
March 2016

Is the Veterans' Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?

Charles G. Mills

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Administrative Law Commons](#), and the [Courts Commons](#)

Recommended Citation

Mills, Charles G. (2016) "Is the Veterans' Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?," *Touro Law Review*. Vol. 17: No. 4, Article 2. Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol17/iss4/2>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

IS THE VETERANS' BENEFITS JURISPRUDENCE OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT FAITHFUL TO THE MANDATE OF CONGRESS?

*Charles G. Mills:*¹

I. BACKGROUND

Since the First Session of the First Congress in 1789, veterans' pensions have been part of American Law.² In 1792, Congress gave the United States District Court the power to determine eligibility for veterans' pensions.³ The judges who had to award these pensions found it was an unconstitutional delegation of power to make this a judicial function, and precluded themselves from the process.⁴ In reaction, Congress passed a series of statutes that limited judicial review of these claims, thus making the handling of veterans' claims a purely administrative function.⁵

The early systems of payments to veterans following the Revolutionary War and Civil War were full of abuses.⁶ By the late Nineteenth Century the cost of providing benefits to Veterans

¹ B. A. Yale University, 1962; J. D. Boston College Law School, 1967; LL.M. Touro College, 2002; Judge Advocate, The American Legion, Department of New York. The author wishes to acknowledge the encouragement and advice of Hon. George C. Pratt in the preparation of this article.

² Ch. XXIV of the 1st Sess. of the 1st Cong., 1 Stat. 95 (1789); Ch. XXVII of the 2d Sess. of the 1st Cong., 1 Stat. 129 (1790); Ch. XXIV of the 3d. Sess. of the 1st Cong., 1 Stat. 218 (1791).

³ Chapter XI of the 1st Sess. of the Second Congress, 1 Stat. 243 (1792).

⁴ Hayburn's Case, 2 U.S. 409, 410 (1792); Remarks of Congressman Sonny Montgomery, Second Judicial Conference of the Court of Appeals for Veterans Claims, 6 Vet. App. at LXXXVIII.

⁵ WILLIAM F. FOX, JR., THE UNITED STATES COURT OF VETERANS APPEALS: AN ANALYSIS OF THE JURISPRUDENCE, ORGANIZATION, AND OPERATION OF THE NEWEST ARTICLE ONE COURT 5-6 (Paralyzed Veterans of America 2d ed. 1998, Pre-Release Version) (on file with the author); Remarks of Congressman Sonny Montgomery, Second Judicial Conference of the Court of Appeals for Veterans Claims, 6 Vet. App. at LXXXVII - IX.

⁶ MICHAEL J. BENNETT, WHEN DREAMS CAME TRUE 36-41 (1996).

sometimes exceeded one third of the Federal budget.⁷ Reeling from this drain on the national treasury, and in reaction to the history of blatant abuse, the government drastically reduced pensions and benefits to World War I veterans.⁸ Following World War I, the veterans who had served their country, and were destitute as a result of the Depression, marched on Washington, D.C. demanding the “bonuses” they had been promised for their service.⁹ The impression the “Bonus March” left on America was profound, for even before the end of World War II, Congress was heatedly debating what type of benefits this new generation of veterans would come home to.¹⁰

Following World War II, the “G. I. Bill of Rights”,¹¹ which greatly expanded Veterans’ benefits, was passed into law. The G.I. Bill was an omnibus measure of large proportion introduced by the American Legion,¹² and lobbied through Congress by strong public opinion.¹³ The Bill provided for disability benefits, unemployment compensation, education funding, housing assistance, low-interest loans and medical benefits.¹⁴

The problem regarding the administration of these benefits, however, still remained. Since the initial holdings of the judiciary, that it was unconstitutional to have that branch administer veterans’ claims, Congress lacked the necessary impetus to change the way the system worked.¹⁵ However, as a

⁷ *Id.* at 40-41; Public Exhibits of The Department of Veterans’ Affairs; *Cf.* Proceedings of the Sixth Judicial Conference of the U. S. Court of Appeals for Veterans’ Claims, 15 Vet. App. CXXXVI to CXXXIX.

⁸ BENNETT, *supra* note 6, at 60-61.

⁹ *Id.* at 59-63.

¹⁰ *Id.* at 63-64, 81-90.

¹¹ Servicemen’s Readjustment Act of 1944, June 24, 1944, ch. 268, 58 Stat. 284 (codified at 38 U.S.C. § 101 *et seq.*).

¹² The American Legion is an organization of U.S. veterans of war. It was chartered by Congress in 1919 as a community-service organization with the purpose of helping American veterans and their families as well as American children. [http:// www.legion.org](http://www.legion.org).

¹³ BENNETT, *supra* note 6, at 80-81, 88.

¹⁴ *Id.* at 137.

¹⁵ FOX, *supra* note 5, at 1.

result of a growing pressure from veterans and veterans' organizations, who perceived too much agency discretion, and enormous case by case discrepancy among the Veterans' Administration's processing of claims,¹⁶ Congress enacted the Veterans Judicial Review Act.¹⁷ The new legislation created the Court of Veterans' Appeals (now known as the Court of Appeals for Veterans' Claims).¹⁸ Upon adoption of the Veterans Judicial Review Act on August 16, 1989, for the first time there was to be judicial review of administrative action on the claims of veterans and their survivors, and precedential case law on veterans' benefits.¹⁹ In addition to giving the Court of Appeals for Veterans' Claims the jurisdiction to review agency decisions, the Act gives the Court of Appeals for Veterans' Claims the power to issue writs of mandamus to compel the Secretary of Veterans' Affairs to act in compliance with its duties.²⁰ On January 22, 1990, the Court of Veterans' Appeals decided *Matter of Quigley*,²¹ the beginning of modern case law concerning benefits for veterans and their survivors.

The Veterans' Judicial Review Act also gave the Court of Appeals for the Federal Circuit ("Federal Circuit") the power to review certain decisions of the Court of Veterans' Appeals.²² On February 13, 1991, the Federal Circuit disposed of the first case it heard with respect to an appeal relating to a veteran claim, by affirming the Court of Appeals for Veterans' Claims in *Hill v Derwinski*.²³ With the exception of one U. S. Supreme Court

¹⁶ *Id.* at 14-15.

¹⁷ Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified in scattered sections of Title 38).

¹⁸ *Id.* at § 301, § 4051 (subsequently renumbered to § 7251) states: "It is hereby established under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals."

¹⁹ *Matter of Wick*, 40 F.3d 367, 368-69 (Fed. Cir. 1994).

²⁰ Pub. L. No. 100-687, 102 Stat. 4105, sec. 301, § 4061(a)(2) (subsequently renumbered to § 7252(a)); *see also Cox v. West*, 149 F.3d 1360, 1362 (Fed. Cir. 1998).

²¹ 1 Vet. App. 1 (1989).

²² Pub. L. No. 100-687, 102 Stat. 4105, sec. 301, § 4092 (subsequently renumbered to § 7292).

²³ 928 F.2d 411 (Fed. Cir. 1991).

affirmance in the case of *Brown v. Gardner*,²⁴ the case law on Veterans' benefits consists entirely of opinions and decisions of the Court of Appeals for Veterans' Claims and the Federal Circuit.

II. IS THE FEDERAL CIRCUIT DOING THE JOB CONGRESS INTENDED?

Most commentators feel that the function of the newly established veterans' courts was to serve the veteran better, and to see that justice was dispensed fairly to all deserving veterans. The Courts, however, are also charged to keep in mind national economic interests. "Congress clearly demonstrated its commitment to accommodating the conflicting interests of society and advancing justice."²⁵ The Federal Circuit is an added check on the new system. This Circuit handles appeals from many different Federal agencies, and cannot issue an opinion in every veteran appeal. The cases in which it does choose to issue an opinion become significant guidance for the law of veterans' benefits. In 1994, Chief Judge Glen Archer of the Federal Circuit said:

[E]very veteran's appeal with the Federal Circuit is important but, because of our limited jurisdiction over the Court of Veterans Appeals, relatively few of the appeals can be reached on the merits. While the Federal Circuit does not issue very many precedential opinions in the area of veterans' law, those that we issue are usually quite important. I suspect that this is what Congress intended us to do²⁶

²⁴ 513 U.S. 115 (1994).

²⁵ Remarks of Congressman Sonny Montgomery, Second Judicial Conference of the Court of Appeals for Veterans' Claims, 6 Vet. App. at XCI.

²⁶ 8 Vet. App. at CXCI (1996).

In 1998, Professor William F. Fox²⁷ opined that as a practical matter, the review of a veteran's claim in most cases will end with the Court of Appeals for Veterans' Claims.²⁸ Professor Fox noted that the Court of Appeals for Veterans' Claims heard over 10,000 cases in less than ten years, while in that same time frame, the Federal Circuit has decided only a small number of these claims with an opinion.²⁹ He went on to say that "[t]ypically, the Circuit disposes of most appeals from the CVA [Court of Appeals for Veterans' Claims] by either affirming the CVA or dismissing the appeal. It issues comparatively few full opinions; and reversals of the CVA, while not unheard of, are relatively rare."³⁰

However, within two years, Professor Fox had completely changed his opinion regarding the effectiveness of the Federal Circuit in veterans' appeals. On September 18, 2000, at the Sixth Judicial Conference of the Court of Appeals for Veterans' Claims, he analyzed the reversals of that court by the Federal Circuit in a power point presentation.³¹ In a four-year period, encompassing 1989 to 1993, three decisions of the Court of Appeals for Veterans' Claims had been vacated without opinion and there had been no reversals.³² The following year, from mid-1993 to mid-1994, there was one published opinion of a reversal and one opinion vacating an order below.³³

²⁷ Professor William Fox, Jr. is a Professor of law at Columbus School of Law at The Catholic University of America. He can be reached at fox@law.edu.

²⁸ FOX, *supra* note 5, at 182.

