit{F. Attorneys Are Largely Shut Out of the Process}

Various rules exist that limit how much and when attorneys can charge fees to represent veterans seeking benefits.\textsuperscript{214} But these policies may have an unfortunate consequence of making lawyers less likely to represent veterans at all. While a ban on unreasonable fees probably does not deter many lawyers, the absolute bar on payment before the Regional Office has made an initial

\textsuperscript{206}\textit{Francway}, 940 F.3d at 1308. The Federal Circuit clarified in the \textit{Francway} opinion that all the veteran needs to do is raise the issue in order to get documents from the VA showing an examiner’s qualifications. \textit{Id.} But for years prior to that, its opinions required, or at least strongly implied, the veteran had to somehow produce information showing the examiner was incompetent. See Parks v. Shinseki, 716 F.3d 581, 585 (Fed. Cir. 2013) (“If an objection is raised it may be necessary for the veteran to provide information to overcome the presumption.”). \textit{See also} Sickels v. Shinseki, 643 F.3d 1362, 1365–66 (Fed. Cir. 2011); Bastien v. Shinseki, 599 F.3d 1301, 1306–07 (Fed. Cir. 2010).

\textsuperscript{207} Gambill v. Shinseki, 576 F.3d 1307, 1311 (Fed. Cir. 2009).

\textsuperscript{208} Duterte, \textit{Duty to Impair}, supra note 181, at 524.

\textsuperscript{209} Fears v. Wilkie, 31 Vet. App. 308, 316 (2019), \textit{aff’d}, 843 F. App’x 256 (Fed. Cir. 2021) (physician was fired from the Army and had news articles written about his professional deficiencies).

\textsuperscript{210} \textit{Id.}


\textsuperscript{212} \textit{Id.} (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

\textsuperscript{213} Duterte, \textit{Duty to Impair}, supra note 181, at 514.

\textsuperscript{214} 38 U.S.C.A. §§ 5904, 7263 (West 2023).
determination\textsuperscript{215} means that lawyers will not get involved until midway through the process. Thus, lawyers will not be involved at the initial pleading or fact-finding stage, which may have adverse consequence for the veteran down the line. Prior to 2006, the prohibitions on attorney fees were much stricter, which had the effect of turning veteran law into a professional moonscape.\textsuperscript{216} To this day, Title 38 “has been ranked as one of the more complex parts of the U.S. Code,”\textsuperscript{217} yet many veterans must struggle through it without an attorney.

\textbf{G. Error Rates Are Worryingly High}

Nearly half of all initial claims for benefits are denied, and most veterans never bother to file an appeal.\textsuperscript{218} Denial rates are as high as 83\% for Gulf War illnesses.\textsuperscript{219} Of course, the VA has an obligation to reject unmeritorious claims, but these numbers show that for all of the paternalistic features built into the system, success is far from assured—and many veterans apparently are too dispirited to even try fighting a rejection.

Although there is no single, definitive tracker of VA error rates across all years, the available data is troubling. From 1982 to 1993, the reversal rate of Regional Office decisions at the Board increased from 12.8\% to 16.2\%.\textsuperscript{220} A 2000 study by the Government Accountability Office showed that initial VA decisions were only correct 68\% of the time, which works out to error rate of 32\%.\textsuperscript{221} In 2008, the remand rate for Regional Official decisions was 57\%.\textsuperscript{222}

A 2014 congressional hearing involved testimony suggesting an even higher rate of error. In a sample of 8,366 claims of veterans represented by the American Legion, 2,330 decisions by a Regional Office were overturned and had

\textsuperscript{215} Id. § 5904(c)(1).

\textsuperscript{216} Simcox, \textit{Wild West}, supra note 144, at 524 (noting that for a number of years there was only one academic analyzing the Veteran Court). At one point, things got so bad the Chief Judge of the Veteran Court asked the Attorney General if Department of Justice employees could serve as “master amici” before the court, though the Department declined. Simcox, \textit{Thirty Years after Walters}, supra note 19, at 694; Cragin, \textit{supra} note 164, at 27, 28 (the year the Veteran Court was stood up, only 1.6\% of Board cases were handled by attorneys).


\textsuperscript{218} McClean, \textit{supra} note 2, at 285.

\textsuperscript{219} \textit{Id.}

\textsuperscript{220} Cragin, \textit{supra} note 164, at 40.

\textsuperscript{221} Cobb, \textit{supra} note 193, at 599.

\textsuperscript{222} \textit{Disability Claims Modernization Act}: H.R. Rep., \textit{supra} note 145, at 7. It is also noteworthy that between 2000 and 2007, the rate of Regional Office decisions that were appealed more than doubled to 12\%, indicating veterans did not believe they were receiving valid denials. \textit{Id.} And the fact that both the number of appeals and the rate of reversal increased in tandem showed many cases were being wrongly decided. \textit{Id.}
benefits awarded, and another 3,904 were inadequately developed and prematurely denied.223 Add those up, and there 6,234 erroneous denials, or 74% of the sample. By 2019, the reversal rate at the Board was 74%.224

The exact, definitive number is hard to pin down. What is plain is that the reversal rate has gone up over time. A likely culprit being the fact that judicial review has led to more rules and standards for adjudicators to inadvertently violate. It goes to show how the VA struggles to comply with due process obligations.

V. VETERAN UNFRIENDLY FEATURES OF THE BOARD

A. Staffing Problems

1. Low Staff Leads to Sloppy Work

Far fewer people work for the Board than at the Regional Offices, but the Board has its personnel problems too. Despite high caseloads, there were only 65 Veteran Law Judges hearing cases for the Board in 2015, at a time when the Social Security Administration had over 500.225 As of September 2023, there were over 1,000,000 pending claims, with 282,220 backlogged claims.226 The number of pending claims and backlogged claims was falling in the first half of the 2010s, then flattened around 2015, spiked in 2019, and by 2023, the claims inventory reached the highest point in at least a decade.227 Still, both the number of pending claims and backlogged claims is higher in 2022 than 2015. At least on this point, the VA is making progress: there were 113 veteran law judges in 2021, with plans to hire more in the future.228

New hires notwithstanding, the Board is still overwhelmed by high caseloads, and the Board sometimes cuts corners in its decisions. A judge of the Veteran Court has said the practice of issuing thinly reasoned opinions was

---

223 Mismanagement: Hearing, supra note 159, at 5.
224 McClean, supra note 2, at 307. This source also reports that the reversal rate in 1992 was 66.2%, which is much higher than the number reported by the above cited Cragin article. Id.
225 Veterans’ Dilemma, supra note 30, at 31.
“disturbing,” “unacceptable,” and “unlawful.” In that case, the Board denied relief because the veteran’s headaches were said to be neither “very frequent” nor “prolonged” but did not define what those terms meant, giving the veteran no idea what they needed to do to qualify for disability. Given that attorneys who work for the Board only have about 20 minutes to screen cases, it is no wonder mistakes get made.

The Board also cannot adequately staff all of the hearings that it conducts. If veterans wish to appeal their initial determination and plead their case to the Board, veterans will need to get a hearing slot. But there are far fewer slots available than veterans seeking to appeal. The Denver Regional Office had 420 hearing slots in 2014, for instance, when 2,200 veterans were waiting for a hearing. This sort of bottleneck guarantees that veterans will be waiting around for their claims to progress.

2. Leadership Failures

Some errors by the Board occur outside of the context of litigation. An investigation found that Board was cooking its books to make itself appear to be more productive. It counted the same cases multiple times to inflate the number of processed cases, changed its reporting system to hide how long cases have been sitting around, improperly labeled cases as held in abeyance to stop the clock on them, and shuffled cases around to make it look like they were moving. Beyond outright misrepresentations, the Board prioritized easy cases so that it could process them quickly and pad its numbers, in violation of the law. As a result, in 2013, although 55,170 cases were shown as completed, only 15,000 were actually adjudicated. The push to increase case production also led to rubberstamping by judges.

All this led Kelli Kordich, the senior counsel for the Board, to testify before Congress that there was “unchecked mismanagement, corruption, and blatant disregard for our nation’s veterans that has become characteristic of Board management in the pursuit of processing appeals at breakneck speed for management’s own self-preservation.” Strong words from such a high-level official within the bureaucracy of the Board.

