2015 VETERANS LAW DECISIONS OF THE FEDERAL CIRCUIT

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INTRODUCTION

In 2015, the number of precedential opinions issued by the U.S. Court of Appeals for the Federal Circuit regarding veterans affairs remained low, and again the Federal Circuit's focus remained predominantly on matters of procedure and jurisdiction rather than substantive veterans benefits law. Significantly, only *one* of the

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Federal Circuit's twelve precedential opinions[1] in this area represents a decision in favor of a veteran.[2]

Recent articles in this area have focused on the actual or potential impact of the changing composition of the Federal Circuit on veterans law.[3] In 2015, the Federal Circuit saw its latest addition, as the Honorable Kara F. Stoll joined the court to fill the seat vacated by the Honorable Randall Rader, who retired in June 2014. Although Judge Stoll is not the first Federal Circuit judge with experience in the field of veterans affairs, this may be the first time that a judge on the Federal Circuit has both appeared on behalf of a veteran and adjudicated a veteran's claim in the same calendar year. While still in private practice, Judge Stoll represented the veteran appellant in *Delisle v. McDonald*,[4] which is discussed below.

I. JURISDICTION OVER VETERANS BENEFITS APPEALS

Since the passage of the Veterans' Judicial Review Act of 1988,[5] veterans and their survivors have enjoyed an entitlement to appeal adverse veterans benefits decisions to the U.S. Court of Appeals for Veterans Claims ("Veterans Court") and to further appeal the

1. The Federal Circuit issued non-precedential decisions or terminating orders in sixty-six appeals from the U.S. Court of Appeals for Veterans Claims during the same period.

2. Carter v. McDonald, 794 F.3d 1342, 1343 (Fed. Cir. 2015). The Federal Circuit also decided three additional appeals in favor of claimants, albeit in non-precedential opinions. *See* Palmatier v. McDonald, 626 F. App'x 991, 994 (Fed. Cir. 2015); Jackson v. McDonald, No. 2014-7088, 2015 WL 3461914, at *7 (Fed. Cir. June 2, 2015); Salberg v. McDonald, 610 F. App'x 973, 978 (Fed. Cir. 2015).

As discussed further below, the Federal Circuit vacated and remanded the Veterans Court's decision in *Wingard v. McDonald*, 779 F.3d 1354 (Fed. Cir. 2015), which would tend to be interpreted as a win for the veteran appellant, but the opposite is the case. On remand, the Veterans Court was instructed to dismiss the claimant's appeal for lack of jurisdiction. *Id.* at 1359.

3. *See, e.g.*, Victoria Hadfield Moshiashwili, *Ending the Second "Splendid Isolation"?: Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437, 1447–48 (2014) ("In 2011, three judges left the court, two assumed senior status, and three new judges were confirmed."); James D. Ridgway, *Changing Voices in a Familiar Conversation about Rules vs. Standards: Veterans Law at the Federal Circuit in 2011*, 61 AM. U. L. REV. 1175, 1177–80 (2012) (commenting that the Federal Circuit has experienced a significant change in composition after years of maintaining "relative stability"); James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1039 (2013) (asserting that the addition of new judges could lead to "unexpected outcomes in areas that previously may have seemed settled").

4. 789 F.3d 1372 (Fed. Cir. 2015).

5. Pub. L. No. 100-687, 102 Stat. 4105 (1988).

decisions of that court to the Federal Circuit.[6] This entitlement, however, has consistently been confounded by limitations placed on the Federal Circuit's jurisdiction. Specifically, pursuant to 38 U.S.C. § 7292, the Federal Circuit has jurisdiction to review decisions of the Veterans Court "with respect to the validity . . . of any statute or regulation . . . or any interpretation thereof."[7] But the court does not have jurisdiction to review questions of fact or the application of law to fact.[8]

In 2015, the Federal Circuit dismissed thirty-three appeals from the Veterans Court for lack of jurisdiction.[9] In other words, the Federal Circuit assumed jurisdiction over only forty-five—or fifty-eight

6. *Id.* § 4052, 102 Stat. at 4113; *id.* § 4092, 102 Stat. at 4120.

7. 38 U.S.C. § 7292(a) (2012).

8. *Id.* § 7292(d)(2); *see, e.g.*, Waltzer v. Nicholson, 447 F.3d 1378, 1380–81 (Fed. Cir. 2006) (declaring that precedent establishes that the Federal Circuit is without jurisdiction to consider whether the weight of evidence in fact meets the legal standard required in a specific case).

