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COMMENTARY

AN OVERVIEW OF PRECEDENTIAL CASES OF THE COURT OF APPEALS FOR VETERANS CLAIMS, 2015

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An Overview of Precedential Cases of the Court of Appeals for Veterans Claims, 2015

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INTRODUCTION

This Article examines the precedential cases issued by the United States Court of Appeals for Veterans Claims (Court) in 2015, with commentary and analysis. Part I briefly reviews important developments occurring in the field of veterans benefits law that establish the context in which these cases were issued. Part II offers summaries and discussion of the cases, presented for the most part in the order in which the issue they address would arise during the course of a benefits claim. Part III briefly concludes with some thoughts about major themes and future directions.

I. BACKGROUND

The context in which the Court's 2015 precedential cases were issued includes the always overwhelming caseload of the Department of Veterans Affairs (VA), new leadership at the agency, and ongoing changes in the makeup of the Court.

On May 30, 2014, Secretary Eric K. Shinseki resigned from VA after a massive patient wait time scandal was exposed in the health care arm of the agency.² Although the benefits arm was not involved in the scandal, the subsequent agency-wide changes affected it both directly and indirectly.³ On July 29, 2014, Robert A. McDonald, former Chairman, President, and Chief Executive Officer of Proctor & Gamble, was confirmed as the eighth Secretary of VA.⁴ Secretary McDonald has no government or medical background⁵ but brought to VA over thirty years of what he describes as “the lessons I’ve learned about mission-driven corporations, strong institutional values, and good management practices.”⁶ He has continued former Secretary Shinseki’s vision of a renewed VA, expanding programs such as “MyVA”⁷ and attempting to establish an institutional mindset that views veterans as “customers” and strives for excellence in providing customer service.⁸

There have been significant changes at the Court as well in the past few years. Coral Wong Pietsch,⁹ Margaret Bartley,¹⁰ and William S. Greenberg joined the Court as judges in 2012,¹¹ bringing the number of active judges at that time from six to nine. In August 2015, Judge Bruce E. Kasold stepped

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² Michael D. Shear & Richard A. Opper Jr., *V.A. Chief Resigns in Face of Furor on Delayed Care*, N.Y. TIMES, May 30, 2014, at A1.

³ For example, the scandal resulted in the discontinuance of bonuses for senior executives in the VA health-care system. *Id.*

⁴ Office of Public Affairs, Dept. of Veterans Affairs, The Honorable Robert A. McDonald, http://www.va.gov/opa/bios/bio_mcdonald.asp (last visited Aug. 5, 2016).

⁵ Scott Pelley, *Cleaning Up the VA: The Secretary of Veterans Affairs Tells Scott Pelley about His Personal Mission to Reorganize the Troubled Agency for His Fellow Vets*, CBS NEWS (June 28, 2015), <http://www.cbsnews.com/news/secretary-robert-mcdonald-on-cleaning-up-veteran-affairs/>.

⁶ Robert A. McDonald, Sec’y, Dep’t of Veterans Affairs, Remarks at the Institute of Medicine Annual Meeting (Oct. 20, 2014), http://www.va.gov/opa/speeches/2014/10_20_2014.asp.

⁷ Office of Public Affairs, *supra* note 4.

⁸ Pelley, *supra* note 5.

⁹ U.S. Court of Appeals for Veterans Claims, Judge Pietsch, <https://www.uscourts.cavc.gov/pietsch.php> (last visited Aug. 5, 2016).

¹⁰ U.S. Court of Appeals for Veterans Claims, Judge Bartley, <https://www.uscourts.cavc.gov/bartley.php> (last visited Aug. 5, 2016).

¹¹ U.S. Court of Appeals for Veterans Claims, Judge Greenberg, <https://www.uscourts.cavc.gov/greenberg.php> (last visited Aug. 5, 2016).

down as Chief Judge, a position he had held for five years,¹² and current Chief Judge Lawrence B. Hagel assumed leadership of the Court.¹³ In the same month, Judge William A. Moorman retired and assumed Senior Judge status, although he continues to issue decisions as a recalled retired Senior Judge.¹⁴

II. THE COURT'S SIGNIFICANT JURISPRUDENCE OF 2015

The Court's 2015 precedential panel and en banc cases are summarized below with discussion and commentary about their significance where and to the extent it is warranted. One caveat is in order, of course: significance is in the eye of the beholder, and any of these cases might have inspired different commentary from different authors. The thoughts expressed below represent the opinions of these two authors in their personal capacities only.

A. Issues Related to Jurisdiction

In 2015, as it had in the previous several years, the Court focused on procedural issues related to its jurisdiction, such as equitable tolling and claim or issue identification. Numerous unique aspects of veterans law—such as the lack of a statute of limitations, the limits on finality, and the concepts of informal claims, pending and unadjudicated claims, bifurcation of claims, and implicit denial—make this a particularly thorny area.¹⁵

i. Issue Jurisdiction

In *Pederson v. McDonald*,¹⁶ the en banc Court clarified its previous case law on claim or issue¹⁷ abandonment, holding that when a veteran knowingly abandons a claim, the Court has authority to review the merits of the claim but will generally decline to do so and will dismiss such claims or issues.¹⁸ The Court stated that the purpose of the *Pederson* decision was to “clarify the reach of the holdings in *Cacciola v. Gibson* regarding the effect of the abandonment of a claim or issue appealed to this Court.”¹⁹ In July 2014, a three-member panel of the Court held in *Cacciola* that “when an appellant expressly abandons an issue in [an] initial brief or fails to present any challenge and argument regarding an issue, the abandoned issue generally is not reviewed by the Court.”²⁰ Less than a year later, the en banc Court concluded that, despite *Cacciola*, when a claimant appealed from a decision of the Board of Veterans' Appeals (Board) addressing multiple issues, it was still unclear whether abandonment of some issues could be “deemed a concession by the appellant that the Board decision contain[ed] no error as to

¹² U.S. Court of Appeals for Veterans Claims, Judge Kasold, <https://www.uscourts.cavc.gov/kasold.php> (last visited Aug. 5, 2016).

¹³ U.S. Court of Appeals for Veterans Claims, Judge Hagel, <https://www.uscourts.cavc.gov/hagel.php> (last visited Aug. 5, 2016).

¹⁴ U.S. Court of Appeals for Veterans Claims, Judge Moorman, <https://www.uscourts.cavc.gov/moorman.php> (last visited Aug. 5, 2016).

¹⁵ See, e.g., Michael Allen, *The Law of Veterans' Benefits 2008-2010: Significant Developments, Trends, and a Glimpse into the Future*, 3 VETERANS L. REV. 1, 12 (2011) (noting that the answer to the question of what constitutes a “claim” in this field “has significant ramifications in a number of areas of the law of veterans' benefits, including, for example, whether a given matter has been adjudicated such that revision is only allowed via the submission of new and material evidence or by demonstrating clear and unmistakable error in the earlier decision”); John Fussell & Jonathan Hager, *The Evolution of the Pending Claim Doctrine*, 2 VETERANS L. REV. 145, 145 (2010) (noting the interconnected nature of many of these issues).

¹⁶ 27 Vet. App. 276 (2015).

¹⁷ This Article will refer to “claim or issue” abandonment to acknowledge that they are different things and that both are implicated in the Court's *Pederson* decision.

¹⁸ *Pederson*, 27 Vet. App. at 279.

¹⁹ *Id.* at 278-79 (citation omitted).

²⁰ *Cacciola v. Gibson*, 27 Vet. App. 45, 48 (2014).

those issues” and, concomitantly, whether any such abandoned issues were on appeal such that the Court had jurisdiction over them.²¹ The Court expressed concern that *Cacciola* might be interpreted to hold that “a statement that an issue has been abandoned on appeal necessarily means that the issue was not reviewed on the merits” and emphasized that such an interpretation would be “mistaken.”²²

Although it may appear that the Court was expending its energy on a purely theoretical concern when it issued an en banc decision to clarify a future possible misinterpretation of a previous panel decision, there can be significant repercussions to how a claim or issue is characterized when a veteran knowingly abandons it on appeal. The answer to this question determines whether a veteran may, in the future, challenge a claim or issue in a Board decision by alleging it is the product of clear and unmistakable error (CUE), because such challenges are precluded by regulation when the claim or issue has been reviewed on the merits by the Court.²³

In its analysis in *Pederson*, the Court noted that its jurisdiction is established by statute and may not, therefore, be limited by which claims or issues an appellant chooses to address in an opening brief.²⁴ Accordingly, to clarify any potential confusion that might remain after *Cacciola*, the Court held that a Notice of Appeal (NOA) from a Board decision places all finally decided issues in that decision on appeal before the Court, regardless of whether any given issue is mentioned in the NOA itself or addressed in subsequent briefing.²⁵

Judge Lance, joined by Judge Hagel, wrote separately to “stress the importance of finality”²⁶ and to note that *Pederson*’s holding that the Court retained discretion to affirm abandoned issues on the merits “encourages appellants to raise all arguments on appeal, avoids piecemeal litigation, and respects the finality of Board and Court decisions.”²⁷ He observed that a veteran should have no incentive to knowingly abandon an issue on direct appeal in favor of strategically preserving the right to present a later CUE challenge, because the latter is a collateral attack with a “much higher standard of proof.”²⁸ To address the concern that some appellants might be harmed by failing to timely appeal a given claim only to later discover an outright error in its adjudication, he noted that, in some cases, a CUE challenge could be replaced by a motion to recall mandate—if an error were discovered within the required time limit.²⁹ In the alternative, he suggested that the Court adopt a rule similar to the Federal Rules of Civil Procedure’s (FRCP’s) Rule 60(b), which provides that, on an appellant’s motion, a court may set aside a

²¹ *Pederson*, 27 Vet. App. at 281.

²² *Id.* at 284.

²³ 38 C.F.R. § 20.1400(b) (2015) (“All final Board decision are subject to revision [on the basis of clear and unmistakable error (CUE)] except (1) [d]ecisions on issues which have been appealed to and decided by a court of competent jurisdiction.”); see *Cacciola*, 27 Vet. App. at 48.

²⁴ *Pederson*, 27 Vet. App. at 283.

²⁵ *Id.* Judge Pietsch concurred in the result but wrote separately to disagree that the Board provided adequate reasons or bases for rejecting the Veteran’s argument concerning his entitlement to a total disability rating for individual unemployability (TDIU). *Id.* at 291-92. However, she concluded the error was not prejudicial and concurred in the decision to affirm the Board’s decision. *Id.* at 292. Judge Schoelen concurred in dismissing the appeal as to the abandoned issue but dissented from the majority’s conclusion that the Board provided adequate reasons or bases as to the TDIU issue. *Id.* at 294-95. Judge Greenberg also concurred in dismissing the appeal as to the abandoned issue but dissented from the majority’s handling of the TDIU issue, asserting that VA should not rely on a medical expert’s opinion as to the ultimate question of unemployability. *Id.* at 295-97.

²⁶ *Id.* at 289.

²⁷ *Id.* at 291.

