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## The Doctor Will Judge You Now

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## THE DOCTOR WILL JUDGE YOU NOW

*Blair E. Thompson*\*

### INTRODUCTION

Imagine you are a U.S. Army combat veteran. A few years ago, you left your home, your friends, and your family to risk your life in service to your country. You survived, but your health is not the same as it was before. Now, you are back, and even though you have a job as a civilian, you rely on the U.S. Department of Veterans Affairs (“VA”) for cost-free health care. You suffered a knee injury during your active duty service that continues to bother you. Your military records show you received treatment when the injury occurred. Since you have been home, you have discussed your knee injury with your doctor at the local VA medical center. Your doctor has diagnosed you and prescribed treatment, but it still causes you problems, especially since your civilian job requires you to be on your feet most of the day.

You decide to apply for VA disability compensation for your knee condition. The VA sends you to an appointment called a Compensation and Pension Examination (“C&P exam”). A doctor whom you have never met before conducts this exam. This doctor asks you about your knee, performs some tests, and sends you on your way in about thirty minutes. Months later, you receive a letter in the mail from VA. Your claim is denied. In the reasoning for the decision, the adjudicator writes that the Compensation and Pension Examiner found that your condition is not a result of your in-service injury, but from a separate injury in your medical records—an incident about a year ago when you went to the emergency room after slipping on ice while shoveling snow and hurt your knee. The adjudicator’s decision makes no mention of the continuous treatment you have received for your knee since the in-service injury, including from your doctors at the VA medical center. The letter says you have the right to appeal, and thanks you for your service.

By adopting the medical opinion as legal reasoning, VA adjudicators rely on Compensation and Pension Examiners (“C&P examiners”) to make the ultimate legal decisions on veterans’ disability claims, even when the medical opinion is inadequate. Further, a veteran has little

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ability to challenge an unfavorable medical opinion prior to receiving the decision on the claim. Indeed, as in the hypothetical above, the veteran often does not even know that the examiner rendered an unfavorable medical opinion until they receive the decision denying their benefits—benefits in which they have a constitutionally protected property interest. As a matter of course, VA does not send veterans copies of the C&P examiner’s opinion prior to the issuance of the adjudicator’s decision, even if the opinion is against the veteran’s claim.

This Article argues that the way VA adjudicators use C&P examiners’ medical opinions—by essentially adopting their medical opinions as legal reasoning—violates veterans’ right to due process in the adjudication of their VA disability compensation claims. In addition to the adjudicators’ adoption of medical opinions as legal reasoning, veterans do not generally receive notice of an unfavorable medical opinion prior to the issuance of a decision on their claim; and therefore, they generally do not have an opportunity to respond to that unfavorable medical opinion prior to the issuance of the decision. While courts and scholars have compared the role of the C&P Examiner in VA adjudication to that of an expert witness in traditional litigation, this Article argues that the role of the C&P Examiner can be more accurately analogized to that of the judge in traditional litigation.<sup>1</sup>

Part I of the Article seeks to understand the reason for the prominent role that C&P examiners’ opinions play in VA disability adjudication today by briefly discussing the history of VA disability adjudication and medical evidence. It then explains the current structure of VA and its system of disability adjudication. Part I next takes a close look at the role of the C&P examination within that adjudication system, especially in light of the U.S. Court of Appeals for Veterans Claims’ decision in *Colvin v. Derwinski*,<sup>2</sup> which increased VA adjudicators’ reliance on C&P examiners’ opinions.

Part II of this Article shows how current law limits VA adjudicators’ ability to meaningfully evaluate opinions from C&P examiners, which makes C&P examiners different from expert witnesses in traditional litigation in ways that are relevant to a due process analysis. It further shows that the ways in which VA uses C&P examiners’ opinions in

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1. See, e.g., *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302 (Vet. App. 2008) (“Both VA medical examiners and private physicians offering medical opinions in veterans benefits cases are nothing more or less than expert witnesses.”); James D. Ridgway, *Mind Reading and the Art of Drafting Medical Opinions in Veterans Benefits Claims*, 5 PSYCHOL. INJ. & L. 72, 73 (2012), available at <https://ssrn.com/abstract=1967508> [hereinafter Ridgway, *Mind Reading*] (“The key to understanding the role of medical evidence in the current adjudication process is realizing that medical opinions in veterans’ cases are essentially substitutes for live expert testimony in a trial-like setting. . . . In this analogy, VA adjudicators act much like judges conducting bench trials.”).

2. *Colvin v. Derwinski*, 1 Vet. App. 171 (Vet. App. 1991).

disability adjudications contributes to significant error and delay in the resolution of veterans' claims.

Part III of this Article discusses veterans' constitutionally protected property interest in their VA disability benefits. It looks to the U.S. Supreme Court's landmark decisions in *Goldberg v. Kelly* and *Richardson v. Perales* to understand what due process requires in the context of administrative adjudication.<sup>3</sup> It compares the facts of these cases to VA's use of C&P examiner opinions in disability adjudication and concludes that VA's adjudication procedures fall short of what procedural due process requires.

Part IV of this Article applies the three-factor test outlined by the Supreme Court in *Mathews v. Eldridge* to determine if VA's current procedures surrounding C&P examinations comply with due process.<sup>4</sup> This Article then uses the *Mathews* factors to propose a new procedure that would bring VA's C&P examination process more in line with due process. It proposes that VA automatically send veterans a copy of the C&P examiner's opinion as soon as it is available, so that veterans are able to review and respond to the medical opinion prior to the issuance of the VA decision. This proposed procedure comports with due process under *Mathews* by reducing the risk of erroneous deprivation of rights without adding significant administrative burden.

## PART I

### A. History of VA Disability Adjudication

A survey of the history of VA disability adjudication reveals a slow march towards the application of procedural due process to veterans' claims. Scholars have explained the reticence of legislators and courts to apply procedures required by due process to veterans' disability adjudication by pointing to the historic understanding of the VA disability adjudication process as non-adversarial.<sup>5</sup> This Article highlights another explanation for that reticence: the idea that the fundamental questions involved in VA disability adjudication are medical, not legal in nature, which renders procedural due process unnecessary. This understanding of VA disability adjudication is one of the reasons for the prominent role

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3. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Richardson v. Perales*, 402 U.S. 389 (1971).

4. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

5. Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361, 375 (2009) [hereinafter Allen, *CAVC at Twenty*]; see Michael Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 507-11 (2011) [hereinafter Allen, *Due Process and the American Veteran*].

that the medical opinion plays in VA disability adjudication today. In order to understand this prominent role, it is necessary to discuss the history of VA disability adjudication.

Federal government programs for disabled veterans significantly expanded after the Civil War due to the need to care for many war-wounded soldiers.<sup>6</sup> Historian Patrick J. Kelly writes that “[f]ederal allowances to Union soldiers and their widows and children were the single largest expenditure in the federal budget . . . every year between 1885 and 1897.”<sup>7</sup>

In 1930, Congress created the Veterans Administration, now known as the Department of Veterans Affairs. Since then, VA has been charged with adjudicating and administering veterans’ benefits, including disability compensation.<sup>8</sup> The Board of Veterans’ Appeals—the last level of appeal within VA, where Veterans Law Judges adjudicate claims—was founded in 1933.<sup>9</sup> VA, including the Board of Veterans’ Appeals, predates the 1946 adoption of the Administrative Procedures Act (“APA”).<sup>10</sup> VA has managed to escape many of the due process requirements that have developed in administrative law since the APA, as well as requirements in the APA itself, including, for example, the merit appointment of independent Administrative Law Judges (“ALJs”).<sup>11</sup>

Congress originally intended for the VA disability adjudication process

6. PATRICK J. KELLY, CREATING A NATIONAL HOME 3, 52-88 (1997); see Stacey-Rae Simcox, *Thirty Years After Walters The Mission is Clear, The Execution is Muddled: A Fresh Look at the Supreme Court’s Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671, 674-75, 681-85 (2018) [hereinafter Simcox, *Thirty Years After Walters*].

7. KELLY, *supra* note 6, at 5.

8. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 309 (1985); see Michael J. Wishnie, “A Boy Gets Into Trouble”: *Service Members, Civil Rights, and Veterans’ Law Exceptionalism*, 97 B.U. L. REV. 1709, 1717 (2017) [hereinafter Wishnie, *Boy Gets Into Trouble*]; see James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans’ Benefits System from 1914 to 1958*, 5 VET. L. REV. 1, 10 (2013) [hereinafter Ridgway, *Origins of the Modern Veterans’ Benefits System*].

9. David Ames, Cassandra Handan-Nader, Daniel E. Ho, & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 15 (2020) [hereinafter Ames et al., *Due Process and Mass Adjudication*].

10. Ames et al., *Due Process and Mass Adjudication*, *supra* note 9, at 15; Robin J. Artz, *What Veterans Would Gain from Administrative Procedure Act Adjudications*, FED. B. ASS’N VET. L. SEC. (2002), reprinted in THE FED. LAW. 14-19 (Aug. 2015), available at <https://www.fedbar.org/wp-content/uploads/2015/08/Vets-Law-pdf-1.pdf>.

11. See James T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeal Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 225-26, 229-43 (2001) [hereinafter O’Reilly, *Burying Caesar*]; Artz, *supra* note 10; MICHAEL ASIMOV, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 4, 21-24 (2019), available at <https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf> (describing adjudication at VA’s Board of Veterans Appeals as “type B adjudication,” which includes “systems of federal agency adjudication that employ *evidentiary hearings* that are required by statutes, regulations, or executive orders, but are *not* governed by the formal adjudication provisions of the APA.”). (emphasis in original).

to be informal, non-adversarial, and “veteran-friendly”; it did not intend for veterans to need to hire attorneys to help them get benefits.<sup>12</sup> Justice Rehnquist discussed this original intention of Congress in the U.S. Supreme Court’s 1985 decision in *Walters v. National Association of Radiation Survivors*.<sup>13</sup> He described the VA adjudication process as one that “is designed to function throughout with a high degree of informality and solicitude for the claimant.”<sup>14</sup> The Court in *Walters* relied on this idea in its decision to uphold the constitutionality of a statute prohibiting attorneys from charging a veteran more than ten dollars for representing the veteran before VA.<sup>15</sup> Veterans’ groups argued that the fee limitation denied them “any realistic opportunity” to obtain legal counsel, thus violating their rights under the Due Process Clause of the Fifth Amendment and under the First Amendment.<sup>16</sup>

In explaining the Court’s rationale, Justice Rehnquist described VA’s adjudication procedures at the time. He observed that “the process prescribed by Congress . . . does not contemplate the adversary mode of dispute resolution utilized by courts in this country.”<sup>17</sup> Veterans’ disability claims at the time were initially adjudicated by a “three-person ‘rating board,’” at the Regional Office, which included a medical specialist, a legal specialist, and an occupational specialist.<sup>18</sup> Similarly, in the early days of the Board of Veterans Appeals—the highest level of appeal within VA—claims were adjudicated by both attorneys and physicians.<sup>19</sup> Rather than relying on a written opinion from a medical expert, the physicians employed at VA could use their own medical judgment to evaluate veterans’ claims.<sup>20</sup>

The Court’s decision in *Walters* to limit the right to counsel for veterans can be understood in the context of this unique adjudicative structure. If a medical specialist is using *medical* judgment to make the decision, then how would a *legal* argument help them make that decision? Indeed, as Justice Rehnquist wrote, “Simple factual questions are capable

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12. *Walters*, 473 U.S. at 321-26; see Allen, *Due Process and the American Veteran*, *supra* note 5, at 507-11; Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans’ Benefits*, 5 U. MIAMI NAT’L SEC. & ARMED CONF. L. REV. 1, 10 (2015) [hereinafter Allen, *Justice Delayed*]; Simcox, *Thirty Years After Walters*, *supra* note 6, at 672, 681-85.

13. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985).

14. *Walters*, 473 U.S. at 310.

15. *Id.*

16. *Id.* at 308.

17. *Id.* at 309.

18. *Id.*

19. Ridgway, *Origins of the Modern Veterans’ Benefits System*, *supra* note 8, at 38-40.

20. See Charles L. Cragin, *Impact of Judicial Review on the Department of Veterans Affairs’ Claims Adjudication Process: The Changing Role of the Board of Veterans’ Appeals*, 46 ME. L. REV. 23, 24-25 (1994) [hereinafter Cragin, *Impact of Judicial Review*].

of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment.”<sup>21</sup>

Moreover, at the time of Justice Rehnquist’s writing, there was no judicial review of VA’s decision-making.<sup>22</sup> If a veteran’s claim was denied by the Board of Veterans’ Appeals, that veteran had no way to seek an independent review of the decision.<sup>23</sup> The lack of a right to appeal for veterans further enshrined the VA adjudication process as a “non-legal” one.