230 Id. at 246.
231 Mismanagement: Hearing, supra note 159, at 10.
232 Veterans’ Dilemma, supra note 30, at 11.
233 Mismanagement: Hearing, supra note 159, at 1–2.
234 Id. at 2.
235 Id.
236 Id.
237 Id. at 4.
B. Board Rules that Can Hurt Veterans

1. Hearings Can be More Adversarial than Intended

Board hearings are meant to be amicable, without the cutthroat features like cross examination or opposing counsel for the VA. But that does not mean it works as intended. Veterans’ benefits attorney David Boelzner wrote that he rarely advised clients to participate in Board hearings.\(^{238}\) Almost all evidence is written, so it is unlikely that an oral statement from the veteran will move the needle, but the veteran just might say something inartful that the Board seizes on to deny the claim.\(^{239}\) And while the Board does not perform cross examination, it can ask follow up questions that lead to the veteran accidentally saying something that damages their case.\(^{240}\) So no matter how informal the hearing is, it can be detrimental.

2. Inadequate Explanation Rules Can Lead to Needless Remands

Frequently, the Board is dinged for failing to provide an adequate statement of reasons or bases for its decisions.\(^{241}\) That alone is concerning, as it deprives veterans a satisfactory explanation of why their claim is denied, frustrates judicial review, and may well mean that the denial was based on faulty reasoning. But at least this is the system working as intended: The Board gets corrected for leaving an analytical gap.

Sometimes, however, the Veteran Court applies the rule in such a way that means the case will get dragged out more, without clarifying anything. For example, if the Board fails to explain something in its written opinion, but the VA Secretary fully explains the matter during its brief or during oral argument before the Veteran Court, the court may still remand for that same explanation to be given by the Board.

In *Skaar v. Wilkie*,\(^{242}\) the veteran was part of a cleanup crew of a B-52 bomber that crashed into another aircraft over Spain and spewed out radioactive plutonium. The veteran was later diagnosed with leukopenia, a white blood cell count disease, and sought compensation.\(^{243}\) As part of his claim, the Air Force provided an estimate of the radiation dose he was exposed to, and concluded it

---

\(^{238}\) Hennings, Boelzner & White, *supra* note 47, at 386 n.106.

\(^{239}\) *Id.*

\(^{240}\) *Id.*

\(^{241}\) *E.g.*, Spellers v. Wilkie, 30 Vet. App. 211, 221 (2018) (holding that the Board had failed to explain adverse credibility determinations).


\(^{243}\) *Id.* at 133.
was unlikely to have caused the leukopenia. In affirming a denial of the claim, the Board did not provide any detailed explanation for the methodology that the Air Force used to come to its estimate, but the Secretary did during appeals process at the Veteran Court. Even so, the court remanded the issue for the Board to give the same explanation, saying “it ultimately is not [the Secretary’s] prerogative to explain what the Board did not. As we have often said, the Secretary cannot make up for the Board’s deficient statement of reasons or bases.”

If the court had identified any errors with the methodology, this would be understandable. But the court did not. It is unclear how remanding for the Board to repeat the same explanation as the Secretary would help the veteran. It will, however, delay the case for months and clog the docket, preventing other cases from being heard.

3. The Fraudulent Evidence Rule Can Hurt Veterans, but not the VA

Occasionally, one will find a regulation that is written to be one-sided against the veteran. One such rule is 38 C.F.R. § 20.1000. Under its terms, a decision by the Board may be vacated if the award of benefits “has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant.” But there is no converse rule for when the denial of benefits is based on false or fraudulent evidence.

When an appellant challenged the lopsided nature of this regulation, the Veteran Court upheld it, saying that it was fine amidst the generally pro-claimant system, that the rule usually did not hurt claimants, and that the VA had an inherent duty to guard the public against fraudulent claims. It did not matter that some of the evidence the Board relied upon to reject a claim appeared fraudulent.

---

244 Id.
245 See id.
246 Id. at 143.
247 Id. As of September 2023, a docket search of Lexis does not show any subsequent opinions following the 2020 ruling. But it indicates an appeal was filed on March 12, 2021, which suggests the veteran is not satisfied with his case. So, the case has been extended for two years, consuming VA bandwidth, without observable benefit to the veteran.
248 A veteran could allege Clear and Unmistakable Error, but that is a very difficult standard to meet.
250 The claimant in the case was a spouse of a veteran who had died. Id. at 27. Her claim for dependency and indemnity benefits was rejected because the Board said the veteran was married to another woman, Rhonda Matthews. Id. at 28. But an Oklahoma State court order held that Ms. Matthews had induced the veteran to marry her through fraud and never fully executed the marriage
C. The Board can Ignore Its Own Policies

The Veteran Court has said when "the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." But at the same time, it has carved out areas where the Board can disregard its own rules at the expense of people’s rights.

Navy veteran Robert Euzebio served in Vietnam, where he was exposed to Agent Orange, and later drank contaminated water at Camp Lejeune. Years later, he was diagnosed with a benign thyroid nodule. The Board rejected the argument that the condition was caused by Agent Orange or the contaminated water. During the course of the appeal, the National Academies of Sciences (NAS) issued a report that supported a connection between the veteran’s exposures and the thyroid nodule. Although the Board did not specifically mention that NAS report, the Board’s official claims adjudication guide, known as the Purplebook, did. Yet the VA contended, and the court agreed, that because the report was not specifically about Mr. Euzebio’s case, it was not constructively before the Board. And so, the VA was allowed to officially acknowledge scientific reports, and then disclaim their existence when it fails to apply them. The decision was remanded two years later, but the ordeal has added years to the veteran’s claim.

More broadly, the Purplebook, as an internal guidance manual, is not substantively binding on the Board, though it must explain why it is not following a provision that relates to particular case. This contrasts with the concept in employment law that when a company promulgates an employee manual and evidences an intent to be bound it, it should be treated as an implied part of the contract and binding on the employer. The Board is thus able to

253 Id. at 397.
254 Id.
255 Id. at 397–99.
256 Id. at 399.
257 Id. at 402.
create internal guide, evince an intent to be bound by generally trying to follow it, yet violate it so long as it explains itself or the veteran fails to raise the issue early enough in the process.

D. Delays Are Long and Errors Are Prevalent

Those seeking benefits from the VA must endure long delays. Slowdowns permeate the entire process. A 2012 study found that it took more than 3 months to initially enroll veterans in health care benefits, for instance. But examples from the Board are particularly egregious. In 2013, it took 1,295 days between date of notice of appeal from a Regional Office and Board decision. That same year, it took 1,603 days to get a final agency decision in a remanded case—longer than the U.S. involvement in World War II. By 2018, average time to wait for an appeal to the board is 2,213 days, or more than six years, with a remand to the Regional Office tacking on 943 days.

Actual delays may even be worse than these numbers suggest. A 2012 review of the VA’s outpatient medical appointment scheduling found that reported appointment wait times were unreliable. There were also inconsistencies in how dates were recorded and how wait times were measured. A 2018 internal audit found that the VA was unable to evaluate the accuracy of its wait time data. All this raises questions about whether other reported wait times are accurate.

It appears overall delay has been improving over years, though it remains stubbornly high. A 2017 congressional report stated a veteran had to wait an average of 116 days for their initial decision on disability, and three years for appeals to be resolved. A witness at a 2015 congressional hearing claimed it was five years. A 2008 congressional hearing estimated the average delay as five to seven years. Whatever figure one prefers, it is clear that cases are not moving quickly enough. Over 1,000 veterans with unresolved disability claims pending more than a year died in 2016.

261 Phoenix: Hearing, supra note 146, at 43.
262 Simcox, Thirty Years after Walters, supra note 19, at 708.
263 Veterans’ Dilemma, supra note 30, at 31.
264 Simcox, Wild West, supra note 144, at 532.
265 Phoenix: Hearing, supra note 146, at 4.
266 Id.
267 Id.
268 SENATE REPORT, MODERNIZATION ACT OF 2017, supra note 34, at 29.
269 Veterans’ Dilemma, supra note 30, at 24.
271 Oliva, supra note 120, at 108. It is true that most veterans waiting out these appeals are receiving some amount of benefits. But even if they eventually get something it can take years.
Improvements over time may be thanks to congressional action by passing the Appeals Modernization Act. Under the old appeals process, the average vet was projected to wait ten years for a final appeals decision by 2027. Even after the Appeals Modernization Act was passed, there were nearly 500,000 claims pending, with 200,000 considered backlogged. This is eerily similar to the numbers of 2008, where there were 630,000 pending claims and roughly 157,000 pending longer than six months.

