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NATIONAL VETERANS LEGAL SERVICES PROGRAM

RECENT COURT DECISIONS VETERANS' ADVOCATES NEED TO KNOW ABOUT

NOVEMBER 2024 - MAY 2025

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TECH TIPS: AUDIO ISSUES DURING THE LIVE WEBINAR

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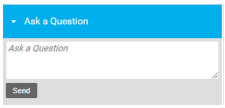

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TODAY'S AGENDA/OVERVIEW

- *Bufkin v. Collins* (U.S. Supreme Court)
  - What the CAVC must do to comply with the requirement that it "take due account" of the VA's application of the benefit-of-the-doubt rule, 38 U.S.C. § 5107(b)?
- *Amezquita v. Collins* (Fed. Cir.)
  - Whether the presumption of soundness applies only to preexisting conditions that are symptomatic at the time of exam for acceptance or enrollment into the military?

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TODAY'S AGENDA/OVERVIEW

- *Champagne v. McDonough* (Fed. Cir.)
  - Whether VA is required to consider a claim for disability pension to also include a claim for disability compensation and vice versa?
- *Rodenhizer v. McDonough* (Fed. Cir.)
  - Whether the CAVC can decide a motion for substitution before VA determines whether the movant is an eligible accrued-benefits claimant?

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TODAY'S AGENDA/OVERVIEW

- *Williams v. Collins* (Fed. Cir.)
  - Whether in the legacy system a Statement of the Case can satisfy VA's obligation under 38 C.F.R. § 3.156(b) to provide a determination directly responsive to new evidence submitted within one year of a rating decision?
- *Chisholm v. Collins* (CAVC)
  - Whether a supplemental claim must be submitted on VA Form 20-0995 and, if not, whether a TDIU application can serve as a supplemental claim if filed after VA denies a claim for an increased disability rating?

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TODAY'S AGENDA/OVERVIEW

- *Heller v. McDonough* (CAVC)
  - Whether a BVA denial of a request to have a case advanced on the docket is a decision that can be appealed to the CAVC, and if not, was there unreasonable delay warranting a writ of mandamus?
- *Ingram v. Collins* (CAVC)
  - Whether, when evaluating musculoskeletal disabilities, VA must discount beneficial effects of medication when the relevant rating criteria do not expressly contemplate medication use?

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TODAY'S AGENDA/OVERVIEW

- *Johnson v. Collins* (CAVC)
  - Whether VA's grant of a supplemental claim for presumptive SC of a disability under the PACT Act moots the appeal of VA's denial of a separate pre-PACT Act claim for SC of the same disability on a direct basis?
- *Ley v. McDonough* (CAVC)
  - Whether a claimant can receive an effective date earlier than that provided by 38 U.S.C. § 5110 based on equitable estoppel or on an "applied constitutional challenge," in this case, an alleged constitutional right-of-access violation?

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TODAY'S AGENDA/OVERVIEW

- *Loyd v. Collins* (CAVC)
  - Whether, under the AMA, the BVA must address the underlying merits of a supplemental claim when the AOJ found that the claimant did not submit new and relevant evidence?

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U.S. SUPREME COURT DECISION

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Bufkin v. Collins

145 S. Ct. 728 (2025)

Decided: March 5, 2025

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Bufkin v. Collins

- **Issue:**
  - What the CAVC must do to comply with the requirement that it "take due account" of the VA's application of the benefit-of-the doubt rule?

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Bufkin v. Collins

- **Relevant Law**
  - VA applies a "benefit-of-the-doubt rule" that tips the scales in a veteran's favor when evidence regarding any issue material to a claim is in "approximate balance"
    - 38 U.S.C. § 5107(b)

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Bufkin v. Collins

- **Relevant Law**
  - CAVC reviews legal issues *de novo* (it gives no weight to BVA's findings)
    - 38 U.S.C. § 7261(a)(1)
  - CAVC may set aside or reverse a BVA factual finding only if is "clearly erroneous"
    - 38 U.S.C. § 7261(a)(4)

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Bufkin v. Collins

- **Relevant Law**
  - In making determinations under § 7261(a), the CAVC shall review the record of proceedings before the Secretary and the BVA and shall "take due account of" the Secretary's application the benefit-of-the-doubt rule, 38 U.S.C. § 5107(b)
    - 38 U.S.C. § 7261(b)(1)

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Bufkin v. Collins

- Facts
  - Mr. Bufkin sought SC disability benefits for PTSD
  - BVA concluded that he did not suffer from PTSD and denied his claim
  - Although there was conflicting evidence in medical reports, BVA found one of the medical reports that determined he did not suffer from PTSD "especially persuasive"
  - BVA concluded that, when taken as a whole, the evidence was not in approximate balance; thus Mr. Bufkin was not entitled to the benefit of the doubt

Bufkin v. Collins

- Facts (cont'd)
  - Mr. Thornton sought an increase in his PTSD rating
  - BVA denied claim after discussing all relevant medical reports of record and assessing the credibility of each doctor's findings
  - Both Vets appealed to the CAVC, arguing that the evidence for and against their claims was in "approximate balance," so they were entitled to the benefit of the doubt
  - CAVC affirmed both BVA decisions, finding that BVA's determinations that the evidence in the cases was not in approximate balance were not clearly erroneous

Bufkin v. Collins

- Facts (cont'd)
  - Vets appealed to Fed. Cir., arguing that CAVC misinterpreted 38 U.S.C. § 7261(b)(1)
    - Argued that "taking due account" of VA's application of the benefit-of-the-doubt rule required CAVC to review the entire record *de novo* and decide for itself whether the evidence was in approximate balance
  - Fed. Cir. rejected Vets' arguments and affirmed CAVC decision

Bufkin v. Collins

- **Supreme Court's Analysis:**
  - Under § 7261(b)(1), CAVC must "take due account" of VA's application of the benefit-of-the-doubt rule
    - CAVC must "give appropriate attention" to VA's work
    - The standards of review in § 7261(a) also govern CAVC's review of benefit-of-the-doubt issues

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Bufkin v. Collins

- **Supreme Court's Analysis:**
  - The appropriate standard of review for any challenge depends on whether the challenge is factual or legal in nature
    - "Approximate-balance" determination is at most a **mixed** determination involving 2 steps:
      1. **VA reviews each item of evidence and assigns weight to it – a fact-finding inquiry**
      2. **VA determines whether the evidence is in approximate balance, which includes both legal and factual components**