In 1988, a few years after *Walters*, Congress passed the Veterans’ Judicial Review Act (“VJRA”), which significantly changed the process and the nature of VA disability adjudication.<sup>24</sup> The VJRA gave veterans the right to appeal VA decisions to an adversarial court—the U.S. Court of Appeals for Veterans Claims (“CAVC”).<sup>25</sup> The CAVC is an Article I Court that has exclusive jurisdiction over decisions from the Board of Veterans Appeals.<sup>26</sup> CAVC decisions may be reviewed by the U.S. Court of Appeals for the Federal Circuit.<sup>27</sup> Federal Circuit decisions may be reviewed by writ of certiorari to the U.S. Supreme Court.<sup>28</sup> Judge Michael Allen describes the creation of the CAVC as “revolutionary”; he cites the doctrinal development of the law of veterans’ benefits as one of the great successes of the CAVC.<sup>29</sup>

The VJRA and the CAVC’s early decisions ended the practice of “rating boards” as adjudicative bodies within VA.<sup>30</sup> The adjudication of claims by rating boards made up of doctors and lawyers relying on their own training and experience could not withstand judicial review.<sup>31</sup> For the first time, the VJRA imposed a requirement on adjudicators at the Board of Veterans’ Appeals to include in their written decisions the reasons and bases for any findings and conclusions, including any findings and conclusions with respect to medical issues.<sup>32</sup> The reasons and bases requirement enables the Court to meaningfully review VA’s

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21. *Walters*, 473 U.S. at 330.

22. Michael E. Serota & Michelle Singer, *Veterans Benefits and Due Process*, 90 NEB. L. REV. 388, 395 (2011).

23. *Id.*

24. See Jennifer D. Oliva, *Representing Veterans*, 73 S.M.U. L. REV. F. 103, 106 (2020).

25. *Id.*; Wishnie, *Boy Gets Into Trouble*, *supra* note 8, at 1722-23; Allen, *Due Process and the American Veteran*, *supra* note 5, at 505-06.

26. 38 U.S.C. § 7252(a).

27. 38 U.S.C. § 7252(c); 38 U.S.C. § 7292.

28. Allen, *CAVC at Twenty*, *supra* note 5, at 368; Allen, *Due Process and the American Veteran*, *supra* note 5, at 506.

29. Allen, *CAVC at Twenty*, *supra* note 5, at 364, 372-73.

30. See Cragin, *Impact of Judicial Review*, *supra* note 20, at 24-25.

31. *Id.*

32. *Id.* at 25-26.

decision.

In 1991, the CAVC interpreted this requirement in *Colvin v. Derwinski* to mean that the Board of Veterans' Appeals may not rely on "its own unsubstantiated medical conclusions," but can only consider independent medical evidence to support its findings.<sup>33</sup> In *Colvin*, the Court noted that the Board failed to cite any medical evidence or any medical treatises to support the medical conclusions in its decision.<sup>34</sup> The Court went on to say that if the medical evidence of record is insufficient, the Board is free "to supplement the record by seeking an advisory opinion [or] ordering a medical examination."<sup>35</sup> Therefore, the Board was no longer able to rely on the medical knowledge of its own physician-adjudicators in rendering disability decisions.<sup>36</sup> As a result, doctors and medical specialists are no longer employed as adjudicators at VA.<sup>37</sup> *Colvin* created a demand for medical examinations and opinions that persists today.<sup>38</sup> As this Article will further discuss below, while the decision in *Colvin* served to protect veterans from arbitrary decision-making by VA adjudicators, it may have led to increased reliance by VA adjudicators on arbitrary or inadequate medical opinions from C&P examiners.<sup>39</sup>

Despite developments like judicial review, VA disability adjudication retains many elements that could be described as non-adversarial, such as a relatively low standard of proof.<sup>40</sup> A veteran must show that it is "as likely as not" that her disability was caused or aggravated by her military service in order to receive disability compensation.<sup>41</sup> If there is an equal amount of evidence for and against the claim, the claim must be resolved in favor of the veteran.<sup>42</sup> Further, it is important to note that Congress has lifted the ten dollar attorney fee limitation after *Walters*.<sup>43</sup> However, veterans are still prohibited by law from hiring an attorney to help them with their disability claim until they have received an initial decision from VA.<sup>44</sup>

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33. *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (Vet. App. 1991).

34. *Id.*

35. *Id.*

36. Cragin, *Impact of Judicial Review*, *supra* note 20, at 25-26.

37. *Id.* at 26.

38. *Id.* at 40.

39. *See infra pp.* 20-25.

40. Simcox, *Thirty Years After Walters*, *supra* note 6, at 678.

41. *Id.*

42. *Id.*; Ridgway, *Mind Reading*, *supra* note 1, at 9.

43. Simcox, *Thirty Years After Walters*, *supra* note 6, at 672, 689-93, 695-96.

44. 38 U.S.C. § 5904(e)(1).



### B. VA Disability Adjudication Procedure Today

The U.S. Department of Veterans Affairs (VA) is an executive, “Cabinet-level” department.<sup>45</sup> Right now, there are approximately 20 million veterans in the country.<sup>46</sup> VA currently serves approximately 5.2 million veterans and survivors who receive disability compensation or pension benefits.<sup>47</sup> In Fiscal Year 2017, VA processed over 1.35 million compensation claims, which was an increase of nine percent over Fiscal Year 2016.<sup>48</sup> New recipients of VA compensation claims are expected to grow by twenty-five percent by 2022.<sup>49</sup>

VA is composed of three administrations: the Veterans Benefits Administration (“VBA”); the Veterans Health Administration (“VHA”); and the National Cemetery Administration (“NCA”).<sup>50</sup> When Americans think of VA, most of the time they are thinking of the VHA. The VHA is the nation’s largest, fully-integrated healthcare system, serving 9 million veterans each year.<sup>51</sup> It is composed of “150 flagship VA Medical Centers, 819 Community-Based Outpatient Clinics, 300 Vet Centers providing readjustment counseling,” as well as residential rehabilitation treatment centers, mobile clinics, and telehealth programs.<sup>52</sup> Therefore, when veterans go to see their primary care provider at their local VA Medical Center, they are interacting with the VHA.

However, when discussing VA benefits, including education benefits, VA home loans, or disability compensation, the relevant administration is the Veterans Benefits Administration (“VBA”).<sup>53</sup> A veteran begins the process of applying for disability compensation from the VBA by either

45. 5 U.S.C. § 101; JENNIFER L. SELIN AND DAVID E. LEWIS, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 28 (2d ed. Oct. 2018), available at <https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agencies%202d%20ed.%20508%20Compliant.pdf>.

46. *Improving the Veteran Experience Through VBA Process Improvements and Modernization*, U.S. DEP’T OF VETERANS AFF. (June 4, 2019), [https://www.va.gov/DATA/docs/Improving-the-Veteran-Experience-Through-VBA-Process-Improvements-and-Modernization-data\\_va\\_gov.pdf](https://www.va.gov/DATA/docs/Improving-the-Veteran-Experience-Through-VBA-Process-Improvements-and-Modernization-data_va_gov.pdf).

47. *Veterans Benefits Administration Reports*, U.S. DEP’T OF VETERANS AFF., [https://www.benefits.va.gov/REPORTS/detailed\\_claims\\_data.asp](https://www.benefits.va.gov/REPORTS/detailed_claims_data.asp) (last updated Mar. 1, 2021).

48. *Improving the Veteran Experience Through VBA Process Improvements and Modernization*, *supra* note 46.

49. *Id.*

50. U.S. DEP’T OF VETERANS AFFAIRS, 2019 VA FUNCTIONAL ORGANIZATION MANUAL 18 (Dec. 21, 2018), available at <https://www.va.gov/FOM-5-Final-July-2019.pdf>.

51. Robert A. McDonald, *VA is Critical to Medicine and Vets*, THE BALTIMORE SUN (Oct. 23, 2014), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-va-secretary-20141023-story.html>.

52. *Id.*

53. The VBA’s mission is to “provide benefits and services to Veterans, their families and survivors in a responsive, timely, and compassionate manner in recognition of their service to the Nation.” U.S. DEP’T OF VETERANS AFFAIRS, 2019 VA FUNCTIONAL ORGANIZATION MANUAL 21 (Dec. 21, 2018), available at <https://www.va.gov/FOM-5-Final-July-2019.pdf>.

filing an application online, sending a paper application through the mail or facsimile, or applying at her local VA Regional Office.<sup>54</sup> There are more than fifty Regional Offices in the country.<sup>55</sup> All evidence must be considered by the Regional Office in the first instance; therefore, Regional Offices are referred to as “agenc[ies] of original jurisdiction.”<sup>56</sup> At this level, VA employees who are generally not lawyers or doctors will make a decision on the claim.<sup>57</sup>

If the veteran disagrees with the Regional Office’s decision, the veteran has three options for appeal under the new Veterans Appeals Improvement and Modernization Act of 2017 (“AMA”).<sup>58</sup> The veteran may submit a Supplemental Claim, a request for Higher Level Review, or the veteran may appeal directly to the Board of Veterans’ Appeals.<sup>59</sup>

The Board of Veterans’ Appeals (“the Board”) is the last level of appeal within the Department of Veterans Affairs. The Board is composed of Veterans Law Judges and attorneys and it has one office location in Washington, DC. Board decisions are reviewed by the U.S. Court of Appeals for Veterans Claims. This Article focuses on the adjudication of disability compensation claims within VA at Regional Offices and at the Board of Veterans’ Appeals.

This Article discusses C&P examinations, which are involved in the majority of veterans’ claims for disability compensation and are often the most critical piece of evidence in a claim. This Article uses the term “VA adjudicators” to refer to those who issue VA decisions. It is used in the Article as a broad term that includes adjudicators at the Regional Office level and at the Board of Veterans’ Appeals.

VA describes its disability adjudication process as one in which it *helps* the veteran obtain benefits.<sup>60</sup> As mentioned above, courts, legislators, and scholars have described VA’s adjudication process as “non-adversarial” for many reasons, including the relatively low standard of proof, the lack of opposing counsel, the lack of a statute of limitations for filing a claim, and VA’s statutorily-imposed duty to assist.<sup>61</sup> Under the duty to assist,

54. Wishnie, *Boy Gets Into Trouble*, *supra* note 8, at 1719.

55. *Id.*

56. 38 U.S.C. § 7104(a); 38 U.S.C. § 7105(b)(1), (d)(1); *Sprinkle v. Shinseki*, 733 F.3d 1180, 1184 (Fed. Cir. 2013).

57. Simcox, *Thirty Years After Walters*, *supra* note 6, at 677; Ridgway, *Mind Reading*, *supra* note 1, at 4 (“First, a claim is decided by an adjudicator at one of fifty-seven Veterans Benefits Administration regional offices (ROs). These adjudicators are not attorneys.”).

58. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 2 (h)(1)(a), 131 Stat. 1105 (2017).

59. *Id.*

60. See U.S. DEP’T OF VETERANS AFFAIRS, SUMMARY OF VA BENEFITS 1-2 (Sept. 2012), available at <https://www.benefits.va.gov/BENEFITS/benefits-summary/SummaryofVABenefitsFlyer.pdf> (“We are here to help you . . . obtain compensation . . .”).

61. See Wishnie, *supra* note 8, at 1719-20 (describing VA’s disability claims adjudication

once a veteran applies for disability compensation, VA is required to make reasonable efforts to assist a veteran in obtaining the evidence necessary to substantiate the veteran's claims.<sup>62</sup>

This duty not only requires VA to inform the veteran of what evidence is necessary to prove her claim, but also requires VA to assist the veteran in obtaining that evidence.<sup>63</sup> The duty to assist requires VA to obtain the veteran's military service records or any relevant records that are held or maintained by a governmental entity, including relevant post-service medical treatment records from local VA medical centers.<sup>64</sup> It even requires VA to attempt to obtain relevant *private* treatment records that the veteran adequately identifies to VA.<sup>65</sup>

When some minimal evidentiary requirements are met, the duty to assist also includes the duty to provide the veteran with a medical examination and medical opinion.<sup>66</sup> In the majority of service-connected claims, VA will order a C&P examination for the veteran in order to obtain an opinion from a medical professional to help the adjudicator make his or her decision on the claim.<sup>67</sup> VA explains that the C&P exam "helps VA determine if you have a disability related to your military service . . . ."<sup>68</sup> The importance of the C&P examiner's opinion to the outcome of the veteran's disability claim cannot be understated. In many cases, medical opinion evidence is "dispositive" of the claim.<sup>69</sup>

The duty to assist also requires that the C&P examiner's opinion be adequate. However, as will be discussed further below, inadequate opinions are one of the most common reasons for remand from the Board

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process); James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VET. L. REV., 113, 117-18 (2009).

62. 38 U.S.C. § 5103A(a).

63. 38 U.S.C. § 5103(a); 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(c).

64. 38 U.S.C. § 5103A(c)(1); *Hyatt v. Nicholson*, 21 Vet. App. 390, 393-95 (Vet. App. 2007).

65. 38 U.S.C. § 5103A(b)(1); *Nicholson*, 21 Vet. App. at 393-94, 396-98.

