The Presumption of Competence of VA Medical Examiners: Where Does it Come From and Where is it Headed?

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INTRODUCTION

> Lower courts often presume that Department of Veterans Affairs medical examiners are competent to render expert opinions against veterans seeking compensation for disabilities they have suffered during military service. The VA appears to apply the same presumption in its own administrative proceedings.
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> But where does this presumption come from? It enjoys no apparent provenance in the relevant statutes. There Congress imposed on the VA an affirmative duty to assist—not impair—veterans seeking evidence for their disability claims. . . . Now, you might wonder if our intervention is needed to remedy the problem. After all, a number of thoughtful colleagues on the Federal Circuit have begun to question the presumption's propriety. And this may well mean the presumption's days are numbered. But I would not wait in hope.[4]

In his eloquent dissent from the denial of certiorari in *Mathis v. Shulkin*,[5] Justice Gorsuch asked where the presumption of competence of VA medical examiners comes from.[6] This article is an attempt to answer that question. In Part I, we discuss the historical relationship between physicians and attorneys in VA decision making, including the decisions of the Board of Veterans' Appeals (BVA). In Part II, we address the effect of the Veterans' Judicial Review Act (VJRA) on this relationship, and the United States Court of Appeals for Veterans Claims' (CAVC) subsequent prohibition on the Board from making independent medical determinations, thus forcing the Board to rely on health care professionals to make such judgments. In Part III, we discuss the effect of the Veterans Claims Assistance Act of 2000 (the VCAA)[7] on the frequency with which VA medical examinations were conducted and medical opinions provided, bringing issues relating to the presumption of competence to the fore. In Part IV, we trace the evolution of the presumption of competence in the decisions of the CAVC and the United States Court of Appeals for the Federal Circuit (the Federal Circuit). In Part V, we offer some thoughts on what the historical development of the presumption tells us about its meaning, application, and likely survival or modification by the courts, including the United States Supreme Court (the Supreme Court).

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[4] Mathis v. Shulkin, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from the denial of certiorari) (citation omitted), *denying cert. sub nom.* Mathis v. McDonald, 834 F.3d 1347 (Fed. Cir. 2016).

[5] 137 S. Ct. 1994 (2017).

[6] *Id.* at 1995 (Gorsuch, J., dissenting). The presumption discussed in this article has been referred to as both the "presumption of competence" and the "presumption of competency."

[7] Veterans Claims Assistance Act of 2000 (VCAA), 38 U.S.C. § 5103A (2018).

I. THE HISTORY OF PHYSICIAN/ATTORNEY BOARD PANELS

Prior to the formation of the BVA, the then Bureau of War Risk Insurance established a Board of Appeals in 1920 to adjudicate veterans' benefits claims.[8] The panel was comprised of three members, two attorneys and one physician, and the Bureau's Chief Medical Adviser made recommendations to the Director in the event of a dispute among the panel.[9] After a November 1920 restructuring, the Board of Appeals also reviewed cases referred by the Medical Board of Review (the Medical Board).[10] The Medical Board was comprised of three physicians, who decided questions on disputed medical ratings.[11] These two boards worked together, for example, to determine whether a claimant would receive a total and permanent disability rating.[12]

In 1921, the United States Veterans' Bureau (the Veterans' Bureau) was established.[13] In 1924, regional offices (ROs) were established and rating boards within them were created to adjudicate veterans' benefits claims.[14] The rating boards included five members, two of whom were "general medical referees," with one of those required to be a general medical examiner.[15] The other members consisted of a claims examiner, a claims reviewer, and a vocational specialist.[16] The medical examiner provided basic examinations of claimants and, where necessary, referred claimants to appropriate specialists for examination.[17] In 1928, the Veterans' Bureau reduced the size of the rating boards to three members, which included a claims specialist, an occupational specialist, and a medical specialist.[18]

The BVA, established in 1933, was similarly organized into three-member sections.[19] However, each BVA section contained two attorneys and one physician.[20] Prior to issuing a decision, each section would receive a tentative decision that had been drafted by a "Consultant Service," consisting of staff attorneys and physicians.[21] This system lasted until 1961.[22] Although there was no requirement in the relevant laws or regulations that physicians participate in any aspect of BVA decision making, either formally or informally, such participation was assumed to be an inherent part of the system, a "given."[23] Both the RO rating boards and the BVA relied on the expertise of both attorneys and physicians in fulfilling their obligations under the relevant regulations to decide claims based on the evidence of record in the context of a nonadversarial system under which adjudicators were required to grant veterans "every benefit that can be supported in law."[24]

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8 Charles L. Cragin, *A Time of Transition at the Board of Veterans' Appeals: The Changing Role of the Physician*, 38 FED. BAR NEWS & J. 500 (1991).
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *See* James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 1, 36 (2013).
14 *Id.* at 36.
15 *Id.* at 37.
16 *Id.* (citing Veterans' Bureau Regulation No. 74 (1924)).
17 *Id.*
18 *Id.* (citing Veterans' Bureau Regulation No. 187, § 7151 (1928)).
19 *Id.* at 39 (citing VETERANS ADMINISTRATION, BOARD OF VETERANS' APPEALS 1933-1984, at 11 (1984)).
20 *Id.*
21 *Id.* at 39-40.
22 Cragin, *supra* note 8, at 500-01.
23 *Id.*
24 Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23, 24-25 (1994) (quoting 38 C.F.R. § 3.103(a) (1988)).

Although the BVA was reorganized in 1961 to replace the Consultant Service with a medical advisory staff, the three-member sections with two attorneys and one physician continued to issue decisions, using the medical advisors for their medical expertise and staff attorneys to draft the appellate decisions.[25]

II. THE VJRA

In 1988, President George H.W. Bush signed the VJRA, which made dramatic changes in the system for adjudicating veterans' benefits claims.[26] Two of the most significant changes were the requirement that the BVA include the "reasons or bases" for its findings and conclusions and the establishment of a court to exclusively review BVA decisions, the United States Court of Veterans Appeals (now CAVC).[27]

Previously, the BVA had been required to include only "findings of fact and conclusions of law" in its decisions.[28] Although BVA decisions had over time contained more discussion of the reasons for its conclusions, the discussions remained limited.[29] For example, the BVA would sometimes cite only "sound medical principles" for its conclusions.[30] The reliance on general medical principles that were likely provided by the physician Board Member and the medical advisory staff but not made explicit in the BVA decisions was one of the main reasons for the reasons or bases requirement.[31] The legislative history of the VJRA indicates that the reasons or bases requirement was designed to provide "a decisional document from the BVA that will enable a claimant to understand, not only the BVA's decision but also the precise basis for that decision, and [will] also permit a claimant to understand the BVA's response to the various arguments advanced by the claimant."[32] Moreover, BVA decisions containing reasons or bases would assist the CAVC in understanding and evaluating the BVA's decisions.[33]

In one of its earliest decisions, the CAVC in 1990 held in *Murphy v. Derwinski*[34] that even for medical conclusions made by a BVA physician, "a mere statement of an opinion, without more, does not provide an opportunity for the veteran to explore a basis for reconsideration or for this Court to review the BVA decision 'on the record[.]'. . ." [35] Going one step further in 1991, the CAVC held in *Colvin v. Derwinski*,[36] that the BVA may consider *only* independent medical evidence to support its findings.[37] The CAVC further explained that,

> If the medical evidence of record is insufficient, or, in the opinion of the BVA, of doubtful weight or credibility, the BVA is always free to supplement the record by seeking an advisory opinion, ordering a medical examination or citing recognized medical treatises in its decisions that clearly support its ultimate conclusions. This procedure ensures that all medical evidence contrary to the veteran's claim will be made known to him and be a part of the record before this Court.[38]

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25 Cragin, *supra* note 8, at 501.
26 Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).
27 Cragin, *supra* note 24, at 23-25.
28 *Id.* at 25-26.
29 *Id.* at 25.
30 *Id.*
31 Cragin, *supra* note 8, at 501.
32 Cragin, *supra* note 24, at 26 (citing S. Rep. No. 418, 100th Cong., 2d Sess. 38 (1988)).
33 *Id.*
34 1 Vet. App. 78 (1990).
35 *Id.* at 81.
36 1 Vet. App. 171 (1991).
37 *Id.* at 172.
38 *Id.* at 175 (citations omitted).