²⁸ *Id.*

²⁹ *Id.* at 290-91.

final decision under very limited circumstances such as mistake, newly discovered evidence, or fraud.³⁰ This second form of proposed relief would be available only if such a motion were submitted within a very limited time; FRCP’s Rule 60(c) specifies that motions “under Rule 60(b) must be made within a reasonable time—and for [mistake, newly discovered evidence, or fraud] no more than a year after the entry of the judgment or order or the date of the proceeding.”³¹

Although these suggestions appear to tip the balance in favor of finality and away from a veteran’s ability to bring ongoing challenges to decisions years after they have been issued, they do represent additional options that would create a middle ground between adjudicating all issues on appeal, regardless of whether they have been argued by the appellant, and limiting a claimant’s post-appeal relief to a CUE challenge with its much higher burden of proof.

Judge Kasold dissented from the holding that the Court retained jurisdiction over all issues finally decided in a Board decision “*regardless of whether the NOA itself or the subsequent briefing narrows the issues on appeal.*”³² He asserted that the majority’s holding as to that particular aspect of the question was not raised by the record and was “wholly unnecessary to the resolution of the appeal.”³³ He concluded that the scope of the Court’s jurisdiction over multiple claims in a Board decision that were not included in a “limited-scope NOA” remained an open question and that the *Pederson* majority’s statements on this issue were mere dicta.³⁴

ii. Case and Controversy Jurisdiction

In 2015, the Court also issued two decisions in response to discovering that the appellants had died at some prior point during the proceedings leading to the previous decisions. On November 14, 2014, the Court issued an en banc decision in *Leavey v. McDonald* and was informed on the same date by the Veteran’s counsel that the Veteran had died eight days earlier.³⁵ The Court stayed proceedings to determine whether the Veteran’s surviving spouse would seek substitution as a potential accrued benefits claimant.³⁶ Approximately two months later, in January 2015, after the Veteran’s surviving spouse decided not to be substituted in the appeal, the Court issued a second en banc decision.³⁷ The Court noted that since it was established in 1990, it has adhered to the “case or controversy” jurisdictional limits set forth in Article III of the U.S. Constitution.³⁸ Accordingly, because the Veteran died before the appeal was resolved, leaving no active case or controversy before the Court, it withdrew the November 2014 decision, vacated the underlying Board decision, and dismissed the appeal for lack of jurisdiction.³⁹

Based on the above description, one would assume that—despite the regrettable circumstances—this case would be a straightforward jurisdictional matter. However, the Court’s eight judges wrote four separate opinions, including a concurrence and two dissents.⁴⁰ Judge Davis, joined by Judge Moorman,

³⁰ *Id.* at 291; *see also* FED. R. CIV. P. 60(b).

³¹ FED. R. CIV. P. 60(c).

³² *Pederson*, 27 Vet. App. at 293.

³³ *Id.*

³⁴ *Id.*

³⁵ *Leavey*, 27 Vet. App. 226, 226-27 (2015).

³⁶ *Id.* at 227.

³⁷ *Id.* at 226-27.

³⁸ *Id.* at 227.

³⁹ *Id.*

⁴⁰ *Id.* at 225.

concurred in the result, emphasizing that the case was also governed by precedent from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).⁴¹ They concluded that, because the Veteran’s surviving spouse decided not to be substituted, withdrawal of the earlier decision and dismissal of the appeal was required, despite the fact that “the en banc Court has invested a tremendous amount of judicial resources into resolving this matter and has written and issued an opinion.”⁴² Judge Kasold dissented from the outcome, suggesting that the Court’s jurisdiction should more properly turn on whether there is a potential accrued benefits claimant who *could be substituted*, not on whether such a potential claimant actually *chose to be substituted*.⁴³

Judge Greenberg also wrote a lengthy dissent that focused not on the question of jurisdiction but on the original claim by the deceased Veteran and the injustice inherent in a system so backlogged that “many veterans are at risk of dying before receiving the full and fair adjudications of their claims.”⁴⁴ He began by citing *Hayburn’s Case* for the proposition that solicitude for veterans is “consistent with Congressional intent as old as the Republic”⁴⁵ and reminded readers that “[c]ircumstances such as [veterans’] advanced age and declining health or the fatal consequences of their physical and psychological wounds are palpable.”⁴⁶ Judge Greenberg emphasized that the Court had adopted the Article III case-or-controversy standard as a voluntary limitation, implicitly suggesting that the Court might make a different choice about its jurisdiction at some point in the future.⁴⁷ However, he devoted most of his dissent to an extensive discussion of the duties of a Board member when conducting a hearing and the errors he perceived in the execution of these duties in the case at hand.⁴⁸ He objected to the use of “strict prejudicial error rules” in the nonadversarial context of veterans benefits law at the agency level and concluded that such rules are harmful to veterans and expose them to “potentially devastating consequences for merely trusting VA to perform its duties.”⁴⁹

Two months after the decision described above, the en banc Court again faced a situation requiring it to withdraw a decision because the Veteran had died.⁵⁰ The Veteran’s attorney was never informed of her client’s death, and her communication with her “client”—which she conducted via mail—continued uninterrupted for nearly three years thereafter.⁵¹ She proceeded to bring the case to oral argument before the en banc Court, and won, setting an important precedent on behalf of her client on equitable tolling in 2013.⁵² Even further (and this will twist the guts of practitioners everywhere), she negotiated a joint motion for remand on the merits of the case, and was granted attorney fees for her (at that point four) years of work on the case.⁵³ Several months later, VA noted that the Veteran had been dead during the last several years of the adjudication and moved to recall the Board decision and recover the attorney fees, which the attorney was eventually obliged to return months after the fees had

⁴¹ *Id.* at 227 (citing *Padgett v. Nicholson*, 473 F.3d 1364, 1370 (Fed. Cir. 2007)).

⁴² *Id.* at 228.

⁴³ *Id.* at 228-29.

⁴⁴ *Id.* at 229-30.

⁴⁵ *Id.* at 229.

⁴⁶ *Id.* at 229-30.

⁴⁷ *Id.* at 230.

⁴⁸ *Id.* at 230-32.

⁴⁹ *Id.* at 231 (citing *Sanders v. Shinseki*, 556 U.S. 396, 412 (2009)).

⁵⁰ *Rickett v. McDonald*, 27 Vet. App. 240 (2015).

⁵¹ *Id.* at 244.

⁵² *Id.* at 241-42.

⁵³ *Id.* at 242.

been issued.⁵⁴ By the time it was withdrawn, the 2013 order had served as an important precedent in the Court's equitable tolling case law for almost two years.⁵⁵

By definition, a large majority of benefits claimants are elderly or disabled, and appeals can take years to complete, even if they are advanced on the docket at the agency and expedited at the Court. Furthermore, one might assume that, like it was in *Leavey*, dismissing the en banc order would have been a straightforward jurisdictional matter, despite the unfortunate circumstances and even despite its relative prominence in the law of equitable tolling. However, the en banc Court again found itself divided, with Judges Kasold, Pietsch, and Greenberg dissenting in part and asserting that the majority was mistaken that the Court lacked jurisdiction—albeit unwittingly—to issue the 2013 order in the first place.⁵⁶ The dissenting judges distinguished *Leavey* because that case involved withdrawing a final decision on the merits of a benefits claim, whereas the decision to be withdrawn in *Rickett* was a nondispositive procedural order.⁵⁷ The dissenters also argued that “the decision to withdraw prior orders is not compelled by a lack of jurisdiction; it ‘is an equitable one’” and should, accordingly, be determined “based on factors such as prejudice to the parties (or a future party) and the public interest.”⁵⁸ Applying those factors, the dissenters observed that neither party had requested that the en banc order be withdrawn and that “this order has been the basis for equitably tolling the appeal period in a number of cases involving veterans’ misfiled NOAs, and has provided important precedent to our equitable tolling case law.”⁵⁹

Given the dissent’s acknowledgement and partial reliance on the fact that the 2013 order in *Rickett* had become an important precedent in the Court’s jurisdiction on equitable tolling, it seems more likely that the dissenters were motivated at least in part by an understandable frustration at the circumstances of the situation. At the same time, however, it is questionable whether the case’s withdrawal will actually have any real impact. Seeing as the en banc Court issued the order in 2013 with no dissent (although with two judges concurring with the result, but not the reasoning) and that the case has been used since then without complaint or re-examination of the precedent by the Court, it seems likely that any similarly positioned appellants could simply cite to the legal reasoning of that order, perhaps with a cite to *Rickett* itself noting that it had been withdrawn on procedural grounds only. If the Court continues to agree with the reasoning, it is only so long until a new precedential case comes along that can be used for the same proposition.

iii. Authority to Issue Noncompensable Ratings

In 2013, the Court affirmed the Board in *Wingard v. Shinseki*, finding that 38 U.S.C. §§ 1110 and 1155 can be reasonably interpreted to allow the Secretary to assign noncompensable ratings for service-connected disabilities.⁶⁰ On appeal, the Federal Circuit held that the Court was precluded by 38 U.S.C. § 7252(b) from making any determination about the Secretary’s reasonableness in establishing the VA rating schedule.⁶¹ The case was remanded for a determination on the remaining arguments

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 244-45.

⁵⁷ *Id.* at 245.

⁵⁸ *Id.* (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 29 (1994)).

⁵⁹ *Id.*

⁶⁰ 26 Vet. App. 334, 339-40 (2013).

⁶¹ *Wingard v. McDonald*, 779 F.3d 1354, 1357 (Fed. Cir. 2015) (explaining that the Court “may not review the schedule of ratings for disabilities . . . or any action of the Secretary in adopting . . . that schedule”).

and, based on the Federal Circuit’s decision, the Court again affirmed the Board decision, concluding in the current matter that there was no reviewable dispute as to whether the Veteran was “in receipt of compensation.”⁶²

Judge Schoelen, writing for the majority, spent about a third of the analysis recapping earlier arguments and then briefly concluded that the Federal Circuit’s decision mandated that the Court affirm the Board.⁶³ The remaining two-thirds of the analysis strongly—although respectfully—expressed the Court’s view that the Federal Circuit was incorrect when it concluded that Congress intended to limit the Court’s authority.⁶⁴ The Court drew a distinction between a theoretical review of “whether an injury or disease is a disability for the purpose of laws administered by the VA and the average impairment in earning capacity caused by varying levels of disability” on one hand,⁶⁵ and a review of whether regulations adopted by the VA are within “the contours of its enabling statute on the other.”⁶⁶ As an example, Judge Schoelen noted with apparent surprise that the Secretary could, according to the Federal Circuit, assign a seventeen percent disability rating (in clear violation of 38 U.S.C. § 1155, which specifies ten grades of disability, from ten to one hundred percent), and such an action would not be reviewable by the Court.⁶⁷ Although technically such a regulation would be directly reviewable by the Federal Circuit under 38 U.S.C. § 502, Judge Schoelen pointed out that the Federal Circuit’s rules of practice require that a challenge be brought “within 60 days after issuance of the rule or regulation or denial of a request for amendment or waiver of the rule or regulation,” which would make such an appeal virtually impossible to bring.⁶⁸ While the Court’s point is sound, fundamentally, it is based in what makes good and sensible policy, whereas the Federal Circuit’s decision is grounded in a strict reading of the statute. It remains to be seen which will eventually prevail.

iv. Equitable Tolling of Appeals to the Court

In 2011, the U.S. Supreme Court held in *Henderson v. Shinseki* that the 120-day appeal period to the Court is not jurisdictional, although it is “an important procedural rule.”⁶⁹ As a result, the Court subsequently held that equitable tolling may be available to appellants who file untimely appeals, when circumstances warrant it.⁷⁰ Because the Federal Circuit has explained that equitable tolling is not “limited to a small and closed set of factual patterns” and is rather decided on a case by case basis,⁷¹ the Court is constantly faced with opportunities to refine the application of this doctrine in the veterans benefits context. In 2015, the Court addressed several new circumstances in which equitable tolling might be available.