66. 38 U.S.C. § 5103A(d); 38 U.S.C. 5103(a); 38 C.F.R. 3.159(c)(4); *McLendon v. Nicholson*, 20 Vet. App. 79, 81-86 (Vet. App. 2006); see *Waters v. Shinseki*, 601 F.3d 1274, 1276-77 (Fed. Cir. 2010).

67. 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.326(a); Allen, *Due Process and the American Veteran*, *supra* note 5; Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability System*, 72 SMU L. REV. 277, 291 (2019) [hereinafter McClean, *Delay, Deny*].

68. U.S. DEP'T OF VETERANS AFFAIRS, VA CLAIM EXAM: FREQUENTLY ASKED QUESTIONS, available at <https://www.benefits.va.gov/COMPENSATION/docs/claimexam-faq.pdf#>.

69. Allen, *Due Process and the American Veteran*, *supra* note 5, at 528; Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513, 557 (2019) [hereinafter Simcox, *Welcome to the Wild West*] ("In the author's experience, new evidence, particularly new medical opinions concerning etiology of disabling conditions, has helped the VA change their minds and grant a veteran benefits approximately 84% of the time."); McClean, *Delay, Deny*, *supra* note 67, at 291 ("Almost every benefits case relies on expert medical testimony to establish a nexus between a veteran's current injury and his or her military service.").

and the CAVC.<sup>70</sup> A thorough medical examination is one that “takes into account the records of prior medical treatment,” but the review of a veteran’s “claims file by a VA examiner, without more, does not automatically render the examiner’s opinion competent or persuasive.”<sup>71</sup> Since VA adjudicators are not medical professionals, medical opinions must contain a sufficient explanation of the medical findings so that a layperson can weigh and evaluate the evidence.<sup>72</sup> The CAVC has held that adjudicators at the Board must be able to conclude “that a medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion.”<sup>73</sup> The probative value of a VA examiner’s medical opinion comes not from the conclusion itself, nor from the fact that it is a “medical conclusion,” but from the “factually accurate, fully articulated, sound reasoning” that is used to support the conclusion reached in the opinion.<sup>74</sup>

The evidence from the C&P examiner generally comes on a standardized form with a list of multiple choice and short-answer questions that the examiner completes. The last question on the form asks the examiner whether the veteran’s disability is related to their military service. The form, including the medical opinion, is then associated with the veteran’s electronic file that will go to the adjudicator. As a matter of course, the veteran does not receive a copy of the completed form—the C&P exam report or opinion.<sup>75</sup> A veteran must request to see the report and opinion.<sup>76</sup>

It is unlikely that veterans who are unrepresented will know that they can and should request the C&P examiner’s report and opinion.<sup>77</sup> VA advertises on a webpage about C&P exams that veterans may get a copy of the final report from the C&P exam by “contacting us” with a link for veterans to “contact your nearest VA regional office.”<sup>78</sup> The same webpage features a “Helpful Tips” document for veterans to read before the C&P exam.<sup>79</sup> This document advises veterans that their C&P exams

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70. *Barr v. Nicholson*, 21 Vet. App. 303, 311 (Vet. App. 2007) (“[O]nce the Secretary undertakes to provide an examination when developing a service-connection claim, even if not statutorily obligated to do so, he must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided.”); Ridgway, *Mind Reading*, *supra* note 1.

71. *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (Vet. App. 2008).

72. *McClean, Delay, Deny*, *supra* note 67, at 291.

73. *Nieves-Rodriguez*, 22 Vet. App. at 304.

74. *Id.*

75. *See Sprinkle v. Shinseki*, 733 F.3d 1180, 1186-87 (Fed. Cir. 2013).

76. *Id.*

77. *See O’Reilly, Burying Caesar*, *supra* note 11, at 238-39.

78. *What to Expect at Your VA Claim Exam (C&P Exam)*, U.S. DEP’T OF VETERANS AFF., <https://www.va.gov/disability/va-claim-exam/> (last visited Aug. 10, 2020).

79. *Id.*; U.S. DEP’T OF VETERANS AFFAIRS, *YOUR VA CLAIM EXAM* (Jan. 2021), *available at* <https://www.benefits.va.gov/COMPENSATION/docs/claimexam-tipsheet.pdf>.

may be short because “the examiner may only need to ask a few questions,” and it reminds veterans to “be truthful and honest” in their exams.<sup>80</sup> The document does not explain the importance of the C&P examiner’s opinion in light of the CAVC’s decision in *Colvin* that limits adjudicators’ ability to make any medical conclusions. The “Helpful Tips” document does not explain how a veteran can—or why a veteran should—obtain a copy of the C&P examiner’s report before the VA decision is issued.

Even if the veteran knows to request a copy of the C&P examiner’s report and does so, there is no guarantee that the veteran will receive the copy before the VA issues its decision on the claims.<sup>81</sup> It often takes VA months, sometimes a year, to fulfill a request for a copy of the C&P examiner’s report or for a copy of the veteran’s “C-file,” which is the complete file of documents that adjudicators use to make their decisions.<sup>82</sup>

Generally, the veteran will find out what the C&P examiner’s opinion was when the veteran receives the VA decision either granting or denying their disability claims.<sup>83</sup> Neither Regional Office decisions nor decisions from the Board of Veterans’ Appeals contain a copy of the C&P examiner’s report, but the narrative section of the decisions will generally describe what the C&P examiner opined in the report.

The U.S. Court of Appeals for Veterans Claims recently held that this type of notice of an adverse C&P examiner’s opinion is sufficient under both VA’s statutory duty to assist and the Due Process Clause of the Fifth Amendment.<sup>84</sup> The court held that VA is not required—by statute or by due process—to automatically send a veteran a copy of the C&P examiner’s report and opinion.<sup>85</sup> In its reasoning, however, the court did not adequately consider three crucial factors that this Article puts forth: (1) VA adjudicators adopt C&P examiners’ medical opinions as legal reasoning; (2) C&P examiners’ medical opinions are often legally inadequate, but adopted by adjudicators anyway; and (3) C&P examiners’ medical opinions not only involve “simple questions of fact” that turn on medical judgment, but also legal questions that require legal judgment.<sup>86</sup>

Because VA adjudicators adopt C&P examiners’ medical opinions as legal reasoning, the C&P examiner’s opinion is critically important to the outcome of a veteran’s claim. Despite this importance, the procedures

80. YOUR VA CLAIM EXAM, *supra* note 78.

81. See O’Reilly, *Burying Caesar*, *supra* note 11, at 239; see *Sprinkle*, 733 F.3d at 1186; see *Young v. Shinseki*, 22 Vet. App. 461, 471-72 (Vet. App. 2009).

82. See O’Reilly, *Burying Caesar*, *supra* note 11, at 239; see, e.g., Brief for Appellant, *Martinez v. Wilkie*, 31 Vet. App. 170 (Vet. App. Mar. 2, 2018).

83. See, e.g., *Young*, 22 Vet. App. at 464.

84. *Martinez*, 31 Vet. App. at 173.

85. *Id.*

86. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 (1985).

governing the C&P examination system are riddled with “significant flaws.”<sup>87</sup> For example, as in the hypothetical above, if the veteran already receives her medical care at a medical center or clinic operated by the Veterans Health Administration, the medical professional who conducts the C&P exam will *not* be the same person whom the veteran sees at her appointments at that medical center or clinic.<sup>88</sup> As VA explains, the C&P exam “is different from a regular medical appointment.”<sup>89</sup> C&P examiners and VHA medical providers serve discreet roles.<sup>90</sup> While the C&P examiner will likely have access to the VHA medical provider’s treatment notes, there is little to no interaction between the two with respect to any individual veteran’s disability claim.<sup>91</sup> Therefore, someone whom the veteran has never met before is asked to give an opinion on the claimed disabilities, while the veteran’s treating VHA medical provider, who has longitudinal knowledge about the veteran’s claimed disabilities, is not consulted. Even if the veteran asks her treating medical provider to provide a medical opinion in support of her disability claim, it is not likely that they will do so in light of prior VA policies specifically prohibiting it.<sup>92</sup>

C&P exams can also be conducted by private medical care providers who are not VA employees, but government contractors.<sup>93</sup> Indeed, in October 2020, members of Congress discovered that VA is in the process of completely eliminating its in-house C&P examinations.<sup>94</sup> Prior to this decision, VA had been increasing its use of contractors to conduct C&P exams.<sup>95</sup> The U.S. Government Accountability Office (“GAO”) reported that between fiscal year 2012 through mid-September 2019, the number of exams conducted by contractors more than quadrupled, from “roughly 178,000 to almost 958,000.”<sup>96</sup> In fiscal year 2019, “contracted examiners

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87. McClean, *Delay, Deny*, *supra* note 67, at 292.

88. *Id.*

89. U.S. DEP’T OF VETERANS AFFAIRS, YOUR VA CLAIM EXAM: KNOW WHAT’S NEXT (Dec. 2016), available at <https://www.benefits.va.gov/COMPENSATION/docs/claimexam-factsheet.pdf>.

90. *See id.*

91. McClean, *Delay, Deny*, *supra* note 67, at 292-93.

92. NAT’L VETERANS LEGAL SERVS. PROGRAM, VETERANS BENEFITS MANUAL § 17.10.5.2 (Barton F. Stichman et al., eds., 2019-2020 ed.); *see* *Beasley v. Shinseki*, 709 F.3d 1154, 1156, 1158-59 (Fed. Cir. 2013) (holding that a veteran had no right to compel VA to direct his treating medical provider to provide a medical opinion in support of his disability claim after the veteran requested it and VA replied that doing so would be a “conflict of interest” and would violate VA policy).

93. McClean, *Delay, Deny*, *supra* note 67, at 291.

94. Nikki Wentling, *VA Plans to Outsource All Compensation and Pension Exams*, STARS & STRIPES (Oct. 21, 2020), <https://www.stripes.com/news/us/va-plans-to-outsource-all-compensation-and-pension-exams-1.649356>.

95. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-715T, VA DISABILITY EXAMS: OPPORTUNITIES REMAIN TO IMPROVE OVERSIGHT OF CONTRACTED EXAMINERS 1 (Sept. 19, 2019).

96. *Id.*

completed more than half of the 1.49 million disability medical exams.”<sup>97</sup>

With the increasing use of contractors to conduct C&P exams, GAO has suggested that oversight of contractors should be improved.<sup>98</sup> In 2018 and 2019, GAO found that VA was behind in completing quality reviews for contracted exams and that VA did not have accurate information about whether contractors were completing veterans’ exams in a timely manner.<sup>99</sup> Perhaps most alarmingly, GAO found that VA relies on the contractors to self-report that their examiners have completed required VA training.<sup>100</sup> It was the contractors, not VA, who confirmed they completed VA training that allowed them to begin conducting VA disability exams.<sup>101</sup> Moreover, GAO found that VA did not review contractors’ self-reports for accuracy or request supporting documentation, which GAO noted “could lead to poor-quality exams that need to be redone and, thus, delays for veterans.”<sup>102</sup>

Another example of a systemic flaw in VA’s C&P examination process is the presumption of competency for C&P examiners. C&P examiners can be doctors, nurse practitioners, or physician’s assistants.<sup>103</sup> They are not required to have experience in the area of medicine that corresponds to the claim for which they are providing an opinion.<sup>104</sup> Any medical provider employed by VA for a C&P exam is “deemed qualified” to render an opinion on any claim, regardless of whether the claim involves a disability that is within the provider’s area of expertise.<sup>105</sup>

In *Francway v. Wilkie*, a veteran challenged this presumption when VA asked a C&P examiner who was an internist to provide a medical opinion about whether the veteran’s current back disability was related to his in-service back injury even after the Board of Veterans’ Appeals instructed that the opinion be provided by an “appropriate medical specialist.”<sup>106</sup>

97. *Id.*

98. *Id.* at 2, 4-8; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-213T, VA DISABILITY EXAMS: IMPROVED OVERSIGHT OF CONTRACTED EXAMINERS NEEDED 1-7 (Nov. 15, 2018); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-13, VA DISABILITY EXAMS: IMPROVED PERFORMANCE ANALYSIS AND TRAINING OVERSIGHT NEEDED FOR CONTRACTED EXAMS 5-8, 11-27 (Oct. 2018).

99. GAO-19-715T, *supra* note 95, at 2, 4-8; GAO-19-213T, *supra* note 98, at 1-7; GAO-19-13, *supra* note 98, at 5-8, 11-27.

100. GAO-19-715T, *supra* note 95, at 7-8.

101. *Id.*

102. *Id.*

103. McClean, *Delay, Deny*, *supra* note 67, at 291.

104. *Id.*; see *Francway v. Wilkie*, 940 F.3d 1304, 1306-09 (Fed. Cir. 2019), *cert. denied*, 140 S. Ct. 2507 (2020). An exception to this rule exists for C&P examiners for traumatic brain injury. VA policy is that C&P examinations for traumatic brain injuries must be conducted by physicians who are specialists in psychiatry, neurology, neurosurgery, and psychiatry. See DEP’T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GEN., VA OIG 16-04558-249, VA POLICY FOR ADMINISTERING TRAUMATIC BRAIN INJURY EXAMINATIONS i-ii (Sept. 10, 2018).