²⁹ *Id.*

³⁰ *Id.*

³¹ 15 Vet. App. CCLVI – CCLXVI (2000).

³² The period corresponds to Volumes 1 through 5 of the Veterans Appeals Reports, Volumes 928 through 999 of the Federal Reports, Second Series, some table dismissals, and some cases affirmed from Volume 1 of the Federal Reports Third Series.

³³ Corresponding to Volume 6 of the Veterans Appeal Reporter and Volumes 6 though 27 of the Federal Reporter, Third Series.

However, there was a marked change in these numbers in the following six years. From mid-1994 to mid-2000, there were the following number of reversals or vacatur:³⁴

Year	Vet. App.	Fed. Rep. 3d	Number rev'd or vacated	Number aff'd or dismissed
1994-1995	7	28-52	11	98
1995-1996	6	52-74	1	54
1996	8	74-102	2	39
1997	10	102-126	6	60
1998	11	131-156	9	45
1998-1999	12	156-168	5	21

Professor Fox's analysis ended part way through the year 2000, but, using his method, the full year would be:

Year	Vet. App.	Fed. Rep. 3d	Number rev'd or vacated	Number aff'd or dismissed
1999-2000	13	169-223	23	153

Professor Fox's study shows that in the period under consideration, the cases affirmed and dismissed by the Federal Circuit outnumbered the reversals and vacatur many times over.³⁵ While his study tells us nothing qualitatively about the appeals to the Federal Circuit affirmed or dismissed without opinion, order, or other explanation of the Court's reasoning, it does show that sometime in or around 1994 there was a dramatic shift in the way the Federal Circuit handled veterans' benefits cases; from a passive role toward a more active role.³⁶ He analyzed the twenty-three reversals with full opinions from 1994

³⁴ Professor Fox worked from the Veterans Appeals Reporter, which, after Volume 11, did not report all table decisions. For the sake of consistency, I have worked from the Federal Reporter volumes indicated, and have included all table dispositions.

³⁵ 15 Vet. App. CCLXIII.

³⁶ *Id.* at CCLXIV.

to July, 2000 and determined that nineteen of these decisions were favorable to veterans, two were adverse to veterans, and two were neutral.³⁷

It may be surprising that an analysis was conducted strictly in terms of whether the published opinions favored or disfavored veterans. At first glance, that may seem a little like analyzing the work of a court to see if it is pro-plaintiff, pro-prosecution, or pro-defendant. In this circumstance, however, the analysis is justified, for "Congress has passed statutes and the agency regulations to assist veterans in establishing facts sufficient to support well-grounded [claims] and give them every benefit that can be supported in law."³⁸ An inquiry into whether the Court is following this Congressional intent is appropriate.

During the 1990s, the Federal Circuit decided at least 536 Veterans' benefits cases and published opinions in only fifty-five of them.³⁹ The other 481 cases, for the most part, consist of cases in which the Court either lacked jurisdiction or felt that the appellant's contentions lacked enough merit to warrant an opinion.⁴⁰ In less than two years the Federal Circuit has published thirty-one opinions in veterans' cases.⁴¹ As of September 2000, these eighty-six cases along with the U.S. Supreme Court's affirmation in *Brown* constitute the entire body of precedential case law in Article III courts concerning veterans' benefits, pensions, healthcare and claims brought by survivors of veterans. This article will explore the question of how faithful those eighty-six published decisions are to the intent of Congress.

³⁷ *Id.*

³⁸ *Collaro v. West*, 136 F.3d 1304, 1309 (Fed. Cir. 1998).

³⁹ These cases appear in the Federal Reporter, Second Series (F.2d) at volumes 928 through 999, and in the Third Series (F.3d) at volumes 1 through 155.

⁴⁰ Many of these cases were brought by *pro se* claimants.

⁴¹ These cases appear in the Federal Reporter, Third Series (F.3d) at volumes 158 through 223.

III. JURISDICTION

A. *Jurisdiction of the Federal Circuit*

The Federal Circuit was created as a court of limited appellate jurisdiction. 38 U.S.C. § 7292 (d)(2) limits the jurisdiction of the Federal Circuit as follows: “Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review: (A) a challenge to a factual determination; or (B) a challenge to a law or regulation as applied to the facts of a particular case.”⁴²

38 U.S.C. § 7292 (a) gives the Federal Circuit jurisdiction to review decisions of the Court of Appeals for Veterans’ Claims “with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities . . .) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision.”⁴³

i. *Denial of Review Based on a Question of Fact*

Early in the history of its Veterans’ claims jurisprudence, the Federal Circuit decided that its jurisdiction would be “strictly construed in harmony with [its] Congressional mandate.”⁴⁴ Typically, a factual determination is one made by the Secretary of Veterans’ Affairs. For instance, determinations that a medical condition is or is not “service connected” and determinations denying or granting an increased valuation for a medical condition are the kind of factual determinations the Federal Circuit will not review.⁴⁵ In *Livingston v. Derwinski*, the Court held:

⁴² 38 U.S.C. § 7292(d)(2) (1994 & Supp. IV 1998).

⁴³ *Id.* at § 7292(a).

⁴⁴ *Livingston v. Derwinski*, 959 F.2d 224, 225 (Fed. Cir. 1992).

⁴⁵ *Johnson v. Derwinski*, 949 F.2d 394 (Fed. Cir. 1991), *cert. denied*, 503 U.S. 990 (1992).

Livingston's case rests solely on the alleged misinterpretation of the legal effect of the board's decision. By this, he confirms that the case is not within our jurisdiction. The interpretation of the board's decision is unquestionably a matter of law, but that is not enough to bring the appeal within this court's statutory jurisdiction. In the absence of a challenge to the validity of a statute or regulation, or the interpretation of a constitutional or statutory provision or regulation, we have no authority to consider the appeal.⁴⁶

Certain cases seem to call for determinations on questions of law, and yet the Federal Circuit has rejected review of these cases, classifying the appeals as questions of fact. For instance, the Federal Circuit will not review determinations that a claim is not well grounded.⁴⁷ Further, a claim that the Secretary of Veterans' Affairs ("Secretary") failed to follow departmental regulations in refusing a new medical examination to a veteran, that such refusal was clear and unmistakable error, and that such refusal violated the Secretary's duty to assist the veteran are factual claims over which the Federal Circuit has found it lacks jurisdiction.⁴⁸ Similarly, a determination by the Court of Veterans' Appeals interpreting the Equal Access to Justice Act⁴⁹ and finding that the position of the Secretary was substantially justified are determinations of fact that the Federal Circuit will not review.⁵⁰

⁴⁶ *Livingston*, 959 F.2d at 226.

⁴⁷ *Woodson v. Brown*, 87 F.3d 1304, 1307 (Fed. Cir. 1996).

⁴⁸ *Glover v. West*, 185 F.3d 1328, 1332-33 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000).

⁴⁹ 28 U.S.C. § 2412. The Equal Access to Justice Act was made applicable to veterans' cases through The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, 4513, sec. 506, 26 U.S.C. § 2412(d)(2)(F).

⁵⁰ *Stillwell v. Brown*, 46 F.3d 1111, 1113 (Fed. Cir. 1995); *Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999); *Clemmons v. West*, 206 F.3d 1401, 1404 (Fed. Cir. 2000).

What the Federal Circuit considers to be or not to be a factual issue is far from obvious. In *Futrell v. Brown*,⁵¹ the veteran had failed to prove his case in several administrative hearings.⁵² In one of those hearings, the hearing officer appeared to concede (at least *arguendo*) the truth of a statement by a doctor that the veteran had been treated by this doctor many years earlier.⁵³ The Board of Veterans' Appeals found the doctor's statement unpersuasive.⁵⁴ On appeal to the Federal Circuit, the majority dismissed the appeal as being one only of fact, over which the Court lacked jurisdiction.⁵⁵ The dissent maintained that the case should be retained to determine, as a matter of law, the question of whether the veteran was entitled to notice that the Board of Veterans' Appeals might reverse the concession of the hearing officer, a question not considered by the Court of Appeals for Veterans' Claims.⁵⁶

ii. *Issues Not Raised Below*

The Federal Circuit will not consider arguments never raised below, including issues of statutory interpretation never raised below.⁵⁷ In *Boggs v. West*,⁵⁸ the Court stated that it does not have jurisdiction to reverse the decisions of the Court of Appeals for Veterans' Claims where arguments made by the appellant were "ignored or silently rejected" and the arguments were not relied on by that court in making its decision.⁵⁹ The dissent in *Boggs* argued that the Federal Circuit should review statutory interpretations made by the court below, even if they were not at issue below.⁶⁰ Also, the Court has held that the Court

⁵¹ 45 F.3d 1534 (Fed. Cir. 1995).

⁵² *Id.* at 1539.

⁵³ *Id.* at 1534, 1537.

⁵⁴ *Id.* at 1538.

⁵⁵ *Id.* at 1535.

⁵⁶ *Futrell*, 45 F.3d at 1540 (Newman, J., dissenting).

⁵⁷ *Boggs v. West*, 188 F.3d 1335 (Fed. Cir. 1999).

⁵⁸ *Id.*

⁵⁹ *Id.* at 1338.

⁶⁰ *Id.* at 1340 (Newman, J., dissenting).

of Appeals for Veterans' Claims need not and ordinarily should not consider an issue raised for the first time in a reply brief.⁶¹

In the case of *Sims v. Apfel*,⁶² a case dealing with Social Security Benefits administration, the Supreme Court held that exhaustion of administrative remedies preserves judicial review of the claims at issue.⁶³ However, in *Belcher v. West*, the Federal Circuit did not interpret *Sims* to mean that appellate jurisdiction is extended to issues never raised below in veterans' cases.⁶⁴ Contrastingly, the Federal Circuit has vacated at least one decision of the court below when that court refused to hear a claim not raised in the administrative proceedings.⁶⁵ The Federal Circuit remanded the case for an exercise of discretion by the court below on the question of whether an exhaustion of remedies is required on the facts of the case.⁶⁶

iii. *Statutory Interpretation*

While the Federal Circuit has jurisdiction to review decisions with respect to the validity or interpretation of a regulation or statute, the Court will not interpret a Department of Veterans' Affairs regulation promulgated during the pendency of the appeal, even if that regulation could be construed as conferring the benefits sought in the appeal.⁶⁷ The Federal Circuit will, however, review the failure of the court below to exercise its discretion to recall its judgment, and will remand when a change in the law creates an argument the veteran failed to raise.⁶⁸

⁶¹ *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999).