In *Aldridge v. McDonald*, the Veteran filed a late NOA and argued that the filing deadline should be equitably tolled.⁷² He asserted that he had been unable to timely file because multiple deaths in his immediate family caused him to become severely depressed such that he had “difficulty processing

⁶² *Wingard v. McDonald*, 27 Vet. App. 329, 333 (2015).

⁶³ *See generally id.*

⁶⁴ *Id.* at 331-32.

⁶⁵ *Id.* at 332.

⁶⁶ *Id.* at 332-33.

⁶⁷ *Id.*

⁶⁸ *Id.* at 331 n.1.

⁶⁹ 562 U.S. 428, 441-42 (2011).

⁷⁰ *Bove v. Shinseki*, 25 Vet. App. 136, 140 (2011) (per curiam).

⁷¹ *Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005).

⁷² 27 Vet. App. 392, 392-93 (2015).

dates and times” and “did not understand that he had only until April 23, 2014, to file his NOA.”⁷³ The Court concluded it could not find equitable tolling warranted because the Veteran’s depression and need to spend time dealing with estate management issues had not “rendered him incapable of handling his affairs” to the extent that they caused his failure to timely appeal.⁷⁴ This is consistent with the Supreme Court’s explanation that equitable tolling is appropriate if the appellant has diligently pursued his or her rights as to the appeal but some extraordinary circumstance stood in the way.⁷⁵ Although the Court did not make the statement explicitly, this decision seems to suggest that equitable tolling will not be available if a veteran prioritizes other matters over his appeal—regardless of how reasonable the choice might be.

Judge Greenberg’s dissent in *Aldridge* provides interesting and revealing insight into his legal philosophy, both in what he said the Court should have done in this case and in how he said it. He began his dissent by stating his belief that the Court should “exercise its equitable power to toll the appeal period.”⁷⁶ He then discussed the Court’s power, using citations that do not merely predate the creation of the Court, but predate the creation of the country within which the Court operates.⁷⁷ He appeared to be suggesting that the Court possesses equitable powers far beyond what it has traditionally embraced or even acknowledged. Problematically, his use of a quote by an 18th-century English Lord for the proposition, “let justice be done whatever be the consequence,” presupposes that Judge Greenberg’s point of view about the outcome of this case represents the correct application of equitable tolling and, therefore, the “just” one.⁷⁸ This is a defensible point of view but certainly not a foregone conclusion.

What is so interesting about Judge Greenberg’s dissent, however, is that none of it is particularly necessary, if what the Judge was attempting to do was sway this particular case. At the heart of the dissent is a discussion of the facts, and rather than making sweeping statements about broad equitable powers and referencing antique English law, Judge Greenberg could simply have made the case that the facts as they stood were sufficient to equitably toll the appeal period and that the majority set too high a bar. In particular, his reminder of the legal standard—that “[t]he diligence required for equitable tolling purposes is ‘reasonable diligence,’ not ‘maximum feasible diligence’”⁷⁹—seems to be a strong argument in this case. However, Judge Greenberg included it as an apparent afterthought at the end of a paragraph devoted to obscure quotes about equitable remedies, preferring to focus on fundamental fairness and principles of equity rather than traditional legal analysis. His method of argument says volumes about his goal—he was clearly looking well beyond this particular case when he wrote it. It will be interesting to see, in the years to come, if Judge Greenberg is able to shift the Court’s view of the scope of its equitable powers.

The Court also addressed equitable tolling in *Palomer v. McDonald*.⁸⁰ In this case, the Veteran argued that equitable tolling was appropriate because of the length of time the postal service took to transit mail to and from the Philippines, because his age and poor eyesight made it impossible for him to read the documents without assistance, and because the notice he received about the appeal period

⁷³ *Id.* at 393.

⁷⁴ *Id.*

⁷⁵ *Holland v. Florida*, 560 U.S. 631, 651-52 (2010).

⁷⁶ *Aldridge*, 27 Vet. App. at 394.

⁷⁷ *Id.* at 395.

⁷⁸ *See id.* at 396.

⁷⁹ *Id.* at 395.

⁸⁰ 27 Vet. App. 245 (2015).

was confusing.⁸¹ The Court denied equitable tolling based on any of these factors.⁸² While the Court gave fact-specific reasoning for denying each argument, one thread reached through all three analyses—that the burden of proof in equitable tolling cases is on the appellant to establish circumstances that merit this extraordinary step. In this case, the Veteran had submitted little more than naked allegations pertaining to the mail, his infirmity, and the notice, without providing actual evidence or the fact-specific arguments the Court was looking for.⁸³

Importantly, however, to even reach the decision it issued, the Court had to initially find—as a matter of first impression—that equitable tolling might be available when a veteran files an untimely motion for reconsideration for a Board decision.⁸⁴ Normally, a timely reconsideration motion abates the finality of the Board decision for the purpose filing an NOA with the Court.⁸⁵ In *Palomer*, the Court extended that principle and held that equitable tolling is not precluded even when a reconsideration motion was filed after expiration of the appeal period.⁸⁶

Finally, in this case, the Court resolved a knotty procedural question about the interaction of the Court’s authority to review a denial of reconsideration by the Board and the principles of equitable tolling set forth in *Henderson*. In *Mayer v. Brown*, the Federal Circuit had explained that 38 U.S.C. § 7261, which allows the Court to review denials of Board reconsideration, does not independently grant jurisdiction but, instead, merely allows the Court to review a Board decision in situations where it would otherwise have jurisdiction.⁸⁷ Therefore, the Court held that, in a situation where the Court declines to exercise jurisdiction over a Board decision, the Court has no independent authority to review the denial of a reconsideration motion.⁸⁸ Because the Court found in *Palomer* that equitable tolling of the 120-day appeal period was not warranted, it was also jurisdictionally precluded from reviewing the Board’s denial of a reconsideration motion.⁸⁹

On the issues pertaining to equitable tolling, Judge Greenberg dissented again, using an abbreviated version of the same arguments and citations pertaining to general equity he expounded on in *Aldridge*. Here, he additionally stated that he would grant equitable tolling based on the mail delay.⁹⁰ Based on the approximately fourteen-day delay in the record for the Veteran’s letters to reach the Board, Judge Greenberg assumed that a similar delay existed in the Board’s mail to the Veteran, and stated that he would toll the appeal period for at least that long.⁹¹ In this case, the extra fourteen days would have been enough to make the filing timely.

While this is not of itself unreasonable, it is hard to reconcile the majority’s desire for specific proof of extraordinary circumstances with the dissent’s back-of-the-envelope estimate based on other evidence in record. Additionally, it is hard to imagine how Judge Greenberg’s proposition would work as a general rule. For example, would each different geographic area be assigned a tolling period based

⁸¹ *Id.* at 249.

⁸² *Id.* at 256.

⁸³ *See generally id.*

⁸⁴ *Id.* at 251.

⁸⁵ *See id.* at 248-49.

⁸⁶ *Id.* at 251.

⁸⁷ 37 F.3d 618, 620 (Fed. Cir. 1994).

⁸⁸ *Palomer*, 27 Vet. App. at 255-56.

⁸⁹ *Id.* at 256.

⁹⁰ *Id.* at 256-57.

⁹¹ *Id.*

on data showing average mail delay? Furthermore, Judge Greenberg did not explain why he would grant veterans living abroad a privilege not accorded to veterans resident in the United States. In any case, the fact that the majority found equitable tolling not warranted because the Veteran failed to meet his burden—rather than the majority and dissent differing on how to weigh the facts—seems to give the dissent’s arguments less weight here than in *Aldridge*.

v. Jurisdiction of the Board as to Extraschedular Ratings

In 2015, the Court decided two cases in which the Secretary challenged the Board’s authority to grant or increase an extraschedular rating,⁹² including one based on total disability for individual unemployability (TDIU).⁹³ The regulatory scheme governing such awards requires that if the Board determines that a service-connected disability causes symptoms of a type or severity beyond those described in the VA Rating Schedule, it must refer the matter to VA’s Director of Compensation Service (Director) for consideration of an extraschedular rating.⁹⁴ Likewise, if the Board finds that a veteran’s service-connected disabilities cause unemployability despite the veteran not meeting the percentage requirements for TDIU, the Board will also refer the claim for extraschedular consideration.⁹⁵ The Director will review the matter, make a determination, and issue a written decision as to whether an extraschedular rating or an award of extraschedular TDIU is warranted.⁹⁶ The Director’s decision is then implemented by the VA regional office (RO).⁹⁷

In *Wages*, the Director denied extraschedular TDIU, and the RO issued a Supplemental Statement of the Case to that effect, which the Veteran appealed.⁹⁸ On reviewing the matter, the Board also denied extraschedular TDIU, relying in part on the Director’s decision, which it described as “evidence.”⁹⁹ The Veteran appealed to the Court, arguing that the Board was wrong to rely on the Director’s denial when making its decision, because the Board is supposed to conduct a *de novo* review and owes no deference to the Director’s initial decision.¹⁰⁰ The Secretary responded by arguing broadly that determinations as to extraschedular TDIU are strictly policy decisions that are committed to the Director’s sole discretion and thus insulated from review by the Board and, by extension, the Court.¹⁰¹

The Court soundly rejected these arguments, holding that “the regulatory scheme created by § 4.16(b) merely withholds from [the Board] the authority to grant extraschedular TDIU in the first instance.”¹⁰² The Court relied on the statutory mandate of 38 U.S.C. § 7104(a), which establishes that the Board is authorized to render the agency’s final decision “on all questions arising under 38 U.S.C. § 511(a).”¹⁰³ This mandate, the Court held, “indisputably” included extraschedular TDIU.¹⁰⁴ The Court

⁹² *Kuppamala v. McDonald*, 27 Vet. App. 447 (2015); *Wages v. McDonald*, 27 Vet. App. 233 (2015).

⁹³ *Wages*, 27 Vet. App. 233.

⁹⁴ 38 C.F.R. § 3.321(b) (2015) (establishing that such a case may be referred to the Director of Compensation Service or the Under Secretary for Benefits).

⁹⁵ *Id.* § 4.16(b).

⁹⁶ *Id.* §§ 3.321(b); 4.16(b).

⁹⁷ *See, e.g., Wages*, 27 Vet. App. at 234.

⁹⁸ *Id.*

⁹⁹ *Id.* at 234-35.

¹⁰⁰ *Id.* at 235.