105. McClean, *Delay, Deny*, *supra* note 67, at 291.

106. *Francway*, 940 F.3d at 1308-09.

The Federal Circuit held that, since the veteran did not raise the issue of the examiner's competency before the Board, he could not challenge it on appeal.<sup>107</sup>

Further, the Court explained that “[t]he presumption is that the VA has properly chosen an examiner who is qualified to provide competent medical evidence in a particular case absent a challenge by the veteran.”<sup>108</sup> However, since there is no requirement that they be informed, many veterans do not even know that the C&P examiner issued an unfavorable medical opinion in their case until they receive the VA decision—whether from the Regional Office or from the Board of Veterans' Appeals. Therefore, it is unlikely that the veteran will know that they could or should even raise the issue of the examiner's competency before the decision is issued.

Veterans with private health insurance, or with the ability to pay a medical consultant, may ask their private doctors for a medical opinion that they can submit as evidence to support their claims for VA disability compensation. On other hand, veterans without the means to pay a medical professional in private practice for a medical opinion are left without a way to provide VA with their own crucial evidence of a medical opinion. Unfortunately, as discussed above, VHA medical providers generally do not provide medical opinions for veterans to include in their VA disability claims.<sup>109</sup> Further, VA disability adjudicators do not request medical opinions from a veterans' treating VHA medical providers.<sup>110</sup> Therefore, if the veteran does not have the means—financial or otherwise—to obtain and submit a medical opinion of their own, they must rely on the VA C&P examiner's opinion.

This structure has a unique impact on veterans who are eligible for VA health care because they have a sufficiently low income. These veterans are able to get health care through VA before receiving any kind of VA disability compensation. As a result, it is possible that these veterans could establish treating relationships, as well as relationships of trust, with their VHA primary care providers for years before even applying for VA disability compensation. If VA eventually denies disability compensation to a veteran in this situation, it can appear to be a Kafkaesque absurdity. On the one hand, a veteran regularly goes to a VA Medical Center to see their medical provider for treatment of a disability that they believe was sustained during service, but on the other hand, the veteran is told by another provider associated with VA—this time a C&P examiner—that the same disability has nothing to do with their military service.

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107. *Id.* at 1309.

108. *Id.*

109. McClean, *Delay, Deny, supra* note 67, at 292.

110. *Id.*



Even if the veteran is able to obtain a medical opinion in support of their disability claim from a private medical provider, there is no guarantee that VA will give it probative weight. Many veterans' advocates believe VA generally prefers the opinions of its C&P examiners to those of private medical providers.<sup>111</sup> Further, VA is unlikely to assign probative weight to an opinion from a private medical provider if that provider does not use the correct burden of proof, which is expressed as, "as likely as not."<sup>112</sup> Most private medical providers who do not regularly work with VA are unlikely to be aware of the necessity of this particular phrasing in their medical opinions.

### *C. Establishing Service Connection*

VA disability compensation is a monthly tax-free payment made to a veteran with a disability resulting from an injury or disease incurred in or aggravated by military service.<sup>113</sup> For a veteran to receive VA disability compensation, she must show that she has a service-connected disability.<sup>114</sup> Service connection is generally established when the veteran provides competent and credible evidence that: (1) she has a current disability; (2) there was an in-service event or injury; and (3) there is a nexus between the current disability and the in-service event or injury.<sup>115</sup>

The second element of service connection—that there was an in-service event or injury—can be established through the veteran's military service records, which should include medical records and personnel records.<sup>116</sup> VA employees will examine the service records to find documentation of the event, injury, or circumstances of service that the veteran alleges occurred or existed.<sup>117</sup> For example, if an Army veteran who was a paratrooper is seeking service connection for a knee disability

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111. *Id.* at 292-93; NAT'L VETERANS LEGAL SERVS. PROGRAM, *supra* note 92, at § 17.10.5.3 ("VA adjudicators often find ways to place less weight on a private medical opinion.").

112. *See* NAT'L VETERANS LEGAL SERVS. PROGRAM, *supra* note 92, at § 17.10.5.3; *see* Ridgway, *Mind Reading*, *supra* note 1, at 9-10 (explaining how a private medical opinion from a psychologist may be rejected by VA if it does not articulate the correct standard of proof).

113. *See* 38 U.S.C. § 1110; 38 U.S.C. § 1131; 38 U.S.C. § 5120; 38 C.F.R. § 3.4(a), (b); 38 C.F.R. § 3.303(a); *VA Disability Compensation*, U.S. DEP'T OF VETERANS AFF., <https://www.va.gov/disability/> (last visited Aug. 10, 2020); INTERNAL REVENUE SERV., PUBLICATION 907, TAX HIGHLIGHTS FOR PERSONS WITH DISABILITIES (Dec. 17, 2020), *available at* <https://www.irs.gov/publications/p907>.

114. 38 U.S.C. § 101(2), (13), (16); 38 C.F.R. § 3.4(a).

115. *Pond v. West*, 12 Vet. App. 341, 346 (Vet. App. 1999) (citing *Caluza v. Brown*, 7 Vet. App. 498 (Vet. App. 1995)).

116. Lay evidence may also be evidence of an in-service event. *See Layno v. Brown*, 6 Vet. App. 465, 469-70 (Vet. App. 1994).

117. U.S. DEP'T OF VETERANS AFFAIRS, TYPES OF RECORDS INCLUDED IN STRS, III.III.2.A.1.E, M21-1 ADJUDICATION PROCEDURES MANUAL (2021).

that he alleges is the result of a parachute malfunction in which he fell to the ground and landed on his knees, VA employees will inspect his service records for documentation of that incident.<sup>118</sup> This could take many forms, including documentation that the veteran sought medical attention while in service, documentation placing the veteran on a physical profile, or a notation in the military service records that the accident occurred.

Generally, competent evidence of two of the elements—a current disability, and a nexus between the current disability and the in-service event or injury—will be evidence from a medical professional. VA’s regulation defines competent evidence as that which is “provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.”<sup>119</sup> Therefore, a veteran submitting a claim for disability compensation will not be able to establish service connection by only submitting a statement that he has a disability that was caused by his military service. The vast majority of the time, the veteran will need a medical opinion from a medical professional that addresses whether a nexus exists.<sup>120</sup> In order to obtain this medical opinion, VA will schedule a C&P examination. Once the C&P examination is completed, a C&P exam report is included in the veteran’s file, and the claim will go to a VA adjudicator at the Regional Office for a decision on the claim.

The legal standard that VA adjudicators must use for determining claims is the “benefit of the doubt” standard.<sup>121</sup> VA should find that a nexus exists if it is “as likely as not” that the veteran’s current disability was caused by the in-service event.<sup>122</sup> This standard is generally interpreted to mean that there is at least a fifty percent chance that the veteran’s disability was caused by the in-service event.<sup>123</sup> On top of a relatively low standard of proof, VA must give a sympathetic reading to each claim.<sup>124</sup> VA’s stated policy is to resolve reasonable doubt “regarding service origin, the degree of disability, or any other point” in

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118. See *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (Vet. App. 2006).

119. 38 C.F.R. § 3.159(a)(1).

120. Allen, *Due Process and the American Veteran*, *supra* note 5, at 528; Simcox, *Welcome to the Wild West*, *supra* note 69, at 557 (“In the author’s experience, new evidence, particularly new medical opinions concerning etiology of disabling conditions, has helped the VA change their minds and grant a veteran benefits approximately 84% of the time.”); McClean, *Delay, Deny*, *supra* note 67, at 291 (“Almost every benefits case relies on expert medical testimony to establish a nexus between a veteran’s current injury and his or her military service.”)

121. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (Vet. App. 1990).

122. McClean, *Delay, Deny*, *supra* note 67, at 291; *see, e.g.*, 38 C.F.R. § 3.311(c)(1)(i), (2), (3) (using the “at least as likely as not” language as a standard of proof).

123. McClean, *Delay, Deny*, *supra* note 67, at 285-86.

124. Wishnie, *Boy Gets Into Trouble*, *supra* note 8, at 1720; Allen, *Due Process and the American Veteran*, *supra* note 5, at 509.

favor of the veteran.<sup>125</sup>

As mentioned, the importance of a medical opinion that addresses whether there is a nexus—a connection between the current disability and the veteran’s service—cannot be understated.<sup>126</sup> In order to establish service connection, the “overwhelming majority of claims” require medical evidence of a nexus between the veteran’s current disability and an event, injury, or disease that occurred during service.<sup>127</sup> Indeed—as mentioned above—whether or not there is competent, adequate evidence of a nexus is often “dispositive” of the claim.<sup>128</sup>

The question of whether service connection exists is rarely straightforward. There are a number of different legal theories of service connection that may be supported by the evidence. The different theories of service connection include direct service connection, secondary service connection, service connection through aggravation, and presumptive service connection, of which there are many different sub-types. Direct service connection exists when a veteran’s current disability was caused or incurred through an event, injury, or disease during service.<sup>129</sup> Secondary service connection exists where a veteran’s current disability is a result of an already service-connected disability.<sup>130</sup> A veteran may also be able to establish service connection on the theory of aggravation if she can show that a condition she had before entering service was worsened by her military service.<sup>131</sup> Another type of service connection through aggravation exists where a veteran’s non-service-connected disability increases in severity due to a service-connected disease or injury.<sup>132</sup> In that case, the veteran may be able to claim service connection for that non-service-connected disability if it was worsened by the service-connected disability.

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125. 38 C.F.R. § 3.102.

126. See Allen, *Due Process and the American Veteran*, *supra* note 5, at 527-28; Allen, *Justice Delayed*, *supra* note 12, at 25 (“[T]he coin of the realm in many veterans’ benefits matters is medical evidence.”).

127. James Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 407 (2009) [hereinafter Ridgway, *Lessons the Veterans Benefits System Must Learn*]; McClean, *Delay, Deny*, *supra* note 67, at 291 (“Almost every benefits case relies on expert medical testimony to establish a nexus between a veteran’s current injury and his or her military service.”); Allen, *Justice Delayed*, *supra* note 12, at 25 (“Whether it is establishing a current disability or (more likely) the nexus between an in-service event and a current disability, medical evidence and opinions are often what matters.”).

128. See Ridgway, *Mind Reading*, *supra* note 1, at 13; Allen, *Due Process and the American Veteran*, *supra* note 5, at 528; Simcox, *Welcome to the Wild West*, *supra* note 69, at 557 (“In the author’s experience, new evidence, particularly new medical opinions concerning etiology of disabling conditions, has helped the VA change their minds and grant a veteran benefits approximately 84% of the time.”).

129. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303.

130. 38 C.F.R. § 3.310(a).

131. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.306.

132. 38 C.F.R. § 3.310(b).

Presumptive service connection enables veterans in certain circumstances to establish service connection who may otherwise be unable to do so by eliminating or easing the requirements of one of the elements of service connection. There are many different sub-types of presumptive service connection, but a common example of this theory is the presumptive service connection available to most veterans of the Vietnam War. This presumption applies to veterans with certain diseases—including type 2 diabetes, ischemic heart disease, prostate cancer, and others—who served in the Republic of Vietnam between January 9, 1962 and May 7, 1975 because VA acknowledges that these veterans were exposed to a toxic herbicide agent, commonly known as Agent Orange.<sup>133</sup> The presumption of service connection eliminates the requirement for these veterans to demonstrate an in-service event; VA presumes that a veteran with these circumstances of service was exposed to Agent Orange.<sup>134</sup>

Presumptive service connection also exists for specific chronic diseases that manifested within a certain amount of time after the veteran's discharge from service.<sup>135</sup> For example, service connection for multiple sclerosis may be presumed if the disease manifested to a degree of ten percent or more within seven years following a veteran's separation from active duty.<sup>136</sup> The evidence of record for any veteran's case may support one or more theories of service connection for just one disability.

When VA adjudicators adopt C&P examiners' medical opinions as legal reasoning, they often fail to consider whether the veteran may be able to establish service connection through more than one legal theory. For example, in *El-Amin v. Shinseki*, the U.S. Court of Appeals for Veterans Claims found that the Board of Veterans' Appeals erroneously relied on an inadequate C&P examination where the examiner only considered direct service connection and failed to consider service connection on the theory of aggravation.<sup>137</sup> Notably, the court observed that the Board's decision "was based almost exclusively on an October 2008 VA medical opinion."<sup>138</sup> In this case, a deceased veteran's wife appealed the Board's denial of benefits for the cause of her husband's death.<sup>139</sup> At the time of his death, the veteran was receiving VA disability benefits for post-traumatic stress disorder ("PTSD").<sup>140</sup> The veteran's

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133. 38 C.F.R. §§ 3.307, 3.309; PUBLIC HEALTH, AGENT ORANGE, U.S. DEP'T OF VETERANS AFF., <https://www.publichealth.va.gov/exposures/agentorange/> (last visited May 24, 2021).