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Bufkin v. Collins

- **Supreme Court's Analysis:**
  - The appropriate standard of review for a mixed question such as this depends on whether answering it entails ***primarily*** legal or factual work
    - Reviewing a determination about whether evidence is approximately balanced is "about as factual sounding" as any question gets
    - Bufkin and Thornton's cases demonstrate that approximate-balance determinations require case-specific factual review

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Bufkin v. Collins

- **Supreme Court's Holding:**
  - VA's determination that evidence regarding a claim for service-connected disability benefits is not in "approximate balance" is a predominantly factual determination that can be reviewed by the CAVC only for clear error
    - 7-2 decision (Justices Jackson and Gorsuch dissented)

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Takeaways

- **CAVC is not required to independently weigh the evidence in a case and decide for itself whether it is in approximate balance and the Vet should be given the benefit of the doubt**
- **CAVC will only reverse BVA's finding that evidence is not in approximate balance if that finding is "clearly erroneous" – a high burden on the Vet**
- **The benefit-of-the-doubt rule is alive and well, and not diminished or gutted by the Supreme Court's decision**

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ADVOCACY ADVICE

- **VA claimants should gather as much evidence in support of their claim as possible and make their strongest arguments that the evidence is weighted in their favor (or at least "nearly equal") at the VA and, if necessary, at the Board**
  - To convince the CAVC to reverse a finding that evidence is not in approximate balance, the claimant will need to argue that BVA's finding is "clearly erroneous," a very high standard

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ADVOCACY ADVICE

- **What if BVA's analysis of whether evidence is in approximate balance is somehow flawed (it failed to address favorable evidence, misinterpreted evidence, etc.), but its conclusion doesn't rise to the level of being "clearly erroneous"?**
  - CAVC can still find that BVA provided "inadequate reasons or bases" for its conclusion that the evidence is not in approximate balance, in violation of 38 U.S.C. § 7104(d), and remand for BVA to make a new decision with proper analysis; it just can't reverse BVA's decision and order it to grant the claim

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DECISIONS OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Amezquita v. Collins

135 F.4th 1369 (Fed. Cir. 2025)

Decided: May 5, 2025

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Amezquita v. Collins

- **Issue:**
  - Whether the presumption of soundness, under 38 U.S.C. § 1111 applies to preexisting conditions that are not symptomatic at the time of the exam, acceptance, or enrollment into the military?

Amezquita v. Collins

- **Relevant Law**
  - VA presumes veterans "to have been in sound condition when examined, accepted, and enrolled for service **except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment**, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service."
    - 38 U.S.C. § 1111; *see* 38 C.F.R. § 3.304(b)

Amezquita v. Collins

- **Relevant Law (cont'd)**
  - 38 U.S.C. § 1111 does not limit "defects…noted at the time of the examination, acceptance, and enrollment" only to conditions symptomatic at that time
    - *Verdon v. Brown,* 8 Vet. App. 529, 535 (1996)

Amezquita v. Collins

- Facts
  - Prior to service, Mr. Amezquita had a Bankart repair surgery on his left shoulder to repair a labral tear caused by a motor vehicle accident

  - Eight months later, in June 2003, he underwent his service-entrance exam
    - Under the "summary of defects and diagnoses" section of the exam report, the examiner noted the repair surgery and that Mr. Amezquita was "completely asymptomatic" with "no physical limitations," and he was cleared for service entry

Amezquita v. Collins

- Facts (cont'd)
  - Two days prior to his separation, VA evaluated Vet for an injury to his left shoulder because he reported feeling his shoulder pop while lifting a heavy bag
    - Examiner diagnosed a left shoulder sprain
  - VA later denied Vet SC for a left shoulder disability, finding that he had surgery on the shoulder prior to service and there was no evidence the left shoulder condition worsened due to service.

Amezquita v. Collins

- Facts (cont'd)
  - BVA held that the presumption of soundness did not attach because, although Vet's shoulder was completely asymptomatic at entrance, the examiner noted the preexisting repair in the defects section of the entrance exam report. BVA further found there was no aggravation of the pre-existing disability.
  - CAVC affirmed, concluding that BVA had a plausible basis for finding the Vet "unsound upon service entry."

Amezquita v. Collins

- **Federal Circuit's Holding:**
  - Affirmed, finding that CAVC did not interpret § 1111's "defects, infirmities, or disorders noted at the time of the examination…" to include "resolved" conditions, as argued by Vet
    - There was no error in the CAVC's interpretation that an asymptomatic condition can be noted as a preexisting defect under § 1111.
    - Nothing in 38 U.S.C. §§ 1110 or 1111 limits "defects … noted at the time of the examination, acceptance and enrollment" to only conditions symptomatic at that time.

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ADVOCACY ADVICE

- **If a condition is noted as a "defect" or "diagnosis" in the entrance exam report, even if asymptomatic, the Vet will need to establish that it worsened during service more than it would have worsened naturally (*i.e.*, it was aggravated by service) to be awarded SC for the disability**
- **Asymptomatic defects or diagnoses are different than conditions simply noted by history, and advocates should be sure to distinguish these two types of conditions**
  - A "history" of the preservice existence of a condition recorded on an entrance exam report will not prevent the presumption of soundness from attaching

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Champagne v. McDonough

122 F.4th 1325 (Fed. Cir. 2024)

Decided: December 6, 2024

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Champagne v. McDonough

- **Issue:**
  - Whether the VA is required to consider a claim for disability pension to also include a claim for disability compensation and vice versa?

