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NATIONAL VETERANS LEGAL SERVICES PROGRAM

RECENT COURT DECISIONS VETERANS ADVOCATES NEED TO KNOW ABOUT

APRIL 2024 - JUNE 2024

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PRESENTER PEGGY COSTELLO

- NVLSP Staff Attorney
- Represents appellants before CAVC and BVA
- Former Associate Professor and Director of Veterans Law Clinic at University of Detroit Mercy School of Law

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TODAY'S AGENDA/OVERVIEW

- Aviles-Rivera v. McDonough (Fed. Cir.)
  - Whether Supplemental Claim, filed after CAVC decision and which was granted, but with a later effective date than sought in the appeal, renders the appeal moot?
- Barry v. McDonough (Fed. Cir.)
  - Whether 38 C.F.R. § 3.350(f)(3) allows for multiple intermediate-rate increases in Special Monthly Compensation?

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TODAY'S AGENDA/OVERVIEW

- Frantzis v. McDonough (Fed. Cir.)
  - Whether the same Veterans Law Judge that conducts a Board hearing must write the final Board decision?
- Smith v. McDonough (Fed. Cir.)
  - Whether CUE standard requires different outcome or only continued litigation leading to a potentially different, but uncertain, outcome?

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- Brack v. McDonough (CAVC)
  - Whether "fair process" doctrine requires the Board to wait 90 days when the appellant has selected the direct review lane under AMA, but has requested a 90-day extension to submit additional argument?
- Frazier v. McDonough (CAVC)
  - Whether 38 U.S.C. § 5121A allows an eligible accrued benefits recipient to be substituted for any VA benefit?

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TODAY'S AGENDA/OVERVIEW

- Hamilton v. McDonough (CAVC)
  - Whether the Board is required to associate the veteran's Federal Torts Claims Act (FTCA) file with the veteran's VA claims file when addressing the veteran's § 1151 claim?
- Jackson v. McDonough (CAVC)
  - Whether an increased rating claim is a supplemental claim or an initial claim under the AMA?

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TODAY'S AGENDA/OVERVIEW

- Lile v. McDonough (CAVC)
  - Whether a voided enlistment automatically bars veterans benefits and, if not, how the VA must consider the circumstances of a claimant's voided enlistment under 38 C.F.R. § 3.14 to determine eligibility?
- McCauley v. McDonough (CAVC)
  - Whether decision to sever service connection is void if VA fails to address alternate theories of service connection raised by the record?

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TODAY'S AGENDA/OVERVIEW

- Williams v. McDonough (CAVC)
  - Whether the Board errs if it issues a decision before expiration of the deadline to modify an NOD under 38 C.F.R. § 20.202(c)(2)?

BONUS CASE

- Loper Bright v. Raimondo (U.S. Sup. Ct.)
  - Whether the *Chevron* doctrine, which sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administered, even when a reviewing court reads the statute differently, should be overruled or clarified?

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

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Aviles-Rivera v. McDonough

Fed. Cir. No. 2022-2084

Decided: June 12, 2024

(Nonprecedential)

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Aviles-Rivera v. McDonough

- **Issue:**
  - Whether a Supplemental Claim, filed after a CAVC decision on the same claim and granted, but with a later effective date than sought in the appeal, renders the appeal moot?

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Aviles-Rivera v. McDonough

- **Relevant Law**
  - Under the Veterans Appeals Improvement and Modernization Act (AMA)
    - Claimants may continuously pursue an issue denied by the BVA by:
      - Appealing to CAVC within 120 days of BVA decision
      - Filing a supplemental claim within 1 year of BVA decision
        - 38 U.S.C. § 5110(a)(2); 38 C.F.R. § 3.2500(c)(3)

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Aviles-Rivera v. McDonough

- **Relevant Law**
  - Claimants may continuously pursue an issue denied by the CAVC by:
    - Appealing to Federal Circuit within 60 days of the CAVC decision (judgment)
    - Filing a supplemental claim within 1 year of the CAVC decision
      - 38 U.S.C. § 5110(a)(2)(E); 38 C.F.R. § 3.2500(c)(4)
  - Claimants may pursue a court appeal and a supplemental claim seeking the same VA benefit simultaneously
    - *Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, 7 F.4th 1110, 1144-45 (Fed. Cir. 2021)

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Aviles-Rivera v. McDonough

- **Facts**
  - This order vacated a May 2022 precedential CAVC decision (35 Vet. App. 268) which affirmed BVA's denial of Vet's claim for SC for hypertension
    - CAVC held BVA did not err by failing to consider a National Academy of Sciences Veterans and Agent Orange Update, because it was "evidence" that BVA was not permitted to review under the AMA evidentiary record restriction of the direct review lane
  - Vet filed supplemental claims for SC for hypertension in May 2022 and July 2023, after CAVC's decision
  - Vet also timely appealed CAVC decision to Fed. Cir.

Aviles-Rivera v. McDonough

- **Facts (cont'd)**
  - The Supplemental claims resulted in VA granting SC for hypertension as a new Agent Orange presumptive condition under the PACT Act
  - Although not noted in the Order, VA granted benefits effective from August 2022, the date the PACT Act became law, even though Vet's claim had been pending since 2013.