These cases illustrated the CAVC's intent to subject the BVA adjudication process to strict due process and procedural constraints "that are more reflective of an adversarial system than the *ex parte*, paternalistic approach that had previously characterized the VA system."[39] In response, the BVA was unsure if it could continue the same approach with physicians as members of panels. Consequently, the BVA created a Physicians Utilization Study Group ("Group"), composed of BVA physicians and attorneys, to explore alternative uses for physicians at the BVA.[40] The Group was split on whether to retain physicians as members of the BVA panels.[41]

The part of the Group in favor of retaining physicians as BVA Members argued that retaining physicians on decision making panels could be done consistently with the requirements under the new law and the CAVC precedent.[42] In addition, this part of the Group "emphasize[d] that more than ninety percent of the cases before the [BVA] involve[d] medical issues, including many which are novel or very complex."[43] They also stressed the importance of the physician BVA Members' involvement in medical training of other staff.[44] Finally, this part of the Group argued that "[t]he trust and honor generally accorded physicians . . . is a compelling intangible that enhances the prestige of the [BVA] and the respect for the medical accuracy of its decisions."[45]

The part of the Group opposed to retaining physicians as members of BVA panels believed that the VJRA and the recent CAVC precedent made it too difficult to continue the current practice of having physicians on adjudicatory panels.[46] They emphasized that the roles of expert witness and adjudicator had become "mutually exclusive," and that the changes in the law and the CAVC's interpretation of the law now required that, if the BVA wanted to consider a physician's opinion, the opinion would have to be a part of the record.[47] Moreover, the due process requirements under the new statutory scheme required that claimants be given notice of such an opinion and an opportunity to comment and contest it, including with contrary evidence.[48] The opposing section of the Group further argued that the majority of the medical questions presented to the BVA were simple and frequent enough that participation of a physician was not required.[49] In addition, they contended that the CAVC's decisions were creating legal complexities that physicians would not be able to properly address.[50]

Ultimately, VA decided to remove the physicians from the decision teams at the BVA and ROs in 1991.[51] As explained in the Chairman of the BVA's Annual Report for Fiscal Year 1992,

> [R]ecent changes in the law, as interpreted by the [Court] have altered the role of the physician in the VA adjudicatory scheme. After their initial term of appointment

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39 Cragin, *supra* note 8, at 502 (italics added).
40 *Id.* at 502-03.
41 *Id*.
42 *Id.*
43 *Id.* at 502.
44 *Id.* at 502-03.
45 *Id.* at 503.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *See* BOARD OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, 1992 CHAIRMAN ANN. REP. 5, https://www.va.gov/VetApp/ChairRpt/BVA1992AR.pdf [hereinafter BVA FY 1992 REP.].

> expires in July 1994, no further appointments of physicians as members of the Board will be made. At such time, all three members of the Board section will be attorneys.[52]

Colvin also resulted in the BVA bifurcating what had been a "streamlined" process of "gather[ing] medical records and put[ting] them before a panel of legal and medical specialists for a collaborative decision," into a "splintered . . . process" involving "separate procedures for analyzing medical evidence and then applying legal standards to it."[53]

The physician BVA Members transitioned to the role of medical advisers to the Board, in which they provided medical training, medical quality review of Board decisions, and medical opinions in cases referred to them by the BVA.[54] To further comply with *Colvin*, the BVA began to seek additional medical information, including medical opinions, from inside and outside of VA.[55] Over the next few years, the absence of medical members within Board sections increased the responsibility of the remaining attorney members to analyze the medical evidence, independently recognizing when additional development of the record was warranted, particularly the need for expert medical opinion evidence.[56]

In the years following *Colvin*, the BVA requested expert opinions, pursuant to 38 U.S.C. § 7109, from "independent medical experts who usually serve[d] on the faculties of leading medical schools" [57] as well as the Chief Medical Director of VA and the Armed Forces Institute of Pathology, pursuant to 38 C.F.R. § 19.176.[58] In March 1992, the regulation was renumbered as 38 C.F.R. § 20.901 and amended to identify the Chief Medical Director as being part of the Veterans Health Administration (VHA).[59] This provision was subsequently broadened to allow a request for "a medical opinion from an appropriate health care professional in the Veterans Health Administration."[60]

The struggle to adjust to the post-*Colvin* universe is illustrated by *Austin v. Brown*.[61] There, the CAVC discussed Chairman's Memorandum No. 01-91-21, which recognized that the Board's use of medical adviser opinions, as reflected in the Board Manual, MBVA-1, precluded incorporating such opinions in Board decisions because claimants were not afforded the rights of notice and comment with regard to such opinions.[62] The Chairman's Memorandum provided that such opinions would be written and added to the claims folder and that notice and comment procedures that applied to other types of medical opinions would apply to these opinions.[63] Nevertheless, the CAVC held that the procedures for obtaining internal medical opinions did not comply with the CAVC's case law requiring an opportunity

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52 *Id.*
53 James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251, 272-73 (2010).
54 BOARD OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, 1991 CHAIRMAN ANN. REP. 1, https://www.va.gov/VetApp/ChairRpt/BVA1991AR.pdf [hereinafter BVA FY 1991 REP.].
55 BVA FY 1992 Rep., *supra* note 51, at 13-14.
56 BOARD OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, 1997 CHAIRMAN ANN. REP. 14, https://www.va.gov/VetApp/ChairRpt/BVA1997AR.pdf [hereinafter BVA FY 1997 REP.].
57 *Id*.
58 38 C.F.R. § 19.176(a), (b) (1980).
59 38 C.F.R. § 20.901(a) (1992).
60 38 C.F.R. § 20.901(a) (2002).
61 6 Vet. App. 547 (1994).
62 *Id.* at 549 (citing Chairman's Memorandum No. 01-91-21).
63 *Id.* (citing Chairman's Memorandum No. 01-91-21).

for the appellant to respond to evidence obtained by the BVA,[64] fair process principles,[65] and applicable regulations, including 38 C.F.R. § 19.9, which addresses BVA remands for further development of the record, and §20.901.[66] Thereafter, the BVA stopped requesting opinions from its medical advisors.[67] In sum, "[t]he VJRA caused the separation of legal and medical expertise within the system, and required the development of a more robust duty to assist to reconnect these halves."[68]

III. THE IMPACT OF THE VCAA'S DUTY TO ASSIST

As the BVA began issuing its decisions via single-member decisions[69] and the CAVC reviewed those decisions, one frequent area of review was VA's obligations under its duty to assist. Prior to 2000, VA assisted veterans in the development of their claims for benefits, with section 3.159(a) of Title 38 generally providing that,

> [a]lthough it is the responsibility of any person filing a claim for a benefit administered by the [VA] to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded, the [VA] shall assist a claimant in developing the facts pertinent to his or her claim.[70]

Similarly, section 3.103(a) provided that VA was "to assist a claimant in developing the facts pertinent to [the] claim."[71] Significantly, the other provisions of the regulation required assistance specifically with regard to obtaining evidence and did not address the provision of medical examinations or opinions.[72] This was consistent with the law providing that the claimant had "the burden of submitting evidence sufficient to justify . . . that a claim is well grounded."[73] The requirement of a well-grounded claim "appeared to limit the expending of VA resources to claims that had potential merit."[74] In *Grivois v. Brown*,[75] the CAVC noted that the statute "reflects a policy that implausible claims should not consume the limited resources of the VA."[76] In 2000, President Clinton signed the VCAA,[77] eliminating the requirement that "VA assistance could only attach to a claim that was well grounded."[78] One of the concerns that led to the passage of the VCAA was cases in which there was evidence of a current disability and an in-service incident or series of events that may have caused it, but VA did not obtain a medical opinion as to whether there was a relationship between these things.[79]

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64 *Id.* at 550-51 (citing Thurber v. Brown, 5 Vet. App. 119 (1993)).
65 *Id.* at 551-52.
66 *Id.* at 552-53.
67 BVA FY 1997 REP., *supra* note 56, at 13.
68 Ridgway, *supra* note 53, at 273.
69 In 2003, the VA regulations were amended to provide that Board Members would also be known as Veterans Law Judges. *See* Appeals Regulations: Title for Members of the Board of Veterans' Appeals, 68 Fed. Reg. 6621, 6621-22 (Feb. 10, 2003).
70 38 C.F.R. § 3.159(a) (1992).
71 38 C.F.R. § 3.103(a) (1988).
72 *See* 38 C.F.R. § 3.159(b), (c) (1992).
73 38 U.S.C. § 3007(a) (1988).
74 *See* Daniel Brook, Motrya Mac, & Nathaniel Doan, *Federal Jurisprudence Regarding VA's Duty to Provide a Medical Examination: Preserving the Uniquely Pro-Claimant Nature of VA's Adjudicatory System While Providing Timely Decisions*, 1 VETERANS L. REV. 69, 70 (2009).
75 6 Vet. App. 136 (1994).
76 *Id.* at 139.
77 Pub. L. No. 106-475, 114 Stat. 2096 (2000); 38 U.S.C. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (2000).
78 Brook, et al., *supra* note 74, at 72 (citing 146 CONG. REC. H9912-01, H9914 (daily ed. Oct. 17, 2000) (statement of Rep. Stump)).
79 *Id.* (citing statement of Rep. Evans).