134. *See* 38 C.F.R. §§ 3.307, 3.309.

135. *Id.*

136. *Id.*

137. *El-Amin v. Shinseki*, 26 Vet. App. 136, 139-141 (Vet. App. 2013).

138. *Id.* at 137-38.

139. *Id.* at 137.

140. *Id.*

wife argued that her husband's PTSD either caused or aggravated his alcoholism, which led to the cirrhosis that caused his death.<sup>141</sup>

The C&P examiner's opinion upon which the Board "almost exclusively" based its decision stated that the veteran's PTSD did not cause his alcohol abuse, and that it was "more likely than not that the veteran's alcohol abuse was *related to* factors other than the veteran's post-traumatic stress disorder."<sup>142</sup> The Court found that this opinion did not show that the examiner considered the theory of aggravation; therefore, it held that the Board's conclusion that the C&P examination was adequate was clearly erroneous.<sup>143</sup>

The different theories of service connection and the example in *El-Amin* demonstrate that, contrary to Justice Rehnquist's statement in *Walters*, the issue of service connection is not a "simple factual question" that only involves medical judgment.<sup>144</sup> Rather, service connection often involves complex factual and legal analysis, which necessarily requires legal judgment in addition to medical judgment. As illustrated in *El-Amin*, the VA adjudicator's adoption of a C&P examiner's medical opinion without legal analysis or judgment leads to error, further remands, and additional delay in the resolution of veterans' claims.

## PART II

### A. Why VA Adjudicators Rely on C&P Examiners' Opinions

As stated, C&P examiners' opinions are often "dispositive" of the outcomes in veterans' disability claims. Despite statutory requirements that VA must consider "all lay and medical evidence of record," VA adjudicators adopt C&P examiners' medical opinions as legal reasoning.<sup>145</sup> This practice essentially places the C&P examiner in the role of adjudicator. One of the reasons for the heavy reliance by VA adjudicators on C&P examiner opinions is the rule that VA adjudicators cannot make their own make medical conclusions. This rule was laid out in the U.S. Court of Appeals of Veterans Claims' ("CAVC") decision in *Colvin v. Derwinski*.<sup>146</sup> *Colvin* was decided in 1991, not long after the establishment of the court itself through the Veterans' Judicial Review Act in 1988.<sup>147</sup>

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141. *Id.*

142. *Id.* at 137-38, 140.

143. *Id.* at 140.

144. *See supra* pp. 18-22; *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985).

145. 38 U.S.C. § 5107(b); 38 U.S.C. § 7104(a).

146. *Colvin v. Derwinski*, 1 Vet. App. 171 (Vet. App.1991).

147. *Wishnie, Boy Gets Into Trouble, supra* note 8, at 1722-23; *Allen, Due Process and the*

In that case, Mr. Colvin, a Vietnam War veteran, sought service connection for multiple sclerosis (“MS”) on the theory of presumptive service connection.<sup>148</sup> Medical evidence in the record indicated that Mr. Colvin experienced symptoms that were possible precursors of MS during service *and* that they occurred within the seven-year period after his separation from service.<sup>149</sup>

However, Mr. Colvin’s claim was denied at the Regional Office.<sup>150</sup> Mr. Colvin appealed to the highest level of adjudication within VA, the Board of Veterans’ Appeals, which affirmed the denial of his claim for MS.<sup>151</sup> In its decision, the Board made many medical conclusions, including that “one episode of burning on urination during service does not represent either the onset of multiple sclerosis or bladder dysfunction often associated with the progression of the disease.”<sup>152</sup>

The veteran appealed to the CAVC, which reversed the Board’s decision and held that the Board may not rely on “its own unsubstantiated medical conclusions.”<sup>153</sup> The court stated that the Board can only consider independent medical evidence to support its findings.<sup>154</sup> The CAVC went on to say that if the medical evidence of record is insufficient, the Board is free “to supplement the record by seeking an advisory opinion [or] ordering a medical examination.”<sup>155</sup> Therefore, it is because of the *Colvin* decision that VA adjudicators must obtain C&P examinations in almost all veterans’ disability claims.<sup>156</sup>

While this rule is favorable to veterans and consistent with due process because it prevents VA adjudicators from making unsubstantiated medical conclusions and arbitrary decisions, it has also allowed VA to shift decision-making from VA adjudicators to C&P examiners. The C&P examiners’ decisions have been shrouded in the cloak of “medical conclusions,” which shields those decisions from meaningful review by adjudicators. Therefore, if a C&P examiner renders an arbitrary or incorrect opinion, the practical effect of *Colvin* is that it is more difficult for the VA adjudicator to address it because doing so would necessarily involve a “medical conclusion,” which adjudicators are prohibited from making.

The question arises that if VA adjudicators cannot meaningfully

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*American Veteran*, *supra* note 5, at 505-06.

148. *Colvin*, 1 Vet. App. at 172.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 175.

153. *Id.*

154. *Id.*

155. *Id.*

156. See Cragin, *Impact of Judicial Review*, *supra* note 20, at 26.

evaluate medical opinions because doing so would mean reaching “medical conclusions” under *Colvin*, what can they do? Must they simply accept whatever medical opinion they receive? While VA adjudicators are not bound to accept whatever medical opinion they receive, they are limited in terms of the decisions that they can make. It is primarily through the duty to assist that VA adjudicators are empowered to make decisions with respect to medical opinions.

For example, the VA adjudicator can decide whether a C&P examiner’s opinion is adequate.<sup>157</sup> The CAVC has held that VA’s duty to assist requires VA to obtain not just any medical opinion, but one that is adequate.<sup>158</sup> An adequate medical opinion is one that contains more than just “data and conclusions.”<sup>159</sup> Rather, it contains “factually accurate, fully articulated, sound reasoning for the conclusion.”<sup>160</sup> An adequate medical opinion is “one which takes into account the records of prior medical treatment, so that the evaluation . . . will be a fully informed one.”<sup>161</sup> Therefore, VA “must ensure that the examiner providing the report or opinion is fully cognizant of the claimant’s past medical history.”<sup>162</sup> Further, VA must be able to conclude that a medical examiner “applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion.”<sup>163</sup>

Another task of the VA adjudicator is to weigh the probative value of medical opinions when there are competing opinions in the record. In deciding how VA should weigh the probative value of a medical opinion, the CAVC in *Nieves-Rodriguez v. Peake* compared VA C&P examiners to expert witnesses.<sup>164</sup> The court borrowed the federal rule of evidence on expert witness testimony<sup>165</sup> to serve as guidance for evaluating medical opinion evidence in veterans’ claims.<sup>166</sup> As veterans’ law scholar James

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157. See *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (Vet. App. 2008).

158. “It is also well established in this Court’s jurisprudence that a thorough and contemporaneous medical examination is ‘one which takes into account the records of prior medical treatment, so that the evaluation of the claimed disability will be a fully informed one.’” *Id.* at 301 (quoting *Green v. Derwinski*, 1 Vet. App. 121, 124 (Vet. App. 1991)); *Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007); *Stegall v. West*, 11 Vet. App. 268, 270-71 (Vet. App. 1998).

159. *Nieves-Rodriguez*, 22 Vet. App. at 304.

160. *Id.*

161. *Green*, 1 Vet. App. at 124; *Ridgway, Lessons the Veterans Benefits System Must Learn*, *supra* note 127, at 408.

162. *Nieves-Rodriguez*, 22 Vet. App. at 301.

163. *Id.* at 304 (citing *Stefl v. Nicholson*, 21 Vet. App. 120 (Vet. App. 2007)).

164. *Id.* at 302.

165. FED. R. EVID. 702.

166. *Nieves-Rodriguez*, 22 Vet. App. at 302. The important factors from the Federal Rule that the Court identified were that (1) the expert testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert witness has applied the principles and methods reliably to the facts of the case. *Id.*

Ridgway noted, “the key to understanding the role of medical evidence in the current adjudication process is realizing that medical opinions in veterans’ cases are essentially substitutes for live expert testimony in a trial-like setting.”<sup>167</sup> Citing to *Nieves-Rodriguez*, Ridgway went on to point out that the CAVC has been “fairly explicit on this point.”<sup>168</sup> However, the Court in *Nieves-Rodriguez* acknowledged one crucial difference between C&P examiners and traditional expert witnesses: unlike expert witnesses in trial-like settings, “medical professionals offering medical opinions in veterans’ benefits cases” are not subject to cross-examination.<sup>169</sup>

As discussed above, since VA adjudicators cannot make their own medical conclusions and veterans cannot cross-examine C&P examiners, the power to enforce the duty to assist—by ensuring medical opinions are obtained when necessary and that, once they are obtained, the opinions are adequate—appears to be the VA adjudicator’s primary tool for ensuring a correct decision is made with respect to a veteran’s claim.<sup>170</sup> Therefore, within VA, the duty to assist appears to be the only safeguard against an erroneous deprivation of a veteran’s benefits.

*B. VA Adjudicators’ Over-Reliance on C&P Examinations and Opinions Leads to Error and Delay.*

Unfortunately, veterans and their advocates know that the duty to assist is not a sufficient safeguard against the erroneous deprivation of a veteran’s benefits. The number of appeals of VA disability decisions has been rising in recent years.<sup>171</sup> The Board remands half of the appeals it receives to the Regional Offices for further development.<sup>172</sup> For years, inadequate medical opinions have been one of the most common reasons for remand from the Board.<sup>173</sup> In 2013, the Board’s then-chairwoman

167. Ridgway, *Mind Reading*, *supra* note 1, at 3.

168. *Id.*

169. *Nieves-Rodriguez*, 22 Vet. App. at 302.

170. See *supra* pp. 6-7, 20-21; Allen, *Due Process and the American Veteran*, *supra* note 12, at 528 (“Before *Cushman*, the way in which the VA adjudicators considered medical evidence, including any rights a veteran had to address that evidence, were the creature of statute and regulation. To be sure, there was judicial review of these medically related matters. But the fundamental reality was that if a veteran received some sort of protection or process, it ultimately came through these regulatory sources.”); McClean, *Delay, Deny*, *supra* note 67, at 302 (“[W]hile veterans have a right to the fair adjudication of their claims under the Fifth Amendment of the Due Process Clause, courts have been reluctant to interfere with Congress’s statutory scheme. As such, the fair and equitable distribution of benefits is dependent on the protections provided by the VA’s regulatory process.”).

171. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-358SP, VA PRIORITY RECOMMENDATIONS 4-5 (Mar. 28, 2019), available at <https://www.gao.gov/assets/700/698312.pdf>.

172. Ames at al., *Due Process and Mass Adjudication*, *supra* note 9, at 9.

173. See Ridgway, *Mind Reading*, *supra* note 1, at 3 (discussing how remands to the ROs by the



testified before Congress that the adequacy of medical examinations is one of “the most frequent reasons for remand.”<sup>174</sup>

With respect to remands of Board decisions from the CAVC, new research examining data from the Board is informative. In 2018, researchers published findings after examining data on all Board decisions from October 1, 1999 to January 31, 2018.<sup>175</sup> Data from July 2013 through January 31, 2018 revealed that the CAVC remanded 2,037 Board decisions for the failure to obtain a medical examination and opinion under the duty to assist.<sup>176</sup> Notably, the data indicates that this was the second most common reason for remand from CAVC.<sup>177</sup> Additionally, the CAVC remanded Board decisions for the failure to adequately state the reasons and bases for the decision by failing to adequately address an inadequate medical opinion 1,819 times, which was the fourth most common reason for remand.<sup>178</sup>

With each remand, a veteran must wait longer for a decision on her claim. A claim can potentially be remanded from the Board to the Regional Office, then sent back from the Regional Office to the Board, and so on for years.<sup>179</sup> Veterans who received a decision from the Board in 2017 waited *an average* of seven years from the filing of the Notice of Disagreement.<sup>180</sup> A high error rate, including “‘avoidable remands,’” contributes to the massive VA backlog of cases and ludicrous wait times

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Board based on inadequate medical opinions are frequent and how inadequate medical opinions are one of the leading bases of remands by the CAVC, despite the lack of official statistics); Ridgway, *Lessons the Veterans Benefits System Must Learn*, *supra* note 127, at 416 n.93; see *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 860 (9th Cir. 2011) (stating “Between 19 and 44 percent of [remands from the Board to the RO] are so-called ‘avoidable remands,’ defined as occurring when ‘an error is made by the [RO] before it certifies the appeal to the B[oard.]’ The district court found that almost half of the ‘avoidable remands’ between January 1, 2008, and March 31, 2008, occurred as a result of violations by VBA employees of their duty to assist veterans.”); Michael Serota & Michelle Singer, *Veterans Benefits’ and Due Process*, 90 NEB. L. REV. 388, 401 (2011).