⁶² 530 U.S. 103 (2000).

⁶³ *Id.* at 112.

⁶⁴ 214 F.3d 1335, 1337 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001). It is not clear that *Sims v. Apfel* applies outside of the Social Security Benefits context. See O'Reilly, *infra* note 278 at 236.

⁶⁵ *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000).

⁶⁶ *Id.* at 1379.

⁶⁷ *Boyer v. West*, 210 F.3d 1351, 1354-55 (Fed. Cir. 2000) (stating that it will not do so when those benefits are being denied based upon a statute).

⁶⁸ *Maggitt*, 202 F.3d at 1379-80.

The Federal Circuit will not review determinations that the evidence in a specific case was or was not sufficient to overcome a presumption.⁶⁹ On the other hand, the Federal Circuit court has held that whether a veteran's application meets the requirements of the Equal Access to Justice Act,⁷⁰ is within its jurisdiction.⁷¹ If the court below applied the wrong interpretation of the Equal Access to Justice Act, the Federal Circuit is without jurisdiction to apply the correct interpretation to the facts, but will remand the case so the court below can do so.⁷² Contrastingly, if the Court of Appeals for Veterans' Claims has not misinterpreted the Equal Access to Justice Act, the Federal Circuit will not review a denial of attorney's fees or review a claim that such denial constituted the deprivation of property without due process.⁷³ By a two-to-one decision, the Federal Circuit held in *In re Bailey* that it has jurisdiction to review a claim by an attorney that he was deprived of a Constitutional right in disciplinary proceedings before the Court of Appeals for Veterans' Claims.⁷⁴ The dissent in *Bailey* argued that the majority went beyond the Court's jurisdiction, which is only to review the validity and interpretation of statutes and regulations.⁷⁵

In *Yeoman v. West*,⁷⁶ the Federal Circuit found the necessary questions of law to sustain its own jurisdiction.⁷⁷ The veteran had been injured in an automobile accident while on active duty. At the time of the accident, he had an elevated blood alcohol content.⁷⁸ On appeal before the Federal Circuit, the only issue was whether the Court of Appeals for Veterans' Claims made any legal errors in affirming the Board of Veterans'

⁶⁹ *Harris v. West*, 203 F.3d 1347, 1351 (Fed. Cir.), *cert. denied*, 530 U.S. 1276 (2000); *Belcher*, 214 F.3d at 1337-38.

⁷⁰ 28 U.S.C. § 2412.

⁷¹ *Bazalo v. West*, 150 F.3d 1380, 1382 (Fed. Cir. 1998).

⁷² *Bowey v. West*, 218 F.3d 1373, 1378 (Fed. Cir. 2000).

⁷³ *Pierre v. West*, 211 F.3d 1364, 1366-67 (Fed. Cir. 2000).

⁷⁴ 182 F.3d 860, 865 (Fed. Cir. 1999).

⁷⁵ *Id.* at 874-75 (Schall, J. dissenting).

⁷⁶ 140 F.3d 1443 (Fed. Cir. 1998).

⁷⁷ *Id.* at 1446.

⁷⁸ *Id.* at 1444-45.

Appeals decision that the veteran's injuries were the result of his willful misconduct.⁷⁹

By casting the issue as one of statutory interpretation, in *Rodriguez v. West*,⁸⁰ the Federal Circuit held that it had jurisdiction over the claim asserted by a veteran's widow, who was seeking to start her benefits on the day of her initial oral claim.⁸¹ The Secretary of Veterans' Affairs had initially argued that the Court lacked jurisdiction because the claim involved a question of the application of the law to the particular facts. At oral argument, however, the Secretary retreated from its initial position. The Federal Circuit held the case to be one of an interpretation of a regulation, and further held that all veterans' claims must be in writing.⁸²

Whether evidence is sufficient and consistent with the circumstances, conditions, or hardships of the veteran's service and whether the contrary evidence is clear and convincing are questions of interpretation of 38 U.S.C. § 1154(b) and are, therefore, questions of law reviewable by the Federal Circuit, not questions of fact.⁸³ For example, by statute, combat veterans are entitled to present lay proof that their disabilities are service connected, and if such proof is satisfactory and consistent with the circumstances, conditions, or hardships of the veteran's service, it can be rebutted only by clear and convincing evidence.⁸⁴ Additionally, the Federal Circuit has found it has the jurisdiction to determine whether the court below properly interpreted a statute regarding that court's role in a judge recusal challenge.⁸⁵

⁷⁹ *Id.* at 1446.

⁸⁰ 189 F.3d 1351 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1004 (2000).

⁸¹ *Id.* at 1352.

⁸² *Id.* at 1351.

⁸³ *Collete v. Brown*, 82 F.3d 389, 392 (Fed. Cir. 1996).

⁸⁴ 38 U.S.C. § 1154(b) (1994).

⁸⁵ *Aronson v. Brown*, 14 F.3d 1578, 1579 (Fed. Cir. 1994), *cert. denied*, 517 U.S. 1209 (1996).

iv. Finality of the Decision Below

The Federal Circuit may only review claims finally determined by the court below.⁸⁶ In *Travelstead v. Derwinsk*⁸⁷ and *Smith v. Brown*⁸⁸ the Court held that a remand by the Court of Appeals for Veterans' Claims with directions to re-determine the matter under a legal standard contrary to that used by the Secretary of Veterans' Affairs in originally determining the claim has the finality necessary to confer jurisdiction on the Federal Circuit.⁸⁹ In *Winn v. Brown*⁹⁰ and *Grantham v. Brown*,⁹¹ *Travelstead* was interpreted as referring only to those cases in which the remand disposes of an important legal issue that would be effectively unreviewable at a later stage of litigation.⁹² However, in *Jones v. West*,⁹³ *Travelstead* was interpreted as conferring finality on all remands for further proceedings in accordance with an interpretation of a statute made by the Court of Appeals for Veterans' Claims in the case.⁹⁴ If, however, the remand simply directs the Secretary of Veterans' Affairs to consider additional evidence, it lacks the finality necessary for review by the Federal Circuit.⁹⁵

v. Direct Review of Rules and Regulations

The Federal Circuit has the power to review the rules and regulations of the Secretary of Veterans' Affairs.⁹⁶ Proceedings for such review are brought directly in the Federal Circuit unless they are in connection with an appeal over which the Court of

⁸⁶ 38 U.S.C. § 7292(a) (1994).

⁸⁷ 978 F.2d 1244 (Fed. Cir. 1992).

⁸⁸ 35 F.3d 1516 (Fed. Cir. 1994) *rev'd on other grounds by statute as stated in* *Lynch v. Gober*, 11 Vet. App. 27 (1997).

⁸⁹ *Travelstead*, 978 F.2d at 1248; *Smith*, 35 F.3d at 1517.

⁹⁰ 110 F.3d 56 (Fed. Cir. 1997).

⁹¹ 114 F.3d 1156 (Fed. Cir. 1997).

⁹² *Winn*, 110 F.3d at 57; *Grantham*, 114 F.3d at 1159.

⁹³ 136 F.3d 1296 (Fed. Cir.), *cert. denied*, 525 U.S. 834 (1998).

⁹⁴ *Id.* at 1299-99 (interpreting 38 U.S.C. § 7292 (1994)).

⁹⁵ *Caesar v. West*, 195 F.3d 1373, 1374-75 (Fed. Cir. 1999).

⁹⁶ 38 U.S.C. § 502, § 7252 (1994).

Appeals for Veterans' Claims has jurisdiction; in which case the appeal is brought in that court.⁹⁷ Also, if the veteran's claim is decided based upon an opinion of the General Counsel to the Secretary of Veterans' Affairs and the opinion is precedential, the opinion constitutes rule making, and the veteran can by-pass the Court of Appeals for Veterans' Claims and appeal directly to the Federal Circuit.⁹⁸

B. Jurisdiction of the Court of Appeals for Veterans' Claims

Many of the early veterans' cases decided in the Federal Circuit were concerned with the jurisdiction of the Court of Appeals for Veterans' Claims.⁹⁹ In *Machado v. Derwinski*,¹⁰⁰ *Espelita v. Derwinski*,¹⁰¹ *Butler v. Derwinski*,¹⁰² *Mayer v. Brown*,¹⁰³ and *Cummings v. West*,¹⁰⁴ the Federal Circuit affirmed the dismissal of a number of untimely appeals to the court below.¹⁰⁵ However, *Machado*, *Butler*, *Mayer*, and *Cummings*

⁹⁷ *Id.* at § 502.

⁹⁸ *Splane v. West*, 216 F.3d 1058, 1062 (Fed. Cir. 2000).

⁹⁹ *Albun v. Brown*, 9 F.3d 1528, 1530 (Fed. Cir. 1993) (holding that the challenge did not address constitutional issues or statutory, regulatory or constitutional interpretation, and therefore does not fall within the jurisdiction of that court); *Espelita v. Derwinski*, 958 F.2d 1052, 1053 (Fed. Cir.), *cert. denied*, 506 U.S. 985 (1992) (holding that the Court of Veterans Appeals correctly dismissed, for lack of jurisdiction, an appeal that was filed past the 120 day limit) *overruled by* *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998); *Nagac v. Derwinski*, 933 F.2d 990, 990 (Fed. Cir.), *cert. denied*, 502 U.S. 943 (1991) (holding that the Court of Veterans Appeals correctly found that it lacked jurisdiction because the notice of disagreement was filed prior to November 18, 1988); *Machado v. Derwinski*, 928 F.2d 389, 390 (Fed. Cir. 1991) (holding that the Veterans Court correctly determined appeals filed past the 120 day limit could not be entertained by that court) *overruled by* *Bailey*, 160 F.3d 1360.

