

The Evolution of the Pending Claim Doctrine

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INTRODUCTION

Whenever the Department of Veterans Affairs (VA) grants a veteran's claim for compensation, it must designate a date that the veteran will begin to receive the particular benefit he or she has been granted.³ This determination of the proper effective date of the award of benefits is one of the most complex determinations VA adjudicators are required to make.⁴

In this article, we will discuss the situation that arises when an effective date is challenged on the basis that VA had previously failed to adjudicate a claim for benefits that was before it, even if a veteran did not specifically raise the claim. The doctrine that the courts have developed in adjudicating cases raising this issue, the pending claim doctrine, is worthy of discussion because it encompasses many areas of veterans law, including the nature of formal and informal claims for benefits, the concept of revision of prior VA adjudications based on clear and unmistakable error (CUE), VA's duty to sympathetically read or develop a veteran's claim to its optimum, and the concept of finality of VA decisions. In developing the pending claim doctrine, the courts have reviewed, analyzed, and synthesized these disparate areas of veterans' law. We will pay particular attention to the decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") in *Ingram v. Nicholson*,⁵ in which the Veterans Court undertook a comprehensive examination of the prior case law on this issue, and attempted to synthesize the relevant cases notwithstanding some

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³ 38 U.S.C. § 5110 (2006); 38 C.F.R. § 3.400 (2008).

⁴ See *Chiarello v. West*, No. 98-2194, 2000 WL 511423, at *2 (Vet. App. Mar. 31, 2000) (unpublished table disposition) ("[T]he area of the proper effective date for VA benefits is one of the more complicated areas in veterans' benefits law.").

⁵ 21 Vet. App. 232 (2007).

apparent inconsistencies in their reasoning and results. We will also discuss recent decisions of the United States Court of Appeals for the Federal Circuit (Federal Circuit), which reflect that the Federal Circuit has adopted the holding of *Ingram* with regard to the appropriate manner for a veteran to challenge VA's failure to adjudicate a claim, and decisions of the Veterans Court extending its holding in *Ingram*.

I. LAWS GOVERNING EFFECTIVE DATES AND CLAIMS

The starting point in determining the appropriate effective date is the date that a veteran files an application (or claim) for benefits.⁶ The general rule for assigning an effective date when granting the most common types of claims, such as a claim for service connection, a claim for an increased rating, or a petition to reopen a previously denied claim, is that the effective date of the granted benefit cannot be earlier than the date of receipt of claim.⁷ There are, of course, exceptions to this rule, but in order to understand these exceptions, and the rule itself, it is first necessary to understand what is meant by the term "claim."

VA law and regulations define the relevant terminology. A "claimant" is defined as a person "applying for, or submitting a claim for, any benefit under the laws administered by the Secretary."⁸ VA's definitional regulation indicates that the terms "claim" and "application" are interchangeable, and defines them as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit."⁹ A series

⁶ See, e.g., *id.* at 254 ("If a claim is granted, however, the date the claim was first raised is relevant to determining the effective date.").

⁷ 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400. Section 5110(a) states "Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a).

⁸ 38 U.S.C. § 5100.

⁹ 38 C.F.R. § 3.1(p); see also *id.* § 20.3(f) (defining "claim" as an application made under title 38 of the U.S. Code "for entitlement to [VA] benefits or for the continuation or increase of such benefits, or the defense of a proposed agency adverse action concerning benefits").

of recent cases have attempted to more precisely define the term “claim” as it applies throughout the VA adjudication process.¹⁰ A general discussion of this issue is beyond the scope of this article.

While the law indicates that a claim for VA benefits must be submitted “in the form prescribed by” VA, the regulations contemplate that veterans will frequently indicate an intent to apply for VA benefits without using these forms.¹¹ An informal claim is defined broadly as any communication or action that demonstrates an intent to apply for an identified benefit.¹² There is no set form that an informal written claim must take: “All that is required is that the communication indicate an intent to apply for one or more benefits under the laws administered by [VA], and identify the benefits sought.”¹³ In certain circumstances, VA hospital or treatment reports may be considered an informal claim.¹⁴

When VA receives an informal claim, it must send the claimant an application form. If VA receives a completed form within a year, the claim “will be considered filed as of the date of receipt of the informal claim.”¹⁵ This combination of a broad definition of an informal claim and the shifting to VA of the burden of continuing the claim process is the starting point in understanding the beginnings of the pending claim doctrine.

¹⁰ See *Rice v. Shinseki*, 22 Vet. App. 447, 451 (2009) (noting that the term “‘claim’ . . . has been used to describe a wide variety of circumstances,” for example: (1) to refer to issues within a claim, (2) to focus on the procedural posture of a case; (3) to describe motions alleging clear and unmistakable error (CUE); (4) to describe the specific benefit sought; and (5) to refer to elements of a claim); see also *Tyrues v. Shinseki*, 23 Vet. App. 166, 185-87 (2009) (Kasold, J., concurring) (reviewing the relevant case law and concluding that “what constitutes a ‘claim’ differs depending on what stage in the administrative process one is attempting to define claim – at the stage when a ‘claim’ is filed, or at the final stage when a ‘claim’ is denied”).

¹¹ 38 U.S.C. § 5101; see, e.g., 38 C.F.R. § 3.157(a) (stating that in certain circumstances a report of examination or hospitalization will be accepted as a claim for increase or to reopen).

¹² 38 C.F.R. § 3.155(a).

¹³ *Rodriguez v. West*, 189 F.3d 1351, 1354 (1999) (internal quotation marks omitted).

¹⁴ 38 C.F.R. § 3.157.

¹⁵ *Id.* § 3.155(a).

What happens if a veteran's communication, in fact, met the definition of an informal claim, but VA adjudicators failed to note this fact at the time? The answer is that VA regulations indicate that such a claim remains pending: a "pending claim" is defined as "[a]n application, formal or informal, which has not been finally adjudicated."¹⁶ The significant effect of the seemingly simple and common sense concept of a pending claim becomes apparent when VA grants a claim and assigns an effective date for a benefit alleged to have been claimed years earlier, but that was not formally adjudicated when it was first raised.

Generally, under VA law, there is neither a statute of limitations nor a limit to the number of times a veteran can file a claim for a particular benefit.¹⁷ Thus, the issue of the disposition of prior claims filed for the same benefit arises with some frequency when VA adjudicators assign an effective date. In assigning an effective date when the benefit granted had been previously sought, VA must address the issue of the finality of a prior decision.

II. OVERCOMING FINALITY

When a VA Regional Office (RO) renders a decision that is not timely appealed by a veteran, that decision becomes final.¹⁸ This is important for determining the effective date when a subsequent

¹⁶ *Id.* § 3.160(c).

¹⁷ See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) ("There is no statute of limitations, and . . . a claimant may resubmit [a claim] as long as he presents new facts not previously forwarded." (citing 38 C.F.R. §§ 3.104, 3.105 (1984))).

¹⁸ See 38 C.F.R. § 20.200 (stating that an appeal consists of a timely filed notice of disagreement (NOD) and, after a statement of the case (SOC) has been furnished, a timely filed substantive appeal); *id.* § 20.302(a) (providing that the time limit for filing a NOD is one year from mailing of notification of determination); *id.* § 20.302(b) (stating that a substantive appeal must be filed within 60 days of mailing of SOC or remainder of one year from mailing of notification of determination); *id.* § 3.160(d) (defining a finally adjudicated claim as "[a]n application, formal or informal, which has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, or by denial on appellate review, whichever is the earlier"); *id.* § 20.1103 (providing that a VA Regional Office (RO) determination of which the Veteran is properly notified is final if an appeal is not perfected as prescribed in the regulations relating to appeals).

claim for the benefit that has been denied is granted. Once there is a final RO denial of a claim for service connection, there are only two ways to overcome this finality.

First, a claimant may seek to have the claim readjudicated by submitting a request to reopen the claim based on new and material evidence; when such new and material evidence is received, a claim must be “reopened” by VA and readjudicated on a *de novo* basis.¹⁹ However, when granting a petition to reopen, and granting the benefit after *de novo* consideration, VA cannot assign an effective date earlier than the date of receipt of the petition to reopen.²⁰

Second, a claimant may seek revision of a final RO decision on the basis that it is the product of CUE.²¹ The most significant aspect of a CUE claim is that, if such a claim is granted, the prior final decision is reversed or amended and this action “*has the same effect as if the decision had been made on the date of the prior decision.*”²² The significance of this rule in the effective date context is clear; it in effect alters the prior decision and vitiates its finality. Thus, a prior RO denial of a claim for service connection can be converted to a grant of service connection, and that grant of service connection is treated as if it were made in response to the previously filed claim that had originally been denied by the reversed decision. In these circumstances, the date of that previously filed claim can become the basis for the effective date of the grant of service connection.²³

¹⁹ 38 U.S.C. § 5108 (2006). Such a request to reopen is frequently referred to as a “petition to reopen” a previously denied claim.

²⁰ *Id.* § 5110(a); *Leonard v. Nicholson*, 405 F.3d 1333, 1336 (Fed. Cir. 2005) (citing *Sears v. Principi*, 349 F.3d 1326, 1332 (Fed. Cir. 2003)); 38 C.F.R. § 3.400(q)(2), (r).

