

## LAW REVIEW<sup>1</sup>

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### **Hamilton v. McDonough: Does the Attorney Work-Product Doctrine Apply to FTCA Files?**

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#### **11.0—Veterans' claims**

The U.S. Court of Appeals for Veterans Claims (CAVC) case of Terry L. Hamilton v. Denis McDonough, Secretary of Veterans Affairs, No. 22-3726, addressed whether the Department of Veterans Affairs (VA) must consider the documents from a Federal Tort Claims Act (FTCA) claim file as part of a veteran's VA claims file when adjudicating claims under 38 U.S.C. § 1151.

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The case, argued on January 23, 2024, and decided on May 23, 2024, involved novel questions about the intersection of veterans' benefits law, the attorney work-product doctrine, and the Privacy Act. The CAVC noted that attorney work-product doctrine was a "new concept" for the court, given the non-adversarial nature of most VA proceedings.

However, FTCA claim files were not prepared with the same duty to assist, so VA's arguments about attorney work product needed consideration.

## Background

Veterans who suffer injuries due to negligent VA medical treatment have two primary avenues for seeking redress: they can file for damages under the FTCA or seek monthly compensation under 38 U.S.C. § 1151.<sup>4</sup> The FTCA allows for monetary damages for injuries resulting from negligence by federal employees, including VA healthcare providers, and requires that veterans first present an administrative claim to VA before proceeding to federal court.<sup>5</sup> In contrast, Section 1151 provides monthly compensation for additional disabilities resulting from VA medical care that was negligent or erroneous.<sup>6</sup> Importantly, a veteran can pursue both types of claims, but any award under Section 1151 must be offset by the amount received in an FTCA settlement.<sup>7</sup>

Terry L. Hamilton served in the Army from 1969 to 1971.<sup>8</sup> His case stemmed from events in 2013, when he sought medical treatment from VA medical centers multiple times for symptoms including dizziness, back pain, lack of energy, loss of appetite, and significant weight loss.<sup>9</sup>

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<sup>4</sup> *Smith v. United States*, 7 F.4th 963, 973 (2021).

<sup>5</sup> 28 U.S.C. §§ 1346(b)(1), 2675,

<sup>6</sup> 38 U.S.C. § 1151.

<sup>7</sup> *Id.* § 1151(b)(2).

<sup>8</sup> *Hamilton v. McDonough*, 7 Vet.App. 228, 234 (2024).

<sup>9</sup> *Id.* at 234-35.

Despite these symptoms and concerns raised by his niece, an oncology nurse, Hamilton's cancer diagnosis was delayed until he was admitted to a non-VA emergency room, where he was diagnosed with stage 4 non-Hodgkin's lymphoma (NHL).<sup>10</sup> Following his diagnosis and treatment, which included chemotherapy and subsequent complications like atrial fibrillation and neuropathy, Hamilton filed an FTCA claim alleging VA negligence in failing to timely diagnose his cancer. VA settled his FTCA claim in 2014.<sup>11</sup>

In December 2015, Hamilton filed claims under Section 1151 for his NHL, atrial fibrillation, and neuropathy.<sup>12</sup> A VA examiner concluded that Hamilton's conditions were not caused or worsened by VA treatment, and the Regional Office (RO) relied on this opinion to deny his claims.<sup>13</sup> Hamilton appealed to the Board of Veterans' Appeals (Board), which also denied the claims, noting the absence of evidence related to the FTCA settlement in the VA claims file.<sup>14</sup> The Board did not address whether VA had a duty to assist Hamilton in obtaining the FTCA claim file or whether it should be considered constructively part of VA claims file.<sup>15</sup>

## **Legal Issues**

Hamilton's primary argument on appeal was that the FTCA claim file should be considered part of his VA claims file under the doctrine of constructive possession.<sup>16</sup> This doctrine holds that evidence within the Secretary of Veterans Affairs' control that could reasonably be expected to be part of the record is constructively part of the administrative

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<sup>10</sup> *Id.* at 235.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

record, even if not physically included.<sup>17</sup> Alternatively, Hamilton contended that VA had a duty to assist him by obtaining and associating the FTCA claim file with his VA claims file.<sup>18</sup>