¹⁰⁰ 928 F.2d 389.

¹⁰¹ 958 F.2d 1052.

¹⁰² 960 F.2d 139 (Fed. Cir. 1992), *overruled by* *Bailey*, 160 F.3d 1360.

¹⁰³ 37 F.3d 618 (Fed. Cir. 1994), *overruled by* *Bailey*, 160 F.3d 1360.

¹⁰⁴ 136 F.3d 1468 (Fed. Cir.), *cert. denied*, 524 U.S. 954 (1998), *overruled by* *Bailey*, 160 F.3d 1360.

¹⁰⁵ *Machado*, 928 F.2d at 390; *Espelita*, 958 F.2d at 1053; *Butler*, 960 F.2d at 142; *Mayer*, 37 F.3d at 620; *Cummings*, 136 F.3d at 1470.

were later all expressly overruled in an *en banc* opinion in *Bailey v. West*,¹⁰⁶ which held that the time limit for appeals to the Court of Appeals for Veterans' Claims is subject to equitable tolling.¹⁰⁷ In *Albun v. Brown*, however, the only issue was whether the court below was correct, as a matter of fact, that the notice of appeal had not been filed when the appellant said it had, and the Federal Circuit dismissed the appeal as being a question of fact.¹⁰⁸

Although the Court of Appeals for Veterans' Claims is prohibited by statute from reviewing schedules of ratings and the action of the Secretary of Veterans' Affairs in adopting or revising them,¹⁰⁹ it does have jurisdiction to set aside changes in those schedules adopted through procedures that violate statutory law.¹¹⁰ Furthermore, the Federal Circuit has held that the Court of Appeals for Veterans' Claims has no jurisdiction over a fee dispute between a veteran's attorney and the Secretary of Veterans' Affairs because appeals of this type are not appeals from the Board of Veterans' Appeals, one of the statutory requirements of jurisdiction.¹¹¹

While jurisdiction over an appeal to the Court of Appeals for Veterans' Claims is conferred by statute and case law, jurisdiction is lost, if, during the pendency of the appeal the veteran dies without being survived by a spouse, child or dependent parent, and the subject matter of the appeal is the type of benefit that terminates upon death.¹¹² Consequently, a veteran's estate cannot assert the deceased veteran's right to this type of benefit.¹¹³

¹⁰⁶ 160 F.3d 1360 (Fed. Cir. 1998).

¹⁰⁷ *Id.* at 1368.

¹⁰⁸ *Albun*, 9 F.3d at 1530.

¹⁰⁹ 38 U.S.C. § 7252 (1994).

¹¹⁰ *Fugere v. Derwinski*, 972 F.2d 331, 334-35 (Fed. Cir. 1992).

¹¹¹ 38 U.S.C. § 7252 (1994); *Wick*, 40 F.3d at 370.

¹¹² *Richard v. West*, 161 F.3d 719, 723 (Fed. Cir. 1998).

¹¹³ *Id.*

C. *Procedural Concerns: The Notice of Disagreement*

If a Veteran wishes to challenge a denial of benefits, he must file a written Notice of Disagreement, which sets the administrative appeal process in motion.¹¹⁴ The Veterans' Judicial Review Act, applies with respect to cases in which a Notice of Disagreement is filed after the effective date of the Act.¹¹⁵ Therefore, judicial review of veterans' claims is not retroactive.¹¹⁶ The Federal Circuit heard and rejected challenges to the constitutionality of this provision.¹¹⁷ The Court has also held that the required Notice of Disagreement must be disagreement with original action by the Secretary of Veterans' Affairs, not internal appellate action by the Secretary.¹¹⁸ While the Court has held that there can be only one Notice of Disagreement for each claim,¹¹⁹ in *Ephraim v. Brown* the Court held that a new diagnosis of a disease related to one for which a claim was made previously is a new claim for which there can be a new Notice of Disagreement.¹²⁰ The Court has also held that a claim regarding disability compensation level is separate from a claim that the disability is related to service in the Armed Forces and will support a new Notice of Disagreement.¹²¹ There may be a new Notice of Disagreement as to the effective date of benefits or the rating assigned to a disability after the veteran prevails on a pre-judicial review Notice of Disagreement as to the connection to military service of his disability.¹²²

¹¹⁴ FOX, *supra* note 5, at 38.

¹¹⁵ Pub. L. No. 100-687, 102 Stat. 4105, 4122, sec. 402 (codified as a note to § 4051, subsequently renumbered to a note to § 7251).

¹¹⁶ *Id.*

¹¹⁷ See, e.g., *Belarmino v. Derwinski*, 931 F.2d 1543, 1544 (Fed. Cir. 1991); see also *Nagac*, 933 F.2d at 990-91.

¹¹⁸ *Strott v. Derwinski*, 964 F.2d 1124, 1128 (Fed. Cir. 1992); *Prenzler v. Derwinski*, 928 F.2d 392, 394 (Fed. Cir. 1991); *Burton v. Derwinski*, 933 F.2d 988, 989 (Fed. Cir. 1991).

¹¹⁹ *Hamilton v. Brown*, 39 F.3d 1574, 1582 (Fed. Cir. 1994).

¹²⁰ 82 F.3d 399, 400 (Fed. Cir. 1996).

¹²¹ *Grantham*, 114 F.3d at 1159.

¹²² *Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed. Cir. 1997).

The claimant has the power to give either the Board of Veterans' Appeals or the Court of Veterans' Claims broad jurisdiction over a range of his claims or narrow jurisdiction over a specific claim only by phrasing his Notice of Disagreement in general language or in narrow specific language.¹²³ The Notice of Disagreement must be directed at the decision sought to be reviewed by the Board of Veterans' Appeals, and gives the Court of Appeals for Veterans' Claims jurisdiction to review only the internal appellate decision of that Board.¹²⁴ In *Collaro v. West*,¹²⁵ the veteran had filed a vague Notice of Disagreement. The Secretary of Veterans' Affairs interpreted it as a factual dispute and adjudicated it accordingly. However, late in the proceedings, the veteran explained that his real dispute was over the validity of an unpublished internal Department of Veterans' Affairs circular.¹²⁶ The Federal Circuit held that the Court of Appeals for Veterans' Claims had jurisdiction over the challenge to the validity of the circular.¹²⁷

Finally, if by reason of the date of the Notice of Disagreement the Court of Appeals for Veterans' Claims lacks jurisdiction, review may be sought in the Federal Circuit in certain cases; and if review is mistakenly sought in the wrong court, the veteran or his survivor is without remedy.¹²⁸

IV. STANDARD OF REVIEW

Review by the Federal Circuit is *de novo*.¹²⁹ Deference is given to the Secretary of Veterans' Affairs' interpretation of a

¹²³ *Maggitt*, 202 F.3d at 1375.

¹²⁴ *Ledford v. West*, 136 F.3d 776, 779-80 (Fed. Cir. 1998).

¹²⁵ 136 F.3d 1304, 1308.

¹²⁶ *Id.* at 1307.

¹²⁷ *Id.* at 1310.

¹²⁸ *Jackson v. Brown*, 55 F.3d 589, 592 (Fed. Cir. 1995).

¹²⁹ *Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000); *Richard*, 161 F.3d at 721; *Degmetich v. Brown*, 104 F.3d 1328, 1331 (Fed. Cir. 1997); *McKnight v. Gober*, 131 F.3d 1483, 1484 (Fed. Cir. 1994); *Wick*, 40 F.3d at 367; *Jones v. Brown*, 41 F.3d 634, 637 (Fed. Cir. 1994); *Prenzler*, 928 F.2d at 393.

statute only if the statute is silent or ambiguous with respect to the issue.¹³⁰ In *Skinner v. Brown*,¹³¹ the dissent stated that deference should be given to any permissible construction of the statute made by the Secretary.¹³² In *Brown v. Gardner*,¹³³ which affirmed *Gardner v. Brown*,¹³⁴ the U.S. Supreme Court agreed that the Federal Circuit could deny deference to a sixty-year old continuous interpretation of a veterans' benefits statute by the executive branch.¹³⁵ The Federal Circuit, in *Tallman v. Brown*, held that a "longstanding administrative practice" of the Secretary of Veterans' Affairs misinterpreting law is not entitled to deference.¹³⁶

Deference will be given to the Secretary's interpretation of an ambiguous statute if the interpretation is not arbitrary.¹³⁷ In *Degmetich v. Brown*,¹³⁸ the statute in question provided for benefits for disabilities resulting from line of duty injuries or diseases to disabled veterans.¹³⁹ The Court upheld the Secretary's right to interpret the statute as applying only to veterans still disabled when they applied for the benefits in question.¹⁴⁰ *Degmetich* was followed exactly in *Gilpin v. West*,¹⁴¹ where the Federal Circuit upheld the Secretary's requirement that sufferers

¹³⁰ *Skinner v. Brown*, 27 F.3d 1571, 1575 (Fed. Cir. 1994); *Cf. Cole v. Brown*, 35 F.3d 551, 551 (Fed. Cir. 1994) (supporting the *Skinner* holding that construction of a statute by the secretary is not acceptable).

¹³¹ 27 F.3d 1571.

¹³² *Id.* at 1576 (Plager, J., dissenting).

¹³³ 513 U.S. 115.

¹³⁴ 5 F.3d 1456 (Fed. Cir. 1993), *aff'd*, 513 U.S. 115.

¹³⁵ *Brown*, 513 U.S. at 122.