Champagne v. McDonough

- **Relevant Law**
  - "....A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit."
    - 38 C.F.R. § 3151(a)

Champagne v. McDonough

- **Facts**
  - 1987: Vet filed VA Form 21-526, "Veteran's Application for Compensation or Pension," seeking benefits for cerebellar degenerative disorder (CDD)
  - RO construed the submission as an application for NSC pension benefits, and awarded the Vet **disability pension** in Dec. 1987
  - 8/1999: Vet filed a Statement in Support of Claim, requesting SC compensation for malaria, as well as any residual illnesses he "obtained while in military service"

Champagne v. McDonough

- Facts (cont'd)
  - 7/2002: RO granted Vet SC for malaria at 0%, but did not grant compensation for any residual illnesses
  - 7/2003: Vet filed NOD alleging that he had contracted malaria in the service and CDD was caused by the malaria
  - 4/2004: RO confirmed 7/2002 RD
  - 2/2005: RO construed one of Vet's filings as a claim for an increased rating for malaria and SC for CDD secondary to malaria

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Champagne v. McDonough

- Facts (cont'd)
  - 1/2018: After multiple proceedings, RO granted Vet SC for CDD with a 100% rating, effective 7/2003
  - Mr. Champagne appealed, arguing that his effective date for compensation should be 1987
  - 10/2020: BVA denied effective date for SC for CDD earlier than 7/2003, finding that the 1987 application contained no suggestion of an intention to make a claim for SC disability benefits in addition to the NSC pension benefits. "Under these circumstances, there was no requirement for VA to consider the claim for pension as also one for compensation."

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Champagne v. McDonough

- Facts (cont'd):
  - **CAVC affirmed, finding that**
    - "VA *may* consider a claim for pension to include a claim for compensation under 38 C.F.R. § 3.151(a), but it is not *required* to do so."
    - BVA permissibly construed the 1987 application as *not* containing a claim for SC compensation

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Champagne v. McDonough

- Federal Circuit's Holding
  - **Affirmed CAVC (and BVA) decision:**
    - CAVC didn't err in finding that the language of § 3151(a) "is permissive – not mandatory," meaning that "VA *may* consider a claim for pension to include a claim for compensation, but it is not *required* to do so"
    - Although § 3.151(a) could have been written more clearly, its plain language and context in the regulatory scheme as a whole unambiguously establish that the VA has discretion to determine that a veteran is solely seeking pension or compensation benefits

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ADVOCACY ADVICE

- Although VA may still consider a claim for pension to be a claim for compensation and vice versa, VA no longer has a combined application for SC compensation & NSC pension benefits. In most circumstances, it will be difficult to establish that VA should consider one of these new forms an application for the other benefit
  - Vets seeking comp should file VA Form 21-526EZ
  - Vets seeking pension should file VA Form 21-527EZ

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ADVOCACY ADVICE

- If you see the older version of VA Form 21-526 in a Vet's file, review it closely to see if the application and associated evidence of record could be construed as a claim for a benefit that VA failed to adjudicate (e.g., Vet provided info in parts of the form relevant to both compensation and pension, such as a statement about an in-service injury and financial info)
  - If so and the grant of that claim could result in additional benefits for the Vet, consider arguing that the claim remains unadjudicated
  - But, VA is not required to consider the application as a claim for that benefit and will not likely do so if there was no suggestion of an intent to claim that benefit

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Rodenhizer v. McDonough

124 F.4th 1339 (Fed. Cir. 2024)

Decided: December 30, 2024

Rodenhizer v. McDonough

- **Issue:**
  - Whether the CAVC can decide a motion for substitution before the VA determines whether the movant is an eligible accrued benefits beneficiary?

Rodenhizer v. McDonough

- **Relevant Law**
  - If a claimant dies while a claim for benefits is pending before VA, a person eligible to receive accrued benefits due to the claimant under 38 U.S.C. § 5121(a) may, not later than one year after the death of the claimant, request to be substituted as the claimant to process the claim to completion
    - 38 U.S.C. § 5121A(a)(1)
  - The successor must file an application for accrued benefits within one year after the date of the death of the deceased claimant
    - 38 U.S.C. § 5121(c)

Rodenhizer v. McDonough

- **Relevant Law**
  - Only certain categories of persons are able to recover accrued benefits that were due and unpaid at the time of a beneficiary's death. A non-dependent parent of a veteran is generally only permitted to recover accrued benefits to the extent necessary to reimburse them for the expenses of the Vet's last sickness and burial that they bore.
    - 38 U.S.C. § 5121(a)(2), (6)

Rodenhizer v. McDonough

- **Relevant Law**
  - If a party dies while a case is pending in the CAVC, the personal representative of the deceased party's estate or any other appropriate person may, to the extent permitted by law, be substituted as a party on motion by such person.
    - U.S. Vet. App. R. 43(a)(2)
  - If eligibility presents fact issues, the CAVC must first obtain from the VA a determination as to whether a particular movant is an eligible accrued-benefits claimant
    - *Breedlove v. Shinseki*, 24 Vet. App. 7, 20-21 (2010)

Rodenhizer v. McDonough

- **Facts**
  - Thomas Rodenhizer, a U.S. Army veteran, appealed to the CAVC seeking an earlier effective date for VA benefits. He died while his appeal was pending.
  - After his death, his mother, Deborah Rodenhizer:
    - Filed with VA a VA Form 21P-0847, Request for Substitution of Claimant Upon Death of Claimant
    - Filed with CAVC a motion to be substituted for the Vet, claiming she was entitled to accrued benefits as the person who bore the expense of her son's burial

Rodenhizer v. McDonough

- Facts (cont'd)
  - In response to a CAVC order, the Secretary informed the Court that VA had not received an application for accrued benefits from Ms. Rodenhizer as required by 38 U.S.C. § 5121(c). As a result, it had made no determination about her eligibility as an accrued-benefits claimant.
  - CAVC denied the substitution motion, vacated BVA's decision, and dismissed the appeal, finding it had no basis to find Ms. Rodenhizer an eligible accrued-benefits claimant, because there was no evidence she had requested a determination of eligibility for accrued benefits from VA within one year of her son's death

Rodenhizer v. McDonough

- Facts (cont'd)
  - In a different *parallel* CAVC case, Ms. Rodenhizer appealed BVA's decision that she is not entitled to accrued benefits on the basis that she was not a dependent parent of the veteran. (She is seeking accrued benefits as the person who bore the expense of last sickness and burial). In that decision, however, BVA concluded that her filing of VA Form 21-0847 constituted a timely application for accrued benefits.

