

**RECENT COURT  
DECISIONS  
VETERANS  
ADVOCATES NEED  
TO KNOW ABOUT  
2/2021-9/2021**

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**PRESENTER**



**Rosalee Hoffman**

- Appellate Attorney, NVLSP
- Co-author, *Veterans Benefits Manual*
- Mentor for Veterans Consortium Pro Bono Program

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**AGENDA**



**Federal Circuit:**

- Military-Veterans Advocacy - validity of certain AMA regulations
- Euzebio - constructive possession and NAS Agent Orange Updates
- Buffington - effective date for recommencement of disability benefits after recall to active service

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# AGENDA



## CAVC:

- Andrews - claimants rights after Court remand of AMA direct review docket case
- Healey - Board obligation to address provisions of the Purplebook
- Hatfield - curing defective informed consent where there is no informed consent

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# AGENDA



## CAVC Cont.:

- Chavis - rating the "functional equivalent" of ankylosis + radiculopathy as part of i/r back claim
- Helmick - meaning of "bore the expense" for accrued benefits purposes
- Cooper - state unemployment benefits as income for purposes of non-service-connected disability pension
- Van dermark - reimbursement for emergency treatment abroad of non-service-connected condition

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# ***Military-Veterans Advocacy (MVA) v. Secretary of VA***

## **\_\_\_ F.4th \_\_\_**

### **(Fed. Cir. 2021)**

### **Issued: July 30, 2021**

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

NVLSP

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

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

NVLSP

**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

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

NVLSP

**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

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***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

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***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

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***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."

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***MVA V. SEC'Y OF VA*****38 C.F.R. § 14.636(c)(1)(i)**

- Limits when a Vet's representative may charge fees for working on a supplemental claim
- Treats supplemental claims differently based on whether or not they were filed w/in one year of a prior decision
  - § 5104(a) supplemental claims, which are "continuously pursued" w/in one year of a prior decision, "will be considered part of the earlier [initial] claim," such that attorneys may charge fees for any work performed on the supplemental claim.
  - § 5104(b) supplemental claims, filed more than one year after decision, fees may only be charged for work performed after "an initial decision on [the] supplemental claim" itself.

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

This limits a claimant's ability to retain paid representation for a § 5104(b) supplemental claim, even though the work is the same as the work involved with a § 5104(a) claim.

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

- The Federal Circuit held that § 14.636(c)(1)(i) is invalid.
  - Conflicts with plain meaning of 38 U.S.C. § 5904(c)(1), which provides broadly for attorney compensation once a claimant receives notice of the AOJ's "initial decision . . . with respect to the case."
  - § 5104(b) supplemental claims are part of the same "case" as the underlying decision

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***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

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16

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

- **The Federal Circuit held that § 3.2500(b) is invalid.**
  - Conflicts with § 5104C's clear authorization for filing supplemental claims “[i]n any case in which the Secretary renders a decision on a claim”
  - While § 5104C expressly bars concurrent lanes of VA review, it does not expressly prohibit concurrent VA and judicial review (including at the CAVC)

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

- **38 C.F.R. § 3.155 excludes supplemental claims from the ITF framework**
  - According to VA, including supplemental claims in the ITF framework would allow for supplemental claims submitted beyond the one-year period to retain an earlier effective date, contrary to § 5110(a)(3)'s requirement that the effective date of such supplemental claims shall not be earlier than the date of receipt.
  - VA told the Court it planned to amend § 3.155 to apply the ITF rule to § 5104(C)(b) supplemental claims, but VA had not issued proposed reg by time of decision

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

- The Federal Circuit held that § 3.155 is invalid.
  - Excluding only supplemental claims from the ITF framework is arbitrary and capricious because VA failed to adequately explain its inconsistent treatment of initial and supplemental claims given the substantially similar statutory language in § 5110(a)(1) and § 5110(a)(3)
  - If the application for an initial claim is “deem[ed] ... to have been received as of the date of the [ITF],” there is no reason why that same interpretation may not also apply to deem a supplemental claim received as of the date of the ITF submission.

