

AN INTRODUCTION TO VETERANS LAW: SERVING THOSE WHO SERVED US  
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*Executive Summary: The Federal Circuit is a court of appeals with exclusive jurisdiction over several important subjects, including veterans law. This memo first provides background information on veterans law, a history of the veterans affairs system, and an overview of the veterans claims process. Next, this memo presents two pressing veterans law issues: the Court of Appeals for Veterans Claims's (CAVC) newfound ability to certify class actions and the Veterans Appeals Improvement and Modernization Act (AMA). The memo concludes with a brief biography detailing the career of our keynote speaker, Chief Judge Margaret Bartley, and provides a list of reference materials, including key vocabulary terms, precedential cases, and starting points for further research.*

I. THE 4-1-1 ON VETERANS LAW

Veterans affairs law is the body of law that governs the adjudication of veterans benefits claims; it is “the creature of a robust federal statutory and regulatory scheme.”<sup>1</sup> The Department of Veterans Affairs (VA) oversees and administers veterans benefits regulated under Title 38 of the United States Code.<sup>2</sup> Once a veteran is discharged from active military service, she and her family become eligible for various benefits.<sup>3</sup> Some of these benefits include health care, compensation and pension, education and training, home loans, insurance, vocational rehabilitation and employment, burial and memorial services, and a variety of fiduciary services.

A. *A Brief History of the Veterans Affairs System*

Prior to the creation of the Veterans Administration, the U.S. Congress and the States all variously provided benefits to veterans.<sup>4</sup> For fifty-eight years, from its inception in 1930 until 1988, the VA operated virtually free of any judicial oversight.<sup>5</sup> Under this system, when the VA denied a veteran's claim, the veteran had no right to challenge the agency's decision.<sup>6</sup> On November 18, 1988, President Ronald Reagan signed the Veteran's Judicial Review Act,<sup>7</sup> thereby establishing the United States Court of Veteran's

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<sup>1</sup> Drake et al., *Review of Recent Veterans Law Decisions of the Federal Circuit*, 69 AM. U. L. REV. 1343, 1345 (2020).

<sup>2</sup> 38 U.S.C. § 301 (2018).

<sup>3</sup> See U.S. DEP'T OF VETERANS AFFAIRS, <https://www.va.gov/opa/persona/index.asp> (last visited Sept. 26, 2020) (explaining that active service means “full-time service, other than active duty for training, as a member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or as a commissioned officer of the Public Health Service, Environmental Science Services Administration or National Oceanic and Atmospheric Administration”). Also note that those service members dishonorably discharged are not eligible for benefits. *Id.*

<sup>4</sup> *Court History*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/history.php> (last visited Sept. 16, 2020).

<sup>5</sup> See *id.* (noting that the VA was the only federal agency free from oversight).

<sup>6</sup> *Id.*

<sup>7</sup> Pub. L. No. 100-687, 102 Stat. 4107 (1988) (codified as amended at 38 U.S.C. § 7101 (2018)).

Appeals—finally providing claimants an avenue to appeal claims that the VA denied.<sup>8</sup> Congress changed the court’s name in 1999 to the United States Court of Appeals for Veterans Claims (CAVC).<sup>9</sup> This court is wholly separate from the VA, and it hears opinions on appeal from the VA-contained Board of Veterans Appeals (BVA).<sup>10</sup>

### B. *The Veterans Claims Process*

Veterans, or certain family members seeking benefits, must apply to receive them at their local VA office.<sup>11</sup> Upon receipt of the benefits application, the VA reviews the applicant’s claim and either accepts or denies it.<sup>12</sup> When a local VA office denies an applicant’s claim, he may appeal directly to the BVA, kicking off a uniquely pro-claimant appeals process.<sup>13</sup>

The BVA is the appellate body of the VA;<sup>14</sup> it is comprised of a Chairman, a Vice Chairman, and Veterans Law Judges.<sup>15</sup> The BVA does not have a set number of judges; the amount of judges varies based on the volume of appeals.<sup>16</sup> Once the BVA reviews the appeal, the Veterans Law Judges issue a final decision.<sup>17</sup> If a claimant does not agree with the BVA’s decision, she may begin the appeals process by timely filing a notice of appeals with the CAVC.<sup>18</sup>

The CAVC is comprised of seven permanent judges and two additional judges, all whom serve fifteen-year terms.<sup>19</sup> A panel of three judges hears appeals from the BVA, from which the CAVC reviews the BVA’s decision, the written record, and the parties’

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<sup>8</sup> See *Court History*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/history.php> (last visited Sept. 16, 2020) (noting that the CAVC is an Article I court).

<sup>9</sup> See *id.* (explaining that the change in name resulted largely from an influx of post-Vietnam claims in the 1970s and 1980s).

