

# PRESENTER

# AGENDA

# AGENDA

# AGENDA



NVLSP

**MVA V. SEC'Y OF VA**

 NVSP

**Issue: Whether certain regulations that implement provisions of the AMA related to supplemental claims are valid.**

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

7

---



---



---



---



---



---



---



---



---

**MVA V. SEC'Y OF VA**

 NVSP

**Challenged Regulations**

- 38 C.F.R. § 14.636(c)(1)(i) – limits when a Vet's representative may charge fees for working on a supplemental claim
- 38 C.F.R. § 3.2500(b) – bars the filing of a supplemental claim when adjudication of that claim is pending before a federal court
- 38 C.F.R. § 3.155 – excludes supplemental claims from the intent-to-file framework

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

8

---



---



---



---



---



---



---



---



---

**MVA V. SEC'Y OF VA**

 NVSP

**Underlying Statutory Framework**

- 38 U.S.C. § 5104C – provides a claimant options for administrative review following an AOJ decision, including the filing of a supplemental claim
- 38 U.S.C. § 5110(a) – governs the effective date of awards
- 38 U.S.C. § 5904(c)(1) – governs when an attorney or agent may begin to charge fees for services rendered in connection with a Vet's claim for benefits

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

9

---



---



---



---



---



---



---



---



---

**MVA V. SEC'Y OF VA**

**38 U.S.C. § 5104C**

• (a) provides that within one year of a decision, “in any case in which the Secretary renders a decision on a claim,” a claimant may:

- (1) file a request for higher-level review;
- (2) file a supplemental claim; or
- (3) file a notice of disagreement

• (b) provides that in any case in which VA renders a decision on a claim and more than one year has passed since the date on which the AOJ issues a decision, the claimant may file a supplemental claim

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

10

---



---



---



---



---



---



---



---



---



---

**MVA V. SEC'Y OF VA**

**38 U.S.C. § 5110(a)**

• Effective date of “continuously pursued” § 5104C(a) supplemental claim goes back to date of initial claim

• Effective date of § 5104C(b) supplemental claim is no earlier than date of receipt of supplemental claim

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

11

---



---



---



---



---



---



---



---



---



---

**MVA V. SEC'Y OF VA**

**38 U.S.C. § 5904(c)(1)**

Provides that a fee may not be charged by agent or attorney until the claimant receives notice of the AOJ’s “initial decision . . . with respect to the case.”

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

12

---



---



---



---



---



---



---



---



---



---

# **MVA V. SEC'Y OF VA**

# **MVA V. SEC'Y OF VA**

# MVA V. SEC'Y OF VA

# MVA V. SEC'Y OF VA



• 38 C.F.R. § 3.2500(b) bars the filing of a supplemental claim when adjudication of that claim is pending before a federal court

- Fed. Cir. noted that CAVC is an Executive Branch entity, rather than a “federal court,” even though VA likely meant to include the CAVC

• Forces a claimant to make a “hard choice” between pursuing appellate review beyond the Veterans Court and protecting the effective date of a continuously pursued supplemental claim

# MVA V. SEC'Y OF VA

# MVA V. SEC'Y OF VA

# MVA V. SEC'Y OF VA

## ADVOCACY ADVICE

# ADVOCACY ADVICE



**Andrews v. McDonough**  
34 Vet.App. 151 (2021)  
Issued: May 28, 2021

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

22

---



---



---



---



---



---



---



---



---



**ANDREWS V. MCDONOUGH**

Issue: What are a claimant's rights after Court remand of an AMA direct review docket case?

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

23

---



---



---



---



---



---



---



---



---



**ANDREWS V. MCDONOUGH**

**Legacy Appeals**

- Upon remand from the CAVC, BVA must:
  - Engage in a critical examination of the justification for the decision;
  - Reexamine the evidence of record, seek any other evidence BVA feels is necessary;
  - Issue a timely, well-supported decision in the case; and
  - Allow a claimant 90 days to submit additional evidence and argument

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

24

---



---



---



---



---



---



---



---



---

# ANDREWS V. MCDONOUGH

# ANDREWS V. MCDONOUGH

# **ANDREWS V. MCDONOUGH**

**ANDREWS V. McDONOUGH**

NVLSP

- The parties agreed that remand was warranted, but could not agree on a JMR because:
  - Vet argued AMA did not address evidentiary rules following Court remand
  - Vet argued he had the right to submit new evidence to BVA during remand proceedings, as required by *Kutscherousky v. West*
  - Vet argued the BVA must conduct a critical examination of the justification for its decision, including by reexamining the evidence of record, as required by *Fletcher v. Derwinski*
  - VA argued that this caselaw did not apply to AMA cases