Pursuant to the VCAA, VA enacted a regulation stating that it would afford a claimant a medical examination or opinion if it "determines it is necessary to decide the claim."[80] Pursuant to 38 C.F.R. § 3.159(c)(4):

> A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but: (A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of a disability; (B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease . . . manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and (C) indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.[81]

In *McLendon v. Nicholson*,[82] the CAVC interpreted each of the "elements" of section 3.159(c)(4). It stated that satisfaction of the elements (A) and (B) did not require a "weighing of competing facts."[83] Regarding the third element, the CAVC found that this was a "low threshold" as it simply required that the evidence "indicates" that there "may" be a nexus between current disability and an injury in service.[84] Given the VCAA's requirement to provide an examination when necessary and the low threshold for establishing such necessity under *McLendon*, the number of medical opinions sought by VA in the development of benefits claims increased dramatically. While the precise number of examinations provided is difficult to determine because it is contained in different data sources, internal VA statistics reflect that between 500,000 and one million examinations requested by the Veterans Benefits Administration were completed by the Veterans Health Administration in the Fiscal Years between 2008 and 2018, with a high of 978,352 in Fiscal Year 2015.[85] Concurring in the denial of a petition for rehearing en banc in *Mathis v. McDonald*,[86] Judge Hughes noted that in 2015 VHA "completed 2,899,593 individual disability benefits questionnaires and/or disability examination templates."[87] Judge Hughes cited VA's brief, in which it noted, "[t]he provision of medical examinations and opinions is part of VA's central mission. VA processed nearly 1.4 million rating claims in Fiscal Year 2015, and over 1 million per year for the last six years."[88] VA also stated in the brief that, "[a]s part of its duty to assist, VA provides over a million disability evaluations yearly."[89] More recently, VA provided approximately two million examinations between January 1, 2017, and April 2018.[90] As more medical opinions were sought, issues relating to the competence of those providing the opinions arose more frequently, and it was in this context that the debate over the presumption of competence arose.

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80 38 C.F.R. § 3.159(c)(4) (2019).
81 *Id*.
82 20 Vet. App. 79 (2006).
83 *Id.* at 81-82.
84 *Id.* at 83.
85 Data provided by the Veterans Health Administration on file with the authors and available on VA's intranet at https://vssc.med.va.gov/VSSCMainApp/products.aspx?PgmArea=44.
86 *See supra* note 4.
87 834 F.3d 1347, 1352 (Fed. Cir 2017) (Hughes, J., concurring in the denial of the petition for rehearing *en banc*); *see infra*, pp. 26-27.
88 Respondent-Appellee's Response to Petition for Rehearing at 8, *Mathis*, 834 F.3d 1347.
89 VHA Directive 1603 (April 22, 2013), http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=1643.
90 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-13, VA DISABILITY EXAMS: IMPROVED PERFORMANCE ANALYSIS AND TRAINING NEEDED FOR CONTRACTED EXAMS 1 (2018).

IV. THE EVOLUTION OF THE PRESUMPTION OF COMPETENCE OF MEDICAL EXAMINERS

The first use of the term "presumption of competence" or "presumption of competency" in this context appears to be in *Harris v. Nicholson*,[91] a single-judge memorandum decision by then-Judge Davis. The appellant had argued that VA breached its duty to assist because there was no indication that the VA examiner was a physician or was Board-certified.[92] In response to the appellant's contention that VA did not establish the competency of the VA examiner, Judge Davis found that "the Board is entitled to assume the competence of a VA examiner."[93] Given the lack of evidence casting doubt on the examiner's competency and qualifications, Judge Davis found "no error in the Board's implicit presumption of competency."[94] Although Judge Davis was the first to use this term, the concept was already in existence. Judge Davis cited two cases in support of his holding, *Hilkert v. West*[95] and *Butler v. Principi*.[96]

In *Hilkert*, the CAVC had addressed a challenge to the qualifications of a physician who prepared an opinion as to whether a veteran's death from cancer was due to exposure to ionizing radiation.[97] The challenge had not been made before the BVA, and when raised at the CAVC it was framed as an allegation that the Board erred by failing to establish competency.[98] In response, the CAVC found that "the Board implicitly accepted [the physician's] competency by accepting and relying on the conclusions in her opinion."[99] The CAVC held that the appellant had not met her burden of showing that the BVA erred in such reliance, and that there was nothing in the record casting doubt on the physician's competency.[100]

The CAVC in *Hilkert* cited two cases by analogy, *Hill v. Brown*[101] and *Ashley v. Derwinski*.[102] These cases, like the Federal Circuit's decision in *Butler*, held that there is a "presumption of regularity" pursuant to which it is presumed that government officials "have properly discharged their official duties."[103]

The presumption of regularity is one of the foundations on which the presumption of competence rests and, given the subsequent dispute as to the appropriateness of applying the presumption of regularity to the competence of VA health care professionals, a brief detour as to its history is warranted. The presumption of regularity has generally been viewed as a "deference doctrine: it credits to the executive branch certain facts about what happened and why and, in doing so, narrows judicial scrutiny and widens executive discretion over decisionmaking processes and outcomes."[104] The Supreme Court first formally articulated the presumption in *United States v. Chemical Foundation, Inc.*,[105] in which

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91 No. 03-1532, 2006 U.S. App. Vet. Claims LEXIS 1367 (Nov. 21, 2006).
92 *Id.* at *1.
93 *Id.* at *6.
94 *Id.* at *7.
95 12 Vet. App. 145 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000).
96 244 F.3d 1337 (Fed. Cir. 2001).
97 *Hilkert*, 12 Vet. App. at 151.
98 *Id.*
99 *Id.*
100 *Id.*
101 9 Vet. App. 246 (1996).
102 2 Vet. App. 307 (1992).
103 *Id.* at 308. (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)).
104 Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2432 (2018).
105 272 U.S. 1 (1926).

the Supreme Court found that "[t]he presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[106] Significantly, none of the cases cited by the Supreme Court in *Chemical Foundation* referenced a presumption of regularity or indicated the nature or source of the presumption.[107] The Supreme Court has continued to apply the presumption, however, most recently stating broadly in 2001 that "a presumption of regularity attaches to the actions of government agencies, and that some deference to agency disciplinary actions is appropriate."[108] Whether the presumption is broad enough to apply to the competence of VA health care professionals is one of the key areas of dispute between those who support the presumption and those who oppose it.

The first precedential decision to cite and apply the presumption of competence was *Cox v. Nicholson*.[109] *Harris* appears to have been a warmup for *Cox*, as Judge Davis authored the unanimous panel decision in the latter, borrowing from his single-judge decision in *Harris* two months previously. The focus of the decision in *Cox* was the appellant's challenge to the adequacy of examinations conducted by non-physicians, in this case a nurse practitioner.[110] The appellant argued that VA did not fulfill its duty to assist him because it did not afford him an adequate examination conducted by a physician.[111] VA's duty to assist, codified at 38 U.S.C. section 5103A, provides that VA must make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate his or her claim.[112] The duty to assist includes providing a medical examination or opinion when necessary to decide the claim.[113] There are various requirements as to the nature of examinations that must be conducted,[114] but the CAVC noted that neither section 5103A nor its implementing regulations define the term "medical examination" and there were no judicial decisions interpreting it.[115] The CAVC also noted that the implementing regulation 38 C.F.R. section 3.159(a)(1) provides that "competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions."[116] As nurse practitioners have advanced education and clinical training, their opinions fall within the scope of the regulation.[117]

The appellant also challenged the qualifications of the physicians who had conducted one of the examinations, based in part of the lack of information as to the physician's qualifications.[118] As in *Harris*, Judge Davis, now speaking for the CAVC, noted that the assertion was not that the physician was not competent but that VA had not established his competence.[119] Again citing *Hilkert* and *Butler*, Judge Davis noted that the BVA was entitled to presume the competence of the examiner, and the

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106 *Id.* at 14-15.
107 Carissa Hessick, *A Bit of History on the Presumption of Regularity*, PRAWFSBLAWG, (Jan. 14, 2019, 7:06 AM), https://prawfsblawg.blogs.com/prawfsblawg/2019/01/a-bit-of-history-on-the-presumption-of-regularity.html.
108 U. S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001) (citation omitted).
109 20 Vet. App. 563 (2007).
110 *Id.* at 567.
111 *Id*.
112 38 U.S.C. § 5103A (2018).
113 *Id.*
114 *Id.*
115 *Cox*, 20 Vet. App. at 568.
116 *Id.* at 569.
117 *Id.*
118 *Id.*
119 *Id.*

appellant bears the burden of showing such reliance was in error.[120] As in Harris, given the lack of evidence casting doubt on the physician's competence and qualifications, Judge Davis found "no error in the BVA's implicit presumption of competence."[121]