Aviles-Rivera v. McDonough

- **Federal Circuit's Order**
  - Dismissed Vet's appeal from CAVC as moot because SC for hypertension granted as a result of supplemental claims
    - Considered moot, despite benefits being granted by VA effective August 2022, rather than 2013, the date of the pending claim filed by Vet
  - Vacated CAVC's precedential decision that Vet had appealed

ADVOCACY ADVICE

- Because claimants can simultaneously pursue a court appeal and a supplemental claim regarding the same issue, success on the supplemental claim will likely cause the appeal to become moot
  - **Supplemental claim will almost always be decided before court appeal, so Vet will get benefits faster if granted by VA**

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ADVOCACY ADVICE

- **But, supplemental claim may not result in max benefits being awarded for issue (effective date / rating may be incorrect)**
  - **If so, seek administrative review (HLR, BVA appeal, or supp claim) w/in 1 year of decision on supp claim**
- **May also prevent judicial review of recurring VA error**
  - **Discuss with claimant – may be willing to wait to file supp claim until after highest-level court decision; effective date will be preserved if supp claim filed w/in one year of court decision**

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ADVOCACY ADVICE

- For SC claims granted presumptively under the PACT Act, if claim was pending prior to 8/2022, but VA assigned an 8/2022 effective date for SC benefits, encourage claimant to appeal/seek review based on direct service connection, to attempt to obtain effective date back to date claim filed

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Barry v. McDonough

101 F.4th 1348 (Fed. Cir. 2024)

Decided: May 16, 2024

Barry v. McDonough

- **Issue:**
  - –Whether 38 C.F.R. § 3.350(f)(3) allows for multiple intermediate-rate increases in Special Monthly Compensation?

Barry v. McDonough

- **Relevant Law**
  - "In addition to the statutory rates payable under 38 U.S.C. 1114 (l) through (n) and the intermediate or next higher rate provisions … additional single disability or combinations of permanent disabilities independently ratable at 50 percent or more will afford entitlement to the next higher intermediate rate or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. 1114, but not above the (o) rate. … [T]he disability or disabilities independently ratable at 50 percent must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114 (l) through (n) or the intermediate rate provisions outlined above. …"
    - 38 C.F.R. § 3.350(f)(3)

Barry v. McDonough

- **Facts**
  - Mr. Barry served in the Army and earned a Purple Heart after being injured in combat.
  - He was awarded a SMC(m)(1/2) due to SC amputation of the right leg above the knee, loss of use of left foot and leg, and a single half-step increase based on related disabilities independently rated 50% or higher
  - He had several other SC disabilities for which he didn't receive SMC: PTSD (70%), right shoulder arthritis (60%), left shoulder arthritis (50%), and 8 others rated 30% or lower

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Barry v. McDonough

- **Facts (cont'd)**
  - Vet appealed to BVA and argued that he should receive an SMC increase above what he already was awarded, based on his numerous rated, but uncompensated, SC disabilities
  - BVA denied the appeal, concluding that Vet could not show entitlement to an increase in SMC
  - Vet appealed to CAVC, arguing that BVA erred when it did not consider whether he would be entitled to more than one SMC increase under § 3.350(f)(3)

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Barry v. McDonough

- **Facts (cont'd)**
  - CAVC concluded that § 3.350(f)(3) could provide for only one ½ level SMC increase. In reaching this conclusion, the majority first reasoned that the text of § 3.350(f)(3) contemplated only one increase in SMC
  - Mr. Barry appealed the CAVC decision to the Federal Circuit

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Barry v. McDonough

- Federal Circuit's Holding
  - Reversed CAVC, holding that the statutory and regulatory context demonstrates that § 3.350(f)(3) unambiguously permits multiple intermediate-rate SMC increases, subject to a statutory cap on benefits
    - "the plain language of § 3.350(f)(3) standing alone does not conclusively resolve the issue dividing the parties. . . . Having elicited all we can from the isolated text of § 3.350(f)(3), then, we turn to context."
    - "The broader statutory and regulatory context unambiguously shows that 38 C.F.R. § 3.350(f)(3) can provide for more than one SMC increase."

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ADVOCACY ADVICE

- Carefully evaluate and calculate the total compensation of a Vet who is eligible for SMC. SMC can be tricky and VA doesn't always get it right.
- If Vet receiving SMC(L) or higher has multiple additional disabilities rated 50%-90% (or that combine to 100%) that aren't contemplated by the SMC award, ensure that VA awards multiple half-step SMC increases as applicable
  - File HLR request if w/in 1 year of most recent rating decision on any rating issue; or supplemental claim w/in 1 year of BVA decision
  - If more than 1 year from most recent decision, claim increased rate of SMC using Form 21-526EZ and consider CUE claim for failure to award earlier

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Frantzis v. McDonough,

104 F. 4th 262 (Fed. Cir. 2024)

Decided: June 4, 2024

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Frantzis v. McDonough

- **Issue:**
  - Whether the same Veterans Law Judge that conduct the Board hearing must write the final Board decision?

Frantzis v. McDonough

- **Relevant Law**
  - "…. A member or panel assigned a proceeding shall make a determination thereon, including any motion filed in connection therewith. . . ."
    - 38 U.S.C. § 7102
  - "Such member or members designated by the Chairman to conduct the hearing shall, except in the case of a reconsideration of a decision …, participate in making the final determination of the claim."
    - 38 U.S.C. § 7107(c) (2016) (pre-AMA)
  - AMA removed above-quoted language from § 7107(c)
    - Pub. L. No. 115-55, § 2(t), 131 Stat. 1105, 1112-12 (2017); 38 U.S.C. § 7107(c) (2017)

Frantzis v. McDonough

- **Facts**
  - While Vet's appeal seeking an increased rating and earlier effective date for SC headaches was pending at BVA, the AMA was enacted and Vet chose to have his case adjudicated under the AMA
  - Vet and his wife testified at a Board hearing. Approximately four months later, his claim was denied; the decision was issued by a different Board member than the one who conducted the hearing

Frantzis v. McDonough

- **Facts (cont'd)**
  - Vet appealed to CAVC, arguing that 38 U.S.C. § 7102 requires the same VLJ who conducts a hearing to also issue the resulting decision. After briefing and before oral argument, CAVC ordered the parties to be prepared to discuss the principle of fair process.
  - CAVC affirmed the Board's denial, relying on the removal of pre-AMA language in 38 U.S.C. § 7107(c). The majority did not consider the fair process doctrine because Vet had not raised that issue himself.