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

28

---



---



---



---



---



---



---



---



---



---

**ANDREWS V. McDONOUGH**

NVLSP

- The Court held that it cannot instruct BVA to allow claimants to submit additional evidence on remand in direct review docket cases
  - Congress intended for the evidentiary record before the Board to be limited to the evidence of record at the time of the RO decision on appeal
  - There is no indication that Congress intended Court remands to function differently than direct appeals from the RO to the BVA

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

29

---



---



---



---



---



---



---



---



---



---

**ANDREWS V. McDONOUGH**

NVLSP

- The Court found there was no due process violation, because if VA denies the claim on remand, the claimant can submit a supplemental claim with new evidence and have another opportunity to submit evidence to BVA, if necessary, by filing an NOD and selecting hearing or evidence docket.
- The Court noted this process would not affect the claimant's effective date or otherwise cause harm.

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

30

---



---



---



---



---



---



---



---



---



---

# **ANDREWS V. MCDONOUGH**

# ANDREWS V. MCDONOUGH

# ANDREWS V. MCDONOUGH

# ADVOCACY ADVICE



***Euzebio v. McDonough***  
**989 F.3d 1305 (Fed. Cir. 2021)**  
**Issued: Mar. 3, 2021**

# **EUZEBIO V. MCDONOUGH**

# EUZEBIO V. MCDONOUGH

# FEUZBIO V. MCDONOUGH

# FEUZBIO V. MCDONOUGH

# EUZEBIO V. MCDONOUGH

# EUZEBIO V. MCDONOUGH

# **EUZEBIO V. MCDONOUGH**

# TAKE AWAYS

# ADVOCACY ADVICE

# HYP0

**SURVEY #1**

NVLSP

- Does VA have constructive possession of the NIH study?
  - Yes
  - No

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

46

---



---



---



---



---



---



---



---



---

**ANSWER**

- Yes
  - The VA examiner's reference to the NIH study puts VA on notice that this study exists, and given that it discusses the link between hypertension and PTSD, it is "relevant and reasonably connected" to the Vet's claim

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

47

---



---



---



---



---



---



---



---



---

**Healey v. McDonough**  
**33 Vet.App. 312 (2021)**  
**Issued: Feb. 21, 2021**

NVLSP

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

48

---



---



---



---



---



---



---



---



---

**HEALEY V. MCDONOUGH**

NVLSP

• **Issue:**

- Whether the Board is required to address provisions of the Purplebook that summarize NAS Agent Orange Updates

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

49

---



---



---



---



---



---



---



---



---



---

**HEALEY V. MCDONOUGH**

NVLSP

• Vietnam Vet sought SC for hypertension, asserting he was diagnosed with high blood pressure around 1978, during service in the Naval Reserves.

• In 2009, VA denied SC for hypertension, finding that it did not begin during active duty.

• Aug. 2015: Vet sought to reopen hypertension claim. He argued that he suffered from this condition as a result of treatment for SC non-Hodgkin's lymphoma (NHL) or as a result of his SC diabetes.

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

50

---



---



---



---



---



---



---



---



---



---

**HEALEY V. MCDONOUGH**

NVLSP

• 2015: VA examiner opined that Vet's hypertension was not related to NHL therapy.

• 2017: VA examiner opined that hypertension was not related to diabetes or NHL therapy.

• VA reopened but denied the claim.

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

51

---



---



---



---



---



---



---



---



---



---

# HEALEY V. MCDONOUGH

# HEALEY V. MCDONOUGH

# HEALEY V. MCDONOUGH

## HEALEY V. MCDONOUGH



- CAVC held that the Board was required to address the relevant Purplebook provision
  - The outcome in this case was guided by *Overton v. Wilkie*, which the CAVC held:
    - BVA is required to discuss any relevant provisions of Manual M21-I
    - BVA is not bound by those provisions, so it must make its own determination before it chooses to rely on an M21-I provision as a factor to support its decision.