²¹ 38 U.S.C. § 5109A; 38 C.F.R. § 3.105(a). Requesting adjudication of whether there was CUE in a prior RO (or Board) decision is technically not a claim but a motion for revision of a prior final adjudication on the basis of alleged CUE: “[I]t is a collateral attack on a final decision.” *Luallen v. Brown*, 8 Vet. App. 92, 94 (1995) (quoting *Fugo v. Brown*, 6 Vet. App. 162, 163 (1994) (per curiam order) (Holdaway, J., concurring)). Nevertheless, the term CUE claim is frequently used by VA, the U.S. Court of Appeals for Veterans Claims (“Veterans Court”), and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). We will use the terms “CUE claim” and “CUE motion” interchangeably.

²² 38 U.S.C. § 5109A(b) (emphasis added); 38 C.F.R. § 3.105(a).

²³ 38 C.F.R. § 3.400(b)(2), (k).

Once a veteran timely appeals an RO decision to the Board of Veterans' Appeals ("Board"), additional considerations come into play with regard to the rule of finality. Finality does not attach when VA fails to act on a timely appeal to the Board, when VA fails to notify the veteran of the adverse decision, when the RO fails to issue a statement of the case, or when VA fails to provide notice to the veteran of his appellate rights.²⁴ Further exceptions to finality exist once the Board renders a decision.²⁵

Another important concept relevant to the development of the pending claim doctrine is VA's duty to sympathetically read or develop a claim to its optimum.²⁶ The Veterans Court has long held that the "uniquely pro-claimant" and non-adversarial nature of the VA adjudication system means that when a veteran files a claim for benefits, VA must liberally construe all documents filed by a claimant in order to determine or infer what claims have been filed.²⁷ The Veterans Court and Federal Circuit have more recently described VA's duty to sympathetically read a veteran's filings and develop his or her claim to an optimum by determining all potential claims raised by the evidence even if not specified by the veteran.²⁸ Even more recently, the Federal Circuit has held that this duty applies in all direct appeals (although not necessarily to CUE claims), regardless of whether the claimant is represented by counsel.²⁹

²⁴ Cook v. Principi, 318 F.3d 1334, 1340-41 (Fed. Cir. 2002) (citing *Tablazon v. Brown*, 8 Vet. App. 359 (1995); *Hauck v. Brown*, 6 Vet. App. 518 (1994); *Kuo v. Derwinski*, 2 Vet. App. 662 (1992); and *Ashley v. Derwinski*, 2 Vet. App. 307 (1992)); see *Myers v. Principi*, 16 Vet. App. 228, 235-36 (2002) (holding that where the Veteran had filed a timely appeal from a prior RO decision and VA failed to recognize the appeal, neither the prior RO decision nor the subsequent denial of reopening of the claim had become final).

²⁵ See *DiCarlo v. Nicholson*, 20 Vet. App. 52, 56 (2006) (listing exceptions to the rule of finality with regard to Board decisions, including the Board's reconsideration of its decision or its *sua sponte* correction of obvious errors).

²⁶ The nature and scope of this duty were discussed and analyzed comprehensively in a prior article of the *Veterans Law Review*: Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases before VA: The "New Paternalism"*, 1 VETERANS L. REV. 2 (2009).

²⁷ *EF v. Derwinski*, 1 Vet. App. 324, 326 (1991).

²⁸ See, e.g., *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (holding that "VA has a duty to sympathetically read a veteran's allegations in all benefit claims").

²⁹ *Robinson v. Shinseki*, 557 F.3d 1355, 1360-62 (Fed. Cir. 2009).

III. CUE IN UNADJUDICATED CLAIMS

The combination of the rules regarding pending claims, effective dates, CUE, finality and its exceptions, and the duty to sympathetically read or develop a claim to its optimum, contains an inherent tension. This tension was revealed in a line of cases that addressed situations in which claimants had filed a previous claim that was not recognized as such by the RO and, therefore, was not adjudicated.³⁰ Under the above rules, such a claim remains pending. However, once a subsequent claim for the same benefit is granted, with the basis of the effective date being the date of the subsequently filed claim, the issue arises as to how to challenge the effective date assigned on this basis. As noted above, the only way to vitiate the finality of a prior unappealed RO decision for effective date purposes is to file a CUE claim seeking to reverse the prior decision and replace it (and therefore the assigned effective date) with a corrective decision.³¹ However, in the case of a prior unadjudicated claim, there was no prior RO decision to attack on the basis of CUE. In the remainder of this article, we will discuss the attempts of the Veterans Court and the Federal Circuit to grapple with this issue. As discussed below, the issue rose to the surface almost incidentally, beginning with simple observations by the Veterans Court that in certain cases in which a veteran makes a claim for an increased rating, where there is evidence of unemployability and the veteran meets the criteria for a total disability rating based on individual unemployability (TDIU), VA must consider the claim as one that includes a claim for a TDIU rating.³² The Federal Circuit then seemed to suggest that the means for challenging such a failure to adjudicate a claim was through a claim of CUE, despite the inherent contradiction in using a tool (CUE) designed to challenge a final decision to instead challenge a failure to make a decision in the first place.³³ Ultimately, the Veterans Court's

³⁰ *Norris v. West*, 12 Vet. App. 413 (1999); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001); *Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005). See discussion *infra* notes 35 - 73 and accompanying text.

³¹ See *supra* notes 21 - 23 and accompanying text.

³² *Norris*, 12 Vet. App. at 421-22.

³³ *Andrews*, 421 F.3d at 1281.

decision in *Ingram v. Nicholson*³⁴ resolved this conflict and synthesized the extensive, and somewhat contradictory, case law, which the Federal Circuit subsequently adopted and the Veterans Court extended, resulting in what the *Ingram* Court called the pending claim doctrine.

IV. THE ORIGINS OF THE PENDING CLAIM DOCTRINE

The earliest cases in which the Veterans Court addressed what would later be called the pending claim doctrine are *Norris v. West*³⁵ and *Roberson v. Principi*.³⁶ Each of these cases involved the issue of a TDIU rating. VA's Schedule of Rating Disabilities (Rating Schedule) provides for grades of rating disabilities from 0 to 100 percent.³⁷ A rating of 100 percent indicates total disability. Recognizing that there are circumstances that will entitle a veteran to a total disability rating even though he is rated less than 100 percent disabled, VA regulations provide for a TDIU, which may be granted when a veteran presents evidence that he is unable to secure a substantially gainful occupation as a result of a service-connected disability or disabilities and meets other criteria.³⁸ *Norris* and *Roberson* were both cases in which the Veterans were granted a TDIU, but subsequently claimed that there was CUE in earlier RO decisions that had failed to adjudicate prior, informal TDIU claims.³⁹ The Veterans in *Norris* and *Roberson* did not argue that there had been a formal claim for a TDIU or even a communication requesting a TDIU. Rather, they argued that the evidence raised such an informal claim for a TDIU and that the RO committed CUE in failing to adjudicate such a claim.⁴⁰ In both cases the Veterans Court and the Federal Circuit first addressed whether there had been an informal claim for a TDIU and then addressed how a veteran should challenge an RO's failure to adjudicate such a claim.⁴¹

³⁴ 21 Vet. App. 232 (2007).

³⁵ 12 Vet. App. 413 (1999).

³⁶ 251 F.3d 1378 (Fed. Cir. 2001).

³⁷ 38 C.F.R. Part 4 (2008).

³⁸ 38 C.F.R. § 4.16 (2008).

³⁹ *Norris*, 12 Vet. App. at 416; *Roberson*, 251 F.3d at 1381-82.

⁴⁰ *Norris*, 12 Vet. App. at 416; *Roberson*, 251 F.3d at 1382.

⁴¹ *Norris*, 12 Vet. App. at 419-22; *Roberson*, 251 F.3d at 1384-85.

In *Norris*, the Veteran had previously been granted service connection for a psychiatric disability and assigned a 30 percent rating.⁴² Subsequently, this rating was increased to 70 percent.⁴³ After the Veteran was hospitalized, 1987 and 1989 rating decisions granted temporary 100 percent ratings, but continued the 70 percent rating upon termination of those temporary ratings.⁴⁴ After a detailed discussion of the regulatory provisions relating to informal claims and VA examinations, as well as VA's duty to fully and sympathetically develop a claim to its optimum, the Veterans Court found that, where a claimant files a claim for an increased rating, his schedular rating meets the minimum requirements for a TDIU, and there is evidence of service-connected unemployability, VA must consider the increased rating claim to be, or to include, a TDIU claim.⁴⁵ The Veteran in *Norris* met these criteria, and the RO did not adjudicate a claim for a TDIU in the 1987 and 1989 rating decisions; therefore, the Veterans Court addressed the issue of the proper remedy for VA's failure to adjudicate the TDIU claim.⁴⁶

With regard to this issue, the Veteran had argued that “the RO’s failure to adjudicate an informally raised TDIU claim constitute[d] a final disallowance of the claim” that could be challenged via a claim of CUE in that final disallowance.⁴⁷ The only case that the Veteran cited in support of this argument, however, was *In Re Fee Agreement of Smith*,⁴⁸ which held, for purposes of whether an attorney could be paid a fee, that the failure of the Board to adjudicate a claim constituted a denial of the claim.⁴⁹ The Veterans Court declined, however, to read *In re Smith* to extend beyond the fee payment context, and held that where “VA has failed to comply during the adjudication process with certain procedural requirements

⁴² *Norris*, 12 Vet. App. at 414.

⁴³ *Id.* at 415.

⁴⁴ *Id.* at 415-16.

⁴⁵ *Id.* at 416-17, 420-21.

⁴⁶ *Id.* at 422.

⁴⁷ *Id.*

⁴⁸ 10 Vet. App. 311 (1997).