Rodenhizer v. McDonough

- Federal Circuit's Holding:
  - CAVC erred in denying the motion to substitute and dismissing the appeal before a final decision was made in the VA proceeding relating to Ms. Rodenhizer's eligibility as an accrued-benefits claimant
    1. If she receives in the parallel action a final determination that she is an eligible accrued-benefits claimant, because of CAVC's refusal to allow substitution, she would have to restart merits proceedings relating to accrued benefits rather than continuing in her son's place, which would be contrary to principles of expediency, fairness, and efficiency
    2. Under Fed. R. App. P. 43, similar to Vet. App. R. 43, courts have approved a stay of proceedings pending a determination as to who is the "personal representative" of a deceased party

Rodenhizer v. McDonough

- **Federal Circuit's Holding:**
  - When there is a fact question as to eligibility, the CAVC should stay action on a motion to substitute in the original claimant's case and stay the determination of whether the case should be dismissed pending a final determination on eligibility in the VA proceeding
  - Fed. Cir. vacated CAVC's judgment and remanded with instructions to hold the appeal and substitution motion in abeyance pending the outcome of proceedings before the VA to determine Ms. Rodenhizer's eligibility for accrued benefits

ADVOCACY ADVICE

- All claims for accrued benefits / requests for substitution must be filed with **VA** within one year of the claimant's death, even if the case is on appeal at the CAVC when the claimant dies
- If death occurs when case is at CAVC, appellant's counsel should:
  1. File a notice of death with CAVC
  2. File a motion for a stay of proceedings at CAVC, pending a motion for substitution at CAVC
  3. Ensure appropriate survivor files claim for accrued benefits/substitution request with VA
  4. File a motion for substitution with the CAVC
  5. If there is a fact question as to eligibility to substitute, file a motion for a stay of proceedings pending VA's determination on eligibility

Williams v. Collins

131 F.4th 1325 (Fed. Cir. 2025)

Decided: March 19, 2025

Williams v. Collins

- **Issue:**
  - Whether in the legacy system a Statement of the Case (SOC) can satisfy VA's obligation under 38 C.F.R. § 3.156(b) to provide a determination directly responsive to new evidence submitted within one year of a rating decision?

Williams v. Collins

- **Relevant Law**
  - New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed, will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.
    - 38 C.F.R. § 3.156(b)
  - Under § 3.156(b), VA must "provide a determination that is directly responsive to the new submission."
    - *Beraud v. McDonald*, 766 F.3d 1402, 1407 (Fed, Cir. 2014)

Williams v. Collins

- **Facts**
  - 7/1978: VA denied Vet's claim for SC for schizophrenia
  - 1/1979: Vet filed NOD
  - 2/1979: Vet submitted additional evidence, including a hospital report diagnosing him with chronic paranoid schizophrenia. A few months later, he submitted a statement saying he had stopped working due to nerves.
  - 6/12/1979: RO prepared a rating decision confirming the previous denial. RO noted the additional evidence, but found it was not new and material. RO did not send decision to Vet.

Williams v. Collins

- **Facts (cont'd)**
  - 6/13/1979: RO issued an SOC to Mr. Williams, listing and describing the additional evidence submitted and the 6/12/1979 rating decision. The RO stated that no change was warranted in the previous denial of SC for schizophrenia.
  - Vet did not submit a VA Form 9 to perfect the appeal
  - 6/2009: Vet filed claim to reopen the previously denied claim for SC for schizophrenia, which was eventually granted with a 100% rating, effective 6/2009

Williams v. Collins

- **Facts (cont'd)**
  - BVA denied an effective date earlier than 6/2009 and Vet appealed to CAVC
  - CAVC affirmed BVA decision, rejecting Vet's argument that BVA should have addressed whether VA's failure to send him a copy of the 6/12/1979 rating decision impacted its finality under 38 C.F.R. § 3.156(b), because VA failed to provide a determination directly responsive to his new evidence submitted within one year of the 7/1978 rating decision

Williams v. Collins

- **Federal Circuit's Holding:**
  - CAVC did not err in determining that VA complied with § 3.156(b)
    - Nothing precludes VA from using an SOC to demonstrate that it has fulfilled its obligations under § 3.156(b), as long as there is some indication that VA determined whether the submission is new and material evidence and considered the evidence in evaluating the pending claim
    - The 1979 SOC met the requirements because it listed the new evidence and stated that no change was warranted in the previous denial, providing some indication that VA considered the evidence, implicitly determined whether it was new and material, and appropriately considered it in connection with the pending claim

ADVOCACY ADVICE

- When evaluating whether a prior claim may remain pending due to VA's receipt of new and material evidence within one year of a legacy rating decision, it is important to look for not only a rating decision, but also other decisional documents, such as SOCs, that indicate VA considered the evidence, determined whether it was new and material, and appropriately considered it in connection with the pending claim
  - If no such decisional document was sent to the claimant, the earlier claim likely remains pending and may serve as the date of claim for effective date purposes

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U.S. COURT OF APPEALS FOR VETERANS CLAIMS CASES

 71

Chisholm v. Collins

Vet. App. No. 22-7028 (2025)

Decided: March 13, 2025

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Chisholm v. Collins

- **Issue:**
  - Whether a supplemental claim must be submitted on VA Form 20-0995 and, if not, whether a TDIU application can serve as a supplemental claim if filed after VA denies a claim for an increased SC disability rating?

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Chisholm v. Collins

- **Relevant Law:**
  - Attorneys can charge fees after the claimant receives notice of VA's "initial decision"
    - 38 U.S.C. § 5904(c)(1)
  - Attorney fees can be paid for representation on a supplemental claim, including a supplemental claim filed to continuously pursue VA's denial of increased ratings
    - *Jackson v. McDonough*, 37 Vet. App. 277, 295 (2024)

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Chisholm v. Collins

- **Relevant Law:**
  - "Supplemental Claim" = A claim for VA benefits filed by a claimant who had previously filed a claim for the same or similar benefits on the same or similar basis
    - 38 U.S.C. § 101(36)
  - Supplemental claim = "any complete claim for a VA benefit **on an application form prescribed by the Secretary** where an initial or supplemental claim for the same or similar benefit on the same or similar basis was previously decided"
    - 38 C.F.R. § 3.1(p)(2)

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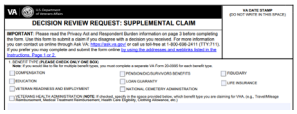
Chisholm v. Collins

- **Relevant Law:**
  - A claimant who disagrees with a prior VA decision may file a supplemental claim "by submitting in writing or electronically a complete application … on a form prescribed by the Secretary any time after the agency of original jurisdiction issues notice of a decision …."
    - 38 C.F.R. § 3.2501


DECISION REVIEW REQUEST: SUPPLEMENTAL CLAIM

Chisholm v. Collins

- **Facts**
  - 2/2020: RO denied Vet's 2019 claim for increased ratings of SC disabilities including tinea pedis and right lower extremity radiculopathy
  - Within a year of the denial, Vet, represented by attorney Chisholm, requested HLR
  - 4/2021: HLR continued denial of increased ratings
  - Within a year of the HLR decision, Vet filed TDIU claim on VA Form 21-8940 and submitted new evidence. Vet asserted that his radiculopathy and tinea pedis negatively impacted his ability to work.