¹⁰¹ *Id.*

¹⁰² *Id.* at 236.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

also relied on its prior holding in *Anderson v. Shinseki* that “there is no restriction on the Board’s ability to review the denial of an extraschedular rating on appeal”¹⁰⁵ and found that limiting the Board’s ability to review such a rating would contravene the congressional intent underlying the statute.¹⁰⁶

The Court rejected the argument that the Director’s extraschedular determinations are case-by-case policy decisions that are immune from review, finding that “the policy decision was made when the Secretary promulgated a regulation mandating that all veterans who are unemployable due to service-connected disabilities will be rated totally disabled, regardless of the schedular ratings assigned.”¹⁰⁷ Accordingly, it held that the Board is authorized to conduct a de novo review of the Director’s decisions as to extraschedular TDIU.¹⁰⁸

Judge Kasold filed a concurrence noting that the error which led to *Wages* had been queued up by the Court’s 2001 decision in *Bowling v. Principi*, which he considered wrongly decided.¹⁰⁹ *Bowling* held that the Board could not award extraschedular TDIU in the first instance,¹¹⁰ and, accordingly, Judge Kasold believed that *Wages* should have been considered by the en banc Court.¹¹¹

The Court issued *Wages* in January 2015; by the end of the year, it was called on, in *Kuppamala v. McDonald*, to decide the related question of whether the Board is authorized to review the Director’s decisions as to general extraschedular ratings and, if so, what standards are to be used and whether the Board is also authorized to grant or increase an extraschedular rating following its review of the Director’s initial decision.¹¹² In *Kuppamala*, the Secretary made arguments similar to those he had presented to the Court in *Wages* and also asserted that there were no “judicially manageable standards” governing the Director’s extraschedular rating decisions and, therefore, the Board would have no criteria by which to review them.¹¹³

The Court again rejected these arguments, noting that “extraschedular consideration is not a question of opinion or discretion, but one of fact”¹¹⁴ and that there is a “clear statutory mandate” that the Board is required to provide “one review on appeal” on behalf of the Secretary in all matters involving the provision of benefits under 38 U.S.C. §§ 511(a) and 7104(a).¹¹⁵ The Court also found no merit in the Secretary’s argument about a lack of “judicially manageable standards,” concluding that “absolute clarity” is not required for the Board to measure the Director’s decision.¹¹⁶ Instead, the Court found that the required standard was average impairment in earning capacity, the same standard on which the rating schedule is based, and a standard which the Board applies on a daily basis.¹¹⁷

¹⁰⁵ *Id.* (citing 22 Vet. App. 423, 427 (2009)).

¹⁰⁶ *Id.* (citing *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 327 F.3d 1339, 1347 (Fed. Cir. 2003) (“Together, §§ 511(a) and 7104(a) dictate that the Board acts on behalf of the Secretary in making the ultimate decision on claims.”)).

¹⁰⁷ *Id.* at 237.

¹⁰⁸ *Id.* at 238.

¹⁰⁹ *Id.* at 239 (citing 15 Vet. App. 1, 10 (2001)).

¹¹⁰ *Bowling*, 15 Vet. App. at 10.

¹¹¹ *Wages*, 27 Vet. App. at 239.

¹¹² *Kuppamala v. McDonald*, 27 Vet. App. 447 (2015).

¹¹³ *Id.* at 451.

¹¹⁴ *Id.* at 454.

¹¹⁵ *Id.* at 455.

¹¹⁶ *Id.* at 454.

¹¹⁷ *Id.* at 453-54. The Court also noted that “[t]he fact that the Secretary has not elected to provide more guidance explaining how to ascertain the average impairment in earning capacity is neither uncommon nor an adequate reason to isolate the Director’s decision from the congressionally mandated Board review established in section 7104.” *Id.*

Taking a step back, it might seem strange that this is a case involving one part of VA arguing that another part of VA did not have the authority to review the decisions of a third part of VA. Ironically, both cases suggest that the Court believes the Board has more statutory authority to deal with matters of extraschedular compensation than VA itself believes it has. It remains to be seen how the Secretary and the Director will respond to this pressure from the Court.

vi. Pending Claims and Finality under 38 C.F.R. § 3.156(b)

In *Mitchell v. McDonald*, the Court held that a 1972 claim for service connection for hearing loss had not become final, but had remained in a pending status for forty years after the original claim was filed.¹¹⁸ Although the effective date of a claim is generally the date the claim was filed,¹¹⁹ and VA decisions on claims usually become final when a veteran does not appeal a denial,¹²⁰ there are a number of exceptions to these rules that act to prevent finality from attaching to a decision.¹²¹ One of those exceptions is 38 C.F.R. § 3.156(b), which states that when new and material evidence is received by VA before the appeal period expires, such evidence is deemed filed “in connection with” the pending claim,¹²² and acts to prevent finality from attaching until VA makes a determination as to whether the evidence is, in fact, new and material.¹²³

In *Mitchell*, the Veteran had originally filed a claim for service connection for hearing loss in 1972.¹²⁴ In October 1973, the claim was denied for lack of a current disability.¹²⁵ In December 1973, two months after the claim was denied, the Veteran submitted evidence of a current disability in the form of a private audiogram documenting his hearing loss.¹²⁶ In December 1999, twenty-six years after the claim was denied and the Veteran submitted evidence that should have cured the denial, the Veteran requested that VA reopen the claim.¹²⁷ That request was denied, as was a subsequent request in February 2007.¹²⁸ In both cases, when listing the evidence considered, the RO did not mention the December 1973 audiogram.¹²⁹ After receiving July 2008 medical opinions that provided evidence linking the Veteran’s hearing loss to service, the RO granted service connection, assessed the condition as one hundred percent disabling, and assigned an effective date in February 2007, the date of the request that eventually led to reopening the claim.¹³⁰

¹¹⁸ 27 Vet. App. 431 (2015).

¹¹⁹ 38 U.S.C. § 5110(a) (2012); 38 C.F.R. § 3.400(b)(2)(i) (2015).

¹²⁰ 38 C.F.R. § 20.1103; *see* 38 U.S.C. § 7105(c) (“If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.”).

¹²¹ *See, e.g.*, *AG v. Peake*, 536 F.3d 1306, 1310 (Fed. Cir. 2008) (citing 38 U.S.C. § 5104 and 38 C.F.R. § 3.103(b) (both requiring VA to notify a claimant of any decision affecting provision of benefits or granting relief, along with an explanation of appeal procedures)); *Young v. Shinseki*, 22 Vet. App. 461, 466 (2009) (holding that “when VA fails to consider new and material evidence submitted within the one-year appeal period pursuant to § 3.156(b), and that evidence establishes entitlement to the benefit sought, the underlying RO decision does not become final”)

¹²² 38 C.F.R. § 3.156(b).

¹²³ *See Beraud v. McDonald*, 766 F.3d 1402 (Fed. Cir. 2014).

¹²⁴ *Mitchell v. McDonald*, 27 Vet. App. 431, 432 (2015).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 433.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

The Veteran appealed and argued for an effective date of August 1972, the date he filed his initial claim.¹³¹ He asserted that the December 1973 audiogram should have been considered as “having been filed in connection with the claim which was pending at the beginning of the appeal period” under 38 C.F.R. § 3.156(b) because the October 1973 denial was based on the lack of a current disability and he had submitted evidence of bilateral hearing loss within the one-year appeal period.¹³²

After discussing prior Federal Circuit case law, the Court agreed with the Veteran, finding that 38 C.F.R. § 3.156(b) requires VA to “assess any evidence submitted during the [one-year appeal] period and make a determination as to whether it constitutes new and material evidence relating to the old claim.”¹³³ VA’s failure to make such a determination in response to such evidence prevents the original decision denying the claim from becoming final.¹³⁴ In the case at hand, the Court concluded that the fact VA had never considered the December 1973 audiogram meant that the effective date for the hearing loss claim should be “as though the former decision [the October 1973 denial of service connection] had not been rendered.”¹³⁵ The Court noted that VA is normally presumed to have considered all the evidence of record even though a decision may not discuss every piece of evidence.¹³⁶ However, the Court held, in cases like *Mitchell* and *Beraud*, applying the presumption would allow VA to make mistakes that could not be identified or remedied.¹³⁷ Therefore, because VA had *never* considered the December 1973 audiogram, the Court concluded that the August 1972 claim had remained pending for over forty years.¹³⁸

Judge Kasold dissented, asserting that VA’s response to new evidence submitted under 38 C.F.R. § 3.156(b) is “an essentially interlocutory, non-merits determination” without the power to vitiate the finality of a claim when a veteran has received a subsequent denial and notice about how to appeal.¹³⁹ He relied in part on the Federal Circuit’s decision in *Cook v. Principi*¹⁴⁰ in noting that the only two exceptions to finality are a successful motion alleging CUE in an otherwise final decision and a successful request to reopen a previously denied claim by submitting new and material evidence.¹⁴¹ The dissent distinguished *Beraud* because in *Mitchell*, the Veteran submitted the relevant evidence to VA,¹⁴² whereas in *Beraud*, the Veteran merely informed VA where the missing evidence could be located.¹⁴³ However, given that VA was under a duty to obtain the evidence the Veteran identified in *Beraud*, this seems like a distinction without a substantive difference. Ultimately, the dissent’s fundamental disagreement seemed to be with the Federal Circuit’s decision in *Beraud* rather than with his majority colleagues’ decision to follow *Beraud*’s precedent. Judge Kasold suggested that “the Federal Circuit should reject the majority’s broad interpretation of *Beraud* and instead limit the case to its facts” or,

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 434 (citing *Bond v. Shinseki*, 659 F.3d 1362, 1367 (Fed. Cir. 2011)).

¹³⁴ *Id.*

¹³⁵ *Id.* (citing 38 C.F.R. § 3.400(q) (2015)).

¹³⁶ *Id.* at 436.

¹³⁷ *Id.*; see *Beraud v. McDonald*, 766 F.3d 1402, 1407 (Fed. Cir. 2014) (quoting *Bond*, 659 F.3d at 1368).

¹³⁸ *Id.* at 440.

¹³⁹ *Id.* at 441.

¹⁴⁰ 318 F.3d 1334 (Fed. Cir. 2002) (en banc).

¹⁴¹ *Id.* at 1341; see 38 U.S.C. § 5109A (2012) (providing for the revision of decisions on grounds of clear and unmistakable error (CUE)); *id.* § 5108 (governing the reopening of disallowed claims); 38 C.F.R. 3.156(a) (2015) (“A claimant may reopen a finally adjudicated claim by submitting new and material evidence.”).

¹⁴² *Mitchell*, 27 Vet. App. at 432.

¹⁴³ *Beraud v. McDonald*, 766 F.3d 1402, 1403 (Fed. Cir. 2014).

alternately, that the en banc Federal Circuit should overrule *Beraud* or reconcile the inconsistencies between that case and its decision in *Cook*.¹⁴⁴ The Federal Circuit subsequently declined to pursue either suggestion.

Ultimately the majority and the dissent seem to have been arguing slightly different points. The dissent asserted that *Beraud* was wrongly decided because there are only two ways to undo the effect of a decision after it has become final. The majority found this argument unpersuasive because the question at hand is not how to undo a final decision but, instead, how to adjudicate a claim *that never became final in the first place*. Neither the majority nor the dissent effectively responded to each other's assertions because they were analyzing related but fundamentally different questions.

Both the majority and the dissent leave unresolved a question of practical application: under *Beraud* and *Mitchell*, when a veteran *timely* files evidence that VA accidentally ignores, and the decision subsequently becomes final, the veteran's only recourse to achieve an effective date of the initial claim is to successfully allege CUE, which is a formidable barrier. On the other hand, a veteran who files the same evidence *after* the initial decision is made—assuming VA also accidentally ignores the evidence—receives significantly stronger protection. The second veteran is much more likely to successfully obtain the earlier effective date because, having filed the ignored evidence *after* the decision issued, this veteran benefits from 38 C.F.R. § 3.156(b), which prevents finality from attaching even if the claim appears to have become final.