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

55

---



---



---



---



---



---



---



---

## HEALEY V. MCDONOUGH



- CAVC explained the Purplebook, like the M21-I, is an administrative staff manual that affects a member of the public, and thus is an “agency action”
- Where a provision of the Purplebook is relevant to an appeal, BVA must incorporate a discussion of the provision into its analysis
- BVA must also provide a reasoned basis for departing from the guidance offered by the provision

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

56

---



---



---



---



---



---



---



---



---

## TAKE AWAYS



- In claims for SC for herbicide-related disabilities, VA must address provisions in VA administrative guidance, including Manual M21-I and Purplebook, that reference the NAS Updates
  - Administrative guidance documents change often
    - The 2021 version of the Purplebook no longer references NAS AO Updates
    - Manual M21-I continues to reference the NAS AO Updates
      - See Manual M21-I, VIII.i.I.B.I.b

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

57

---



---



---



---



---



---



---



---



---



**Buffington v. McDonough**  
Fed. Cir. No. 2020-1479  
Issued: Aug. 6, 2021

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

58

---



---



---



---



---



---



---



---

**BUFFINGTON V.  
MCDONOUGH**



**Issue before the Federal Circuit:**

- Is a VA regulation that provides the effective date for recommencing (as opposed to initially awarding or discontinuing) service-connected disability benefits once a veteran leaves active service reasonable?

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

59

---



---



---



---



---



---



---



---

**BUFFINGTON V.  
MCDONOUGH**



- Vets cannot receive both active service pay and disability compensation for the same time period.
  - 38 U.S.C. § 5304(c)
- The effective date of a reduction or discontinuance of disability compensation due to receipt of active service pay or retirement pay as “the day before the date such pay began.”
  - 38 U.S.C. § 5112(b)(3).
- Congress did not establish when or under what conditions compensation recommences once a disabled Vet leaves active service.

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

60

---



---



---



---



---



---



---



---

# **BUFFINGTON V. MCDONOUGH**

# **BUFFINGTON V. MCDONOUGH**



**BUFFINGTON V.  
MCDONOUGH**

- Jan. 2009: Vet sought to recommence his disability benefits
- Aug. 2009: VA determined Vet was entitled to compensation effective on Feb. 1, 2008—one year before he sought recommencement.
- Vet filed an NOD, challenging the effective date

**BUFFINGTON V.  
MCDONOUGH**

NVLSP

- July 2017: BVA denied an effective date prior to Feb. 1, 2008 for the reinstatement of VA benefits
  - Because request for reinstatement was received more than one year after separation from active service, VA cannot resume compensation payments more than one year prior to the date of the claim.
- July 2019: CAVC affirmed the Board decision
- Feb. 2020: Vet appealed to the Federal Circuit

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

64

---



---



---



---



---



---



---



---



---

**BUFFINGTON V.  
MCDONOUGH**

NVLSP

**Vet argued:**

- § 3.654(b)(2) conflicts with and is an unreasonable interpretation of 38 U.S.C. § 5304(c)
  - Congress intended VA to withhold or suspend a Vet's benefits only "for any period for which such person receives active service pay."
  - Congress did not intend VA to predicate payment or reinstatement of benefits upon notice by the Vet

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

65

---



---



---



---



---



---



---



---



---

**BUFFINGTON V.  
MCDONOUGH**

NVLSP

- Fed. Cir. held that Congress was silent regarding the effective date for recommencing benefits and § 3.654(b)(2) is a reasonable gap-filling regulation
  - Encourages Vet to seek recommencement of disability benefits in a timely fashion, but always provides a Vet with some comp
  - By incentivizing early filing, VA promotes the efficient administration of benefits, but not at all costs
  - It is reasonable for VA to require timely reapplication, since a disability may improve or worsen over time

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

66

---



---



---



---



---



---



---



---



---

**TAKE AWAY**

NVLSP

- Vets already receiving disability benefits who are recalled to active duty must affirmatively file for recommencement of benefits.
- To receive maximum amount of VA benefits, Vet must file for recommencement within one year from date of release from active service, so effective date for recommencement will be the day after release.

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

67

---



---



---



---



---



---



---



---



---

NVLSP

**Hatfield V. McDonough**  
**33 Vet.App. 327 (2021)**  
**Issued: March 8, 2021**

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

68

---



---



---



---



---



---



---



---



---

**HATFIELD V. MCDONOUGH**

NVLSP

• **Issue:**

– Whether VA can apply the “minor deviation” rule to cure defective informed consent in a Section 1151 claim where there is no informed consent to begin with.