The Federal Circuit first addressed the presumption of competence in *Rizzo v. Shinseki*.[122] In *Rizzo*, the appellant had challenged the BVA's decision to afford more probative weight to the opinion of VA's Chief Officer of Public Health and Environmental Hazards "without first establishing his competency as an expert."[123] Citing *Cox* and *Hilkert*, the CAVC held that the appellant had not met his burden of providing evidence either demonstrating that the author of the opinion was "not an expert or that would cause doubt on his competency or qualifications."[124] The Federal Circuit affirmed, framing the issue throughout its opinion as one in which the appellant bore the burden. According to the Federal Circuit, the appellant "essentially asks this court to impose a new standard requiring VA to affirmatively establish on the record the qualifications of an expert witness before the [BVA] may rely upon the opinion of that witness."[125] After quoting the CAVC's holding and reasoning in *Cox*, the Federal Circuit stated simply that it was adopting the CAVC's reasoning.[126] The Federal Circuit elaborated that "[a]bsent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the BVA's reliance on that physician."[127] Thus, where there is no challenge to the competence of qualifications of a VA medical expert before the BVA, VA "need not affirmatively establish that expert's competency."[128] The Federal Circuit noted that the appellant had identified no law or precedent indicating that the BVA was required to first establish the physician's qualifications in order to assign probative weight to his opinion.[129] In addition, anticipating the concerns expressed by Justice Gorsuch many years later, the Federal Circuit noted that the presumption of competence "did not create an evidentiary burden that conflicts with VA's statutory duty to assist."[130] While VA's duty to assist requires reasonable efforts by VA to assist a claimant in obtaining evidence to substantiate his or her claim, it did not apply in this context because VA was not requiring claimants such as the Veteran to provide evidence establishing competence in order to substantiate his claim.[131]

The Federal Circuit also cited the presumption of regularity to support its holding. Quoting from its own decision in *Miley v. Principi*,[132] the Federal Circuit characterized the presumption of regularity as providing that "in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties."[133] The Federal Circuit rejected the appellant's contention that the presumption of regularity applied only to procedural matters and that its extension to

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120 *Id.*
121 *Id.*
122 580 F.3d 1288 (Fed. Cir. 2009).
123 Rizzo v. Peake, No. 07-0123, 2008 U.S. App. Vet. Claims LEXIS 1651, at *4 (Aug. 26, 2008), *aff'd sub nom.* Rizzo v. Shinseki, 580 F.3d 1288 (Fed. Cir. 2009).
124 *Id.* at *6.
125 *Rizzo*, 580 F.3d at 1290.
126 *Id.* at 1291.
127 *Id.*
128 *Id.*
129 *Id.* at 1291-92.
130 *Id.* at 1292.
131 *Id.*
132 366 F.3d 1343 (Fed. Cir 2004).
133 *Rizzo*, 580 F.3d at 1292 (quoting *Miley*, 366 F.3d. at 1347).

this situation was unwarranted: "Nothing in this court's precedent limits the presumption to procedural matters."[134] Quoting *Butler*, the Federal Circuit summarized the presumption of regularity as simply allowing "courts to presume that what appears regular is regular, the burden shifting to the attacker to show the contrary."[135]

The Federal Circuit next addressed the presumption of competence in *Sickels v. Shinseki*.[136] There, the appellant took a slightly different tack, arguing that in not addressing whether VA medical opinions on which it rested its decision were "thorough and informed" or "sufficiently informed by physical examination or other diagnostic procedures," the BVA failed to provide adequate reasons and bases to support its conclusions.[137] The Federal Circuit extended, broadened, and generalized the holding in *Rizzo*, finding that the same logic meant that the BVA need not "give reasons and bases for concluding that a medical examiner is competent unless the issue is raised by the veteran," because the BVA should not be required to explain its reasoning as to issues that were not raised before it.[138]

The appellant also argued that the burden should not have been on him to challenge the competence of the medical examiners because of the paternalistic and non-adversarial nature of the veterans' benefits system.[139] In response, the Federal Circuit relied on its holding in *Rizzo*, noting that even though the BVA is required to consider issues reasonably raised by the evidence of record, the presumption of competence is warranted unless the competence of the medical examiner is challenged.[140] The Federal Circuit also cited the presumption of regularity to conclude that the CAVC "did not err by not requiring the [BVA] to state reasons and bases demonstrating why the medical examiners' reports were competent and sufficiently informed."[141]

The next case to address the presumption of competence, *Parks v. Shinseki*,[142] involved a challenge to a report prepared by an advanced nurse practitioner as to whether a veteran's disabilities were caused by chemicals to which he was intentionally exposed as part of Shipboard Hazard Defense (SHAD). The Federal Circuit characterized the issue broadly (in contrast to the CAVC and the parties, which had focused on the qualifications of nurse practitioners) as whether the appellant "waived his right to overcome the presumption that the selection of a particular medical professional means that the person is qualified for the task."[143] Unlike in *Rizzo* and *Sickels*, the Federal Circuit identified the presumption of regularity at the beginning of its analysis, as one of two principles that were controlling.[144] The first such principle was that VA is required to rely only on "competent medical evidence," which is defined in the regulation implementing VA's duty to assist as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions."[145] The second principle was the presumption of regularity, which the Federal Circuit, again quoting *Miley* and *Butler*, described as providing that "in the absence of clear evidence to the contrary, the court will

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134 *Id.*
135 *Id*. (quoting Butler v. Principi, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).
136 643 F.3d 1362 (Fed. Cir. 2011).
137 *Id.* at 1365.
138 *Id.* at 1366.
139 *Id.*
140 *Id.*
141 *Id.*
142 716 F.3d 581 (Fed. Cir. 2013).
143 *Id.* at 584.
144 *Id.*
145 *Id.* (citing 38 C.F.R. § 3.159(a)(1)).

presume that public officers have properly discharged their duties" and, more simply, "what appears regular is regular."[146] The Federal Circuit combined these two principles to summarize that "[i]n the case of competent medical evidence, the VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case,"[147] noting that properly viewed, "the presumption is not about the person or a job title; it is about the process." The Federal Circuit also noted that a presumption exists to eliminate burdens and that requiring the BVA to produce evidence as to the competence of a medical professional, whose competence under prior caselaw could be presumed, was both illogical and would contribute to problems associated with repeated remands leading to systemwide backlogs and delays.[148]

The Federal Circuit also noted that the presumption was rebuttable and cited *Bastien v. Shinseki*[149] in support of this proposition.[150] In *Bastien*, the Veteran had been exposed to radiation and died from a rare type of blood cancer, having been diagnosed with a rare form of lymphoma.[151] There were conflicting medical opinions, two of which were from VA physicians, as to whether this exposure caused his death from several rare types of cancer.[152] Although multiple issues were raised, the Federal Circuit found it had jurisdiction over only one: "that the [BVA] improperly relied on [VA's] medical witnesses because it did not affirmatively establish their qualifications as medical experts."[153] The appellant sought to distinguish *Rizzo* on the ground that she did in fact challenge the VA physicians' competence or qualifications before the BVA.[154] The Federal Circuit rejected this argument for two reasons. First, the appellant had asked for the qualifications of one of the physicians, and VA provided those qualifications, but the Federal Circuit held that a "request for information about an expert's qualifications . . . is not the same as a challenge to those qualifications."[155] The Federal Circuit assumed that litigants given such qualifications would frequently conclude there was no basis for challenging them.[156] Second, the appellant had challenged the other physician's opinion on the ground that he was not independent because he was employed by VA.[157] This was not, the Federal Circuit said, a challenge to the physician's expertise but to his objectivity, and the laws and regulations allowing for opinions from VA health care professionals, VHA physicians, and independent medical experts, undercut the validity of such a challenge.[158] Thus, the Federal Circuit required that the appellant set forth specific reasons why the VA physician was not qualified to offer an opinion.[159] If the more general allegations of the appellant in *Bastien* were found sufficient to require VA to establish the physician's qualifications, this would be contrary to the holding of prior cases, including *Rizzo*, that VA ordinarily need not establish a physician's competence.[160]

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146 *Id.* (quoting Rizzo v. Shinseki, 580 F.3d 1288 (Fed. Cir. 2009)).
147 *Id.* at 585 (citing Sickels v. Shinseki, 643 F.3d 1362 (Fed. Cir. 2011)).
148 *Id.*
149 599 F.3d 1301 (Fed. Cir. 2010).
150 *Parks*, 716 F.3d at 585 (citing *Bastien*, 599 F.3d at 1307).
151 *Bastien*, 599 F.3d at 1303.
152 *Id.* at 1303-04.
153 *Id.* at 1306.
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.* at 1307.
158 *Id.*
159 *Id.*
160 *Id.*