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***ADVOCACY ADVICE***

- VA-accredited attorneys and claims agents can charge fees for work on supplemental claims, even if filed more than one year after VA's initial denial.
- A claimant may file a supplemental claim with new and relevant evidence while pursuing judicial review of a BVA denial of the same claim.
  - May result in VA granting benefits faster than if resolved by Court
  - But grant of supplemental claim may moot case at Court, allowing VA to avoid judicial review of certain issues

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***ADVOCACY ADVICE***

- You can file an ITF in advance of a supplemental claim, if most recent prior decision denying the claim was more than one year ago
  - No longer need to worry that ITF won't protect the effective date
    - Great news if you aren't sure whether VA previously denied the benefit
  - Will give you extra time to obtain or identify new and relevant evidence

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21

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

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**ANDREWS V. MCDONOUGH**

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

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**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

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**ANDREWS V. MCDONOUGH** 

- Under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), a claimant has 3 options following an AOJ decision. They can file:
  - (1) a request for higher-level review
  - (2) a supplemental claim
  - (3) a Notice of Disagreement (NOD), which initiates an appeal to the Board

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**ANDREWS V. MCDONOUGH** 

- When filing an NOD, the claimant has three more options:
  - (1) direct review docket
  - (2) evidence submission docket
  - (3) a hearing docket

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**ANDREWS V. MCDONOUGH** 

- In the direct review docket, the evidentiary record before the Board is limited to the evidence of record at the time of the rating decision on appeal
- In the evidence and hearing dockets, the claimant has the opportunity to submit additional evidence to the Board
- No matter which docket the claimant selects, VA's duty to assist no longer applies at the Board

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# ANDREWS V. MCDONOUGH



- 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

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# ANDREWS V. MCDONOUGH



- 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

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# ANDREWS V. MCDONOUGH



- 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.

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**ANDREWS V. MCDONOUGH** 

**What are claimant's rights on remand from the Court?**

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**ANDREWS V. MCDONOUGH** 

**Legacy Appeals**

- Claimants will continue to have the right to submit additional evidence and argument upon remand from the Court.
- BVA will be required to engage in a critical examination of the justification for the decision, reexamine the evidence of record, seek any other evidence it feels is necessary, and issue a timely, well-supported decision.

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**ANDREWS V. MCDONOUGH** 

**AMA Appeals**

- Where a claimant selected direct review docket, BVA will not consider or develop new evidence upon remand from the Court
- BVA will be required to reexamine the evidence of record, seek any other evidence [if the RO failed to satisfy its duty to assist], and issue a timely, well-supported decision.

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## ADVOCACY ADVICE



- Limitation on ability to submit additional evidence to BVA following CAVC remand in direct review cases should be taken into account when initially choosing BVA lane/docket
  - Not most important factor, though
- Even if Vet chose direct review lane, Vet can still submit additional *argument* to BVA following a CAVC remand
- If Board continues denial of claim on remand, Vet can file supplemental claim with new and relevant evidence (such as medical nexus opinion) within 1 year of BVA denial to protect effective date

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## ***Euzebio v. McDonough***

989 F.3d 1305 (Fed. Cir. 2021)

Issued: Mar. 3, 2021



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## ***EUZEBIO V. MCDONOUGH***



- Issue:
  - Does VA have “constructive possession” of NAS Agent Orange Updates?

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***EUZEBIO V. MCDONOUGH*** 

**NAS Agent Orange Updates**

- National Academies of Sciences, Engineering & Medicine (NAS) was tasked by Congress to review and summarize the scientific evidence and assess the association between exposure to AO and diseases suspected to be associated with such exposure.
- NAS transmits to VA and Congress “Updates” approximately every two years.

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***EUZEBIO V. MCDONOUGH*** 

- Vet sought SC for a thyroid condition due to AO exposure
- Mar. 2016: While appeal was pending before BVA, NAS published the 2014 AO Update.
  - The 2014 AO Update found that “thyroid conditions overall showed an indication of increased risk with herbicide exposure.”

