BERGMANN & MOORE, LLC

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Quarterly Court Case Analysis

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Willen v. Collins
__ Vet. App. ___ (2025)
May 21, 2025

Bottom Line Up Front:
The Court of Appeals for Veterans Claims (CAVC) held that a Board remand can contain a final decision that is appealable to the CAVC even when the remand order is not labeled as a denial.

This case is good for Veterans but applies to a relatively narrow set of circumstances.

What happened in *Willen*:

- In November 2023, the Board remanded Mr. Willen's claims for a higher rating for major depression disorder and TDIU.
- Within that remand, in a section labeled "Preliminary Matters", the Board stated that "the appeal period could not begin earlier than April 11, 2016."
- Mr. Willen appealed this to the CAVC, arguing it was effectively a final denial of an earlier effective date for increased evaluations.
- He CAVC agreed holding that the Board's treatment of an issue can be a final denial even if not formatted as a denial.

Why *Willen* is important:

- This decision clarifies that a "remand" can include final decisions, which are subject to an appeal.
- The CAVC's decision means that sometimes a decision from VA may include a final determination on a matter even if it isn't formatted like a decision on that issue.

What VSOs Should Do*Loyd*: VSOs should follow the government's own guidance: if you see something, say something. Carefully read all decisions from VA, including any remands from the Board or deferred rating decisions from the RO. If you think any part of those decisions includes a denial of part of the Veteran's claim, be sure to seek additional review or appeal of that issue.

Analysis of
Perkins v. Collins
__ Vet. App. __ No. 22-59986515
16, 2025

Bottom Line Up Front:
The Court of Appeals for Veterans Claims (CAVC) held Veterans can qualify for both Montgomery GI Bill (MGIB) and Post 9/11 GI Bill benefits even with a single period of service if they meet the eligibility requirements for both programs without using the same period of service twice. They can receive up to the statutory 48- month cap of total education benefits under both programs. This is good for Veterans because it means that Veterans can receive benefits under both the Montgomery GI Bill and Post-9/11 Bills.

What happened in *Perkins*:

- Veteran Kassidy Perkins served on active duty from August 2014 to August 2020.
- While still in service, she was admitted to Wesleyan University, and in October 2019 sought Post-9/11 educational benefits.
- VA issued a certificate of eligibility for Post-9/11 benefits and notified Ms. Perkins that it had made an alternative election on her behalf to relinquish entitlement to Montgomery GI Bill benefits.
- Ms. Perkins appealed that alternative election to the Board of Veterans' Appeals (Board) arguing that her 6-year period of service entitled her to benefits under both the Montgomery GI Bill and the Post-9/11 GI Bill.
- The Board denied the appeal and distinguished the Supreme Court's decision in *Rudisill v. McDonough* only applied to Veterans with *two separate* qualifying periods of service (two DD-214's) and Ms. Perkins only had a single period of service. On appeal to the CAVC, Ms. Perkins argued that the length of her service, not the number of separate periods, was the key factor in eligibility to both programs.

- She highlighted that the majority in *Rudisill* expressly focused on the length of Mr. Rudisill's service rather than the fact that he had two

separate periods of service when it was found he was entitled to both benefits.

What the Court Decided:
The CAVC agreed with Ms. Perkins and concluded that "*Rudisill* essentially decides this case for us." Ms. Perkins, just like Mr. Rudisill, is entitled to both benefits up to the 48-month statutory maximum allowed by law.

- The service time qualifies for both programs.
- The Veteran isn't using the *same time* to qualify for both programs.

Why *Perkins* is important:

- VSOs can assist Veterans who served a "long" period of active duty and qualify for MGIB & PGIB.
- VA **cannot** automatically force Veterans to forfeit the MGIB because they used their PGIB.
- Veterans may now receive up to 48 total months of educational benefits between the two programs.