9. Smithers v. McDonald, 626 F. App'x 1011, 1012 (Fed. Cir. 2015) (per curiam); Williams v. McDonald, No. 2015-7105, 2015 WL 8773799, at *2 (Fed. Cir. Dec. 15, 2015) (per curiam); Thornton v. McDonald, 626 F. App'x 1007, 1008 (Fed. Cir. 2015) (per curiam); Cleaver v. McDonald, 622 F. App'x 911, 912 (Fed. Cir. 2015) (per curiam); Newgard v. McDonald, 628 F. App'x 754, 757 (Fed. Cir. 2015) (per curiam); Gabriel v. McDonald, 621 F. App'x 1024, 1025 (Fed. Cir. 2015) (per curiam); Schellinger v. McDonald, 627 F. App'x 918, 918, 920 (Fed. Cir. 2015); Shoemake v. McDonald, 615 F. App'x 954, 954 (Fed. Cir. 2015) (per curiam); Andrus v. McDonald, 615 F. App'x 950, 951 (Fed. Cir. 2015) (per curiam); Hulsey v. McDonald, 625 F. App'x 546, 549 (Fed. Cir. 2015) (per curiam); Philippeaux v. McDonald, 612 F. App'x 615, 616–17 (Fed. Cir. 2015) (per curiam); Jeremiah v. McDonald, 609 F. App'x 644, 645–46 (Fed. Cir. 2015) (per curiam); Scotto v. McDonald, 620 F. App'x 913, 920 (Fed. Cir. 2015) (per curiam); Lawson v. McDonald, 618 F. App'x 670, 674 (Fed. Cir. 2015); *Delisle*, 789 F.3d at 1374; Bejarano v. McDonald, 607 F. App'x 994, 996 (Fed. Cir. 2015) (per curiam); Thomas v. McDonald, 614 F. App'x 513, 516 (Fed. Cir. 2015); Williams v. McDonald, 614 F. App'x 499, 503 (Fed. Cir. 2015) (per curiam); Hall v. McDonald, 607 F. App'x 991, 992 (Fed. Cir. 2015) (per curiam); Guajardo v. McDonald, 607 F. App'x 985, 987 (Fed. Cir.) (per curiam), *cert. denied*, 136 S. Ct. 598 (2015); Rodriguez v. McDonald, 611 F. App'x 715, 719 (Fed. Cir. 2015) (per curiam); Bell v. McDonald, 604 F. App'x 932, 933 (Fed. Cir. 2015) (per curiam); Swearingen v. McDonald, 603 F. App'x 1005, 1006 (Fed. Cir. 2015) (per curiam); Vetter v. McDonald, 599 F. App'x 386, 386 (Fed. Cir. 2015) (per curiam); Vann v. McDonald, 606 F. App'x 1005, 1009 (Fed. Cir. 2015); Keel v. McDonald, 602 F. App'x 522, 524 (Fed. Cir.) (per curiam), *cert. denied*, 135 S. Ct. 2332 (2015); Wohlwend v. McDonald, 595 F. App'x 989, 991 (Fed. Cir. 2015); Smith v. McDonald, 602 F. App'x 516, 518 (Fed. Cir. 2015) (per curiam); Ervin v. McDonald, 594 F. App'x 687, 688 (Fed. Cir. 2015); Bowers v. McDonald, 594 F. App'x 684, 685 (Fed. Cir. 2015) (per curiam); Macak v. McDonald, 598 F. App'x 776, 780–81 (Fed. Cir. 2015) (per curiam); Kelly v. McDonald, 592 F. App'x 949, 950 (Fed. Cir. 2015) (per curiam); Fullmer v. McDonald, 589 F. App'x 537, 538 (Fed. Cir. 2015) (per curiam).

percent—of the seventy-eight veterans appeals that the court resolved in 2015. And of those, seven appeals were dismissed in part.[10]

In *Delisle v. McDonald*, a panel of the Federal Circuit, comprised of Chief Judge Sharon Prost, Judge Alan D. Lourie, and District Judge Rodney Gilstrap,[11] dismissed the claimant's appeal for lack of jurisdiction because the appeal presented only questions of fact or the application of law to fact.[12] Specifically, the appeal concerned a request for an increased rating for Mr. Delisle's right knee disability, which the Veterans Court determined fell within established diagnostic codes ("DCs").[13]