This appears to be an absurd result. No sensible system, no matter how pro-claimant, could reasonably intend to provide *less* protection to claimants who timely file evidence than to those who file the same evidence after a decision has been rendered. Indeed, 38 C.F.R. § 3.156(b) seems to suggest that both types of claimants should be treated equally; there is no law, regulation, or logical support suggesting the late-filing veteran has the right to greater protection. But, in the wake of *Mitchell*, the majority seems to leave the law in that state. It remains to be seen how this will develop.

B. Duty to Assist

In 2015, the Court issued only one case that directly addressed VA's duty to assist veterans in developing their claims.¹⁴⁵ In *Gagne v. McDonald*, the Court ruled on an issue regarding VA's interactions with the Joint Services Records Research Center (JSRRC).¹⁴⁶ When attempting to confirm a veteran's stated PTSD stressor, VA's policy was to submit a records request to the JSRRC.¹⁴⁷ Because of limited resources, the JSRRC restricts records requests to a sixty-day search window.¹⁴⁸ Accordingly, it has been VA policy to inform veterans that they must provide details of their stressors with enough specificity to submit to JSRRC and that their claims may be denied if they cannot furnish the required information.¹⁴⁹

¹⁴⁴ *Mitchell*, 27 Vet. App. at 446.

¹⁴⁵ Although *Mitchell* dealt with 38 C.F.R. § 3.156(b), a regulation that establishes a key aspect of VA's duty to assist the veteran in developing a claim, the legal issues in *Mitchell* were fundamentally about how a failure to comply with the duty to assist affects finality rather than the substance of the duty itself.

¹⁴⁶ 27 Vet. App. 397 (2015).

¹⁴⁷ *Id.* at 401.

¹⁴⁸ *See id.*

¹⁴⁹ *Id.*

In *Gagne*, the Court ruled that the language of the implementing statute in this case requires VA to continue records requests “unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.”¹⁵⁰ The VA policy of requiring a sixty-day time period, therefore, was in contravention of the statute, and VA’s duty to assist requires that VA submit additional requests covering different sixty-day periods until time period described by the veteran is covered, unless that time period is “unreasonably long” or are merely “fishing expeditions,” terms the Court did not define with any specificity.¹⁵¹

Nothing about this decision is surprising, except perhaps the fact that it took so long for this issue to come before the Court and get resolved. The difficulty of remembering specific dates for events that occurred decades in the past during a time of stress and fear has meant that many veterans have a great deal of difficulty providing adequate information to VA to substantiate the stressor events they allege as the source of their PTSD. On one hand, this decision should ensure that they have an easier time in the future. On the other hand, it will be interesting to follow the practical effects as this decision starts getting implemented.

It is hard to read this decision without considering the real-world consequences. On average, JSRRC processes approximately 10,000 records per year.¹⁵² The Court’s decision in *Gagne* may play out in any number of ways. For example, it might make the existing process significantly more onerous, because a negative response from JSRRC might engender half a dozen follow-up requests to cover a not “unreasonably long” time period.¹⁵³ Additionally, requests that might never have reached JSRRC in the past, because they would be denied at the RO level, will now be parsed by VA and sent along to JSRRC. It remains to be seen what the long-term fallout of this decision is; a whole spectrum of results seems possible. It might have no major impact at all, only slowing down the claims of individual veterans who must now wait for multiple requests and responses. In such cases, the veterans in question will probably be better off with the slower process because their stressor verification requests would previously not have been sent to JSRRC at all. The new procedures might cause massive, system-wide slowdowns as the new volume of requests overwhelms the JSRRC system. Alternatively, either of these options could be the impetus for JSRRC or VA to design and implement new and more efficient ways to verify a veteran’s stressor event.

Finally, while the decision in *Gagne* restricts itself to the sixty-day window for identifying a stressor event, it seems hard to imagine that the logic of the decision could not be extended to any other identifying information required by JSRRC. For example, VA asks veterans to provide a social security number, date, unit of assignment, and geographic location to verify a PTSD stressor.¹⁵⁴ If the duty to assist requires VA to submit multiple requests to cover a fourteen-month period, it seems hard to believe that a request that is incomplete to a similar level—such as a veteran who provides an overbroad geographic region or a partial unit number—would not also be enough to trigger the duty to assist, requiring VA to submit multiple requests to JSRRC in an attempt to fill in the missing information.

¹⁵⁰ *Id.* at 403 (quoting 38 U.S.C. § 5103A(c)(2) (2012)).

¹⁵¹ *Id.* at 404.

¹⁵² See JSRRC, Joint Services Records Research Center Mission, <https://www.rmda.army.mil/jsrrc/RMDA-JSRRC-Mission.html> (last visited Aug. 5, 2016).

¹⁵³ See *Gagne*, 27 Vet. App. at 404.

¹⁵⁴ See, e.g., Shera Finn et al., *VA’s Duty to Assist in the Context of PTSD Stressor Verification: What Must VA Do to Fulfill the Veterans Claims Assistance Act of 2000?*, 1 VETERANS L. REV. 50, 60 (2009).

C. Elements of Service Connection

Although many service connection claims turn on whether a veteran can establish the third element—a causal nexus or link between a current disability and military service—the Court did not issue any cases on that topic in 2015. It did, however, issue one case addressing each of the first two elements of service connection: a current disability and an in-service event or injury.

i. Current Disability

In 2013, the Federal Circuit decided *Walker v. Shinseki*, in which it limited the theory of continuity of symptomatology, described in 38 C.F.R. § 3.303(b), such that it could only be used to establish service connection for the chronic illnesses listed in 38 C.F.R. § 3.309.¹⁵⁵ However, in *Fountain v. McDonald*, the Court held that one of the listed illnesses, “organic diseases of the nervous system,” can include tinnitus when there is evidence of acoustic trauma.¹⁵⁶ This holding reopened another avenue of service connection for veterans with tinnitus who are able to establish that they have experienced continuous symptoms since their military service.

The 2013 Federal Circuit decision in *Walker* was, in some ways, a surprising circumscription of the “lay evidence revolution” that gained steam with *Jandreau v. Nicholson*¹⁵⁷ and *Davidson v. Shinseki*.¹⁵⁸ Establishing service connection by continuity of symptomatology had become an increasingly powerful tool as more and more VA adjudicators became comfortable with the idea that lay evidence could be as competent as medical evidence to establish observable symptoms and events. Limiting this theory to the chronic illnesses listed in 38 C.F.R. § 3.309 suddenly cut back the options of many veterans who might have been experiencing symptoms since service but were unable to document that fact because of, for example, lack of health insurance or undiagnosed psychological problems.

ii. In-Service Incurrence

In 2015, the Court issued a significant decision addressing the in-service event or injury element of service connection, specifically the presumption of in-service herbicide exposure for veterans who served in Vietnam.¹⁵⁹ *Gray v. McDonald* dealt with an important aspect of the “blue water” versus

¹⁵⁵ 708 F.3d 1331, 1338 (Fed. Cir. 2013).

¹⁵⁶ *Fountain v. McDonald*, 27 Vet. App. 258, 260 (2015).

¹⁵⁷ 409 F.3d 1372, 1376-77 (Fed. Cir. 2007) (rejecting the Court’s view that competent medical evidence was required when the determinative issue involves medical etiology or medical diagnosis).

¹⁵⁸ 581 F.3d 1313, 1316 (Fed. Cir. 2009) (holding that the Court erred in “stat[ing] categorically that ‘a valid medical opinion’ was required to establish nexus,” and that the appellant was “‘not competent’ to provide testimony as to nexus because she was a layperson”).

¹⁵⁹ *Gray v. McDonald*, 27 Vet. App. 313 (2015). The second element required to establish service connection is the existence of an event or injury during service, to which the current condition may be linked. 38 C.F.R. § 3.303 (2015). In some cases, legal presumptions have been established such that veterans do not have to submit evidence that an in-service event occurred: for example, a veteran who served in Vietnam between certain dates in 1962 and 1975 is presumed to have been exposed to Agent Orange during that time. *Id.* § 3.307(a) (6). Subsequent case law has refined this doctrine to require that, to benefit from the presumption, a veteran must have served “at some point on the landmass or the inland waters of Vietnam.” *Haas v. Peake*, 525 F.3d 1168, 1197 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1149 (2009). The need for service in the “inland waters of Vietnam” created a key distinction between service that qualifies for the presumption, on smaller “brown water” vessels that “operated on the muddy, brown-colored inland waterways of Vietnam,” and service that does not qualify, on larger “blue water” vessels such as “gun line ships and aircraft carriers” that “operated on the blue-colored waters of the open ocean.” Training Letter 10-06, Adjudicating Disability Claims Based on Herbicide Exposure from U.S. Navy and Coast Guard Veterans of the Vietnam Era (Sept. 9, 2010) (rescinded). VA has since rescinded this guidance; current policy distinguishes between “inland waterways” and “offshore waters.” VA ADJUDICATION PROCEDURE MANUAL M21-1 Pt. IV, SUBPT. ii, CH. 1, § H.2 (2016).

“brown water” distinction.¹⁶⁰ Mr. Gray, a U.S. Navy Veteran, had several disabilities that would qualify for an automatic grant of service connection if he could establish in-service herbicide exposure.¹⁶¹ However, he had never actually set foot on land during his time in Vietnam.¹⁶² Before the Board, he argued that his service aboard the U.S.S. *Roark*, a large blue-water vessel, while it was docked in Da Nang Harbor constituted service in the inland waters of Vietnam.¹⁶³ Among other items, he relied on a copy of a November 2009 Board decision from another Veteran’s appeal, in which the Board had applied the presumption of in-service herbicide exposure based on its conclusion that Da Nang Harbor was a “brown water” inland waterway for the purposes of the regulation.¹⁶⁴ In that other case, the Board explained its reasoning as follows:

[T]he Veteran’s service was conducted on a ship that frequently anchored in a harbor within the territorial borders of Vietnam. The evidence of record clearly shows that Da Nang Harbor is well sheltered and surrounded on three sides by the shoreline of Vietnam. The harbor is nearly totally surrounded by land and . . . the entire harbor is located within the territorial boundaries of Vietnam. As such, given the location of the harbor as being surrounded by the land on three sides, and the evidence that the harbor is within the territory of Vietnam, and resolving all doubt in the Veteran’s favor, the Board finds that Da Nang Harbor is an inland waterway for purposes of the regulation.¹⁶⁵

However, the Board rejected Mr. Gray’s argument, noting that decisions in other Board appeals are not precedential.¹⁶⁶ It also observed that the November 2009 Board decision’s finding—that Da Nang Harbor was an inland waterway for the purpose of establishing herbicide exposure—was contrary to VA’s established official policy on the matter.¹⁶⁷ The Board relied on a December 2008 VA Bulletin and a September 2010 VA Training Letter, both of which explicitly defined all Vietnam’s coastline harbors as “blue water” areas.¹⁶⁸ Accordingly, the Board found that Mr. Gray did not have in-service herbicide exposure and denied the claim.¹⁶⁹

Mr. Gray appealed and argued before the Court that it was arbitrary and capricious for VA to interpret 38 C.F.R. § 3.307(a)(6)(iii) such that Da Nang Harbor was defined as a “blue water” area rather than part of the “brown water” system of inland waterways.¹⁷⁰ He asserted that VA’s only rationale for defining Da Nang Harbor as blue water rather than a brown water inland waterway was an opinion that it was “easy to enter due to being open to the sea.”¹⁷¹ The Court noted that in *Haas*, the Federal Circuit upheld the brown versus blue water distinction because it was based on the likelihood of herbicide exposure.¹⁷² In this case, however, the Court concluded that VA’s assignment of blue or brown water designations to

¹⁶⁰ *Gray*, 27 Vet. App. at 318-19.