Suggested argument based upon *PerkinsLoyd*: Requests for education benefits under both the Montgomery GI Bill and Post-9/11 GI Bills are appropriate as part of an initial claim using VA Form 22-1990, a Supplemental Claim using VA Form 20-0995, Higher-Level Review requests using VA Form 20-0996, and Notices of Disagreement using VA Form 10182 when Veterans' service qualifies under both bills without using any period of time twice, whether they have a single period of service or multiple periods of service.

> [Veteran's name] is entitled to education benefits under both the Montgomery GI Bill and the Post-9/11 GI Bill, up to the statutory 48-month cap on educations benefits, because [he or she] qualifies under each bill without using any period of [his or her] service twice. *See Perkins v. Collins*, __ Vet. App. __, __, slip op. at 8, No. 24-6515 (May 16, 2025).

Analysis of
Loyd v. Collins
__ Vet. App. __ No. 22-5998
May 8, 2025

Bottom Line up Front:
The opinion from the Court of Appeals for Veterans Claims (CAVC) in ***Loyd*** holds, when a Supplemental Claim is denied for not having new and relevant evidence and is appealed to the Board, **the only issue the Board can review is whether new and relevant evidence was submitted.** The Board cannot consider the overall merit issue of the claim. This is bad for Veterans because it means that a dispute over new and relevant evidence will delay VA's ability to consider the merits of a claim.

What happened in *Loyd*:

- Veteran Marvin Loyd filed for a left-eye condition secondary to his service-connected stroke.
- VA Denied this claim in November 2019.
- In November 2020 (withing 365 days), he filed a Supplemental Claim for multiple issues including the left-eye condition.
- The RO denied the Supplemental Claim for left-eye condition as no new and relevant evidence was submitted or received.
- Mr. Loyd appealed to the Board where he tried to argue the merits of his claim based upon the whole record.
- The Board only considered whether any evidence submitted at the time of the supplemental claim for the left-eye conditions was new and relevant.
- The Board denied the claim as evidence submitted was not new and relevant and did not address the merit of the left-eye condition. Being as the matter has not been re-opened, the only appealable decision to the Board was whether new and material evidence was received in a timely manner.
- Loyd filed an appeal to the CAVC arguing that the Board should have considered the merits of his claim on the full record because he was continuously pursuing an original claim for secondary service connection.

- The CAVC disagreed and concluded that the only issue before the Board when reviewing this type of RO denial is whether there was any new and relevant evidence. Accordingly, the Board did not have to address whether Mr. Loyd's claim was erroneously denied originally or whether there was a duty-to-assist error prior to the Supplemental Claim.

Why *Loyd* is important:

- If VA denies a Supplemental Claim for not having new and relevant evidence, appealing to the Board will not lead to a full review of the claim's merits. The Board is limited to reviewing *only* the "new and relevant" question.
- This can lead to delays without getting any closer to a favorable decision.

Best Practices for VSOs:

If VA denies a Supplemental Claim because of a lack of new and relevant evidence:

- **Do not appeal to the Board** just to challenge that finding.
- **Instead,** file another supplemental claim with evidence that is clearly new and relevant, file a higher-level review.
- **Note:** If the Supplemental Claim was continuously pursuing a prior denial, then you should make sure to file the new Supplemental Claim within a year of the decision prior to the old Supplemental Claim to ensure continuous pursuit.

Important Note on Continuous Pursuit:

The opinion indicates the Secretary (VA) conceded, an appeal to the Board challenging new and relevant evidence would maintain continuous pursuit keeping the original effective date. However, VBA does not appear to be applying the law that way and it is unclear if the Court will hold VA to this position in the future. You should file a new Supplemental Claim within one year of the original decision to maintain the effective date.

Suggested argument based upon *Loyd*: As the decision is unfavorable, we do not recommend citing *Loyd*.