Frantzis v. McDonough

- **Federal Circuit's Holding**
  - It is not required that the same VLJ who presides at the hearing make the final determination and author the decision
  - The AMA amended § 7107(c) and removed the language that in the legacy system required the same VLJ for both the hearing and final determination. The express language for the same Board member requirement no longer exists.
  - Fair process doctrine argument forfeited because it was not raised below

ADVOCACY ADVICE

- Prepare for and make a complete and detailed record at BVA hearing, as a different VLJ will likely review the transcript to prepare the decision
- Consider making "Fair Process" argument at CAVC, particularly if VLJ deciding claim makes adverse credibility determination related to BVA hearing

Smith v. McDonough

104 F. 4th1375 (Fed. Cir. 2024)

Decided: May 20, 2024

Smith v. McDonough

- **Issue:**
  - –Whether the CUE standard requires different outcome or only continued litigation leading to a potentially different, but uncertain, outcome?

Smith v. McDonough

- **Relevant Law**
  - "Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied."
    - 38 C.F.R. § 20.1403(a)

Smith v. McDonough

- Relevant Law
  - "To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable."
    - 38 C.F.R. § 20.1403(c)

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Smith v. McDonough

- Facts
  - In 1992, the RO denied Navy Vet Mark Smith's claim for SC for deep vein thrombosis (DVT)
  - In 1996, BVA affirmed the denial and determined that the claim was not "well-grounded" because there was no medical evidence showing that he currently had DVT. Vet did not appeal.
  - In 2012, Mr. Smith filed a new claim for SC for DVT, which was granted effective 10/31/2012

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Smith v. McDonough

- Facts (cont'd)
  - In 2016, Mr. Smith filed a motion to revise the 1996 Board decision based on CUE. He argued that there had been enough evidence, including PEB reports, to overcome the "well-grounded" threshold, and that he should have been allowed to proceed, aided by VA's duty to assist.
  - BVA denied his motion; he appealed to CAVC; the matter was returned to BVA after a JMR.

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Smith v. McDonough

- **Facts (cont'd)**
  - BVA again found no CUE
    - Found there had been sufficient evidence to overcome the "well-grounded" threshold and the finding that the claim was not "well-grounded" was wrong
    - But, the CUE standard was not met, because it was not "absolutely clear" Vet had DVT at the time of his prior claim
  - CAVC affirmed Board's decision

Smith v. McDonough

- **Appellant's Argument at Federal Circuit**
  - CAVC erred in interpreting 38 C.F.R. § 20.1403 to limit CUE-eligible errors to those that manifestly changed the outcome "with respect to the merits of the underlying claim" and limiting CUE-eligible errors to those in which "but for an alleged error, service connection would have been awarded"
  - 38 C.F.R. § 20.1403 covers not only the change in the outcome of a claim, but also a change in the course of proceedings, *i.e.*, a procedural change that potentially could change the ultimate outcome of the claim. Triggering VA's duty to assist and allowing a claim to proceed to the merits constitutes a sufficient change in outcome for purposes of § 20.1403 and should trigger CUE.

Smith v. McDonough

- **Secretary's Response to Appellant's Argument**
  - CAVC correctly found that Appellant did not show that there was an error that manifestly changed the outcome of his claim. The error must be "outcome determinative" and change the Board's decision of the appeal.

Smith v. McDonough

- **Federal Circuit's Holding - Affirmed**
  - The "manifestly different outcome" standard can't be met by correcting an error that leads only to continued litigation with an uncertain outcome
  - CUE requires that it would be "absolutely clear" that correcting the error made by VA would lead to a manifestly different outcome, not merely a potentially different outcome
  - As the failure to fulfill the duty to assist does not constitute an outcome determinative error, neither does a failure to trigger the duty to assist

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ADVOCACY ADVICE

- **Look for CUE in previous final VA denials of claims**
  - finding one is like finding a diamond, especially if the error was made some time ago
  - BUT, finding CUE, like finding a diamond, is not likely
- **Don't waste time on a CUE claim unless you have a reasonable argument that it is "absolutely clear" that a favorable outcome (i.e., granting of the claim) would have resulted if VA had not made the error**

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U.S. COURT OF APPEALS FOR VETERANS CLAIMS CASES

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Brack v. McDonough

37 Vet. App. 172 (2024)

Decided: April 24, 2024

Brack v. McDonough

- **Issue:**
  - –Whether the "fair process" doctrine requires that the Board wait 90 days when the Veteran has selected the direct review lane under AMA, but has requested a 90-day extension to submit additional argument?

Brack v. McDonough

- **"Fair Process Doctrine"**
  - Created by CAVC (*Thurber v. Brown*, 5 Vet. App. 119 (1993); *Sprinkle v. Shinseki*, 733 F.3d 1180, 1185 (Fed. Cir. 2013))
  - Non-Constitutional right created when it was unclear if VA claimants had property rights protected by the Due Process Clause of the Fifth Amendment (now recognized)
  - Generally requires notice and opportunity to be heard at each step
  - Supplements the procedural rules of statutes and regulations, but cannot supplant them. When VA procedural rules are validly altered or amended, the "fair process doctrine" must adapt. The requirements of the doctrine must be derived from the procedural context in which the doctrine is invoked.