The Secretary of Veterans Affairs argued that the FTCA claim file is protected from disclosure by the attorney work-product doctrine and the Privacy Act.<sup>19</sup> The attorney work-product doctrine, established in *Hickman v. Taylor*, protects materials prepared by attorneys in anticipation of litigation from being disclosed.<sup>20</sup> The Privacy Act provides individuals with access to federal agency records about themselves but includes exemptions for records compiled in anticipation of litigation, aligning with the work-product doctrine.<sup>21</sup>

## **Relevant Laws**

### **Duty to Assist and Constructive Possession**

The Secretary of Veterans Affairs has a statutory duty to assist claimants in obtaining evidence necessary to substantiate their claims for benefits, as outlined in 38 U.S.C. § 5103A.<sup>22</sup> This duty includes obtaining relevant service medical records, VA medical or examination records, and any other pertinent records held by federal agencies that the claimant identifies and authorizes the Secretary to obtain.<sup>23</sup> The duty to assist continues until the records are obtained or it becomes reasonably certain that the records do not exist or that further efforts to obtain them would be futile.<sup>24</sup>

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<sup>17</sup> *Id.* at 236 (citing *Euzebio v. McDonough*, 989 F.3d 1305, 1319 (Fed. Cir. 2021)).

<sup>18</sup> *Id.* at 235

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 237-38 (citing *Hickman v. Taylor*, 329 U.S. 495, 514 (1947)).

<sup>21</sup> 5 U.S.C. § 552a(d)(1).

<sup>22</sup> 38 U.S.C. § 5103A(a).

<sup>23</sup> *Id.* at § 5103A(c)-(d)(2)(C).

<sup>24</sup> *Id.* at § 5103A(b)

The doctrine of constructive possession relates closely to the duty to assist. It holds that evidence within the Secretary's control, and reasonably expected to be part of the record, is constructively part of the administrative record.<sup>25</sup> This doctrine ensures that VA adjudicators consider all relevant and reasonably connected documents generated by VA, even if they are not physically part of the claims file.<sup>26</sup>

### **Attorney Work-Product Doctrine**

The attorney work-product doctrine protects materials prepared by attorneys in anticipation of litigation from being disclosed to opposing parties.<sup>27</sup> This protection is meant to ensure that attorneys can prepare their cases without undue interference or fear that their legal strategies will be revealed. However, this doctrine does allow for the discovery of relevant, non-privileged facts if there is a substantial need and undue hardship in obtaining equivalent materials otherwise.<sup>28</sup>

The doctrine applies even in cases where no actual litigation occurred, given that it is not always clear whether a settlement will take place when attorneys are producing work product.<sup>29</sup>

### **Privacy Act**

The Privacy Act allows individuals to access records held by federal agencies that pertain to them but includes exemptions for records compiled in anticipation of litigation.<sup>30</sup> This exemption aligns with the protections provided by the work-product doctrine, allowing certain materials prepared for litigation to remain confidential.<sup>31</sup>

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<sup>25</sup> *Euzebio*, 989 F.3d at 1319.

<sup>26</sup> *Lang v. Wilkie*, 971 F.3d 1348, 1354 (Fed. Cir. 2020).

<sup>27</sup> Fed. R. Civ. P. 26(b)(3)(A).

<sup>28</sup> *Id.* at (b)(3)(A)(ii).

<sup>29</sup> See *id.* at (b)(3)(A).

<sup>30</sup> 5 U.S.C. § 552a(d)(1), (5).

<sup>31</sup> See 5 U.S.C. § 552a(d)(5); *Hamilton*, 37 Vet.App. at 238-239; Fed. R. Civ. P. 26(b)(3)(A).