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

69

---



---



---



---



---



---



---



---



---

**HATFIELD V. MCDONOUGH**

NVLSP

- Requirements for establishing benefits under 38 U.S.C. § 1151 based on VA health care:
  - (1) Vet must experience a qualifying additional disability or death that was not the result of the Vet's willful misconduct
  - (2) Additional disability or death must have been caused by VA medical treatment, care, or exam
  - (3) The proximate cause of the Vet's additional disability or death must be "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of fault on the part" of VA or "an event not reasonably foreseeable"

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

70

---



---



---



---



---



---



---



---



---



---

**HATFIELD V. MCDONOUGH**

NVLSP

- To establish that the proximate cause of a disability was "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA," the claimant must show either:
  - (1) VA failed to exercise the degree of care that would be expected of a reasonable health care provider; or
  - (2) VA furnished the care, treatment, or exam without the Vet's informed consent

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

71

---



---



---



---



---



---



---



---



---



---

**HATFIELD V. MCDONOUGH**

NVLSP

### Informed consent

"Informed consent is the process by which the practitioner discloses to and discusses appropriate information with a patient so that the patient may make a voluntary choice about whether to accept the proposed diagnostic or therapeutic procedure or course of treatment."

– 38 C.F.R. §17.32

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

72

---



---



---



---



---



---



---



---



---



---

# HATFIELD V. MCDONOUGH

**HATFIELD V. MCDONOUGH**



**NVLP**

- 38 C.F.R. § 3.361(d)(1)(ii):
  - To determine whether there was informed consent, VA will consider whether the health care providers substantially complied with the requirements of § 17.32
  - Minor deviations from informed consent requirements of § 17.32 that are immaterial under the circumstances of a case will not defeat a finding of informed consent
  - Consent may be express or implied under the circumstances specified, as in emergency situations

# MCNAIR V. SHINSEKI 25 VET. APP. 98 (2011)



- Appellant is widow of Vet
- Vet had active service from Mar. 1944 to May 1945
- In July 1978, Vet was diagnosed with Hodgkin's disease at a VA facility
- From Sept. 1978 to Nov. 1978, Vet underwent radiation therapy and follow-up care at a VA hospital
- *The record contains no documented informed consent for radiation therapy.*

## **HATFIELD V. MCDONOUGH**



• Radiation therapy eliminated the Hodgkin's disease, but produced adverse side effects, including severe pulmonary complications

• Jan. 1979:

- Vet died from pulmonary complications of radiation therapy
- Widow filed a claim seeking DIC

• Oct. 1980: BVA denied claim

# HATFIELD V. MCDONOUGH

# HATFIELD V. MCDONOUGH



**NVSP**

- **Oct 2019: BVA denied DIC under Section 1151**
  - Citing *McNair*, found there was no informed consent, but that deviations from the informed consent requirements are minor and immaterial if a reasonable person in similar circumstances would have proceeded with the medical treatment even if informed of the foreseeable risk
  - In this case, no reasonable person would have declined the radiation treatment

**HATFIELD V. MCDONOUGH**



**NVLSP**

- **Widow appealed to CAVC and argued:**
  - Cannot apply the “reasonable person” test to cure defective informed consent, because VA obtained no informed consent
- **VA argued:**
  - If BVA finds a lack of documentation of informed consent, then the “reasonable person” test applies in assessing whether VA had obtained informed consent
  - BVA correctly applied the “reasonable person” test because no reasonable person in Vet’s situation would have opted to forego radiation treatment



**HATFIELD V. McDONOUGH**

- **CAVC held:**
  - The minor-deviation exception applies only with there is a finding of informed consent.
  - The “reasonable person” test from *McNair* does not apply to situations where no consent was obtained

**HATFIELD V. McDONOUGH**

NVLSP

- CAVC concluded that the widow is entitled to compensation under § 1151
  1. Vet had a qualifying death;
  2. Death was actually caused by VA's actions (actual causation); and
  3. VA did not obtain informed consent (proximate causation)

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

82

---



---



---



---



---



---



---



---

**TAKE AWAYS**

NVLSP

- The proximate causation requirement of § 1151 can be established with a complete lack of informed consent
- If a § 1151 claim involves medical treatment from the 1990s or earlier, VA records should be reviewed for presence of informed consent
- A complete lack of informed consent (as opposed to defective informed consent) is rare in claims involving recent medical treatment

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

83

---



---



---



---



---



---



---



---

LOCAL TITLE: INVO INFORMED CONSENT  
STANDARD TITLE: CONSENT  
DATE: 09/20/2017 10:48:05(24:11) ENTER DATE: SEP 22, 2014(09:24:55)  
AUTHOR: [REDACTED] EXP. COPIES: [REDACTED]  
INSTITUTION: [REDACTED]  
DIVISION: [REDACTED]  
COMPLEXITY: [REDACTED] STATUS: COMPLETED

1. Standardized location: One description of treatment/procedure.  
Endotracheal intubation and mechanical ventilation at 10:48:05(24:11) was performed through Vista Imaging.