Brack v. McDonough

- **Relevant caselaw**
  - The fair process doctrine prohibits BVA from issuing a decision before the expiration of the 90-day period for submitting evidence following certification of a legacy appeal to the Board, when a claimant states an intention to submit argument (unless argument is, in fact, submitted sooner)
    - *Bryant v. Wilkie*, 33 Vet. App. 43 (2020)

Brack v. McDonough

- **Facts**
  - Mr. Brack served in Vietnam and, as a result, is presumed to have been exposed to herbicide agents
  - 1/2021: Vet sought and was granted compensation for CAD with a 10% rating from 1/5/2021; he disagreed with the effective date assigned
  - 7/2021: RO denied earlier effective date
  - 8/25/2021: Vet submitted VA Form 3288 requesting copy of c-file, accompanied by letter stating: "I am asking for a 90-day extension from the date this request is completed to submit additional supporting evidence."

Brack v. McDonough

- **Facts (cont'd)**
  - 10/2021: Vet files VA Form 10182 (NOD) and selects the Direct Review lane (*i.e.*, no hearing and no add'l evidence)
  - 1/20/2022: Rep receives copy of VA claims file
  - 3/8/2022: BVA issues decision denying earlier effective date (47 days after claims file received)

Brack v. McDonough

- **Appellant's Argument**
  - BVA should have construed the 8/2021 submissions in a liberal manner together with 10/2021 NOD to understand that Vet was seeking 90 days in which to submit argument, as well as evidence
  - BVA's failure to delay the decision until 90 days after the claims file was received or until Appellant's argument was submitted violated the fair process doctrine
  - Although *Bryant* addressed procedures in the legacy system, that decision's fair process holding is equally applicable to the AMA

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Brack v. McDonough

- **VA's Position**
  - Because Vet selected the direct review lane, BVA properly considered only the evidence of record at the time of the July 2021 decision
  - BVA acknowledged that Vet's representative requested 90 days from the time the c-file request was fulfilled to submit any additional supporting evidence. However, as the direct review option was selected on the NOD, BVA could not consider new evidence.
  - The review lane Mr. Brack selected obviated the stated reason for the 90-day delay and the claims file had been provided; thus, there was "no legal basis to delay adjudication"

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Brack v. McDonough

- **CAVC's Holding**
  - BVA's failure to delay issuing its decision was proper, because even if it misconstrued the request to delay, the Vet had other options for his appeal path, and he chose the one "ill-suited to his circumstances." The AMA afforded him the opportunity to select an alternative review lane through which he would have had a longer time to submit argument
  - Fair process did not require BVA to wait 90 days after the c-file was received to render its decision. *Bryant*'s holding cannot simply be grafted onto the AMA system.
  - The statutory and regulatory scheme surrounding the direct review lane make it the option for claimants who want a decision as quickly as possible. The fair process doctrine does not permit or require procedures that would disrupt that scheme.

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ADVOCACY ADVICE

- **BVA is neither required nor likely to grant extensions of time to submit argument in the direct review lane**
  - Submit written argument along with NOD or as soon as possible after filing
  - Although BVA is currently deciding Direct Review docket cases about 2 years after filing NOD, VA's goal is 1 year and claims (particularly AOD cases) can be decided earlier
- **Know and inform your clients of the consequences of the selection of the various review/appeal paths under the AMA**

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Frazier v. McDonough

37 Vet. App. 244 (2024)

Decided: May 23, 2024

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Frazier v. McDonough

- **Issue:**
  - –Whether 38 U.S.C. § 5121A allows an eligible accrued benefits recipient to be substituted for any VA benefit?

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Frazier v. McDonough

- **Relevant Law**
  - "If a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant under [38 U.S.C. § 5121(a)] may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purposes of processing the claim to completion."
    - 38 U.S.C. § 5121A(a)(1)

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Frazier v. McDonough

- **Relevant Law**
  - "If a claimant dies on or after October 10, 2008, a person eligible for accrued benefits . . . may, in priority order, request to substitute for the deceased claimant in a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, that was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died. . . ."
    - 38 C.F.R. § 3.1010(a)

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Frazier v. McDonough

- **Facts**
  - Appellant, Jeanine Frazier, is the adult daughter of a deceased Navy Vet. She is a qualified accrued benefits recipient, having been substituted under 38 U.S.C. § 5121A to continue her father's appeals before VA.
  - Ms. Frazier appealed an April 2022 BVA decision that dismissed her father's claims for entitlement to specially adapted housing (SAH), special home adaptation (SHA), and eligibility for automotive adaptive benefits. BVA explained that, although it had granted Ms. Frazier substitution in her father's appeal overall, substitution was not permitted for these particular claims because they involved non-periodic, personal benefits that do not survive a Vet's death.

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Frazier v. McDonough

- **Appellant's Argument**
  - Because she qualifies as an accrued benefits recipient under § 5121(a), she can be substituted to pursue the Vet's claim under § 5121A for "any benefit under a law administered by the Secretary," including the non-periodic benefits at issue
  - VA's implementing regulation, 38 C.F.R. § 3.1010, is invalid to the extent it imposes a limit on substitution inconsistent with § 5121A
  - Under § 5121A, she is not limited to recovering the expenses she bore concerning the Vet's last illness and burial, as she would be under § 5121(a)(6)

Frazier v. McDonough

- **Secretary's Argument**
  - Congress adopted the limits for accrued benefits under § 5121(a) in its substitution statute under § 5121A. In order to be eligible to receive accrued benefits under § 5121(a), the benefits must be periodic monetary benefits
  - Because no one can be an eligible accrued benefits recipient with respect to claims for SHA, SAH, and automobile adaptive benefits, no one is eligible to continue the appeal of those matters under § 5121A.
  - If Appellant is found to be entitled to continue the appeal of the claims for SHA, SAH, and automobile adaptive benefits, she is only eligible to be reimbursed for expenses she bore during the Vet's last sickness or burial

Frazier v. McDonough

- **CAVC's Holding:**
  - 38 U.S.C. § 5121A unambiguously provides that an eligible accrued benefits recipient can be substituted in a claim for any VA benefit, including non-accrued benefits. To the extent 38 C.F.R. § 3.1010(a) restricts substitution to claims for "periodic monetary benefits," it is inconsistent with § 5121A and invalid.
  - § 5121A requires that a person who is allowed to substitute on the grounds that they bore the expense of a Vet's last sickness and burial is limited under § 5121(a)(6) to the amount of such expense when allowed to substitute into a deceased Vet's claim.