174. Simcox, *Welcome to the Wild West*, *supra* note 69, at 557; McClean, *Delay, Deny*, *supra* note 67, at 294.

175. Daniel E. Ho et al., *Quality Review of Mass Adjudication: A Randomized Natural Experiment at the Board of Veterans Appeals, 2013-16*, 35 J.L. ECON. & ORG. 239 (June 2019), available at [https://dho.stanford.edu/wp-content/uploads/Ho\\_HandanNader\\_Ames\\_Marcus.pdf](https://dho.stanford.edu/wp-content/uploads/Ho_HandanNader_Ames_Marcus.pdf). For each case, the researchers were able to obtain variables including the Board disposition, issues disputed, whether the case was appealed to the CAVC, CAVC’s disposition on each issue, and the Board’s coding of the reason for the CAVC remand.

176. The Board coded the reason as: “duty to assist medical examination/opinion required.” *Id.* at 277.

177. 3,300 cases were remanded for “[o]ther [reasons and bases] deficiency existing case law.” *Id.* at 276.

178. *Id.*

179. Ridgway, *Mind Reading*, *supra* note 1, at 2 (“Because VA adjudicators have a duty to secure adequate medical evidence before deciding a claim, problems with medical evidence in the VA system will lead not to dismissal of the claims, but rather to delays, remands, and further development. Unfortunately, this can cause a claim to drag on for a decade or more before it is properly decided.”).

180. Daniel E. Ho et al., *supra* note 175, at 245.

for decisions.<sup>181</sup>

The fact that inadequate medical examinations are one of the most common reasons for remand from the Board to the Regional Offices, and from the CAVC to the Board, demonstrates that in a significant number of cases, VA adjudicators rely too much on inadequate medical opinions for their decisions. This over-reliance on inadequate opinions leads to excessive remands, which only contributes to the already unconscionable delays that veterans experience while waiting for a fair adjudication of their disability claims.

Medical opinion evidence has a significant impact on both the outcome of a veteran's claim and on how long it takes for the veteran to receive that outcome. If the opinion is both adverse to the veteran's claim and an inadequate one under the law, the veteran has little recourse to attack it aside from hoping for a remand with instructions for a new examination from the Board or the CAVC.<sup>182</sup> Indeed, veterans' law practitioners understand all too well the irony of having to advise their clients to "hope for a remand"; it is essentially asking them to look forward to the addition of months or years to the time they have already been waiting for a fair and proper adjudication of their claim.

*C. C&P Examiners Are More Accurately Analogized to Judges Than to Expert Witnesses.*

As mentioned, Courts and legal scholars have compared VA C&P examiners to expert witnesses in traditional litigation in order to understand the role of examiners within the disability adjudication process.<sup>183</sup> However, the comparison of a VA C&P examiner to an expert witness is neither accurate nor useful for understanding the role of the C&P examiner in veterans' disability claims. C&P examiners can be more accurately analogized to judges in traditional litigation insofar as the C&P Examiner's opinion is determinative of the claim's success, and the veteran is then left with an appeal as the only way to challenge it. Also unlike expert witnesses, VA C&P examiners are essentially

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181. See Wishnie, *Boy Gets Into Trouble*, *supra* note 8, at 1752 (quoting *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 859-90 (9th Cir. 2011)).

182. While the veteran is generally permitted to submit her own medical opinion evidence after a remand, this is only possible if the veteran knows a favorable medical opinion would help her claim, and if the veteran is able to afford to pay a doctor or medical provider for the opinion. Further, doctors and medical providers unfamiliar with VA's disability claims process will most likely be unaware that they need to phrase the opinion in a specific way in order for VA to give their opinion any evidentiary weight.

183. See generally *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (Vet. App. 2008); *Hilkert v. West*, 12 Vet. App. 145, 151 (Vet. App. 1999); *Ridgway, Mind Reading*, *supra* note 1, at 2 ("The key to understanding the role of medical evidence in the current adjudication process is realizing that medical opinions in veterans' cases are essentially substitutes for live expert testimony in a trial-like setting.").

insulated from meaningful review, which helps explain the high rate of error in decisions discussed in the previous Section.

As a matter of course in VA disability adjudication, veterans do not even receive a copy of the C&P examiner's medical examination and opinion.<sup>184</sup> While veterans may request a copy of the C&P examiner's medical examination or opinion from the VA Regional Office, there is no guarantee that the veteran will receive it before the decision is issued—or receive it at all.<sup>185</sup> Further, the veteran may not even know that she should request a copy of the C&P examiner's medical examination and opinion in the first place. These procedures make the C&P examiner significantly different from an expert witness, as it is impossible to challenge what one cannot review.

Further, unlike expert witnesses in trial-like settings, veterans cannot submit interrogatories to the C&P examiner.<sup>186</sup> Veterans cannot cross-examine VA C&P examiners.<sup>187</sup> Expert witnesses in traditional litigation, however, can be subjected to “vigorous cross-examination,” which the U.S. Supreme Court has called a “traditional and appropriate” method of attacking evidence.<sup>188</sup> Cross-examination can reveal biases or prejudices of the witness, which affects the weight of the witness's testimony.<sup>189</sup> According to Professor Wigmore, two core beliefs of the Anglo-American system of evidence are that there is “no safeguard for testing the value of human statements [that is] comparable to that furnished by cross-examination,” and that “no statement . . . should be used as testimony until it has been probed and sublimated by that test.”<sup>190</sup> Indeed, even the Supreme Court has noted that it holds these beliefs to be so fundamental that it has applied them not only in the criminal context, but in types of cases where administrative and regulatory actions were subject to review.<sup>191</sup>

To the contrary, the current structure of law, policy, and regulation essentially insulates VA C&P examiners from meaningful review. Veterans cannot confront the examiner in a hearing to cross-examine them, nor can they submit interrogatories to the examiner after an unfavorable opinion. Indeed, the veteran may not even be able to review

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184. *See Sprinkle v. Shinseki*, 733 F.3d 1180 (Fed. Cir. 2013).

185. *See, e.g., Young v. Shinseki*, 22 Vet. App. 461, 471-72 (Vet. App. 2009).

186. *See Sprinkle*, 733 F.3d 1180; *Gambill v. Shinseki*, 576 F.3d 1307, 1310-13 (Fed. Cir. 2009); Allen, *Due Process and the American Veteran*, *supra* note 5, at 520, 527-29.

187. *Nieves-Rodriguez*, 22 Vet. App. at 302.

188. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595-96 (1993).

189. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (quoting J. WIGMORE, EVIDENCE § 940, p. 775 (Chadbourn rev. 1970)).

190. *Greene v. McElroy*, 360 U.S. 497 (1959) (quoting 5 WIGMORE ON EVIDENCE § 1367 (3d ed. 1940)).

191. *Id.* at 496-97.

the C&P examiner's opinion before the VA decision is issued. With such insulation, the comparison of a VA C&P examiner to an expert witness in a traditional trial-like setting is inaccurate.

Expert witnesses in traditional litigation are subject to cross-examination, which allows an opposing party to immediately explore the witness's qualifications, the manner in which the witness reached his or her conclusions, the witness's possible biases or prejudices, as well as their credibility. Moreover, as experienced trial lawyers know, cross-examination can elicit unanticipated but important information that ultimately proves to be fundamental to the fair adjudication of a case. The denial of such a meaningful opportunity for the fair adjudication of claims by a purportedly "veteran-friendly" adjudication process within an agency that claims to have the sacred duty of "car[ing] for [those] who have borne the battle" is an issue that deserves close examination.<sup>192</sup>

Rather than an expert witness in traditional litigation, the role of the VA C&P examiner in the veterans' disability adjudication process can be more closely analogized to that of the judge in traditional litigation. Like a VA C&P examiner, a judge is not subject to cross-examination once she issues a decision. A judge cannot be compelled to answer interrogatories after she has issued her decision. The most common way a party can challenge a judge's decision is by arguing that it is inadequate in some way, that is, by appealing and asking for a new decision. Similarly, the primary way a veteran can challenge a VA C&P examiner's opinion is by appealing and asking for a new opinion based on VA's failure to satisfy the duty to assist.

As discussed above, when presented with an inadequate medical opinion, a VA adjudicator is constrained in terms of how she addresses it because of the limitations of *Colvin v. Derwinski*.<sup>193</sup> Under *Colvin*, the VA adjudicator is not competent to reach medical conclusions; therefore, adjudicators generally do not make judgments about the substance of the medical evidence or of the medical opinion itself.<sup>194</sup> The VA adjudicator is left with the task of ensuring that the medical opinion provided is adequate. However, since inadequate medical opinions remain one of the leading causes of remand, VA adjudicators are relying on the inadequate medical opinions for their decisions in a significant number of veterans' claims. Therefore, within the disability adjudication process, VA adjudicators are often effectively serving as mouthpieces for VA C&P examiners that give the imprimatur of law to inadequate medical opinions.

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192. U.S. DEP'T OF VETERANS AFFAIRS, CELEBRATING AMERICA'S FREEDOMS, THE ORIGIN OF THE VA MOTTO, available at <https://www.va.gov/opa/publications/celebrate/vamotto.pdf> (last visited Aug. 10, 2020).

193. See *Colvin v. Derwinski*, 1 Vet. App. 171 (Vet. App. 1991).

194. See *id.*

## PART III

*A. Veteran-Applicants Have a Constitutionally Protected Property Interest in VA Disability Benefits.*

The U.S. Supreme Court has not explicitly answered the question of whether applicants for VA benefits have a property interest in those benefits that is protected by the Due Process Clause of the Fifth Amendment to the U.S. Constitution.<sup>195</sup> However, in 2009, the Federal Circuit held in *Cushman v. Shinseki* that veteran applicants for VA disability benefits do possess such an interest.<sup>196</sup>

In *Cushman*, by analogizing applicants for VA disability benefits to applicants for Social Security disability benefits, the Federal Circuit reasoned that, like the entitlement to Social Security benefits, the entitlement to VA benefits is statutorily created and therefore “arises from a source that is independent” from VA proceedings, and upon a showing of entitlement, the grant or denial of veterans’ benefits is not subject to the discretion of government officials; rather, the statutes provide an absolute right to benefits.<sup>197</sup> Therefore, the Court reasoned, veteran applicants have a property interest in service-connected disability benefits that is protected by the Due Process Clause of the Fifth Amendment.<sup>198</sup>

As Judge Michael Allen points out, while some have argued that *Cushman* is controversial, the Federal Circuit has not revisited the question and it remains law; as such, it is a landmark case for veterans’ rights, as well as an important constitutional decision.<sup>199</sup> For the first time, the Federal Circuit recognized that an applicant’s property interest in VA disability compensation is protected by the Due Process Clause of the Fifth Amendment.<sup>200</sup>

The question then arises as to what process is due to veterans seeking VA disability compensation, especially when it comes to the over-reliance of VA adjudicators on VA C&P examinations in their decision-making. Judge Allen has noted that “[t]he process by which medical

195. *Kapps v. Wing*, 404 F.3d 105, 115 (2d Cir. 2005); *Gambill v. Shinseki*, 576 F.3d 1307, 1310-11 (Fed. Cir. 2009); see Michael Serota & Michelle Singer, *Veterans Benefits and Due Process*, 90 NEB. L. REV. 388, 412 (2011).

196. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009); Allen, *Due Process and the American Veteran*, *supra* note 5, at 512; Simcox, *Thirty Years After Walters*, *supra* note 6, at 36.

197. *Cushman*, 576 F.3d at 1297-98.

198. *Id.* at 1298.

199. See Allen, *Due Process and the American Veteran*, *supra* note 5, at 503. It is not controversial that a constitutionally protected property interest exists in non-discretionary government benefits. See MICHAEL ASIMOV, *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 27-28* (2019).

200. Simcox, *Welcome to the Wild West*, *supra* note 69, at 538; McClean, *Delay, Deny*, *supra* note 67, at 300-01.

opinions are obtained and evaluated provides fertile ground for arguments that could be framed around the rubric of due process.” Indeed, veterans have put forward such arguments, and the Federal Circuit and the CAVC have had the opportunity to explore them in cases since *Cushman*; however, answers remain unclear.<sup>201</sup>

In *Gambill v. Shinseki*, the Federal Circuit addressed an argument from a veteran that VA violated his rights under the Due Process Clause by not allowing him to submit written interrogatories to the VA medical professional who opined that the veteran’s disabilities were not connected to his military service.<sup>202</sup> The Court declined to address the argument because it found that “the absence of a right to confrontation” in Mr. Gambill’s case was not prejudicial.<sup>203</sup>

It is important to note, however, that the facts of *Gambill* are unique and unlike the majority of veterans’ cases in an important way: the medical opinion at issue in *Gambill* was not from a C&P examiner; rather, the medical opinion at issue was a VHA opinion under 38 C.F.R. § 20.906(a). In very narrow circumstances, the Board of Veterans’ Appeals can bypass the Regional Office and order a medical opinion on its own from a specialist in VA’s Veterans Health Administration when “such medical expertise is needed for equitable disposition.”<sup>204</sup> In *Gambill*, the Federal Circuit cited to regulations which require that the veteran be given notice that a VHA opinion has been requested, that the veteran receive a copy of the opinion when it is obtained by the Board, and that the veteran be given 60 days to respond to the medical opinion.<sup>205</sup>

These procedures *only* exist in reference to VHA opinions, which are only obtained in a relatively small amount of veterans’ cases. In the vast majority of veterans’ cases, C&P exams are scheduled, and adjudicators’ decisions are made based on those exam reports and opinions, but veterans are *not* provided with a copy of the exam report and opinion, nor are they given an opportunity to respond to it prior to the issuance of the decision.