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***EUZEBIO V. MCDONOUGH*** 

- July 2017: BVA denied the claim, finding that benign thyroid nodules had not been shown to be related to his in-service environmental exposures
- BVA declined to provide Vet with a VA exam
  - Vet’s “conclusory generalized statements” that his thyroid condition is related to his in-service exposure to Agent Orange did not meet the low burden to trigger VA’s duty to provide a VA exam

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## EUZEBIO V. MCDONOUGH



- Vet appealed to CAVC
  - Argued that the 2014 AO Update was constructively before BVA, and if BVA had considered it, BVA would have ordered an exam
- CAVC found that the 2014 AO Update was not constructively before BVA
  - Even if VA is aware of a report and the report contains general info about the type of disability on appeal, that is insufficient to trigger constructive possession
  - To trigger constructive possession, there must be a *direct* relationship to the claim on appeal

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## EUZEBIO V. MCDONOUGH



- Vet appealed to the Federal Circuit
- Fed. Cir. held the correct standard for constructive possession is relevance and reasonableness
  - Requiring the evidence to bear a “direct relationship” or be specific to Vet is w/out basis in relevant statute or reg
  - The relevancy limitation allows VA to focus its efforts on obtaining documents that have a reasonable possibility of assisting claimants in substantiating their claims for benefits
  - Limited to situations where VA has “constructive or actual knowledge” of evidence that is “relevant and reasonably connected” to Vet’s claim

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## EUZEBIO V. MCDONOUGH



- With respect to the 2014 AO Update:
  - There was no question that VA and BVA specifically (through its citations of the 2014 AO Update in the Purplebook) had notice of the 2014 AO Update
  - The relevance of the NAS reports to herbicide claims is well-known and well-established through decades of veteran engagement and congressional investigation.

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## TAKE AWAYS



- **This is a narrow holding.**
  - VA has constructive possession of NAS AO Updates in herbicide-related disability claims
  - VA does *not* have constructive possession of most treatises/texts, regardless of the type of claim

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## ADVOCACY ADVICE



- Vets should still submit NAS reports (or excerpts) to support AO-related claims for diseases not on the AO presumptive list, if the report contains favorable info
  - 2018 AO Update (<http://nap.edu/25137>) should be enough to at least trigger a VA medical opinion on direct SC
    - Hypertension and monoclonal gammopathy of undetermined significance in "sufficient evidence of an association" category
    - Stroke in "limited or suggestive evidence of an association" category
    - VA recognizes all other diseases in these categories as presumptively linked to herbicides
    - VA overlooks NAS reports in claims for these diseases

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## HYPOTHESIS



- Vet claimed SC for hypertension secondary to SC PTSD.
- A VA examiner wrote a negative nexus opinion and cited an NIH study.
- The examiner did not include a copy of the NIH study with the opinion and the study is not in the VBMS e-folder/c-file

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**SURVEY #1**

**NVLSP**

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

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**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

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**NVLSP**

***Healey v. McDonough***

**33 Vet.App. 312 (2021)**

**Issued: Feb. 21, 2021**

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**HEALEY V. MCDONOUGH** 

• **Issue:**

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

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**HEALEY V. MCDONOUGH** 

- 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.

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**HEALEY V. MCDONOUGH** 

- 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.

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**HEALEY V. MCDONOUGH** 

- Mar. 8, 2018: BVA published the Purplebook, an internal document encompassing all BVA policies and procedures
  - Discussed the 2012 NAS Update, which concluded there is “limited or suggestive evidence” of a relationship between hypertension and AO.
  - Explained that though it is not sufficient to prove SC, in “cases where presumptive (or actual) exposure to Agent Orange has been conceded,” the Board should “not deny service connection for hypertension . . . without first obtaining a VA medical opinion on the nexus element.”

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**HEALEY V. MCDONOUGH** 

- Oct. 2018: BVA denied Vet's claim, finding:
  - Hypertension was not caused or aggravated by either SC diabetes or treatment for SC non-Hodgkin's lymphoma.
  - The 2015 and 2017 VA medical opinions were highly probative
- Vet appealed to CAVC

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**HEALEY V. MCDONOUGH** 

- Vet argued:
  - BVA failed to address the reasonably raised theory that hypertension may be directly related to exposure to AO
  - Although the 2012 NAS Report is not in his c-file, the Board had constructive possession due to its inclusion in the Purplebook
- VA argued:
  - BVA did not have constructive possession of the NAS Report because it had no direct relationship to Vet's claim
  - There is no duty to address matters raised by the Purplebook, as its contents are not binding on BVA

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**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.

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**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

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**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.1.B.1.b

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

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***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?

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***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.

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***BUFFINGTON V. MCDONOUGH*** 

- VA promulgated 38 C.F.R. § 3.654(b)(2):
  - Payments, if otherwise in order, will be resumed effective the day following release from active duty if claim for recommencement of payments is received within 1 year from the date of such release: otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim.