ADVOCACY ADVICE

- If an individual is qualified to substitute for a deceased veteran, be sure to pursue every pending claim of the veteran, even those for non-periodic payments
  - **The substitute may still have a difficult time establishing entitlement to such benefits on behalf of the deceased Vet**
- Even if successful, though, the substitute can receive no more than the actual amount of the expenses the substitute incurred for the burial and last illness

Hamilton v. McDonough

37 Vet. App. 228 (2024)

Decided: May 23, 2024

Hamilton v. McDonough

- Issue:
  - –Whether VA is required to associate the veteran's Federal Torts Claims Act (FTCA) file with the veteran's VA claims file when addressing the veteran's § 1151 claim?

Hamilton v. McDonough

- **Legal Framework**
  - Vets incurring disability as a result of negligent VA medical treatment or other torts may seek a one-time award of damages under the Federal Tort Claims Act (FTCA), monthly compensation under 38 U.S.C. § 1151 (similar to a claim for VA SC compensation), or both, subject to an offset
  - Prior to filing an FTCA lawsuit in Federal District Court, Vet must first file an administrative FTCA claim with VA

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Hamilton v. McDonough

- **Facts**
  - Mr. Hamilton filed an FTCA claim and reached a settlement with VA at the administrative stage (prior to filing a lawsuit)
  - Vet later filed a § 1151 claim and asked VA to associate his FTCA claims file with his VA claims file
  - BVA denied the § 1151 claim
    - BVA acknowledged the FTCA claim, but indicated that Vet had not submitted any evidence in conjunction with it

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Hamilton v. McDonough

- **Appellant's Argument**
  - The entire FTCA file was constructively part of the VA claims file and should have been discussed by BVA in its decision denying his claim
  - Alternatively, the duty to assist required VA to obtain the FTCA file and associate it with the veteran's VA claims file

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Hamilton v. McDonough

- **Secretary's Argument**
  - The entire FTCA file was shielded from disclosure to Appellant, and therefore from BVA's consideration in connection with the merits of the § 1151 claim, because:
    1. Work product doctrine (generally)
    2. Exemption under the Privacy Act for info compiled in reasonable anticipation of litigation

Hamilton v. McDonough

- **CAVC Holding**
  - Vet's FTCA claim file is constructively part of the veteran's VA claims file, as it was in VA's control and relevant to Vet's § 1151 claim
  - However, VA may invoke the work product doctrine and exemption five in the Privacy Act (5 U.S.C. § 552a(d)(5)) to argue that the contents of the FTCA claim file should not be disclosed to the Vet, made part of the VA claims file, or considered by VA adjudicators when deciding the merits of the § 1151 claim

Hamilton v. McDonough

- **CAVC Holding (cont'd)**
  - Nondisclosability must be assessed on an individualized basis, based on the nature of each document or the info in question
    - **Opinion work product** is **protected** from disclosure and should not be considered by BVA in connection with the merits of a § 1151 claim
      - Opinions, mental impressions, conclusions, and legal theories reflected in documents such as interviews, statements, memoranda, correspondence, and briefs prepared in anticipation of an adversarial proceeding

Hamilton v. McDonough

- CAVC Holding (cont'd)
  - **Fact work product** is **not shielded** from disclosure and should be considered by BVA in connection with the merits of a § 1151 claim
    - BVA is deemed to have constructive knowledge of such info, so the duty to assist requires that it be made part of the VA claims file
  - Remand required for BVA to conduct fact-intensive inquiry of assessing the nature of documents in FTCA claim file to determine which ones are "fact work product" vs. "opinion work product"

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ADVOCACY ADVICE

- If Vet has previously filed an FTCA claim with VA and is now filing a § 1151 claim, request that the entire FTCA claim file be associated with the VA claims file.
  - VA will need to determine what info it can withhold as "opinion work product"
- Request a list and detailed description of any documents or other info withheld, so that you can determine whether to seek such info on appeal or if it is legitimately protected

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Jackson v. McDonough

Vet. App. No. 22-3528

Decided: June 25, 2024

 78

Jackson v. McDonough

- **Issue:**
  - Whether an increased rating claim is a supplemental claim under the AMA?

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Jackson v. McDonough

- **Facts**
  - Appellant is an attorney who challenged a BVA decision denying attorney fees for her work representing a Vet in a 9/2021 claim for an increased rating for a hip disability, filed on VA Form 21-526EZ
  - Vet was granted SC for his hip disability in a 3/2008 rating decision
  - Appellant's law firm began representing Vet in 2009 and appealed the assigned rating
  - VA increased rating, but BVA ultimately denied an even higher rating in a 12/2018 decision, which became final
  - VA granted the 9/2021 increased rating claim in a 12/2021 rating decision, but denied attorney fees

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Jackson v. McDonough

- **Appellant's Argument**
  - Under the plain language of the AMA, her client's 9/2021 submission was a supplemental claim
  - Because the increased rating claim is a supplemental claim, she is entitled to a fee because she provided services after the initial March 2008 rating decision that granted the veteran service connection for his hip disability, and the supplemental claim resulted in increased benefits for her client