¹⁶¹ *Id.* at 315. Under 38 U.S.C. § 1116(a) (2012), disabilities listed in 38 C.F.R. § 3.307(a)(6)(iii) (2015) are presumed to have been caused by in-service herbicide exposure, eliminating the need for a veteran to establish linkage, the third element of service connection. Most of Mr. Gray’s disabilities were among those listed in § 3.307(a)(6)(iii). *Id.* at 319.

¹⁶² *Id.* at 317.

¹⁶³ *Id.* at 319.

¹⁶⁴ *Id.* at 316-17.

¹⁶⁵ *Id.* at 317.

¹⁶⁶ *Id.* at 318.

¹⁶⁷ *Id.* at 317.

¹⁶⁸ *See id.* at 317-18.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 318.

¹⁷¹ *Id.*

¹⁷² *Id.* at 322.

“the murky area where inland waterways open to the ocean and the brown water mixes with the blue” was based on factors unrelated to herbicide exposure.¹⁷³ As a result, the Court found, the rationale for those designations was inconsistent with the purpose of the regulation.¹⁷⁴ The Court also found that VA’s interpretation was irrational, inconsistently applied, and not worthy of deference.¹⁷⁵ The Court remanded the case and instructed VA to reevaluate the manner in which it defined inland waterways, particularly as applied to Da Nang Harbor, and to focus on the regulation’s purpose: the probability of herbicide exposure.¹⁷⁶

This case is a good example of what can happen when adjudicators lose sight of the fact that legal presumptions are often fiction, established to implement Congress’s policy decisions.¹⁷⁷ In a common law system, many judicial decisions will extend a previous ruling to cover similar facts because the same reasoning will apply, or will extend a doctrine beyond its initial boundaries because an analogous situation arises or because there is a logical reason for such an extension.¹⁷⁸ Legal presumptions, however, are poor candidates for such analysis because, given that they are based on a fiction in the first place, they cannot be logically extended with any guarantee of sound results.

This is apparently what happened in the Board decision upon which Mr. Gray based his arguments on appeal: the 2009 Board decision treated the definition of Da Nang Harbor as an issue that was open to analogizing and distinguishing and extending logically. However, 38 U.S.C. § 1116(f) and 38 C.F.R. § 3.307(a)(6)(iii) were not established because they reflect reality; no one has ever asserted that every square foot of Vietnam was actually being sprayed with herbicides at every hour of every single day between January 9, 1962, and May 7, 1975. Instead, Congress recognized the difficulty of identifying which areas of Vietnam were sprayed with herbicide at which times and which troops were in a given location at the time spraying occurred. Accordingly, as a policy decision, Congress established 38 U.S.C. § 1116(f) to remove the requirement that a veteran who served in Vietnam submit evidence of in-service herbicide exposure, and VA established 38 C.F.R. § 3.307(a)(6)(iii) to implement it.¹⁷⁹

Although it must be tempting for legal adjudicators, whose minds are used to the logical distinctions and extensions required by common law analysis, to fall prey to the temptation to extend familiar presumptions, the Court’s analysis in *Gray* maintained its focus on the key element at issue: the brown water versus blue water distinction *is not about water*; it’s about the likelihood of herbicide exposure.¹⁸⁰

iii. Disability Rating

After a veteran is awarded compensation benefits for a service-connected disability, VA must assess when the award of benefits should become effective and what level of compensation should be paid. The Court addressed these downstream issues in 2015 in three decisions addressing the disability rating process and two decisions addressing effective dates.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 323-24.

¹⁷⁵ *Id.* at 324-26.

¹⁷⁶ *Id.* at 327.

¹⁷⁷ *See, e.g.*, Rostam J. Neuwirth, *Law and Magic: A(nother) Paradox?*, 37 T. JEFFERSON L. REV. 139, 145-49 (2014) (comparing legal presumptions with legal fictions).

¹⁷⁸ *See generally* Eric Alden, *Rethinking Promissory Estoppel*, 16 NEV. L.J. 659, 666-68 (2016) (offering a brief summation of the practices of American common law).

¹⁷⁹ For a general discussion of this legal presumption, *see* Haas v. Peake, 525 F.3d 1168 (2008).

¹⁸⁰ *See Gray*, 27 Vet. App. at 322.

In *Copeland v. McDonald*, the Court concluded that the Board erroneously considered a rating by analogy of a Veteran’s diagnosed disabilities of pes planus and hallux valgus.¹⁸¹ The majority in *Copeland* reaffirmed the Court’s holding in *Suttman v. Brown*,¹⁸² which held that rating by analogy is statutorily inappropriate when there is a listed diagnostic code (DC) for a veteran’s service-connected disability, and denied the appeal on those grounds.¹⁸³ In his dissent, Judge Greenberg did not disagree with the holding of *Suttman*, but instead argued that the majority mischaracterized the case when it discussed rating by analogy in the first place.¹⁸⁴ Judge Greenberg observed that nowhere did the Board actually attempt to rate the Veteran’s disability by analogy; instead, the Board selected one DC from several that could potentially be appropriate for the rating, and Judge Greenberg believed the Board merely erred in making the choice it did.¹⁸⁵

In *Petitti v. McDonald*, the Court held that 38 C.F.R. §§ 4.59 and 4.71a, DC 5002, work in tandem to authorize a minimum compensable rating of ten percent per joint, to be combined but not added, for painful motion, even though the veteran may not experience actual limitation of motion.¹⁸⁶ Section 4.59 is one of the regulations that precede the musculoskeletal DCs in the rating schedule set out in part 4 of Chapter 38 of the Code of Federal Regulations and guide VA as to how the subsequent DCs are to be interpreted. Section 4.59, entitled “Painful Motion,” provides:

With any form of arthritis, painful motion is an important factor of disability, the facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to affected joints. Muscle spasm will greatly assist the identification. Sciatic neuritis is not uncommonly caused by arthritis of the spine. The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. Crepitation either in the soft tissues such as the tendons or ligaments, or crepitation within the joint structures should be noted carefully as points of contact which are diseased. Flexion elicits such manifestations. The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.¹⁸⁷

In *Petitti*, the parties disagreed about whether the criteria for “painful motion” under § 4.59 included the mere presence of joint pain or whether the regulation required “objective evidence” of pain during range-of-motion testing.¹⁸⁸ The Veteran reported experiencing joint pain “both at rest and . . . during activities such as walking, standing, and sitting,” but his VA examinations did not indicate painful motion during range-of-motion tests.¹⁸⁹

¹⁸¹ 27 Vet. App. 333, 338-39 (2015). The Court ultimately found the error to be harmless, because the Board ultimately rated the Veteran’s disabilities under the diagnostic codes (DCs) specifically addressing those disorders. *Id.*

¹⁸² 5 Vet. App. 127 (1993).

¹⁸³ *Copeland*, 27 Vet. App. at 338-39.

¹⁸⁴ *Id.* at 340.

¹⁸⁵ *Id.*

¹⁸⁶ 27 Vet. App. 415, 425-26 (2015). Diagnostic Code 5002, governing rheumatoid arthritis, is set out in 38 C.F.R. § 4.71a (2015).

¹⁸⁷ 38 C.F.R. § 4.59. In *Burton v. Shinseki*, 25 Vet. App. 1, 5 (2011), the Court held that this regulation is not limited to arthritis.

¹⁸⁸ *Petitti*, 27 Vet. App. at 422.

¹⁸⁹ *Id.*

Evaluating joints under DC 5002 is further complicated by the fact that this DC cross-references other DCs that need to be considered during the rating process.¹⁹⁰ Specifically, DC 5002 provides that chronic residuals of rheumatoid arthritis will be rated “under the appropriate diagnostic codes for the specific joints involved.”¹⁹¹ Thus, assigning an appropriate rating for a veteran with painful motion due to chronic residuals of rheumatoid arthritis involves the interplay of at least three sources of guidance with the VA rating schedule: DC 5002, the DC for the specific joint in question, and § 4.59.

Engaging the standard tools of regulatory interpretation, the Court in *Petitti* first examined DC 5002 in detail and concluded that “the plain language of DC 5002 makes limitation of motion a prerequisite for both a compensable disability rating under the DC relevant to the particular joint involved and for a minimum disability rating.”¹⁹² The Court then noted that DC 5002 requires that “[l]imitation of motion must be objectively confirmed by findings such as swelling, muscle spasm, or satisfactory evidence of painful motion.”¹⁹³ The Court concluded that § 4.59 also authorized a minimum disability rating for an “actually painful” joint, and held that DC 5002’s reference to “painful motion” and § 4.59’s reference to “actually painful” motion were synonymous.¹⁹⁴

The Court reviewed relevant prior case law, including *Lichtenfels v. Derwinski*, which held that § 4.59 serves to link painful motion and limited motion, such that a veteran who has painful motion is deemed to have limited motion for the purpose of DC 5003, governing degenerative arthritis, *even without actual limitation of motion*.¹⁹⁵ The Court concluded that the same principles applied to link § 4.59 and DC 5002 when rating rheumatoid arthritis:

Because the Court holds that § 4.59’s reference to “painful motion” is equated with the reference to “limitation of motion” in DC 5002, a claimant with [rheumatoid arthritis] who demonstrates that he has painful motion of a joint is entitled to the minimum disability rating for that joint under DC 5002 and § 4.59, even though the claimant does not have actual limitation of motion.¹⁹⁶

The Court concluded its analysis by relying on prior case law to conclude that a claimant who experiences painful motion due to arthritis but does not suffer limitation of motion may rely on the interplay of these regulations to become eligible for a *minimum* disability rating, but not more.¹⁹⁷

As to the evidence required to establish painful motion, the Court concluded that although § 4.59 does not require objective evidence of painful motion, DC 5002 does require such a showing.¹⁹⁸ As such, a *veteran’s* lay testimony alone will not suffice, presumably because it is considered subjective.¹⁹⁹ However, adequate objective confirmation need not be range-of-motion testing or any other form of medical evidence; lay observations, such as family members’ statements about observing a veteran’s painful motion, are adequate as “objective evidence of painful motion.”²⁰⁰

¹⁹⁰ 38 C.F.R. § 4.71a.

¹⁹¹ *Id.*

¹⁹² *Petitti*, 27 Vet. App. at 424.

¹⁹³ *Id.* at 427 (citing 38 C.F.R. § 4.71a, DC 5002).

¹⁹⁴ *Id.* at 429-30.

¹⁹⁵ *Id.* at 428-29 (discussing *Lichtenfels v. Derwinski*, 1 Vet. App. 484 (1991)).

¹⁹⁶ *Id.* at 426.

¹⁹⁷ *Id.* (citing *Mitchell v. Shinseki*, 25 Vet. App. 32, 37 (2011)).

¹⁹⁸ *Id.* at 417-18.

¹⁹⁹ *Id.* at 428.