There may not be any simple path to eliminate long waits. To some extent, delay is an inevitable part of due process. Judicial review has forced the VA to re-adjudicate thousands of decisions and required Board to write longer decisions to comply with precedent, increasing its workload in the process. An unfortunate consequence of efforts to help veterans by eschewing statutes of limitation and finality of judgments is that they contribute to a large backlog of cases.

Hal Williams’s story exemplifies the hard tradeoff between speed and catering to claimants. Veterans of advanced age are supposed to get quicker treatment from the VA, but this does not always happen. Mr. Williams joined the military in 1963, so when he filed an appeal in October 2014 relating to a knee injury, the Board promised it would “take prompt action.” True to its word, it rendered a decision within a month, but it was merely for a remand to the Regional Office for consideration of a new issue. The case worked its way back up to the Board in July 2016, where he was promised it would be “handled expeditiously.” Again, it moved fast, issuing a decision within 43 days but denying relief. This time Mr. Williams argued he should have had longer to submit evidence, and the court addressed this argument in 2019. So even when the Board genuinely moved quickly, it can open itself up to appeals.

While some delay may be inescapable, one fixable cause is the alarmingly high error rate at the Board. In 2021, there were 9,303 appeals of a


273 McDonough Hearing, supra note 166, at 2.


275 Veterans’ Dilemma, supra note 30, at 23.


277 Id.

278 Id. at 50.

279 Id.

280 Id.
Board decision to the Veteran Court.\textsuperscript{281} Of those, there were 7,704 remands, 572 affirmances, and 1,027 dismissals.\textsuperscript{282} That works out to 82.8% remand rate, and only 6.1% of decisions resulting in affirmance. In other words, the Board is making a prejudicial error at least 82.8% of the time and is only conclusively vindicated by the court 6.1% of the time. These numbers are consistent with prior years. So thousands of cases are getting kicked back, and gumming up the works, due to Board error.

The issues have not been for lack of funding, at least not entirely. In 1992, VA benefit payments totaled $17 billion.\textsuperscript{283} At the same time, there were 3.2 million completed actions at the Regional offices, about 70,000 notices of disagreement, 38,000 appeals transferred to the Board, 33,500 cases disposed of by the Board, and 1,742 notices of appeal to the Veteran Court.\textsuperscript{284} In 2007 there were 102,000 notices of disagreement and 4,600 cases appealed to the Veteran Court\textsuperscript{285} and $35 billion in benefits were paid out to 3.6 million veterans.\textsuperscript{286} By 2014, there were 145,000 notices of disagreement filed,\textsuperscript{287} and $86 billion in benefits paid out.\textsuperscript{288} Over 20-odd years, the VA’s budget quintupled while notices of disagreement only doubled. So the workload at the Board has gone up, but nowhere near as fast as the overall budget.

VI. UNFRIENDLY FEATURES OF THE COURT OF APPEALS FOR VETERANS CLAIMS

The Veteran Court plainly considers itself separate and apart from the paternalistic realm of the VA.\textsuperscript{289} It is unclear whether Congress intended such a

\textsuperscript{281} Fiscal Year 2021 Annual Report, supra note 96, at 3.
\textsuperscript{282} Id.
\textsuperscript{283} Cragin, supra note 164, at 33.
\textsuperscript{284} Id. at 34.
\textsuperscript{287} Veterans’ Dilemma, supra note 30, at 5.
\textsuperscript{289} Kutscherousky v. West, 12 Vet. App. 369, 372 (1999) ("consistent with the shift of the claim upon remand by the Court from the Court’s adversarial process back to the nonadversarial, ex parte adjudication process carried out on behalf of the Secretary.").
Admittedly, a court where two opposing parties argue against each other is going to be more adversarial than a system where the veteran presents evidence without an opponent who argues for a denial. But the court, of its own accord, designed a number of rules, practices, and precedents that sharpen the adversarial nature of the court. Nothing in its enabling statutes or legislative history dictate these policies, and they have the result of making it harder for veterans to get relief. The Federal Circuit and Supreme Court do the same thing. And Congress passed several statutes that make the judicial review process harsher to veterans. The point here is not to figure out how to apportion blame on the judges of the Veteran Court, Federal Circuit, Supreme Court, or members of Congress. Only to point out that, collectively, these institutions have made it harder for veterans to prevail.

A. The Veteran Court Chose to Adopt Article III Justiciability Rules

When the Veteran Court was created, it had an almost unprecedented situation: a clean slate of law to create and a new institution to build. Presented with this opportunity, the court chose to adopt various Article III conventions, even though doing so would winnow out claims that veterans could make. Nothing required this; the court chose it on its own.

Under Article III, of the Constitution, the “judicial Power” of the courts extends to “Cases” and “Controversies.” Known as the Case or Controversy Clause, the Supreme Court has said that this provision delimits the sorts of disputes that are appropriately resolved through the courts. The justiciability doctrines that “cluster about Article III” exist to preserve the separation of powers and limit the power of unaccountable judges. Critically, these doctrines were born out of Article III courts. But when Congress established the Veteran Court, it was based under its Article I authority

290 134 Cong. Rec. 31,787 (1988) (calling the law creating judicial review “a compromise bill which guarantees veterans a day in court without creating an adversarial method of decision making at the VA.”).
291 Allen, supra note 285, at 373.
292 Id. at 374.
293 134 Cong. Rec. 31788 (1988) (statement of Mr. Edwards) (“The new U.S. Court of Veterans Appeals, as a judicial tribunal, has the authority to establish its own rules of practice and procedure.”); 134 Cong. Rec. 31466 (1988) (statement of Mr. Cranston) (responding to concerns the court would make the VA claims process “more adversarial” by saying that “I do not believe [these concerns] are well founded, and I am convinced that the compromise agreement fairly addresses all of these concerns.”).
294 U.S. Const. art. III, § 2, cl. 1.
to “constitute Tribunals inferior to the supreme Court.”\(^{297}\) The court is wholly a creature of Congress, its powers may be circumscribed or eliminated at will, and its judges are not entitled to life tenure provisions of Article III.\(^{298}\) What is more, Congress has evinced an intent that the Veteran Court to be more claimant friendly than an ordinary tribunal.\(^{299}\) Hence, an Article I court does not run the same risk of short-circuiting the democratic process, nor does it require the same level of self-imposed restraints to keep its power in check.\(^{300}\)

The Supreme Court has acknowledged that the policy reasons for requiring issue exhaustion, by analogy, are weaker in the non-adversarial setting.\(^{301}\) Yet the Veteran Court enforces justiciability doctrines with vigor.\(^{302}\) Nothing is forcing the Veteran Court to do this.\(^{303}\) Ironically, the Federal Circuit will intervene when the Veteran Court acts like an Article III court to fashion a

---


\(^{298}\) See 38 U.S.C.A. § 7252 (West 2023) (establishing the powers of the court, along with limitations); 38 U.S.C.A. § 7253 (West 2023) (imposing term limits on judges and making them removable by the president); Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 526 (1828) (stating that Article I courts “are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it.”).

\(^{299}\) 38 U.S.C.A. § 7261(a)(4) (West 2023) (authorizing the court to reverse finding of facts adverse to the claimant, but saying nothing about facts favorable to the claimant); cf. Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (“This court and the Supreme Court both have long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant.”).

\(^{300}\) Article I courts have voluntarily imposed justiciability rules, but the rationalization is weaker than for Article III courts. See CW Gov’t Travel, Inc. v. United States, 46 Fed. Cl. 554, 557–58 (2000).