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Jackson v. McDonough

- **Secretary's Argument**
  - An increased rating claim is distinct from a supplemental claim, and this was pointed out during the VA rulemaking procedure and in VA regulation
    - 38 C.F.R. § 3.1(p)(1)(ii)
  - The 12/2021 decision was the initial decision on the increased rating claim
  - A supplemental claim focuses on administrative review; an increased rating claim asks the VA to review new facts

Jackson v. McDonough

- **CAVC Holding**
  - Increased rating claim is not a supplemental claim
  - The 9/2021 submission is a new claim which is distinct from the 2007 claim and requests a different benefit; the initial decision at issue here was the 12/2021 decision
    - There was no claim to supplement in 9/2021; VA already had granted Vet's 2007 claim, and that claim was not on appeal
  - Because attorney fees are only available for work performed after the initial decision, no fees are owed to the attorney

Jackson v. McDonough

- **Advocacy Advice**
  - Remember that increased rating claims are "initial" claims, even if a previous claim for an increased rating of the same disability was previously denied
    - New and relevant evidence not required for VA to adjudicate the merits of the increased rating claim
  - Attorney fees are not payable for work associated with the filing of an increased rating claim; however, attorney fees can be paid for work associated with review/appeal of a decision denying an increased rating

Note on Attorney Fees

- VA only recently updated Manual M21-5 to reflect the holding in *Military-Veterans Advocacy v. Secretary of Veterans Affairs*, 7 F.4th 1110 (Fed. Cir. 2021), that attorney fees are permitted for all supplemental claims, including those filed more than a year after the prior decision. The Federal Circuit held that 38 C.F.R. § 14.636(c)(1)(i) was inconsistent with the AMA to the extent it prohibited fees for work on such supplemental claims.
  - Manual M21-5, 8.A.1.h (change date Aug. 21, 2024)
- In the coming months, VA plans to update 38 C.F.R. 14.636(c) accordingly

 85

Lile v. McDonough

37 Vet. App. 140 (2024)

Decided: April 11, 2024

 86

Lile v. McDonough

- Issue
  - Whether a voided enlistment automatically bars veterans benefits and, if not, how the VA must consider the facts of a claimant's voided enlistment under 38 C.F.R. § 3.14 to determine eligibility?

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Lile v. McDonough

- **Relevant Law**
  - 38 C.F.R. § 3.14 provides the ways service can be valid for VA purposes, despite the service dep't voiding a claimant's enlistment
  - 38 C.F.R. § 3.12 provides rules for VA benefit eligibility based on character of discharge (COD determinations – statutory and regulatory bars and exceptions to bars)

Lile v. McDonough

- **Facts**
  - When Mr. Lile enlisted in the Army, he completed forms which inquired whether he had "ever been arrested, charged, cited (including traffic violations) or held by any law enforcement … regardless of whether the citation or charge was dropped or dismissed or you were found not guilty."
  - Mr. Lile responded, "No," but a background check the next month disclosed prior convictions of larceny and breaching the peace
  - Mr. Lile was released from the Army for fraudulent entry. He was issued a DD Form 214 that listed his discharge as "uncharacterized

Lile v. McDonough

- **Facts (cont'd)**
  - Later, Mr. Lile filed claims for VA disability compensation, which VA denied
  - Mr. Lile appealed to BVA, which affirmed the denial, finding
    1. He had no creditable service upon which to warrant basic entitlement to VA benefits because the Army discharged him from service as a result of a voided enlistment based on fraud
    2. His voided service is equivalent to a dishonorable discharge

Lile v. McDonough

- CAVC Holding
  - A voided enlistment does not categorically bar eligibility for veterans benefits
    - 38 C.F.R. § 3.14 states, "service is valid unless enlistment is voided by the service department." The regulation's subsections carve out scenarios in which service under a voided enlistment might still qualify for benefits. VA may be bound by certain service department findings (such as dates of entrance and voidance or the fact that the enlistment was voided), but VA is to independently determine how those findings affect a claimant's eligibility for benefits.

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Lile v. McDonough

- CAVC Holding (cont'd)
  - VA must first apply 38 C.F.R. § 3.14 to determine if the voided enlistment falls into subsection (a) or (b):
    a) period of service valid if reason for voided enlistment was not in subsection (b) and discharge was under conditions other than dishonorable
    b) VA benefits may not be paid if statute bars eligibility (felony conviction or desertion), or person had legal incapacity to contract for reason other than minority, such as insanity
  - If (b) applies, VA's assessment ends because benefits cannot be paid
  - If (a) applies, VA would likely need to conduct COD determination under 38 C.F.R. § 3.12 to determine if discharge was under conditions other than dishonorable

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Lile v. McDonough

- CAVC Holding (cont'd)
  - CAVC remanded for BVA to consider the effect of Mr. Lile's voided enlistment on his eligibility for benefits, including
    - Determining whether his convictions were treated as misdemeanors, because § 3.14(b) refers only to a conviction for a felony; and
    - if § 3.14(b) does not apply, to characterize the period of service under § 3.12

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Lile v. McDonough

- Advocacy Advice
  - Remember that a voided enlistment does not necessarily bar eligibility for VA benefits
  - Conduct a careful analysis of a voided enlistment under 38 C.F.R. §§ 3.14 and 3.12, following the guidance of the Court set forth in *Lile*
    - If appropriate, present argument that § 3.14(b) does not apply and that discharge was under conditions other than dishonorable under § 3.12

 94

McCauley v. McDonough

37 Vet. App. 188 (2024)

Decided: May 20, 2024

 95

McCauley v. McDonough

- Issue:
  - –Whether a decision to sever service connection is void if VA fails to address alternate theories of service connection raised by the record?