<sup>10</sup> *Id.*

<sup>11</sup> DANIEL T. SHEDD, CONG. RESEARCH SERV., OVERVIEW OF THE APPEAL PROCESS FOR VETERANS’ CLAIMS 1 (2012), [http://www.veteranslawlibrary.com/files/CRS\\_R42609.pdf](http://www.veteranslawlibrary.com/files/CRS_R42609.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> See Drake et al., *supra* note 1, at 1345 n.4 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (explaining that the VA must assist veterans in developing evidence to support their claims). For example, veterans are entitled to the “benefit of the doubt” when there is a balance of positive and negative evidence. See *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990) (explaining that 38 U.S.C. § 3007(b) provides this unique standard of proof to veterans). The BVA reviews claims *de novo*. *Henderson*, 562 U.S. at 440-41.

<sup>14</sup> *Board of Veterans’ Appeals*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.bva.va.gov/index.asp> (last visited Sept. 26, 2020).

<sup>15</sup> *Board of Veterans’ Appeals Organizational Chart*, U.S. DEPARTMENT OF VETERANS AFFAIRS, [https://www.bva.va.gov/docs/Board\\_of\\_Veterans\\_Appeals\\_Organizational\\_Chart.pdf](https://www.bva.va.gov/docs/Board_of_Veterans_Appeals_Organizational_Chart.pdf) (last visited Sept. 27, 2020).

<sup>16</sup> *How Do I Appeal?*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet-508Compliance.pdf> (last visited Sept. 27, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> See *Court Process*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, [http://www.uscourts.cavc.gov/court\\_process.php](http://www.uscourts.cavc.gov/court_process.php) (last visited Sept. 26, 2020) (explaining that veterans must file a notice of appeal to the CAVC within 120 days of the BVA’s decision).

<sup>19</sup> *Id.*

briefs.<sup>20</sup> After the CAVC issues its judgment, a party has sixty days to appeal the decision to the United States Court of Appeals for the Federal Circuit.<sup>21</sup>

The Federal Circuit hears questions of law; thus, claimants only appeal CAVC decisions when they believe that the CAVC has made a legal error.<sup>22</sup> The Federal Circuit cannot review the CAVC’s factual findings unless the case presents a constitutional issue.<sup>23</sup> Given the limited jurisdiction, few cases reach the Federal Circuit.<sup>24</sup> When a party does not agree with the Federal Circuit’s decision, it can appeal to the Supreme Court.<sup>25</sup>

The most recent and important veterans law case to reach the Supreme Court was *Kisor v. Wilkie*.<sup>26</sup> In *Kisor*, a veteran, Mr. Kisor, sought disability benefits, but the VA denied his application.<sup>27</sup> Upon review, the BVA denied Mr. Kisor’s claim because he failed to proffer “relevant official service department records” not filed at the time of the initial claim.<sup>28</sup> The BVA’s decision turned on its interpretation of the word “relevant” as used in 38 C.F.R. § 3.156(c)(1).<sup>29</sup> Both the CAVC and the Federal Circuit affirmed the BVA’s decision.<sup>30</sup> The Court considered whether the Secretary of the VA made a valid “interpretation of an ambiguous regulation, 38 C.F.R. § 3.156(c)(1).”<sup>31</sup> Twice before *Kisor*, in *Auer v. Robbins*<sup>32</sup> and *Bowles v. Seminole Rock & Sand Co.*,<sup>33</sup> the Court considered the issue of an executive department’s interpretation of an ambiguous regulation. In *Auer* and *Bowles*, the Court determined that courts must defer to an agency’s reading of its own ambiguous regulation.<sup>34</sup> Reviewing the issue of interpretation again in *Kisor*, the Court decided not to overrule these two seminal cases—instead it articulated a new three step test for courts to apply when determining if a regulation contains ambiguous language.<sup>35</sup>

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<sup>20</sup> *Id.* However, the majority of the cases that reach the CAVC are non-precedential; single judges, as opposed to a panel of three judges, resolve these non-precedential cases. *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Court Role and Structure*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Sept. 27, 2020).

<sup>23</sup> CONG. RESEARCH SERV., U.S. COURT OF APPEALS FOR VETERANS CLAIMS: A BRIEF INTRODUCTION 1 (2019), <https://crsreports.congress.gov/product/pdf/IF/IF11365>.

<sup>24</sup> *Court Jurisdiction*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/the-court/court-jurisdiction> (last visited Sept. 27, 2020) (noting that, as of 2018, the Federal Circuit’s case load consisted of 20% administrative law cases, 67% intellectual property cases, and 13% money damages against the United States government). Veterans benefits claims, international trade disputes, and personnel claims, account for the administrative law cases that make up 20% of the Federal Circuit’s docket. *Id.*

<sup>25</sup> *Court Process*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, [http://www.uscourts.cavc.gov/court\\_process.php](http://www.uscourts.cavc.gov/court_process.php) (last visited Sept. 26, 2020).