The Federal Circuit elaborated in *Parks* as to how specific the challenge must be to the qualifications of a physician before the BVA to avoid waiving the right to rebut the presumption on appeal. The Federal Circuit held that the first step in overcoming the presumption of competence is to object to the selection of a particular medical professional and to do so specifically.[161] The only specific argument that the appellant had made before the BVA was that the report prepared by the nurse practitioner should not have been considered because, contrary to established procedures, it was not signed by a physician.[162] Even construing the record sympathetically as required in all cases particularly where, as here, the appellant was *pro se* before the RO and had non-attorney representation before the BVA, this was not specific enough: "it is one thing to read a record sympathetically . . . it is quite another to read into the record an argument that had never been made."[163]

In *Wise v. Shinseki*,[164] the CAVC created an exception to the requirement that a claimant must expressly raise the issue of an examiner's competence before VA. There, the issue was whether the Veteran's service-connected posttraumatic stress disorder (PTSD) had contributed to his death from heart disease.[165] A private physician expressed a positive opinion as to this association, and the BVA requested an advisory medical opinion from the VHA.[166] A VA staff cardiologist acknowledged that she had no significant training in psychiatry, but nonetheless opined that it was not likely that the PTSD had aggravated his heart disease or hastened his death.[167] After summarizing the above case law as to the presumption of competence, the CAVC acknowledged that the appellant did not challenge the competence of the VA physician before the BVA, which would ordinarily mean that the BVA was not required to discuss the physician's competence.[168] But because the opinion in this case contained within it evidence of "irregularity," i.e., the physician's own admission of a lack of expertise to properly answer the question posed to her, the CAVC held that the presumption of competence did not attach.[169] In these circumstances, the BVA failure to address the competence of the physician rendered its statement of reasons or bases inadequate.[170]

Nohr v. McDonald[171] is an example of a case in which the CAVC found that the Veteran met his burden of challenging the competence of the VA medical examiner. There, in connection with the Veteran's claim for service connection for a psychiatric disorder, the BVA had obtained an opinion from a VHA psychiatrist.[172] Consistent with the law and regulation, the BVA provided the Veteran and his attorney with a copy of the psychiatrist's opinion with an opportunity to respond.[173] The Veteran's representative submitted questions (termed "interrogatories") for the psychiatrist to answer, including requesting a *curriculum vitae* (CV) and, alternatively, asked the BVA to subpoena the psychiatrist to appear at a personal hearing.[174] One of the questions pertained to the psychiatrist's statement

161 Parks v. Shinseki, 716 F.3d 581, 585 (Fed. Cir. 2013).
162 *Id.* at 586.
163 *Id.*
164 26 Vet. App. 517 (2014).
165 *Id.* at 521.
166 *Id.* at 521-22.
167 *Id.* at 523.
168 *Id.* at 526.
169 *Id.* at 527.
170 *Id.*
171 27 Vet. App. 124 (2014).
172 *Id.* at 127.
173 *Id.*
174 *Id.* at 127-28.

recognizing her "personal limitation."[175] The BVA denied the request to have the psychiatrist answer the interrogatories and to subpoena the psychiatrist, finding that neither was contemplated in the laws and regulations applicable to veterans' benefits claims. The CAVC held that, notwithstanding the use of the term "interrogatories," the Veteran had reasonably raised issues concerning the psychiatrist's competence.[176] Noting that the presumption of competence–"that VA benefits from a [rebuttable] presumption that it has chosen a person who is qualified to provide a medical opinion in a particular case"[177]–"is "well settled" and requires that the Veteran raise the issue on appeal before the BVA, the CAVC held that the Veteran had done precisely that.[178] The request to explain the phrase "personal limitation" was a reasonable follow up, pursuant to *Wise*, of a statement indicating possible lack of expertise, and the request for the CV was a reasonable effort to obtain information to try to overcome the presumption of competence.[179]

The above cases set the stage for the Federal Circuit to address the nature and underpinnings of the presumption of competence in a comprehensive manner. In *Mathis v. McDonald*,[180] a nonprecedential decision, the Federal Circuit adopted the characterization of the presumption of competency used by the CAVC. In its decision, the CAVC described the presumption of competency "as a presumption that VA has properly chosen a person who is qualified to provide a medical opinion in a particular case."[181] In denying the Veteran's claim for service connection for sarcoidosis, VA had relied on the opinion of a VA physician that his sarcoidosis was not related to his pulmonary symptoms during his military service.[182]

Before the CAVC, the Veteran had argued that VA had failed to establish that the physician, who specialized in family practice, was qualified to offer an opinion on this question involving pulmonology.[183] In a memorandum opinion, Judge Lance noted that the presumption of competency is rebuttable, but that the first step in rebutting it is to object.[184] Because there was no such objection before the BVA, and because the mere fact that the physician was not a pulmonologist did not by itself render the opinion inadequate, Judge Lance found the opinion adequate and affirmed the BVA's denial of the claim.[185] The Federal Circuit affirmed the CAVC's decision in a nonprecedential opinion,[186] in which it framed the issue as whether it should disavow the presumption of competency as it applies to VA medical examiners.[187] In a narrowly written opinion, Judge O'Malley reasoned that the Federal Circuit lacked the jurisdiction to make factual findings regarding the competency of the examiner in that case and was bound by precedent to presume the examiner's competence.[188] She noted that while there may be a basis to criticize the line of cases establishing the presumption, there is a practical need for such a rule given the volume of VA benefits cases.[189]

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175 *Id.* at 132.
176 *Id.*
177 *Id.* at 131-32 (quoting Parks v. Shinseki, 716 F.3d 581, 585 (Fed. Cir. 2013)).
178 *Id.* at 132-33.
179 *Id.* at 132, 133.
180 834 F.3d 1347 (Fed. Cir. 2016), *cert. denied sub nom.* Mathis v. Shulkin, 137 S. Ct. 1994 (2017).
181 Mathis v. McDonald, No. 13-3410, 2015 U.S. App. Vet. Claims LEXIS 654 (May 21, 2015).
182 *Mathis*, 834 F.3d at 1354.
183 *Mathis*, 2015 U.S. App. Vet. Claims LEXIS 654, at *1.
184 *Id.* at *9 (citing Parks v. Shinseki, 716 F.3d 581, 585 (Fed. Cir. 2013)).
185 *Id.*
186 Mathis v. McDonald, 643 F. App'x 968 (Fed. Cir. April 1, 2016) (nonprecedential opinion).
187 *Id.* at 971.
188 *Id.* at 975.
189 *Id.*

Judge Reyna concurred because the holding represented an application of multiple precedential decisions in this area, but expressed the wish that "the entire court should review the case law concerning the presumption of competence with the objective of eliminating it."[190] Judge Reyna's wish was partially granted, as the Federal Circuit considered a petition for rehearing en banc,[191] and, although the petition was denied, the judges of the Federal Circuit were able to express their views on this question. There were two opinions concurring in the denial of rehearing en banc and two opinions dissenting from the denial, reflecting a 7-5 split of the Federal Circuit Judges in regular active service as to whether the presumption should be continued or eliminated.[192] In the primary concurrence, Judge Hughes emphasized the limited nature of the presumption and VA's continuing obligation to develop the record and assist the veteran.[193] While the presumption allows VA to assume the examiner's competence, the probative weight of the examiner's reports must still be weighed by VA.[194] Moreover, a veteran may request from VA information to challenge the competency of the examiner, and if VA does not properly respond to such a request or otherwise fulfill its duty to assist the veteran, its decisions are subject to multiple levels of review by the BVA, the CAVC, and the Federal Circuit. Judge Hughes noted that the BVA has frequently responded to requests for examiners' qualifications by directing VA ROs to provide such information pursuant to VA's duty to assist and that the CAVC has recognized that VA's duty to assist includes an obligation to develop the record regarding an examiner's competency.[195] He also noted that neither Mr. Mathis nor the veterans in the other presumption of competency cases had both attempted to procure information about the examiners' qualifications and challenged their competency.[196] Thus, the Federal Circuit had never, according to Judge Hughes, upheld a denial of a claimant's request for competency information where there was reason to question competency and the information was needed to answer the question.[197] Judge Hughes concluded by noting that VA provides over one million disability evaluations every year and in 2015 had completed almost three million disability benefits questionnaires and/or disability examination templates.[198] Given these circumstances and the lack of guidance by the dissent on how elimination of the presumption would work, Judge Hughes found that the Federal Circuit should not revise a presumption that is one small piece of a long and complicated process in a case that did not demonstrate a problem with the use of the presumption.[199]