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McCauley v. McDonough

- Relevant Law
  - "… service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government)…."
    - 38 C.F.R. § 3.105(d)

McCauley v. McDonough

- Facts
  - Mr. McCauley served on active duty during the Vietnam Era, include on two Navy ships and at Camp Lejeune
  - He claimed entitlement to SC for several disabilities due either to Agent Orange exposure or contaminated water at Camp Lejeune
  - The RO granted his claims based on AO exposure, but did not address CLCW
  - Two months after granting claim, RO proposed to sever SC, and later did, because it found Vet was not on board a ship while it was in the waters of Vietnam

McCauley v. McDonough

- Facts (cont'd)
  - Vet appealed and BVA issued a decision finding that it was clear and unmistakable that Vet did not serve in Vietnam or its territorial waters, and there was no indication that SC for his disabilities could be granted on any other basis
  - BVA never mentioned the theory of SC based on CLCW

McCauley v. McDonough

- **Parties' Arguments**
  - Appellant asserted that BVA erred by failing to address whether his severed disabilities (diabetes, CAD, and scars) were caused by CLCW. Because it did not, severance was *void ab initio*, a legal nullity, and his benefits must be reinstated.
  - Secretary conceded that BVA erred by not addressing exposure to CLCW, but did not believe the error voided the severance. The Sec'y believed the matter should be remanded for BVA to consider whether the severed disabilities are related to CLCW.

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McCauley v. McDonough

- **CAVC Holding**
  - "In considering whether severance of service connection is proper, the Board must address alternate theories of entitlement that are raised by the claimant or reasonably raised by the record. If the Board upholds a severance decision without doing so, it has failed to satisfy the severance standards of § 3.105(d). And this means that the severance is void ab initio."

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McCauley v. McDonough

- **CAVC Decision**
  - Because BVA failed to consider a properly raised theory of SC, it failed to show that SC "is clearly and unmistakably erroneous," as required for severance under 38 C.F.R. § 3.105(d)
  - "[T]he Secretary's job is not done if he only shows that the theory on which service connection was originally granted was erroneous – that would not necessarily prove that maintaining service connection is clearly erroneous."
  - The severance was void and BVA must reinstate SC retroactive to the date of severance

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McCauley v. McDonough

- Advocacy Advice
  - Carefully review any decision seeking to sever benefits to be sure all theories of entitlement to benefits that were raised, or reasonably raised by the record, have been addressed.
    - If severance based on only one theory without consideration of other theories, argue that grant was not clearly and unmistakably erroneous and that severance should be voided

Williams v. McDonough

Vet. App. No. 21-7363

Decided: June 21, 2024

Williams v. McDonough

- Issue:
  - Whether the Board errs if it issues a decision before expiration of the deadline to modify an AMA NOD under 38 C.F.R. § 20.202(c)(2)?

Williams v. McDonough

- **Relevant Law**
  - A claimant may modify the information identified in the Notice of Disagreement for the purpose of selecting a different evidentiary record option [i.e., BVA docket]…. Requests to modify a Notice of Disagreement must be made by completing a new Notice of Disagreement on a form prescribed by the Secretary, and must be received at the Board within one year from the date that the agency of original jurisdiction mails notice of the decision on appeal, or within 60 days of the date that the Board receives the Notice of Disagreement, whichever is later. Requests to modify a Notice of Disagreement will not be granted if the appellant has submitted evidence or testimony as described in §§ 20.302 and 20.303.
    - 38 C.F.R. § 20.202(c)(2)

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Williams v. McDonough

- **Procedural History**
  - 1970: VA grants Vet SC for chronic cervical spine strain with noncompensable rating
  - 3/2019: Vet sought increased rating for cervical spine disability; AOJ increased rating to 10%
  - 12/2020: HLR denied rating higher than 10%
  - 6/2021: Vet filed NOD and selected direct review docket

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Williams v. McDonough

- **Procedural History (cont'd)**
  - 6/8/2021: VA notified Vet that it had received his NOD and that he could not submit more evidence, but if he wanted to switch dockets, he could file a request to do so within 60 days of the date the Board received his NOD, or within one year of the VA decision being appealed, whichever is later, and that he could request an extension of time to submit such a "docket switch request"
  - 7/16/2021: Board issued decision on appeal, denying rating in excess of 10%

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Williams v. McDonough

- **Parties' Arguments**
  - Vet argued that BVA robbed him of the time vested by § 20.202(c)(2) when it decided his claim before he could change his NOD. He also invoked the fair process doctrine. If he had been allowed to change his NOD, he would have selected evidence lane and added evidence.
  - Secretary argued that § 20.202(c)(2) is an outer limit on the time to change lanes. It is not an internal restriction on how quickly BVA can issue a decision. The regulation says nothing about BVA having to wait to decide a case. There was no prejudice, because Vet can submit the new evidence with a supplemental claim.

Williams v. McDonough

- **CAVC Holding**
  - BVA cannot issue a decision until the time to modify an NOD under § 20.202(c)(2) has expired.
    - The Court ordered BVA to give Vet 60 days from the date it informs him that his appeal has been returned to the Board to request a docket switch
  - BVA's error in issuing a decision before the deadline expired was prejudicial. Although Vet could submit new evidence with a supplemental claim, the legal burden on a claimant is higher for a supplemental claim because the claimant needs to submit "new and relevant" evidence before the RO is able to address the merits of a supplemental claim

Williams v. McDonough

- **Advocacy Advice**
  - If necessary, you can switch your choice of docket before the Board within the applicable time period (within one year of date of decision being appealed or 60 days from date Board receives NOD, whichever is later)
  - If BVA issues denial before time expires and Vet wanted to change lanes, request reconsideration by BVA or appeal to CAVC and argue that BVA was prohibited from issuing decision early