⁴⁹ *Id.* at 314.

mandated by law or regulation, the claim remains pending in that VA adjudication process.”⁵⁰ In *Norris*, this finding was fatal to the Veteran’s CUE claim, because it meant that the 1987 and 1989 claims remained pending at the RO, and therefore could not be challenged via CUE, since CUE is a challenge to a finally decided claim and not to a pending claim. The Veterans Court, therefore, affirmed the Board’s decision for this reason, and not for the reasons cited by the Board, which was that no TDIU claim had been raised.⁵¹

Similarly, in *Roberson*, the Veteran alleged CUE in the RO’s failure to adjudicate a TDIU claim.⁵² There, the Veteran indicated in his initial claim for service connection for a psychiatric disability that he had not worked in almost a year.⁵³ Thus, *Roberson* involved the propriety of the rating initially assigned with a grant of service connection rather than one sought via an increased compensation claim. The Federal Circuit’s holding as to TDIU was similar to the Veterans Court’s holding in *Norris*: “[o]nce a Veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, . . . VA must consider TDIU.”⁵⁴ The Federal Circuit, like the Veterans Court in *Norris*, cited the language of 38 C.F.R. § 3.155(a) and VA’s duty to develop a claim to its optimum in support of this holding.⁵⁵ However, the Federal Circuit distinguished *Norris* on the ground that there, the evidence had raised informal claims for increased rating, to include TDIU, but these claims had never been adjudicated.⁵⁶ In contrast, the Veteran’s original claim for service connection in *Roberson*, which included a claim for a TDIU (by virtue of his submission of evidence of unemployability and his request for the highest rating possible), had been decided by the RO when it granted his claim for service connection and assigned

⁵⁰ *Norris*, 12 Vet. App. at 422.

⁵¹ *Id.*

⁵² *Roberson v. Principi*, 251 F.3d 1378, 1381 (Fed. Cir. 2001).

⁵³ *Id.* at 1380.

⁵⁴ *Id.* at 1384.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1383.

a 70 percent rating.⁵⁷ Therefore, the Federal Circuit held, because the Veteran in *Roberson* was challenging a final RO decision, his CUE claim as to this decision was valid.⁵⁸ The Federal Circuit held that VA was required to consider a CUE claim in these circumstances, and remanded for such consideration.⁵⁹

V. THE CREATION OF A CONTRADICTION

The holdings of *Norris* and *Roberson* did not appear to mark any great transformation in the law regarding pending claims. The focus of those decisions was on the fact that a TDIU could be raised implicitly, by claiming the highest rating possible and submitting evidence of unemployability. However, because both cases involved CUE claims, the Veterans Court and the Federal Circuit had addressed whether this was a proper way to challenge the failure to adjudicate such an implicitly raised claim for TDIU. Where, as in *Norris*, the TDIU claim was raised as part of an increased rating claim but was never decided, the TDIU claim remained pending and could not be attacked via CUE. However, where a final decision had been made that implicitly denied the TDIU claim, as in *Roberson*, that denial could be challenged with a CUE claim. The Federal Circuit's attempt in *Roberson* to distinguish *Norris* on this basis, however, revealed a simmering tension in this area of law that was about to boil over. This boiling point was reached in *Andrews v. Nicholson*.⁶⁰

Once again, the issue of TDIU was at the forefront. In 1983, the RO granted service connection for a psychiatric disorder, assigning a 10 percent disabling rating, and in 1985 the RO granted an increased, 30 percent, rating.⁶¹ On neither occasion did the RO adjudicate the issue of a TDIU, even though such consideration was warranted under *Roberson*, as there was evidence of unemployability.⁶²

⁵⁷ *Id.* at 1384. Because a 70 percent rating is less than a TDIU, the decision to assign a 70 percent rating implicitly denied entitlement to a TDIU.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1385.

⁶⁰ 421 F.3d 1278 (Fed. Cir. 2005).

⁶¹ *Id.* at 1279.

⁶² *Id.* at 1281 (citing *Roberson*, 251 F.3d at 1384).

In 1995, the Veteran filed a CUE claim through counsel, arguing that the 10 and 30 percent ratings were incorrect applications of the Rating Schedule.⁶³ Before the Veterans Court, the Veteran argued that VA's failure to consider evidence of unemployability was CUE, but only to the extent that the RO had failed to grant a higher rating, not that the RO erred in failing to treat his filings as raising a TDIU claim.⁶⁴ After some procedural developments, during which *Roberson* was decided, the Veterans Court held that the Veteran failed to meet the burden of establishing CUE.⁶⁵ The Veterans Court also held that *Roberson* did not apply in this situation and, even if it did, the Veteran in *Andrews* did not have a valid CUE claim.⁶⁶

Before the Federal Circuit, VA argued that, even if VA erred in failing to construe the Veteran's pleadings as raising a TDIU claim in 1983 and 1985, such an error could not be considered in a CUE motion, because any unadjudicated TDIU claim would still be pending before the RO.⁶⁷ The Federal Circuit rejected VA's argument, finding that it conflicted with its holding in *Roberson*.⁶⁸

In *Andrews*, the Federal Circuit found that it "clearly held in *Roberson* that the VA's failure to consider a TDIU claim in this manner is properly challenged through a CUE motion."⁶⁹ While the focus of the *Andrews* decision was on the circumstances in which VA has a duty to read pleadings sympathetically, the more significant holding for purposes of the pending claim doctrine was the Federal Circuit's conclusion that Andrews remained free to file a new CUE claim based on the failure to adjudicate the TDIU claim he implicitly made in his 1983 and 1985 applications.⁷⁰ More broadly, the Federal

⁶³ *Id.* at 1279.

⁶⁴ *Id.* at 1280.

⁶⁵ *Andrews v. Principi*, 18 Vet. App. 177, 183-84 (2004).

⁶⁶ *Id.* at 185-86.

⁶⁷ *Andrews*, 421 F.3d at 1281.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1284. Regarding the duty to sympathetically read pleadings, the Veterans Court had held that *pro se* pleadings were to be afforded a sympathetic reading to see if they contained a CUE claim, but that a sympathetic reading was not required of the CUE motions themselves.

Circuit in *Andrews* held that, “when the VA violates *Roberson* by failing to construe the veteran’s pleadings to raise a claim, such claim is not considered unadjudicated but the error is instead properly corrected through a CUE motion.”⁷¹

The holding in *Andrews* made clear that the Federal Circuit viewed a CUE claim as the proper vehicle for challenging the failure to adjudicate a TDIU.⁷² The issue that was in the background was now front and center: a CUE claim is a claim of error in a prior RO decision, but in *Andrews*, there was no prior decision denying a TDIU.⁷³

The Veterans Court would squarely address this contradiction in *Ingram*. Prior to *Ingram*, in *Richardson v. Nicholson*,⁷⁴ the Veterans Court sought to apply *Andrews* where a Veteran had raised a claim of CUE in the RO’s failure to adjudicate an issue.⁷⁵ The Veterans Court held that pursuant to *Roberson* and *Andrews*, such a CUE claim could be asserted.⁷⁶ In adjudicating such a claim, VA must first give a full and sympathetic reading to the *pro se* claimant’s prior submissions to determine whether a claim was reasonably raised.⁷⁷ If it is determined that a claim was reasonably raised, VA must determine whether a claim is pending or whether it was adjudicated as part of a final decision.⁷⁸ Only in the latter case could the claimant collaterally attack the resulting decision on the basis of CUE.⁷⁹ Significantly, the Veterans Court in *Richardson* did not reach the second question, finding that the Board failed to apply *Roberson* by not giving the

Andrews, 18 Vet. App. at 185. The Federal Circuit found this holding to be erroneous; according to the Federal Circuit, VA’s duty to read pleadings sympathetically applied to all *pro se* pleadings. *Andrews*, 421 F.3d at 1282-83. However, the Federal Circuit found this error to be harmless, because *Roberson*’s 1995 CUE motion was filed through counsel and, at that time, the duty to read pleadings sympathetically applied only to *pro se* veterans. *Id.*

⁷¹ *Andrews*, 421 F.3d at 1282-83.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ 20 Vet. App. 64 (2006).

⁷⁵ *Id.* at 68, 70-72.

⁷⁶ *Id.* at 71-72.

⁷⁷ *Id.* at 72.

⁷⁸ *Id.*

⁷⁹ *Id.*

pro se claimant's prior submissions a full and sympathetic reading.⁸⁰ The Veterans Court remanded the claim to the Board for consideration of whether such a claim was reasonably raised based on such a sympathetic reading.⁸¹ Even more significantly, the Veterans Court wrote, "[w]hether or not CUE is the exclusive way to raise such a matter is an issue we need not address in order to decide the matter before us."⁸² This set the stage for *Ingram v. Nicholson*.⁸³

VI. STRUGGLING TO CREATE A WORKABLE FRAMEWORK

Ingram, unlike *Norris*, *Roberson*, and *Andrews*, did not involve a claim for a TDIU.⁸⁴ In *Ingram* the Veteran had filed a claim in May 1986 after undergoing lung surgery at a VA Medical Center (VAMC).⁸⁵ The claim was made via the standard VA claim form, and the Veteran subsequently submitted a statement in support of his claim.⁸⁶ The language in the claim form and statement in support was ambiguous as to whether, in addition to filing a claim for a non-service-connected pension, the Veteran was also claiming entitlement to compensation under 38 U.S.C. § 1151.⁸⁷ In August 1986, the RO denied the claim for a non-service-connected pension only.⁸⁸ In April 1992, the Veteran filed a claim in which he made clear he was seeking compensation pursuant to § 1151, and that

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 72 n.7.