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***BUFFINGTON V. MCDONOUGH*** 

- Vet served on active duty Sept. 1992 to May 2000
- Mar. 2002: VA granted SC for tinnitus and assigned a 10% evaluation, effective May 31, 2000
- Aug. 2003: Vet recalled to active duty in the Air National Guard. He informed VA and VA discontinued his disability comp.
- July 2005: Vet completed his term of active ANG service

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***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

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***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

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***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

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***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

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## TAKE AWAY



- 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.

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67

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## ***Hatfield V. McDonough***

**33 Vet.App. 327 (2021)**

**Issued: March 8, 2021**



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## ***HATFIELD V. MCDONOUGH***



### • 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.

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**HATFIELD V. MCDONOUGH** 

- 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"

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**HATFIELD V. MCDONOUGH** 

- 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**

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**HATFIELD V. MCDONOUGH** 

**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

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**HATFIELD V. MCDONOUGH** 

**Informed consent cont.**

- “Appropriate information” is info that a reasonable person in the patient’s situation would expect to receive in order to make an informed choice about whether or not to undergo the treatment or procedure.
- Specific information and level of detail required will vary depending on the nature of the treatment or procedure
- Patient must have decision-making capacity to give informed consent
- If patient lacks decision-making capacity, a surrogate acting on behalf of the patient may give consent
  - 38 C.F.R. §17.32

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**HATFIELD V. MCDONOUGH** 

- 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

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**MCAIR V. SHINSEKI**  
**25 VET. APP. 98 (2011)** 

- Vet signed informed consent form for mammoplasty
- As a result of the surgery, Vet developed neuralgia, which before her surgery was not disclosed as a potential risk.
- CAVC held that VA’s failure to inform Vet about a potential adverse effect (neuralgia) did not defeat a finding of informed consent *if a reasonable person faced with similar circumstances would have proceeded with the treatment*

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**HATFIELD V. MCDONOUGH**


- 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.*

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**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

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**HATFIELD V. MCDONOUGH**


- July 2010: Widow applied to reopen the DIC claim
  - Argued she is entitled to DIC under Section 1151 because VA failed to inform Vet of the risks of developing pulmonary complications as a result of radiation treatment such that he could not provide informed consent to this medical treatment

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**HATFIELD V. MCDONOUGH** 

- **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

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**HATFIELD V. MCDONOUGH** 

- **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

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**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

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# TAKE AWAYS



- 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

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## **Chavis v. McDonough**

**34 Vet.App. 1 (2021)**

**Issued: April 16, 2021**

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## **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

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86

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## **CHAVIS V. MCDONOUGH**

**Ankylosis**

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

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87

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**CHAVIS V. MCDONOUGH** 

**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.

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**CHAVIS V. MCDONOUGH** 

**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

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**CHAVIS V. MCDONOUGH** 

- 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

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**CHAVIS V. MCDONOUGH** 

- 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

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**CHAVIS V. MCDONOUGH** 

- 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

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**CHAVIS V. MCDONOUGH** 

- 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

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**CHAVIS V. MCDONOUGH** 

- Feb. 2017 VA exam:
  - 70 degrees of pain-free forward flexion on exam
  - No functional loss on flare-up
  - No radiculopathy
- Nov. 2017 VA addendum opinion:
  - Clarified that Vet has moderate bilateral radiculopathy, which was a progression of the previous diagnosis of low back strain.

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**CHAVIS V. MCDONOUGH** 

- Jan. 2018: RO awarded SC for right and left lower extremity radiculopathy as associated with the lumbar spine disability and assigned an initial 10% evaluation for each leg.
- Apr. 2018: BVA decision:
  - Denied a rating in excess of 40% for lumbar spine disability
    - Did not manifest in ankylosis
  - Increased bilateral radiculopathy ratings to 20%

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**CHAVIS V. MCDONOUGH** 

- Vet appealed to CAVC and argued:
  - Functional loss that manifests as complete loss of motion should be rated as ankylosis
  - BVA erred by failing to assign higher ratings for radiculopathy
  - BVA had jurisdiction over radiculopathy ratings because they were part of the lumbar spine disability increased rating claim
    - Note (I) of the General Rating Formula provides that neurologic abnormalities associated with a spine disability are to be evaluated separately
    - Nov. 2009 NOD placed the radiculopathy evaluations in appellate status because it expressed disagreement with the Feb. 2009 RO decision that did not address neurologic complications.