Williams v. McDonough

- **Advocacy Advice**
  - *Williams* could hurt Vets who want a fast decision by BVA, particularly those who file an NOD soon after the RO decision and elect the Direct Review lane and/or request/qualify to have their case advanced on the docket
  - Consider having appellant file a statement expressly:
    - waiving the right to modify the NOD under § 20.202(c)(2) / the applicability of *Williams;* and
    - advising BVA that the appellant does not object to receiving a decision before the time to modify the NOD under § 20.202(c)(2) expires

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BONUS CASE: SUPREME COURT OVERRULES *CHEVRON*

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Loper Bright Enters. v. Raimondo

144 S. Ct. 2244 (2024)

Decided: June 28, 2024

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Loper Bright v. Raimondo

- **Issue:**
  - Whether a reviewing court is required to defer to a federal agency's reasonable interpretation of ambiguity in a statute administered by the agency (known as the *Chevron* deference doctrine)?

Loper Bright v. Raimondo

- **Background of *Chevron* Deference:**
  - Articulated by Justice Stevens in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), a case involving a challenge to EPA regulations interpreting a term in the federal Clean Air Act. The Supreme Court set out a two-step test for courts reviewing an agency's construction of a statute it administers:

Loper Bright v. Raimondo

- **Background of *Chevron* Deference (cont'd):**
  1. The court determines "whether Congress has directly spoken to the precise question at issue." If the meaning of the statute is "unambiguously expressed," then "that is the end of the matter" and the agency and court must adhere to that meaning;
  2. "If the statute is silent or ambiguous with respect to the specific issue," the court asks "whether the agency's answer is based on a permissible construction of the statute."

Loper Bright v. Raimondo

- **Background of *Chevron* Deference (cont'd):**
  - Step 2, which became known as "*Chevron* deference," directed courts to resist "simply impos[ing] their own construction of the statute" and instead to defer to the agency's reasonable construction of a statute when the statute failed to clearly express Congress's intent.

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Loper Bright v. Raimondo

- **Background of *Chevron* Deference (cont'd):**
  - During the past 40 years since *Chevron* was decided, *Chevron* deference became a central doctrine of administrative law, with federal district courts and appellate courts applying the test in tens of thousands of cases. Application of the test strongly favored agency (including VA) interpretations. Studies estimate that, under *Chevron* deference, the agency prevails in more than 75% of such cases decided by federal courts of appeals and that percentage may be higher in federal district courts.

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Loper Bright v. Raimondo

- **Current Case - *Loper Bright***
  - In 2023, the U.S. Supreme Court granted *certiorari* to consider two circuit court decisions that applied the *Chevron* test to uphold a somewhat obscure National Marine Fisheries Service regulation which requires fishing vessel owners, in some circumstances, to pay for an onboard observer to monitor compliance with federal fisheries regulations.
  - In the lead case, *Loper Bright*, the D.C. Circuit found the underlying statute, the Magnuson-Stevens Act, silent on the question of whether vessel owners could be required to pay for a monitor. The court proceeded to step 2 and applied *Chevron* deference where it deferred to the agency's interpretation and found it to be reasonable.

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Loper Bright v. Raimondo

- *Current Case - Loper Bright* (cont'd):
  - In granting *certiorari,* the Supreme Court framed the question presented as: **"Whether the Court should overrule *Chevron* or at least clarify that statutory silence … does not constitute an ambiguity requiring deference to the agency."**

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Loper Bright v. Raimondo

- Supreme Court's Decision:
  - *Chevron* is overruled. A 6-3 Supreme Court majority abolished the *Chevron* doctrine.
  - The Court held that, under the Administrative Procedure Act, courts must "exercise independent judgment in determining the meaning of statutory provisions," even ambiguous ones
  - The Supreme Court did not provide clear or specific direction about what approach or standard lower courts should apply to resolve uncertainty after the traditional rules of statutory construction have been applied

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Loper Bright v. Raimondo

- Supreme Court's Decision (cont'd):
  - "By overruling *Chevron*, though, the Court does not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite the Court's change in interpretive methodology. See *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 457, 128 S. Ct. 1951, 170 L. Ed. 2d 864. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding."

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Loper Bright v. Raimondo

- **Implications of *Loper Bright*:**
  - The ruling can be expected to have significant implications for federal agencies, including VA (think 38 C.F.R.), and those subject to federal regulation, including veterans
  - The ruling charges courts with supplying the interpretation of ambiguous statutory provisions, even where technical and scientific expertise may be implicated
  - The ruling increases the likelihood of success in challenging federal regulations
  - The ruling limits executive agencies' ability to fill gaps in the laws and to address situations not expressly anticipated by Congress, and may cause agencies to proceed more cautiously and narrowly in adopting regulations

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Loper Bright v. Raimondo

- **Implications of *Loper Bright*:**
  - The ruling puts pressure on Congress to legislate with greater specificity, or at least to expressly delegate interpretative authority, where permissible
  - The ruling may increase regulatory uncertainty and limit confidence in agency pronouncements
  - Creates opportunities for those seeking to challenge regulations they believe are unreasonable, unsound, or inconsistent with congressional direction or intent. Challengers no longer will have to overcome automatic deference to an agency's interpretation, but rather will have to persuade the reviewing court that the agency did not apply the "best reading" of the underlying statute.

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Loper Bright v. Raimondo

- **Implications of *Loper Bright*:**
  - Past CAVC, Federal Circuit, and Supreme Court decisions that relied on *Chevron* remain valid law
  - But, regulations at issue in prior court decisions that relied on *Chevron* may be challenged in new cases in which the judges will be required to exercise independent judgment in determining the meaning of statutory provisions using traditional tools of statutory construction
    - This may result in the holdings in prior cases that relied on *Chevron* being overturned in the future

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