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Jeffrey D. Parker
Veterans Affairs, jeffrey.parker3@va.gov

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AS A MATTER OF FACT: REASSERTING THE ROLE OF BASIC FACTS IN VETERANS COURT JURISPRUDENCE

JEFFREY D. PARKER*

"There is nothing I know of so sublime as a fact."

– *George Canning*[1]

ABSTRACT

Unique to legal literature, this article outlines the most basic and unsexy nature of fact finding at the lowest tribunal – what is decided by a lower tribunal after weighing the different stories and conflicting evidence, and after deciding which story to believe or which evidence has more value. While legal holdings and precedents are much more engaging to the legal mind, such legal "holdings" are heavily dependent upon the basic facts found for support. A legal rule without supporting facts is mere dicta, while a legal rule squarely derived from the facts forms a legal precedent.

This article identifies several logical errors and predispositions that appellate courts may be prone to that alter the deference owed to the lower court's most basic fact finding. The article focuses specifically in administrative law, and more specifically Department of Veterans Affairs decisions, providing illustrations of US Court of Veterans Appeals (Veterans Court) fact deference errors.

* Jeffrey Parker is a Veterans Law Judge who serves our nation's veterans at the Board of Veterans' Appeals in Washington, D.C. Judge Parker is a veteran of service, having practiced criminal and administrative law as a Lieutenant in the U.S. Navy Judge Advocate Generals Corps during the Persian Gulf Era. The views expressed in this article are the author's alone and do not necessarily represent the views of the Board of Veterans' Appeals, Department of Veterans Affairs (VA), or the U.S. Government.

1. CHARLES NOEL DOUGLAS, FORTY THOUSAND QUOTATIONS 675 (Sully & Kleintrich eds., 1917 ed., 1904).

Everyone knows what a fact is, but not everyone respects the facts they know. There is currently an ongoing erosion of the solidity of facts in popular culture.[2] Such trends in philosophy, cultural morality, and public forum discussions are knocking at the doorstep of the law.[3] While lawyers and judges are doubly qualified—first as a lay person, and then by legal training—to know what a fact is, as humans they are still susceptible to human preconceptions[4] and logical error.[5]

This Article illustrates some logical fallacies employed in both precedential and nonprecedential decisions[6] of the U.S. Court of Appeals for Veterans Claims (Veterans Court or CAVC)[7] that affect its fact deference toward decisions of the Board of Veterans' Appeals (Board).[8] The U.S. Department of Veterans Affairs

2. One only need to glance at the news or popular culture to see frequent references to phrases such as "alternative facts," "fact checking," "post-truth," and "truth decay." *See, e.g.*, Sarah C. Haan, *Facebook's Alternative Facts,* 105 VA. L. REV. ONLINE 18, 18 (2019); JENNIFER KAVANAGH & MICHAEL D. RICH, TRUTH DECAY: AN INITIAL EXPLORATION OF THE DIMINISHING ROLE OF FACTS AND ANALYSIS IN AMERICAN PUBLIC LIFE 1, 116, 263 (2018); OXFORD DICTIONARIES WORD OF THE YEAR 2016, https://en.oxforddictionaries.com/word-of-the-year /word-of-the-year-2016 (last visited Apr. 7, 2019) ("Post-truth," an adjective defined as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.").

3. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 180 (2018) ("There are new forces at work that should make us concerned that the same disease plaguing today's political dialogue will infect (or further infect) the judiciary.").

4. *See Hayburn's Case*, 2 U.S. 409, 414 n.4 (1792) ("[W]e well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a pre-conceived opinion, even unguardedly, much more deliberately, given…").

5. James D. Ridgway et al., "*Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 54 (2016) ("Judges are human and, as such, are susceptible to cognitive bias and motivated reasoning. Indeed, whether driven by ideology or not, an inherent feature of appellate judging is that the same language can be interpreted differently and lead to different outcomes, particularly when it involves some subjective element."); *see* Kevin W. Saunders, *Informal Fallacies in Legal Argumentation*, 44 S.C. L. REV. 343, 345 (1993) (discussing a general overview of typical informal fallacies in legal reasoning).

6. This Article addresses decisions of the Veterans Court by way of illustration, citing a few precedents as a caution that improper fact deference may make its way even into precedent. The cases were not selected by any systematic or comprehensive review of Veterans Court decisions, precedential or nonprecedential, so this Article draws no larger conclusions as the extent of such nondeference.

7. The Veterans Court is an Article I Court established by Congress by the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105, and began issuing decisions in 1990. The Veterans Court has limited jurisdiction over decisions of the Board of Veterans' Appeals. *See* 38 U.S.C. §§ 7252(a)-(c), 7261(c)-(d) (2018). Limited aspects of decisions of the Veterans Court are reviewed by the U.S. Court of Appeals for the Federal Circuit. 38 U.S.C. § 7292(c)-(e) (2018).

8. *Board of Veterans Appeals*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.bva.va.gov (last visited Dec. 17, 2018). The Board of Veterans' Appeals is the highest adjudicative agency within the U.S. Department of Veterans Affairs (VA). *See* 38 U.S.C. § 7101(a) (2018); *Board of*

(VA) and the Veterans Court are each charged with well-defined roles in providing or insuring a fair compensation system that maximizes veterans' benefits according to statute, regulations, and delegated legal authorities—a system which provides its own generous legal standards that favor veterans.[9]

Examining the very nature of the basic or "historical" fact, an area of legal literature that has drawn little focus,[10] this Article excludes discussion of other types of facts,[11] and only addresses mixed questions of law and fact to illustrate how the fact within the mixed question is still owed deference. The fact deference errors of the Veterans Court identified in this Article include outcome preference, misstatement of facts, overshadowing of fact by emphasis on law, relitigating facts through the reasons and bases requirement, holdings that lack factual support, lifting facts out of context, and *ad hominem* attacks on the agency.

The conclusion is an appeal to the Veterans Court to review its own fact deference practices in order to avoid relitigating the same facts, creating unclear precedents, and trading in its role as legal guide for short-term changes in case outcomes. Application of clear error review versus reasons and bases remand will benefit veterans by providing actual appellate review by a judge of the Veterans Court, and will finalize more decisions, ultimately reducing backlog,[12]

Veterans Appeals, U.S. DEP'T OF VETERANS AFFAIRS, http://www.bva.va.gov (last visited Dec. 17, 2018).

9. 38 U.S.C. § 5107(b) (2018) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.").

10. A discussion focused on administrative agency fact-finding is rarely the focus in the legal literature as it seems so unattractive compared to purely legal themes, mixed law-fact recognition questions, and trendy policy and law themes. *See* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 27 (2018) ("[A]lthough longstanding administrative law doctrines that command judges to defer to agency interpretations of statutes and regulations have received intense academic and judicial scrutiny in recent years, fact deference has received comparatively little attention.").

11. Similar sounding phrases that are not the subject of this Article because they are different concepts include "error in fact" (when a court gives a judgment or verdict and does not know of a fact) and "mistake of fact" (a legal obligation does not occur because a fact is forgotten or ignored by a court). This Article is also not about "legislative" facts (general facts that help the tribunal decide questions of law and policy and discretion). This Article does not stray into the moral zone of "truth" because, while truth is built on fact, it also involves a value question. While there may be some parallels between a lower administrative body fact-finding and fact-finding by a jury, this Article recognizes the parallels are imperfect. *See* Kelly Kunsch, *Standard of Review (State & Federal): A Primer*, 18 SEATTLE U.L. REV. 11, 28 (1994) ("juries do not ordinarily make specific findings of fact . . . juries typically make only legal conclusions.").

12. James D. Ridgway & David Ames, *Misunderstanding Chenery and the Problem of Reasons-or-Bases Review*, 68 SYRACUSE L. REV. 303, 305–06 (2018) ("[T]he [Veterans Court] ought to abandon reasons-or-bases review as it is currently practiced in favor of a traditional approach to appellate review of fact-finding" of adjudicative fact for clear error because the current approach is "dramatically increasing the time it takes to resolve claims.").

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

by either upholding or reversing the decision re-adjudications, and wait times for veterans.

I. DISTINCT ROLES OF THE VETERANS COURT (APPELLATE BODY) AND THE BOARD (AGENCY)

> "Peace has its victories, but it takes brave men and women to win them."
>
> – *Ralph Waldo Emerson*[13]

A grateful nation remembers its veterans who took on the risks and responsibilities for protection of their fellow citizens and country. There are no more worthy recipients than disabled veterans to which such care and compensation should be provided.

The conscious and statutory mission of the U.S. Department of Veterans Affairs (VA) is to care for those veterans of service, including by providing a wide array of disability compensation and other compensatory benefits to disabled veterans.[14] The VA is charged with assisting veterans and developing evidence, then fairly weighing that evidence to make fair findings of fact that maximize disability compensation for veterans.[15]

On the other hand, the Veterans Court has oversight authority of the VA disability compensation system that assures the system provides due process, complies with legal authority, and uses fair reasoning to support decisions for veterans.[16] The Veterans Court has the authority to rule on VA legal authorities, and to make binding legal precedents for future cases when doing so.[17]

Finding specific facts in a particular case is not within the Veterans Court's jurisdiction.[18] The Veterans Court is required to defer to VA on basic fact-finding, leaving the Veterans Court free to give precedential legal guidance for future cases.[19]

13. *Ralph Waldo Emerson Quotes*, GOODREADS, INC., https://www.goodreads.com/quotes/4729-whatever-you-do-you-need-courage-whatever-course-you-decide (last visited May. 1, 2021).

14. *See* DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS iii (2018).

15. For elaboration of VA disability benefits, benefit maximizing provisions of the rating schedule that VA uses to compensate disabilities, and generous legal provisions, *see* Jeffrey Parker, *Getting the Train Back on Track: Legal Principles to Guide Extra-schedular Referrals in VA Disability Rating Claims*, 28, FED. CIR. B.J. 175, 177, 189 (2019).

16. *Id*. at 176–77, 197.

17. *Id*. at 205.

18. *Id*. at 206.

19. *Id*.

II. THE NATURE OF FACTS

"I keep six honest serving-men

(They taught me all I knew);

Their names are What and Why and When

And How and Where and Who."

– *Rudyard Kipling*[20]

According to Black's Law Dictionary, a fact is a "thing done; an action performed or an [i]ncident transpiring; an event or circumstance; an actual occurrence."[21] Facts go about quietly supporting the law and are so easily overshadowed by the more engaging intellectual attractions of the law.

A lay person knows what a fact is. A lay person can tell you that Uncle Joe fell from a ladder two months ago, injured his hip, and went by ambulance to the hospital, where doctors diagnosed a hip fracture. A lay witness can tell you that, on March 21st at 9:25 A.M., while driving west on Franconia Avenue in a blue pickup truck, the defendant ran the red light, struck the plaintiff, then left the scene of the accident. These observable actions, events, or occurrences are basic facts.

The most basic facts, which materialize in law as findings of fact, have been variously described in the law as "historical facts" or "established facts,"[22] "pure finding of fact,"[23] "primary" facts,[24] "objective facts,"[25] "material facts,"[26]

20. RUDYARD KIPLING, JUST SO STORIES 62 (1998).

21. *Fact*, BLACK'S LAW DICTIONARY, https://thelawdictionary.org/fact/ (last visited Apr. 19, 2021).

22. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (referencing facts found as "historical facts" or "established facts" when defining mixed questions of law and fact).

23. David E. Boelzner, *In Sight, It Must Be Right: Judicial Review of VA Decision for Reasons and Bases vs. Clear Error*, 17 RICH. J. L. & PUB. INT. 681, 687 (2014) ("[P]ure finding of fact, i.e. what occurred, will often involve [circumstantial evidence and] the exercise of reason").