\(^{302}\) Philbrook v. Wilkie, 32 Vet. App. 342, 345 (2020), rev’d and remanded sub nom., Philbrook v. McDonough, 15 F.4th 1117 (Fed. Cir. 2021) (“This Court long ago adopted the rule from Article III, section 2 of the U.S. Constitution that our jurisdiction only extends to a case or controversy.”) (internal quotations omitted).

\(^{303}\) Mokal v. Derwinski, 1 Vet. App. 12, 15 (1990) (“We are granted power judicial in nature and being statutorily characterized as a ‘Court’ we are free, in the absence of a congressional directive to the contrary, to adopt as a matter of policy the jurisdictional restrictions of the Article III case or controversy rubric.”). Congress has arguably directed to the contrary. Federal law uses the phrase “case or controversy” when describing the powers of the Court of Federal Claims (another Article I court). 28 U.S.C.A. § 2519 (West 2023). But that phrase appears nowhere in the law enacting the Veteran Court. See generally Veterans’ Judicial Review Act, Pub. L. 100-687, 102 Stat. 4105, 4113 (1988). By the Veteran Court’s own reasoning, this suggests that Congress did not seek to impose such limitation on the Veteran Court. See Petite v. McDonough, 35 Vet. App. 64, 70 (2021) (“Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993)).
remedy for a veteran, but not when the Veteran Court forges rules that deny relief for veterans.

It is particularly odd when one considers that the court consciously refuses to import rules from other systems that would help veterans, such as analogous regulations from the Social Security Administration. But it has no qualms about importing rules from ordinary appellate courts that pare down the number of valid claims.

1. Jurisdiction

By law, the Veteran Court may not review the disability rating schedule or the Secretary’s actions creating or revising those standards. This leads to an odd situation where the judicial reviewer may not question some of the most consequential decisions of the agency it is supposed to check. At least here, the court can point to a clear statutory limitation on its power. That is not always the case.

The court has claimed that deciding a case based on equities would be an improper expansion of its jurisdiction. Granted, a statute does give the Secretary the power to grant equitable relief, but it does not preclude the court from doing so. Separately, the court says it lacks authority to review decisions that are entirely within the Secretary’s discretion. This is not based on any express prohibition from Congress; rather, the concept is drawn from principles handed down by the Supreme Court from ordinary litigation. The Veteran Court did not attempt to expand its ambit and get rebuked; it imposed this restraint on its own accord.

2. Ripeness

If a controversy can clearly be seen on the horizon, but has not yet fully come to a head, the court will hold back. For example, the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) allows the VA to provide healthcare to certain children of veterans, but only until age

---

304 Parker, supra note 29, at 302–303.
310 Darrow v. Derwinski, 2 Vet. App. 303, 306 (1992). The case involved a widow of a veteran who received equitable relief from the Secretary, and unsuccessfully petitioned the Veteran Court for more. Id. at 303.
A dependent child asked the court to consider whether the Affordable Care Act, and corresponding military healthcare statutory changes, raised the CHAMPVA eligibility for children to age 26. But the court declined to consider the argument because the child was only 22, and thus, the matter was unripe. Likewise, the court will not issue advisory opinions.

3. Mootness

The court insists that a live controversy must exist at the outset of litigation and continue throughout the appeal. This means the court has an ongoing duty to ensure that a controversy exists. A matter becomes moot if benefits get awarded. Mootness standards are taken from the Supreme Court.

In Cardona v. Shinseki, a same-sex spouse was denied additional compensation because under federal law at the time, her marriage was not legally valid. On appeal, the spouse challenged the constitutionally of the law discriminating against same-sex couples. Although the law had previously been enforced, the government stopped defending it in 2013, per an attorney general directive. Due to the non-enforcement, the court dismissed the appeal as moot, leaving a discriminatory law on the books. As of August 2022, the law still technically defines a “spouse” as “a person of the opposite sex who is a wife or husband,” waiting in the wings for reactivation. Rather than strike down an odious law—thus ensuring it could not be easily resurrected by a new presidential administration or regressive Supreme Court precedent—the Veteran Court simply dropped the appeal. This saved neither time nor effort for the court: it still had to write a lengthy opinion explaining why mootness applied.

313 Id.
316 Id.
319 Id. at 472.
320 Id. at 473.
321 Id.
322 Id. at 483.
Curiously, even when the parties do not disagree with each other on a point, the court may still intervene to create a rule that ends up hurting veterans. In *Kennedy v. Wilkie*, the VA created an explanatory document for its employees called a “Fast Letter” in 2013. The Fast Letter provided guidance that led a Regional Office to grant dependency and indemnity benefits in 2015 to a spouse who had originally filed a claim in 2005 and been denied benefits. However, the effective date of the benefits was 2015, meaning she missed out on the decade of payments she would have gotten had her 2005 claim been granted. The spouse then sought to have her benefits backdated to 2005—something could only happen if the Fast Letter was deemed to be a “liberalizing law or VA issue.” Both parties agreed the Fast Letter was a “VA issue,” disagreed about whether it was “liberalizing.”

Rather than accept the agreement of the parties and assume without deciding it was a “VA issue,” the court held both parties were wrong and it was *not* a “VA issue” at all, thus rejecting the spouse’s request for backdating.

There was nothing wrong with the court’s reasoning about the definition, but it is peculiar to leapfrog the agreement of the parties in a putatively non-adversarial system in order to reject a claim on other grounds.

### B. The Veteran Court Has Imported Rules that Ease Its Workload at the Expense of Claimants

1. **Docket Management Rules**

According to the court, perfunctory and undeveloped arguments will not be considered. Improperly presented arguments will not be considered. Arguments that are raised too late, such as in a reply brief, will not be considered. If a veteran does not affirmatively raise an earlier issue with the

---

325 *Id.*
326 *Id.*
327 38 C.F.R. § 3.114(a) (2023).
329 *Id.*
332 Carpenter v. McDonough, 33 Vet. App. 298, 307–308 (2021), *opinion withdrawn and superseded on reconsideration*, 34 Vet. App. 261 (2021). However, the court does sometimes choose to consider late arguments. *E.g.*, Crumlich v. Wilkie, 31 Vet. App. 194, 202 (2019). And sometimes the VA is on the receiving end of this sort of rule. If the Board fails to give a satisfactory explanation, it does not matter if a VA attorney is able to provide an explanation at oral argument.
court, it will be deemed abandoned and dismissed. Although a veteran may have a right to an oral hearing before the Board, no such generosity is extended by the court: the VA may oppose a veteran’s request for oral argument, and the court is free to dispense with oral argument. The court may issue precedential decisions even when neither party requests it.

The basis for these kinds of rules is, at least in part, for the convenience of the court. No doubt, the easiest way for an appellate tribunal to decide a case is for the parties to fully brief all relevant issues on time. But the court has indicated it will overlook sloppy work from the Board at times. It has said, “we’ve had no problems reviewing... implicit factual determinations by the Board.” Why allow the Board to get away with covert findings, but require veterans to make their arguments quickly and expressly?

Rules requiring proper articulation of the issues by veterans also contrast sharply with the VA’s duty to read claims sympathetically, to maximize benefits, and to analyze a claim for all possible theories raised by the evidence. Lower-level VA employees without law degrees must do the hard work of fleshing out a veteran’s case for them, but the appellate judges insist that all arguments be fully baked and timely made before they will be considered.

2. Constitutional Avoidance

Like many other judicial bodies, the Veteran Court follows the “fundamental and long-standing principle of judicial restraint... that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” Not only does the court apply the doctrine of constitutional avoidance in the abstract, but the court is also extraordinarily hesitant to find any constitutional violations in practice. Then-Professor Michael Allen (now Veteran Court judge) noted that from 2009 to 2011—a period immediately after the

Skaar v. Wilkie, 33 Vet. App. 127, 143 (2020), vacated in part sub nom. Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022) (“It ultimately is not [the VA attorney’s] prerogative to explain what the Board did not. As we have often said, the Secretary cannot make up for the Board’s deficient statement of reasons or bases.”).


Fugere v. Derwinski, 1 Vet. App. 103, 105 (1990) (“Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation.”).


Federal Circuit recognized that the Fifth Amendment applies to proceedings—the Veteran Court never found a constitutional violation. The author’s own review of the court’s published cases from 2018 to 2021 found eight cases raising constitutional challenges, and all were rejected. For all of the fanfare of applying the Fifth Amendment to veteran benefits, it has had little tangible impact.