Analysis of
Johnson v. Collins
__ Vet. App. __ No. 23-7589
March 26, 2025

Bottom Line Up Front:
The opinion from the Court of Appeals for Veterans Claims (CAVC) in ***Johnson*** holds that when VA grants benefits under a *liberalizing law* like the PACT Act, that grant does **not** cancel or resolve a pre-existing claim or appeals based on direct service connection. These are treated as *separate claims* with potentially different effective dates. Veterans can and should pursue both tracks to maximize retroactive benefits. a VA Regional Office (RO) grant of service connection under the PACT Act did not resolve a pending appeal at the Board of Veterans' Appeals (Board) for service connection on a direct basis. In *Johnson*, the Board of Veterans' Appeals (Board) dismissed the appeal for service connection for diabetes mellitus, bilateral lower extremity peripheral neuropathy, and hypertension following the RO's grants of service connection under the PACT Act, concluding that the appeal was moot. The CAVC held that the RO's grants of service connection under the PACT Act (a liberalizing law) did not resolve the pending Board appeal involving 2016 pre-PACT Act claims.

What happened in *Johnson*:
- In May 2016, Mr. Johnson filed a claim for service connection for diabetes, bilateral lower extremity peripheral neuropathy, and hypertension, asserting exposure to Agent Orange while serving as a security guard at Nam Phong Royal Thai Air Force Base, patrolling the perimeter every night.
- The RO denied service connection finding Mr. Johnson did not serve in Vietnam and there was no evidence of herbicide exposure during service. Mr. Johnson appealed to the Board (Board Appeal I). In October 2022, while his appeal was pending at the Board, Mr. Johnson filed Supplemental Claims for the same disabilities pursuant to the PACT Act.
- In March 2023, the RO granted service connection for diabetes, bilateral lower extremity diabetic peripheral neuropathy, and

hypertension, effective from August 10, 2022, the effective date of the PACT Act.

- Mr. Johnson appealed to the Board (Board Appeal II), seeking earlier effective dates considering his pending Board appeal.
- In December 2023, the Board dismissed the 2016 appeal as "moot" because service connection has been established.
- Mr. Johnson appealed this decision to the CAVC, and it reversed the Boards dismissal.

What the Court decided:

- Grants based on the PACT Act do not resolve earlier claims or appeals.
- The Court explained that the PACT Act claims are "separate and distinct" claims triggered by a liberalizing law.
- The Board must address the original appeal from 2016, which could entitle the Veteran to an earlier effective date.

In February 2025, the Board remanded Mr. Johnson's earlier-effective-date appeal (Board Appeal II) for further development.

Why *Johnson* is important:

Johnson is important for two reasons:

- First, it recognizes that a grant of benefits under a liberalizing law such as the PACT Act does not resolve a pending claim (or appeal) filed prior to the effective date of the liberalizing law.

- Second, it recognizes that a Veteran can pursue separate procedural appeal paths (direct service connection to the Board AND the effective date of the award of service connection) at the same time even though both procedural paths end up at the same place (an earlier effective date).

Best Practices for VSOs

- If VA Grants service connection under the PACT Act (or any new law) and the Veteran had a claim/appeal pending before the date of the

liberalizing law, **do not withdraw or accept a dismissal** of the original claim/appeal.

Suggested argument based upon *Johnson*:
Arguments based upon *Johnson* can be appropriate whenever a claim is pending prior to a liberalizing change in law and the benefit is granted effective from the date of the liberalizing law. We recommend continuing to pursue the claim or appeal based on the law as it existed prior to the change in law as well as appealing the effective date of the award which was based on the liberalizing law.

> Although VA granted [Veteran's name]'s claim of [state specific claim] based on a liberalizing change in law, effective from the date of the liberalizing law, the Veteran's claim [or appeal] based on the law as it existed prior to the liberalizing law remains pending before VA. *Johnson v. Collins*, __ Vet. App. __, __, slip op. at 2, No. 23-7589 (Mar. 26, 2025) (holding that "[t]he RO's grants of service connection under the PACT Act did not resolve the pending Board appeal").