⁸³ *Ingram v. Nicholson (Ingram I)*, 20 Vet. App. 156 (2006), *opinion withdrawn and superseded on reconsideration by Ingram v. Nicholson (Ingram II)*, 21 Vet. App. 232 (2007). This article will refer to the Veterans Court's 2006 *Ingram* decision as *Ingram I* and the Veterans Court's 2007 *Ingram* decision as *Ingram II*.

⁸⁴ *Ingram II*, 21 Vet. App. at 234.

⁸⁵ *Id.* at 235.

⁸⁶ *Id.* VA Form 21-526, Veteran's Application for Compensation or Pension, is the standard VA claims form.

⁸⁷ *Ingram II*, 21 Vet. App. at 235-36. Non-service-connected pension is awarded to veterans of a period of war who meet certain service requirements and are permanently and totally disabled due to non-service-connected disability not resulting from willful misconduct of the veteran. 38 U.S.C. § 1521 (2006). Compensation under § 1151 is awarded in certain situations where a disability is caused by VA care. *Id.* § 1151.

⁸⁸ *Ingram II*, 21 Vet. App. at 235.

claim was ultimately granted.⁸⁹ The RO assigned an effective date in April 1992 for the grant of compensation benefits under § 1151; the Veteran disagreed with the decision, ultimately arguing that the effective date should be in May 1986, the date he filed his initial VA claim form.⁹⁰

The Board denied an effective date earlier than April 1992, because the claim form and statement in support did not show an intent to claim compensation under § 1151.⁹¹ The Veteran appealed to the Veterans Court, arguing that the Board erred by not sympathetically reading his pleadings and also erred in determining that neither the May 1986 claim nor the August 1986 statement in support constituted an informal claim for compensation under § 1151.⁹² The Veterans Court requested briefing on the impact of *Andrews*, specifically, the Federal Circuit's conclusion that VA's failure to construe pleadings to raise a claim, rather than resulting in an unadjudicated or pending claim, is "properly corrected through a CUE . . . motion."⁹³ Initially, both parties argued in favor of a narrow reading of *Andrews*, which left intact "the longstanding jurisprudence regarding pending claims and the statutory and regulatory framework underlying it."⁹⁴ This argument was based on the inherent contradiction of making a CUE claim, which must be directed at a prior final decision, with regard to a claim that was never finally adjudicated.⁹⁵

At this point in the litigation, VA changed its position and argued that since *Ingram* was controlled by the holding in *Andrews*, dismissal of the case was warranted because no CUE claim had been made.⁹⁶ In July 2006, the Veterans Court issued a decision in *Ingram*, rejecting VA's argument and vacating the

⁸⁹ *Id.* at 235-36.

⁹⁰ *Id.* at 236.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 236-37.

⁹⁵ *Id.* at 237.

⁹⁶ *Id.*

Board's decision.⁹⁷ However, later that month, the Federal Circuit issued a decision in *Deshotel v. Nicholson*,⁹⁸ which seemed to support the reasoning and decision in *Andrews*. VA moved for reconsideration of *Ingram I* based on *Deshotel* and the Veterans Court granted the motion, withdrawing its decision in *Ingram I* and issuing a new decision that again vacated the Board's decision.⁹⁹

The difficulties faced by the Veterans Court and the comprehensive and elucidating nature of its decisions in *Ingram I* and *Ingram II* cannot be overstated. The Veterans Court was faced with seemingly conflicting decisions on an issue that both it and the Federal Circuit had struggled with which involved multiple areas of the law. The Veterans Court, like the mathematician Andrew Wiles attempting to solve Fermat's last theorem, thoroughly analyzed these different areas of veterans law and engaged in the Herculean task of synthesizing the case law to produce a workable framework for addressing the issue of pending claims in future cases.¹⁰⁰

The Veterans Court reached the same result in *Ingram I* and *Ingram II*, but an analysis of the differences in its decisions is instructive. In order to understand these differences, we must first consider the intervening decision in *Deshotel*.

In *Deshotel*, the RO denied the Veteran's 1969 claim for service connection for head injury residuals and the Veteran did not appeal.¹⁰¹ In July 1984, the Veteran filed a petition to reopen

⁹⁷ *Ingram v. Nicholson*, 20 Vet. App. 156 (2006), *opinion withdrawn and superseded on reconsideration by Ingram II*, 21 Vet. App. at 232.

⁹⁸ 457 F.3d 1258 (Fed. Cir. 2006).

⁹⁹ *Ingram II*, 21 Vet. App. at 237-38, 257.

¹⁰⁰ See SIMON SINGH, FERMAT'S LAST THEOREM 277-78 (2005) (describing how six referees were required to review Wiles's manuscript proving Fermat's last theorem, rather than the usual two or three, because of the variety of mathematical techniques utilized in the paper). We do not suggest here that the Veterans Court's decisions in *Ingram I* and *Ingram II* specifically, or legal reasoning generally, are comparable to either Andrew Wiles's solution to Fermat's last theorem or the solution of any mathematical proof; rather, we are simply making a point about the difficulties faced by the Veterans Court in addressing this issue and its effective analysis and synthesis of the seemingly contradictory case law.

¹⁰¹ *Deshotel*, 457 F.3d at 1259.

his claim for service connection for head injury residuals.¹⁰² He did not file a claim for service connection for a psychiatric disability, but subsequently claimed that VA had a duty to sympathetically read his application to include such a claim.¹⁰³ In 1985, the RO granted service connection for “status post head trauma with post traumatic headaches.”¹⁰⁴ The RO did not address or decide a claim for service connection for a psychiatric disability, but noted in its decision that a VA examination showed no psychiatric symptomatology.¹⁰⁵ In August 1999, the Veteran sought to reopen his claim, including the issues of service connection for “memory loss and depression due to head/brain disease.”¹⁰⁶ In a September 1999 decision, the RO treated the Veteran’s claim as a petition to reopen a claim for service connection for a psychiatric disability but deferred a decision on this claim.¹⁰⁷

Ultimately, the RO granted the claim for service connection for mood disorder, personality change, and cognitive disorder secondary to traumatic brain injury with post-traumatic headaches, effective the August 1999 date of the petition to reopen.¹⁰⁸ The Veteran filed a notice of disagreement (NOD) as to the effective date, arguing that the effective date should have been the July 1984 date of the prior petition to reopen.¹⁰⁹ However, the RO treated this NOD as a CUE claim with regard to the January 1985 decision; specifically, a claim that the failure to adjudicate a claim for service connection for a psychiatric disability constituted CUE in the January 1985 decision.¹¹⁰ The RO denied the CUE claim, the Veteran appealed to the Board, and the Board, concluding that the January 1985 decision implicitly denied any claim for service connection for a psychiatric disability, found no CUE in that decision.¹¹¹

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (internal quotation marks omitted).

¹⁰⁵ *Id.* at 1259-60.

¹⁰⁶ *Id.* at 1260 (internal quotation marks omitted).

¹⁰⁷ *Id.* (noting that the RO deferred the decision until additional medical records were available).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

The Veteran appealed to the Veterans Court and argued both that the RO had assigned an incorrect effective date (and that this issue was on appeal due to his timely NOD as to the initially assigned effective date) and that there was CUE in the January 1985 decision because the RO had overlooked the psychiatric findings in the VA examination report.¹¹²

With regard to the first argument, the Veterans Court held that it lacked jurisdiction to consider an appeal from the RO's 1985 decision because that decision had become final and could only be attacked via a CUE claim.¹¹³ The Veteran appealed this decision to the Federal Circuit and did not pursue the CUE claim.¹¹⁴ The Veteran argued that the 1985 decision was not final as to the claim for service connection for a psychiatric disability that was not, but should have been, adjudicated based on a full and sympathetic reading of the Veteran's 1984 claim.¹¹⁵ According to the Veteran, his 1984 claim for service connection for a psychiatric disability "remained pending and unadjudicated until the RO's October 2000 decision" granting service connection for mood disorder, personality change, and cognitive disorder.¹¹⁶

The Federal Circuit rejected the Veteran's argument that his 1984 claim had remained pending. The Federal Circuit, citing *Andrews*, held that when a "veteran files more than one claim . . . at the same time, and the RO's decision acts . . . on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run."¹¹⁷ Thus, the Veteran's remedy was to either file a timely appeal from the January 1985 RO decision arguing that it should have granted a claim for service connection for a psychiatric disability or file a CUE claim seeking revision of the January 1985 RO decision after the period in

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1261.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

which to appeal expired.¹¹⁸ Therefore, the Federal Circuit held that the Veterans Court correctly rejected Deshotel's pending claim argument and properly dismissed the appeal for lack of jurisdiction.¹¹⁹

In *Ingram II*, the Veterans Court framed the issue as what is the proper procedural time and mechanism to assert an alleged failure of VA to perform its duty to sympathetically read a veteran's filings to determine whether a claim has been raised.¹²⁰ Addressing this issue required a determination as to whether the RO's 1986 decision "decided" a 38 U.S.C. § 1151 claim or whether the alleged 1986 § 1151 claim was still pending at the time of the 1992 claim.¹²¹ In the former case, the "decision" would have to be attacked via a CUE claim rather than the 1992 § 1151 claim; in the latter case, the 1992 claim would be considered to be merely correspondence that was part of the "present claim stream" flowing back to the 1986 claim and culminating in the *Ingram II* Court's direct review.¹²² Only in the latter case would the Veterans Court have jurisdiction to address the substance of the Veteran's arguments, as there would be no CUE claim on appeal.¹²³

Having thus framed the issue, the Veterans Court summarized the law regarding effective dates, pending unadjudicated claims, and CUE.¹²⁴ The Veterans Court restated the competing theories of the case as involving, on the one hand, the theory that the April 1992 submission from the Veteran was merely correspondence regarding the pending and unadjudicated May 1986 claim, and, on the other hand, the theory that the August 1986 RO decision denied the 38 U.S.C. § 1151 claim *sub silentio*, and the April 1992 submission was, therefore, a petition to reopen.¹²⁵ Noting that these two theories could not coexist, the Veterans Court resolved the conflict in favor

¹¹⁸ *Id.* at 1262.