3. Collateral Estoppel / Issue Preclusion

Collateral estoppel, or issue preclusion, is the idea that when a court has ruled on a fact that two parties litigated over, that fact is conclusively settled even if those parties engage in subsequent litigation. The purpose of this doctrine is not so much justice as it is “to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation.” While veterans may have a freer hand than most litigants to continually litigate the same issues, the same collateral estoppel may still apply. Even if the previous judgment is erroneous, it is still controlling. Nothing in the enabling statutes requires enforcing collateral estoppel rules.

Bonner v. Wilkie involved a servicemember who died of cancer in 1975 after participating in atomic weapon testing. Initially, his autopsy diagnosed him with Hodgkin’s disease, and after his death, his wife argued his death was linked to the testing, and thus she was entitled to dependency and indemnity compensation. The regional office denied the claim in 1976, rejecting any link. In 1995, the National Institutes of Health opined that the evidence favored lymphoma as the true cause of death, which led to the VA granting the compensation, only starting in 1995—meaning the family lost out

342 Id.
345 Id. (“There is no section in title 38 that creates a procedure for making a freestanding challenge to the finality of a prior decision.”).
347 Id.
348 Id.
on 20 years of benefits. 349 In 2008, the family argued that the 1976 decision had clear and unmistakable error, and thus, they were entitled to back-payment for those unpaid years of 1975 to 1995. 350 Over the years, both the Veteran Court and Federal Circuit made adverse rulings on various points, but the family kept the litigation going. 351

In 2021, the Veteran Court said these prior rulings left “little room to maneuver” because “the principles of collateral estoppel, or issue preclusion, apply.” 352 It implied that, if not for the previous rulings, it would have found for the family, but ended up affirming the validity of the 1976 Board decision. 353 The dissent, arguing for the family’s position, pointed out that Congress created the Veteran Court to correct injustices below and established the clear and unmistakable error doctrine to address issues that occurred before judicial review was even available. 354

4. It Is Unclear How Much Docket Management Rules Actually Help

It should be noted that efficiency, while perhaps not the overriding goal of the veterans’ benefits system, is still important. For every veteran who is allowed to make a hail Mary legal argument, another is going to have to wait longer for their claim to be heard. But it is curious that the Veteran Court has imported so many docket-management and judicial self-restraint doctrines from normal civil court system without alteration. While all actors should be concerned with unnecessary delay, the system Congress created clearly puts more emphasis on due process, not quick process. Yet the Veteran Court does not appear to have taken this into account in crafting many of its rules of procedure.

Moreover, to the extent that improving efficiency is the goal, restrictive rules at the court of last resort are a poor means to accomplish it. For a doctrine like collateral estoppel to actually improve efficiency, it is not enough that it defeats a case on appeal. The cost to the government of briefing and arguing the case is already spent, and the case has already taken time and resources at every step along the way. 355 To truly be effective at speeding things up, a docket-

349 *Id.* at 212.
350 *Id.* at 213.
351 *Id.* at 215.
352 *Id.* at 216.
353 See *id.* at 220.
354 *Id.* at 220 (Greenberg, J., dissenting).
355 It does save the government a payout for disability compensation, potentially, but it can be hard to say whether it costs the government more to litigate an appeal, or just pay out the money. At worst, a 100% disabled veteran costs the government about $32,000 a year. 38 U.S.C.A § 1114(j) (West 2023). One assumes a veteran arguing for 100% disability probably has at least some legitimate injuries that would get paid out regardless of restrictive appellate doctrine. The author
management rule must deter people from filing in the first place. In an ordinary system, rules from the high court that limit claims would trickle down and, theoretically, lawyers would become familiar with the case law and advise their clients not to sue in the first place. No rational client would want to waste money on a hopeless suit.

But in the VA system, the process is mostly free to the veteran, and rules essentially forbid having an attorney at the time of filing an initial claim. So, it is hard to imagine anyone is being dissuaded from filing an unmeritorious claim for benefits due to a Veteran Court opinion. Today, attorneys can be brought in after the Regional Office makes its decision, but for the first 25 years of the court, no attorney could be paid until the case made it to the Veteran Court.356 In other words, for the first era of the court, restrictive rules of the appellate court would have little deterrent effect on unmeritorious cases churning through the VA administrative review system, yet essentially all of the rules trace their lineage to this era. Who was supposed to inform veterans that these arcane rules existed, and that they should terminate their claims? Even today, most veterans do not appeal the Regional Office decision, so only a small slice of veterans will ever retain a lawyer and learn that these restrictive doctrines exist—a small slice that contains a hefty number of heartbreaking stories.

The court does not appear to see it this way at all, at least as implied by one concurrence. Veteran Court Judge Falvey quoted the Supreme Court to say “our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”357 But the VA system, more so than other,
prides itself on being accessible to unrepresented claimants, shuts lawyers out of the early stage, and unrepresented litigants make up a sizeable percentage of appeals.\footnote{Fiscal Year 2021 Annual Report, supra note 96, at 1 (showing that 10% of appeals are unrepresented, and 43% of petitions are).} The premise that parties will be represented by counsel simply does not work as well for the VA.

C. The Court Refuses to Assert Any Equity Powers

The very first case of the Court of Appeals for Veterans Claims was \textit{In re Quigley}.\footnote{In re Quigley, 1 Vet. App. 1 (1989).} It involved a distressed veteran whose benefits card was going to be revoked.\footnote{Id.} Desperate to prevent this, he wrote to the newly established court seeking an emergency injunction.\footnote{Id.} The letter was misaddressed, so the court did not receive it until after the revocation had already occurred.\footnote{Id.} Even so, the court considered the matter, concluding that the attempted appeal was premature, as the veteran had not yet received an adverse determination from the Board.\footnote{Id. at 1–2.} As such, the court disclaimed that it had jurisdiction to rule.\footnote{Id. at 2.} From the very beginning, then, the court made clear it was not going to bend the rules to favor veterans.

Although the Veteran Court says it will interpret ambiguous regulations to the veteran’s benefit, this may not amount to much. Both the Federal Circuit and Veteran Court caution that veterans “cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.”\footnote{Disabled Am. Veterans v. Gober, 234 F.3d 682, 692 (Fed. Cir. 2000); Gazelle v. McDonald, 27 Vet. App. 461, 471 (2016).} The Veteran Court is strident that it is not a court of equity and cannot grant relief based on compelling facts alone.\footnote{Holle v. McDonald, 28 Vet. App. 112, 119 (2016); Moffitt v. Brown, 10 Vet. App. 214, 225 (1997); Cutler v. Derwinski, 2 Vet. App. 336, 336 (1992) (rejecting a claimant’s plea to apply “law of common sense, fairness and justice” to his case).} Nor will the court broadly apply equitable tolling.\footnote{See Taylor v. Wilkie, 31 Vet. App. 147, 154 (2019) (citing cases to explain that while the court may toll a deadline, it will not equitably toll the effective date of compensation, which means it will not extend the period in which a veteran would be eligible for benefits).}

Bizarrely, the Veteran Court asserts it has extra-statutory powers in other contexts. It has held the VA has an intrinsic duty to safeguard public funds from...
unjustified claims, despite the fact that no statute sets this out.\textsuperscript{368} Lacking direct statutory support, the court also claims it has “wide discretion” to award attorney fees under the Equal Access to Justice Act, backed up by Federal Circuit and Supreme Court precedent,\textsuperscript{369} but not based on statutory text. And the court has sometimes gone to great lengths to interpret the rules to ensure that attorneys got their fees.\textsuperscript{370} Ensuring attorneys get fees improves the odds that future attorneys will continue to represent claimants, but it is discordant to tell veterans equity powers cannot help them while their attorneys enjoy “wide discretion” to get paid.

This is part of a larger pattern of the court selectively claiming its hands are tied. In \textit{Hembree v. Wilkie},\textsuperscript{371} the court refused to require that a veteran understood what he was doing when he requested to withdraw a claim in writing. The court claimed it had to enforce the regulation as written, even though it had previously added an extra-textual requirement that \textit{oral} requests to withdraw had to be made knowingly.\textsuperscript{372} So in a sense, the court is affirmatively deciding not to push the boundaries of its equity powers to help veterans.