<sup>26</sup> 139 S. Ct. 2400 (2019).

<sup>27</sup> *Id.* at 2409.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Drake, *supra* note 1, at 1350.

<sup>32</sup> 519 U.S. 452 (1997).

<sup>33</sup> 325 U.S. 410 (1945).

<sup>34</sup> *Kisor*, 139 S. Ct. at 2409.

<sup>35</sup> *Id.* at 2416–418; *see also* Drake, *supra* note 1, at 1352–353 (outlining the three steps: (1) determine if a genuine ambiguity exists; (2) if ambiguity exists, the interpretation of the ambiguity must be reasonable; (3) even if the interpretation is reasonable, determine if the interpretation deserves “controlling weight”).

## II. TWO KEY VETERANS BENEFITS LAW ISSUES TO KEEP AN EYE OUT FOR

In 2017, the Federal Circuit and Congress revolutionized the veterans benefits process. First, in April 2017, the Federal Circuit decided *Monk v. Shulkin*.<sup>36</sup> After the VA denied his application for disability benefits because of his other than honorable discharge, Mr. Monk filed a petition for a writ of mandamus with the CAVC, requesting that the CAVC order the Secretary of the VA to “promptly adjudicate both his disability benefits application and the applications of *similarly situated veterans*.”<sup>37</sup> The CAVC denied both Mr. Monk’s request for class certification and his individual petition.<sup>38</sup> The CAVC rejected the class action request on the ground that it lacked the authority to maintain class actions.<sup>39</sup> The Federal Circuit reversed on appeal, holding that the All Writs Act<sup>40</sup> also authorized the CAVC to aggregate cases, including Mr. Monk’s, which concerned a petition for a writ of mandamus.<sup>41</sup> Since *Monk*, the CAVC has certified three class actions.<sup>42</sup> Until the CAVC adopts its own class action rules and procedures, the CAVC has opted to use Rule 23 of the Federal Rules of Civil Procedure as a guide for class action proceedings.<sup>43</sup> This new class action process provides veterans and their surviving family members with more choices of how to handle disagreements with the VA’s decisions.<sup>44</sup>

Second, in August 2017, Congress passed the Veteran Appeals Improvement and Modernization Act (AMA).<sup>45</sup> The rules that the VA promulgated to implement the AMA took effect in February 2019.<sup>46</sup> The AMA, in part, created a new decision review process before the agency consisting of three different “lanes” of review: higher-level review, supplemental claims, and appeal (NOD).<sup>47</sup> The first two lanes involve review by the agency of original jurisdiction, most often a VA regional office, that made the initial decision. Under higher-level review, claimants cannot submit additional evidence, there is only argument.<sup>48</sup> In supplemental claims, claimants may submit evidence that is new and relevant.<sup>49</sup> In the NOD lane, veterans proceed directly to the Board of Veterans Appeals for *de novo* review; once at the Board, appellants may submit evidence in the hearing and evidence dockets but not in the direct docket.<sup>50</sup>

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<sup>36</sup> 855 F.3d 1312 (Fed. Cir. 2017).

<sup>37</sup> *Id.* at 1314 (emphasis added).

<sup>38</sup> *Id.* at 1315.

<sup>39</sup> *Id.* (explaining that at Mr. Monk’s decision review hearing, the VA informed Mr. Monk that he could not move forward with his appeal until the BCNR provided records concerning his discharge status).

<sup>40</sup> 28 U.S.C. § 1651(a).

<sup>41</sup> *Monk*, 855 F.3d at 1318.

<sup>42</sup> *See, e.g.*, *Godsey v. Wilkie*, 31 Vet. App. 207, 225 (2019) (per curiam); *Skaar v. Wilkie*, 32 Vet. App. 156, 201 (2019); *Wolfe v. Wilkie*, 32 Vet. App. 1, 34 (2019).

<sup>43</sup> *Monk v. Wilkie*, 30 Vet. App. 167, 170-71 (2018) (en banc).

<sup>44</sup> *Monk*, 835 F.3d at 1321.

<sup>45</sup> Pub. L. No. 115-55, 131 Stat. 1105 (2017).

<sup>46</sup> VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019) (proposed final rule).

<sup>47</sup> 38 U.S.C. § 5104C (2018); *Board of Veterans’ Appeals*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.bva.va.gov/index.asp> (last visited Sept. 26, 2020).

<sup>48</sup> 38 U.S.C. § 5104B(d).

<sup>49</sup> 38 U.S.C. § 5108.