²⁰⁰ *Id.*

This case illustrates a number of points, including the fact that applying the rating schedule to veterans' service-connected disabilities can be very complicated. It also highlights an ongoing tension in the field of veterans benefits law about whether competent and credible lay evidence will be considered adequate evidence as to any given element of a claim. The Court and the Federal Circuit have consistently held that a veteran's competent and credible lay statements are adequate evidence, reiterating the point again and again over the years even as the Board seems to resist fully adopting and applying this concept.²⁰¹ In *Petitti*, the Board found the Veteran's lay testimony about experiencing painful motion to be competent and credible but still concluded that it was not "satisfactory evidence" of painful motion.²⁰² It is interesting that the Court did not go as far as to reverse the Board here—perhaps because the specific language of DC 5002 requires "objective confirmation" of painful motion.²⁰³

In *Prokarym v. McDonald*, the Board considered whether the descriptive language used in the DCs—in this case, the word "severe" as used in several different DCs relating to the foot—is a determination about a veteran's overall level of disability, or whether the term "severe" was used in different ways according to the individual DC in which it appeared.²⁰⁴ In this case, the Veteran argued that he was entitled to at least a thirty percent rating for each foot for "severe" foot injuries under DC 5284, because he was already in receipt of a fifty percent rating under DC 5276 for "pronounced" flatfoot and, in DC 5276, "pronounced" is a higher category than "severe."²⁰⁵

The Court concluded that, based on the structure of the DCs, it is apparent that terms such as "severe" are intended to be applied within the context of the specific DC at issue, rather than being descriptors of injury level that apply consistently across all DCs in the rating schedule.²⁰⁶ The Court found that to interpret the language of the DCs otherwise would render portions of the DCs moot, or as the Secretary argued, "would . . . reduce the carefully crafted criteria of DC 5276 to nothing more than a guide for the application of DC 5284."²⁰⁷

iv. Effective Date

Although it might initially seem like a straightforward process to assign a date when a veteran's compensation becomes effective, figuring out the correct effective date is actually one of the most complex determinations in the area of veterans benefits law.²⁰⁸

At issue in *Swain v. McDonald* was whether a regulation²⁰⁹ requiring a specific test for confirmation of a hearing loss diagnosis—in this case, the Maryland CNC speech discrimination test—also establishes the effective date of the increased disability rating, such that the effective date may be no earlier than the date of the test confirming the diagnosis.²¹⁰ Here, the Veteran argued that once the diagnosis is confirmed as required by the regulation, VA may use other evidence of record to establish

²⁰¹ See, e.g., *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007).

²⁰² *Petitti*, 27 Vet. App. at 429-30.

²⁰³ 38 C.F.R. § 4.71a (2015).

²⁰⁴ 27 Vet. App. 307, 310 (2015).

²⁰⁵ *Id.* at 309 (citing 38 C.F.R. § 4.71a).

²⁰⁶ *Id.* at 310-11.

²⁰⁷ *Id.* at 311.

²⁰⁸ See, e.g., John Fussell & Jonathan Hager, *The Evolution of the Pending Claim Doctrine*, 2 VETERANS L. REV. 145 (2010).

²⁰⁹ 38 C.F.R. § 4.85 (2015).

²¹⁰ 27 Vet. App. 219, 221-22 (2015).

an effective date earlier than the date of the Maryland CNC test.²¹¹ The Court determined that 38 C.F.R. § 4.85 controlled only whether an increased rating was warranted and disallowed an increased rating without the Maryland CNC test, but the regulation does not mention an effective date.²¹² Therefore, the effective date must be governed generically by 38 U.S.C. § 5110(b)(3), which merely requires that the increase in disability be “ascertainable” without imposing additional requirements.²¹³ In this case, other medical evidence in the file, including audiological reports and doctors’ evaluations, showed that the Veteran’s hearing was substantially the same in 2009, several years before the Maryland CNC test, as it was in 2013 when the test in question was administered.²¹⁴

In this case, the Court arrived at an intuitively appealing result through some fairly unintuitive legal reasoning. The intuitive reading would seem to be something like, “in this case it is obvious that Mr. Swain was disabled at the ten percent level at least back to 2009, but the regulation requires a Maryland CNC test in order to be eligible for benefits, so while he may have met the medical requirements in 2009, he did not meet the legal requirements until later.” Instead, the Court explained that § 4.85 functions as a threshold test and that, as long as the threshold is met at some point, other evidence can be used to show that a veteran’s increased rating should predate the test.²¹⁵ The Court’s reasoning that § 4.85 does not mention effective dates seems a bit strange because establishing effective dates is not the purview of the various diagnostic codes. At the same time, the language of § 4.85 pertaining to the Maryland CNC test only specifies that “an examination” for hearing impairment need use the Maryland CNC test.²¹⁶ Thus, an examination lacking that test would seem to be rendered per se inadequate, but it is difficult to argue with the Court’s logic that the provision also does not create a legal barrier to a rating, given appropriate medical evidence.

D. Other Issues in Veterans Benefits Law

i. Procedure and the Sympathetic Reading Doctrine

On its face, the Court’s decision in *Gomez v. McDonald* addressed the timeliness of a claimant’s NOA.²¹⁷ However, to resolve the matter, the Court addressed VA’s obligation to sympathetically read a pro se claimant’s pleadings.²¹⁸ In *Gomez*, one month after receiving a Board decision, the Veteran filed a motion pro se with the Board titled “Motion for Revision of Board June 18, 2013 Decision Pursuant to Subpart-O Section 20.1400 Rule 1400 (Rule A & B) Inextricably Intertwined.”²¹⁹ The Board’s mail room staff misidentified the communication and forwarded it to the RO, which filed it and took no other action.²²⁰ More than a year later, in August 2014, the Veteran filed an NOA with the Court, explaining that his filing was untimely because the Board never responded to his “Motion for Reconsideration.”²²¹

²¹¹ *Id.*

²¹² *Id.* at 223 (citing 38 C.F.R. § 4.85).

²¹³ *Id.* at 224 (citing 38 U.S.C. § 5110(b)(3) (2012)).

²¹⁴ *Id.* at 225.

²¹⁵ *See id.* at 323-25.

²¹⁶ 38 C.F.R. § 4.85.

²¹⁷ 28 Vet. App. 39 (2015).

²¹⁸ *Id.* at 43 n.1 (citing *Robinson v. Shinseki*, 557 F.3d 1355, 1358-59 (Fed. Cir. 2009) (noting that “the Board has a special obligation to read pro se filings liberally”).

²¹⁹ *Id.* at 40.

²²⁰ *Id.*

²²¹ *Id.* at 40-41.

In *Gomez*, the Court extended the holding of *Ratliff v. Shinseki*—that a “written expression of disagreement” filed at the RO abates the finality of a Board decision until certain events or actions resolve it²²²—to expressions of disagreement filed at the Board, on the basis that VA is a single entity as far as where documents are filed.²²³ One of the three possible actions resolving a veteran’s expression of disagreement is that “the Board Chairman determines the status of the document, that is, whether it is considered a motion for Board reconsideration or not, and notifies the claimant.”²²⁴ In *Gomez*, this occurred in October 2014, during the course of litigation before the Court.²²⁵ As a result, the Court deemed the August 2014 NOA *prematurely* filed and concluded that the NOA matured and was timely filed on receipt of the Board’s status determination as to the July 2013 document.²²⁶

Judge Kasold dissented, believing the case was cut and dried: in his view, based on the style and content of the document in question, it was clearly a motion for revision based on CUE.²²⁷ The fact that the Veteran later referred to it a motion for reconsideration made no difference.²²⁸ Judge Kasold found it “inexplicabl[e]” that the Court would see it any other way; he noted that veterans have the right to contest the decisions they receive in several different ways and he would not second-guess a veteran’s choice, even if it turned out to be a bad one.²²⁹ Judge Kasold proceeded to analyze the matter as a motion for revision.²³⁰

The Court’s decision in *Reliford v. McDonald* also raised the question of how far to extend the practice of liberally construing a pro se veteran’s pleadings.²³¹ When a veteran dies during the processing of a benefits claim, the veteran’s surviving spouse can file a claim for accrued benefits, which is a new claim to determine whether the record as it stood at the time of the veteran’s death would show that the veteran was due benefits and, if so, to pay any such benefits to the surviving spouse.²³² However, because filing a claim for accrued benefits initiates a new claim, it means the survivor must start over again at the beginning of the claims process.²³³

To streamline this process, Congress passed 38 U.S.C. § 5121A, which allows the proposed beneficiary to substitute for the veteran in the original claim—which means the process would not need to be restarted from the beginning, adding years of processing time. In almost all cases, this is an unmitigated benefit, not only allowing the record to be further developed but not requiring the surviving spouse to go back to the beginning of the line.

Reliford was one of the rare cases where this streamlining was not a benefit for the surviving spouse.²³⁴ The fact that substituted claims do not close the record was significant here; the additional development done after the Veteran’s death brought to light negative evidence that led to the claim being

²²² 26 Vet. App. 356, 360-61 (2013).

²²³ *Gomez*, 28 Vet. App. at 43-44 (citing *Jaquay v. Principi*, 304 F.3d 1276, 1287 (Fed. Cir. 2002) (en banc)).

²²⁴ *Id.* at 42 (citing *Ratliff*, 26 Vet. App. at 360-61).

²²⁵ *Id.* at 40.

²²⁶ *Id.* at 45.

²²⁷ *Id.*

²²⁸ *Id.* at 45-46.

²²⁹ *Id.* at 46 & n.3.

²³⁰ *Id.* at 47.

²³¹ 27 Vet. App. 297 (2015).

²³² 38 U.S.C. § 5212 (2012).

²³³ *See id.*

²³⁴ *Reliford*, 27 Vet. App. at 301.

denied.²³⁵ As a result, the Veteran’s surviving spouse argued that the Secretary erred by automatically treating her application for accrued benefits as a claim for substitution.²³⁶

The Court in *Reliford* declined to rule on the question of whether the Secretary had the authority, under the applicable regulations, to “unilaterally” decide to treat a claim for accrued benefits as a claim to substitute.²³⁷ Instead, the Court noted that the VA policy is to provide a surviving spouse with the opportunity to waive the substitution right.²³⁸ Because Mrs. Reliford never received notice and the opportunity to waive substitution, and was prejudiced thereby, the Court remanded the matter for adjudication as an accrued benefits claim, based on the record as it existed at the time of the Veteran’s death.²³⁹ The question of the basic propriety of the Secretary’s policy in this area thus remains open.

Both *Gomez* and *Reliford* highlight an ongoing issue that will most likely continue to be a focal battle at the Court: to what extent should the paternalism inherent in the VA benefits system win out over plain language and need for efficiency? Stripped of its hyperbole, Judge Kasold’s dissent in *Gomez* makes a reasonable point. Should VA, when it receives a form with a specific request from a veteran, process the request as it stands—even if there might be a better option available to the veteran—or should VA be required to scour the options available in the benefits system and then presume that the agency’s judgment is the better one, that the veteran could not have had a valid reason for making the option requested? *Reliford* illustrates that VA’s decision to substitute its judgment for the claimant’s as to which procedural option is the best strategy is not always the best course for the appellant.