*B. VA Adjudicators’ Over-Reliance on C&P Examiners’ Opinions  
Raises Due Process Concerns.*

The Due Process Clause of the Fifth Amendment guarantees that an

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201. Allen, *Due Process and the American Veteran*, *supra* note 5, at 14-18.

202. *Gambill v. Shinseki*, 576 F.3d 1307, 1309-10 (Fed. Cir. 2009).

203. *Id.* at 1311-13.

204. *Sprinkle v. Shinseki*, 733 F.3d 1180, 1183-85 (Fed. Cir. 2013); 38 U.S.C. § 5103A(d); 38 C.F.R. § 20.901(a) (2019), (current version at 38 C.F.R. § 20.906(a) (2019)); *see Gambill*, 576 F.3d at 1309.

205. *Gambill*, 576 F.3d at 1311 (citing regulations).

individual will not be deprived of life, liberty, or property without due process of law.<sup>206</sup> Due Process has generally been interpreted to include notice and a fair opportunity to be heard.<sup>207</sup> In his article, *Some Kind of Hearing*, Judge Henry J. Friendly quotes Justice White's comment in *Wolff v. McDonnell*: "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests."<sup>208</sup> When it comes to administrative agencies conducting "mass adjudication," the question of what a "hearing" means is a complex one to answer.<sup>209</sup>

The complexity arises out of the reluctance on behalf of Courts and legislators to "judicialize" administrative proceedings.<sup>210</sup> Instead of requiring the same constitutional safeguards that exist in traditional adversarial litigation across administrative agency adjudication, a requirement of "some kind of hearing" has led to a patchwork of different, complex procedures across agencies, many of which are opaque or confusing to claimants.<sup>211</sup>

In order to understand the absence of procedural due process in the way C&P examiner reports and opinions are used in VA disability adjudication, it is necessary to discuss how the U.S. Supreme Court first applied procedural due process in administrative adjudication in its landmark decision of *Goldberg v. Kelly*, and to discuss how it has done so with respect to medical opinions in a context that is somewhat similar to VA disability adjudication: that of Social Security disability adjudication.

The U.S. Supreme Court's 1970 decision in *Goldberg v. Kelly* launched a sprawling "due process explosion" or "revolution" for administrative agency adjudication.<sup>212</sup> In *Goldberg*, the Court faced the issue of whether the Due Process Clause requires that a state welfare recipient be afforded an evidentiary hearing before the state terminates the recipient's benefits.<sup>213</sup> The Court held that due process does require an adequate hearing *before* the termination of welfare benefits.<sup>214</sup>

206. U.S. CONST. amend. V; *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009).

207. *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009).

208. Henry J. Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267, 1267 (1975).

209. *Id.*; see O'Reilly, *Burying Caesar*, *supra* note 11, at 244 (comparing the openness of Administrative Law Judges at the Social Security Administration to the Board of Veterans' Appeals, "which sits like the Wizard of Oz, shrouded in remote mystery.").

210. See Friendly, *supra* note 208, at 1269. ("[T]he tendency to judicialize administrative procedures has grown apace in the United States. English judges and scholars consider that we have simply gone mad in this respect.").

211. See David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1 (2020).

212. *Id.* at 9; Friendly, *supra* note 208; Ames et al., *supra* note 211, at 9.

213. *Goldberg v. Kelly*, 397 U.S. 254, 260-61 (1970).

214. *Id.* at 267-68.

The Court explained that such a hearing “need not take the form of a judicial or quasi-judicial trial,” and noted that it did not wish to add “procedural requirements beyond those demanded by rudimentary due process.”<sup>215</sup> However, the Court did list certain procedures that due process requires, including “an effective opportunity to defend by confronting any adverse witnesses and by presenting . . . arguments and evidence orally.”<sup>216</sup> The Court found that a welfare recipient’s inability to confront or cross-examine adverse witnesses was “fatal to the constitutional adequacy of the procedures.”<sup>217</sup>

Further, the ability of the welfare recipient to present his position orally was important to the satisfaction of due process: first, the Court noted that written submissions are an “unrealistic option” for many welfare recipients; second, it stated that written submissions generally do not provide the “flexibility of oral presentations” since the recipient cannot “mold his argument to the issues the decision maker appears to regard as important.”<sup>218</sup>

Writing for the majority, Justice Brennan provided some guidance for determining what process is due in the context of administrative agency adjudication: “the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss,’” and “upon whether the recipient’s interest . . . outweighs the governmental interest in summary adjudication.”<sup>219</sup> Using this analysis, the Court focused on the nature of welfare benefits, the erroneous termination of which could deprive an eligible recipient of the means to live.<sup>220</sup> It concluded that this interest outweighed the state’s interest in avoiding additional administrative burdens.<sup>221</sup>

Shortly after *Goldberg* was decided, the Court had the opportunity to consider what procedural due process requires when it comes to written medical opinions for Social Security disability adjudication.<sup>222</sup> In *Richardson v. Perales*, the Social Security disability applicant’s claims were denied based on adverse written reports from doctors, even though the applicant provided live testimony in a hearing in opposition to the doctors’ reports, and the applicant did not get to cross-examine the

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215. *Id.* at 266-67.

216. *Id.* at 267-68.

217. *Id.* at 268.

218. *Id.* at 269.

219. *Id.*

220. *Id.* at 264.

221. *Id.*

222. *Richardson v. Perales*, 402 U.S. 389, 402 (1971).



doctors who wrote the reports.<sup>223</sup> The Court held that, despite the applicant's testimony, the lack of cross-examination, and the hearsay character of the doctors' reports, the reports could still be received as evidence in the Social Security disability hearing where the applicant had not exercised his right to subpoena the doctors and avail himself of the opportunity for cross-examination.<sup>224</sup>

In holding that the procedures in *Richardson* were consistent with procedural due process, the Court distinguished the case from *Goldberg* in ways that are relevant for the discussion of procedural due process and medical opinions in VA disability adjudication.<sup>225</sup> First, the Court noted that, unlike the welfare recipients in *Goldberg*, the applicant in *Richardson* had notice: the physicians' reports were on file and available for inspection, the authors of the reports were known and subject to subpoena and cross-examination.<sup>226</sup> Second, the Court pointed to the *medical* questions involved in Social Security disability adjudication, noting that "the specter of questionable credibility and veracity is not present."<sup>227</sup>

While it may be argued that the Court's decision in *Richardson v. Perales* means that VA's practice of obtaining written reports and opinions from C&P examiners for purposes of adjudicating veteran's disability claims complies with procedural due process, VA disability adjudication differs from Social Security adjudication in important ways that raise Due Process concerns.

For example, with regard to the Court's finding that the claimant in *Richardson* had notice, discovery in VA disability adjudication differs significantly from discovery in Social Security adjudication.<sup>228</sup> As discussed above, veterans are not likely to know that they should request a copy of the C&P examiners' written report and opinion, nor are they likely to know why the opinion is so important in light of *Colvin*.<sup>229</sup> Even if the veteran does know and requests a C&P examiners' written report and opinion, the process to obtain it can cause delay.<sup>230</sup>

Further, the Social Security claimant in *Richardson v. Perales* was represented by an attorney.<sup>231</sup> The opportunity to request that a subpoena be issued and the opportunity for cross-examination are most meaningful

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223. *Id.*

224. *Id.*

225. *Id.* at 406-407.

226. *Id.*

227. *Id.*

228. See O'Reilly, *Burying Caesar*, *supra* note 11, at 238-39.

229. *Id.*

230. *Id.*

231. See *Richardson*, 402 U.S. at 395.

with attorney representation. In the context of VA disability adjudication, veterans have not historically been represented by attorneys due to the legacy of *Walters* and attorney fee limitations.<sup>232</sup> Indeed, veterans are not even permitted to hire an attorney until they have already received a decision on their claims.<sup>233</sup> Veterans Service Organizations have provided non-lawyer representation to veterans before VA and continue to do so, however, their caseloads can be extraordinarily high.<sup>234</sup> Data on dispositions from the Board of Veterans' Appeals from Fiscal Year 2019 shows that 12.27% of veterans had no representation, 22.76% had attorney representation, and over 50% had representation from a Veterans Service Organization or a State Service Organization.<sup>235</sup> In contrast, data from the Social Security Administration from Fiscal Year 2015 shows that over 70% of Social Security disability claimants had attorney representation at the hearing level.<sup>236</sup>

The Court's rationale in *Richardson v. Perales* that the claimant had notice of the doctors' reports, as well as the opportunity to request subpoenas and conduct cross-examination, makes less sense in the context of disability adjudication before VA in light of the historical exclusion of attorney representation before VA; the current lack of attorney representation before VA; the lack of discovery; and that veterans are not automatically provided with copies of the C&P examiners' reports upon which adjudicators rely. A veteran is not likely to know about the importance of the C&P exam report and opinion to the outcome of the claim, and if that veteran is unrepresented, it will be difficult for her to figure out its importance, request a copy, request a subpoena of the examiner, and then conduct cross-examination.

The Court's second point of reasoning in *Richardson* mentioned above—that Social Security disability adjudication involves medical questions, which renders procedural due process inapplicable—is reminiscent of the Court's reasoning behind limiting veterans' right to counsel in *Walters*.<sup>237</sup> The Court appears to regard it as self-evident that

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232. Simcox, *Thirty Years after Walters*, *supra* note 6, at 681-97 (describing the history of VA representatives and attorneys in VA disability adjudication).

233. 38 U.S.C. § 5904(c)(1).

234. NAT'L VETERANS LEGAL SERVS. PROGRAM, *supra* note 92, at § 1.1.3.

235. U.S. DEP'T OF VETERANS AFFAIRS, BOARD OF VETERANS APPEALS, ANNUAL REPORT FISCAL YEAR 2019 32 (2019), *available at* [https://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2019AR.pdf](https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf).

236. SOCIAL SEC. ADMIN., SOCIAL SECURITY ADMINISTRATION ANNUAL DATA FOR REPRESENTATION AT SOCIAL SECURITY HEARINGS (May 23, 2018), *available at* <https://www.ssa.gov/open/data/representation-at-ssa-hearings.html> (click preferred format between "CSV" and "XLSX" under "download this dataset", then click the downloaded file and scroll to year 2015 on the left-hand side).

237. *See Richardson v. Perales*, 402 U.S. 389, 407 (1971); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985) ("Simple factual questions are capable of resolution in a

medical evidence is devoid of error and bias simply by virtue of its being medical evidence. This proposition alone requires investigation, which is outside the scope of this Article. If one concedes for the sake of argument that VA disability adjudication turns primarily on medical evidence, which inherently does not carry a risk of error or bias from which procedural due process would protect, it is difficult to understand the remand rates at the CAVC and the Board, or the systemic flaws inherent in the C&P examination process described above, such as the competency of C&P examiners—an issue which the Federal Circuit has ruled the veteran must raise—and the lack of oversight and training of contractors conducting C&P exams, as reported by GAO.<sup>238</sup>

Moreover, despite VA adjudicators' over-reliance on C&P examiners' opinions, the threshold question of service connection in VA disability adjudication does not *only* turn on medical evidence. Indeed, it could be argued that the questions in VA disability adjudication turn less on medical evidence than the questions involved in Social Security disability adjudication because the VA adjudicator must not only ask whether the veteran is *currently* disabled—as the Social Security adjudicator must do—but the VA adjudicator must *also* ask whether the veteran's military service *caused* the veteran's disability.<sup>239</sup> As discussed above, whether the veteran's current disability was caused by the veteran's military service can involve complicated legal analyses, depending on the facts of the case.<sup>240</sup> For example, a veteran can argue different theories of service connection, including direct service connection, secondary service connection, service connection through aggravation, and presumptive service connection, of which there are many different sub-types.<sup>241</sup> For the reasons discussed above, the Court's reasoning that procedures mandated by due process are not necessary where the adjudication turns on simple questions easily answered by medical evidence is inapplicable in the context of VA disability adjudication.

Ironically, despite these different *legal* theories—all of which VA must consider if reasonably raised by the record, regardless of whether the veteran specifically argues it or not—VA adjudicators still rely on C&P

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nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment.”).

238. McClean, *Delay, Deny*, *supra* note 67, at 291-95.

239. *See* 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.4; 38 C.F.R. § 3.303.

240. *See supra* pp. 16-20.