Chisholm v. Collins

- **Facts (cont'd)**
  - 4/2022: In response to TDIU application, VA awarded Vet higher ratings for radiculopathy and tinea pedis
  - Later, VA denied direct payment of attorney fees to Att'y Chisholm because, according to BVA:
    - Vet's 2019 claim stream for higher ratings ended when he did not pursue appellate review of the 4/2021 HLR decision
    - TDIU request was a new claim, which made the 4/2022 rating decision an initial decision on that claim and prevents Mr. Chisholm from charging fees

Chisholm v. Collins

- **Appellant's arguments**
  - Att'y Chisholm helped his client get benefits for radiculopathy and tinea pedis, and these decisions were not the initial decisions in the case
  - The 2019 claim remained pending when VA granted higher ratings in 4/2022, because he had submitted documents before the appeal deadline
  - The VA Form 21-8940 (Application for TDIU) was a supplemental claim for increased ratings for tinea pedis and radiculopathy, filed within one year of the 4/2021 HLR decision, thus serving to continuously pursue the 2019 claim

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Chisholm v. Collins

- **CAVC's Decision:**
  - Determination of whether an attorney can charge fees turns on whether VA made an earlier decision in the case. Rationale: Congress doesn't want Vets to pay fees before VA denies them a benefit.
    - Attorneys may charge a fee after the claimant receives notice of VA's "initial decision . . . with respect to the case"
      - 38 U.S.C. § 5904(c)(1) (emphasis added)
    - Federal Circuit takes a broad view of the term "case"
      - *Perciavalle v. McDonough*, 101 F. 4th 829, 836 (Fed. Cir. 2024)

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Chisholm v. Collins

- **CAVC's Decision (cont'd):**
  - TDIU is not a separate claim. It is a way to get a higher rating for a disability (to maximize the benefit).
  - If a Vet has SC disabilities and applies for TDIU, VA must consider whether the Vet or record raises the prospect of higher ratings for the SC disabilities
    - *Phillips v. McDonough*, 37 Vet. App. 394, 401 (2024)

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Chisholm v. Collins

- **CAVC's Decision (cont'd):**
  - Here, Vet's TDIU request implicated his radiculopathy and tinea pedis
  - Because the TDIU application was a request for higher ratings, it included a continued quest for higher compensation, including for tinea pedis and radiculopathy, which VA recently denied
  - Thus, the Vet had previously filed a claim for the same or similar benefits on the same or similar basis. "**In other words, he had filed a supplemental claim**."
  - Accordingly, past-due attorney fees were warranted

Chisholm v. Collins

- **CAVC's Holding:**
  - While a supplemental claim must be filed on a form prescribed by the Secretary, it doesn't have to be filed on a supplemental claim form (VA Form 21-0995)
    - VA regulations do not restrict supplemental claims to only one form
    - VA knows how to limit claimants to specific forms and didn't do so with supplemental claims

Chisholm v. Collins

- **CAVC's Holding:**
  - "Because a request for TDIU is not a standalone claim but an attempt to obtain the correct (higher) rating, an application for TDIU may serve as a supplemental claim when filed after VA has already denied higher ratings for the disabilities at issue."
    - But, the Court cautioned that its decision should not be read to require VA to accept all TDIU applications as supplemental claims for denied rating decisions–different facts in a different case might warrant a different result

ADVOCACY ADVICE

- **Check whether a TDIU application filed after a decision on a claim for an increased rating should be considered a supplemental claim**
  - To qualify as a supplemental claim, the disability at issue in the increased rating claim would likely need to be at issue in the TDIU claim (Vet or record indicates that the disability may cause unemployability)
  - More important than qualifying an attorney or agent for fees, it could support an earlier effective date for increased ratings or TDIU based on continuous pursuit of the earlier increased rating claim
- **Decision leaves door open for other VA forms to qualify as supplemental claims under the right circumstances**

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Heller v. McDonough

38 Vet. App. 75 (2024)

Decided: November 21, 2024

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Heller v. McDonough

- **Issue:**
  - Whether a BVA denial of a request to have a case advanced on the docket (AOD) is a decision that can be appealed to the CAVC, and if not, was there unreasonable delay warranting a writ of mandamus?

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Heller v. McDonough

- **Relevant Law**
  - CAVC has jurisdiction to review final BVA decisions
    - 38 U.S.C. § 7252(a)
  - CAVC has power through the All Writs Act to issue writs in aid of its jurisdiction
    - 38 U.S.C. § 1651(a)
  - BVA may advance a case on its docket if the appellant is seriously ill or under severe financial hardship
    - 38 U.S.C. § 7107(b)(3)(B); 38 C.F.R. § 20.800(c)(1)

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Heller v. McDonough

- **Facts**
  - Veteran Heller suffers from severe suicidal ideation and has a history of past suicide attempts & behavior.
  - He is also unemployed and experiencing financial hardship
  - VA denied his claim for SC for a mental health condition
  - Vet appealed to BVA, where the case has been awaiting a decision since a July 2022 BVA hearing

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Heller v. McDonough

- **Facts**
  - Mr. Heller moved 4 times to have his case advanced on BVA's docket, supported by medical evidence of his serious illness, including suicidal ideation, and statements about unemployment
  - BVA denied each AOD motion, giving only a conclusory statement that there was insufficient evidence to show that he was seriously ill
  - Vet filed a petition for a writ of mandamus, asking CAVC to order BVA to issue a decision or advance his case on the docket

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Heller v. McDonough

- **CAVC Decision – Issued Writ**
  - Issuance of a writ requires showing (1) lack of alternative means to obtain desired relief; (2) clear and indisputable right to the writ; and (3) issuing the writ is warranted.
    - 1st requirement met because BVA's denial of an AOD motion is not a decision that can be appealed to the CAVC. It does not involve a grant or denial of a benefit and does not address an essential element of the claim for benefits. It can also be revisited any time by BVA without additional legal hurdles. Because it can't be "appealed," a petition for a writ of mandamus is the appropriate course of action.