In the primary dissent, Judge Reyna made three arguments in favor of en banc review and elimination of the presumption of competence from the VA benefits system.[200] He first challenged the line of cases creating the presumption of competency.[201] He listed several reasons why there was no basis for the CAVC to have created the presumption of competence by applying the general presumption of regularity to VA's choice of examiners: there was no evidentiary basis that VA's selection process yielded competent examiners; the presumption of regularity has been typically applied to routine, non-discretionary, and ministerial procedures, something selecting medical examiners is not; and the

190 *Id.*
191 *See* Mathis v. McDonald, 834 F.3d 1347 (Fed. Cir. 2016) (denying petition for rehearing en banc).
192 *Id.*
193 *Id.* at 1349.
194 *Id.*
195 *Id.* at 1350.
196 *Id.* at 1350-51, 1352 n.1.
197 *Id.* at 1351.
198 *Id.* at 1352.
199 *Id.* at 1353.
200 *Id.* at 1353-60.
201 *Id.* at 1355-56.

presumption of competence does not apply to private health care providers, but VA has not shown a valid basis for presuming its own examiners competent while not extending the same presumption to non-VA health care providers.[202] Judge Reyna also argued that the presumption violated the due process rights of veterans because it left them with no way to challenge a key piece of evidence that is used to deny their claims.[203] Because a veteran must make a specific objection to an examiner's competence in order to learn their qualifications, but may not be able to formulate such an objection without first seeing their qualifications, this places them in a "catch-22" situation.[204] Finally, Judge Reyna found that removing the presumption would not overly burden VA for two reasons.[205] First, there is already a standard for determining the competence of medical examiners in 38 C.F.R. section 3.159(a)(1), which provides that competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements or opinions.[206] Second, eliminating the presumption would allow the BVA to have an administrative record on which it could review an examiner's qualifications and would allow a veteran to determine whether or not to challenge an examiner's competence based on information he or she could review in the examiner's CV.[207]

The appellant sought review by the Supreme Court. Although the petition for writ of certiorari was denied, Justice Gorsuch dissented from the denial.[208] After noting the presumption by lower courts and VA that VA medical examiners are competent to render opinion in veterans' benefits claims, Justice Gorsuch asked where the presumption comes from, given that it does not appear in the statutes.[209] He noted the law requiring VA to assist veterans in pursuing their claims, contrasting it with the presumption of competence, which impairs them in doing so.[210] He also criticized how the presumption works in practice, as VA typically does not provide information allowing a veteran to challenge the presumption at the RO level, instead waiting for the BVA to order that such information be provided; however, the BVA often does not take such action unless the Veteran gives a specific reason to find that the examiner may not be competent.[211] Justice Gorsuch asked why an agency can create, or receive an imprimatur from the courts to create, a system with no statutory basis that impairs rather than assists the veterans that it serves.[212] He noted, citing *Mathis*, that many Federal Circuit Judges had questioned the propriety of the presumption, suggesting that perhaps the courts might soon find the presumption invalid, but, given the significance of the issue, he found that the Supreme Court should now reach the issue and not "wait in hope."[213]

In a "statement respecting the denial of certiorari" in which she indicated agreement with the Supreme Court's decision to deny certiorari, Justice Sotomayor disagreed with Justice Gorsuch on the ultimate question of whether certiorari should be granted, but expressed similar concerns.[214] Like Justice Gorsuch, she stressed the importance of the issue and noted the "catch-22" in which veterans are

202 *Id.*
203 *Id.* at 1356-59.
204 *Id.* at 1357.
205 *Id.* at 1359-60.
206 *Id.* at 1359.
207 *Id.* at 1360.
208 Mathis v. Shulkin, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from denial of certiorari).
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 *Id.* at 1994 (Sotomayor, J., respecting the denial of certiorari).

placed by the presumption.[215] Specifically, a veteran needs to know the medical examiner's credentials in order to raise an objection, but VA does not generally provide this information.[216] Given that the BVA sometimes requires a specific objection to competence, this results in a veteran having to "make a specific objection to an examiner's competence before she can learn the examiner's qualifications."[217] Agreeing with Justice Gorsuch as to the questionable nature of the presumption, Justice Sotomayor pointed out other problems with the system as it currently operates.[218] She noted that when VA denies benefits by relying on an examiner's opinion while at the same time denying access to that examiner's credentials, it "ensures that the presumption will work to the veteran's disadvantage."[219] Given that the Veteran in this case did not ask VA to provide the examiner's credentials, granting certiorari in this case would not allow review of both the presumption and how it works in practice at VA.[220] A more helpful case would be one in which VA denied benefits after refusing a request to provide the examiner's credentials.[221] Justice Sotomayor therefore concluded that waiting until a more appropriate case was presented to the Supreme Court would allow VA and the courts "to continue their dialogue over whether the current system for adjudicating veterans' disability claims can be squared with the VA's statutory obligations to assist veterans in the development of their disability claims."[222]

This set the stage for a new case in which VA and the courts could develop a comprehensive record on which a decision reviewing the presumption of competency could be made. That case was *Watson v. Shulkin*.[223] There, the CAVC requested that the parties each submit a supplemental memorandum of law answering four questions.[224] First, "[u]nder what circumstances is a claimant required to expressly raise the issue of an examiner's competence to the [BVA]?"[225] Second, "[w]here a claimant did not raise the issue of an examiner's competence, but the [BVA] requested a particular type of examination or opinion . . . what, if any, are the [BVA's] duties with respect to assessing the competence of the examiner who provided the resulting opinion?" and, "[f]or comparison purposes, how, if at all, are those duties different than in cases where the issue is expressly raised?"[226] Third, where the examiner specializes in a field different from the type of examination requested by the Board, does the examiner's opinion "show[] some irregularity that prevent[s] the presumption of competence from attaching, and raise[s] the issue of [the examiner's] competence such that the claimant is relieved of the obligation to expressly raise the issue?"[227] Fourth, "[w]hat is the effect of VA Adjudication Procedures Manual, M21-1, Part III, Subpart iv, ch. 3, § A.6, which instructs VA staff to '[r]equest a specialist examination only if it is considered essential for rating purposes,' and explains that, for example, '[a] specialist examination may be requested [] if an issue is unusually complex[,] if there are conflicting opinions or diagnoses that must be reconciled, or [] *based on a [BVA] remand*?"[228]

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215 *Id.*
216 *Id.*
217 *Id.* (quoting Mathis v. McDonald, 834 F.3d 1347, 1357 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing en banc)).
218 *Id.* at 1995.
219 *Id.*
220 *Id.*
221 *Id.*
222 *Id.*
223 No. 16-2035, 2017 U.S. App. Vet. Claims LEXIS 1310 (Sept. 15, 2017), *vacated and dismissed as moot sub nom.* Watson v. Wilkie, No. 16-2035, 2018 U.S. App. Vet. Claims LEXIS 1485 (Nov. 7, 2018).
224 *Id.* at *1.
225 *Id.* at *1-2.
226 *Id.* at *2.
227 *Id.* at *2 (citing *Wise v. Shinseki*, 26 Vet. App. 517, 526 (2014).
228 *Id.* at *2.

Significantly, the appellant contended in his memorandum that Justice Gorsuch and Judge Reyna were correct that the cases establishing the presumption of competence were wrongly decided, because there was neither a statutory or regulatory basis for such a presumption, nor a factual predicate as to the nature and efficacy of VA's process for selecting VA examiners.[229] However, the responses of both parties to the CAVC's questions provide insight as to how the presumption is applied and how it is viewed by those in favor of and against continuing it.