24. Daniel Solomon, *Identifying and Understanding Standards of Review*,THE WRITING CTR. AT GEO. UNIV. L. CTR. 1, 5 (2013), https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf (explaining that "historical" facts are synonymous with "basic" facts or "primary" facts). For a distinction between "primary facts" and "ultimate facts," which are conclusions from the evidence *see* Thomas J. Poche, *Administrative Law—Substantial Evidence on the Record Considered as a Whole*, 12 LA. L. REV. 290, 295 (1952) ("Testimony and other evidence are the proof from which the primary facts are inferred. Primary facts are the proof from which ultimate facts are inferred." "[T]he ultimate facts found by an agency are the ultimate conclusions inferred from the evidence.").

25. Larsen, *supra* note 4, at 177; Charles H. Koch, Jr., *An Issue-Driven Strategy for Review of Agency Decisions*, 43 ADMIN. L. REV. 511, 524 (1991) (defining fact as "something done or having existence or information with objective reality.").

26. *Material Fact*, THE LAW DICTIONARY, https://thelawdictionary.org/material-fact (last visited Apr. 15, 2019) (defining "material fact" as one that is "[c]rucial to the interpretation of a phenomenon or a subject matter, or to the determination of an issue at hand this is a specific type of confirmed or validated event, item of information, or state of affairs.).

"adjudicative facts,"[27] "specific facts,"[28] and "true facts" or "substantive truth."[29] These are different descriptions of the same concept, hereinafter referred to simply as basic facts.

Basic facts arise in a legal context. Many legal conclusions are primarily determined by findings of basic facts. The underlying basic facts are still owed great deference by the Veterans Court. For example, in veterans law, the relevance,[30] credibility,[31] and weight[32] of evidence are examples of such mixed fact-law questions. Other examples of veterans law mixed questions that are decided by the specific facts of a case are service connection,[33] the effective

27. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) (explaining that adjudicative facts cover "what the parties did, what the circumstances were, [and] what the background conditions were."); Koch, *supra* note 25, at 525 n. 84 ("When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts.") (quoting 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 15.03 (1958)).

28. Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 UNIV. OF CHI. L. REV. 643, 654 (2015) ("[C]ase-specific facts" are known as "adjudicative facts").

29. *See* Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases,* CORNELL LAW FACULTY PUBLICATIONS 497, 498 (1999), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2388&context=facpub. "True facts" are defined in distinction from "formal legal truth," which is "whatever is found as fact by the legal fact-finder, whether it accords with substantive truth or not." *Id*.

30. *See* Abels v. Wilkie, No. 2018-1484, 2019 U.S. App. LEXIS 4441, at *8 (Fed. Cir. Feb. 14, 2019) (holding that "the Veterans Court had engaged in improper appellate factfinding when it found that certain medical records were not relevant"); *cf.* Sullivan v. McDonald, 815 F.3d 786, 792 (Fed. Cir. 2016).

31. Smith v. Derwinski, 1 Vet. App. 235, 237–38 (1991) ("Credibility is determined by the fact finder . . . . [The] Court cannot determine the credibility of a veteran's sworn testimony. Determination of credibility is a function for the [Board].").

32. Washington v. Nicholson, 19 Vet. App. 362, 369 (2005) (recognizing that weighing medical opinions involves fact-finding by properly declining the opportunity to weigh a potentially corroborating medical opinion that the Board failed to discuss) ("we are unwilling to make the initial judgment concerning the weight to be given to [a medical statement] . . . we will avoid expressing an opinion on the appropriate corroborative weight the Board should have given to [the medical opinion].").

33. *See* Dyment v. West, 13 Vet. App. 141, 144 (1999) (holding that a finding of service connection, or no service connection, involves a weighing of evidence, and is a finding of fact that the court reviews under the "clearly erroneous" standard).

dates for VA benefits,[34] disability ratings,[35] and the duties to notify and assist a veteran-appellant.[36]

III. CLEAR ERROR STANDARD OF APPELLATE FACT REVIEW

> "[O]nce—many, many years ago…I *thought* I made a wrong decision. Of course, it turned out that I had been right all along. But I was *wrong* to have *thought* that I was wrong."
>
> – *John Foster Dulles*[37]

The Board and the Veterans Court each have statutorily defined and limited jurisdictions.[38] The different legal standards accorded findings of fact versus legal holdings parallel the unique tasks allotted between the lower administrative body (the Board) and the appellate court (the Veterans Court).[39]

As applied to the VA, there are two levels of fact-finding adjudication—first at a Regional Office (RO), then appealed cases are decided by the Board, which

34. Evans v. West, 12 Vet. App. 396, 401 (1999) (recognizing that the assignment of an effective date is a finding of fact that will not be overturned unless the court finds it to be clearly erroneous).

35. Webster v. Derwinski, 1 Vet. App. 155, 159 (1990) ("Because we are a [c]ourt of review, it is not appropriate for us to make a de novo finding, based on the evidence, of the appellant's degree of impairment."), cited in Hensley v. West, 212 F.3d 1255, 1263–64 (2000); Kuppamala v. McDonald, 27 Vet. App. 447, 454 (2015) ("[E]xtraschedular consideration is not a question of opinion or discretion, but one of fact…Clearly, this is a fact-driven analysis assessing a veteran's unique disability picture and whether that picture results in an average impairment in earning capacity significant enough to warrant an extraschedular rating.").

36. *See* Mayfield v. Nicholson, 444 F.3d 1328, 1335 (2006) (citing Veterans Court cases for the proposition that Veterans Court decisions "have consistently treated the question of whether a particular notice is sufficient to satisfy the notification requirements of [38 U.S.C. § 5103(a)] as factual.").

37. HENRI TEMIANKA, FACING THE MUSIC 190 (1973).

38. *See* 38 U.S.C. § § 7104, 7252.

39. When creating the Veterans Court, the Senate Committee Report explained that its standard for reviewing facts found by the Board "is intended to afford the maximum possible deference to the [Board]'s expertise as an arbiter of the specialized types of factual issues that arise in the context of claims for VA benefits, while still recognizing and providing for the possibility of error in [Board] factual determination . . ." S. REP. NO. 100-418, at 60 (1988); JAMES D. RIDGWAY, VETERANS LAW: CASES AND THEORY 737 (2015); *see* Johnston v. Brown, 10 Vet. App. 80, 84 (1997); Cromley v. Brown, 7 Vet. App. 376, 378 (1995); Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990); *see* Quintero v. Wilkie, No. 18-0255, 2019 U.S. App. Vet. Claims LEXIS 527, at *9 (Vet. App. Apr. 2, 2019) (showing an example of careful application of clear error deference as to one part of the issue and less formally, but accurately, restating the clear error standard.) ("If one were sitting as the initial decisionmaker, it might be possible to have reached a different conclusion. But that is not what the Court does at this stage in the process. It reviews what the Board did."); Amanda J. Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 240 (2009) ("The standard of review, in theory at least, works to balance the unique strengths each court possesses.").

is the highest-level fact finder within the VA.[40] Administrative agencies such as the Board have been traditionally recognized for their expertise[41] in developing and deciding factual questions[42] because of their specialized training and practical experience reviewing similar types of evidence and the same legal questions.[43]

The Board first finds basic facts, then applies these basic facts to legal criteria to make an ultimate conclusion on the legal question.[44] This results in a "mixed question" of fact and law.[45] The Board is the expert fact-finder, and clear error deference is still owed the basic facts tucked within the Board decision's ultimate legal conclusions.[46]

After the Board has weighed the evidence, found facts, and applied the facts to the law, the case may be appealed to the Veterans Court, an Article I Court[47] with jurisdiction that requires clear error deference to fact-finding,[48] no

40. Elkins v. Gober, 229 F.3d 1369, 1377 (2000). As only Board decisions are directly appealed to the Veterans Court, the case law speaks primarily in terms of deference to Board decision. *See Id*. ("Fact-finding in veterans cases is to be done by the expert [Board], not by the Veterans Court.").

41. INS v. Ventura, 537 U.S. 12 (2002) (per curiam) (explaining that one reason new issues should be heard first at the lowest level is so that the lower-level decision maker "[can] bring its expertise to bear upon the matter; can evaluate the evidence; can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a [higher] court later determine whether its decision" is appropriate).

42. Koch, *supra* note 25, at 530 ("The agencies are superior fact gatherers and hence the courts should do little monitoring of fact-gathering.").

43. *Id*. at 531.

44. The Board is charged by statute with both basic fact-finding and mixed question findings. *See* 38 U.S.C. § 7104 ("Jurisdiction of the Board. (d) Each decision of the Board shall include—(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record . . .").

45. *Id*.

46. Boelzner, *supra* note 23, at 685.

47. 38 U.S.C. § 7251 (establishing under Article I of the U.S. Constitution "the United States Court of Appeals for Veterans Claims").

48. 38 U.S.C. § 7261(a)(4) (2018) ("[I]n the case of a finding of material fact adverse to the claimant [the Veterans Court may] hold unlawful and set aside or reverse such finding if the finding is clearly erroneous."); 38 U.S.C. § 7261(c) (2018) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the [Veterans Court]."). FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); Shira A. Scheindlin, *Judicial Fact-Finding and the Trial Court Judge*, 69 U. MIAMI L. REV. 367, 371 (2015) (citing FED. R. CIV. P. 52(a)(6)) (stating that the standard of appellate review of fact-finding is a clearly erroneous showing that the trial judge made a clear error in the finding of fact. The standard of review is supposed to be very deferential because the trial judge heard the witnesses and determined credibility).

deference to legal interpretations,[49] and minimal deference for other mixed questions of law and fact.[50] Clear error arises when there is a "definite and firm conviction that a mistake has occurred."[51] Maintaining this fact-law distinction,[52] and properly applying the respective legal standards to each, is the challenge presented to the Veterans Court.[53]

In one early precedent of *Ashmore v. Derwinski,*[54] the early Veterans Court pioneered veterans' law from scratch, carefully selecting cases in which the facts supported the rule of law holding made on those facts.[55] In another early precedent of *Young v. Derwinski*,[56] the Veterans Court held that there was "no plausible basis in the record" for the Board's findings that the veteran actually signed and mailed a letter. The Veterans Court went out of its way to show the extent of the evidence that supported (was "not inconsistent with") the Board's factual findings.[57] While the early Veterans Court honestly handled the facts, it also delved deep into the facts of the case.[58] Although this may have been an innocent foray into whether the case needed guidance, it is one that invited

49. 38 U.S.C. § 7261(a)(1) (2018) (providing that the Veterans Court shall "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action" of VA).

50. 38 U.S.C. § 7261(a)(3) (2018) (providing that for other decisions and findings of the VA, the Veterans Court reviews under an "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" standard).

51. *See* Andino v. Nicholson, 498 F.3d 1370, 1373 n.1 (Fed. Cir. 2007) (elaborating on the "clear error" standard with a summary of U.S. Supreme Court cases).

52. Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 58 (2010). ("[The law-fact distinction is] ill-defined . . . . The restriction on review most affects cases whose dispositions typically turn on the resolution of factual issues . . . . If their claims are factual rather than legal, the law precludes federal courts from exercising jurisdiction, leaving the agency as the final arbiter.").

53. *See* Stephen A. Weiner, *The Civil Nonjury Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1871–72 (1966) (illustrating the difficulties that courts struggle with when trying to define and maintain the law-fact distinction).

> For example, the judge may declare that a master is liable for a tort committed by a servant acting within the scope of his employment. The jury may reconstruct the servant's acts which culminated in the commission of the tort. But in addition to the resolution of these questions, the decision will have to be made whether such a tort was within the scope of the servant's employment.

Id.

54. 1 Vet. App. 580, 583 (1991) (noting that the Board "listed with care the findings" of a VA examination, and relied on the Board's "listing of supportive clinical findings" to support the Board's finding that disability was mild, and not severe).

55. *Id*. at 583–84.

56. 2 Vet. App. 59, 61–62 (1992) ("the [Board]'s findings are not inconsistent with the veteran's separation agreement, divorce decree, and will.").