2. Patient name: [REDACTED]

3. Patient age: [REDACTED]

4. The patient's understanding capacity:  
a. Yes  
b. No  
c. Uncertain

5. The patient's physical condition:  
a. Stable  
b. Unstable  
c. Critical  
d. Other: [REDACTED]

6. The patient's history:  
a. Known  
b. Unknown  
c. Other: [REDACTED]

7. Treatment/procedure: Bronchoscopy is a test that allows a physician to look inside the airways of the lungs. The physician inserts a flexible tube (bronchoscope) into the nose or mouth and into the airways. Before the procedure, the patient receives medication that relaxes a muscle in the airway. This allows the physician to pass the bronchoscope through the airway. The physician then passes a small camera attached through the bronchoscope in order to take pictures of the airways. The physician may also pass a small tool through the bronchoscope to remove a sample of tissue (biopsy) (remove small pieces of tissue to check for disease). If necessary, the physician will also:  
a. Insert a tube into the airway to stop or prevent bleeding.  
b. Insert a tube into the airway to remove mucus or will place tubes to facilitate dilatation drainage.  
c. Insert a tube into the airway to remove areas which are necrotic.  
d. Use ultrasound waves to remove deep into the cellular tissue or into skin.  
e. Use a special light (laser/photodynamic therapy) or electrical waves to remove tissue.  
f. Use a special light (laser/photodynamic therapy) or electrical waves to remove tissue.  
g. Place a tube in the windpipe to protect the airway.  
h. Insert a tube into the airway to remove mucus or will prevent (tracheostomy).  
i. Other: [REDACTED]

8. After the procedure is completed, the mucous is removed and the patient is monitored in the recovery room.

9. Wearer anesthetic and/or sedative medication will be used:  
a. No  
b. Yes

10. To avoid complications, the following procedure will be used in this treatment/procedure:  
a. No  
b. Yes

11. Informed consent: [REDACTED]

12. Supervising practitioner: [REDACTED]

13. Other practitioner(s) involved in this treatment/procedure: [REDACTED]  
a. No  
b. Yes

14. Comments:  
[REDACTED] During the course of this treatment/procedure will be disposed of in accordance with hospital procedures.

84

---



---



---



---



---



---



---



---



**Chavis v. McDonough**  
34 Vet.App. I (2021)  
Issued: April 16, 2021

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

85

---



---



---



---



---



---



---



---



---



**CHAVIS V. MCDONOUGH**

• Issues:

- Whether the requirement of ankylosis in VA's General Rating Formula for the Spine can be met with evidence of the "functional equivalent" of ankylosis
- Whether the Board can consider radiculopathy rating as part of a claim for an increased rating for a back disability

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

86

---



---



---



---



---



---



---



---



---



**CHAVIS V. MCDONOUGH**

Ankylosis  
Immobility and consolidation of a joint due to disease, injury, or surgical procedure

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

87

---



---



---



---



---



---



---



---



---

**CHAVIS V. McDONOUGH**

  
NVSP

**General Rating Formula – Spine**

**100%:** Unfavorable ankylosis of the entire spine

**50%:** Unfavorable ankylosis of the entire thoracolumbar spine

**40%:** Forward flexion of the thoracolumbar spine 30 degrees or less; OR, favorable ankylosis of the entire thoracolumbar spine

...

Note (1): Evaluate any associated objective neurologic abnormalities ... separately, under an appropriate diagnostic code.

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

88

---



---



---



---



---



---



---



---



---



---

**CHAVIS V. McDONOUGH**

  
NVSP

- **Principles for Rating Musculoskeletal Disabilities**
  - A higher rating is warranted where there is evidence that disability causes additional functional loss—i.e., the inability to perform the normal working movements of the body with normal excursion, strength, speed, coordination, and endurance—including as due to pain
  - A higher rating is warranted where there is a reduction in normal movement in different planes, including changes in the joint's range of movement, strength, fatigability, or coordination
    - A higher rating based on additional functional loss with use over time or during flare-ups, should, if feasible, be portrayed in terms of the degree of additional ROM loss