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Heller v. McDonough

- **CAVC Decision – Issued Writ**
  - 2nd requirement met because the 2-year delay was unreasonable. All "TRAC" factors favored the Vet.
    - CAVC found BVA's complete failure to act on the appeal is not governed by a rule of reason capable of accounting for the delay in this particular case
    - CAVC noted the effect of the delay on Mr. Heller, including evidence of severe suicidal ideation with a prior attempt, unemployment, and his more desperate messages as his appeal languished
    - CAVC was not convinced that expediting a decision in the appeal would have a considerable effect on the VA or other similarly situated vets
      - *See Telecomms. Research & Action Ctr. v. FCC*, 242 U.S. App. D.C. 222, 750 F.2d 70 (1984)

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Heller v. McDonough

- **CAVC Decision – Issued Writ**
  - 3rd requirement met because this was an extraordinary situation. CAVC noted it was NOT finding that *any* evidence of suicidal ideation or financial hardship would warrant a writ. But under the circumstances of this case, a writ was warranted.

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ADVOCACY ADVICE

- Remember that an "appeal" of BVA's denial of an AOD request will be rejected by the CAVC. Instead, if the claimant is seriously ill or under severe financial hardship and BVA denies an AOD request, the claimant should consider filing a petition for a writ of mandamus at the CAVC based on "unreasonable delay."
  - *Heller* provides a model for a petition for a writ of mandamus based on unreasonable delay.
- AOD requests should be specific and identify evidence of serious illness, suicide attempts/threats/requests for help, and financial difficulties. If the situation becomes worse after an initial denial of an AOD request, file another request with new evidence and argument.

Ingram v. Collins

Vet. App. No. 23-1798

Decided: March 12, 2025

Ingram v. Collins

- **Issue:**
  - Whether, when evaluating musculoskeletal disabilities, VA must discount beneficial effects of medication when the relevant rating criteria do not contemplate medication use?

Ingram v. Collins

- **Relevant Law**
  - VA must discount beneficial medication effects when relevant rating criteria do not specifically contemplate medication use
    - *Jones v. Shinseki*, 26 Vet. App. 56 (2012)
  - VA may consider the beneficial effects of medication if the rating criteria contemplates medication use
    - *McCarroll v. McDonald*, 28 Vet. App. 267 (2016)

Ingram v. Collins

- **Relevant Law**
  - Where a musculoskeletal disability results in additional functional loss on use or during flare ups, the Vet may be entitled to a higher evaluation than set forth in a diagnostic code based on range-of-motion limitation
    - *Chavis v. McDonough*, 34 Vet. App. 1 (2021); *Sharp v. Shulkin*, 29 Vet. App. 26 (2017); *DeLuca v. Brown*, 8 Vet. App. 202 (1995)

Ingram v. Collins

- **Facts**
  - Mr. Ingram has SC back and left ankle disabilities for which he takes various medications, including opioids and over-the-counter drugs to alleviate his symptoms
  - The rating criteria for his back (DC 5237) and ankle (DC 5271) disabilities do not reference the effects of medication
  - Vet sought higher ratings for these disabilities

Ingram v. Collins

- **Facts**
  - 7/2022: VA examiner noted that Vet's back and ankle disabilities flared up frequently, the flares were alleviated by medications, and the flares significantly limited functional ability
  - BVA granted an earlier effective date for the Vet's 20% rating for a back disability, but denied a rating greater than 20%. BVA also denied a rating greater than 10% for his ankle disability. BVA did not discount or consider the beneficial effects of medication when evaluating the severity of these disabilities.

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Ingram v. Collins

- **Appellant's Arguments**
  - BVA erred in denying higher evaluations because it failed to discount or subtract the beneficial effects of medication when evaluating his back and ankle disabilities, because DCs 5237 and 5271 do not address the effects of medication
  - BVA should have determined the beneficial effects of those medications and discounted them when evaluating his disabilities

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Ingram v. Collins

- **Secretary's Arguments**
  - BVA is prohibited from considering the beneficial effects of medication when assessing the severity of SC disability because, under *Jackson v. McDonough*, 37 Vet. App. 87, 92 (2023), "VA may not rely on factors outside the rating criteria, including the use of medication, unless the rating criteria contemplate the use of medication"
  - *Jones* should not apply, because caselaw and regulations already require examiners to provide ROM estimates of impairment under the worst-case scenario of a flare-up and applying *Jones* would serve no purpose.

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Ingram v. Collins

NVLSP

NVLSP Court Win

- **CAVC Decision**
  - *Jackson* had no negative impact on *Jones* and *McCarroll*, which remain good law
    - "The Secretary offers a twisted interpretation of … *Jackson*"
  - The DCs applicable to the Vet's back and ankle disabilities are based on an assessment of the limitation of motion caused by the disabilities and do not reference medication. Pursuant to current caselaw such as *Jones* and *McCarroll*, BVA was obligated to discount the beneficial effects of the medications taken for each disability and evaluate the baseline severity of those disabilities.

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Ingram v. Collins

NVLSP

- **CAVC Decision**
  - Although a VA exam mentioned generally that medications were alleviating factors, it didn't provide info that BVA could use to satisfy *Jones*. In assigning evaluations, BVA did not consider, whether the Vet was taking medications, whether his ROM improved with medication use, and, if so, to what extent. Nor did BVA address whether flare-up frequency lessened with medication and, if so, to what extent. BVA's silence on these issues constituted error in failing to comply with *Jones*.
  - *Jones* complements caselaw concerning the evaluation of musculoskeletal conditions, because VA could not assess a vet's worst-case scenario, including a flare up, if it was also factoring in the beneficial effects of medication

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Ingram v. Collins

NVLSP

- **CAVC Holding:**
  - ***Jones* applies in the evaluation of musculoskeletal disabilities where the relevant DC does not reference medication as a factor in evaluation**
  - Here, "the Board did not acknowledge, let alone discuss and discount, the beneficial effects of medication used to treat the veteran's disabilities. . . . [B]ecause the Board did not comply with *Jones*, remand is required."