57. *Id*. at 61.

58. *Id* at 60–61.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

subsequent Veterans Court panels and individual judges to continue to delve deeply into the facts of a case.[59]

The Veterans Court's precedents demonstrate that, in the main, it has stated and purports to apply clear error deference to Board fact-finding on a variety of legal questions, even though it has rarely done so in factually close cases where clear error deference would be tested.[60] Instead, many of the Veterans Court's holdings stating clear error deference to Board fact-finding are cases where the facts are clearly *against* the appellant and, therefore, easily support the Board's findings of fact, such that clear error deference was never tested.[61]

For examples of where subsequent Veterans Courts made precedent when the facts of the case were overwhelmingly *against* the appellant, see the precedent of *Burden v. Shinseki*,[62] which held that the Board's findings that the veteran was not married were "not clearly erroneous."[63] The underlying facts of the case show that the veteran asserted at least sixteen times that he was not married, that he was divorced, and that there were multiple other inconsistencies with the purported spouse's stories.[64] In *Elias v. Brown*,[65] while the Veterans Court affirmed a Board decision, the only evidence in support of the appellant's claim consisted of two legally incompetent lay statements that had *no* probative value.[66] In *Miller v. Shulkin*,[67] where the Veterans Court upheld the Board's finding that a rating in excess of the schedular maximum rating of 10% for neurological symptoms was not warranted, the facts directed only one outcome of higher rating.[68]

It is hard to find a Veterans Court precedent where the facts as found by the Board were a close call, such that the clear error deference standard actually directed the court's holding. Instead, most factually close cases are remanded by the Veterans Court for additional reasons, based on the explanations by the Board.[69]

59. *See generally* Elias v. Brown, 10 Vet. App. 259, 261–62 (1997).

60. *See generally* Young, 2 Vet. App at 61.

61. *See generally* Burden v. Shinseki, 25 Vet. App. 178, 188.

62. *Id*. at 187–88.

63. *Id*. at 188.

64. *Id*. at 187.

65. Elias v. Brown, 10 Vet. App. 259, 259 (1997).

66. *Id*. at 263–64.

67. 28 Vet. App. 376 (2017).

68. *Id*. at 381; *see also* Urban v. Shulkin, 29 Vet. App. 82 (2017) (showing that the Board decided that the co-existing asthma warranted the higher 60% rating, while the co-existing obstructive sleep apnea warranted only a 50% rating. The Veterans Court upheld the Board's favorable selection of the asthma, with the higher 60% rating, as the predominant respiratory disability, as well as the finding that the asthma was properly rated.)

69. Ridgway et al., *supra* note 6.

I. UN-FACTS: TECHNIQUES AND FALLACIES THAT DIMINISH FACTS

"Facts matter not at all. Perception is everything. It's certainty."

– *Stephen Colbert*[70]

This article assumes the best motives by the Veterans Court in its attempts to sort cases and apply proper judicial deference to the component parts of the case. If the illustrations in this Article show Veterans Court derivation from full deference to Board fact-finding, it would not be from an assumption of bad motive; to the contrary, it is assumed to be from too much of a good motive. Like the VA, the Veterans Court is concerned about the welfare of veterans and assuring the VA disability compensation system is maximizing benefits.[71] These concerns might suggest to the Veterans Court that its primary goal is to aim for a better compensation outcome in each case before it, rather than reviewing the Board decisions only for clear error.

The Veterans Court has delineated the proper legal standards of deference owed for its jurisprudence,[72] pursuant to the requirement that the Veterans Court state the standard of review it applies.[73] The challenge to the Veterans Court is to consistently apply the clear error deference standard to Board fact-finding.[74]

70. Interview by Nathan Rabin with Stephen Colbert, Host, The Colbert Report (Jan. 25, 2006).

71. *See* A.B. v. Brown, 6 Vet. App. 35, 38 (1993) (presuming a veteran is seeking the highest compensation); Bradley v. Peake, 22 Vet. App. 280 (2008); Buie v. Shinseki, 24 Vet. App. 242, 250 (2011) (recognizing special monthly compensation benefits may still be available in some cases where a veteran is already receiving a 100 percent rating); Copeland v. McDonald, 27 Vet. App. 333, 338 (2015) (stating that the VA "[s]ecretary has, through various regulations, created procedural mechanisms to account for all symptoms and effects arising from service-connected conditions."); Morgan v. Wilkie, 31 Vet. App. 162, 167 (2019) (stating that the "VA has powerful, ready-made *schedular* rating tools" to use to maximize benefits).

72. *See* Medrano v. Nicholson, 21 Vet. App. 165, 169 (2007) (showing an examples of the Veterans Court's accurate statement of the legal standards to the applied to Board fact-finding).

> The Court reviews the Board's factual findings under the 'clearly erroneous' standard of review. 38 U.S.C. § 7261(a)(4). 'A factual finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' Hersey v. Derwinski, 2 Vet. App. 91, 94 (1992) (quoting United States v. U. S. Gypsum Co., 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *See id.*

Id. "[The Veterans Court] stated the role of this Court is not to make findings of fact, but to ascertain whether the findings made by the Board evidence clear error. The Board's findings constitute clear error only where they are not supported by a plausible basis in the record." Cooper v. Brown, 6 Vet. App. 450, 452 (1994) (citing Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990)).

73. *Gilbert*, 1 Vet. App. at 56.

74. Ridgway et al., *supra* note 6 (stating that the Veterans Court's single-judge authority has resulted in "unacceptable variance in how supposedly established law is applied to the appeals of veterans seeking benefits.").

Maintaining the Veterans Court's appellate role requires it not to engage in suggestions offered before it that the VA is biased against claimants, or presuppositions that the Board decisions lack proper reasoning and legal analysis, as such predispositions would disincline the Veterans Court toward deference to VA and the Board's expertise in handling and weighing the evidence. This Article identifies several such enticements toward nondeference.

A. Choosing Outcome Over Limited Jurisdiction

> "The province of the [C]ourt is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."
>
> – *John Marshall* in *Marbury v. Madison*[75]

The Veterans Court must balance the need to provide meaningful case review with the statutory requirement to provide very great (clear error) deference to the Board's findings of fact.[76] The Veterans Court's appellate jurisdiction is limited to "the record of the proceedings before the Secretary and the Board."[77] Freed from having to relitigate facts, the Veteran's Court can expend its energies and resources providing legal interpretation and guidance.[78]

There is a strain of thought among the Veterans Court that the court is more analogous to an Article III Court,[79] which has broad authorities that include the taking of life, liberty, and property, as well as other inherent equitable judicial powers to tailor a remedy where law and regulation provide no remedy.[80] However, the specialized Article I Veterans Court, which was created by

75. Marbury v. Madison, 5 U.S. 137, 170 (1803).

76. Boelzner, *supra* note 23 at 681, 689 ("[P]ure finding of fact, i.e. what occurred, will often involve [circumstantial evidence and] the exercise of reason.").

77. 38 U.S.C. § 7252(a)-(b); *see also* Henderson v. Shinseki, 589 F.3d 1201, 1212 (Fed. Cir. 2009) ("[T]he Veterans Court reviews each case that comes before it on a record that is limited to the record developed before the RO and the Board."), *rev'd on other grounds sub nom,* Henderson ex rel. Henderson v. Shinseki, 131
S. Ct. 1197 (2011).

78. Peters, *supra* note 39, at 235.

> When used properly, standards of review require appellate judges to exercise self-restraint and in so doing, act to create a more respected and consistent body of appellate law and a more efficient judicial system. When judges manipulate the standard of review's scope, or ignore its underlying purpose, an inconsistent and unreliable body of law results.

Id. (citing Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 418 (2007) ("[R]eviewing courts [must] exercise self-restraint in the use of their reversal power.")).

79. *See* Taylor v. Wilkie, 31 Vet. App. 147, 159 (2019) (Greenberg, J., dissenting) (showing the belief that the Veterans Court has Article III powers) ("We have a duty to properly examine through our inherent constitutional power to apply equitable remedies where Congress has not expressly authorized a result."); *see also* U.S. CONST. art. III, § 2, cl. 1 ("The judicial power extends to all cases, in law and equity. . .").

80. *See* U.S. CONST. art. III, §§ 1, 2, cl. 1.

Congress in 1988 and placed under the auspices of Congress to legally guide the VA's distribution of veterans benefits, has a more limited jurisdiction.[81] Stepping out of its jurisdictional constraints has earned the Veterans Court the occasional reminder by the Federal Circuit Court that it is not an Article III Court, but rather, it is an Article I Court of limited and specialized jurisdiction that is specifically delineated by statute.[82] To the extent the Veterans Court prefers an outcome in a case, in order to reach that outcome, it may be tempted to provide less deference to facts found by the Board.[83]

B. Misstating or Mischaracterizing the Agency's Findings of Fact

> "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence."
>
> – *John Adams*, The Portable John Adams[84]

There is a difference between the Veterans Court misunderstanding some nuance within fact-finding versus recharacterizing or omitting facts found by the Board. The latter is suspected when the purported "holding" of the case would be mere *dicta* but-for the recharacterized or omitted facts.

In the Veterans Court precedent of *Fountain v. McDonald*, the Board had weighed the evidence and found as a fact that "[s]ymptoms of tinnitus were not

81. *See* Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits*, 46 ME. L. REV. 5, 8 (1994).

82. Sullivan v. McDonald, 815 F.3d 786, 793 (Fed. Cir. 2016) ("[W]e urge the Veterans Court to be mindful of its jurisdictional limits and refrain from engaging in factfinding when applying the proper statutory and regulatory framework as outlined in this opinion.").

> This court's decision in *Sullivan v. McDonald, supra*, is on point. There, the court held that the Veterans Court had engaged in improper appellate factfinding when it found that certain medical records were not relevant, an issue that the Board in that case had not considered. *Sullivan*, 815 F.3d at 792. The same analysis applies here.

Abels v. Wilkie, No. 2018-1484, 2019 U.S. App. LEXIS 4441, at *5 (Fed. Cir. Feb. 14, 2019).

83. Peters, *supra* note 39, at 266 ("Judges who attempt to force what is in their view an equitable result must artfully maneuver their way around the appropriate standard of review and the constraints it imposes."); Kunsch, *supra* note 12, at 40 ("Appellate courts often avoid the constraints imposed upon them by the 'clearly erroneous' standard by finding the issue under consideration something other than one of pure fact" (citing Susan R. Petito, *Federal Rules of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule been Clearly Erroneous?*, 52 ST. JOHN'S L. REV. 68, 87-90 (1977))); Masur & Ouellette, *supra* note 28, at 699 (stating that courts can generate "deference mistakes," one type of which is "asymmetric" deference when "legal issues sometimes reach appellate courts under a more deferential standard that *always* favors one type of party.").