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

89

---



---



---



---



---



---



---



---



---



---

**CHAVIS V. McDONOUGH**

  
NVSP

- Aug. 1976: Vet service-connected for low back disability
- Nov. 2008: Vet filed a claim for an increased rating
- Dec. 2008 VA exam:
  - Diagnosed lumbar intervertebral disc syndrome (IVDS) of the sciatic nerve distribution and noted sensory deficits in the left lower leg and foot
  - Reported low back pain that radiated into lower legs, was exacerbated with physical activity, and was relieved by rest
  - 20 degrees of lumbar flexion with pain

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

90

---



---



---



---



---



---



---



---



---



---

**CHAVIS V. MCDONOUGH**

NVLSP

- Feb. 2009: RO increased lumbar spine rating to 40%
- Nov. 2009: Vet appealed
- Dec. 2011 VA exam:
  - Reported constant low back pain that fluctuated in intensity and resulted in leg weakness and an inability to bend forward
  - Pain exacerbated with physical activity and relieved by rest
  - 35 degrees of forward flexion on exam
  - Diagnosed left-sided radiculitis secondary to the lumbar spine disability

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

91

---



---



---



---



---



---



---



---



---



---

**CHAVIS V. MCDONOUGH**

NVLSP

- Jan. 2012: Vet sought treatment for chronic low back pain that radiated into the left thigh
  - Described episodes of pain that left him unable to move, which occurred 5x per year
  - Normal ROM on exam
- June 2012: SSOC adds left lumbar radiculitis as part of the SC lumbar disorder, not a separate diagnosis.
  - Based on subjective symptoms, rather than a separate diagnosis of radiculopathy

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

92

---



---



---



---



---



---



---



---



---



---

**CHAVIS V. MCDONOUGH**

NVLSP

- Dec. 2015: Vet testified at BVA hearing
  - Back symptoms episodic in nature.
  - During flare-ups, he is unable to move and is confined to bed or dependent on a walker or wheelchair
  - Several episodes required him to call an ambulance to transport him to the hospital for treatment
  - Described radiating pain and numbness in his legs

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

93

---



---



---



---



---



---



---



---



---



---

# CHAVIS V. MCDONOUGH

# CHAVIS V. MCDONOUGH

# CHAVIS V. MCDONOUGH

**CHAVIS V. MCDONOUGH**

NVLSP

- VA argued:
  - General Rating Formula does not contemplate the functional equivalent of ankylosis
  - Ankylosis requires consolidation of joint resulting in restriction of motion
  - No ankylosis noted in VA exams
  - BVA did not have jurisdiction over the radiculopathy evaluations because Vet did not file an NOD following the January 2018 RO decision granting SC and assigning the initial ratings

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

97

---



---



---



---



---



---



---



---



---



---

**CHAVIS V. MCDONOUGH**

NVLSP

- CAVC held:
  - General Rating Formula permits evaluation based on ankylosis, if functional loss is equivalent to ankylosis
    - Functional equivalence of ankylosis can be shown on flare-up
  - BVA had jurisdiction over radiculopathy because it was part of his claim seeking a higher evaluation for the underlying lumbar spine disability
    - Medical evidence indicated radiculopathy was a progression of the lumbar spine disability and not a new and separate condition
    - VA's duty to sympathetically construe filings indicated it was part of claim seeking higher rating for lumbar spine disability

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

98

---



---



---



---



---



---



---



---



---



---

**ADVOCACY ADVICE**

NVLSP

- Lay descriptions of functional loss are very important for joint disability claims, particularly the spine
- Vets should describe the extent of their ability to move during flare-ups and after repeated use over time
- Review DBQs carefully for descriptions of functional loss equivalent to ankylosis ("I can't move [joint] during flare-ups")
- Even if DBQ provides ROM measurements/estimates and does not note ankylosis, a Vet's description of functional loss during flare-ups may represent "functional" ankylosis

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

99

---



---



---



---



---



---



---



---



---



---

# ADVOCACY ADVICE

# ADVOCACY ADVICE

## Or here!

### 30. Film ops

Is the Veteran being examined during a film op?