¹³⁶ 105 F.3d 613, 615 (Fed. Cir. 1997).

¹³⁷ *Degmetich*, 104 F.3d at 1331-32.

¹³⁸ 104 F.3d 1328.

¹³⁹ *Id.* at 1330 (interpreting 38 U.S.C. § 1131 (1994) which states in relevant part: "For disability resulting from personal injury suffered or disease contracted in line of duty . . . in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled . . . compensation as provided in this subchapter").

¹⁴⁰ *Id.* at 1332.

¹⁴¹ 155 F.3d 1353 (Fed. Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999).

from post-traumatic stress disorder be symptomatic at the time they apply for benefits.¹⁴²

While deference is given to the Secretary with respect to factual determinations, deference is not given to the Court of Appeals for Veterans' Claims' answers to questions of law.¹⁴³ The Federal Circuit reviews statutory interpretations of that court without formal deference.¹⁴⁴

V. THE RECORD

Both the Court of Appeals for Veterans' Claims and the Federal Circuit have separate rules that govern determination of the record below.¹⁴⁵ Under Court of Appeals for Veterans' Claims procedures, any relevant record held by the Department of Veterans' Affairs may be designated or counter-designated as part of the record.¹⁴⁶ Under Local Rule 1 of the Federal Circuit, the Court of Appeals for Veterans' Claims is deemed a "district court."¹⁴⁷ Therefore, the rules concerning settling the record in a court below, not those concerning agency filing of a record in an agency review or enforcement case should govern.¹⁴⁸ While this author has found no case where the Federal Circuit has addressed

¹⁴² *Id.* at 1356 (reasoning that 38 U.S.C. §1110 is "identical in all respects" to 38 U.S.C. §1131 for purposes of the interpreting guidelines). 38 U.S.C. §1110 (1994) states in relevant part "For disability resulting from personal injury suffered or disease contracted in line of duty. . . in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled. . . compensation as provided in this subchapter. . .").

¹⁴³ *Cook v. Brown*, 68 F.3d 447, 450 (Fed. Cir. 1995) (affirming on different grounds the denial of attorneys' fees to a non-lawyer member of the bar of the Court of Appeals for Veterans' Claims).

¹⁴⁴ *See Bowey*, 218 F.3d at 1376; *Haines v. West*, 154 F.3d 1298, 1299-1300 (Fed. Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999).

¹⁴⁵ U.S. Vet. App. R. 10; Fed. R. App. Proc. R. 10-11, 16-17; Fed. Cir. R. 10-11, 17.

¹⁴⁶ U.S. Vet App. R. 10.

¹⁴⁷ Fed. Cir. R. 1(a)(1)(D).

¹⁴⁸ *Compare* Fed. R. App. Proc. R. 10-11 and Fed. Cir. R. 10-11 concerning the record from the court below *with* Fed. R. App. Proc. R. 16-17 and Fed. Cir. R. 17 concerning the filing of the record from an agency review or enforcement action.

the question of what actually constitutes the record in a veteran's benefit case, the Court has recognized a presumption that all evidence in the veteran's record has been reviewed by the Department of Veterans' Affairs.¹⁴⁹ However, the Federal Circuit has never reviewed the holding of the Court of Appeals for Veterans' Claims in *Bell v. Derwinski*,¹⁵⁰ which states that all pertinent records in the possession of the Secretary of Veterans' Affairs are constructively before the Board of Veterans' Appeals and that if the Board fails to consider any such material records, the case must be remanded.¹⁵¹

VI. PRECEDENT

The Federal Circuit takes a strong view that only its full published opinions are to be relied on as precedent.¹⁵² In *Hamilton v. Brown*,¹⁵³ the Court said:

As an initial matter, we note with disapproval that the Court of Veterans Appeals places considerable weight upon, and discusses at length, the nonprecedential order issued by this court in the aftermath of the *Whitt* case. The matter is also extensively discussed by the parties. We remind counsel and the court that nonprecedential opinions and orders are not citable to this court . . . and they are not intended to convey this court's view of law applicable in other cases. Nonprecedential orders and opinions are used in summary dispositions of cases in which a full precedential opinion is not considered necessary, but something

¹⁴⁹ *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000) (rejecting appellant's claim that all evidence in the record must be "discussed").

¹⁵⁰ 2 Vet. App. 611 (1992).

¹⁵¹ *Id.* at 613.

¹⁵² For a full discussion of this issue see Charles G. Mills, *Anastassof v. United States and Appeals in Veterans' Cases*, 3 J. OF APP. PRAC. & PROCESS 419 (2001).

¹⁵³ 39 F.3d 1574.

more than a one-sentence Rule 36 *[footnote omitted]* affirmance is warranted or needed.¹⁵⁴

The above statement refers to a case named *Whitt v. Derwinski*,¹⁵⁵ where a single Federal Circuit judge had vacated a leading case in the Court of Appeals for Veterans' Claims.¹⁵⁶ The lower court in *Hamilton* had relied on this non-precedential decision. As a result, the Federal Circuit admonished both the Court of Appeals for Veterans' Claims for relying on the case, and the counsel involved in attempting to argue the case before the Federal Circuit as precedent.¹⁵⁷

VII. THE FINALITY OF THE DENIAL OF CLAIMS

There is a general rule against reopening a veteran's claim after it has been finally denied and all appellate review exhausted.¹⁵⁸ However, as listed in *Routen v. West*,¹⁵⁹ there are three important exceptions to this rule: a) *De novo* review after a change in the law; b) New and material evidence; and c) Correction of clear and unmistakable error.

A. *De Novo Review After a Change in Law*

The Federal Circuit has held that when a provision of law or regulation creates a new basis for entitlement, the claim asserts rights that did not previously exist, and is a different claim.¹⁶⁰ In

¹⁵⁴ *Id.* at 1581.

¹⁵⁵ 979 F.2d 215 (Fed. Cir. 1992) (Table), *overruled in part by Hamilton*, 39 F.3d 1574.

¹⁵⁶ 1 Vet. App. 40 (1990), *en banc rev. denied*, 1 Vet. App. 94 (1990), *vacated by Whitt*, 979 F.2d 215, *overruled in part by Hamilton*, 39 F.3d 1574.

¹⁵⁷ *Hamilton*, 39 F.3d at 1581.

¹⁵⁸ *Spencer v. Brown*, 17 F.3d 368, 371-72 (Fed. Cir.), *cert. denied*, 513 U.S. 810 (1994) (citing 38 U.S.C. § 7104(b) which states in relevant part: "Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.").

¹⁵⁹ 142 F.3d 1434, 1438 (Fed. Cir.) *cert. denied*, 525 U.S. 962 (1998).

¹⁶⁰ *Spencer*, 17 F.3d at 372.

Spencer v. Brown,¹⁶¹ a claimant attempted to reopen a claim based on the statutory change to 38 U.S.C. § 5108 which states that a claim must be reopened if “new and material evidence” is presented.¹⁶² However, prior to the 1989 overhaul of veterans’ benefits law, a claim could be reopened only if the new and material evidence was “in the form of an official report from the proper service department.”¹⁶³ According to the *Spencer* court, the change to 38 U.S.C. § 5108 was not the kind of change in law that would allow for *de novo* review.¹⁶⁴

B. New and Material Evidence

38 U.S.C. § 5108 requires the Secretary of Veterans’ Affairs to reopen disallowed claims “if new or material evidence is presented or secured.”¹⁶⁵ The Federal Circuit has held that the Court of Appeals for Veterans’ Claims cannot reopen the claim itself and determine factual issues *de novo*.¹⁶⁶ Failure of the Secretary to reopen the claim requires remand by the court.¹⁶⁷

The Federal Circuit has also held that in the absence of a legal error in the analysis by the Court of Appeals for Veterans’ Claims, the Federal Circuit is without jurisdiction to review a

¹⁶¹ 17 F.3d at 368.

¹⁶² 38 U.S.C. § 5108 (1994) states: “If new and material evidence is presented or secured with respect to a claim which has been disallowed, the secretary shall reopen the claim and review the former disposition of the claim.”

¹⁶³ *Spencer*, 17 F.3d at 373; 38 U.S.C. § 4004(b) (1982) (re-sequenced to 38 U.S.C. § 5108). 38 U.S.C. § 4004(b) stated: “When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered, however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.”

¹⁶⁴ *Spencer*, 17 F.3d at 372.

¹⁶⁵ 38 U.S.C. § 5108 (1994) states: “If new and material evidence is presented or secured with respect to a claim which has been disallowed, the secretary shall reopen the claim and review the former disposition of the claim.”

¹⁶⁶ *Winters v. Gober*, 219 F.3d 1375, 1379-80 (Fed. Cir. 2000).

¹⁶⁷ *Id.*

determination by that court as to whether evidence is new and material.¹⁶⁸ In *Hodge v. West*, the Secretary of Veterans' Affairs had provided a reasonable definition of what evidence is "new and material," but the Court of Appeals for Veterans' Claims did not accord it deference.¹⁶⁹ The Federal Circuit held it will give "no deference at all" to the lower court's interpretation of what is "new and material" and reversed the decision below with directions to apply the original regulatory definition which, unlike the lower court, did not require that the new evidence be outcome determinative.¹⁷⁰ In *Lofton v. West*,¹⁷¹ the court below had applied the same harsh definition of "new and material" for which it had been reversed in *Hodge*.¹⁷² However, in *Lofton*, the Federal Circuit found that it could affirm the lower court decision based upon a question of the validity of a Department of Veterans' Affairs regulation without determining whether the new evidence was material under the standard set forth in *Hodge*.¹⁷³

In *Routen v. West*, the Federal Circuit held that the statutory creation of a new presumption is not new evidence for purposes of 38 U.S.C. § 5108.¹⁷⁴ A claim previously denied on the basis that the claimant was not a "veteran" within the meaning of the applicable statute may be reopened if new and material evidence is presented with respect to the claimant's status as a "veteran."¹⁷⁵ Also, the surviving spouses of deceased veterans are required to present new and material evidence in support of any claim derivative from a claim of the deceased veteran previously disallowed in a final determination.¹⁷⁶ However, a finding of fact by the Court of Appeals for Veterans'

¹⁶⁸ *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996); *Spencer*, 17 F.3d at 374 (citing 38 U.S.C. § 7292(d)(2) (Supp IV 1992) which delineates the appellate jurisdiction of the court).