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ADVOCACY ADVICE

- Check if the DC under which a musculoskeletal disability is rated contains any reference to medication (most do not). If not, and Vet takes any medication for the disability, ensure VA does not base the rating on the Vet's symptoms when medicated
  - Argue that VA must rate condition based on how bad it would be w/out medication, including during flare-ups and after repeated use over time, and obtain a medical opinion if necessary
  - Point to evidence in the record showing the severity when Vet is not medicated
  - Submit lay statements about symptoms, including limitation of motion, when Vet is off meds

Johnson v. Collins

Vet. App. No. 23-7589 (2025)

Decided: March 26, 2025

Johnson v. Collins

- Issue:
  - Whether VA's grant of a supplemental claim for presumptive SC of a disability under the PACT Act moots the appeal of VA's denial of a separate pre-PACT Act claim for SC of the same disability on a direct basis?

Johnson v. Collins

- **Relevant Law**
  - On 8/10/2022, the PACT Act became law and expanded the presumption of herbicide exposure to vets who served in Thailand at any U.S. or Royal Thai base during the period beginning 1/9/1962 and ending on 6/30/1976, without regard to where on the base the vet was located or what military job specialty the vet performed
    - Pub. L. 117-168, § 403; 38 U.S.C. § 1116(d)(2)

Johnson v. Collins

- **Facts**
  - 5/2016: Vet filed claims for SC for diabetes, peripheral neuropathy, and hypertension, alleging they were caused by herbicide exposure in Thailand
  - 2/2017: RO denied claims, finding he was not exposed to herbicides; he later appealed to BVA
  - 10/2022: While his pre-PACT Act claims were pending before BVA, he filed supplemental claims for SC for the same disabilities under the PACT Act
  - 3/2023: RO granted SC for the disabilities, effective 8/10/2022, based on PACT Act's expanded herbicide exposure presumption

Johnson v. Collins

- **Facts (cont'd)**
  - 5/2023: Vet appealed post-PACT Act claims to BVA, seeking an earlier effective date
  - 12/2023: BVA dismissed pre-PACT Act appeal as moot; Vet appealed to CAVC
  - 2/2025: BVA remanded the post-PACT Act claims for earlier effective dates for further development

Johnson v. Collins

- **CAVC Decision**
  - The 2/2025 BVA decision did not render the CAVC appeal regarding the pre-PACT Act claim moot
    - A live case or controversy still existed, because that remand order was not a final decision that granted benefits and it did not grant Vet the relief he sought
  - The RO's 3/2023 grant of SC in a separate claim stream under the PACT Act could not resolve Mr. Johnson's pending pre-PACT Act BVA appeal. Once a claim is in appellate status, it can only be resolved by the Board.
  - Although generally all theories of SC are part of the same claim, Mr. Johnson's case was distinguishable because he raised two separate theories of entitlement in two separate claim streams

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Johnson v. Collins

- **CAVC Decision (cont'd)**
  - Under *Spencer v. Brown*, claims based on liberalizing laws are "separate and distinct" from prior claims for SC for the same disability, even when the claims depend on the same facts
  - The PACT Act is a liberalizing law that expanded the herbicide exposure presumption, creating a new and different basis of entitlement for Mr. Johnson that was not available when he filed his initial claims
  - Thus, Vet's PACT Act claims were separate from his pre-PACT Act claims that were pending before the BVA
  - CAVC reversed BVA's conclusion that appeal was moot and remanded the matters for BVA to adjudicate his pre-PACT Act claims for SC based on the law that existed at that time

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ADVOCACY ADVICE

- **If Vet had a claim for SC for a disability now subject to presumptive SC under the PACT Act pending since prior to 8/10/2022, and VA granted SC on a presumptive basis effective 8/10/2022, continue to pursue benefits for the period prior to 8/10/2022 under the theory of direct SC**
  - If SC was granted as part of the single claim stream that began prior to 8/10/2022, Vet should seek review of the decision that granted presumptive SC
  - If SC was granted based on a different supplemental claim filed after the PACT Act became law, Vet can both:
    1. Continue to pursue the original SC claim on a direct basis
    2. Seek review of the effective date for benefits granted based on the post-PACT Act claim

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Ley v. McDonough

38 Vet. App. 52 (2025)

Decided: January 2, 2025

Ley v. McDonough

- **Issue:**

  - Whether a claimant can receive an effective date earlier than that provided by 38 U.S.C. § 5110 based on equitable estoppel or on an "applied constitutional challenge," in this case, an alleged constitutional right-of-access violation?

Ley v. McDonough

- **Relevant Law**
  - Unless specifically provided otherwise …, the effective date of an award based on an initial claim, or a supplemental claim, of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.
    - 38 U.S.C. § 5110(a)(1)
  - Equitable estoppel is not available to override the claim-filing effective-date limits of 38 U.S.C. § 5110
    - *Taylor v. McDonough*, 714 F.4th 909 (Fed. Cir. 2023) (en banc)
  - Individuals have a Constitutional right to "meaningful access" to an exclusive forum for the adjudication of property rights
    - *Christopher v. Harbury*, 536 U.S. 403 (2002); *Lewis v. Casey*, 518 U.S. 343 (1996)

Ley v. McDonough

- **Facts**
  - Veteran Ley was diagnosed with monoclonal B-cell lymphocytosis by a VA hematologist in 2012, who allegedly did not tell Vet that he had chronic lymphocytic leukemia (CLL) or use the term "leukemia"
  - Vet experienced disabling symptoms which continued, but he did not file a claim for VA benefits until 2016, when a VA oncologist diagnosed him with CLL. The doctor found that he met the diagnostic criteria for CLL since 2010
  - VA granted Vet SC for CLL, effective 1/29/2015, one year before VA received his claim (presumptive – AO)

Ley v. McDonough

- **Appellant's Argument**
  - Mr. Ley argued for an earlier effective date on equitable estoppel grounds based on VA's withholding of info about his diagnosis
  - He also argued that § 5110's effective date limits were unconstitutional, as applied to him, because VA actively interfered with his right of access to its benefits system by not properly informing him of his diagnosis before 2016
  - Based arguments on Fed. Circuit's *Taylor* decision