Yes  No

Does planned evidence (statements from the Veteran) support pain, tenderness, weakness, lack of endurance, or incoordination which

Yes  No

Block (Thoracolumbar Spine): Conditions Disability Benefits Questionnaire Updated on June 17, 2020 - v2020\_3

Released March 2021 Page 6 of 14

### SECTION B - RANGE OF MOTION (ROM) AND FUNCTIONAL LIMITATION (continued)

Joint or factor that cause limitation	Normal	Plan	Flexion	Flexion sideways	Left bend	Endurance	Coordination
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Forward Bending Endurance (30 degrees)	degrees			Left lateral bend endurance (30 degrees)	degrees		
Forward endurance (30 degrees)	degrees			Right lateral bend endurance (30 degrees)	degrees		
Forward endurance (30 degrees)	degrees			Endurance endurance (30 degrees)	degrees		
The examiner should provide the estimated range of motion based on a review of all prior clinical information. In addition, the examiner should provide the examiner's statement on examination, care specific evidence to include medical treatment records when applicable, and the examiner's medical expertise. If, after evaluation of the prior clinical and associated evidence, the examiner believes that the evidence does not support the disability, the examiner should provide the evidence to the VA. The information should not be based on the examiner's樵knowledge or in general terms to determine an opinion as to whether or not disability is denied.							
Please cite and discuss evidence. (May be specific to the case and based on all prior evidence)							

# ADVOCACY ADVICE

# ADVOCACY ADVICE



• **Issue:**

- What is the meaning of “bore the expense” in the context of the statute that allows for accrued benefits to be paid to the person who bore the expense of last sickness and burial?



**HELMICK V. MCDONOUGH**

- 38 U.S.C. § 5121 provides that certain persons may receive accrued benefits following the death of someone entitled to receive periodic monetary benefits from VA at the time of his or her death
- If no surviving spouse, child, or dependent parent, accrued benefits can be paid to “the person who bore the expense of last sickness and burial.”

– 38 U.S.C. § 5121(a)(6)



- Vet's widow / Appellant's mother, was awarded VA death pension, with aid and attendance, effective May 1, 2007
- Feb. 2011: widow submitted a medical expense report asserting:
  - She paid ~\$40,000 in her own unreimbursed medical expenses in 2010, including ~\$28,000 for assisted living
  - She expected to pay ~\$51,000 for her medical expenses in 2011, including \$45,600 for assisted living
- April 2011: While VA was processing medical expense report, widow died



**HELMICK V. MCDONOUGH**

- Appellant applied for some of his mother's accrued benefits, stating that he had paid ~\$1,500 in burial expenses.
  - VA granted!
- Identified a loan for assisted care of \$15,000 from 2010 and 2011 as an additional debt he had incurred on behalf of his mother, who did not pay him back.
  - VA denied!

**HELMICK V. MCDONOUGH**

NVLP

- Apr. 2019 BVA Decision:
  - Found medical expenses for assisted living cannot be counted as both an unreimbursed medical expense paid by mother to establish entitlement to pension benefits, *and* as payments made by the appellant from his own funds for purposes of establishing entitlement to accrued benefits
  - Finding premised on notion that “bore the expense” = “paid”

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

109

---



---



---



---



---



---



---



---



---



---

**HELMICK V. MCDONOUGH**

NVLP

- CAVC held that “bore” is broader than “paid”
  - to accept or allow oneself to be subjected to especially without giving way
  - to “assume” or “accept”
  - to support the weight of; sustain
  - to move while holding up and supporting (something)
  - to support or carry
- Plain meaning of “bore the expense” includes whatever circumstances created the financial burden

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

110

---



---



---



---



---



---



---



---



---



---

**HELMICK V. MCDONOUGH**

NVLP

Congress's clear intent was to make whole the person who—one way or another—was saddled with the financial burden of a beneficiary's last sickness and burial

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

111

---



---



---



---



---



---



---



---



---



---

**TAKE AWAY**

NVLP

- A person does not have to have directly “paid” expenses related to the last sickness or burial to have “bore” those expenses
- For accrued benefits purposes, “bore the expense” includes a personal loan that was provided to the now-deceased individual for the now-deceased individual to pay medical expenses of their last sickness (or perhaps pre-pay for their burial)

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

112

---



---



---



---



---



---



---



---



---

**Cooper v. McDonough**  
33 Vet.App. 341 (2021)  
Issued: Feb. 26, 2021

NVLP

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

113

---



---



---



---



---



---



---



---



---

**COOPER V. McDONOUGH**

NVLP

- **Issue:**
  - Whether state unemployment compensation is excluded from countable income for VA non-service-connected disability pension purposes

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

114

---



---



---



---



---



---



---



---



---

**COOPER V. McDONOUGH**

NVLSP

**38 U.S.C. § 1521(a), (j) provides that a Vet may be entitled to pension if:**

- 1) Vet served during a period of war
- 2) Meets specific income and net worth criteria; AND
- 3) Is permanently and totally disabled due to NSC disabilities and not due to his or her own willful misconduct