Interestingly, despite dismissing the appeal, the Federal Circuit proceeded in dicta to discuss a legal issue raised by Mr. Delisle.[14] Specifically, the Federal Circuit rejected Mr. Delisle's argument that DC 5257 is a catch-all regulation that would entitle him to an increased rating.[15] The legal argument did not, however, vest the Federal Circuit with jurisdiction over Mr. Delisle's appeal because the Veterans Court had already determined that application of DC 5257 to the facts of Mr. Delisle's claim would not entitle him to an increased rating.[16]

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10. Mathis v. McDonald, 725 F. App'x 539, 542 (Fed. Cir. 2015) (per curiam); Clay v. McDonald, 618 F. App'x 674, 677–78 (Fed. Cir. 2015) (per curiam); El Malik v. McDonald, 618 F. App'x 1007 (Fed. Cir. 2015) (per curiam); Bryan v. McDonald, 615 F. App'x 681, 685 (Fed. Cir. 2015); Winsett v. McDonald, 611 F. App'x 710, 714 (Fed. Cir. 2015) (per curiam); Salberg v. McDonald, 610 F. App'x 973, 978 (Fed. Cir. 2015); Grayton v. McDonald, 597 F. App'x 1079, 1082 (Fed. Cir. 2015) (per curiam).

Although it has become a relatively common practice at the Federal Circuit, "dismissal" of an issue is an imprecise way of declining to review an issue because the court lacks jurisdiction to do so. This practice, however, highlights the Federal Circuit's sensitivity to its jurisdictional constraints in veteran's appeals. *See* PAUL M. SCHOENHARD, VETERANS AFFAIRS LAW 419 (2012) (discussing how the Federal Circuit often imprecisely treats nonreviewability of an issue as dismissal of the issue for lack of jurisdiction).

11. *Delisle*, 789 F.3d at 1373. The Honorable Rodney Gilstrap of the U.S. District Court for the Eastern District of Texas sat by designation with the Federal Circuit in April 2015.

12. *Id.* at 1374.

13. *Id.*

14. *See id.* ("Further, if the court were to reach the merits of Mr. Delisle's claim, he cannot prevail.").

15. *Id.* at 1374–75. Note that the Federal Circuit's treatment of this argument does not form a basis for dismissing Mr. Delisle's appeal, does not comprise a holding, and does not represent precedent on the legal issue.

16. *Id.*; Delisle v. Shinseki, No. 12-3113, 2014 WL 718507, at *2 (Vet. App. Feb. 26, 2014), *appeal dismissed*, 789 F.3d 1372 (2015).

In *Wingard v. McDonald*,[17] the Federal Circuit considered another jurisdictional issue: whether 38 U.S.C. § 7252(b) precludes the Veterans Court from reviewing a case if the U.S. Department of Veterans Affairs (VA) complied with statutory constraints on the schedule of disability ratings.[18] The Federal Circuit expressly held "that Congress has barred the Veterans Court from conducting that review and also has barred this court from itself conducting the review on appeal from a Veterans Court decision."[19]

Relatedly, the Federal Circuit explained that its authority to review regulations on direct appeal from the VA pursuant to 38 U.S.C. § 502 did not permit it to take up the same issues indirectly via the Veterans Court.[20]

II. EQUITABLE TOLLING AND THE PRESUMPTION OF REGULARITY

In 2011, the U.S. Supreme Court issued its decision in *Henderson v. Shinseki*,[21] holding that the deadline for a veteran to file a notice of appeal to the Veterans Court is not jurisdictional. In so doing, the Court left open the possibility that such filings could be subject to equitable tolling.[22] In the wake of *Henderson*, the Federal Circuit has issued four precedential decisions, working with the Veterans Court to develop the framework and boundaries for equitable tolling in this context.[23]

In *Toomer v. McDonald*,[24] the Federal Circuit once again took up the issue of equitable tolling in a case that the court had remanded twice already for further review of equitable tolling considerations.[25]

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17. 779 F.3d 1354 (Fed. Cir. 2015).

18. *Id.* at 1355.

19. *Id.*

20. *Id.* at 1358–59.

21. 562 U.S. 428 (2011).

22. *See id.* at 438, 442 n.4 (clarifying that, in this case, the court expressed no view on the question of whether the deadline for filing a notice to appeal is subject to equitable tolling).

23. Toomer v. McDonald, 783 F.3d 1229, 1239–40 (Fed. Cir. 2015); Checo v. Shinseki, 748 F.3d 1373, 1378–81 (Fed. Cir. 2014); Dixon v. Shinseki, 741 F.3d 1367, 1375–79 (Fed. Cir. 2014); Sneed v. Shinseki, 737 F.3d 719, 726 (Fed. Cir. 2013). The Federal Circuit's *Checo* and *Dixon* decisions are analyzed in Victoria Hadfield Moshiashwili, *The Downfall of* Auer *Deference: Veterans Law at the Federal Circuit in 2014*, 64 AM. U. L. REV. 1007, 1062–70 (2015), and the court's *Sneed* decision is analyzed in Moshiashwili, *supra* note 3, at 1507–09.