¹¹⁹ *Id.*

¹²⁰ *Ingram v. Nicholson*, 21 Vet. App. 232, 238-39 (2007).

¹²¹ *Id.* at 239.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 239-42.

¹²⁵ *Id.* at 242-43.

of the Veteran.¹²⁶ However, the Veterans Court changed the language of its holding in *Ingram I* to take account of the intervening *Deshotel* decision and this change is instructive as to the Veterans Court's view of the significance of that case and *Andrews*. In *Ingram I*, the Veterans Court held:

[W]e conclude that a reasonably raised claim remains pending until there is an *explicit* adjudication of the claim or an *explicit* adjudication of a subsequent 'claim' for the same disability. If there is no *explicit* final denial of the original claim prior to the granting of the subsequent claim, then, as part of his or her appeal of the effective-date decision, an appellant can raise the fact that he or she filed the original claim for the same disability at an earlier date than the claim which was subsequently granted.¹²⁷

In contrast, in *Ingram II*, the Veterans Court held:

[W]e conclude that a reasonably raised claim remains pending until there is *either a recognition of the substance of the claim in an RO decision from which a claimant could deduce that the claim was adjudicated* or an explicit adjudication of a subsequent 'claim' for the same disability. If there is no final denial of the original claim prior to the granting of the subsequent 'claim,' then, as part of his or her appeal of the effective-date decision, an appellant can raise the fact that he or she filed the original claim for the same disability at an earlier date than the claim which was subsequently granted.¹²⁸

The differences in the quoted language from *Ingram I* and *Ingram II* reflects that in *Ingram I* the Veterans Court initially intended a much narrower holding, in the sense that a claim would remain pending unless it had been explicitly denied. The removal of the word "explicit" in *Ingram I* and the addition in *Ingram II* of the "recognition of the

¹²⁶ *Id.* at 243.

¹²⁷ *Ingram v. Nicholson*, 20 Vet. App. 156, 164 (2006) (emphasis added) (citations omitted).

¹²⁸ *Ingram II*, 21 Vet. App. at 243 (emphasis added) (citations omitted).

substance of the claim” clause make it possible to find that a claim has been deemed denied or denied *sub silentio*, even when there is no explicit denial of that claim. This allowed the Veterans Court to reconcile its holding in *Ingram II* with the Federal Circuit’s holdings in *Roberson*, *Andrews* and *Deshotel*. These Federal Circuit decisions, particularly the latter two, could be interpreted to stand for a broad rule that the proper manner for alleging the failure to adjudicate a claim is a CUE motion.

The Veterans Court characterized VA’s argument in this regard: Whenever multiple claims are filed in one application at the same time, an adjudication of one claim results in adjudication of all claims in the application, regardless of the type of claims, the benefits sought, or whether the other claims were mentioned.¹²⁹

However, as the Veterans Court in *Ingram II* explained, the cited cases did not stand for such a proposition. While *Norris* held that the TDIU claims reasonably raised in the prior claims remained pending at the RO, those claims were made as part of increased ratings claims, made subsequent to the initial rating determination.¹³⁰ In contrast, in *Roberson* and *Andrews*, TDIU was found to have been raised as part of the initial claim for service connection (because, by asserting unemployability in his initial claim for service connection, the Veteran had requested the highest rating possible).¹³¹ Thus, since the Veterans’ claims in *Andrews* and *Roberson* had in fact been finally decided by the RO (by its decision to assign a schedular rating rather than a TDIU) these decisions could be attacked via a CUE motion.¹³²

The Veterans Court in *Ingram II* explained that, while VA had argued in *Andrews* that the TDIU claim raised by the initial pleading was unadjudicated and, therefore, remained pending (and thus immune from attack on appeal), the Federal Circuit in *Andrews* responded that VA’s failure to consider a TDIU claim ““in this manner is properly

¹²⁹ *Id.* at 246 (citing *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006)).

¹³⁰ *Id.* at 249.

¹³¹ *Id.*

¹³² *Id.*

challenged through a CUE motion.”¹³³ The *Ingram II* Court interpreted the Federal Circuit’s words “in this manner” to refer to a situation where there was a simultaneous claim for service connection and a TDIU with a final explicit decision as to service connection implicitly denying the TDIU claim, as opposed to the increased rating claim in *Norris* that also claimed TDIU but was not decided.¹³⁴

Similarly, while VA argued that *Deshotel* had supplanted the pending claim doctrine, the Veterans Court in *Ingram II*, in interpreting *Deshotel*, again seized on the Federal Circuit’s “carefully chosen words.”¹³⁵ The Veterans Court noted that the Federal Circuit had rejected *Deshotel*’s argument that the 1985 RO decision was not final as to his psychiatric disability claim because that claim ““was never explicitly addressed”” by stating that the RO need not “specifically” address that claim in order for it to be considered deemed denied and, therefore, challengeable via a CUE motion.¹³⁶ The Veterans Court interpreted these “carefully chosen words” to mean that an RO decision will only constitute an adjudication of a claim not specifically decided, “where the RO decision addresses the claim in a manner sufficient for a claimant to deduce that the claim was adjudicated.”¹³⁷ This interpretation of *Deshotel*, while not as broad as that advocated by VA, was nevertheless more forgiving than the initial, pre-*Deshotel* standard outlined in *Ingram I*. There, the Veterans Court had required an explicit final denial of the original claim.¹³⁸ The Veterans Court in *Ingram II* recognized that the Federal Circuit’s decisions in *Andrews* and *Deshotel* could not withstand such an interpretation, and so relaxed the standard for considering a claim to have been adjudicated rather than remain pending. This allowed for situations such as those in *Andrews* and *Deshotel* where it was plausible, based on the mention of symptomatology in the narrative

¹³³ *Id.* at 245 (quoting *Andrews v. Nicholson*, 421 F.3d 1278, 1281 (Fed. Cir. 2005)).

¹³⁴ *Id.* at 249.

¹³⁵ *Id.* at 247.

¹³⁶ *Id.* at 246-47 (quoting *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006)).

¹³⁷ *Id.* at 247.

¹³⁸ *Ingram v. Nicholson*, 20 Vet. App. 156, 164 (2006).

of the decision, to consider the claim to have been denied without an explicit adjudication, *i.e.*, a deemed or *sub silentio* denial.¹³⁹

In applying its post-*Deshotel* standard to the facts in *Ingram II*, the Veterans Court rejected VA's contention that there was a *sub silentio* denial of a 38 U.S.C. § 1151 claim or that such a claim was deemed denied.¹⁴⁰ Rather, the Veterans Court pointed to the differences in 38 U.S.C. § 1151 claims and claims for non-service-connected pension, and held that, because the Veteran in *Ingram* was informed only that his claim for pension was denied because his condition was not established as permanent, he was not on notice as to how a § 1151 claim would have been decided by the RO, or that such a claim had, in fact, been implicitly denied.¹⁴¹ The Veterans Court speculated that, had the RO informed the Veteran that there had been no finding of a lung disability, that might have been sufficient to find a *sub silentio* denial of a § 1151 claim, but no such information was conveyed to the Veteran, either in the decision or the letter informing him of it.¹⁴² The Veterans Court contrasted these facts with those in *Deshotel*, where the Veteran was informed that his claim for service connection for residuals of a head injury had been granted, and that a VA examination had demonstrated no psychiatric symptoms, thus placing the Veteran on notice that service connection for a psychiatric disability was denied.¹⁴³ The Veterans Court also distinguished *Roberson* and *Andrews*, because there, the grant of service connection and the assignment of ratings less than 100 percent were found to contain implicit denials of claims for TDIU.¹⁴⁴ *Norris*, in contrast, involved a claim for a TDIU raised as part of an increased rating claim after the initial grant of service connection; thus, the Veteran in *Norris* could not challenge the earlier decisions via CUE, because they had not mentioned TDIU, and thus did not contain a deemed or *sub silentio* denial of a claim for a TDIU.¹⁴⁵

¹³⁹ *Ingram II*, 21 Vet. App. at 252.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 247.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 248.

¹⁴⁵ *Id.* at 249.

The Veterans Court in *Ingram II* then discussed the rationale for its reading of the precedents in this manner. First, the Veterans Court noted that the broad reading of *Andrews* and *Deshotel* would relieve VA, with regard to the claim deemed or *sub silentio* denied, of its duties to notify and assist a veteran with regard to such claim, and its duty to provide notice of and reasons for its decisions.¹⁴⁶ Moreover, such a broad reading could cause confusion as to whether a claim was in fact denied, and could result in the filing of NODs “as to all claims not mentioned in the RO adjudication.”¹⁴⁷ In addition, the broad reading would result in a greater burden on veterans, who would have to challenge the deemed or *sub silentio* denial meeting the higher burden of proof and more restrictive evidentiary standards for prevailing on a CUE claim.¹⁴⁸ The Veterans Court also cited legislative history indicating that the Veterans Retirement Benefits Act of 1989 requirements that the RO provide a statement of reasons for its decision and a summary of the evidence considered in reaching its decision reflects a Congressional “intent that a veteran receive notice as to the reasons for a decision on the claim.”¹⁴⁹ Finally, a broad reading would cause confusion as to whether new and material evidence would be required to reopen a claim deemed or *sub silentio* denied.¹⁵⁰ While this parade of horrors may have been somewhat of an overstatement of the consequences of adopting VA’s position, the Veterans Court’s discussion of its rationale explained all of the potential consequences, some of them bordering on the absurd, of adopting a general rule of deemed or *sub silentio* denials.

