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Key Lessons from Two Recent Veterans Law Precedents: *Bilharz and Stewart*

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11.0—Veterans' claims.

Two recent decisions by the Court of Appeals for Veterans Claims (Court) are likely to have significant impact on veterans' rights and Veterans Affairs (VA) procedures, with an end to the fair process doctrine and an affirmation of the Court's ability to reverse and reinstate benefits when VA misapplies the law to sever or reduce.

Bilharz v. Collins: End of the Fair Process Doctrine

In *Bilharz v. Collins*,³ the Court addressed critical questions regarding due process and procedural fairness in VA adjudication. This consolidated appeal involved two veterans, Bilharz and Pinto, whose cases presented distinct but related procedural challenges. Both

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³ Case No. 22-6158 (Vet. App. 2025), decided on August 14, 2025.

veterans experienced a common procedural scenario that has become increasingly prevalent since the Appeals Modernization Act (AMA): they participated in Board hearings conducted by one Veterans Law Judge (VLJ), but their claims were ultimately decided by a different VLJ. This split-decision process raised the questions about procedural fairness that have lingered since the AMA took away veterans' right to have the same judge who conducts their hearing also render the final decision on their claims.

The Evolution of Fair Process Doctrine

The Court's analysis began with examining the statutory and regulatory landscape governing VLJ proceedings. The AMA's removal of the previous statutory requirement that the same VLJ conduct both the hearing and decision—the “continuity” requirements—left veterans without explicit statutory or regulatory protection ensuring that the person who was able to see and hear the veteran testify is the same person who decided the claim.

With no direct statutory or regulatory provisions addressing this procedural gap, the Court turned to examine what alternative protections might exist. The analysis focused on two potential sources of procedural protection: constitutional due process rights and the “fair process doctrine,” a concept the Court had developed.

The Federal Circuit's decision in *Cushman v. Shinseki*⁴ established that procedural due process rights apply to VA benefits claims. Before this decision, the Court had developed the fair process doctrine as a gap-filling measure to ensure procedural fairness where specific statutory or regulatory guidance was absent.

In *Biharz*, the Court recognized that the two concepts serve identical functions in protecting veterans' procedural rights: “[I]n accordance

⁴ 576 F.3d 1290 (Fed. Cir. 2009).

with recent Federal Circuit precedent, “[t]he fair process doctrine is a recognition that due process applies in the claimant process.”⁵ This represents a significant convergence of two previously distinct analytical frameworks.

Due Process Analysis Under *Mathews v. Eldridge*

Having established that fair process and due process are equivalent, the Court applied the well-established *Mathews v. Eldridge*⁶ framework to evaluate whether the procedure violated veterans' constitutional rights. The *Mathews* test requires balancing three factors: (1) the private interest affected, (2) the risk of erroneous deprivation without additional procedures, and (3) the government's interest, including fiscal and administrative burdens.

Private Interest: Veterans have a substantial property interest in their benefits claims, representing potentially significant monthly compensation for service-connected disabilities. These benefits often constitute crucial financial support for veterans and their families, making the private interest factor weighty in the constitutional analysis.

Risk of Erroneous Deprivation: The Court examined whether having different VLJs conduct hearings and write decisions creates a meaningful risk of erroneous claim denials. The analysis focused on whether the decision-writing VLJ, who did not personally observe the veteran's testimony, might make different credibility determinations or miss important nuances from the hearing.

Government Interest: The Court considered VA's administrative efficiency concerns and resource constraints. The process allows for greater flexibility in case management and may reduce processing

⁵ Frantzis v. McDonough, 35 Vet.App. 354 (2022), aff'd, 104 F.4th 262 (Fed. Cir. 2024), at 266.

⁶ 424 U.S. 319 (1976).

delays, representing legitimate governmental interests in efficient adjudication.

After applying this balancing test, the Court concluded that due process is not categorically violated when different VLJs conduct hearings and write decisions. The Court found that the potential benefits of the current system, combined with other procedural safeguards, generally provide sufficient protection against erroneous deprivations.

As-Applied Due Process Violations

While rejecting a categorical due process violation, the Court recognized that specific circumstances could create as-applied constitutional violations. The Court provided a clear example: if a hearing VLJ explicitly tells a veteran that their testimony was highly credible, but the decision-writing VLJ subsequently finds the veteran not credible without adequate explanation, this could constitute an as-applied due process violation.