<sup>50</sup> 38 U.S.C. §§ 7105, 7113.

### III. KEYNOTE SPEAKER CAVC CHIEF JUDGE MARGARET BARTLEY

*American University Law Review's* 2020 Federal Circuit Symposium Keynote Speaker, Chief Judge Margaret Bartley, has worked in veterans law since her graduation from American University Washington College of Law in 1993.<sup>51</sup> Upon graduation, Chief Judge Bartley clerked for the late Judge Jonathan R. Steinberg of the CAVC.<sup>52</sup> President Obama nominated Chief Judge Bartley to the CAVC on June 22, 2011.<sup>53</sup> The United States Senate confirmed the nomination on May 24, 2012, and on June 25, 2012 President Obama appointed Chief Judge Bartley to the court.<sup>54</sup> Chief Judge Bartley assumed the position of Chief Judge of the CAVC on December 4, 2019.<sup>55</sup> Prior to her appointment, Chief Judge Bartley advocated for veterans for over seventeen years as a staff attorney and senior staff attorney for the National Veterans Legal Services Program (NVSLP).<sup>56</sup> In this capacity, Chief Judge Bartley advised and trained members of the various veterans organizations, such as the American Legion, the Military Order of the Purple Heart, and the Vietnam Veterans of America.<sup>57</sup> Chief Judge Bartley also served as Director of Outreach and Education for the Veterans Consortium Pro Bono Program.<sup>58</sup>

### IV.

### REFERENCE MATERIALS

#### *Definitions/Abbreviations/Standards:*

- **“At least as likely as not standard:”** the evidentiary standard for veterans (*Gilbert v. Derwinski*)
- **The Benefit of the Doubt Doctrine:** the burden of proof for veterans (*Gilbert v. Derwinski*)
- **The Board/BVA:** The Board of Veterans’ Appeals (where veterans first bring their claims)
- **The CAVC:** The Court of Appeals for Veterans Claims (the U.S. Court of Appeals that hears appeals from the BVA)
- **Pro-claimant:** the veterans law system is non-adversarial. The VA has a statutory “duty to assist” the claimant in developing supportive evidence, and the BVA must give the veteran the benefit of the doubt.
- **The VA:** Department of Veterans Affairs (a federal cabinet-level agency)
- **Veteran:** Title 38 of the Code of Federal Regulations defines a veteran as “a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.”

#### *Noteworthy Cases:*

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<sup>51</sup> *About the Court*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/bartley.php> (last visited Sept. 26, 2020).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

## Supreme Court

- *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019). The Court did not overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the two cases which require courts to defer to an agency's reading of its own "ambiguous" regulation.

## The U.S. Court of Appeals for the Federal Circuit

- *Lang v. Wilkie*, 971 F.3d 1348, 1355 (Fed. Cir. 2020). The Federal Circuit determined that VA adjudicators do not need "actual knowledge of VAMC medical records to establish constructive receipt."
- *Sellers v. Wilkie*, 965 F.3d 1328, 1338 (Fed. Cir. 2020). The Federal Circuit held that in order for a veteran to be entitled to an earlier effective date for a medical condition, the veteran must present a legally sufficient formal claim that identifies "the sickness, disease, or injuries for which compensation is sought, at least at a high level of generality."
- *Monk v. Shulkin*, 855 F.3d 1312, 1322 (Fed. Cir. 2017): the Federal Circuit changed the long-standing rule that veterans could only file appeals for themselves, and it held that veterans could bring class actions.

## The U.S. Court of Appeals for Veterans Claims

- *Martinez-Bodon v. Wilkie*, No. 18-3721, 2020 WL 4590176, at \*8 (Vet. App. 2020): Holding that the term "disability," which the CAVC previously defined as "a functional impairment of earning capacity," applies broadly and includes "more than just pain." However, the CAVC noted that the VA retained authority "to adopt and apply its rating schedule," which might limit the definition of "disability." Therefore, the CAVC found that the BVA "did not err in denying service connection for an anxiety disorder," because the VA had properly exercised its authority "to limit compensation to disabilities that conform to a DSM-5 diagnosis."
- *Godsey v. Wilkie*, 31 Vet. App. 207 (2019): The CAVC's first certified class action. Under *TRAC*, the CAVC found that the BVA unreasonably delayed this class, which included veterans who had been waiting more than 18 months for the VA to advance their appeals.

*Further Reading Materials:*

- Drake et al., *Review of Recent Veterans Law Decisions of the Federal Circuit*, 69 AM. U.L. REV. 1343 (2020)
- Chase Cobb, Note, *For Him Who Shall Have Borne the Battle: How the Presumption of Competence Undermines Veterans' Disability Law*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 577 (2019).
- Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513 (2019).
- James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113 (2009).