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**CHAVIS V. MCDONOUGH** 

- 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

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**CHAVIS V. MCDONOUGH** 

- 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

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**ADVOCACY ADVICE** 

- 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

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## ADVOCACY ADVICE



- If VA separately adjudicates ratings for the spine and secondary radiculopathy or other neurologic conditions, an appeal of the spine disability rating may encompass an appeal of the rating of the secondary conditions
  - Look at the medical history and Vet's filings
  - But to be safe, it is best to clearly identify in any review request/NOD each specific issue Vet wants to challenge
    - i.e., list right lower extremity radiculopathy, left lower extremity radiculopathy, and lumbar spine disability on the NOD / HLR / Supplemental Claim form

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103

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## *Helmick v. McDonough*

34 Vet. App. 141 (2021)

Issued: May 25, 2021



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104

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## *HELMICK V. MCDONOUGH*



### • 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?

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105

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**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)

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**HELMICK V. MCDONOUGH** 

- 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

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**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!

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**HELMICK V. MCDONOUGH** 

- 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”

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**HELMICK V. MCDONOUGH** 

- 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

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**HELMICK V. MCDONOUGH** 

**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**

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## TAKE AWAY



- 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)

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112

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## *Cooper v. McDonough*

33 Vet.App. 341 (2021)

Issued: Feb. 26, 2021



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113

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## *COOPER V. MCDONOUGH*



### • Issue:

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

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114

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**COOPER V. MCDONOUGH** 

**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

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**COOPER V. MCDONOUGH** 

- 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

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**COOPER V. MCDONOUGH** 

- 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

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**COOPER V. MCDONOUGH** 

- **Vet appealed to CAVC and argued:**
  - State unemployment compensation is “public relief for the unemployed,” constitutes a donation from public relief or welfare organizations, and is excluded from countable income under Section 1503(a)(1)
- **VA argued:**
  - All income is countable for purposes of NSC pension except for those specifically listed in the statute.
  - Unemployment compensation is not welfare; not all tax-funded benefits should be considered donations from a public relief organization, especially given that some Social Security benefits are included as countable income.

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**COOPER V. MCDONOUGH** 

- **CAVC held:**
  - A “public relief organization” is a governmental entity formed for the purpose of providing financial or other assistance to individuals and communities in need
  - A “donation” is a voluntary or charitable transfer of money to a recipient in need
  - “Unemployment compensation payments” are a state’s regular disbursement of funds set aside for the purpose of providing compensation to workers who have lost employment for reasons unrelated to job performance
    - Compensation turns on the recipient’s employment status without regard to need

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**SURVEY #2** 

**Given the definitions offered by CAVC, is state unemployment compensation a “donation from a relief or welfare organization”?**

- Yes
- No

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***COOPER V. MCDONOUGH*** 

**NO!**

- The ordinary common meaning of the statutory terms does not include unemployment compensation
- The unemployment compensation program existed when Congress enacted the Veterans' Pension Act of 1959 and when Congress amended the pension program
  - If Congress had wanted to exclude unemployment compensation from countable income for NSC pension purposes, it could have done so

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**TAKE AWAYS** 

- State unemployment compensation is countable income for NSC pension purposes
- Donations from these organizations may be excluded as countable income:
  - The Red Cross
  - FEMA
  - Catholic Charities
  - Salvation Army
  - United Way

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***Van Dermark v. McDonough*** 

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

**Issued: June 1, 2021**

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***VAN DERMARK V.  
MCDONOUGH***



• **Issue:**

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

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***VAN DERMARK V.  
MCDONOUGH***



• 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

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***VAN DERMARK V.  
MCDONOUGH***



- 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

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***VAN DERMARK V. MCDONOUGH***



- 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

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***VAN DERMARK V. MCDONOUGH***



- 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

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***TAKE AWAYS***



- 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

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## 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:
 



Download on the  
App Store

ANDROID APP ON



Google play

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## NVLSP TRAINING OPPORTUNITIES

- NVLSP offers private in-person and webinar training tailored to the needs of your organization
- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, at [richard@nvlsp.org](mailto:richard@nvlsp.org)

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