Analysis of
Amezquita v. Collins
Federal Circuit Decision Summary: *Amezquita v. Collins* (May 5, 2025)
For Distribution to Veteran Service Officers
__ F.4th __, No. 23-1975

Bottom Line Up Front:
The Federal Circuit held that a **preexisting condition doesn't have to be symptomatic** to be considered "noted" at entry. This means an **asymptomatic medical history** can mean the presumption of soundness does not attach.

However, this asymptomatic medical history still must be recorded by the reviewing medical professional to be "noted" and the presumption of soundness not to attach.

What the Case Was About:

- The Veteran had a **shoulder surgery before service**. At his entrance examination the medical examiner listed his history of shoulder surgery and said he was "completely asymptomatic" with "no physical limitations."
- During service, he felt a "pop" in the same shoulder when lifting a bag.
- After service, he quickly applied for VA benefits, citing a shoulder injury.
- VA denied the claim, saying the shoulder condition **preexisted service** and wasn't aggravated.
- The argument was made that because the Veteran was **asymptomatic** at entry, the presumption of soundness should apply.
- The Court rejected that, saying **a condition can be "noted" even if it's asymptomatic** at enlistment.

Why This Matters for VSOs:

- The **presumption of soundness** means that a Veteran is presumed to be in good health when they enter service unless a condition is *noted* during the entrance exam.
- Before this case, there was some **gray area** about whether an *asymptomatic* condition observed by the entrance medical examiner counted as "noted."
- This ruling makes it easier for VA to say, *"See, this was mentioned on the entrance form even if there were no symptoms, so we don't have to presume the Veteran was sound."*

Best Practices for VSOs (Post-Amezquita):

Always check what's in the entrance exam.

- Ask: *Did a medical professional actually diagnose or observe a condition at entry?*
- Remember, just a Veteran's listing their medical history is not enough. The presumption of soundness attaches unless a medical condition is "noted" by the medical examiner at enlistment.

Challenge VA findings of "noted" conditions by:

- Pointing out **lay history** versus **medical findings**
- Arguing that statements in entrance exams must be **from competent medical sources** to count as "noted."

Build the record with strong lay statements.

- If a Veteran had no symptoms before service but began experiencing them during or shortly after, get that on the record.
- Lay evidence can help connect in-service events to post-service symptoms, especially when the separation exam appears "clean."

VSO Challenge:

Since *Amezquita* is bad for veterans we **don't** recommend citing it directly. Instead, use the following language if a Veteran reports his relevant medical history himself, but the medical examiner does not diagnose any condition.

"Although [Veteran's name] had a medical history prior to service, the medical examiner did not any medical condition at their entrance to military service. Therefore, the presumption of soundness attaches. 38 U.S.C. § 1111; 38 C.F.R. § 3.304."

Final Thought:
This decision is bad for veterans but applies only to a narrow set of facts. More than ever, VSOs should focus on what the entrance exam *says*, who wrote it, and whether symptoms clearly began or worsened *during* service. Good documentation and lay statements remain essential.

Analysis of
Hatfield v. Collins
Federal Circuit Decision Summary: Hatfield v. Collins (May 2, 2025)
__ F.4th __, No. 23-2280 (Judges: Lourie, Bryson, Stark)

Bottom Line Up Front:
The Federal Circuit upheld the earlier decision from the Court of Appeals for Veterans Claims (CAVC), ruling that there was **no clear and unmistakable error (CUE)** in a 1980 Board decision. While the Court didn't change the law, this decision reinforces how **hard it is to win a CUE argument** when the argument is based on interpreting old laws or regulations differently than VA did at the time.