The court has held firm that it will not invoke equity powers even when the facts of a case are horrifying. In \textit{Taylor v. Wilkie},\textsuperscript{373} the majority did not wish to recount the facts of the case where it denied relief, but the dissent did. Army veteran Bruce Taylor joined the military after his brother was killed in Vietnam.\textsuperscript{374} He then volunteered for testing at the Edgewood Arsenal, where he and 15 others were given a nerve agent to see how it would affect them at the firing range.\textsuperscript{375} The nerve agent caused Mr. Taylor to believe he was shooting people, not targets, and led to a whole host of physical maladies.\textsuperscript{376} As part of the testing, he signed a secrecy oath, subject to criminal punishment.\textsuperscript{377} He went on to serve two tours in Vietnam in 1970 and 1971, where he experienced flashbacks.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{370} Blue v. Wilkie, 30 Vet. App. 61, 66–72 (2018) (holding that the VA committed “implicit error,” which meant the attorney could get fees, even though the court simultaneously held that it “find[s] no error” in the VA’s actions); Conley v. Wilkie, 30 Vet. App. 224, 227–28 (2018) (holding that even though the court did not “explicitly” find error by the VA, it still found a remand based on agency error, and thus the attorney could get fees).
\item\textsuperscript{371} Hembree v. Wilkie, 33 Vet. App. 1, 5 (2020).
\item\textsuperscript{372} \textit{Id.} at 5-6.
\item\textsuperscript{373} Taylor v. Wilkie, 31 Vet. App. 147, 155 (2019) (Greenberg, J., dissenting).
\item\textsuperscript{374} \textit{Id.} at 155 n.5.
\item\textsuperscript{375} \textit{Id.} at 155.
\item\textsuperscript{376} \textit{Id.}
\item\textsuperscript{377} \textit{Id.} at 156.
\end{itemize}
\end{footnotesize}
to his testing, as well as new stressors in the warzone.\textsuperscript{378} The Department of Defense was aware that secrecy oaths were preventing test subjects like Mr. Taylor from discussing symptoms with their doctors or applying for compensation.\textsuperscript{379} In 2006, Mr. Taylor was informed he could discuss symptoms with his doctors and file a disability claim, which he did in 2007.\textsuperscript{380} The VA promptly diagnosed him with PTSD and major depressive disorder, but said the effective date of his award was when he filed, not when he underwent the testing and stressors\textsuperscript{381}—meaning he missed out on the thousands upon thousands of dollars he would have earned through disability payments from the prior four decades.

No matter, said the court. Even though the government was the one who inflicted much of the harm on Mr. Taylor intentionally, and then legally barred him from seeking compensation or explaining his health history, the court would not award him benefits for any date prior to his filing a claim in 2007.\textsuperscript{382}

If the court refuses to use equity powers, how about the Secretary? Their track record is hardly more benevolent. The power rests with the Secretary alone, and they have not delegated it to any of their subordinates.\textsuperscript{383} In 2015, the Secretary granted equitable relief only 15 times, resulting in benefits of less than one million dollars.\textsuperscript{384} Considering that around that same year, there were 1.3 million claims and \$87 billion distributed,\textsuperscript{385} that means only about 0.001\% of claims received equitable relief—a statistical nonentity.

D. Overreliance on Single-Judge Decisions

For every panel decision of the Veteran Court, there are 40 single-judge memorandum decisions.\textsuperscript{386} The court itself kicked off this trend: the court’s ninth opinion was a single-judge decision, even though neither party asked for it.\textsuperscript{387} Because they are not binding, single-judge opinions are usually slimmer and the

\textsuperscript{378} Id.
\textsuperscript{379} Id. at 156–57.
\textsuperscript{380} Id. at 157.
\textsuperscript{381} Id.
\textsuperscript{382} Id. at 149.
\textsuperscript{384} Letter from Robert A. McDonald, supra note 355. Through 2022, the law required the Secretary to submit a report to Congress detailing every grant of equitable relief. 38 U.S.C.A § 503(c) (West 2023). No report will be required after 2022, which may make the Secretary more comfortable granting relief, but we won’t be able to track this. Id.
\textsuperscript{385} Ridgway, Stichman & Riley, supra note 217, at 3.
\textsuperscript{386} Fiscal Year 2021 Annual Report, supra note 96, at 4 (noting that in 2021, there were 48 panel decisions and 1,940 single judge decisions).
\textsuperscript{387} Ridgway, Stichman & Riley, supra note 217, at 8.
drafter is relieved of the obligation to ensure the opinion meshes well with existing law.\textsuperscript{388} The court favors single-judge opinions as a means to cut through its docket.\textsuperscript{389}

Commentators are overwhelmingly critical of unpublished cases as leading to lower quality opinions.\textsuperscript{390} These single-judge decisions are non-precedential, but show “unacceptable variance” between how individual judges revolve cases, such as the vastly different rates of affirmance of Board decisions.\textsuperscript{391} One scholar has gone so far as to argue that the overuse of single judge decisions denies veterans of true appellate review, as there is no interchange between judges.\textsuperscript{392}

Arguably, the current practice of heavy reliance on single-judge opinions makes the tribunal more like a court of equity than of law. After all, the vast majority of its decisions are not precedential, and the decisions need only resolve the present case. But rather than wielding this sort of power in a way designed to help veterans, the court instead does it in a haphazard way that does not necessarily favor either party.

\textit{E. The Presumption of Regularity Glosses Over VA Errors}

The presumption of regularity is the general legal principle that government officials are performing their duties correctly, fairly, lawfully, and in good faith.\textsuperscript{393} As it pertains to the VA system, the presumption of regularity has been applied to mailing out documents,\textsuperscript{394} receiving documents,\textsuperscript{395} and considering documents.\textsuperscript{396} This means that if, say, notice of a hearing does not get delivered, the veteran has the burden of proving that the mailing did not occur, rather than the VA having to prove that it did.

Standing alone, the presumption of regularity means that if the VA neglects to send something in the mail, the veteran will have an extremely hard time proving agency fault. For example, in one case, the veteran was able to rebut the presumption, but only after submitting evidence of over 1,000 times that the

\begin{footnotes}
\footnotetext{388}{\textit{Id.} at 13.} \\
\footnotetext{389}{\textit{Id.} at 9–10.} \\
\footnotetext{390}{\textit{Id.} at 14.} \\
\footnotetext{391}{\textit{Id.} at 25–26 (noting that affirmance rates were between 22\% and 60\% depending on the judge). Ironically, one of the motivations for creating a Veteran Court was to improve consistency in benefits decisions. 134 CONG. REC. 27,788 (1988).} \\
\footnotetext{392}{Ridgway, Stichman & Riley, \textit{supra} note 217, at 55.} \\
\footnotetext{393}{Crumlich v. Wilkie, 31 Vet. App. 194, 201 (2019) (internal citations omitted).} \\
\footnotetext{395}{Redding v. West, 13 Vet. App. 512, 515 (2000).} \\
\footnotetext{396}{Baldwin v. West, 13 Vet. App. 1, 5–6 (1999).}
\end{footnotes}
VA failed to mail something, and concessions by VA employees that the mailing system was flawed. That veteran was only able to do this because they retained an attorney who had been practicing for years and could document these longstanding failures. An unrepresented litigant would have no hope of compiling evidence like this.

The presumption of regularity, as applied to medical examinations, is also a major exception to the Board’s obligation to provide its reasons or bases for a decision. Ordinarily, the Board must provide proper reasons or bases for its decisions. This rule is more than a paper tiger; violations have resulted in numerous decisions being kicked back. The Board is relieved of its ordinary duties when it comes to medical examiners. There is no obligation for the Board to explain why it finds a particular medical examiner credible unless the veteran specifically raises the issue.

The VA gets other favorable presumptions. All evidence submitted to the VA is presumed to be reviewed by the VA when it makes a decision. The Federal Circuit has indicated that this presumption is “almost irrefragable to overcome.” This means that if a veteran wants assurance that the VA actually considered a particular piece of evidence or argument, there is nothing the courts will do.