84. *John Adams Quotes*, GOODREADS, INC., https://www.goodreads.com/quotes/32621-facts-are-stubborn-things-and-whatever-may-be-our-wishes [https://perma.cc/9FVL-QQRL] (last visited June 1, 2021).

chronic in service and have not been continuous since service separation." [85] These findings of fact in the negative by the Board in *Fountain*, if left standing, would have precluded the Veterans Court from making its holding in this case, namely, that tinnitus is one of the "chronic" diseases that require application of chronic disease presumptive service connection provisions.[86] In this case, the Board had in fact weighed evidence for and against the element of continuous post-service tinnitus symptoms, including assessment of credibility of reasons proffered for not reporting symptoms, before finding as a fact that the symptom of tinnitus had *not* been continuous since service—a finding of fact that precludes presumptive service-connection in the case.[87]

Using a reasons and bases deficiency, the *Fountain* court speculated that the veteran's tinnitus *could* have been both present *and* unnoticed—logically incompatible concepts that are precluded by the Veterans Court's own precedent recognizing that a veteran is fully capable of recognizing tinnitus[88] and that if a person does not recognize this symptom then, necessarily, the person does not have the symptom.[89] *Fountain* introduced its own inference (that, somehow, the

85. 27 Vet. App. 258 (2015); *see* Docket No. 12-23 753, https://www.va.gov/vetapp13/Files1/1302973.txt (last visited Nov. 25, 2020). As *Fountain* was adjudicated by the Board prior to *Walker v. Shinseki*, (which restricted chronic disease presumptions to the list of disabilities at 38 C.F.R. § 3.309(a) (2018)), the Board had erred in the veteran's favor by applying the chronic disease legal presumptions in *Fountain*. *See* Docket No. 12-23 753, https://www.va.gov/vetapp13/Files1/1302973.txt (last visited Nov. 25, 2020). The Board's denial of the claim was, instead, based on the finding of fact that the weight of the evidence showed that symptoms of tinnitus were not in fact continuous since service. *Id*. The Board had specifically weighed the proffered excuses for the absence of relevant complaints in service or for twenty-nine years after service, but it found such assertions were outweighed by the other evidence, so they were not considered to be credible. *Id*.

86. 38 U.S.C. § 1112 (stating that a chronic disease becoming manifest to a degree of ten percent or more within one year from service separation shall be considered to have been incurred in or aggravated by such service, notwithstanding the lack of diagnosis or treatment during service); 38 C.F.R. § 3.303(b) (2018) (stating that service connection will be presumed where there are either chronic symptoms shown in service or continuity of symptomatology since service for diseases identified as "chronic" in 38 C.F.R. § 3.309(a) (2018); with a chronic disease shown as such in service, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes; for the showing of chronic disease in service, there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time; if a condition noted during service is not shown to be chronic, then generally, a showing of continuity of symptoms after service is required for service connection).

87. *Fountain*, 27 Vet. App. at 274.

88. *See* Charles v. Principi, 16 Vet. App. 370, 374 (2002) ("[R]inging in the ears is capable of lay observation.").

89. *See* FED. R. EVID. 803(7) (indicating that the absence of an entry in a record may be evidence against the existence of a fact if such a fact would ordinarily be recorded); Kahana v. Shinseki, 24 Vet. App. 428, 440 (2011) (stating that VA may use silence in the service treatment records as evidence contradictory to a veteran's assertions if the service treatment records appear to be complete and the injury, disease, or symptoms involved would ordinarily have been recorded

symptom might not be "severe" enough to be noticed), effectively creating new evidence for the appellant as to why he had not reported any symptoms for twenty-nine years after service.[90] This is contrary to the Board's explicit finding of fact that, after a weighing of the evidence, such post-service symptoms were not in fact present—a finding that was owed clear error deference.[91]

Another example of the Veterans Court's misstatement of the Board's actual finding of fact is illustrated by the court's factual assumption in *Golden v. Shulkin*[92] that the Board relied on Global Assessment of Functioning (GAF) psychological scale scores to deny a *higher* rating.[93] The facts found by the Board in *Golden* are that, independent of any reliance on GAF scores, the Board decision adjudicated the case on its merits and addressed relevant findings of psychological symptoms and degrees of social and occupational impairment.[94] The Board decision did not use GAF scores to support its decision as to the actual rating assigned or to deny a higher rating, but only referenced GAF scores to see if a higher rating could be granted.[95] Consequently, the very broad announcement by the court in *Golden*—that GAF scores are inherently unreliable—did not apply to the case that announced it.[96]

In the more recent precedent of *Morgan v. Wilkie*,[97] the Board had found that "[n]either the facts of this case nor the Veteran's allegations *raise* the issue of extraschedular consideration."[98] Notwithstanding this clear finding, the Veterans Court found itself unable to say whether the Board had found that an extraschedular issue had been *raised*, or not, and remanded the case back to the Board for further explanation as to whether an extraschedular claim had been *raised*.[99] By remanding the case, the Veterans Court avoided having to apply

had they occurred) (Lance, J., concurring); Buczynski v. Shinseki, 24 Vet. App. 221, 224 (2011) (stating that the absence of a notation in a record may be considered if it is first shown both that the record is complete and also that the fact would have been recorded had it occurred).

90. *Fountain*, 27 Vet. App. at 273.

91. *Id.* at 274.

92. 29 Vet. App. 221, 224 (2018) (purporting to "hold" that VA should not use "GAF scores to assign a psychiatric rating" in certain cases).

93. *Id.* at 223.

94. *Id*. at 222–23. Part of the Board's finding was that "GAF scores assigned during the relevant period do not provide a basis for assigning a higher rating," that the "lowest score" showed no greater impairment than the seventy percent rating assigned, and that other GAF scores not relied upon showed even lesser impairment. *Id*. In other words, the Board considered the GAF scores only for the purpose of seeing if they showed a *higher* rating were warranted; the Board decision in *Golden* did not rely on a GAF score in making its decision regarding the level of compensation for the service-connected psychological disorder it actually found. *Id.*; *see* Board docket No. 16-1208 at the Veterans Court website: https://www.uscourts.cavc.gov/ (last visited Apr. 12, 2019).

95. *Golden*, 29 Vet. App. at 226.

96. *Id.* at 225.

97. 31 Vet. App. 162, 162 (2019).

98. *Id.* at 165 (*emphasis added*).

99. *Id.* at 164.

clear error deference to the Board's finding that an extraschedular claim had in fact not been raised, avoided application of the rule of prejudicial error,[100] and the Veterans Court's own case law that applies the rule of prejudicial error to this very type of claim,[101] and avoided the outcome of ending an extraschedular appeal odyssey that the court itself had allowed to be raised where there was never an actual claim or evidence of extraschedular impairment in the case.[102]

Similar misstatements or mischaracterization of Board findings of fact appear in nonprecedential memorandum decisions of the Veterans Court, which are cited here to show their use by various judges in more fact-determinative single judge cases where no novel legal question is presented.[103] In one such case, the Board's finding of fact—that the first diagnosis of schizophrenia occurred a few years *after* service—was mischaracterized as a finding that the veteran's father died after service.[104] Another nonprecedential decision misstated that there was "no explanation" to support an examiner's opinion before reporting four supporting explanations.[105] Another single judge decision incorrectly declared that specific symptoms were not "complaints" from the appellant as the Board had stated, when in fact they were.[106] Deference to agency

100. 38 U.S.C. § 7261(b)(2) (providing the Veterans Court shall "take due account of the rule of prejudicial error.").

101. *See* Fisher v. Principi, 4 Vet. App. 57, 60 (1993) ("[I]n the absence of exceptional or unusual circumstances, the failure to deal with [a different type of extraschedular rating under 38 C.F.R. § 4.16(b) that has the same referral standard] would at the most be harmless error."); Bagwell v. Brown, 9 Vet. App. 337, 339 (1996) (holding that no prejudice in the Board's non-referral where factors that are not capable of raising extraschedular referral were identified); Shipwash v. Brown, 8 Vet. App. 218, 227 (1995) (finding that there were no exceptional or unusual circumstances shown in the case to even require the Board to discuss extraschedular *referral*); Thun v. Peake, 22 Vet. App. 111, 117 (2008) (holding that where the assertions are not capable of raising extraschedular referral, there is no harm in the Board's denial of referral).

102. *See* Parker, *supra* note 15, at 230 (explaining a further analysis of how the facts in *Morgan* never identified actual extraschedular impairment, as well as recent Veterans Court trends creating a dual track extraschedular rating system even by using schedular rating criteria to do so).

103. *See id.*, *supra* note 15, at 205.

104. *See* McElroy v. Wilkie, No. 17-0921, 2018 BL 179893, at *1–2 (Vet. App. May 21, 2018).

105. *See* Gormlet v. O'Rourke, No. 17-0963, 2018 BL 257780, at *4–5 (Vet. App. July 18, 2018) (stating the examiner "offered no explanation to support his medical opinion" as to what caused the veteran's death, before reporting in the same and subsequent paragraph that the examiner 1) noted no significant treatment for asbestos since service, 2) that x-ray findings showed complications from a non-service-related disease of AML and not the service-connected pleural condition, 3) that a review of medical literature showed no relationship between asbestos exposure and AML, and 4) identified an AML risk factor of smoking, where there was a 40-year history of smoking in the case).

106. *Compare* McClaskey v. O'Rourke No. 16-1280, 2018 BL 233768, at *1–2, *4 (Vet. App. June 29, 2018), *with* No. 08-17 677 (B.V.A. March 8, 2016) (https://www.va.gov/vetapp16/files2/1609330.txt) showing that the appellant's complaints of the following: pain (reported by appellant at 1/07, 9/09, 10/13, and 7/15 VA examinations), less movement than normal (decreased motion and stiffness reported at 1/07 & 9/09 VA exams), fatigability (weakness reported at 1/07 VA exam,

expertise could have supplied the meaning of this term.[107] In one case, the Veterans Court decision substituted its own fact-finding by converting a non-service-related, post-service back injury (herniated nucleus pulposus with sciatic nerve injury) into the already service-connected, back disability (strain and arthritis with tenderness).[108] These *individual judge* decisions are virtually unreviewable by the Federal Circuit Court precisely because they are fact intensive and there is not a novel question of law at issue.[109]

C. Dissolving Facts in Mixed Questions of Fact and Law

"Facts don't cease to exist because they are ignored."

– Aldous Huxley[110]

Nearly thirty years of Veterans Court jurisprudence has occasionally drawn the Federal Circuit Court to remind the Veterans Court to properly maintain fact deference within the mixed law-fact question.[111] Once the Veterans Court enters the law-fact arena, the tendency is to focus only on the legal question (to which the court owes no deference) rather than the basic facts (to which the court still owes clear error deference).[112] Applying only one standard of deference in a case

fatigue and weakness at 9/09 VA exam), interference with sitting, standing, weight bearing (flare ups and inability to do anything until pain subsides, use of cane as assistive device, and can only walk ¼ of a mile reported at 1/07 & 9/09 VA exams; pain aggravated by walking, relieved by relieving weight bearing by leaning over something, reported at 10/13 VA exam; could not sit or lift, and used wheelchair, cane, and walker, reported at 7/15 VA exam). The appellant submitted lay statements corroborating his complaints of pain, with associated decreased function, need to rest, and difficulty in sitting, standing, and walking No. 08-17 677 (BVA March 8, 2016) (https://www.va.gov/vetapp16/files2/1609330.txt).

107. Agency expertise instructs that a "complaint" by a patient is not a formal legal proclamation but is simply a symptom of which a person is aware, or which causes discomfort and which is often the principal reason for seeking medical attention. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 399 (31st ed. 2007).

108. *See* Kennedy v. O'Rourke, No. 16-2780, 2018 BL 193446, at *2–3, *5 (Vet. App. May 31, 2018) (showing that in a case where the veteran was service connected for lumbar tenderness, arthritis, and strain, the Court misstates that the "appellant appears to be service connected for the post-service work injury" at the post office that caused a herniated disc with sciatica).

109. *Id.* at *1; Hensley v. West, 212 F.3d 1255, 1263 (Fed. Cir. 2000); Kyhn v. Shinseki, 716 F.3d 572, 577 (Fed. Cir. 2013).

110. Stephanie Williams, *I'm New Here, Week Twelve…*, HISTORY'S NEWSSTAND BLOG (May 3, 2019, 1:31 PM), blog.rarenewspapers.com/?p=10351&print=1.

111. *See* Hensley v. West, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("the ultimate conclusion [of well-groundedness] is a question of law, but that conclusion rests on factual matters the determination of which by the agency fact-finders is entitled on review to substantial deference."); Kyhn v. Shinseki, 716 F.3d 572, 577 (Fed. Cir. 2013) ("The Veterans Court's application of the presumption of regularity to this factual finding does not convert the underlying finding [that VA had a regular practice of notifying of examinations] into a legal conclusion.").

112. Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73, 74 (1950).

simplifies the appellate court's tasks. Dissolving the fact-law distinction has the added benefit of bringing about a desired outcome.[113] Similar treatment of factual questions de novo is not unique to the Veterans Court.[114] For example, parallel federal court deference failures have been identified in Federal District Court reviews of Administrative Law Judge (ALJ) decisions of Social Security Administration (SSA) appeals.[115]

While the question of whether the Veterans Court has jurisdiction in a case is ultimately a legal determination, the determination is based on specific facts such as who the claimant is, whether filing deadlines were met, and whether there was relevant evidence submitted (regardless of its strength).[116] In one nonprecedential decision, the Veterans Court overlooked the underlying documents and jurisdictional facts found in the Board decision (adjudication document, appeal documents, and readjudication document), which led to the court's mistaken and unexplained conclusion that jurisdiction was lacking over the issue.[117] Contrast the Veterans Court precedent in *Criswell v. Nicholson*,[118] which did apply clear error deference, upholding the Board's finding that medical records did not demonstrate an intent to file a claim for VA benefits.[119]

A specific variety of this technique for dissolving facts within mixed questions is when the Veterans Court treats legal-sounding findings of facts, such as relevance, credibility, and weight of the evidence, as purely legal questions to which no deference (*de novo* review) is owed.[120] Focusing the

> The reviewing court itself has the final word upon whether the particular finding is one of "law" or "fact", and in deciding that question it, in effect, determines whether the review of that finding is to be a broad or narrow one . . . As one observer has pointed out, "since all rules of law are something more than abstract propositions of logic, and depend for their meaning on their relevance to certain states of fact, it is inevitable that Courts should often lay down as matters of law what are really in essence matters of fact."

Id. (quoting C.K. ALLEN, LAW AND ORDERS 160 (1945)).

113. Stephen A. Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1022 (1967) (focusing on single judge decisions in nonjury civil cases) ("if the court feels that a trial judge's determination should be reversed, it will classify it as a legal conclusion, thereby making reversal easier.").

114. *See* GELBACH & MARCUS, *infra* note 115, at 56.

115. See JONAH B. GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY DISABILITY LITIGATION IN THE FEDERAL COURTS, ADMINISTRATIVE CONFERENCE OF THE U.S. 56 (July 28, 2016) (providing an excellent overview of SSA processes and appeals to and through the federal courts by quoting SSA lawyers and personnel as to the effect that federal courts ignore the "substantial evidence" standard of review when reviewing ALJ decisions in SSA appeals, and often adjudicate factual questions).

116. *See* Robertson v. Shulkin, No. 15-3269, 2017 WL 1046284, at *2 (Vet. App. Mar 20, 2017).

117. *See id*.

118. Criswell v. Nicholson, 20 Vet. App. 501, 504 (2006).

119. *Id.*

120. Fountain v. McDonald, 27 Vet. App. 258, 274 (2015).

discussion on credibility-related legal questions (such as the legal standard to weigh conflicting evidence and case law as to which evidence can even be considered in the weighing of credibility, etc.) diverts from the fact that the Board already weighed the evidence and found as a basic fact that the claimant/affiant was not credible.

The Veterans Court in *Fountain* appears to have dissolved the Board's findings of absence of continuous symptoms, and lack of credibility, into its *de novo* review of the entire case, both law and facts.[121] In *Fountain*, the Board weighed the evidence and made a credibility determination, finding as a material fact that the veteran had not experienced symptoms of tinnitus continuously since service—a finding of fact that was owed clear error deference.[122] The *Fountain* court announced the rule of law that a chronic disease legal presumption applied to tinnitus—a rule of law that the Veterans Court decides *de novo*—even though the facts in *Fountain* did not support this holding.[123]

The *Fountain* court's reasoning tacitly admits that its holding was not based on the facts of the case ("there *may* be reasons unrelated to the merits of the claim or unrelated to whether a claimant is experiencing symptoms")[124] but was being made regardless of the credibility of the evidence ("merits of the claim") against credibility, and was contrary to the evidence that showed an absence of post-service symptoms for twenty-nine years ("unrelated to whether a claimant is experiencing symptoms").[125] By doing so, the Board's fact finding on credibility and continuous symptoms had been dissolved by *Fountain*'s characterization of the entire case as one of legal analysis and holding.[126]

Deference to Board fact finding does not necessarily mean that the claim will be denied. One recent memorandum decision illustrates the proper clear error deference to the Board's findings of fact and weighing of evidence pursuant to a disability rating, leaving the Board's findings intact, then reversing

121. *Id*. at 259–60.

122. *Id*.

123. *Id*. at 264–65.

124. *Id*. at 274.

125. *Fountain*, 27 Vet. App. at 274.

126. *Id.* at 274–75. The holding unsupported by the found facts in *Fountain* rendered the Board's fact finding on credibility and continuous symptoms irrelevant to the holding in this case, which strongly suggested the Board should make different findings of fact—a suggestion that the Board followed to reverse the outcome of the case. *Id*. Upon remand, following the lead of the Court's *sub silentio* suggestion, the subsequent Board decision excused the twenty (plus)-year absence of symptoms, finding the veteran to be credible in the retroactive reporting of tinnitus symptoms, and finding as a fact that there were continuous post-service symptoms that met the criteria for presumptive service connection. *Id*.

the outcome of the case because the Board had committed *legal* error that required a separate disability rating.[127]

D. Fact Finding via the "Reasons and Bases" Requirement

"Facts are facts and will not disappear on account of your likes."

– Jawaharlal Nehru[128]

The Board must provide adequate reasons and bases to support its findings of fact and conclusions of law.[129] When the Board's reasons are incomplete or inadequate, the Veterans Court may remedy the deficiency by vacating the Board's decision, then remand the case back for clearer reasons and bases.[130] The Veterans Court remands most of its cases back to the Board using the reasons and bases requirement,[131] a practice that finds parallels in the federal court review of ALJ decisions in SSA appeals.[132]

The remand for clearer reasons should not be used to direct the Board to insert preferred inferences from the evidence, as a way of reweighing the case, or for a different case outcome.[133] Such court-ordered *quasi*-relitigation of the

127. *See* Ziminsky v. Wilkie, No. 17-4163, 2019 WL 82126, at *3 (Vet. App. Jan. 3, 2019) (stating that the "[Veterans] Court will not disturb [the] favorable findings" of the Board that provide the "factual predicat[ion] necessary" for a separate disability rating).

128. *Jawaharlal Nehru Quotes*, GOODREADS, INC., https://www.goodreads.com/quotes/358163-facts-are-facts-and-will-not-disappear-on-account-of (last visited Oct. 24, 2020).

129. *See* 38 U.S.C. § 7104(d)(1) (2019) (stating that a Board decision must include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record); *see also* Caluza v. Brown, 7 Vet. App. 498, 506 (1995) ("[T]he Board's statement of reasons or bases must account for the evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant, and provide the reasons for its rejection of any such evidence.").

130. 38 U.S.C. § 7252(a) (2019) (stating that the Veterans Court "shall have power to . . . reverse a decision of the Board or remand the matter, as appropriate.").

131. Ridgway & Ames, *supra* note 13, at 316 ("[N]early half of all reasons for remand were in situations in which the Board discussed the issue or evidence in dispute, but the [Veterans Court] could not, or would not, conclude that the Board's analysis was wrong.").

132. GELBACH & MARCUS, *infra* note 115, at 44, 47 (reviewing federal court remand rates in recent years of not less than 45%, coupled with a reversal rate of only 3%, with SSA plaintiffs prevailing at more than double the rate of other administrative agency appeals, and noting some have suggested that such a high remand rate is inconsistent with a standard of review that requires deference to agency findings of fact).

133. Boelzner, *supra* note 23, at 681, 688–89.

> But how can the Court consider the soundness of the Board's reasoning in reaching those factual conclusions without running afoul of the specific admonition in 38 U.S.C. § 7261(a)(4) that the reviewing court must accept the Board's material findings of fact unless they are clearly erroneous? If findings of fact are subject to review and rejection or revision by the Court if inadequately reasoned, is the Court impermissibly substituting its judgment for that of the Board? If the Board provides no statement of reasons and bases, it has violated

facts of the case would be inconsistent with the foundational principle of *res judicata*.[134]

In *Morgan v. Wilkie*, the Veterans Court remanded the case for the Board to provide further reasons and bases to support a finding of fact the Board clearly had already made (that an extraschedular rating claim had not been *raised* by the veteran or the evidence).[135] The Veterans Court used the remand-for-reasons-and-bases platform to direct the Board to a variety of other *schedular* rating remedies[136] that were not even claimed,[137] and had been virtually abandoned before the Veterans Court, as the focus of the arguments was on *extra*-schedular referral rather than a schedular rating.[138]

As this case did not factually support further extraschedular precedent in this area of the law, which the Veterans Court panels have radically altered in recent years,[139] precisely because an extraschedular claim was never raised, the

> the statute and committed error warranting remand. But can the Court review the soundness of the reasons and bases and still respect the Board's material findings of fact?

Id.

134. *Id*.

135. 31 Vet. App. 162, 164 (2019); *see* discussion of *Morgan*, *supra* Section I.B, Misstating or Mischaracterizing the Agency's Findings of Fact.

136. *Morgan*, 31 Vet. App. at 164. The Veterans Court in *Morgan,* after entertaining an extraschedular remedy for two years, refocuses on the rating schedule remedies, namely, secondary service connection, rating by analogy, resolving reasonable doubt to grant a higher schedular rating, special monthly compensation, and rating under more than one diagnostic code. *Id*. These rating schedule remedies, when applied, moot the need for extraschedular remedies. *Id*. The Veterans Court also lists individual unemployability as a rating schedule remedy, even though it is legally a different type of extraschedular remedy. *Id*.; *see also* Parker, *supra* note 15 (showing additional Rating Schedule remedies available to compensate disabilities).

137. *Morgan*, 31 Vet. App. at 164 (showing that as of March 24, 2015, claims for VA benefits, which include claims for secondary service connection under 38 C.F.R. § 3.310, must be filed on the standardized claim form prescribed by the VA Secretary)*; see also* 38 C.F.R. §§ 3.150 (2014), 3.151 (2019); 79 Fed. Reg. 7660 (Sept. 25, 2014) (eliminating informal claims by requiring that, effective March 24, 2015, VA claims be filed on standard forms).

138. *Morgan*, 31 Vet. App. at 164. It is understandable that the Veterans Court in *Morgan* would want the Board to remedy the conundrum that it had created over the last few years by suggesting extraschedular ratings that might apply to any stray symptoms, even those that are explicitly in the rating schedule, so would now strongly suggest that the VA grant service connection for unclaimed secondary service connection symptoms or somehow grant compensation for such symptoms so as to moot the extraschedular question it had entertained on appeal for two years, fully and extensively briefed with supplementary briefings, and even entertained oral argument presented to an *en banc* panel—notwithstanding the extraschedular rating issue had never been raised or found to be raised before VA, and had been found by the Board not to have been raised. *Id*. The only way to avoid ruling on the fully briefed extraschedular question before it, which with application of clear error deference (or any degree of deference) would have ended the veteran's extraschedular quest, was to find a reasons and bases deficiency in order to punt the case back to the Board to provide a remedy under the VA Rating Schedule. *Id*.

139. *See* Parker, *supra*, note 15 (analyzing recent trends in Veterans Court jurisprudence of extraschedular rating claims from 2016 to the present).

Veterans Court in *Morgan* remanded the case ostensibly for further explanation, and by doing so avoided rendering a substantive decision.[140]

This redirection by the Veterans Court to *schedular* rating remedies in *Morgan* strongly suggests that the Board, in order to follow the Veterans Court's suggestions to find a schedular remedy, will have to violate its own jurisdictional limitations by adjudicating secondary service connection claims that were never raised.[141] Undoubtedly, the Board as fact finder will comply with the court's very strong suggestion to change the facts in this case, in order to grant secondary service connection for disabilities that are not even diagnosed and have not been claimed and are shown by evidence to be related to the service-connected hearing loss disability.[142] This will likely result in a changed outcome based on differently found facts that the court could not directly make.