The Veterans Court also cited more general policy concerns, noting that the pending claim doctrine is preferable to a doctrine of deemed or *sub silentio* denials because it protects veterans’ appellate rights and does not impose additional hardship on VA, as it only requires that each claim be specifically addressed.¹⁵¹ Thus, the requirement

¹⁴⁶ *Id.* at 251 (citing 38 U.S.C. §§ 5103(a), 5103A, 5104 (2006)).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 251-52.

¹⁵⁰ *Id.* at 252-53.

¹⁵¹ *Id.* at 253.

that VA sympathetically interpret documents to determine when a claim is reasonably raised is complemented by the pending claim doctrine, under which a claim, once raised, remains pending until adjudicated.¹⁵²

The Veterans Court thus found that Ingram had properly challenged the effective date of the award of § 1151 benefits because his 1986 claim had remained pending and because the Veteran had timely challenged the effective date when the claim had been granted in June 1999.¹⁵³ As to whether the RO had assigned the correct effective date, the Veterans Court remanded the claim to the Board to determine whether the May 1986 application and subsequent communications raised a § 1151 claim, “based on a sympathetic reading of those documents that does not require conformance with legal pleading requirements or intent to seek benefits under section 1151 explicitly.”¹⁵⁴

Thus, the Veterans Court in *Ingram II* reconciled the holdings of *Andrews* and *Deshotel*, which had the potential to require the logically inconsistent concept of a CUE claim in the absence of a final decision, and read them with both the required deference to the Federal Circuit, whose decisions are binding on the Veterans Court,¹⁵⁵ and in a manner that produced a workable framework for analyzing similar claims in the future. The Veterans Court’s decision implied that the Federal Circuit had not fully considered the consequences of its decisions in *Andrews* and *Deshotel*. One would have to conclude from the Federal Circuit’s decision in *Williams v. Peake*,¹⁵⁶ that it agreed with the Veterans Court’s assessment.

VII. APPLYING AND MODIFYING THE FRAMEWORK

In *Williams*, the Veteran had applied for, and been denied, service connection for a nervous condition in 1977, but had not been notified of that denial.¹⁵⁷ The Veteran subsequently filed another

¹⁵² *Id.*

¹⁵³ *Id.* at 255.

¹⁵⁴ *Id.* at 256-57.

¹⁵⁵ 38 U.S.C. §§ 7252, 7292 (2006).

¹⁵⁶ 521 F.3d 1348 (Fed. Cir. 2008).

¹⁵⁷ *Id.* at 1349.

claim for the same disability, was again denied, and this time was informed of the denial.¹⁵⁸ He did not appeal.¹⁵⁹ The Veteran filed a petition to reopen his claim in May 1994; this petition and the underlying claim were granted, with a 100 percent rating effective the May 1994 date of the petition to reopen.¹⁶⁰ The Veteran challenged the effective date, claiming that, because he had never been notified of the initial denial of his 1977 claim, that claim was still pending and unadjudicated, warranting an effective date based on the date of that claim.¹⁶¹ The Veterans Court, relying on *Ingram I* prior to its withdrawal, held that the final adjudication of the identical second claim subsumed the initial denial of the identical claim (which had remained pending because of lack of notice).¹⁶²

The Federal Circuit noted that there was no debate that the initial claim was a pending claim at the time of the identical October 1978 claim, and that the subsequent October 1978 claim was finally adjudicated in December 1979.¹⁶³ The issue was thus “whether a finally adjudicated claim on a subsequent identical claim serves as a final adjudication of an earlier pending identical claim.”¹⁶⁴ If the claims were treated separately, as the Veteran in *Williams* argued, then the first claim would remain pending.¹⁶⁵ If the final adjudication of the second claim necessarily constituted final adjudication of an earlier filed claim for service connection for the same disability, then the disallowance of the second claim terminated the pending status of the first claim.¹⁶⁶

Significantly, the Federal Circuit noted that the express language of the pertinent regulations, regarding pending and finally adjudicated claims, did not clearly resolve this issue, and that neither

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (citing *Ingram v. Nicholson*, 20 Vet. App. 156, 164 (2006)).

¹⁶³ *Id.* at 1350.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

party nor the Federal Circuit could find any source of information that could assist in resolving the issue.¹⁶⁷ Thus, the Federal Circuit seemed to imply that it was looking for guidance on the issue because it was an issue of first impression, even though it had addressed similar questions in *Andrews* and *Deshotel*.

Having thus framed the issue, the Federal Circuit simply stated: “We agree with the Veterans Court that a subsequent final adjudication of a claim which is identical to a pending claim that had not been finally adjudicated terminates the pending status of the earlier claim.”¹⁶⁸ The Federal Circuit briefly reasoned that the notice given of disallowance of a later claim informs a veteran that an earlier claim for service connection has been denied and affords an opportunity to appeal that determination.¹⁶⁹

This brief decision is surprising. Given the Veterans Court’s comprehensive review in *Ingram II* of the various areas of law relevant to this issue and its struggle to reconcile the Federal Circuit’s precedents, one would have expected the Federal Circuit to address whether the Veterans Court properly read *Andrews* and *Deshotel* narrowly, to allow a CUE claim where there is either a recognition of the substance of the claim or an explicit adjudication. Notably, the Federal Circuit quoted approvingly from both *Ingram I* and *Ingram II*.¹⁷⁰ Subsequently, in *Adams v. Shinseki*,¹⁷¹ the Federal Circuit did address and elaborate on the Veterans Court’s resolution in *Ingram* of the appropriate analytical framework to be used in determining the disposition of pending claims. However, once again, it allowed the Veterans Court to lead the way.

In *Adams*, the Veteran had filed a claim for “rheumatic heart,” shortly after being discharged from service for heart problems in 1951.¹⁷² The Veteran submitted numerous medical documents as well

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1351.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1349-50.

¹⁷¹ 568 F.3d 956 (Fed. Cir. 2009).

¹⁷² *Id.* at 959.

as his own affidavit, which contained numerous diagnoses and characterizations of his heart condition, including rheumatic valvular heart disease, aortic insufficiency, mitral insufficiency, cardiac enlargement, myocardial disease, and subacute bacterial endocarditis.¹⁷³ The RO denied his claim because he had no active symptoms of “rheumatic valvulitis or associated disease” during service.¹⁷⁴ The Veteran appealed to the Board, arguing he was entitled to service connection for a “heart condition.”¹⁷⁵ The Board denied the claim because the service treatment records did “not disclose active rheumatic fever or other active cardiac pathology during service” and the Board found that “rheumatic valvulitis was incurred prior to and not aggravated during his military service.”¹⁷⁶

In February 1989, the Veteran filed a petition to reopen his claim which the RO denied and he appealed to the Board.¹⁷⁷ The Board characterized the claim as one for “service connection for endocarditis residuals.”¹⁷⁸ In February 1997, the Board granted service connection for “heart disease, claimed as residuals of endocarditis, including heart valve damage.”¹⁷⁹ The RO’s implementation of the Board’s decision assigned an effective date in 1989, based on when the Veteran had been admitted to a VA hospital for treatment of the heart condition.¹⁸⁰ The Veteran appealed the assigned effective date, arguing that his 1951 claim for endocarditis remained pending until the Board’s 1997 decision granted him service connection for this disability, thus warranting an effective date of the day after separation from service.¹⁸¹ The Board found that there was no such pending claim, and the Veterans Court agreed finding that, although there were two claims for service connection in 1951 (a formal claim for service

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* The Veteran’s claim was denied by three separate rating decisions in 1951. *Id.*

¹⁷⁶ *Id.* (internal quotation marks omitted).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (internal quotation marks omitted).

¹⁷⁹ *Id.* (internal quotation marks omitted).

¹⁸⁰ *Id.* at 959-60.

¹⁸¹ *Id.* at 960.

connection for rheumatic heart disease and an informal claim for service connection for endocarditis), the RO's 1951 decision denying the formal claim for rheumatic heart condition "implicitly denied" his informal claim for service connection for endocarditis.¹⁸²

In *Adams*, the Federal Circuit finally addressed directly and comprehensively the appropriate standard to be applied in addressing an argument for an earlier effective date based on the failure to adjudicate a claim. In explaining when a claim not explicitly denied could nevertheless be considered a final decision, the Federal Circuit referred to the "implicit denial rule" fourteen times, as if it were discussing an established doctrine, without noting that the Federal Circuit, the Veterans Court, and the Board had never before used this phrase.¹⁸³ The Federal Circuit stated generally: "The 'implicit denial' rule provides that, in certain circumstances, a claim for benefits will be deemed to have been denied, and thus finally adjudicated, even if [VA] did not expressly address that claim in its decision."¹⁸⁴ The Federal Circuit cited its language from *Deshotel* and characterized the Veterans Court in *Ingram II* as "elaborating" on the test set forth in *Deshotel* regarding when a claim will be deemed to have been denied.¹⁸⁵ In summarizing the rule, it quoted from previous Veterans Court's decisions that where an RO decision "discusses a claim in terms sufficient to put the claimant on notice that it was being considered and rejected, then it constitutes a denial of that claim even if the formal adjudicative language does not 'specifically' deny that claim."¹⁸⁶

Reviewing the Veterans Court's decision in *Adams*, the Federal Circuit identified four factors to be used in determining whether a pending claim is denied: (1) the description of evidence considered in the VA adjudication (by the RO or Board); (2) the

¹⁸² *Id.*

¹⁸³ *Id.* at 961-65. A Westlaw search confirms that the first use of this phrase appears in *Adams*.