## The Court's Analysis

### **Attorney Work-Product Protections Still Apply**

The court acknowledged that the FTCA claim file likely contained relevant information to Hamilton's Section 1151 claims and that the traditional elements for constructive possession had been met.<sup>32</sup> However, the court also recognized the protections offered by the attorney work-product doctrine and the Privacy Act and agreed that these legal principles must be maintained to protect certain materials prepared in anticipation of litigation, allowing attorneys to prepare cases without fear that their work would be freely accessible to adversaries.<sup>33</sup> The duty to assist under section 5103A does not nullify the limitations on disclosure under the work-product doctrine and section 552a(d)(5) with respect to an FTCA claim file.<sup>34</sup>

### **No Blanket Exemptions**

That said, CAVC determined that neither the attorney work-product doctrine nor the Privacy Act grants the Secretary a blanket exemption from disclosing all documents within the FTCA claim file.<sup>35</sup> VA's duty to assist means that VA cannot withhold an entire FTCA claim file based solely on the protections of the work-product doctrine and the Privacy Act.<sup>36</sup> The court stated that while VA may invoke the work-product doctrine or exemption five of the Privacy Act to argue that the contents of the FTCA claim file should not be disclosed to a veteran, made part of the VA claims file, or considered by VA adjudicators when adjudicating the merits of a section 1151 claim, VA must differentiate between protected and unprotected types of information.<sup>37</sup> Facts contained

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<sup>32</sup> *Hamilton v. McDonough*, 37 Vet.App. at 237.

<sup>33</sup> *Id.* at 239-40.

<sup>34</sup> *Id.* at 240.

<sup>35</sup> *Id.* at 232.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

within the file are generally disclosable, whereas opinions, legal strategies, and similar materials are not.<sup>38</sup> The court held that the Board must review the contents of the file, segregate protected opinions and legal strategies from unprotected facts, and associate the relevant unprotected information with the VA claims file to comply with the duty to assist.<sup>39</sup>

Therefore, because VA never attempted—even in a manner consistent with the work-product doctrine or the Privacy Act—to associate Mr. Hamilton's FTCA claim file with his VA claims file, CAVC concluded that the Board failed to ensure that VA satisfied its duty to assist.<sup>40</sup>

### **Suggested Procedure for a VA “Privilege Log”**

Using the Federal Rules of Civil Procedure and typical civil cases as a framework, the court suggested a process by which VA could apply the protections of the work-product doctrine and the Privacy Act to specific information rather than entire classes of documents.<sup>41</sup>

First, 38 C.F.R. § 1.511 seems to appoint a VA regional counsel as the appropriate record custodian of the tort claims file. 38 C.F.R. § 1.511(a)(2) (2023) ... VA adjudicators at the agency of original jurisdiction responsible for developing the VA claims file can request the FTCA claim file from the regional counsel having jurisdiction over Mr. Hamilton's case. A regional counsel will then have several options: turn over the claim file in its entirety, or only those portions of the file that counsel believes are unprotected and submit a privilege log of the withheld information. If the veteran disputes the extent of the regional counsel's claimed

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<sup>38</sup> *Id.* at 243.

<sup>39</sup> *Id.* at 232.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 242.

privilege, the Board can conduct an in camera-style review of the contested materials and make a formal, written decision as to what is disclosable and what is not. This decision should be sufficiently detailed to facilitate review by this Court—including an explanation of the relevant privilege and why the material is protected. The Board should be guided by the basic principle that, while *materials* that constitute attorney work product are protected from discovery, the underlying *facts* of those materials may still be discoverable. *See* FED. R. CIV. P. 26(b)(3); *United States v. All Assets Held at Bank Julius Baer & Co., Ltd*, 270 F. Supp. 3d 220, 226 (D.D.C. 2017). Consistent with its reasons or bases requirement, the Board should then weigh the disclosable evidence in adjudicating Mr. Hamilton's section 1151 claims. *See Faust v. West*, 13 Vet.App. 342, 357–58 (2000) ("As a general matter, VA should not consider in its decisions any evidence not made available to the claimant").<sup>42</sup>

CAVC concluded by reiterating that VA was free to adopt a different approach, as long as VA implemented the general legal structure the court had outlined in its opinion.<sup>43</sup>

## **Conclusion**

To reconcile VA's duty to assist veterans with its right to maintain the confidentiality of certain documents, CAVC suggested procedures that VA might use to assess the contents of the FTCA claim file, segregate protected from unprotected information, and ensure that unprotected information is associated with the VA claims file to fulfill the duty to assist.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

The court then vacated the Board's decision and remanded the case for further proceedings consistent with its opinion.

The court's ruling underscores the importance of transparency and thoroughness in VA's adjudication process, ensuring that veterans have access to all relevant evidence while maintaining necessary confidentiality.

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