The reasons and bases requirement on Board decisions can be interpreted in a way to make the finding of a fact by the Board so onerous that the fact can only be found in one direction.[143] Indicia of nondeference to Board fact finding is when the Veterans Court finds itself deep in the weeds of the Board's factual findings—reporting extensive factual backgrounds and openly questioning inferences from sub-sections of that evidence. In such cases, a call for clearer explanation of the Board's reasoning replaces the Veterans Court's clear error burden of sustaining a finding of fact where there is a "plausible basis in the record" for the fact.[144]

To illustrate an overly burdensome reasons and bases requirement, the Veterans Court, in one nonprecedential decision where the Board had found that a head laceration injury in service was not a stressor to cause posttraumatic stress disorder, upon review, deflected the "clear error" burden of the Veterans Court

140. *Morgan*, 31 Vet. App. at 167. The Veterans Court instead chose a different case upon which to land its desired extraschedular precedent by forming a new en banc panel in a case where extraschedular rating was raised and substantively adjudicated. *Id*.

141. *Id*.

142. *Id*.

143. James D. Ridgway, VETERANS LAW: CASES AND THEORY 705 (2015).

> The early case law of the [Veterans Court] turned the reasons or bases standard into a very demanding requirement . . . By declaring that Board decisions lacked sufficient reasons or bases to allow for review, the CAVC was able to pressure the Board into providing an analysis so detailed that the decision could be understood by someone with no prior familiarity with the process. The practical effect has been to shift the burden to the Board to prove that its decisions are correct, regardless of whether there is sufficient evidence to support them.

Id.

144. *See* Reonal v. Brown, 5 Vet. App. 458, 460 (1993) ("[T]he [Veterans] Court cannot reject as clearly erroneous the Board's finding of fact that [a doctor] based his opinion solely on appellant's account of his medical history [where the Board's determination has a plausible basis in the record]"); Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990) (showing that the Veterans Court cannot reject a Board's finding of fact as clearly erroneous when there is a "plausible basis in the record.").

into a burden of clearer decision by the Board,[145] wading deep into the facts by offering excuses for the appellant's mendacity that were contrary to the Board's credibility finding.

The Veterans Court may question the Board's inferences drawn from the evidence to such an extent the series of qualms with the inferences serve as the Veterans Court's tacit rejection of the inferences that the Board drew.[146] In such cases when the Veterans Court's questions are read as strong suggestions to the Board to draw different inferences that affect the weight of the evidence, the Veterans Court's wishes become the Board's commands.[147]

The remaining available possible inferences that the Board may draw dictate finding different facts when the case is readjudicated during remand from the Veterans Court.[148] For an example, one nonprecedential Veterans Court decision imputes credibility to a lay statement that the Board had specifically weighed against other evidence and found not to be credible.[149]

145. *See* Kendrick v. Shinseki, No. 12-3520, 2014 WL 2054280, at *3–4, 5–6 (Vet. App. May 20, 2014) (stating that the Board "did not then clearly decide whether the appellant's confirmed in-service injury can be classified as a verified PTSD stressor" before suggesting there were other "implications of that event"). In this case, the Veterans Court somewhat quizzically found the Board's credibility finding not to be clearly erroneous, but itself offered various excuses for the appellant's mendacity regarding when symptoms of schizophrenia began (doing so in a rhetorical flourish suggestive of doubt rather than clear error), and reweighed a medical examiner's opinion by suggesting how the examiner was supposed to have relied on the appellant's inconsistent histories. *Id*.

146. Koch, *supra* note 25, at 525 ("[S]pecific facts [(adjudicative facts)] can be proven in the traditional ways. For this reason, [the Veterans] Courts might review these facts very closely.").

147. *See, e.g.,* Howell v. Wilkie, No. 17-1458, 2018 WL 2074128, at *1 (Vet. App. May 4, 2018), wherein the Veterans Court remanded under the reasons and bases requirement where it had simply disagreed with the Board's explicit credibility findings (the "Board has considered the Veteran's lay statements along with the medical evidence of record"; "the Board does not find the Veteran's statements as to his alleged severity of symptoms to be credible"), and does so by selecting one examination report to dissect in detail while ignoring three other examination reports and other medical and lay evidence that was reported and relied on by the Board. *See infra* Section I.F. This memorandum decision reframes how the Board should weigh credibility, shifting away from the Court's clear error standard regarding review of the Board's credibility finding to a clearer reasons and bases requirement for the Board.

148. McElroy v. Wilkie, No. 17-0921, 2018 WL 2293292, at *2 (Vet. App. May 4, 2018).

149. *Id*. In *McElroy*, the Veterans Court reasserts the value of a lay statement that the Board had specifically weighed and found not to be credible. *Id*. It is unclear what the Veterans Court was trying to accomplish by this in-the-weeds reweighing of the evidence except for a general relitigation of the case on remand, as the fact suggested by the Veterans Court to be favorable to the case (that the veteran's father was murdered before service and symptoms of schizophrenia began prior to service) weighs against the veteran's claim by tending to show a pre-service injury and/or disease for which service connection cannot be granted as a matter of law. *See id*.

This technique of relitigating inferences usually involves an extensive factual reporting by the Veterans Court,[150] upon which it relies to review and analyze the case,[151] with a detailed analysis of inferences drawn from particular evidence.[152] By suggesting alternative implications of evidence and even subparts of evidence (implicitly rejecting the implications the Board chose),[153] the Board is steered to different findings and case outcome.[154] This type of fact relitigation by the Veterans Court was supposed to have been precluded by the clear error standard of review of Board decisions that was chosen by Congress in the legislation establishing the Veterans Court.[155]

150. *See* Jackson v. O'Rourke, No. 17-1655, 2018 WL 3700081, at *1–2, 4–5 (Vet. App. July 30, 2018) (showing an example of a nonprecedential Veterans Court decision that extensively reports the facts, rejects the Board's finding that certain medical opinions outweighed others, rejects the Board's finding that its prior orders had been complied with, suggests the fact of in-service injury where the Board had found none, and suggests continuous symptoms after service where the Board had already found that symptoms began years after service).

151. *See* Hensley v. West, 212 F.3d 1255, 1264 (Fed. Cir. 2000) (showing an example of how the Veterans Court at times engages in fact finding by using in-depth factual reporting and analysis) ("[T]he [Veterans Court] took it upon itself to review 'de novo' the [Board]'s determination of well groundedness. . . . It began by dissecting the factual record in minute detail.").

152. *See* Moody v. Wilkie, 30 Vet. App. 329, 343–44 (2018) (Toth, J., dissenting) (describing the majority opinion as having conducted "its own assessment of the record evidence" and cautioning against a "third-act reevaluation of the evidence"); *see also* Veterans Court nonprecedential memorandum decision 17-1823 for an example of a dissection of any distinction between terms ("association" versus "aggravation" and "contribution" versus "causation"), with the Court inconsistently stating that an examiner did not give an aggravation opinion before finding that there was a discussion of aggravation that had an "incomplete rationale," and substituting a *de novo* rejection of the examiner's three-part rationale for the opinion (1. association is not causation, 2. the veteran did not have the type of sleep apnea that could be associated with PTSD, and 3. there were two other more likely causes of the disorder that the veteran had).

153. *See* Castillo v. Snyder, No. 15-4150, 2017 WL 507542, at *2 (Vet. App. Feb. 8, 2017) (showing an example of a reweighing of an examiner's opinion by the Veterans Court). The Veterans Court first recharacterized the Board's reference to a study showing "limited or suggestive evidence of [an] association" (which, read in the study's own context means that the VA examiner "has determined that the evidence overall does not establish a positive association between herbicide exposure and hypertension"), as a Board finding "that there was evidence indicating an association," then finding a supposed inconsistency between the Board's alleged finding and a VA examiner's opinion that there was "no known association between herbicides and hypertension in later years," and doing so by removing the VA examiner's qualifier of "in later years," to then ignore the Board's finding of fact that the examiner's opinion was adequate. *Id*. The Court's remand remedy was for the Board to ask the examiner to do what he had just done — consider limited/suggestive studies when formulating the opinion. *Id*.

154. *See id*. at *3.

155. *Proposed Veterans Administration Adjudication Procedure and Judicial Review Act and Veterans Judicial Review Act: Hearing on S. 11 and H. 2292 Before the S Comm. on Veterans' Affairs*, 100th Cong. 335 (1988) (statement of Hon. Morris S. Arnold, Judge, U.S. Dist. Ct. W.D. Ark.) ("The [Veterans Courts] are not well equipped to determine such factual issues as whether or not an injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time uniformly"); *see, e.g., id.* at 43

E. Holding Does Not Apply to the Facts Error

> "If you get all the facts, your judgment can be right; if you don't get all the facts, it can't be right."
>
> – *Bernard M. Baruch*[156]

When the Veterans Court finds it does not have a case with the factual foundations upon which to make the legal precedent,[157] it must either abandon the attempt to make the rule of law and wait for another case,[158] or force the matter-of-law ruling onto the case at hand, reasoning that, regardless of the specific facts of this case, the rule of law ought to be made applicable to similar future cases.[159] An overly broad rule that is not applicable to the case at hand is more in the nature of a legislative or policy statement, which are enacted or created by other branches of government, than a legal interpretation to be issued from the courts.

(statement of Hon. Stephen G. Breyer, Judge, U.S. Ct. of App. for the First Cir.) ("I believe that reviewing Agency fact finding is something I don't do very well."); *see also* Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990), *cited in* Boelzner, *supra* note 23, at 685 n.24.

156. BURTON EGBERT STEVENSON, THE HOME BOOK OF AMERICAN QUOTATIONS 148 (1986 ed. 1967) (quoting ST. LOUIS POST-DISPATCH, June 21, 1965, at 5A).

157. A purported legal "holding" announced in a case without the prerequisite facts to make that holding, in addition to being *dicta*, commits the logical fallacy of Accident, which consists in applying a general rule to a particular case whose "accidental" circumstances render the rule inapplicable. IRVING M. COPI, INTRODUCTION TO LOGIC 160 (11th ed. 2002); *see* Saunders, *supra* note 6, at 367.

158. The Veterans Court in *Spellers v. Wilkie*, 30 Vet. App. 211 (2018), showed restraint from offering *dicta*, leaving "for another day" the unanswered legal question (of the possibility of extraschedular referral based on severity when a disability reaches the maximum schedular rating) that the Veterans Court held was not raised by the facts of the case.