¹⁸⁴ *Id.* at 961.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 962-63 (quoting *Ingram v. Nicholson*, 21 Vet. App. 232, 255 (2007) (citation omitted)).

relatedness of the claims; (3) the timing of the claims, *i.e.*, whether filed simultaneously or close together in time; and (4) whether a reasonable person would be placed on notice that the expressly denied claim also included an implicit denial of another inferred or informal claim.¹⁸⁷

In addition, responding to the Veteran's argument that the Veterans Court's application of the implicit denial rule violated his due process rights to fair notice of the RO's denial of his claim, the Federal Circuit stated that the "implicit denial rule," in specifying the limited circumstances in which a claim may be considered to have been implicitly denied including those in which a reasonable person would have been placed on notice of the denial, "is, at bottom, a notice provision."¹⁸⁸ The Federal Circuit also found that the fact that, in *Deshotel*, the claim explicitly denied and the claim implicitly denied were filed at the same time was not dispositive, even though the Federal Circuit's language in *Deshotel* seemed to indicate that the rule was limited to this situation.¹⁸⁹ Limiting the implicit denial rule to cases in which multiple claims were filed at the same time would ignore the fact that veterans can submit evidence relating to one claim at different times and ROs can adjudicate separate claims in a single decision.¹⁹⁰ Rather, the four factor test of the implicit denial rule, particularly the question "whether it would be clear to a reasonable person" that VA's actions expressly adjudicating one claim is meant to dispose of other claims, is the only relevant inquiry.¹⁹¹

Significantly, the Veteran also argued that his case was distinguishable from *Deshotel* because the Veteran in *Deshotel* failed to appeal the RO's denial, while the Veteran in *Adams* did appeal.¹⁹² The Federal Circuit disposed of this argument briefly,

¹⁸⁷ *Id.* at 963-64.

¹⁸⁸ *Id.* at 964-65.

¹⁸⁹ *Id.* at 961-62 (discussing the Veteran's interpretation of the statement "[w]here the veteran files more than one claim with the RO at the same time" (quoting *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006)).

¹⁹⁰ *Id.* at 964.

¹⁹¹ *Id.*

¹⁹² *Id.*

citing the Veterans Court's explanation in *Adams* that the lack of an appeal was irrelevant because the key inquiry was the reasonableness of the notice afforded to the Veteran, whether by the RO or the Board.¹⁹³ Once again, the Veterans Court was left to take the lead, this time in addressing the pending claim doctrine in the context of decisions appealed to the Board.

VIII. FURTHER CLARIFICATION OF WHAT TYPES OF DECISIONS CREATE FINALITY

In *Juarez v. Peake*,¹⁹⁴ the Veterans Court further clarified the different situations when a decision will be deemed final. The Veteran's 1954 claim for service connection for a back disability was denied in 1955.¹⁹⁵ The Veteran claimed that he never received notice of this decision.¹⁹⁶ The Veteran next applied for service connection for this disability in March 1996.¹⁹⁷ Although he claimed that he had never been given notice of the initial denial, the RO treated the March 1996 claim as a petition to reopen the claim previously denied in 1955.¹⁹⁸ The RO denied the petition to reopen because new and material evidence had not been submitted.¹⁹⁹ The Veteran conceded that he was notified of this decision.²⁰⁰ The next claim for service connection for this disability was an informal petition to reopen received in August 1997; that petition to reopen and the underlying claim were granted by the RO in August 1998.²⁰¹ The effective date assigned by the Board on appeal was in August 1997, the date of the informal claim.²⁰² The Veteran timely disagreed with this effective date determination.

¹⁹³ *Id.*

¹⁹⁴ 21 Vet. App. 537 (2008).

¹⁹⁵ *Id.* at 538.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* The RO originally assigned an effective date of August 27, 1997 and a Board decision granted an earlier effective date of August 1, 1997. *Id.*

The Board found that, because the Veteran had been notified of, and had not appealed, the April 1996 denial of his petition to reopen, that decision had become final.²⁰³ Therefore, the earliest possible effective date was the August 1997 date of the petition to reopen.²⁰⁴ The Board went on to state that, because the Veteran was not notified of the 1955 denial, that decision did not become final until the date that the April 1996 decision (of which the Veteran *was* notified) became final.²⁰⁵ The Board implicitly found that the initial 1954 service connection claim had remained pending.²⁰⁶

Before the Veterans Court, the Veteran argued that the correct effective date should have been based on the initial 1954 claim, because that claim never became final.²⁰⁷ VA argued that the subsequent 1996 decision with proper notice “cured any lack of notification” of the 1955 denial.²⁰⁸ The Veterans Court accepted VA’s argument and found that the April 1996 decision denying the petition to reopen was not properly challenged by the Veteran, *i.e.*, he did not file a NOD within one year of notification of the RO decision.²⁰⁹ Not only did the Veterans Court affirm the Board’s finding that the date of the petition to reopen was the proper effective date, but it modified the Board’s decision by removing from the decision the Board’s discussion of whether the 1955 decision had become final prior to the subsequent 1996 denial.²¹⁰ As the Veteran’s arguments for an earlier effective date were all based on disagreement with the conclusion of the April 1996 RO decision, they had to be “rejected because neither the Board nor the [Veterans] Court here has jurisdiction to reverse or modify the 1996 RO decision,” as that decision had become final and was not being challenged via a CUE claim.²¹¹

²⁰³ *Id.* at 539.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 541. This holding implicitly found that finality had attached to the 1955 decision. *See id.*

²¹⁰ *Id.*

²¹¹ *Id.*

In explaining its decision, the Veterans Court noted that, even if the 1996 decision had erroneously denied the claim as a petition to reopen rather than an initial claim, *Deshotel* (and *Ingram II*) indicated that a claim does not have to be formally adjudicated in order to provide notice of a denial, as long as it is sufficiently discussed in the body of the decision.²¹² In other words, to create finality, the notice of the decision must identify the benefit being denied, but need not give a valid reason for the decision.²¹³ If the reason for denial is invalid, it must be challenged through a timely appeal or a CUE claim.²¹⁴ The Veteran in *Juarez*, however, did neither; rather, he waited until the subsequent August 1998 decision granting his subsequent August 1997 informal claim.²¹⁵

While the Veteran cited *Myers v. Principi* in support of his argument, the Veterans Court distinguished the *Myers* line of cases, noting that in *Myers*, VA had failed to recognize a timely NOD; thus, the subsequent RO denials were invalid, as finality had not attached, and the subsequent submissions were therefore all part of the same claim stream.²¹⁶ In *Juarez*, there was no such allegation of a *Myers*-like jurisdictional barrier.²¹⁷ The Federal Circuit had similarly noted in *Cook v. Principi*²¹⁸ that a seemingly final prior RO denial can be rendered nonfinal by RO actions that either fail to properly notify a veteran of a decision or fail to take appropriate action on a timely NOD.²¹⁹

Thus, in *Juarez*, as in *Williams*, the pending claim doctrine enunciated in *Ingram II* was used as a sword against a veteran. In

²¹² *Id.* at 542.

²¹³ *Id.*

²¹⁴ *See id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 542-43 (citing *Myers v. Principi*, 16 Vet. App. 228, 228-30, 235-36 (2002)).

²¹⁷ *Id.* at 543.

²¹⁸ 318 F.3d 1334 (Fed. Cir. 2002).

²¹⁹ *Id.* at 1340-41 (citing *Tablazon v. Brown*, 8 Vet. App. 359 (1995); *Hauck v. Brown*, 6 Vet. App. 518 (1994); *Kuo v. Derwinski*, 2 Vet. App. 662 (1992); and *Ashley v. Derwinski*, 2 Vet. App. 307 (1992)) (addressing, respectively, situations in which VA failed to notify a claimant of the denial of a claim, mail a claimant a copy of the Board decision, provide notice to the claimant of appellate rights, or issue the claimant a SOC).

each case, the Veteran's initial claim had remained pending, but the subsequent denial of the same claim had ended this pending status, and prevented the Veteran from arguing on direct appeal of a later denial of the claim for an earlier effective date based on the prior pending claim.

In *Jones v. Shinseki*,²²⁰ the Veterans Court directly addressed the effect of an RO decision that was appealed but not acted upon, a procedural posture similar to that in *Myers* and *Cook*. The Veteran filed a September 1973 claim for service connection for "nerves."²²¹ Within the one-year appeal period, the Veteran filed a statement specifically indicating that it was a NOD with the denial of his service connection claim.²²² Instead of issuing a statement of the case (SOC), the RO issued deferred and confirmed rating decisions.²²³ Subsequently, the Veteran filed claims for psychiatric disabilities that were treated as petitions to reopen his claim, with his 1985 petition to reopen for a "nervous condition" being denied by the RO and then, after he appealed, by the Board, which characterized the claim as one for service connection for a nervous condition to include posttraumatic stress disorder (PTSD).²²⁴ In 1987 the RO again denied the Veteran's petition to reopen and, after he appealed, the Board, in February 1988, again affirmed the RO decision.²²⁵

Ultimately, the Board granted service connection for PTSD and assigned an effective date of May 1989, the date the Veteran's subsequent May 1989 petition to reopen was received.²²⁶ The Veteran appealed this effective date, arguing that because the RO did not issue an SOC following the March 1974 NOD, the claim that was denied in February 1974 remained open and pending, preventing finality from attaching to the subsequent adjudications.²²⁷ The Veterans

²²⁰ 23 Vet. App. 122 (2009).