Although not clarifying the scope of equitable tolling, the Federal Circuit has also analyzed *Henderson* in *Tyrues v. Shinseki*, 732 F.3d 1351 (Fed. Cir. 2013).

24. 783 F.3d 1229 (Fed. Cir. 2015).

25. *Id.* at 1239. In 2011, the Federal Circuit remanded Mr. Toomer's original appeal to the Veterans Court for further adjudication in view of *Henderson*. Toomer

The Board of Veterans Appeals ("Board") claimed to have sent Mr. Toomer its decision on his claim on June 2, 2009.[26] What followed was rather peculiar:

> On July 27, 2009, however, Mr. Toomer informed the VA by telephone that he had not yet received the Board Decision. He was informed a decision had already been entered and another copy would be mailed to him. On August 4, 2009, the VA mailed a cover letter to Mr. Toomer with a date-stamp of "AUG 04 2009," . . . [and] (1) a copy of the VA's [earlier] cover letter to Mr. Toomer hand-dated "6/02/09," (2) a copy of the Board's June 2, 2009 decision, also hand-dated "6/02/09" with a stamped "FILE COPY" over the signature block, and . . . a notice of appellate rights . . . .[27]

Mr. Toomer filed his notice of appeal more than 120 days after June 2, 2009, although he did so within 120 days of August 4, 2009.[28] The Veterans Court dismissed his appeal as untimely and twice reentered its dismissal in the wake of remands from the Federal Circuit.[29]

On appeal to the Federal Circuit for a third time, Mr. Toomer's case was submitted to a panel comprised of Judges Jimmie V. Reyna, Raymond C. Clevenger, and Evan J. Wallach. Judge Wallach wrote the opinion for the court,[30] with Judge Reyna writing in dissent.[31]

Judge Wallach's panel opinion focused first on whether Mr. Toomer had rebutted the presumption of regularity that attached to the VA's claim that it had, in fact, sent its original Board decision on June 2, 2009.[32] In particular, Judge Wallach addressed Mr. Toomer's argument that the VA had a duty to provide him with additional information regarding VA procedures, which he could use to rebut the presumption of regularity.[33] The Federal Circuit found that the

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v. Shinseki, 424 F. App'x 950 (Fed. Cir. 2011) (per curiam). After Mr. Toomer's appeal was again dismissed by the Veterans Court in *Toomer v. Shinseki*, No. 09-4086, 2012 WL 762844, at *2 (Vet. App. Mar. 12, 2012), the Federal Circuit again remanded the case to the Veterans Court for further consideration of the evidence and argument that Mr. Toomer had submitted regarding the presumption of regularity. Toomer v. Shinseki, 524 F. App'x 666, 670–71 (Fed. Cir. 2013).

26. *Toomer*, 783 F.3d at 1231.
27. *Id.* (citations omitted).
28. *Id.*
29. *Id.* at 1231–32.
30. *Id.* at 1231.
31. *Id.* at 1240 (Reyna, J., dissenting).
32. *Id.* at 1234 (majority opinion).
33. *Id.* at 1235.

VA had satisfied its obligations in this regard and deferred to the Veterans Court's analysis of the evidence.[34]

Judge Wallach then addressed the Veterans Court's decision not to apply equitable tolling in Mr. Toomer's case. In doing so, Judge Wallach looked to the analytical framework endorsed by the Federal Circuit in 2014 in *Checo v. Shinseki*,[35] stating that "'to benefit from equitable tolling, . . . a claimant [must] demonstrate three elements: (1) extraordinary circumstance; (2) due diligence; and (3) causation.' That is, due diligence must be shown '[i]n addition to an extraordinary circumstance.'"[36]

Judge Wallach acknowledged that "equitable tolling is not 'limited to a small and closed set of factual patterns,'"[37] but concluded that the Veterans Court "properly considered whether, in this case, Mr. Toomer's claim that he was misled by a VA document constitutes an extraordinary circumstance."[38] The Federal Circuit declined to revisit further the Veterans Court's substantive analysis.[39]