This framework provides important guidance for identifying problematic cases while maintaining the general validity of the process. It suggests that veterans and their representatives should carefully document any positive credibility assessments or other encouraging statements made during hearings, as these could form the basis for as-applied challenges if contradicted in subsequent decisions.

VLJ Hearing Duties and Regulatory Evolution

The Court's analysis of VLJ hearing duties revealed significant changes in regulatory language and requirements following the AMA's implementation. Under the legacy appeals system, 38 C.F.R. § 3.103(c)(2) explicitly required that claimants be entitled to hearings "at any time" and mandated that presiding VA employees must "(1) explain

the issues and (2) suggest the submission of any evidence that may have been overlooked.”

The AMA amendments modified this language, changing “hearing at any time” to “before VA issues notice of a decision on an initial or supplemental claim.” However, VA clarified during the notice-and-comment process that this change was not intended to alter the Board’s substantive duties during hearings after the decision on an initial or supplemental claim.

The current AMA regulation, 38 C.F.R. § 20.705, discusses VLJ hearing duties but lacks explicit language requiring explanation of issues or suggestions regarding additional evidence. However, the Court noted that the regulatory list of duties is non-exhaustive, suggesting that additional obligations may be implied or derived from other sources.

The Pinto Case and Procedural Violations

The Pinto case provided a concrete example of how these hearing duties translate into practical requirements. The Board denied Pinto’s claim because he failed to submit private treatment records. Critically, however, the VLJ who conducted Pinto’s hearing never asked him to provide these records or explained that they might be necessary for his claim.

The Court found this situation constituted a violation of 38 C.F.R. § 20.705, reasoning that the Board cannot deny a claim for failure to submit evidence that the VLJ never requested during the hearing. This holding establishes an important principle: there must be procedural consistency between hearing conduct and decision rationales.

CCK Law Analysis

The *Bilharz* decision provides clarity for veterans’ appeals practice while maintaining VA’s operational flexibility. By aligning fair process doctrine

with constitutional due process and applying the *Mathews* framework, the Court created a more coherent analytical structure for evaluating procedural challenges in VA adjudication.

The decision's practical impact lies primarily in its protection against as-applied violations and its clarification of VLJ hearing duties. Veterans and representatives now have clearer standards for identifying when split-decision procedures may violate due process, particularly in cases involving conflicting credibility assessments.

Additionally, the Court's analysis of hearing duties reinforces the importance of VLJs actively fulfilling their obligation to assist veterans in developing their claims. The Pinto case demonstrates that failure to request necessary evidence during hearings cannot later be used as grounds for claim denial.

This decision reflects the ongoing evolution of veterans' benefits law as it adapts to AMA procedures while preserving fundamental fairness protections. The Court successfully balanced administrative efficiency concerns with due process requirements, creating a framework that protects veterans' rights while acknowledging the practical realities of modern VA adjudication.

This being said, the *Mathews* elements are a more complex analysis than the fair process doctrine, which may place a greater burden on veterans.

Stewart v. Collins: When VA Incorrectly Severs or Reduces Benefits, the Court Can Reverse and Reinstate

Richard A. Stewart, a Marine Corps veteran who served from 1963-1967, was awarded Total Disability Individual Unemployability (TDIU) based on his post-traumatic stress disorder (PTSD) in June 2022. In September 2022, a VA regional office (RO) granted him Special Monthly

Compensation (SMC) under 38 U.S.C. § 1114(s), effective February 28, 2018. However, in February 2023, VA determined this SMC award was based on clear and unmistakable error (CUE) and proposed to discontinue it. The Board of Veterans' Appeals (Board) upheld this discontinuance in November 2023, leading to Stewart's appeal to the U.S. Court of Appeals for Veterans Claims.

Legal Context

SMC under § 1114(s) requires two components: (1) a service-connected disability rated as total (the “100% requirement”), and (2) additional service-connected disabilities independently ratable at 60% or more combined (the “60% requirement”). A TDIU rating can satisfy the first requirement only if the veteran's unemployability is based on a single disability.