²²¹ *Id.* at 123.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 123-24.

Court considered the proposition that a VA procedural error can cause a claim stream to remain open and that, if VA fails to act on a claim, that claim remains pending.²²⁸ It noted the holdings of *Williams*, *Ingram II*, and *Juarez*, all indicating that “a reasonably raised claim remains pending until there is either a recognition of the substance of the claim in an RO decision from which a claimant could deduce that the claim was adjudicated *or an explicit adjudication of a subsequent ‘claim’ for the same disability.*”²²⁹ However, despite the explicit adjudication of a subsequent claim for the same disability in *Jones*, the Veterans Court accepted the distinction between the Veteran in *Jones*, on the one hand, whose claim had been placed in appellate status, and the Veterans in *Williams*, *Juarez*, and *Ingram*, whose denied claims had not been appealed.²³⁰ The Veterans Court quoted from its decision in *Juarez* the discussion of *Myers* indicating that “[o]nly a subsequent Board decision can resolve an appeal that was initiated but not completed.”²³¹ That was precisely the situation in *Jones*, as the Board had subsequently considered and adjudicated an appeal from the RO’s denial of a subsequent petition to reopen the same claim for service connection for a nervous condition.²³² The Veteran argued that the Board had not adjudicated the same claim because the Board had referred to a nervous condition to include PTSD while the initial denial had been of a claim for service connection for a nervous condition. The Veterans Court rejected this argument because a single claim can encompass more than one disability and the Board’s decision was sufficient to put the Veteran on notice that his 1973 claim for nerves, which had remained pending in appellate status, was being denied.²³³

The Veterans Court thus extended the holdings of *Williams*, *Juarez*, and *Ingram II* to claims in appellate status by virtue of the filing

²²⁸ *Id.* at 124 (citing *Myers v. Principi*, 16 Vet. App. 228 (2002) and *Cook v. Principi*, 318 F.3d 1334, 1340 (Fed. Cir. 2002)).

²²⁹ *Id.* (quoting *Ingram v. Nicholson*, 21 Vet. App. 232, 243 (2007) (emphasis added) (citations omitted)).

²³⁰ *Id.* at 124-25.

²³¹ *Id.* at 125 (quoting *Juarez v. Peake*, 21 Vet. App. 537, 543 (2008)).

²³² *Id.*

²³³ *Id.* (citing *Clemons v. Shinseki*, 23 Vet. App. 1, 5 (2009)).

of a NOD: “[W]here an appellant places a claim for one disability into appellate status by virtue of an NOD, that claim is resolved by a later *appellate* adjudication of a subsequent claim where both claims stem from the same underlying disorder and the claimed disabilities are identical or substantially similar.”²³⁴

More recently, in *Charles v. Shinseki*,²³⁵ the Federal Circuit addressed yet another variation of the finality question: whether a subsequent claim that is abandoned renders an earlier pending claim also abandoned. The unusual facts of *Charles* involved a Veteran whose claim for service connection for manic depression was denied, after which the Veteran submitted additional evidence within one year but did not file a NOD.²³⁶ The record did not reflect that the RO had considered this evidence as required by the applicable regulation.²³⁷ The Veteran filed a subsequent claim for service connection for a nervous condition which he later abandoned.²³⁸ Eventually, when the RO granted the Veteran’s even later claim for service connection for a nervous condition, it assigned as an effective date the date of receipt of the most recently received claim.²³⁹ The Veterans Court, citing *Williams*, ruled that this was the correct effective date because the abandonment of the second claim rendered the original pending unadjudicated claim final.²⁴⁰

The Federal Circuit disagreed and vacated the Veterans Court’s decision.²⁴¹ It found that the initial denial of service connection did not become final due to the lack of a NOD because new evidence was submitted within the one year appeal period.²⁴² Moreover, the Federal

²³⁴ *Id.* at 126.

²³⁵ 587 F.3d 1318 (Fed. Cir. 2009).

²³⁶ *Id.* at 1320.

²³⁷ *Id.*; see 38 C.F.R. § 3.156(b) (stating that new and material evidence received prior to the expiration of the one year appeal period for filing a NOD is considered as having been filed in connection with the claim pending at the beginning of the appeal period).

²³⁸ *Charles*, 587 F.3d at 1320.

²³⁹ *Id.* at 1321.

²⁴⁰ *Id.* at 1321-22.

²⁴¹ *Id.* at 1323-24.

²⁴² *Id.* at 1323.

Circuit held that the abandonment of a later filed claim does not have the same effect as an RO denial of a later filed similar claim, which allows a claimant to infer that the earlier filed claim based on the same disability has also been adjudicated, as in *Williams* and *Juarez*.²⁴³ The Federal Circuit based this holding on the fact that an abandoned claim has not been adjudicated and no specific notice has been provided to the claimant indicating that the claim has been considered abandoned.²⁴⁴ This is in keeping with the pronouncement of the Federal Circuit in *Adams* that at bottom the “implicit denial rule” is a notice provision.²⁴⁵

CONCLUSION

As discussed above, the pending claim doctrine has evolved substantially. Initially arising in the context of TDIU claims, the early decisions appeared haphazard, with the Federal Circuit in *Andrews* and *Deshotel* failing to fully realize the consequences of its broad language implying a general rule that claims not explicitly denied could be deemed denied and attacked only via a CUE claim, a vehicle designed specifically to attack prior explicit final denials. The decision in *Deshotel* contained the seeds of the subsequent resolution of this contradiction, by indicating that finality could attach to a claim not explicitly denied in certain circumstances. But the Federal Circuit’s statement (within a brief decision) that, “[w]here the Veteran files more than one claim with the RO at the same time, and the RO’s decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied and the appeal period begins to run,” raised more questions than it answered.²⁴⁶ It was left to the Veterans Court in *Ingram II* to rescue the pending claim doctrine from this overly broad statement and provide a workable framework for addressing situations in which a claim

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See *Adams v. Shinseki*, 568 F.3d 956, 964-65 (Fed. Cir. 2009).

²⁴⁶ *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006).

was not explicitly adjudicated and then, years later, the effective date assigned in a subsequent decision granting a claim for the same disability was challenged based on a pending claim theory. In *Ingram I*, the Veterans Court had sought to allow for a claim to remain pending absent an explicit adjudication. However, the decision in *Deshotel* (that a claim may be deemed denied) forced the Veterans Court to modify its rule. Nevertheless, in *Ingram II*, the Veterans Court required a decision to at least recognize the substance of a claim not explicitly adjudicated in order for the unadjudicated claim to be considered to have been deemed denied. The Veterans Court noted the absurdities that could result from a literal reading of the *Deshotel* Court's statement, and created a viable framework for addressing such unadjudicated claims, one that provided for notice to the Veteran in the form of the recognition of his unadjudicated claim in a decision resolving a latter identical or similar claim.

The Federal Circuit's holding in *Adams* fully vindicated the *Ingram II* Court's approach. Using its newly coined "implicit denial rule," the Federal Circuit embraced and expanded on the *Ingram II* Court's framework, identifying four factors for consideration, all of which recognized that, "at bottom," the rule is a notice provision, precisely the central concern of the *Ingram II* Court in crafting the rule (albeit with a different name). The Federal Circuit was even forced to repudiate its statement in *Deshotel* that the rule applied to claims filed "at the same time," indicating again the overly broad nature of its language and lack of forethought as to its consequences.

Thus, in developing the pending claim doctrine, the courts have been forced to think and write carefully about many concepts in veterans' law, including the nature of formal and informal claims, the concept of finality, VA's duty to sympathetically read or develop a veteran's claim to its optimum, the scope of CUE claims, and the assignment of effective dates. Despite being an inferior court, the Veterans Court took the lead in developing a workable

framework for dealing with pending claim issues, and the Federal Circuit followed this lead. The result is the implicit denial rule, which allows a claim not explicitly adjudicated to remain pending, unless it was discussed in terms sufficient to put the claimant on notice that it was being considered and rejected. The Federal Circuit's statement of the implicit denial rule is consistent with the Veterans Court's pending claim decisions, including its emphasis on the importance of notice to a claimant in determining whether to consider a claim not explicitly adjudicated to have been denied. Moreover, in *Williams*, the Federal Circuit affirmed the decision of the Veterans Court, specifically agreeing that subsequent final adjudication of a claim identical to a pending claim that had not been finally adjudicated terminates the pending status of the earlier claim. Thus, the courts appear to have reached a consensus on how to adjudicate issues relating to the pending claim doctrine.

While the Federal Circuit vacated the Veterans Court's decision in *Charles*, the Federal Circuit's reasoning was based on the same concern that underlay those of the Veterans Court in its pending claim decisions -- the fact that there is an absence of notice when a claim is abandoned, thus preventing an abandoned claim from rendering a prior unadjudicated claim final. We therefore predict that, should the decision in *Jones* be appealed, it will be affirmed by the Federal Circuit.

The path taken by the courts in developing the pending claim doctrine has been circuitous, but the appropriate destination -- a rule that protects the rights of veterans and provides a workable framework for the Board and the courts to apply -- has been reached.