In dissent, Judge Reyna questioned the majority's reluctance to review the Veterans Court's equitable tolling analysis as a matter of law, noting that, in his view, no material facts were in dispute.[40] On the merits, Judge Reyna would have found that equitable tolling was appropriate.[41] And, in his view, the Veterans Court's decision to the contrary established a precedent that may produce undesirable, or even "absurd," results in other cases.[42]

III. OTHER PROCEDURAL MATTERS

The Federal Circuit also considered several appeals focusing on procedural matters, including whether (1) notice errors may be cured, (2) the VA can be found to violate its duty to assist when it orders an additional medical examination that ultimately does not

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34. *See id.* at 1236 ("[A]s to Mr. Toomer's evidence that the Board Decision he received in the August 4, 2009 mailing was unsigned and hand-dated, the [Veterans Court] acknowledged this may be 'some evidence that the original decision might not have been finalized or mailed on June 2,' but 'does not rise to the level of clear evidence of irregularity' . . . .").

35. 748 F.3d 1373 (Fed. Cir. 2014).

36. *Toomer*, 783 F.3d at 1238 (alterations in original) (citation omitted) (quoting *Checo*, 748 F.3d at 1378–79).

37. *Id.* at 1239 (quoting Mapu v. Nicholson, 397 F.3d 1375, 1380 (Fed. Cir. 2005)).

38. *Id.*

39. *Id.* at 1239–40.

40. *Id.* at 1240–41 (Reyna, J., dissenting).

41. *Id.* at 1241–43.

42. *Id.* at 1243.

support the veteran's claim, (3) the Veterans Court has discretion to deny motions to recall a prior judgment under "the Plan," and (4) whether procedural arguments may be waived if not raised and exhausted before the Board and/or the Veterans Court.

In *Carter v. McDonald*,[43] the Federal Circuit considered the effect of the Board's failure to provide proper notice of the deadline for submitting new evidence pursuant to a joint remand from the Veterans Court.[44] Specifically, as part of the remand proceedings, the Board sent a letter to Mr. Carter and his former representative, the Disabled American Veterans, advising Mr. Carter that any additional argument or evidence in his case "must be submitted . . . within [ninety] days of the date of this letter."[45] The Board did not send the letter to Mr. Carter's new counsel, and Mr. Carter's new counsel did not receive the letter within the ninety-day period.[46] A copy of the letter was, however, provided to Mr. Carter's new counsel as part of Mr. Carter's claim file after the ninety-day deadline had passed, but before the Board issued a decision in Mr. Carter's case.[47] The Board denied Mr. Carter's claim.[48]

On appeal, the Veterans Court concluded that the Board's inclusion of the notice letter in the version of the claim file provided to Mr. Carter's new counsel *cured* the Board's error in failing to send the letter to Mr. Carter's new counsel in the first instance.[49]

On further appeal to the Federal Circuit, Mr. Carter's case was submitted to a panel comprised of Judges Reyna, S. Jay Plager, and Richard G. Taranto. Judge Taranto wrote the opinion for the court.[50]

Importantly, the government did not dispute the Board's duty to provide notice directly to the claimant's representative pursuant to 38 C.F.R. 1.525(d).[51] As a result, the Federal Circuit's focus remained solely on whether Mr. Carter's counsel's general understanding of procedure or the Board's subsequent provision of a copy of the letter

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43. 794 F.3d 1342 (Fed. Cir. 2015).
44. *Id.* at 1342–43.
45. *Id.* at 1343 (emphasis omitted).
46. *Id.*
47. *Id.*
48. *Id.* at 1343–44.
49. *Id.* at 1344.
50. *Id.* at 1342.
51. *Id.* at 1345. Although the Federal Circuit does not appear to have addressed the significance of this regulation in the past, the Veterans Court has consistently treated the failure to provide notice to a claimant's representative pursuant to 38 C.F.R. § 1.525 as error. *See, e.g.*, McGlaughn v. Nicholson, 23 Vet. App. 504, No. 04-1218, 2007 WL 1659090, at *3 (May 31, 2007) (unpublished table decision).

to Mr. Carter's counsel cured the Board's failure to provide timely notice.[52] As the panel held, neither cured the Board's error:

> Without an additional notice, we do not see how the notice failure could have been cured unless the applicable law itself contemporaneously put Mr. Carter's counsel on notice that the [ninety]-day letter could not be applied according to its unambiguous terms, i.e., unless the law informed his counsel that, despite the unambiguously stated deadline, Mr. Carter was legally entitled to submit evidence past the deadline and have it considered by the Board exactly as if it had been submitted before the deadline. There was no such law.[53]