What the Case Was About:

- In 1980, the Board denied benefits to the Veteran (Hatfield).
- Decades later, Hatfield argued that the Board decision amounted to **CUE** for failing to properly apply two statutes: § 351 (now 38 U.S.C. § 1151) and § 4131—which he believed should have been read together to award compensation.
- The CAVC already rejected that claim in 2023, saying that while the legal theory was interesting, it didn't rise to the level of undebatable legal error that's required for CUE.
- The Federal Circuit **affirmed** that ruling.

Why This Matters:

- **CUE is a high bar.** To win, the Veteran must prove the original decision was not just wrong, but **undebatably** wrong based on the law **as it existed at the time**.
- Courts continue to hold that CUE cannot be based on **new or novel interpretations** of older laws.

- Even if two laws could logically be read together today, that doesn't mean VA's failure to do so decades ago is automatically a legal error.

Key Takeaways for VSOs:

- Be cautious when helping a Veteran pursue CUE based on complex or evolving legal interpretations. These claims are rarely successful.
- The courts have made clear that **just because a decision might be wrong by today's standards doesn't mean it was undebatably wrong back then.**
- If you're dealing with a CUE case, you'll want to show that **VA clearly violated a legal requirement that was established and understood at the time** of the original decision.

Notable Quote from the Court (Simplified):
Even if two laws existed at the same time and could have been read together, that alone isn't enough to show they **had** to be read together back in 1980. That's the difference between a regular legal argument and proving CUE.

Practical Use:
This case isn't one to cite as support for a claim. Instead, **keep it in your back pocket** as a reminder of how courts approach CUE motionsinvolving legal interpretation. If you're facing a similar issue, you'll want to explain why *your* case is different and doesn't rely on hindsight.

Analysis of
Westervelt v. Collins
CAVC Decision Summary:
__ Vet. App. __, No. 23,24 (Panel: Greenberg, Meredith, Toth)

Bottom Line Up Front:
In this legacy case, the Court of Appeals for Veterans Claims (CAVC) ruled that when VA injects a **Clear and Unmistakable Error (CUE)** determination into a pending appeal, like reversing a favorable rating, **the entire issue remains before the Board**. The Board must fully consider whether that CUE determination was valid and whether the Veteran is still entitled to a higher or separate rating.

This prevents VA from limiting what the Board can review simply by calling something a "CUE" correction.

What Happened in Westervelt:

- The Veteran was originally rated **70% for a Traumatic Brain Injury (TBI)**. Later, VA also granted **30% for PTSD**.
- After the Veteran filed a Notice of Disagreement (NOD), a Decision Review Officer (DRO) reviewed the appeal.
- The DRO decided the 30% PTSD rating was **CUE**, saying the symptoms overlapped with the TBI and should not have been rated separately.
- The Veteran appealed to the Board, which reviewed the case.
- The legal question became: What exactly was the Board allowed to review? Just the rating issue, or also the validity of the CUE finding?

What the Court Decided:

- The CAVC rejected arguments that the CUE decision somehow split the appeal into separate tracks or limited the Board's scope.

- The Court held that **everything reasonably related to the PTSD rating was still before the Board** including whether the PTSD rating should be restored, increased, or rated separately from the TBI.
- The Board **must address all issues raised by the Veteran and the record** that could result in greater compensation.
- This includes questioning whether the CUE determination was correct.

Why This Matters for VSOs:

- If VA reduces or removes a benefit during an appeal (even under the label of “CUE”), that **does not limit the Board’s duty** to consider all aspects of the claim.
- VSOs should ensure that the **entire scope of the issue remains in play**, especially when a rating is reduced or revised mid-appeal.
- The ruling helps protect Veterans from being boxed into narrow procedural traps created by VA during the appeal process.

Key Takeaways for VSOs:

- Even when VA claims it corrected a “CUE,” **the Board must still review everything** tied to the original appeal.
- Don’t let a CUE finding discourage broader argument for a higher or restored rating.
- In legacy cases or AMA reviews, VSOs should still raise all relevant issues including the accuracy of any unfavorable VA findings made during the appeal.