¹⁶⁹ 155 F.3d 1356, 1361 (Fed. Cir. 1998).

¹⁷⁰ *Id.* at 1363-64.

¹⁷¹ 198 F.3d 846 (Fed. Cir. 1999).

¹⁷² *Id.* at 848-49.

¹⁷³ *Id.* at 849.

¹⁷⁴ *Routen*, 142 F.3d at 1440.

¹⁷⁵ *D'Amico v. West*, 209 F.3d 1322, 1326-27 (Fed. Cir. 2000).

¹⁷⁶ *Zevalkink v. Brown*, 102 F.3d 1236, 1241-42 (Fed. Cir. 1996), *cert. denied*, 521 U.S. 1103 (1997).

Claims that new evidence is merely cumulative requires a conclusion that it is not new and material.¹⁷⁷

C. *The Correction of Clear and Unmistakable Error*

Secretary of Veterans' Affairs regulation 38 C.F.R. § 3.105(a)¹⁷⁸ allows for correction of an otherwise final denial of a claim if the denial was the product of "clear and unmistakable error."¹⁷⁹ Such a correction would have retroactive effect.¹⁸⁰ In *Russell v. Principi*,¹⁸¹ the Court of Appeals for Veterans' Claims held *en banc* that final decisions of the Board of Veterans' Appeals are subject to correction for clear and unmistakable error.¹⁸² In *Smith v. Principi*,¹⁸³ the Court of Appeals for Veterans' Claims, relying on *Russell*, directed the Board of Veterans' Appeals to determine whether its prior final decision was the product of clear and unmistakable error.¹⁸⁴ However, on appeal in *Smith v. Brown*,¹⁸⁵ the Federal Circuit reversed and held that correction for clear and unmistakable error is permitted only by the office of original jurisdiction in which the veteran filed his claim, and not after the veteran has had a review by the Board of Veterans' Appeals.¹⁸⁶

Congress reacted swiftly in response to the decision in *Smith v. Brown*, by enacting Public Law § 105-111, which took

¹⁷⁷ Anglin v. West, 203 F.3d 1343, 1347 (Fed. Cir. 2000).

¹⁷⁸ 38 C.F.R. § 3.105(a) (2000).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* 38 C.F.R. § 3.105(a) states: "the . . . decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision."

¹⁸¹ 3 Vet. App. 310 (1992).

¹⁸² *Id.* at 312.

¹⁸³ 3 Vet. App. 378, *reconsider. denied*, 4 Vet. App. 131 (1992), *rev'd* 35 F.3d 1516 (Fed. Cir. 1994), *superseded by statute as stated in*, Lynch v. Gober, 11 Vet. App. 27 (1997).

¹⁸⁴ *Id.* at 381.

¹⁸⁵ 35 F.3d 1516 (Fed. Cir. 1994), *superseded by statute as stated in*, Lynch, 11 Vet. App. 27.

¹⁸⁶ *Id.* at 1526.

effect on November 21, 1997 and is applicable to all determinations made before, on, or after its effective date.¹⁸⁷ Public Law § 105-111 added § 5109A to Title 38 of the U. S. Code and permits the Secretary of Veterans Affairs to correct his "clear and unmistakable error" on his own motion or upon request "at any time after the decision is made."¹⁸⁸ In addition, Public Law § 105-111 added § 7111 to Title 38, which allows the Board of Veterans' Appeals to correct its own "clear and unmistakable error."¹⁸⁹ Judicial review is applicable to all clear and unmistakable error cases pending before the Secretary, the Court of Appeals for Veterans' Claims, the Federal Circuit, or the U.S. Supreme Court on the effective date of the statute or filed thereafter.¹⁹⁰

The statutes enacted involving the correction of clear and unmistakable error have become the subject of scholarly analysis. In his 1998 study of the Court of Appeals for Veterans' Claims, Professor Fox said, "The statutory language may contain some nuances, not readily apparent on its face, that will give reviewing courts trouble in the future."¹⁹¹ This anticipated 'trouble' has been borne out in cases decided after Professor Fox's 1998 study. For instance, in *Haines v. West*,¹⁹² the Federal Circuit rejected an argument that 38 U.S.C. § 5109A allowed a clear and unmistakable error claim belonging to the veteran to survive his death.¹⁹³ Likewise, in *Donovan v. West*,¹⁹⁴ the Federal Circuit refused to allow the enactment of the new law to revive a clear and unmistakable error claim previously rejected by the Board of Veterans' Appeals in the absence of an additional claim that such rejection was an additional clear and unmistakable error.¹⁹⁵ In

¹⁸⁷ Act effective Nov. 21, 1997, Pub. L. No. 105-111, 111 Stat. 2271, § 1(c).

¹⁸⁸ *Id.* at sec. 1(a), §§ 5109A(c)-(d).

¹⁸⁹ *Id.* at sec. 1(a), § 7111(c).

¹⁹⁰ *Id.* at sec. 2 (codified as a Note to 38 U.S.C. § 7251).

¹⁹¹ FOX, *supra* note 5, at 38.

¹⁹² 154 F.3d 1298 (Fed. Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999).

¹⁹³ *Id.* at 1301.

¹⁹⁴ 158 F.3d 1377 (Fed. Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999).

¹⁹⁵ *Donovan*, 158 F.3d at 1382-83.

*Dittrich v. West*¹⁹⁶ and *Brown v. West*,¹⁹⁷ the Federal Circuit refused to allow correction by the Regional Office of its clear and unmistakable error, which had been subsumed in a Board of Veterans' Appeals determination limiting such correction to the Board.¹⁹⁸

The Federal Circuit has attempted to clarify the language of the statutes involving the correction of clear and unmistakable error. In *Bustos v. West*,¹⁹⁹ *Hayre v. West*,²⁰⁰ and *Yates v. West*,²⁰¹ the Federal Circuit held that error must be outcome determinative to be clear and unmistakable,²⁰² a test not applied to new and material evidence.²⁰³ In *Howard v. Gober*,²⁰⁴ the Federal Circuit affirmed a decision by the Court of Appeals for Veterans' Claims that it had no jurisdiction over a claim of clear and unmistakable error if the Board of Veterans' Appeals had not yet addressed that issue.²⁰⁵ In *Grant v. West*,²⁰⁶ one judge of the Federal Circuit suggested during oral argument that the Secretary's failure to correct clear and unmistakable error on his own motion is unreviewable.²⁰⁷

Despite the broad language of Public Law § 105-111 concerning correction of clear and unmistakable error "at any time" even in cases pending before the U.S. Supreme Court, it seems clear that the Federal Circuit has limited the interpretation

¹⁹⁶ 163 F.3d 1349 (Fed. Cir. 1998), *cert. denied*, 526 U.S. 1349 (1999).

¹⁹⁷ 203 F.3d 1378 (Fed. Cir. 2000).

¹⁹⁸ *Id.* at 1381; *Dittrich*, 163 F.3d at 1352.

¹⁹⁹ 179 F.3d 1378 (Fed. Cir.), *cert. denied*, 528 U.S. 967 (1999).

²⁰⁰ 188 F.3d 1327 (Fed. Cir. 1999).

²⁰¹ 213 F.3d 1372 (Fed. Cir.), *cert. denied*, 531 U.S. 960 (2000).

²⁰² *Bustos*, 179 F.3d at 1381; *Hayre*, 188 F.3d at 1333; *Yates*, 213 F.3d at 1374-75 (approving the Department of Veteran's Affairs regulation, 64 Fed. Reg. 2134 (1999) which interprets clear and unmistakable error as outcome determinative error).

²⁰³ See discussion *supra*, at Section VII. Finality of Denial of Claims, b. New and Material Evidence, discussing *Hodge v. West* and the court's interpretation of new and material evidence.

²⁰⁴ 220 F.3d 1341 (Fed. Cir. 2000).

²⁰⁵ *Id.* at 1345.

²⁰⁶ 194 F.3d 1330 (Fed. Cir. 1999), *aff'g* 1998 U.S. Vet. App. LEXIS 961 (1998), *review denied* 1998 U.S. Vet. App. LEXIS 720 (1998).

²⁰⁷ *Grant*, 1998 U.S. Vet. App. LEXIS, at *12.

of the statute to an authorization for the Board of Veterans' appeals to correct its own clear and unmistakable errors.²⁰⁸

VIII. THE DUTY TO ASSIST

The administration of veterans' claims is unique in that Congress has attempted to enact legislation that is paternalistic in nature, statutorily providing that all proceedings below the level of the Court of Appeals for Veterans' Claims are to be non-adversarial and paternalistic, at least if they are not on remand from the courts.²⁰⁹ 38 U.S.C. § 5107(a) places upon the Secretary of Veterans' Affairs the duty to "assist such a claimant in developing the facts pertinent to the claim."²¹⁰ In tension with this instruction, prior to the enactment of the Veterans Claims Assistance Act of 2000,²¹¹ 38 U.S.C. § 5107(a) also placed upon a claimant "the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded."²¹² In *Epps v. Gober*,²¹³ an *en banc* decision, the Federal Circuit held that the term "such a claimant" meant one who had "first met its burden of submitting a 'well grounded' claim."²¹⁴ In *Morton v. West*,²¹⁵ the Court of Appeals for Veterans' Claims, relying on *Epps*, held that "absent the submission and establishment of a well-grounded claim, the Secretary cannot undertake to assist a veteran in developing facts pertinent to his or her claim."²¹⁶ The Federal Circuit affirmed this interpretation of the statute on appeal.²¹⁷

²⁰⁸ *Id.* at *9-11.