Decisions of the Board must be based on the entire record and upon consideration of all evidence, material, and applicable laws and regulations. But absent evidence to the contrary, the Board is presumed to have considered everything, even if it does not mention it.

Somewhat related to the presumption that all evidence is considered, the VA can silently reject entire claims under the “implicit denial rule.” In general, a claim for benefits is considered pending until it is finally adjudicated. But under the implicit denial rule, a claim can be conclusively denied even if the VA does not expressly tell the veteran why it denied the claim. For example, if multiple claims are submitted and only one is explicitly denied, the other can be deemed implicitly denied. Or, if the Regional Office does not say it is deciding

---

399 Sickels v. Shinseki, 643 F.3d 1362, 1366 (Fed. Cir. 2011).
400 Gonzales v. West, 218 F.3d 1378, 1381 (Fed. Cir. 2000).
401 Id. (quoting Clemmons v. West, 206 F.3d 1401, 1403 (Fed. Cir. 2000)).
406 Id. at 961.
407 Cogburn v. McDonald, 809 F.3d 1232, 1235 (Fed. Cir. 2016).
a veteran’s claim for a psychiatric condition, but notes a physical examination showed no evidence of a psychiatric condition, that can be enough to deny the claim. Thus, Veterans must parse VA decisions with a lawyer’s eye, or hire a lawyer, if they want to know the fate of their claims.

F. Small Leniency for Veterans Whose Records are Lost by the VA

Like any large bureaucracy, the VA may simply lose people’s records. The problem of missing records is “well-known and widespread.” In 1973, a fire at a storage center in St. Louis, Missouri, destroyed 16 to 18 million records. A catastrophe like this leaves veterans in a tough spot, for the courts will not presume a service connection for a disability where records were lost through no fault of the claimant.

In Cromer v. Nicholson, concerning a veteran whose records were lost in the 1973 fire, the Federal Circuit said the burden remained with the veteran to show their benefit claim is valid. Nor would the Federal Circuit hold that government negligence in losing the records would create a presumption in favor of the claimant—a rule that some civil courts have applied. According to the court, the VA complied with its duty to assist by obtaining alternative medical records to supplant those destroyed in the blaze.

Although the VA must help the veteran find alternative records if they exist, and the Board has a heightened duty to explain its findings in such a case, these protections count for little if the only dispositive records went up in smoke, or the VA simply ignores alternative evidence. Given that most servicemembers get all of their health care through the military while serving, it is highly unlikely that alternative records even exist. What is more, under the VA’s own manual, claims processors are discouraged from sending repeated

---

408 Id. at 1234.
410 Id. at 481. This is nothing new. In 1800, a fire struck the War Department and incinerated all records of military trials from the 18th century. Fred L. Borch, Defending Soldiers at Early Courts-Martial, ARMY L. 1 (May 2017).
412 Jandreau v. Nicholson, 492 F.3d 1372, 1376 n.3 (Fed. Cir. 2007).
413 Cromer, 455 F.3d at 1351.
414 Id.
415 Wherry, supra note 409, at 504.
416 Id. at 498–99.
requests to the national records center after being told records do not exist.\textsuperscript{417} This rule does serve the valid purpose of cutting down the number of futile requests for records (which slows down everyone else’s record requests) but has the consequence of reducing the odds of any records being found.

G. Limits on Fact-Finding Lead to Needless Remands

Federal law states that “in no event” shall facts found by the VA be “subject to trial de novo by the [Veteran] Court.”\textsuperscript{418} This has been interpreted as preventing the court from doing any kind of fact-finding.\textsuperscript{419} In turn, the Federal Circuit will not review factual determinations either; it cannot even review an as-applied challenge to a law or regulation.\textsuperscript{420} The Federal Circuit has also said that while the Veteran Court can review how the Board weighed the evidence, the Veteran Court cannot weigh the evidence itself.\textsuperscript{421} Nor may the Veteran Court consider anything outside of the “record of proceedings” before it.\textsuperscript{422} As a result, it often kicks back simple factual questions to lower level bodies for further adjudication. This forces veterans to wait months while the lower administrative bodies conduct more hearings.

Because of limitations on fact-finding, the court is disabled from answering seemingly straightforward questions that could provide relief. In one case, the uncontested evidence showed the veteran had an average diastolic blood pressure of 101.16.\textsuperscript{423} By regulation, a veteran was entitled to compensation if they had a “history of diastolic pressure over 100.”\textsuperscript{424} The court held that the Board erroneously interpreted the meaning of “history” so as to exclude early blood pressure readings that led to the 101 average.\textsuperscript{425} When properly calculated, the veteran would be entitled to compensation, but the court refused to simply declare this because the Board had not yet made a finding to this effect.\textsuperscript{426}

\textsuperscript{417} Id. at 487.
\textsuperscript{418} 38 U.S.C.A. § 7261(c) (West 2023).
\textsuperscript{419} Andre v. Principi, 301 F.3d 1354, 1362 (Fed. Cir. 2002); Sullivan v. McDonald, 815 F.3d 786, 793 (Fed. Cir. 2016) ("We urge the Veterans Court to be mindful of its jurisdictional limits and refrain from engaging in factfinding when applying the proper statutory and regulatory framework as outlined in this opinion.").
\textsuperscript{421} Deloach v. Shinseki, 704 F.3d 1370, 1380 (Fed. Cir. 2013).
\textsuperscript{422} 38 U.S.C.A. § 7252 (West 2023).
\textsuperscript{424} Id. at 78.
\textsuperscript{425} Id. at 80.
\textsuperscript{426} Id. at 81.
Or, in *Petite v. McDonough*,\(^{427}\) the Board said a dependent child was not eligible for healthcare benefits because she was over 18 and not pursuing full-time classes at a VA-approved educational institution—a finding based on a misreading of the statute that set out the age cutoff for benefits. The court held the child’s age was no bar to benefits, but remanded for the Board to determine whether she was, in fact, at a VA-approved institution.\(^{428}\) Given that the VA maintains a list of approved institutions on its website,\(^{429}\) answering this question (and thus winding up the case) would have been remarkably simple.

A third example comes from *Romero v. Tran*.\(^{430}\) In that case, a veteran’s representative never received proper notice to file an appeal, and as a result, the appeal was not filed until after the deadline.\(^{431}\) The VA could not prove the notice was sent in the mail, but argued the veteran could not prove this particular piece of mail had not gone out.\(^{432}\) On appeal, the veteran submitted evidence of widespread failures by the VA to send out these kinds of notices.\(^{433}\) The Veteran Court agreed that this evidence was sufficient to rebut the normal presumption that VA mailing procedures were adequate, so the VA would have to affirmatively prove it sent this particular notice—something the VA did not claim it would be able to do.\(^{434}\) Despite it being painfully obvious that, but for the mailing error, the appeal would have been filed on time, the court still remanded to the Board to denote this ministerial observation.\(^{435}\) *Romero* is all the more vexing because it was the second case to reach the same conclusion: in 2020, the court released an almost identical case for the same claimant.\(^{436}\) The 2021 decision was only to clarify some points about rebuttal evidence.\(^{437}\)

At least those claimants get to go back to the Board for resolution. Every once in a while, the court will direct the claimant to restart the process from scratch by filing a new claim at the Regional Office.\(^{438}\) Or the court will simply


\(^{428}\) Id. at 73.


\(^{431}\) Id. at 255–56.

\(^{432}\) Id. at 256.

\(^{433}\) Id.

\(^{434}\) Id. at 267–68.

\(^{435}\) Id. at 269 (“From the record and the Secretary’s concession, it very well may be that appellant’s merits Substantive Appeal was timely. However, it is the Board’s responsibility, not ours, to make the necessary factual findings in the first instance.”).

\(^{436}\) Romero v. Wilkie, 33 Vet. App. 84, 86 (2020). The first two paragraphs, for instance, are carbon copies.