On the other hand, the *Gomez* majority made the valid point that—especially given the Board’s obligation to read pro se filings liberally—it would be “illogical” to read a claim in a way that would undisputedly put the appellant in a worse litigation position.²⁴⁰ In *Gomez*, the majority could find no basis for assuming the claimant would want to forfeit direct review of a Board decision only to preserve the possibility of a later review under the much higher legal standard for CUE. Synthesizing this idea with Judge Kasold’s point that it should not be the place of VA (or the Court) to determine an appellant’s litigation strategy, and with *Reliford*, where the apparent “best choice” was substituted for the appellant’s actual request, a sensible option for VA to address such issues going forward might be to allow claimants to make “illogical” choices but to require a higher standard for such pleadings. The regulations already require that some submissions, such as motions for revision based on an allegation of CUE, to be “pled with specificity.”²⁴¹ Requiring pro se appellants to provide some clear indication that they are choosing the less obvious path on purpose thus does not seem beyond the pale.

In any case, by suggesting that VA was correct in reading the appellant’s request as exactly what it said, rather than a puzzle VA needed to solve, Judge Kasold may have been expressing a minority view

²³⁵ *Id.*

²³⁶ *Id.* at 300.

²³⁷ *Id.* at 303.

²³⁸ *Id.* at 303-04.

²³⁹ *Id.* at 304. Judge Lance filed a concurrence for the purpose of noting his belief that the majority erred when it cited *Beverly v. Nicholson*, 19 Vet. App. 394 (2005), for the proposition that the Court has jurisdiction over claims reasonably raised to the Board. *Reliford*, 27 Vet. App. at 305. He presented a convincing argument that *Beverly* is not good law on that point, and, more importantly, he noted that the issue was moot in the case at hand because the Court was not deciding between multiple claims but, instead, deciding how VA should have properly interpreted and adjudicated Mrs. Reliford’s claim. *Id.* As a result, Judge Lance believed that citing *Beverly* was both irrelevant and confusing. *Id.*

²⁴⁰ *Gomez v. McDonald*, 28 Vet. App. 39, 43 n.1 (2015).

²⁴¹ *See, e.g., Andre v. West*, 14 Vet. App. 7, 10 (2000) (per curiam), *aff’d sub nom. Andre v. Principi*, 301 F.3d 1354 (Fed. Cir. 2002).

on the Court. This is, of course, a new venue for a conversation as old as veterans benefits themselves, and many eyes will be watching how it goes forward.

Anyone who works in the field of veterans law—or, in all likelihood, any field where pro se appellants are common—will have the experience of reading documents that include citations, language, and phrases that seem to be included for no other reason than that the appellant thinks they make the document sound “legal.” The facts provided by the Court in *Gomez* do not hint as to whether or not Mr. Gomez fell into this category. Even given the full record before the Board, in many cases it will be nigh impossible to determine whether an appellant is just copying language taken from a random Internet page with no relevance to the case at hand or is a canny amateur taking advantage of a system designed to resolve ambiguity in favor of claimants.

ii. Section 1151 Benefits

In *Ollis v. McDonald*, the Veteran’s VA physician referred him to a private doctor for a procedure that caused additional injury.²⁴² The Veteran filed a claim for VA benefits under 38 U.S.C. § 1151, and the Board found that the disability was not caused by a VA employee or facility.²⁴³ The Court affirmed the Board’s decision, holding that the additional injury was, “at best, a remote consequence of—and not caused by—VA’s conduct.”²⁴⁴ The majority also held that VA has no duty to inform veterans that undergoing procedures outside VA facilities might affect their future eligibility for section 1151 compensation if they are injured as a result of negligent medical treatment from a private health care provider.²⁴⁵

Judge Greenberg wrote a strongly worded dissent observing that, partly in response to the recent VA wait times scandal,²⁴⁶ there is a “rapidly growing class of veterans” who are increasingly being referred to private health care providers because VA facilities are unable to provide the care they need.²⁴⁷ He argued that section 1151 compensation must be available to veterans who receive negligent care in a private facility if a VA recommendation is the direct cause of the veteran being treated at the private facility in the first place.²⁴⁸ Judge Greenberg argued that the practice endorsed by the decision at hand was “inequitable” and asserted that he could not “join a holding that frustrates the veteran-friendly intent of Congress.”²⁴⁹ He concluded that, as a “matter of equity, the Court should at least hold that a veteran cannot lose section 1151 eligibility when he or she has followed a VA medical recommendation and was never properly informed of the possible consequences.”²⁵⁰

Although neither the majority nor the dissent mentioned it, veterans who are injured as a result of negligent private medical care are not totally without recourse; they are simply without recourse *as to recovery from VA*. They still have the option of recovery against the private medical provider via a regular medical malpractice lawsuit. While such a lawsuit is onerous, of course, bringing a successful claim against VA under section 1151 is also a significant burden.

²⁴² 27 Vet. App. 405, 407 (2015).

²⁴³ *Id.* at 406.

²⁴⁴ *Id.* at 411.

²⁴⁵ *Id.* at 412-13.

²⁴⁶ See *supra* Part II.

²⁴⁷ *Id.* at 414-15.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 415.

²⁵⁰ *Id.*

As to its place in the Court's 2015 jurisprudence, *Ollis* illustrates the ongoing tension between the principle of procedural formalism on one hand and a more relaxed approach on the other. Judge Greenberg made this issue explicit in his dissent when he cited a 1917 case from the Court of Appeals of New York and quoted Judge Cardozo: "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."²⁵¹

iii. Waiver of Overpayment

In *Dent v. McDonald*, the Veteran appealed from a Board decision concluding that a debt for overpayment of non-service-connected pension benefits was properly created.²⁵² The case turned on the definition of the word "award," and the Court held, first, that the word "award" in 38 U.S.C. § 5112(b) (9) and (10) included "payments of awards" such as a "running award of pension."²⁵³ The Court further held that when the beneficiary of a running award experiences a change in income *subsequent to the initial award of VA pension benefits* that results in an erroneous overpayment, VA must consider both the "beneficiary's knowledge" and VA's "administrative error or error in judgment" when determining whether a valid debt has been created.²⁵⁴ The Court conducted a standard, albeit lengthy, *Chevron* analysis, concluding that the statutory term "award" was not ambiguous and that, even if it had been, the Secretary's implementing regulation was consistent with the statute and would be afforded deference.²⁵⁵

Judge Bartley concurred in part but dissented from the conclusion that a valid debt was created after the Veteran informed VA that his income had changed, on the basis that VA's failure to respond to the Veteran and its continuation of payments at the same rate constituted administrative error that was solely the fault of VA.²⁵⁶

III. CONCLUSION

Judge Kasold and Judge Greenberg both authored notable separate statements in 2015, and looking at the differences between the two sets of statements can shine a light on where the Court's current judicial philosophy stands. Judge Kasold would hold veterans to a certain formalism, even when they are pro se; on the other hand, Judge Greenberg would free the Board and the Court from some formalities, if it led to veterans receiving more compensation. The dissent in *Ollis* makes this clear, when Judge Greenberg quotes Judge Cardozo to argue that the law—in this case, the uniquely claimant-friendly veterans' benefits system—has grown beyond formalism.

The majorities in all the cases Judges Kasold and Greenberg dissented from in 2015 rejected both these extremes. Interestingly, these two seemingly opposite viewpoints find common ground in

²⁵¹ *Id.* (citing *Wood v. Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)).

²⁵² 27 Vet. App. 362 (2015).

²⁵³ *Id.* at 365 (citing 38 U.S.C. § 5112(b) (2012)).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 372-81. Consistent with the Court's past practice, the panel did not mention *Brown v. Gardner*, 513 U.S. 115 (1994), the other major interpretive canon in veterans law cases, which dictates that "ambiguity in a veterans benefits statute should be resolved in the veteran's favor." James Ridgway, *Toward a Less Adversarial Relationship Between Chevron and Gardner*, 9 U. MASS L. REV. 388, 393 (2014); see also Linda Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59, 66-70 (2011). Presumably because the Court concluded that the statutory language was unambiguous in *Dent*, it found no reason to address the inherent tension between *Chevron's* agency deference and *Gardner's* presumption in favor of the veteran.

²⁵⁶ *Id.* at 387.

their shared dissent in *Rickett*.²⁵⁷ The judges do not state anything explicitly, but it seems likely, based on their other dissents this year, that Judge Kasold authored the *Rickett* dissent to encourage the Court to act formally, not equitably, and Judge Greenberg signed on to encourage the Court not to take a step that would harm the equitable interests of veterans.

The frequent dissents and concurrences seen in the past few years suggest that the Court appears to have been experiencing an increasing internal divergence. One interesting aspect of *Pederson* is that, for an en banc decision that was only supposed to be clarifying a panel decision addressing jurisdiction less than a year earlier, it was a surprisingly fractured plurality.²⁵⁸ Eight judges participated in the case, and there were two concurrences, authored or joined by three judges, as well as three dissents, authored or joined by four judges.²⁵⁹ The Court issued a similarly divided en banc decision in *Johnson* in 2013; the eight participating judges authored one main opinion, one concurrence, and two dissents, one of which was joined by a second judge.²⁶⁰ This may be additionally noteworthy given that a recent empirical study of the Court's single-judge decisions found considerably uneven patterns of variance in case outcomes.²⁶¹ Some veterans law scholars have suggested that such a diversity of approaches to the law may matter more at the Court than at any other federal court and called this trend "troubling, given that it is an appellate tribunal."²⁶²

Although Judges Kasold and Greenberg take quite different approaches to procedural formalism, their viewpoints may not represent the far ends of the spectrum on the Court for long: the Court's composition will be changing significantly in the near future. Chief Judge Hagel and Judge Kasold's terms of service end in December 2016, Judge Lance will be eligible for retirement in 2017, and Judges Davis and Schoelen's terms of service end in December 2019.²⁶³ Although the Court is, by statute, comprised of between three and seven judges, Congress has approved a temporary expansion to nine judges, given the heavy caseload the Court manages.²⁶⁴ Assuming it is maintained in its expanded form at a full complement of nine judges, the Court will need to fill five vacant positions in the next three-and-a-half years, a turnover rate of more than fifty percent. It will be interesting to watch the push and pull of these philosophical positions over the next few years, as the Court experiences a change in more than half of its judicial personnel.

²⁵⁷ *Rickett v. McDonald*, 27 Vet. App. 240, 244-45 (2015).

²⁵⁸ *Pederson v. McDonald*, 27 Vet. App. 276 (2015).

²⁵⁹ *See id.* Judge Bartley recused herself. *Id.* at 278.

²⁶⁰ *Johnson v. Shinseki*, 26 Vet. App. 237, 240 (2013) (en banc), *rev'd sub nom.* *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014).

²⁶¹ James D. Ridgway et al., "Not Reasonably Debatable": *The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STANFORD L. & POL'Y REV. 1 (2016).

²⁶² Bradley W. Hennings et al., *Now Is the Time: Experts vs. the Uninitiated as Future Nominees to the U.S. Court of Appeals for Veterans Claims*, 25 FED. CIR. B.J. 371, 392 (2016).

²⁶³ *See* 38 U.S.C. § 7253 (2012) (establishing that judges on the Court shall serve for fifteen-year terms).

²⁶⁴ United States Court of Appeals for Veterans Claims, About the Court, <http://www.uscourts.cavc.gov/about.php> (last visited Aug. 5, 2016); *see* Press Release, Nat'l Veterans Legal Servs. Program, Court Reviewing Veteran Appeals Gets More Help, Thanks to New Judges, Says NVLSP (July 12, 2012), *available at* <http://www.nvlsp.org/news-room/press-releases/court-reviewing-veteran-appeals-gets-more-help-thanks-to-new-judges-says-nv>.