159. *See* Doucette v. Shulkin, 28 Vet. App. 366 (2017) (showing an example of Veterans Court matter-of-law "holdings" announced in *dicta* by holding that the VA disability rating schedule was adequate to rate all the hearing loss symptoms that case and later suggesting a list of unrelated symptoms that might be hearing loss symptoms in future cases). In a subsequent case of *King v. Shulkin*, 29 Vet. App. 174 (2017), the Veterans Court shows sensitivity to having its *dicta* in *Doucette* labeled as such and attempts to retroactively "affirmatively hold now that it was not" *dicta*. In *King*, the Veterans Court actually found *no* uncompensated symptoms under the facts of the case, then offered a pure hypothetical as to how uncompensated symptoms in future cases should be compensated, before self-declaring the hypothetical to be a matter-of-law holding applicable to all cases. *See* King v. Shulkin, No. 16-2959, 2018 WL 1212422, at *1 (Vet. App. Mar. 8, 2018) ("[M]uch of our extraschedular jurisprudence has developed around advisory comments that had no bearing on the resolution or facts of any case" (citing to Padgett v. Nicholson, 473 F.3d 1364, 1370 (Fed. Cir. 2007) (stating that the Veterans Court "does not decide hypothetical claims."))); Petermann v. Wilkie, 30 Vet. App. 150, 157 (Fed. Cir. 2018) (Toth, J., dissenting) ("The hypothetical discussion in King . . . remains dicta"); *see also Petermann*, 30 Vet. App. 150, 154–55 n.3 (Fed. Cir. 2018) (stating that the majority agreed that the hypothetical in *King* was dicta in the strict sense because "it did not describe the precise facts in King," but then found the question of dicta to be academic because the fact pattern in *Petermann* "present[ed] that exact situation" as contemplated by the *King* hypothetical).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Such matter of law holdings in cases unsupported by the factual premises create *quasi-dicta* that confuses the parties and the Board, so render unclear the *stare decisis* effects of the court's broad *dicta* announced as rules of law. The Veterans Court creates a dilemma for those relying on its precedents—either 1) treat the *dicta* as precedent and apply it to all future cases (even though the overbroad holding may conflict with other law and precedent and raises questions about its application to other contexts) or 2) ignore the court's own overbroad matter of law declaration (which is not a practical option at all, as the same court who thought its *dicta* was a matter of law holding will surely use its full legal authority to enforce its "holding" in all future cases). This is a lose-lose situation for the Veterans Court and any VA adjudicator honestly trying to decipher the court's *dicta* and apply it to future cases that have different facts.

Some Veterans Court decisions that illustrate this logic error include the precedent of *Fountain*, wherein the court's rule of law holding—that chronic disease presumptive provisions are applicable to tinnitus—was not required or supported by the facts in *Fountain*.[160] The credible facts as found by the Board in *Fountain* showed no "continuous symptoms" for twenty-nine years after service, and the chronic disease legal presumption had effectively already been applied to the case by the fact that the Board had made findings regarding chronic symptoms in service and continuous symptoms since service—findings that would not be required if chronic disease presumptions did not apply.[161]

This error of a holding unsupported by the facts is also illustrated by the purported precedent of *Golden*.[162] In that precedent, the Veterans Court's rule of law that the "VA should not use GAF scores to assign a rating" was rendered inapplicable to the case before it by the fact that the Board had not in fact relied upon GAF scores when assigning the disability rating.[163] Such overly broad rule made irrespective of the facts of a case more resembles VA policymaking, rulemaking, or legislation than a legal holding by the court.

160. Fountain v. McDonald, 27 Vet. App.. 258, 266, 272 (2015).

161. *Id.* at 272; *see* discussion of *Fountain*, *supra* Section I.B, Misstating or Mischaracterizing the Agency's Findings of Fact (referencing the facts found by the Board).

162. Golden v. Shulkin*,* 29 Vet. App. 221, 226 (2018).

163. *Id*.; For a more extensive discussion of the Board's findings of fact in the *Golden* case, see *supra* Section I.B, Misstating or Mischaracterizing the Agency's Findings of Fact.

F. Out of Context Error: Fallacy of Accent

"The fewer the facts, the stronger the opinion."

– Arnold H. Glasow[164]

Generally, VA fact-finding is based on a totality of the evidence approach.[165] The Board is charged with considering *all* evidence that is in the record, including lay evidence as well as medical evidence.[166] The evidence is later sorted based on relevance, credibility, then weight, but is never categorically excluded.[167] Lifting one fact out of context, while excluding the mention of other facts, would clearly be a lower-body adjudicative error, as well as logical error of fallacy of accent[168] if engaged in by the Veterans Court.

One example of fallacy of accent occurred in the Veterans Court precedent of *Horn v. Shinseki,* wherein the Board had made a litany of factual findings to support the finding that the Legg-Perthes disease the veteran had *before* service clearly and unmistakably did not worsen in severity *during* service.[169] The evidence relied on by the Board included that there was no hip injury during service, the brief period of service was less than two months, the veteran reported a pre-service history of left hip pain from Legg-Perthes disease since age six, a service doctor who was treating the veteran medically opined that the preexisting Legg-Perthes disease was not worsened by service, x-rays taken in

164. *Arnold H. Glasglow Quotes*, GOODREADS, INC., https://www.goodreads.com/author/quotes/1965567.Arnold_H_Glasow (last visited Oct. 23, 2020).

165. R. Chuck Mason, *Overview of the Appeal Process for Veterans' Claims*, CONG. RES. SERV. REP. 7–5700 (Sept. 19, 2016), https://fas.org/sgp/crs/misc/R42609.pdf.

166. 38 U.S.C. § 7104(a) (2018) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record"); 38 U.S.C. § 5107(b) ("Secretary shall consider all information and lay and medical evidence of record in a case"); 38 U.S.C. § 1154(a) (stating that Secretary should provide regulatory provisions as required by due consideration of "all pertinent medical and lay evidence").

167. *See* Jandreau v. Nicholson, 492 F.3d 1372, 1377 (Fed. Cir. 2007); Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009).

168. COPI, *supra* note 157, at 165 ("When a premiss relies for its apparent meaning on one possible emphasis, but a conclusion is drawn from it that relies on the meaning of the same words accented differently, the fallacy of *accent* is committed."). The way in which the meaning shifts in the fallacy of accent depends upon what parts of it may be emphasized or accented when the passage quoted is torn from its context. *Id*.

169. Horn v. Shinseki, 25 Vet. App. 231, 237, 245 (Vet. App. 2012). Under 38 U.S.C. § 1111 and 38 C.F.R. § 3.304(b), a veteran will be considered to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable evidence demonstrates that an injury or disease existed prior to and was not aggravated by service. To be considered "noted," the condition must be recorded in an examination report. 38 C.F.R. § 3.304(b) (2019). When a defect, infirmity, and/or disorder is not noted upon examination, to rebut the presumption of soundness, VA must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. *See* Wagner v. Principi, 370 F.3d 1089, 1092 (Fed. Cir. 2004).

service showed already severe deformity consistent with "old" Legg-Perthes disease, a service medical board (which included a physician) concluded there was no worsening during service, the medical board's opinion was based on careful review of clinical records, health records, and medical examination reports, the actual symptoms at service separation were identical to those prior to service, and that years after service x-ray findings and symptoms were also identical to the pre-service symptoms.[170]

Out of all these facts found by the Board relying on both lay and medical evidence, the Veterans Court selected a single fact based on one piece of medical evidence to frame the legal question as "whether a medical examination board (MEB) report containing only an unexplained[171] 'X' in a box on a form can constitute clear and unmistakable evidence of lack of aggravation."[172] This single fact was presented by the Veterans Court as the *only* fact in the case for which its rule of law depended.[173] The *Horn* majority omitted a host of contextual facts, documentary evidence, and other lay and medical evidence[174] relevant to the "legal" question it chose as the issue. Any question of what the "X" on one item of evidence meant could have been easily resolved by deference to agency expertise[175] acquired from routinely interpreting such medical board reports.

In its precedent in *Fountain*, the Board had weighed the evidence and found as a fact that symptoms of tinnitus had not been continuous since service, including that the appellant was not credible in recent reports that such

170. *Horn,* 25 Vet. App. at 237–38.

171. Labeling the "X" as "unexplained" is also an example of a misstatement or mischaracterization of the Board decision's findings as the Board decision had specifically found as facts that an October 1970 medical board included a physician, that the medical board carefully reviewed clinical records, health records, and medical examination reports, and that the medical board report included a medical opinion by a physician that the preexisting Legg-Perthes disease was not aggravated during service. This factual answer is contrary to the "holding" to which the court arrived, namely, that the medical board's "X" designation lacks any factual or evidentiary value to prove a disability did not get worse during service.

172. *Horn,* 25 Vet. App. at 233.

173. Even though the fact lifted from its context is a true fact, either standing alone without context or providing a new context could be misleading. *See* COPI, *supra* note 157, at 167 ("Even the literal truth can . . . deceive [when placed in a misleading context].").

174. *See Horn,* 25 Vet. App. at 245–46 (Lance, J., dissenting) (pointing out "that the majority understates the current evidence . . . in this case there are numerous pieces of evidence against the appellant's claim . . . [,and] there is other evidence in the record against the claim that the majority fails to acknowledge.").

175. Agency expertise includes the knowledge that medical boards include at least one physician, and that the "X" placed in a specific box is a medical opinion of non-aggravation by service. *See id.* (Lance, J., dissenting) (pointing out that even the significance of the "X" was inaccurately stated by the majority: "the mark on the MEB report is far from the only evidence against this claim," and that, as "to the MEB report itself, the mark . . . is not the only relevant portion . . . [in which] three doctors were unanimous in" the non-aggravation opinion).

symptoms had been continuous, first mentioning such symptoms twenty-nine years after service. The Veterans Court again engaged in out-of-context logical error by mischaracterizing that the Board only relied on two reasons for its credibility finding—absence of complaints of tinnitus symptoms during service and for many years after service,[176] and the failure to file a claim for VA benefits for years after service.[177]

The *Fountain* court omitted several of the Board's additional material findings of fact: the veteran's own contemporaneous lay history at service separation denying symptoms, the absence of medical findings, the affirmative act of filing four other VA compensation claims for other disorders while not claiming tinnitus, the significant post-service noise exposure doing road work for twenty-six years, the veteran's affirmative denial of tinnitus after service at an examination, a medical opinion that it was unlikely tinnitus was related to service, and multiple medical histories reported by the veteran that also did not mention tinnitus symptoms.[178]

These medical histories, which solicited reporting of known past and present symptoms, in the context of naming other disorders but omitting any mention of tinnitus, is a very different fact from just an "absence of complaints" in a context-free vacuum.[179] By its selective framing of evidence and findings, the Veterans Court showed little deference to the extensive facts found, and little deference to the Board's finding of fact that the recent reports of continuous post-service symptoms were outweighed by other evidence so were not credible.[180]

This out-of-context fallacy also makes its appearance in routine memorandum decisions of the Veterans Court. In one decision, the Veterans Court misleadingly suggested the Board decision relied only on one examination report in making a credibility finding, omitting reference to the Board's reliance on three other examination reports, medical treatment records, and the veteran's own lay histories presented at the examinations.[181] Another Veterans Court nonprecedential decision purported to find a Board deficiency in addressing an appellant's testimony but arrived at this conclusion by omitting several outcome-determinative Board findings of fact, including decades of smoking after service and a VA examiner's opinion that smoking caused the lung cancer.[182]

176. Fountain v. McDonald, 27 Vet. App. 258, 262 (2015).

177. *Id.*

178. *Id.* at 73–74, 260–61.

179. *Id.* at 262.

180. *Id.* at 272.

181. *See* Howell v. Wilkie, No. 17-1458, 2018 WL 2074128, at *1 (Vet. App. May 4, 2018).

182. *See* Bayes v. Shulkin, No. 16-1985, 2017 WL 3751677, at *2 (Vet. App. Aug. 31, 2017) (omitting the following Board findings of fact: that the veteran smoked for decades, the medical opinion and Board finding of fact that smoking was the cause of the lung cancer, the finding of fact of no nexus of lung cancer to agent orange or toxins, that the veteran was not at the Thailand base

When the Veterans Court vacates the Board's findings in such cases by finding deficiency with one or two findings lifted out of the factual context of the case, effectively removing the fact as found from the subsequent range of findings the Board may make, the court's *quasi*-relitigation of the fact unsettles the facts found by the Board. When the Veterans Court does this in a precedent, it props the precedent on a shaky foundation.

G. Ad Hominem *Fallacy (Attack on the Agency)*

"When you have no basis for an argument, abuse the plaintiff."

— *Cicero*[183]

Depicting the VA as an entity that exists for the purpose of denying veterans their well-deserved benefits, and who only reluctantly and by great force of law enforced by an appellate court,[184] pays such benefits, is another type of *ad hominem* logical fallacy.[185] This implication that the VA withholds or delays benefits usually travels together with an emotional appeal for benefits that, wishing for a different outcome, begs the very case question of whether the facts and law actually support the grant of benefits.[186]

during the time when it was sprayed with herbicides, and that service duties did not take the veteran to the perimeter of the military base).