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

115

---



---



---



---



---



---



---

**COOPER V. McDONOUGH**

NVLSP

- **38 U.S.C. § 1521(b) provides that the maximum annual rate of pension is reduced by the amount of Vet's annual income**
- **38 U.S.C. § 1503(a) provides “all payments of any kind or from any source” are included when calculating the Vet's income, with some exclusions, including:**
  - Donations from public or private relief or welfare organizations

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

116

---



---



---



---



---



---



---

**COOPER V. McDONOUGH**

NVLSP

- Oct. 2008: Vet granted NSC pension
- July 2013: Vet notified VA that he was in receipt of SSDI, and NSC pension was reduced
- 2014: VA adjusted Vet's countable income from Dec. 2008 through 2010 based on his collection of unemployment compensation from the state of WI
- Vet disagreed that state unemployment compensation should be counted as income
- Feb. 2019: BVA denied request to exclude unemployment compensation from his total countable income

© 2021 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

117

---



---



---



---



---



---



---

# COOPER V. MCDONOUGH

# COOPER V. McDONOUGH

# **SURVEY #2**

# COOPER V. MCDONOUGH

# TAKE AWAYS

The logo for the National Veterans Legal Services Program (NVLSP) is located in the top right corner. It features a stylized graphic of a shield or map in blue, green, and yellow, with a small American flag in the upper left corner of the shield. Below the graphic, the acronym "NVLSP" is written in a bold, sans-serif font.

# *Van Dermark v. McDonough*

**Vet. App. No. 19-2795**

**Issued: June 1, 2021**

**VAN DERMARK V.  
MCDONOUGH**

NVLSP

• Issue:

- Whether a Vet can be reimbursed for emergency treatment abroad for a non-service-connected condition

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

124

---



---



---



---



---



---



---



---



---



---

**VAN DERMARK V.  
MCDONOUGH**

NVLSP

• 38 U.S.C. § 1724 governs hospital care, medical services, and nursing home care abroad

- “the Secretary shall not furnish hospital or domiciliary care or medical services outside any State”
- Exceptions include medical services and hospital care abroad when necessary for treatment of a SC disability or as part of a rehab program

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

125

---



---



---



---



---



---



---



---



---



---

**VAN DERMARK V.  
MCDONOUGH**

NVLSP

• Under 38 U.S.C. § 1728, VA must reimburse Vet for non-VA emergency treatment, when treatment was for:

- 1) SC disability
- 2) non-SC disability associated with an aggravating SC disability
- 3) **any disability, if a Vet has a permanent total disability**
- 4) any illness, injury, or dental condition of a Vet in a rehab program where the care or treatment is necessary to facilitate participation in that program

• Under 38 U.S.C. § 1725, VA must reimburse Vet for non-VA emergency treatment, when Vet is an active VA healthcare participant and personally liable for the treatment

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

126

---



---



---



---



---



---



---



---



---



---

**VAN DERMARK V.  
MCDONOUGH**

NVLSP

- Vet lives in Thailand; not SC for a cardiac condition, but
  - Is entitled to TDIU
  - Is an active VA healthcare participant
- May 2016 & May 2018: Vet underwent medical treatment for cardiac issues in Thailand
- Vet sought reimbursement for emergency medical expenses
- BVA denied reimbursement, finding that emergency treatment reimbursement provisions in 38 U.S.C. §§ 1725 and 1728 are constrained by 38 U.S.C. § 1724's general prohibition against VA providing medical care abroad

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

127

---



---



---



---



---



---



---



---



---

**VAN DERMARK V.  
MCDONOUGH**

NVLSP

- CAVC held:
  - Sections 1725 and 1728 permit reimbursement for Vets who receive emergency treatment from domestic, non-VA healthcare providers
  - Section 1724 covers when Vets abroad who receive medical care or services—including emergency treatment—may receive reimbursement.
  - Vets who receive medical care abroad in connection with a non-SC condition not part of a rehab program cannot be reimbursed by VA

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

128

---



---



---



---



---



---



---



---



---

**TAKE AWAYS**

NVLSP

- U.S. citizen Vets who receive medical care or services abroad—including emergency treatment—may only receive reimbursement if:
  - the treatment is for a SC condition, or
  - part of a rehab program

© 2021 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

129

---



---



---



---



---



---



---



---



---

# NVLSP VA BENEFIT IDENTIFIER



• Questionnaire/App: Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to

• 3 WAYS to Access:

**NVLSP Website**

Download on the  
**App Store**

ANDROID APP ON  
**Google play**

# NVLSP TRAINING OPPORTUNITIES