In response to the first question, the parties agreed that the above discussed cases require a claimant to "expressly raise the issue of an examiner's competence" before VA and that there is an exception to this rule that was applied in *Wise*.[230] The parties disagreed, however, as to the nature and scope of this exception. VA contended that the exception was a narrow one, which it characterized as existing "when the examiner expressly calls his or her own competence into question."[231] The appellant characterized the exception more broadly, arguing that the "presumption does not attach whenever there is some indication in the record that VA's process for selecting the examiner in a particular case was irregular."[232] According to the appellant, the listing by the physician in *Watson* of cardiologist itself raised the issue of the competence of the examiner.[233] VA disagreed, contending that the listing of a specialty does not raise the issue of the examiner's competence, but, rather, the issue is only raised by an examiner "expressly call[ing] her own qualifications into question so as to undermine the opinion."[234]

The parties similarly disagreed with regard to the second question, with VA contending that the fact that the BVA requested a particular type of examination or opinion did not alter the presumption of competence or the requirement that the claimant expressly raise the issue before VA.[235] The appellant countered that the claimant need not expressly raise the issue when the BVA requests an examination or opinion from an examiner with a specific specialty.[236] The appellant reasoned by analogy from *Mathews v. McDonald*,[237] where the BVA had instructed that an examination by three oncologists be conducted but the examination was in fact conducted by a single oncologist.[238] The CAVC held that the BVA was required to explain why the single oncologist opinion substantially complied with the remand instruction.[239] Thus, according to the appellant, once the BVA makes a determination that a particular type of examination is required, the claimant need not object when that type of examination was not provided.[240]

Similar arguments were made by the parties as to the third question, with the appellant contending that the face of the examination report can show irregularity if the examiner's specialty is different than the one requested by the BVA, and VA arguing that it cannot.[241] The appellant argued that VA's actions in requesting an examination or opinion by a specialist triggered the presumption of

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229 Appellant's Supplemental Memorandum of Law at 7 n.2, Watson v. Shulkin, No. 16-2035, 2017 U.S. App. Vet. Claims LEXIS 1310 (Sept. 15, 2017) [hereinafter Appellant's Supplemental Memorandum of Law].
230 Memorandum of Law of Appellee Secretary of Veterans Affairs at 2-3, *Watson*, No. 16-2035, 2017 U.S. App. Vet. Claims LEXIS 1310 [hereinafter Memorandum of Law of Appellee]; Appellant's Supplemental Memorandum of Law, *supra* note 225, at 5.
231 Memorandum of Law of Appellee, *supra* note 226, at 2-3, 8.
232 Appellant's Supplemental Memorandum of Law, *supra* note 225, at 5.
233 *Id.* at 6.
234 Memorandum of Law of Appellee, *supra* note 226, at 8.
235 *Id.* at 9.
236 Appellant's Supplemental Memorandum of Law, *supra* note 225, at 7.
237 28 Vet. App. 309 (2016)).
238 Appellant's Supplemental Memorandum of Law, *supra* note 225, at 7-8 (citing *Mathews*, 28 Vet. App. at 316-17).
239 *Id.*
240 *Id.* at 8-9.
241 *Id*. at 10; Memorandum of Law of Appellee, *supra* note 226, at 9-10.

regularity, which in turn required that the examination be performed by such a specialist even in the absence of a specific request by the claimant.[242] VA countered that the non-specialist's training as a general practitioner would render him or her "capable of providing comprehensive medical care, and . . . qualified through his or her education, training or experience to offer competent medical diagnoses, statements, or opinions. . . . To hold otherwise would create an illogical double-standard where the [BVA] would have to establish the competence of a specialist to conduct an examination in an unrelated field, but would not have to for a medical provider who does not provide any indication of his or her practice area."[243]

As to the fourth question, VA argued that not only did VA's Adjudication Manual (the Manual) not affect the requirement that a claimant challenge an examiner's competence before the agency, it bolstered the presumption of competence by ensuring that the examiners are in fact competent, both by requiring that specialist examinations are to be requested when considered essential to answer the questions posed and by permitting an examiner to ask for an opinion by a specialist if, in the opinion of the examiner, such would be necessary and appropriate to answer a particular question.[244] The appellant read the Manual to reinforce the principle that when the BVA requests an examination or opinion from a specialist, it must ensure that the request is complied with.[245] The appellant also emphasized that the Manual does not "establish a regular, consistent VA procedure for selecting examiners," because it only provides for specialist examinations in certain situations, giving adjudicators discretion in making such a determination in the absence of a Board remand order requiring a specialist.[246] Thus, the appellant implied, the Manual falls short in meeting the requirements for a presumption of regularity or competence, namely, that there be a "regular, consistent" procedure that can be relied on to allow for something to be presumed.[247]

Finally, the CAVC asked that VA describe its "usual process for selecting an examiner to perform a Compensation and Pension examination or provide medical opinion.[248] In response, VA explained that consistent with the VA Adjudication Manual and Office of Disability and Medical Assessment (DMA) Directive 1603, the local VA medical facility would schedule the examination based upon the specific examination certification required and the availability of a certified examiner, or qualified contract examiner if one was not available.[249] Generally, examiners were "selected to conduct examinations based on their certifications and availability to conduct the requested examination."[250] VA stated that "[e]very examiner must successfully complete a series of mandatory training courses and undergo a preceptorship" before the examiner may conduct an examination.[251] At a minimum, VA explained that "the pre-requisite training courses share accreditation" for several continuing education programs.[252] In addition, medical professionals "performing certain specialty examinations must successfully

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242 Appellant's Supplemental Memorandum of Law, *supra* note 225, at 10.
243 Memorandum of Law of Appellee, *supra* note 226, at 13-14.
244 *Id.* at 15-16.
245 Appellant's Supplemental Memorandum of Law, *supra* note 225, at 11.
246 *Id.*
247 *Id.*
248 *Watson*, No. 16-2035, 2017 U.S. App. Vet. Claims LEXIS 1310, at *2.
249 Memorandum of Law of Appellee, *supra* note 226, at 16.
250 *Id.* at 16-17.
251 *Id.* at 17.
252 *Id.*

complete additional training."[253] VA emphasized that "[t]he system is designed to ensure that medical examinations are conducted by qualified health care providers. Medical examiners are not assigned at random to perform examinations that may or may not have nexus to their training and qualifications. . . ."[254]

Unfortunately, after the memoranda were filed, Mr. Watson passed away. As counsel was unable to ascertain whether any eligible substitute existed, the CAVC dismissed the appeal, now titled *Watson v. Wilkie*.[255]

The debate over the presumption of competence then took an unexpected turn. A panel of the Federal Circuit and the Court each addressed the presumption of competence as if it were a relatively insignificant and noncontroversial rule.

In *Francway v. Wilkie*,[256] a panel of the Federal Circuit seemed to minimize the scope and significance of the presumption. There, the Veteran had not challenged the competence of the VA medical examiner before the BVA. On appeal, he contended that the presumption of competence was invalid, as it lacked a statutory basis and was inconsistent with VA law, specifically the duty to assist and the benefit of the doubt doctrine.[257] The Federal Circuit interpreted the Veteran's argument as a request for the panel to ask for en banc review to overturn the cases creating the presumption of competence.[258] The Federal Circuit declined to do so[259] because it found the presumption to be a limited one, "far narrower" than asserted, emphasizing the holdings of the above cases requiring that the veteran challenge the VA medical examiner's competence before the BVA and finding that once such a challenge is made, "the presumption has no further effect."[260] The Federal Circuit also stressed that VA agreed with this interpretation, indicating at oral argument that the presumption is not an evidentiary burden but merely a burden to request, and that once the veteran has done so, VA must respond and the BVA must make a decision on this question with adequate reasons or bases.[261] As the presumption did not create a greater burden on a veteran than the general requirement that he or she raise an issue in the first instance, the Federal Circuit held that the CAVC did not err in affirming the BVA's decision relying on the presumption of competence in the absence of a challenge to the VA medical examiner's competence.[262]

Thus, the *Francway* panel portrayed the presumption of competence as a limited mechanism consistent with others in VA law requiring the claimant to raise an issue before the BVA, without recognizing the sharp and passionate divisions among the Federal Circuit Judges in *Mathis* as to the nature, scope, and propriety of the presumption. Apparently recognizing this shortcoming in the panel decision, the Federal Circuit granted rehearing en banc for the limited purpose of adding a footnote to

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253 *Id.*
254 *Id.* at 18.
255 No. 16-2035, 2018 U.S. App. Vet. Claims LEXIS 1485 (Nov. 7, 2018), *vacating and dismissing as moot sub nom.* Watson v. Shulkin, No. 16-2035, 2017 U.S. App. Vet. Claims LEXIS 1310 (Sept. 15, 2017).
256 930 F.3d 1377 (Fed. Cir. 2019).
257 *Id.* at 1379.
258 *Id.*
259 The petition for a hearing en banc was referred to the circuit judges in regular active service and was denied. *See* Francway v. Wilkie, No. 2018-2136, 2018 U.S. App. LEXIS 37153 (Nov. 28, 2018) (per curiam). The later panel decision indicated that it construed the appellant's continued argument as to the illegitimacy of the presumption as a request for the panel to ask for an en banc hearing and overrule the cases upholding the presumption, and that it declined to do so. *Francway*, 930 F.3d at 1379.
260 *Francway*, 930 F.3d at 1381.
261 *Id.*
262 *Id.* at 1382.