241. *See, e.g.*, 38 C.F.R. §§ 3.303(b), 3.304 (direct service connection), 3.306 (aggravation), 3.307 (presumptive service connection for chronic, tropical, or prisoner-of-war related disease, disease associated with exposure to certain herbicide agents, or disease associated with exposure to contaminants in the water supply at Camp Lejeune), 3.308 (presumptive service connection), 3.310 (disabilities that are proximately due to, or aggravated by, service-connected injury), 3.311 (claims based on exposure to ionizing radiation), 3.317 (compensation for certain disabilities occurring in Person Gulf veterans).

examiners' medical opinions most of the time in order to avoid making a "Colvin violation." For example, imagine a veteran sustained a head injury while on active-duty service, and that head injury is documented in the veteran's service records. Years after service, this veteran seeks to obtain VA disability compensation for debilitating headaches from which she currently suffers, and which she believes is related to her in-service head injury. Her post-service medical evidence shows that she has continuously been treated for the headaches since her discharge from service. VA will likely schedule this veteran to undergo a C&P examination for the headaches.

Imagine that the C&P examiner examines this veteran, then writes an opinion in which he states that it is less likely than not that the veteran's headaches are connected to her in-service head injury because the veteran denied a history of headaches on her separation examination prior to her discharge. Since the VA adjudicator is prohibited from making her own medical conclusions, and there are no other medical opinions in the record, the VA adjudicator may not be able to issue a decision under *Colvin*, finding that the veteran's headaches are connected to her in-service head injury, even though her post-service medical evidence shows continuous treatment since discharge. Granting the claim under these circumstances would likely constitute an impermissible independent medical conclusion.

In contrast, Social Security adjudicators are permitted to analyze medical evidence in the record beyond the opinions from medical experts and examiners.<sup>242</sup> For example, a Social Security adjudicator would be permitted to interpret the evidence of our hypothetical veteran's continuous post-service treatment for headaches since her discharge as evidence of direct service connection to the in-service head injury, despite the examiner's opinion. Indeed, Social Security adjudicators are permitted to consider a number of factors when evaluating medical opinions.

Below is a list of the factors that Social Security provides to adjudicators in its internal Program Operations Manual System to consider when evaluating medical opinions:

**Supportability.** Supportability means the extent that a medical opinion is supported by the relevant objective medical evidence and the explanations provided by the medical source. The more relevant the objective medical evidence and supporting explanations presented by a medical source are to support his or her medical opinions or prior administrative medical

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242. See *Program Operations Manual System (POMS)*, DI 24503.025, SOCIAL SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0424503025>; see also *Program Operations Manual System (POMS)*, DI 24503.035, SOCIAL SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0424503035> (For claims submitted prior to March 27, 2017).

findings, the more persuasive the medical opinions or prior administrative medical finding(s) will be.

**Consistency.** Consistency means the extent a medical opinion is consistent with the evidence from other medical and nonmedical sources. This also includes considering internal conflicts within the evidence from the same source. The more consistent a medical opinion or prior administrative medical finding is with the evidence from other medical and nonmedical sources in the claim, the more persuasive the medical opinion or prior administrative medical finding.

**Relationship with the claimant.** This factor includes the combined consideration of the following five issues:

**Length of the treatment relationship.** The length of time the medical source treated the claimant may help demonstrate whether the medical source has a longitudinal understanding of the claimant's impairments.

**Frequency of examinations.** The frequency of the claimant's visits with the medical source may help demonstrate whether the medical source has a longitudinal understanding of the claimant's impairments.

**Purpose of treatment relationship.** The purpose for treatment the claimant received from the medical source may help demonstrate the level of knowledge the medical source has of the claimant's impairments.

**Extent of the treatment relationship.** The kinds and extent of examinations and testing the medical source has performed or ordered from specialists or independent laboratories may help demonstrate the level of knowledge the medical source has of the claimant's impairments.

**Examining relationship.** A medical source may have a better understanding of the claimant's impairments if he or she examined the claimant than if the medical source only reviewed evidence.

**Specialization.** The medical opinion or prior administrative medical finding of a medical source who received advanced education and training to become a specialist may be more persuasive about medical issues related to his or her area of specialty than the medical opinion or prior administrative finding of a medical source who is not a specialist.

**Other factors.** Consider any other factors that tend to support or contradict a medical opinion or prior administrative medical finding. This includes, but is not limited to, evidence showing a medical source has:

Familiarity with other evidence in the claim, or

An understanding of our disability program's policies and evidentiary requirements.<sup>243</sup>

This list of factors demonstrates how much more adjudicatory capacity Social Security adjudicators have than VA adjudicators. While VA disability adjudicators are constrained to rely on the C&P examiner's opinion by the rule set out in *Colvin v. Derwinski*, Social Security disability adjudicators have the ability to analyze medical opinions in conjunction with the medical evidence of record, which allows them to

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243. See *supra* note 242.

consider factors such as whether the medical opinions are supported by and consistent with the other medical evidence of record; the nature of the relationship between the medical professional conducting the exam and the claimant; and importantly, whether the medical professional conducting the examination has experience or expertise in the area of medicine relevant to the examination.

When comparing VA disability and Social Security adjudicators, there is yet another important distinction to keep in mind that is relevant to a due process analysis. Social Security adjudicators include Administrative Law Judges as contemplated by the Administrative Procedures Act (APA).<sup>244</sup> APA Administrative Law Judges are independent and impartial adjudicators who “stand[] between the claimant and the whim of agency bias and policy.”<sup>245</sup> VA adjudicators, on the other hand—including the Veterans Law Judges at the Board of Veterans’ Appeals—are employees of VA, without the independence afforded by the APA.<sup>246</sup>

These factors—the complicated legal and factual questions involved in VA disability adjudication, the limited decision-making ability of VA adjudicators, as well as their questionable independence from agency policy—should all be considered in a due process analysis of any VA procedure. When it comes to the question of whether the way VA uses C&P examiner’s opinions in the adjudication of disability claims complies with due process, these factors, as well as those mentioned above, demonstrate that more process may be due in order to reduce excessive error and delay, and to ensure fundamental fairness.

#### PART IV

##### *A. A New Procedure That Balances Due Process with Administrative Burden*

Since veteran applicants for VA disability benefits have a protected property interest in their benefits, the question arises as to what process is due. While the Supreme Court’s decision in *Goldberg v. Kelly* may have “judicialized” administrative procedure by setting off a “due process revolution,” the Court’s decision in *Mathews v. Eldridge* may be said to have reined in that revolution.<sup>247</sup> In *Mathews*, the Court laid out a three-

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244. Artz, *supra* note 10, at 14-19.

245. *Id.*

246. *See id.*; Simcox, *Thirty Years after Walters*, *supra* note 6, at 679; *see generally* MICHAEL ASIMOV, *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT* (2019).

247. *See* Friendly, *supra* note 208, at 1269. (“[T]he tendency to judicialize administrative procedures has grown apace in the United States. English judges and scholars consider that we have

factor test for determining whether due process exists in a given administrative process.<sup>248</sup> The first factor to be considered is the private interest affected by the government action; the second is the “risk of erroneous deprivation” through the procedures used, and the probative value of additional substitute safeguard; and, the third factor is the government’s interest, “including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>249</sup>

The issue in *Mathews* was whether due process required that a Social Security disability benefits recipient be afforded a hearing prior to the termination of their benefits.<sup>250</sup> In analyzing the first factor of the test, the Court compared the private interest of the Social Security disability benefits recipient to that of the welfare recipient in *Goldberg*.<sup>251</sup> The Court noted that “the degree of potential deprivation” was likely to be greater for a welfare recipient than for a Social Security disability benefits recipient because welfare “is given to persons on the very margin of subsistence,” while eligibility for Social Security disability benefits “is not based upon financial need.”<sup>252</sup> The Court acknowledged that a Social Security disability benefits recipient has a disability, and therefore, may have “modest resources,” but ultimately concluded that “the disabled worker’s need is likely to be less than that of a welfare recipient.”<sup>253</sup>

While it could be argued that the Court’s distinction is essentially sophism, rather than a meaningful analysis based on the realities of daily life for many people with disabilities, the fact remains that like Social Security disability benefits, VA disability benefits are not based upon financial need. Therefore, under *Mathews*, the Court would likely distinguish the private interest of a veteran with a disability from that of the welfare recipient in *Goldberg*.

The second factor to be considered in the due process analysis is the risk of erroneous deprivation.<sup>254</sup> In evaluating this factor, the Court cited to *Richardson v. Perales* to support its conclusion that Social Security disability benefits turn on questions of medical evidence, which involve “routine, standard, and unbiased medical reports by physician specialists,” and therefore, do not present the “specter of questionable credibility and veracity.”<sup>255</sup> As mentioned above, the assumption that

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simply gone mad in this respect.”)

248. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

249. *Id.*

250. *Id.* at 323.

251. *Id.* at 340-43.

252. *Id.* at 340-41.

253. *Id.* at 342-43.

254. *Id.* at 343.

255. *Id.* at 344 (quoting *Richardson v. Perales*, 402 U.S. 389, 404 (1971)).

medical evidence is free from error or bias is deserving of investigation itself, although it is outside the scope of this Article. Nevertheless, veterans' VA disability compensation claims do not turn solely on routine or standard medical reports. Indeed, if that were true, inadequate medical opinions would not be one of the most common reasons for remand at the Board of Veterans' Appeals and the CAVC.<sup>256</sup> Veterans' disability claims involve complicated factual and legal analyses that take into account the different theories of service connection.<sup>257</sup> Instead of exercising independent judgment that takes into account all of the evidence of record and applies possible legal theories, VA adjudicators often adopt the medical opinions of C&P examiners as legal reasoning, which only perpetuates the erroneous deprivation of veterans' disability benefits. Accordingly, veterans applying for VA disability compensation differ from the Social Security disability recipients in *Mathews* with respect to this factor.

The third factor that the Court describes is “the Government’s interest, including the function involved and the fiscal and administrative burdens” that the procedural requirement would entail.<sup>258</sup> Because of the high volume of claims and existing delays in processing, these concerns weigh against further “judicialization” of VA disability adjudication, such as the use of interrogatories or routine cross-examination of C&P examiners.<sup>259</sup> Scholars have noted that such adversarial procedures might chip away at some of the more non-adversarial, “veteran-friendly” features of VA disability adjudication.<sup>260</sup>

Importantly, the Court notes in *Mathews* that the “essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”<sup>261</sup> Balancing the risk of significant administrative burden on the one hand with this essence of due process on the other, it seems that—at a minimum—veterans should automatically be sent a copy of the C&P examiner’s report and opinion as soon as it is available, whether the veteran requests it or not. It should be accompanied by a form letter that explains how the VA adjudicator will use the C&P examiner’s opinion in making the decision.

This additional procedure would satisfy the essence of due process

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256. See *supra* pp. 23-25.

257. See *supra* pp. 16-20.

258. *Mathews*, 424 U.S. at 335.

259. See Friendly, *supra* note 208, at 1267.

260. See, e.g., Simcox, *Welcome to the Wild West*, *supra* note 69, at 572-73; Allen, *Due Process and the American Veteran*, *supra* note 5, at 529-34.

261. *Mathews*, 424 U.S. at 348 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring)).



by—in the case of an unfavorable medical opinion—notifying the veteran of the case against her, thereby giving her an opportunity to respond before the issuance of the decision. Further, it takes into account the third factor identified by the Court in *Mathews* because the procedure would not significantly increase administrative burden since VA already regularly sends mail to veterans in relation to their disability claims.<sup>262</sup>

Finally, by sending veterans copies of the C&P examiners' medical opinions prior to the issuance of any VA decision on a claim and allowing the veteran to respond, the VA adjudicator will be compelled to do more than simply adopt the C&P examiners' medical opinion as legal reasoning. Rather, the VA adjudicator would need to address the veteran's response to the medical opinion. The veteran's response could lead the VA adjudicator to take any number of actions, such as inspecting evidence not inspected before, requesting another medical opinion to address a different theory of service connection, requesting additional medical evidence, requesting additional military records, or simply writing a decision that more accurately addresses the veteran's contentions.

#### CONCLUSION

In recognition of their extraordinary sacrifice to serve our country, the U.S. Department of Veterans' Affairs exists to "care for him who shall have borne the battle."<sup>263</sup> VA's mission to care for this particular group of people makes it even more important that it do so without error, delay, or unfairness. Unfortunately, many veterans have lost trust in VA and are skeptical that they can receive a fair adjudication of their disability claims from VA.

While recent changes in law may begin to address some of these issues by changing the appeals process, real reductions in error and delay will only be accomplished when VA changes the way it uses C&P examiners' opinions in disability adjudication. At a minimum, due process requires that a veteran be able to see the evidence that the VA adjudicator will be using to decide the claim *before* they decide the claim and that the veteran has an opportunity to respond to evidence against them before the decision is issued.

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262. *See, e.g.,* *Martinez v. Wilkie*, 31 Vet. App. 170, 180 (Vet. App. 2019) (acknowledging that the veteran's private interest in receiving service-connected disability compensation is stronger than "the Government's interest in saving the cost of postage.").

263. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).