In the only precedential win for a veteran in 2015, the Federal Circuit reversed the Veterans Court's decision and remanded Mr. Carter's claim.[54]

In *Herbert v. McDonald*,[55] the Federal Circuit considered whether 38 U.S.C. § 5103A, which imposes on the VA a broad duty to assist veterans in developing their claims, forbids the VA from ordering a medical examination unless the existing record is found to be insufficient.[56] Writing for a panel consisting of Judges Timothy B. Dyk, Taranto, and Todd M. Hughes, Judge Taranto provided the following explanation:

> The statute states that, in certain circumstances, the Secretary *must* order a medical examination. It does not say, however, that the Secretary may not order a medical examination in any other circumstance. It imposes an evidence-gathering duty on the Secretary. It does not confine discretion the Secretary otherwise has to gather evidence, including by ordering a medical examination.[57]

The Veterans Court decision affirming the denial of benefits to Mr. Herbert was thus affirmed.[58]

In *Smith v. McDonald*,[59] the Federal Circuit considered the Veterans Court's discretion in the implementation of the plan ("Plan") the Federal Circuit established in *National Organization of Veterans Advocates, Inc. v. Secretary of Veterans Affairs*,[60] "requiring the Department of Veterans Affairs . . . to take certain actions to identify

52. *Carter*, 794 F.3d at 1345.
53. *Id.*
54. *Id.* at 1347.
55. 791 F.3d 1364 (Fed. Cir. 2015).
56. *Id.* at 1366.
57. *Id.* at 1366–67.
58. *Id.* at 1367.
59. 789 F.3d 1331 (Fed. Cir. 2015).
60. 725 F.3d 1312 (Fed. Cir. 2013).

and rectify harms caused by its wrongful application of a former version of 38 C.F.R. § 3.103."[61] Importantly, in *Smith,* there was no evidence that the invalid version of section 3.103 had at any point been applied during adjudication of his claim.[62] Nonetheless, because Mr. Smith had not obtained full relief on his claim—because his case was returned as a result for searches on "§ 3.103" and "*Bryant*," and consistent with the Plan—the VA offered to file a motion to recall the Veterans Court's decision in his case and to file a motion for a joint remand of his claim for further adjudication.[63] The Veterans Court, however, denied both motions.[64]

On appeal to the Federal Circuit, a panel comprised of Chief Judge Prost, Judge Plager, and Judge Wallach held that the Plan did not impose any obligations on the Veterans Court.[65] The Veterans Court's decision was thus affirmed.[66]

In *Scott v. McDonald*,[67] the Federal Circuit considered whether procedural objections that are not expressly raised and exhausted in proceedings before the Board and/or the Veterans Court may be deemed waived.[68] Specifically, this case invited the Federal Circuit to relax its precedent regarding issue exhaustion and to clarify or extend its past holdings regarding the duty of the Board to liberally construe claimants' arguments and to consider related claims that are reasonably raised by the record, even if not expressly raised by the claimant.[69]

During proceedings at the VA, Mr. Scott requested a hearing before the Board but was unable to appear at the scheduled time.[70] Although Mr. Scott had informed the Board that he was incarcerated and, therefore, unable to appear in person, the Board determined that Mr. Scott's failure to appear was without good cause and refused to provide him with a rescheduled hearing.[71]

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61. *Smith*, 789 F.3d at 1332. Section 3.103 outlines claimants' procedural due process and appellate rights during U.S. Department of Veterans Affairs (VA) proceedings. 38 C.F.R. § 3.103 (2015).

62. *Smith*, 789 F.3d at 1333.

63. *Id.*

64. *Id.* at 1334.

65. *See id.* at 1331, 1335 ("Neither the requirements of the Plan nor the language of our decisions in the *NOVA* litigation bound the Veterans Court to automatically grant a joint motion to recall or remand simply because such a motion was proffered.").

66. *Id.* at 1335.

67. 789 F.3d 1375 (Fed. Cir. 2015).

68. *Id.* at 1381.

69. *See id.* at 1377–78, 1380–81.

70. *Id.* at 1376–77.

71. *Id.* at 1377.