\(^{437}\) Romero v. Tran, 33 Vet. App. at 255.

fail to resolve the issue that the parties were arguing over, meaning that future appeals and subsequent remands are more likely.\footnote{Withers v. Wilkie, 30 Vet. App. 139, 149 (2018) (the court held the Board did not define what “sedentary” employment meant, but the court remanded rather than defining the term in its opinion).} Eventually, a veteran on remand may get compensation, but they will have to wait months before the VA makes the requisite findings and awards disability.\footnote{See Skaar v. Wilkie, 33 Vet. App. 127, 150 (2020) (Meredith, J., dissenting) (noting that there were “3400 pages of evidence and argument submitted to the Board following the Court’s limited remand.”).}

Similarly, the Veteran Court is disabled from reviewing changes to definitions of what a disability is. The Secretary can even remove which diseases make a veteran eligible to receive compensation, and the court is powerless to stop it.\footnote{Byrd v. Nicholson, 19 Vet. App. 388 (2005).} So, the Court of Appeals for Veterans Claims is incapable of examining one of the bedrock features of the veterans’ benefits system.

Moreover, the court has commonly made remand, rather than reversal, the default rule. In \textit{Tucker v. West},\footnote{Tucker v. West, 11 Vet. App. 369, 373 (1998).} the Board erred multiple times and so clearly that the VA conceded the fault on appeal. Regardless, the court still remanded.\footnote{\textit{Id.} at 374.} Misapplication of the law, failure to provide adequate reasons or bases, and failure to provide an adequate record all result in remand, not reversal.\footnote{\textit{Id.}} Reversal is normally saved for when the only permissible view of the evidence is contrary to the Board’s decision,\footnote{\textit{Id.}} a high standard to meet. A remand not only slows down the process, but it is possible for the system to deny relief at the end of it. If that happens, all of the veteran’s months of slogging through the appeals process will have been for naught.

\textbf{H. Frequent Application of the Harmless Error Rule}

By law, the Veteran Court must “take due account of the rule of prejudicial error.”\footnote{Shinseki v. Sanders, 556 U.S. 396, 406 (2009).} As written, the statute only requires the court to “take due account” of the rule,\footnote{38 U.S.C.A. § 7261(b)(2) (West 2023).} rather than inexorably apply it, yet the Supreme Court interprets this as a mandate to use the same harmless error as ordinary civil cases.\footnote{\textit{Id.}} Consequently, even if the VA messes up, a veteran will not get relief unless they can show the error caused material harm. This is a fairly common
rule. Between 2018 and 2021, the Veteran Court cited the rule 19 times as part of its justification for denying relief in published opinions, about one-seventh of all published opinions during that time.449

In military criminal cases, if the defendant alleges a constitutional error on appeal—even if it was not preserved at trial—the government has the burden of proving that the error was harmless beyond a reasonable doubt.450 This is despite the fact that the accompanying statute is firmer: “A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.”451 So while the Veteran Court’s statute directs it to “take due account” of the harmless error rule, military criminal courts’ statute directs they “may not” invalidate a conviction for a harmless error. It is a foundational tenant of textualism—and the Veteran Court’s jurisprudence—that when Congress uses different words, they must have different meanings.452 Yet somehow, the Veteran Court strictly enforces its gentler harmless error rule, and military criminal courts softly interpret their harsher rule.

It makes even less sense considering how many veterans go through the process without an attorney, whereas every military defendant is entitled to a free attorney regardless of income and for all stages of trial and appeal.453 Consider Bowen v. Shinseki454 a case where a veteran was improperly denied a hearing at the Regional Office, but this was held harmless because the veteran received a later hearing before the Board. Veterans are essentially prohibited from having attorneys at the Regional Office,455 so an unrepresented veteran may not even realize that errors are being committed against them.


455 See 38 U.S.C.A. § 5904(c) (West 2023) (prohibiting attorneys from receiving any fees for work done before the Regional Office’s initial decision).
I. Restrictive Class Action Rules

After years of the Veteran Court refusing to recognize a right to certify class actions for veterans’ benefits, the Federal Circuit reversed course in 2017, based in part on the Veteran Court’s inherent judicial powers.\(^{456}\) The Chief Judge of the Veteran Court called this a “seismic shift” in precedent and a “watershed decision” that would shape the law for years.\(^{457}\) Although the Federal Circuit authorized class certification, it left it to the Veteran Court to devise a specific framework to handle class action suits.\(^{458}\)

At first, the Veteran Court looked to the Federal Rules of Civil Procedure as a starting point.\(^{459}\) But it has not attempted to relax the rules for peculiarities of the veterans’ benefits system. Unrepresented litigants are commonplace in veterans’ benefits litigation, including on appeal to the court. Yet, failure to have a class counsel learned in law is enough to defeat a certification without elaboration, a rule borrowed from standard civil litigation.\(^{460}\) There was not even discussion about why the rule demands a law degree or how it might apply differently in veteran litigation; the fact that a federal rule existed was enough to settle the matter.

This is not to say the Veteran Court always hews exactly to the federal rules—sometimes it makes things harder for plaintiffs. In *Skaar v. Wilkie*,\(^{461}\) the court deviated from the federal rule to create a presumption against certifying a class action, saying the default approach would be to simply issue a precedential opinion. In theory, a precedential opinion would apply to all members of the class and give them the same sort of relief as an outright victory through a class action. But practice teaches that a precedential opinion is a weaker remedy. First, it relies heavily on trusting the VA, which, by the time it reaches the court, is in an adversarial posture to the veteran. When the court hands down a precedential decision but declines to certify the class, it announces that it “expects the VA to take steps to immediately implement this precedential decision throughout the VA system and apply it to all cases pending before VA.”\(^{462}\)

The VA has not always lived up to this sort of trust. In *Burton v. Wilkie*,\(^{463}\) the VA intransigence led the court to exclaim “The Secretary’s delay

---

\(^{456}\) Monk v. Shulkin, 855 F.3d 1312, 1318 (Fed. Cir. 2017).


\(^{459}\) Monk, 30 Vet. App. at 170.


of a year and counting in updating VA’s materials to comply with a Federal Circuit decision is unacceptable and especially egregious because it is not the first time that VA has delayed in implementing a court directive.” Burton occurred only one year before Skaar, yet the court assumes the VA will speedily grant relief to all class members after a new precedential opinion comes out. Even if the VA acts in good faith, the process is slow, and there may be legitimate questions about how a new precedent applies to voluminous class members. In contrast, if a veteran was part of a victorious class action, they would have a clearer path to relief.

VII. CONCLUSION

This Article has gone over the many ways things have gone wrong at the VA. What can we do to make it right? The preceding sections explained the problems in detail. Some thoughts on how the system could improve are listed below:

- Oversight of the VA’s duty to assist should be strengthened. This is a well-meaning policy that too often gets ignored.
- Veterans should have the option to hire attorneys at the initial stage.
- VA employees who review claims should have more of their evaluation based on accuracy, not just speed.
- Veterans should not be required to get a new C&P exam for every claim if their pre-existing medical records allow the VA to make a conclusion without an additional exam.
- Medical examiners should be competent in the area they provide an expert opinion on, and veterans should have an easier time challenging an examiner’s competence.
- Board staff should be increased and better trained to reduce error rates.
- The Veteran Court should review its justiciability rules that hurt veterans without adequate justification, and it should be empowered to find facts to definitively resolve cases.
- The VA Secretary should use equity powers more frequently.

While it is true that the VA has many kindly features that help veterans, it should be clear that labeling a system paternalistic is not enough to guarantee good results. The idea that a system is non-adversarial has been used to deny rights before. When servicemembers sued for the right to have attorneys at summary court-martial proceedings (which is technically not a criminal conviction but can still result in jail time), the Supreme Court rejected the claim. It justified it by saying a summary court-martial “is not an adversary

---

proceeding."\textsuperscript{465} Therefore, introducing attorneys would transform “a brief, informal hearing” into an “attenuated proceeding which consumes the resources of the military.”\textsuperscript{466} The same logic was used to deny attorneys to defendants at probation hearings.\textsuperscript{467}

The VA might not be as bad as those systems, but the direction it is heading is worrisome. From the initial application to the “court of last resort,” there are rules that either do not work as intended, or have been weakened to be less helpful to veterans. Policymakers have shown a willingness to tackle problems at the VA in the past. They should not let up until it can be said that every veteran is getting a fair shake.

\textsuperscript{465} Id. at 40.
\textsuperscript{466} Id. at 45.