183. DAVID S. SHRAGER & ELIZABETH FROST, THE QUOTABLE LAWYER 76 (1986).

184. For an example of how a Veterans Court single judge decision anachronistically and selectively lifted a mere four words from the 1886 U.S. Supreme Court case of Yick Wo v. Hopkins, 118 U.S. 356, 366 (1886), to attribute bad motives to the Board, see Pratt v. Wilkie, No. 19-0919, 2020 WL 2463070, at *5 (Vet. App. May 13, 2020) (stating that the requirement for a Board "statement of reasons or bases serves not only to help a claimant understand what has been decided, but also to ensure that *VA decisionmakers* do not exercise '*naked and arbitrary power*' in deciding entitlement to disability benefits") (emphasis added). Yick Wo involved a local city ordinance that discriminated against a Chinese non-citizen, and which involved questions from the U.S. Constitution's Fourteenth Amendment equal protection clause, as well as a mind-boggling host of further legal distinctions that include there was no VA until 1930 and no Board until 1936. The 'clear' implication that the Board in 2020, despite the legal obligations to follow laws, regulations, and thirty years of Veterans Court precedent, is inclined to exercise "naked and arbitrary power" to deny claims is nothing short of an explicit, unwarranted, and Veterans Court-dishonoring *ad hominem* attack.

185. *See* Saunders, *supra* note 6, at 345 (explaining more completely this type of logical fallacy).

186. *See*, *e.g.*, one citation to *Hayburn's Case*, routinely inserted in Veterans Court decisions:

> As "many unfortunate and meritorious [veterans], whom [C]ongress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined by a long one," 2 U.S. 408, 414 (1792); *see* 38 U.S.C. § 7112.

This unfortunate citation to *Hayburn's Case* for the proposition that a delay in getting benefits to veterans would leave veterans in financial ruin gives the reader of the Veterans Court decision the mistaken impression that VA is trying to delay payment of veterans' claims. An actual reading of *Hayburn's Case*, 2 U.S. at 413, shows that it was the Article III Courts who were refusing to pay pensions to veterans ("this Circuit court cannot be justified in the execution of that part of the act,

As applied to VA fact-finding, this logical fallacy presupposes that, because VA adjudications are performed for the purpose of denying benefits, VA adjudicative facts found do not deserve much deference, if any deference at all.[187] For a more explicit example of an *ad hominem* attack on VA and Board decisions, a recent dissent in a Veterans Court decision characterized a Board finding that the appellant could have filed for VA benefits as "a basic Board error and *thoughtless*" and "nothing more than a *heartless attempt to dehumanize a veteran.*"[188] Participation in such a logical fallacy is, of course, beneath the dignity of any appellate court, including the Veterans Court,[189] just as it is incompatible with clear error deference owed to the Board's fact-finding.

CONCLUSION

> "One precedent creates another and they soon accumulate and constitute law. What yesterday was a fact, today is doctrine."
>
> – *Junius*[190]

The Veterans Court's appellate role includes providing oversight based on the rule of law, sound logic, evidentiary principles designed to lend legal guidance for future cases, and error correction in Board decisions.[191] These aspirations are compromised when the court is lured to direct the outcome in the

which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States."). It was the Article II Executive Branch's U.S. Attorney General who interposed on behalf of the veteran who had claimed for pension because the Court had refused to hear the veteran's case and provide the relief the veteran sought. Of course, citation to *Hayburn's Case* in a veterans' law context is highly questionable. First, there are now distinguishing features of an established VA, decades of statutory and regulatory benefits authorizations, administrative law due process and property "entitlement" protections, all reinforced by a body of case law by the Veterans Court. Second, the real legal significance of *Hayburn's Case* was the separation of powers of the three branches of the federal government under the U.S. Constitution, not which branch was trying to force payment of *ad hoc* veterans benefits and which branch was refusing to pay the benefits. For a review of the extensive layers of due process in veterans' benefits law, see Michael P. Allen*, Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 502 (2011).

187. Saunders, *supra* note 6, at 345.

188. Taylor v. Wilkie, 31 Vet. App. 147, 158 (2019) (Greenberg, J., dissenting) (emphasis added) (providing another example of ad hominem attack on VA by anachronistically attributing "bad acts" of the military service department nerve agent experimentation decades earlier to the current VA adjudication); *id.* at 162 ("VA attempts to separate itself from the bad acts of the Department of Defense. Yet, VA serves as part of one Government.").

189. This both ironic and misleading *Hayburn's Case* quotation, which heretofore had routinely found its way to single judge memorandum decisions, recently was inserted into Veterans Court precedents. *See, e.g.*, Golden v. Shulkin*,* 29 Vet. App. 221, 226 (2018); Petermann v. Wilkie, 30 Vet. App. 150, 156 (Vet. App. 2018).

190. 1 JUNIUS, THE LETTERS OF JUNIUS 3 (1772).

191. 38 U.S.C. § 7261(a).

case immediately before it,[192] including by creative reinterpretations of facts found in a case.

Fact-finding consumes the Veterans Court's resources relitigating facts already found. Non-deferential treatment of the Board's findings functions as a *quasi*-relitigation of the facts in a case, undermining any *res judicata* effect of the facts found by the Board. In the short term, the Veterans Court has averted such drain of resources by extensive use of joint motions for remand, which are agreements by VA and the appellant that are filed with the court Clerk to remand the case.[193] As these joint motions for remand are not substantively reviewed by a judge of the court, the veteran-appellant never benefits from a substantive review of his or her case because a Veterans Court judge never saw the case that bears the imprimatur of court order.[194]

Forcing the Board to relitigate the facts of a case on remand from the court, whether by a joint motion or single judge decision, creates a delay of other cases before VA and the court, and suggests to an appellant in most cases that there is more merit to a case than is actually present. In reality, only a small percentage of those cases remanded by the court materialize in monetary benefits to the appellant.[195]

In theory, the facts of the case are to drive the case to its inevitable legal conclusion, creating a *stare decisis* effect that leads to the same legal conclusion in subsequent factually similar cases, creating consistent Veterans Court rulings. Matter of law holdings by the Veterans Court rendered in cases unsupported by the factual premises necessary to that holding create *quasi-dicta* that render unclear any *stare decisis* effects of the Veterans Court's holding. Such an overly broad rule resembles legislation or policy making that belongs to the other branches of government. Such an over-broad rule made without factual predicates will lead to overbroad and questionable applications to cases with different facts. The court's broad rules have to be implemented by VA adjudicators who have been handed such abstract rules without a guiding context.

192. Koch, *supra* note 25, at 527 (arguing that, if courts were to review the findings of administrative tribunals "with any depth, they would be paralyzed and unable to perform more important functions. . . . If we mire the courts in the mass of specific factual decisions, even controversial ones, made by the bureaucracy, we will prevent the courts from performing much more important functions to which they can make a greater contribution. Thus, the courts may have the capacity to review findings of specific fact very closely but should not.").

193. Hillary Bunker et al., *Reforming the Equal Access to Justice Act to Maximize Veterans' Receipt of Benefits and Increase Efficiency of the Claims Process*, 4 VETERANS L. REV., 206, 214 (2012).

194. *Id.* at 208.

195. Ridgway & Ames, *supra* note 13, at 305 (arguing that "years of data on decisions by both the CAVC and the Board indicate that these remands do not translate into either more favorable outcomes for the individual veterans or useful systemic changes" and has not changed the rate at which the Board grants claims).

The technique of lifting one fact out of its larger factual context calls into question any precedential value of the court's "holding," leaving confusion in its wake as to whether the holding only applies when the narrowly emphasized fact (for example, an "X" on a medical board report) is repeated in a future case.[196] If a rule of law can be announced in any case without regard to the facts of that case, then every statement penned by the Veterans Court in panel decisions for the last thirty years is potentially a precedent.

This uncertainty as to precedential value risks creating precedent fatigue by VA adjudicators left to search and divine actual holdings among *dicta*.[197] Ethereal declarations in *dicta*, whether they claim to be precedent or not, necessarily dilute the value of the Veterans Court's actual precedents, which can only succeed with the force of law intended if they are clear, logical, and make sense on a recognizable set of similar facts.

The Veterans Court diminishes its reputation in the veterans' law community as the law guide when it steps down to rearrange facts or downplay the significance of the facts already found in a case. When the court injects its outcome preferences by second-guessing inferences drawn from the evidence and reweighing evidence, or begs the question as to whether the facts support the payment of benefits in a given case, it takes on the narrow, inappropriate role of a party to the litigation. The Veterans Court should leave the partisan role to appellate representatives, who, in contrast, have no broad duty to ensure a fair system, but a duty only to try to change the case outcome, and who are paid even if the result is a remand from the court that never results in any compensation to the veteran-appellant. Trading its reputation as a fair arbiter of the legal questions brought before it is a dear price for the Veterans Court to pay for short-term change of specific case outcomes.

As any *ad hominem* rhetoric from any corners of the Veterans Court only feeds the facts-be-damned blogosphere lore that the VA disability compensation system is adversarial and imbalanced against veterans, this causes veterans to be even more dissatisfied with the VA disability compensation system. For all the due process layers that have created a multi-year evolution VA claims process, the VA disability compensation system is still very adept at maximizing VA compensation benefits. When the frustrations with the Congressional add-on designs of the VA disability system are personalized into motives attributable to VA adjudicators, this lose-lose rhetoric unnecessarily diminishes veterans' confidence in the VA disability compensation system.

Who can remedy the Veterans Court's fact-finding deference practices but the Veterans Court itself? While the Federal Circuit Court in recent years has

196. *Horn,* 25 Vet. App. at 233.

197. *See* the "Court" perspective of the Board in Jeffrey Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 216 (2009).

heard more veterans law cases on purely legal questions, the Veterans Court's fact deference practices are unchecked and unreviewable due to the limited Federal Circuit jurisdiction over the Veterans Court.[198] The Federal Circuit Court's jurisdiction over Veterans Court judgments is narrowly limited to rules of law or statute or regulation,[199] and only those laws or regulations the Veterans Court cites and says it relies on. VA cannot appeal the Veterans Courts' handling of fact-finding in Board decisions, or how the Veterans Court applied a law or regulation that affects the facts in a given case.[200] The Veterans Court's remands for ostensibly better reasons and bases are also not reviewable as there is not yet a final decision to appeal.

For these reasons, the Veterans Court's treatment of facts and the Board's fact-finding, for all practical purposes, become the law of the case to be understood to the extent possible and, to that extent, to be followed. This leaves the Veterans Court to self-police its fact deference to Board decisions. This Article urges the Veterans Court to examine its current practices and to guard against techniques or logical fallacies that would lure the court toward anything less than clear error deference to the Board's fact-finding.

198. The Federal Circuit "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d); Andino v. Nicholson, 498 F.3d 1370, 1373 (Fed. Cir. 2007) (stating, when vacating and remanding the Veterans Court's affirmation of Board decision that a letter was sufficient evidence to sever service connection, but not finding clear error because the case involved a weighing of the evidence, that "making credibility determinations or weighing evidence" involves fact finding that "is beyond our jurisdiction." "Even with a mountain of evidence which contradicts a fact finding, we cannot disturb this finding on appeal."); Prinkey v. Shinseki, 735 F.3d 1375, 1383 (Fed. Cir. 2013) (holding that the Federal Circuit did not have jurisdiction to review the facts underlying an assessment of CUE by the Veterans Court).

199. For an overview of Federal Circuit jurisprudence regarding veterans' law, see Victoria Hadfield Moshiashwili, *Ending the Second "Splendid Isolation"?: Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437, 1449 (2014).

200. *Id.*