Thereafter, Mr. Scott's claim was decided adversely on the merits.[72] He appealed to the Veterans Court, which granted him a remand, and his claim returned to the VA.[73] Mr. Scott did not, however, expressly raise—either with the Veterans Court or with the Board on remand—any procedural objection to the Board's refusal to reschedule his original evidentiary hearing.[74]

When Mr. Scott ultimately pressed his objection, during a second appeal to the Veterans Court, the Veterans Court determined that the argument had not been properly raised and exhausted at the agency level and was thus waived.[75]

On appeal to the Federal Circuit, Mr. Scott's case was submitted to a panel comprised of Judges Dyk, Haldane Robert Mayer, and Reyna. Writing for the panel, Judge Dyk addressed the law of issue exhaustion separately regarding Mr. Scott's apparent failure to raise his objection before the Veterans Court and the Board.[76] Synthesizing the Federal Circuit's precedents in each context, Judge Dyk provided the following conclusion:

> [A]bsent extraordinary circumstances not apparent here, we think it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran, though at the same time giving the veteran's pleadings a liberal construction.
>
> In short, we hold that the Board's obligation to read filings in a liberal manner does not require the Board or the Veterans Court to search the record and address procedural arguments when the veteran fails to raise them before the Board. Under the balancing test articulated in *Maggitt* [*v. West*,[77]] the VA's institutional interests in addressing the hearing issue early in the case outweigh Scott's interests in the Veterans Court's adjudication of the issue.[78]

The Federal Circuit thus affirmed the Veterans Court's waiver determination.

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72. *Id.*

73. *Id.*

74. *Id.* The panel opinion noted that "Scott again appealed to the Board via a re-certification of appeal form which checked 'YES' in answer to 'WAS HEARING REQUESTED?,'" *id.*, but the Federal Circuit did not explain why that was insufficient to raise the hearing issue. *Id.* at 1381.

75. *Id.* at 1377.

76. *Id.* at 1376, 1381.

77. 202 F.3d 1370 (Fed. Cir. 2000).

78. *Scott*, 789 F.3d at 1381 (citing *Maggitt*, 202 F.3d at 1377).

IV. SUBSTANTIVE BENEFITS ELIGIBILITY DECISIONS

The few precedential opinions addressing claimants' rights to substantive benefits tackled straightforward issues in equally straightforward fashion.

In *Mulder v. McDonald*,[79] the Federal Circuit considered the VA's statutory obligation to reduce payment of benefits awards to veterans during periods of incarceration pursuant to 38 U.S.C. § 5313(a)(1).[80] Specifically, the court was asked to determine whether a period of incarceration due to an inability to post bail post-conviction but pre-sentencing should be treated as incarceration "for conviction of a felony."[81] A panel of the Federal Circuit comprised of Judges Pauline Newman, Kathleen M. O'Malley, and Raymond T. Chen affirmed the Veterans Court's conclusion that the critical time point is when a felony conviction is entered.[82]

Mr. Mulder argued on appeal that "the necessary causal link between his incarceration and felony conviction was not present until he was actually sentenced to a term of imprisonment exceeding sixty days."[83] Writing for the Federal Circuit, Judge Chen thus focused on the construction of the statutory language "incarcerated . . . *for* conviction of a felony."[84] To that end, Judge Chen referred to the Federal Circuit's 2014 decision in *Wilson v. Gibson*,[85] in which the court addressed a related argument; namely, whether the relevant timing consideration is when a conviction becomes final by virtue of exhaustion of appellate rights.[86] Consistent with *Wilson*, the Federal Circuit in *Mulder* "decline[d] to equate the word 'sentencing' with the statutory term 'conviction'"[87] and concluded that "[t]he statutory language does not require that the conviction be the sole reason that the individual is incarcerated."[88]

In *Dixon v. McDonald*,[89] a Federal Circuit panel comprised of Judges Newman, Dyk, and Reyna held in a very brief opinion that "absent notice to the VA of the veteran's legal obligation, the VA is not liable

79. 805 F.3d 1342 (Fed. Cir. 2015).
80. *Id.* at 1343.
81. *Id.* at 1346 (emphasis omitted).
82. *Id.* at 1343, 1349.
83. *Id.* at 1346.
84. *Id.*
85. 753 F.3d 1363 (Fed. Cir. 2014).
86. *Id.* at 1366–68. The Federal Circuit's decision in *Wilson* is discussed in Moshiashwili, *supra* note 23, at 1049–50.
87. *Mulder*, 805 F.3d at 1346.
88. *Id.* at 1346–48.
89. 778 F.3d 1339 (Fed. Cir. 2015).

for such obligation after the veteran's death."[90] This broad issue arose in *Dixon* in the specific context of a claim for retroactive garnishment of benefits payments pursuant to an Order of Support.[91] The Veterans Court held, and the Federal Circuit affirmed, "that 42 U.S.C. § 659(i)(5) requires that a garnishment order or similar legal process be served on the VA, in order for the VA to garnish veteran's payments."[92]