²⁰⁹ See 38 U.S.C. § 7252 and § 7261 (referring to the jurisdiction and scope of review of the Court of Veterans' Appeals).

²¹⁰ *Id.*

²¹¹ Pub. L. No. 106-475, 114 Stat. 2096 (as codified at 38 U.S.C. §§ 5100, 5103A and 5126; amending §§ 5102, 5103, 5106 and 5107).

²¹² 38 U.S.C. § 5107(a) (1994).

²¹³ 126 F.3d 1464 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 940 (1998).

²¹⁴ *Id.* at 1468 (emphasis in original).

²¹⁵ 12 Vet. App. 477 (1999).

²¹⁶ *Id.* at 486.

²¹⁷ *Morton v. Gober*, 243 F.3d 557 (Fed. Cir. 2000).

In response to *Morton*, the Secretary of Veterans' Affairs sent out "fast letters" to his local offices, summarily repealing various regulations and prohibiting the Department of Veterans' Affairs service officers from assisting veterans who had not yet submitted all the evidence to show a well-grounded claim or who failed to do so within thirty days. The American Legion, The Military Order of the Purple Heart,²¹⁸ and the Paralyzed Veterans of America²¹⁹ brought original proceedings in the Federal Circuit to review the "fast letters" of the Secretary.²²⁰ On motion of the Secretary, these proceedings were stayed pending the disposition of the *Morton* case on appeal. Unfortunately, after the Federal Circuit ordered this stay, the appellant in *Morton*, Jack W. Morton, died.²²¹ The proceedings by the various veterans' organizations are still pending, and the stay was never lifted.²²²

In *Hayre v. West*,²²³ decided about two-and-a-half weeks after *Morton*, the Federal Circuit discussed the nature of the duty to assist at great length, but only in a context where the claimant had already established a well-grounded claim.²²⁴ *Hayre* was a somewhat shocking case in which the Regional Office of the Department of Veterans' affairs told the claimant that it did "not find in your medical records or elsewhere any evidence of the existence of a nervous condition," but did not tell him that it never received or examined the medical records, as was its duty.²²⁵ The Federal Circuit vacated the order of the Court of

²¹⁸ The Military Order of the Purple Heart is an organization which was formed in 1932. Its members are all recipients of the Purple Heart for Military Merit decoration. The purpose of the organization is to help disabled and needy veterans and their families. <http://www.purpleheart.org>.

²¹⁹ The Paralyzed Veterans of America is a veteran's service organization chartered by Congress in 1946. <http://www.pva.org>.

²²⁰ *U.S. v. Romero-Gonzalez*, 2000 U.S. App. LEXIS 19469 (4th Cir. 2000) *cert. denied*, 531 U.S. 1093 (2001); *U.S. v. Marriott*, 2000 U.S. App. LEXIS 18168 (6th Cir. 2000) *cert. denied*, 531 U.S. 1094 (2001); *Kirkner v. Wilson*, 531 U.S. 1115 (2001).

²²¹ *Morton v. Gober*, 2000 U.S. App. LEXIS 22464, *1-2 (2000).

²²² *Morton*, 243 F.3d 557 (2000).

²²³ 188 F.3d 1327.

²²⁴ *Id.* at 1331-35.

²²⁵ *Id.* at 1329.

Appeals for Veterans' Claims and held that such misconduct prevented the action of the Regional Office from becoming final.²²⁶

Nine months later, the Federal Circuit decided *Hensley v. West*.²²⁷ In *Hensley*, the Court pointed out that it lacked the power as a three-judge panel to overturn the *Epps* decision, which was the precedent followed in the *Morton* case.²²⁸ The *Hensley* Court avoided all mention of *Morton*, but did quote Court of Appeals for Veterans' Claims cases favorably to the effect that the standard for a "well-grounded claim" is "unique, and uniquely low," and "rather low."²²⁹ Less than a week later, in *Schroeder v. West*, the Federal Circuit held that a veteran who establishes that one of his claims is well grounded is entitled to assistance on all of his claims.²³⁰

In response to the *Morton* decision, Congress enacted the Veterans Claims Assistance Act of 2000²³¹ (the "Act"). The Act amended § 5107, and entirely eliminated the requirement that there be a well grounded claim.²³² The Act expands and makes more detailed the Secretary's duty to assist, only excluding those claims where no reasonable possibility exists of substantiating the claim.²³³ Also, the Act contains some retroactivity for claims denied between July 14, 1999 and the effective date of the Act, December 2000.²³⁴

²²⁶ *Id.* at 1333; (citing to *Tablazon v. Brown*, 8 Vet. App. 359, 361 (1995); *Hauck v. Brown*, 6 Vet. App. 518, 519 (1994)).

²²⁷ 212 F.3d 1255 (Fed. Cir. 2000).

²²⁸ *Id.* at 1261.

²²⁹ *Id.*

²³⁰ 212 F.3d 1265, 1271 (Fed. Cir. 2000).

²³¹ Pub. L. No. 106-475, 114 Stat. 2096 (as codified at 38 U.S.C. §§ 5100, 5103A and 5126; amending §§ 5102, 5103, 5106 and 5107).

²³² *Id.* at sec. 4, § 5107.

²³³ *Id.* at sec. 3(a), § 5102-5103.

²³⁴ *Id.* at sec. 7 (codified as a note to § 5107).

IX. ANALYSIS OF RECENT STUDIES

As discussed previously, Professor Fox's analysis at the Sixth Judicial Conference is a good indication that the Federal Circuit is frequently doing what Congress intended it to do, oversee the Court of Appeals for Veterans' Appeals and develop a consistent body of case law. His study was, however, limited to reversals. Some of the reversals that are part of his statistics involve substantial legal developments.²³⁵ These reversals should be explored more fully for their substantive impact, rather than just to note the fact that they reverse a holding of the court below.

For instance, although *Tallman v. Brown*²³⁶ directly benefits only Annapolis graduates,²³⁷ it stands for the broader principle that deference will not be accorded to long-standing practices of the Department of Veterans' Affairs.²³⁸ Similarly, *Hodge v. West*²³⁹ significantly broadened the class of cases that can be reopened for new and material evidence.²⁴⁰ *Bailey v. West*²⁴¹ applies equitable tolling to appeals to the Court of Appeals for Veterans' Claims.²⁴² *Linville v. West*²⁴³ greatly expanded the range of issues raised by claimants, which the Court of Appeals for Veterans' Claims could consider.²⁴⁴ *Hayre* established a rule that the Secretary's duty to assist cannot be exhausted by mere *pro forma* requests for documents²⁴⁵

Arguably, a study of recently affirmed cases gives a slightly different picture. By statute, many veterans' benefits cannot have an effective date earlier than the filing date of the

²³⁵ Remarks of Professor Fox, Sixth Judicial Conference of the Court of Appeals for Veterans' Claims, 15 Vet. App. at CCLXIV.

²³⁶ 105 F.3d 613.

²³⁷ *Id.*

²³⁸ *Id.* at 615.

²³⁹ 155 F.3d 1356.

²⁴⁰ *Id.* at 1359-60.

²⁴¹ 160 F.3d 1360.

²⁴² *Id.* at 1364.

²⁴³ 165 F.3d 1382 (Fed. Cir. 1999).

²⁴⁴ *Id.* at 1384.

²⁴⁵ *Hayre*, 188 F.3d at 1331.

claim.²⁴⁶ An informal claim can only become a claim if it is converted into a formal claim within one year.²⁴⁷ In *Fleshman v. West*,²⁴⁸ the veteran failed to complete every box on his application and to sign it.²⁴⁹ Because it took him more than a year to correct all the defects in his application and although the claim itself was set forth in full on the original application, the Federal Circuit affirmed the decision below denying the veteran an effective date before he corrected all deficiencies in completing the form.²⁵⁰

In *Routen v. West*²⁵¹ the Federal Circuit held that the erroneous failure of the Secretary to apply an evidentiary presumption in favor the veteran does not give the veteran the right to reopen the claim as he would if the Secretary had ignored evidence.²⁵²

In *Soria v. Brown*²⁵³ the Federal Circuit affirmed the denial of benefits to a World War II Philippine Commonwealth Army veteran because his proof of service was issued by the Republic of Philippines Department of National Defense instead of the United States Army.²⁵⁴ *Young v. Gober*²⁵⁵ affirmed the denial of ex-Prisoner of War status to a member of a B-24 crew shot down in World War II and detained in a neutral Swedish prisoner camp.²⁵⁶ *Ramey v. Gober*²⁵⁷ involved a veteran exposed to atomic radiation who contracted one of the diseases, which under regulations created under a 1984 statute, made it easier to

²⁴⁶ 38 U.S.C. § 5110(a) (1994) which states in relevant part: "the effective date of an award . . . shall not be earlier than the date of receipt of application thereof."

²⁴⁷ *Id.* at § 5110(b)(2).

²⁴⁸ 138 F.3d 1429 (Fed. Cir.), *cert. denied*, 525 U.S. 947 (1998).

²⁴⁹ *Id.* at 1430.

²⁵⁰ *Id.* at 1434.

²⁵¹ 142 F.3d 1434.

²⁵² *Id.* at 1442-43.

²⁵³ 118 F.3d 747 (Fed. Cir.), *cert. denied*, 522 U.S. 98 (1997).

²⁵⁴ *Id.* at 749.

²⁵⁵ 121 F.3d 662 (Fed. Cir. 1997).

²⁵⁶ *Id.* at 665.