Ley v. McDonough

- ***Taylor* Decision**
  - Case involved Vet who was a test subject in chemical warfare program and had taken an oath of secrecy which prevented him from providing info for VA disability claims
  - Federal Circuit decided case en banc (13 judges)
  - Majority (8) held that "equitable estoppel is not available to override the claim-filing effective-date limits of § 5110"
  - Plurality held that § 5110 is subject to an as-applied constitutional challenge and found that Vet's situation presented a rare instance where § 5110's effective date rule was unconstitutional as applied to him
  - Concluded the required effective date of benefits for disabilities linked to the secret chemical warfare program is the date that the vet would have had in the absence of the imposition of the secrecy oath

Ley v. McDonough

- **CAVC Decision in this case**
  - Fed. Cir. unequivocally held in *Taylor* that equitable estoppel is not available to override the claim-filing effective-date limits of § 5110
  - As applied to Mr. Ley, constitutional right-of-access challenge also failed
    - Constitutional right = meaningful access to adjudicatory system
    - Requires "active interference" by gov't that is "undue"
    - Misdiagnosis/withholding info is not active interference from gov't that prevented Vet from filing claim
    - Not the "very rare set of circumstances" sufficient to support a Constitutional violation

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Ley v. McDonough

- **CAVC Decision (cont'd)**
  - VA doctor's actions did not affirmatively prevent Mr. Ley from filing a claim in 2012
    - He was free to file a claim for VA benefits for the disability with which he was diagnosed in 2012 – "monoclonal B-cell lymphocytosis"
  - CAVC affirmed the BVA decision denying an effective date earlier than 1/2015 for CLL

*Vet has appealed to Fed. Circuit

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ADVOCACY ADVICE

- **The normal effective date rules can be overcome by an as-applied Constitutional challenge, including a VA violation of the right-of-access, but establishing such a violation requires a "very rare" set of circumstances**
- **Under *Ley*, it will be nearly impossible to establish a right of access violation based on an argument that a VA misdiagnosis/withholding of info prevented Vet from filing a claim, even for a condition that is subject to presumptive SC**
  - But consider making argument and citing Judge Jaquith's dissent: "a VA doctor's decision to deceive a patient about the nature and extent of his disability is (and should be) the kind of extraordinarily rare circumstance that justifies ordering the assignment of an effective date outside the parameters of section 5110."

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Loyd v. Collins

Vet. App. No. 22-5998 (2025)

Decided: May 8, 2025

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Loyd v. Collins

- **Issue:**
  - Whether, under the AMA, the BVA must address the underlying merits of a supplemental claim when the AOJ found that the claimant did not submit new and relevant evidence?

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Loyd v. Collins

- **Relevant Law**
  - A supplemental claim is one of three "actions" a claimant can take to challenge an adverse AOJ decision under the AMA
    - 38 U.S.C. § 5104C(a)(1)
  - If new and relevant evidence is presented or secured with respect to a supplemental claim, "the Secretary shall readjudicate the claim"
    - 38 U.S.C. § 5108(a)
  - If new and relevant evidence is not presented or secured, the AOJ will issue a decision finding that there was insufficient evidence to readjudicate the claim
    - 38 C.F.R. § 3.2501

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Loyd v. Collins

- **Facts**
  - 11/22/2019: VA denied Mr. Lloyd's claim for SC for a left eye disability
  - 11/17/2020: Vet filed a supplemental claim for SC for his left eye disability
  - 12/2/2020: RO denied Vet's supplemental claim because he failed to submit new and relevant evidence
  - 11/2021: Vet filed NOD and elected BVA's evidence submission docket
  - BVA declined to readjudicate the claim and continued the denial, finding Vet had not submitted new and relevant evidence

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Loyd v. Collins

- **Appellant's Argument**
  - BVA should have adjudicated the merits of his claim for SC for his left eye disability
    - The plain language of § 5104C(a) means that it is the claim, not the prior decision, that is under review regardless of the path by which administrative review is sought.
    - Regardless of whether Vet submits new and relevant evidence, if he submits a supplemental claim within one year of the denial, he is entitled to the same review on the merits as if an NOD had been filed

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Loyd v. Collins

- **CAVC Decision:**
  - The plain language of §§ 5104C(a) and 5108, when read together, mandate that a claimant submit new and relevant evidence before VA can adjudicate the merits of the claim if the claimant submits a supplemental claim
  - If the AOJ denies a supplemental claim because a claimant has not submitted new and relevant evidence, the issue before BVA on an appeal from that decision is limited to whether the evidence a claimant submitted was new and relevant
  - While a supplemental claim preserves an earlier effective date, it does not keep the merits of the initial claim open for BVA review absent the submission of new and relevant evidence

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Loyd v. Collins

- **CAVC Decision:**
  - CAVC affirmed BVA's decision declining to readjudicate Mr. Loyd's left eye disability claim because he failed to submit new and relevant evidence and not addressing the merits of the underlying claim.
    - Vet did not contest BVA's finding that he didn't submit new and relevant evidence

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Loyd v. Collins

- **CAVC Decision:**
  - The Court noted that it was leaving for another day the question of whether the Board could reach the merits in the first instance if it concluded that the evidence a claimant submitted was new and relevant contrary to the AOJ's determination or whether it would be required to remand the matter to the AOJ to consider the merits in the first instance
  - The Court indicated that Mr. Loyd could continuously pursue his claim and preserve the potential effective date for benefits by filing a supplemental claim with new and relevant evidence within one year of the Court's decision.

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ADVOCACY ADVICE

- **If Vet doesn't have N&R evidence (or can't identify such evidence for VA to attempt to obtain), Vet should pursue a review option other than a supp. claim—HLR or BVA appeal, which would allow for review of the underlying merits**
- **If RO finds Vet did not submit N&R evidence, best option may be to file another supp. claim with new evidence that will likely qualify as relevant, if Vet can obtain such evidence**
  - Even if successful in appeal/HLR of RO finding that evidence was not new and relevant, BVA or HLR may simply return claim to RO for readjudication of the merits, delaying resolution by months or years

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