In *Haynes v. McDonald*,[93] a Federal Circuit panel comprised of Judges Newman, O'Malley, and Wallach held in a very brief opinion that a surviving spouse must, in fact, have been a spouse at the time of the veteran's death.[94] "Section 3.50(b)," the panel explained, "defines the 'surviving spouse' as someone 'who was the spouse of the veteran at the time of the veteran's death,' tracking [38 U.S.C. § 101(3)]. No exception to this clear statutory mandate and regulation is indicated."[95]

In *Moffitt v. McDonald*,[96] a Federal Circuit panel comprised of Judges Lourie, Kimberly A. Moore, and O'Malley held—consistent with the Federal Circuit's decision in *Kernea v. Shinseki*[97]—that a surviving spouse may not rely on a "hypothetical entitlement" theory to establish eligibility for enhanced dependency and indemnity compensation benefits and that the VA was permitted to give retroactive effect to the regulation that established that policy.[98]

V. DIRECT REVIEW OF VA REGULATIONS

The Federal Circuit heard only one direct petition under 38 U.S.C. § 502 in 2015.[99] In *McKinney v. McDonald*,[100] a panel comprised of Judges O'Malley and Wallach, and District Judge Gilstrap considered a petition for review of the effective date of a regulation[101] that provides a presumption of herbicide exposure for certain veterans

90. *Id.* at 1340–41.
91. *See id.*
92. *Id.*
93. 785 F.3d 614 (Fed. Cir. 2015).
94. *Id.* at 614, 616. Judge Newman authored the opinions for the Federal Circuit in both *Dixon*, discussed above, and *Haynes*.
95. *Id.* at 616.
96. 776 F.3d 1359 (Fed. Cir. 2015).
97. 724 F.3d 1374, 1382 (Fed. Cir. 2013).
98. *Moffitt*, 776 F.3d at 1364–69.
99. As discussed above, the Federal Circuit determined in *Wingard v. McDonald* that it did not have jurisdiction to treat an appeal from a dismissal by the Veterans Court of an appeal regarding the contents of the Ratings Schedule as if it were a § 502 appeal. 779 F.3d 1354, 1358–59 (Fed. Cir. 2015).
100. 796 F.3d 1377 (Fed. Cir. 2015).
101. 38 C.F.R. § 3.307(a)(6)(iv) (2011).

who served in units that operated in or near certain areas of the Korean demilitarized zone (DMZ) during the Vietnam era.[102]

The challenged regulation finds its genesis in the Veterans Benefits Act of 2003,[103] which authorized benefits for certain children with spina bifida born to veterans who were exposed to herbicides near the Korean DMZ.[104] Thereafter, the VA determined that such veterans' presumptive exposure should rationally be established for purposes both of their children's benefits—as specified by the 2003 Act—and of their own personal claims for benefits.[105] The Veterans Benefits Administration thus revised its Adjudication Procedure Manual to provide for such a presumption.[106]

In 2009, the VA proposed the challenged regulation,[107] which was finalized and published in 2011.[108] The final rule extended the period of time of service for which the presumption would be established and set an effective date thirty days after publication of the final rule in the Federal Register.[109]

Mr. McKinney and several veterans service organizations challenged the effective date of the regulation because it created the peculiar result that the same claimant may be awarded service connection for a current disability based on the regulation's presumption for the period from 2011 onward, but may be denied service connection for the same disability prior to 2011 for lack of evidence.[110]

Writing for the Federal Circuit, Judge O'Malley concluded that the challenged regulation did not reflect an arbitrary or capricious act by the VA.[111] Rather, Judge O'Malley noted, its prospective application is consistent with the VA's treatment of other liberalizing statutes and regulations.[112]

CONCLUSION

In sum, the year 2015 was a sparse year for veterans law at the Federal Circuit. Although it can be hoped that the continued

102. *McKinney*, 796 F.3d at 1378.
103. 38 U.S.C. § 1821 (2012).
104. *McKinney*, 796 F.3d at 1379.
105. *Id.*
106. *Id.*
107. *Id.* at 1379–80.
108. *Id.* at 1380.
109. *Id.*
110. *Id.* at 1381–83.
111. *Id.* at 1384–86.
112. *Id.* at 1384–85.

decrease in the number of precedential opinions issued by the Federal Circuit in this area is attributable to improved operations at the VA and effective review by the Veterans Court, it remains distressing that so few veterans appeals are decided on the merits and that the Federal Circuit's jurisdictional limitations continue to impose roadblocks to veterans' all-too-lengthy battles for benefits.