The Court's Analysis

Primary Issue: Nature of SMC

The Court's most significant holding addressed whether SMC constitutes “service connection” subject to severance under 38 C.F.R. § 3.105(d), or whether it is a form of compensation subject to different regulatory procedures.

The Court distinguished service connection and SMC. Service connection refers to the determination that a disability was incurred or aggravated during military service; SMC, by contrast, is a monetary benefit paid monthly to veterans with additional service-related hardships beyond those contemplated by standard disability ratings. The Court emphasized that SMC is compensation that “varies according to the nature of the veteran's service-connected disabilities” rather than a determination about service-relatedness itself.

Discontinuing SMC “reduces the amount of monthly compensation a veteran receives—by eliminating the extra compensation for a service-connected disability or disabilities—but that action does not speak to whether VA continues to recognize his or her disabilities as related to service.”

Board's Procedural Errors

The Court identified several critical errors in the Board's decision:

- 1. Wrong Legal Standard Applied** — The Board incorrectly applied § 3.105(d) (severance of service connection) when it should have applied a different subsection of § 3.105 governing reductions in compensation. Both parties agreed this was error.
- 2. Failure to Address the Correct CUE Theory** — The regional office's May 2023 CUE finding focused on whether Stewart's TDIU was properly based on a single disability (the 100% requirement). However, the Board completely ignored this issue and instead found CUE only regarding the 60% requirement - that no single additional disability was rated 60% or more. This represented a fundamental jurisdictional problem, as the Board can only address CUE theories that were first adjudicated by the regional office.
- 3. Misstatement of Legal Requirements** — The Board erroneously stated that SMC required “one other single disability” rated 60% or greater, when established Federal Circuit precedent in *Gazelle v. Shulkin*⁷ clearly held that the 60% requirement “can be met by combined disabilities.”
- 4. Failure to Address Favorable Findings** — The Board failed to acknowledge or analyze the binding favorable findings made by the regional office when initially awarding SMC. Under 38 C.F.R. §§ 3.104(c)

⁷ 868 F.3d 1006 (Fed. Cir. 2017).

and 20.801(a), favorable findings are binding unless rebutted by evidence of CUE, but the Board provided no such analysis.

Remedy Analysis

The Court rejected the Secretary's request for remand, applying the principle from *Horn v. Shinseki*⁸ that courts should not provide VA "yet another opportunity to generate more evidence to make up the shortfall" when the government fails to carry its burden of proof.

The Secretary's admission that VA was seeking remand "to better explain why it discontinued SMC(s) or to again attempt to discontinue that benefit" demonstrated that this was precisely the type of situation where remand would be inappropriate. The Court noted: "The Court would not remand a case when a veteran fails to carry a point on which he or she has the burden of proof; it would be unseemly to so accommodate VA and the Board as to matters on which the Government has the burden of proof."

Holding and Disposition

The Court held that:

- 1. SMC is not service connection** — SMC discontinuance should not be analyzed under severance standards but under provisions governing compensation reductions.
- 2. VA failed to carry its burden** — The combination of applying the wrong legal standard, failing to address the actual CUE theory, misstating legal requirements, and ignoring favorable findings meant VA's discontinuance was "fatally flawed."
- 3. Reversal and reinstatement required** — Given VA's failure to comply with applicable law, the proper remedy was reversal of

⁸ 25 Vet. App. 231 (2012).

the discontinuance and reinstatement of SMC benefits as of August 1, 2023.

CCK Law Analysis

The dispute in this case was about remedy. The parties agreed that the Board did not apply the law correctly when it discontinued the Veteran's SMC-S award. We argued that because it was VA's burden to prove that the discontinuance was required, and it failed to satisfy that burden by applying the law incorrectly, the Court should reverse the Board's decision. The Secretary insisted that remand was required for the Board to provide better reasons for discontinuing the benefit.

The supplemental briefs and oral argument focused largely on whether the Board even had jurisdiction to discontinue SMC on the basis that it did, and what was the appropriate remedy. The Court avoided the jurisdictional issue, finding that because SMC is a rate of compensation and not an award of service connection, the Board erred by applying 38 C.F.R. § 3.105(d), which governs severance of service connection. The Court also declined to answer which subsection of 3.105 applied. It determined that regardless, the Board "attempted to stop or reduce payment to a veteran but failed to comply with the appropriate law," so reversal was required.

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