²⁵⁷ 120 F.3d 1239 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1151 (1998).

prove the connection between exposure and disease.²⁵⁸ A 1988 statute listed other diseases, which were presumed to be caused by the exposure if they occurred within a specified time after it.²⁵⁹ The Federal Circuit affirmed a denial of connection of the disease to the exposure.²⁶⁰

Yeoman v. West,²⁶¹ once again, was a tragic case where a strict application of the law denied all benefits to a quadriplegic veteran.²⁶² While on active duty, the veteran drove with an excessive blood alcohol content without adequate sleep and was involved in an accident that left him permanently disabled. About sixteen months later, he was discharged based upon his injuries.²⁶³ The Federal Circuit wrote a fully published opinion affirming the denial of benefits to him based upon his willful misconduct.²⁶⁴ The Court treated the case as one of regulatory interpretation, not the application of the law to particular facts.²⁶⁵

As part of the present analysis, it must be borne in mind that the appeals in *Ramey* and *Yeoman* were long shots and that, on balance, the published cases that have affirmed the denial of veterans' benefits do not even approach outweighing the pro-veteran reversals in the last several years.

As previously discussed, in 1994, the Federal Circuit clearly misjudged Congressional intent in *Smith v. Brown*.²⁶⁶ This is shown by the decisive way in which Congress acted to correct that decision.²⁶⁷ The Federal Circuit has recently received another such correction in the form of the Veterans Claims

²⁵⁸ *Id.* at 1241.

²⁵⁹ Pub. L. No. 100-321, 102 Stat. 485 (1988) (codified at 38 U.S.C. § 1112(c)).

²⁶⁰ *Ramey*, 120 F.3d at 1247 (clarifying its earlier decision on this point in *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994)).

²⁶¹ 140 F.3d 1443.

²⁶² *Id.* at 1448.

²⁶³ *Id.* at 1444-45.

²⁶⁴ *Id.* at 1449.

²⁶⁵ *Yeoman*, 140 F.3d at 1448.

²⁶⁶ See discussion *supra*, at Section VII. Finality of the Denial of Claims, c. The Correction of Clear and Unmistakable Error.

²⁶⁷ Pub. L. No. 105-111, 111 Stat. 2271.

Assistance Act of 2000,²⁶⁸ passed in reaction to the *Morton* case decided in the Court of Appeals for Veterans' Claims and the Secretary's implementation of that court's decision.²⁶⁹ When the appellant Morton died, the Federal Circuit refused to lift the stay in *The American Legion v. West*,²⁷⁰ and refused to tackle the question of whether veterans need to establish that their claim is well grounded before they can receive assistance in developing their claim.²⁷¹ Instead the Federal Circuit tried to attenuate the burden, somewhat, in the *Hensley v. West*²⁷² and *Schroeder v. West* decisions.²⁷³

It is easy to see, however, why Congress did not like the *Morton* decision. Often the only way a veteran can establish that his claim is well grounded is by the records of Veterans' Health Administration hospitals and by medical records of the Armed Forces. *Morton*, as interpreted by the Secretary of Veterans' Affairs, had the effect of preventing Department of Veterans' Affairs service officers from assisting the veteran to retrieve medical records until the veteran first made a showing of a well-grounded claim. Since such a showing can only be made from information found in those records, this procedure was directly contrary to the intent of the Veterans Judicial Review Act.²⁷⁴ The Federal Circuit failed to proceed with *The American Legion* until Congress took the lead and corrected *Morton*.²⁷⁵ The Court's inexplicable lack of action on the duty to assist, however, does not substantially diminish Professor Fox's conclusion that

²⁶⁸ Pub. L. No. 106-475, 114 Stat. 2096.

²⁶⁹ See discussion *supra*, at Section VIII. The Duty to Assist.

²⁷⁰ 2001 U.S. App. LEXIS 1387.

²⁷¹ *Id.*

²⁷² *Hensley*, 212 F.3d at 1260 (interpreting 38 U.S.C. §5103 to mean that the duty to assist includes explaining to a veteran who is making a claim, what is needed for that claim).

²⁷³ *Schroeder*, 212 F.3d at 1271 (finding that in order for 38 U.S.C. §5107(a)'s duty to assist to apply, only one of the veteran's claims has to be shown to be well-grounded).

²⁷⁴ *Morton*, 12 Vet. App. at 486. See 38 U.S.C. §§ 7252, 7261.

²⁷⁵ See Pub. L. No. 106-475, 114 Stat. 2096 (2000) (amending 38 U.S.C. § 5107(a))(Duty to assist).

the Federal Circuit is now taking an aggressive role in protecting the rights of veterans.²⁷⁶

Another view regarding the performance of the system that handles veterans' claims is that of Professor James O'Reilly of the University of Cincinnati,²⁷⁷ who believes that the entire veterans' appeals process is flawed and needs to be scrapped.²⁷⁸ Professor O'Reilly argues that the system does not work because it creates enormous delays that prevent the veteran from receiving the benefits to which he or she is entitled.²⁷⁹ In particular, Professor O'Reilly argues that the Court of Appeals for Veterans' Claims seldom reverses the Board of Veterans' Appeals by ordering the award of benefits but, instead, simply remands the case for further Board action under the proper legal principles.²⁸⁰ O'Reilly argues that the Secretary's General Counsel remands many cases to the Board on issues that are not outcome determinative,²⁸¹ thereby delaying consideration of the real issues by the Court of Appeals for Veterans' Claims for about a year.²⁸² To add insult to injury, the Secretary's General Counsel frequently requests two, thirty-day extensions of the deadline for almost every step of the appeal, resulting in even further delay.²⁸³ Professor O'Reilly does not discuss the problem of delay in the appeal process itself.

²⁷⁶ FOX, *supra* note 5, at 186.

²⁷⁷ Professor O'Reilly is a Visiting Professor of Law at the University of Cincinnati; J.D., University of Virginia; B.A., *cum laude*, Boston College.

²⁷⁸ James O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 224 (2001). A different view can be found in Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343 (2001). Mr. O'Connor is an attorney in the Office of General Counsel of the Department of Veterans' Affairs. The differences between Professor O'Reilly and Mr. O'Connor mostly concern administrative questions rather than the Federal Circuit, which both of them praise, but different implications may be drawn from the praise.

²⁷⁹ O'Reilly, *supra* note 278, at 224.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 232.

²⁸² *Id.* at 226-27.

²⁸³ *Id.*

Another criticism of the current system of reviewing veterans' claims made by Professor O'Reilly is that the Court of Appeals for Veterans' Claims lacks the necessary will to make the Secretary of Veterans' Affairs 'do the right thing.'²⁸⁴ Professor O'Reilly is correct that the Court of Appeals for Veterans' Claims is extremely reluctant to use its mandamus power to compel the Board to act promptly or in accordance with the instructions in the remand.²⁸⁵ In addition, cases are sometimes remanded for medical examinations or to obtain records, and at times come back on appeal without compliance with the remand.

Although Professor O'Reilly has identified a very real problem, this problem may be in the process of being resolved by the Department of Veterans' Affairs. Until a veteran gets to the Federal Circuit, neither the Court of Appeals for Veterans' Claims nor the Board of Veterans' Appeals or any other appropriate governmental body takes a firm hand to make sure the bureaucracy does 'the right thing' promptly. Nevertheless, Professor O'Reilly gives the Federal Circuit credit for trying to bring veterans' benefits law in line with general federal administrative law, and does look to the Federal Circuit as a short-term remedy to cure the reluctance of the Court of Appeals for Veterans' Claims to compel compliance with the law.²⁸⁶

The solution, as proposed by Professor O'Reilly, would be to have veterans' claims heard first by an administrative law judge, then by a National Appeals Council, then by a United States District Court, and only then by the local United States Court of Appeals.²⁸⁷ However, it is unclear why Professor O'Reilly believes that the National Appeals Council would be free of the problems that plague the Board of Veterans' Appeals. It is hard to see how a mere substitution of one agency for another will correct the problems of non-compliance by the offices of original jurisdiction. And, yet, Professor O'Reilly's proposal is

²⁸⁴ O'Reilly, *supra* note 278, at 252-253.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 228.

²⁸⁷ *Id.* at 243.

not new. In the 1970's, the U.S. Senate proposed that the United States District Courts review veterans' benefit decisions.²⁸⁸ The House Veterans' Affairs Committee rejected this idea, believing that the fragmentation of the law for veterans' claims would lead to confusion.²⁸⁹ Members of the bar of the Court of Appeals for Veterans' Claims typically have a nationwide practice in this area. Fragmentation of veterans' benefits law in eleven circuits could well mean eleven answers to such questions as: 1) When are Board of Veterans' Appeals affirming an earlier denial by a regional office subsumed? 2) Which errors are clear and unmistakable? 3) What evidence is new and material? and 4) How far must the Secretary go in assisting a veteran? Instead, the House Veterans' Affairs Committee urged a different solution, which was ultimately adopted, an Article I Administrative court.²⁹⁰

X. CONCLUSION

While it is true that there are problems that still inhere in the system, the Federal Circuit is not the cause of these problems. The Court is just beginning to assert itself on behalf of the veteran and on behalf of the plain meaning of the laws passed by Congress. While on the one hand, in *Smith* and *Morton*, the Federal Circuit started down two wrong paths clearly not intended by Congress, on the other hand, the Court has provided a uniform body of veterans' benefits law, the function Congress did intend. There is every indication that the Federal Circuit is performing its role, as mandated by Congress, by decisively defining the law, usually in favor of the veteran, and even more often in favor of the clear meaning of the statutes.

It is time, however, for the Federal Circuit to take the next step. The Court should not only define the law of veterans' benefits, but should insure that the agency it reviews adheres to

²⁸⁸ Remarks of Congressman Sonny, Second Judicial Conference of the Court of Appeals for Veterans Claims, 6 Vet. App. LXXXIX (1994).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

it. If necessary, the Congressional mandate of the Federal Circuit should not only require that the Court of Appeals for Veterans' Claims act in a manner consistent with the Federal Circuit, but should also require that the Court of Appeals for Veterans' Claims ensure that the Secretary of Veterans' Affairs complies more swiftly with the directives given to that agency when a case is remanded to it.