the panel decision, overruling *Rizzo* and *Bastien* to the extent that they were inconsistent with the prior decision in *Francway*.[263] In *Rizzo* and *Bastien*, the Federal Circuit had seemed to place the burden on veterans to set forth specific reasons why the VA health care professional was not qualified to offer an opinion. The footnote overruling these cases was consistent with the *Francway* panel's statement that the presumption of competency "requires nothing more than is required for veteran claimants in other contexts–simply a requirement that the veteran raise the issue."[264] In other words, a veteran is required to make a general objection to the competence of the examiner rather than give a reason why he or she was is not competent. Further emphasizing its view as to the limited nature of the doctrine, the en banc court also expressed the view that the rule requiring veterans raise the issue of a medical examiner's competency before the Board should be referred to as a requirement rather than the presumption of competency.[265] Francway sought review by the Supreme Court, but his petition for a writ of certiorari was denied.[266] *Francway* was, like *Mathis*, a case in which the Veteran did not ask VA to provide the examiner's credentials, the denial was not surprising, with the Supreme Court more likely to grant certiorari in a case where VA denied benefits after declining a request to provide the examiner's credentials, as suggested by Justice Sotomayor in her statement in *Mathis*.[267]

Similarly, in *Fears v. Wilkie*,[268] a panel of the CAVC focused on the appellant's burden to raise the issue before VA. Summarizing the cases, the CAVC stated, "[w]e have never been called on to review whether there was sufficient evidence to rebut the presumption. Rather, our precedent has focused on cases where no objection to competence has been made below."[269] After reviewing the cases, culminating in *Parks* and a "bright line" application of the presumption that required even *pro se* litigants to raise some objection to the BVA in order for the presumption to be rebutted, the CAVC emphasized what it called the "*Wise* exception."[270] That exception relieves a claimant of his or her obligation to object to an expert's competence before VA and allows them to raise the matter for the first time before the CAVC on appeal.[271] In *Wise*, the exception applied because "the examiner expressly called her own qualifications into question."[272] In *Fears*, the Court held that the *Wise* exception was not for application because the only documents that were relied on to attack the competence of the VA medical examiner, documents showing misconduct by the examiner, were not in the record of proceedings before VA and not in VA's constructive possession.[273] Like the Federal Circuit, the CAVC stressed that had a proper objection been made, in this case as conceded by VA had the appellant submitted the documents to the BVA showing the examiner's misconduct, the BVA would likely have been required to address them even if the argument had not been expressly raised by the appellant.[274]

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263 Francway v. Wilkie, No. 2018-2136, 2019 U.S. App. LEXIS 30635 (Fed. Cir. Oct. 15, 2019) (Order); Francway v. Wilkie (*Francway II*), 940 F.3d 1304, 1307 n.1 (2019).
264 *Francway II*, at 1308.
265 *Francway II*, at 1307 n.1.
266 *Francway v. Wilkie*, 140 S. Ct. 2507 (2020).
267 *See supra*, at 29-30.
268 31 Vet. App. 308 (2019).
269 *Id.* at 314.
270 *Id.* at 316.
271 *Id.*
272 *Id.*
273 *Id.* at 318.
274 *Id.* at 319.

CONCLUSIONS

While the presumption of competence is a term of relatively recent vintage, the debate over its nature, scope, and propriety encompasses many issues of longstanding concern in veterans law, such as the proper role of physicians and the extent to which their expertise can be accepted in the absence of a challenge, with consideration of the due process rights of veterans in requiring that they make such a challenge. The role of physicians in the adjudication of veterans' benefits claims had already undergone significant changes when the VJRA accelerated this trend. Prior to the VJRA, the nature of boards, panels, and sections containing physicians changed over time as cases became more complex and VA decision making became more formalized. In response to the VJRA and the CAVC's holdings prohibiting Board Members from exercising their own medical judgment and requiring them to rely on independent medical evidence, the Board's Physicians Utilization Study Group anticipated the issues underlying the subsequent debates regarding the presumption of competence. The primary concern of the opponents of allowing physicians to remain on the BVA panels was the lack of ability to challenge the physician's opinion if it were simply an unidentified portion of the BVA decision. The supporters in contrast emphasized the inherent reliability of physicians ("trust and honor"). These were similar to the later arguments in support of and against the presumption of competence.

The VCAA's requirement that a VA examination or opinion be provided in many circumstances as part of VA's duty to assist, combined with the CAVC's interpretation allowing for the requirement to be easily triggered resulted in a massive increase in the number of such examinations and opinions. Perhaps inevitably, given the already large case load of the BVA and the CAVC, the courts sought to create a device whereby the veterans' benefits system, already burdened with backlogs and delays, would not grind to a halt in an effort to judge the competence of VA health care professionals in every case, but would also respect the due process rights of veterans to challenge this competence in appropriate cases.

The phrase presumption of competence, although new in *Harris*[275] and *Cox*[276], was characterized as an "implicit presumption of competency,"[277] reflecting the CAVC's view that the presumption was a longstanding, inherent part of the veterans' benefits system that was now being made explicit.

The debate over the presumption of competence of VA medical examiners has focused on at what point during an appeal a challenge to an examiner's competence must be asserted, and the specificity with which such a challenge must be made, and not necessarily whether these examiners should be presumed competent to offer an opinion in the first place. The early cases focused on the lack of a challenge to competence made before the BVA, applying the general principle that the appellant bears the burden of bringing errors to the attention of the adjudicator. The Federal Circuit in *Parks* noted both the specific objection requirement as well as the delays and backlogs that would be associated with repeated remands. In *Wise*, *Nohr*, and *Matthews*, the courts found exceptions to the requirement that the appellant specifically and explicitly challenge the competence of a VA medical examiner, where the examiner herself raised issues as to her own competence, where the CV of the examiner and other information was requested, and where the BVA had remanded the claim with instructions to obtain an opinion from a specific group of physicians, instructions that ultimately were not followed.

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[275] No. 03-1532, 2006 U.S. App. Vet. Claims LEXIS 1367 (Nov. 21, 2006).
[276] 20 Vet. App. 563.
[277] 2006 U.S. App. Vet. Claims LEXIS 1367, *7.

But the battle lines were drawn and the underlying issues comprehensively debated in *Mathis*. The supporters of the presumption stressed its role as one part of a long and complex process of adjudicating veterans claims, and placed the burden on the veteran to challenge the competence of the health care professional, and also rhetorically placed the burden on those seeking to overturn the presumption to say how it would work in a system with millions of examinations per year. The opponents found no basis for the presumption in the first place, noting its absence from the relevant statutes and regulations and contending it is an unwarranted extension of a presumption of regularity designed for matters more procedural and ministerial than the offering of a substantive medical opinion. They also argued that the burdens on VA would not be substantially increased as part of a system in which they were already required to give significant assistance to veterans. More significantly, they continued the longstanding due process argument, noting the "catch-22" in which veterans were placed by requiring them to affirmatively challenge the competence of the health care professional with information that they could only obtain as a result of such a challenge. These arguments were echoed by the parties in *Watson* in response to the CAVC's questions, which were designed to canvas the opinions of supporters and detractors of the presumption as to how it should operate in practice.

Will another case challenging the presumption of competence reach the Supreme Court? The dissent of Justice Gorsuch and statement of Justice Sotomayor suggest that it will. Justice Sotomayor, while not as eager as Justice Gorsuch to decide the issue, shared many of his concerns about the propriety of the presumption and the system underlying it, and suggested only that the dialogue between the courts and VA continue as more appropriate cases for review of the presumption come before the courts.

The recent decisions in *Francway* and *Fears* by the Federal Circuit and the CAVC, respectively, seem to reflect a lack of eagerness by those courts for the issue to return to the Supreme Court. These decisions minimized the significance of the presumption by characterizing it as a narrow, procedural hurdle easily overcome by an appellant's challenge before the BVA that would shift the burden to VA to establish the competence of the VA medical examiner. Some legal commentators have a different opinion. In a recent Note, Chase Cobb forcefully argues that the presumption is a substantive rule that shields VA's disability benefits system from judicial review, protects incompetent medical examiners, contravenes veterans' benefits statutes as well as the non-adversarial and pro-claimant nature of the veterans' benefits system, and violates the Fifth Amendment's Due Process Clause.[278] He posits that this problem has a simple solution, based on Judge Reyna's proposal in *Mathis*: eliminating the presumption and requiring VA to provide evidence of the examiner's qualifications by attaching the examiner's CV to the report and if necessary having the examiner indicate why he or she is qualified.[279] A majority of the Federal Circuit and Court do not seem to share this view of the presumption's nefarious consequences or the ease with which the proposed solution could be implemented. Whether a majority of the Supreme Court would agree if the merits of the presumption were to come before it remains to be seen. It is our view that an understanding of the history and evolution of the role that VA physicians have played in VA's disability benefits adjudication process can inform and assist both sides of the debate.

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[278] Chase Cobb, Note, *For Him Who Shall Have Borne the Battle: How the Presumption of Competence Undermines Veterans' Disability Law*, 25 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 577, 595-603 (2019).
[279] *Id.* at 615.