


7-29-2019

For Him Who Shall Have Borne the Battle: How the Presumption of Competence Undermines Veterans' Disability Law

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Recommended Citation

Chase Cobb, *For Him Who Shall Have Borne the Battle: How the Presumption of Competence Undermines Veterans' Disability Law*, 25 Wash. & Lee J. Civ. Rts. & Soc. Just. 577 (2019).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol25/iss2/8>

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For Him Who Shall Have Borne the Battle: How the Presumption of Competence Undermines Veterans' Disability Law

Chase Cobb*

*"To care for him who shall have borne the battle
and for his widow, and his orphan."*

—The VA Motto

"Honor to the Soldier, and Sailor everywhere, who bravely bears
his country's cause. Honor also to the citizen who cares for his
brother in the field, and serves, as he best can, the same cause—
honor to him, only less than to him, who braves, for the common
good, the storms of heaven and the storms of battle."

—Abraham Lincoln

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I. Introduction

When the Veterans Administration denies a veteran's claim for disability benefits it often does so based on the opinion of an expert medical examiner—usually a doctor or a nurse.¹ But under a recent federal rule, the VA carries no burden of laying a foundation for the expert medical examiner's opinion—no burden of establishing the quality of the expert's education or the depth of her experience; no burden of establishing the scope of the expert's training or the soundness of her reasoning.² Instead, the VA may simply presume the qualifications of its own expert examiner and throw the burden on the veteran of offering specific objections.³ If the veteran fails to object to the examiner's qualifications at a particular time (at the first stage of the disability review process),

1. See generally VA ADJUDICATION PROCEDURES MANUAL, M21-1MR, Part III, subpart iv, ch. 3, § A (setting forth VA policy for medical examinations).

2. See *Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (holding that the VA need not affirmatively establish the competency of its expert medical examiners).

3. See *id.* (requiring that veterans rebut the presumption of competence by offering evidence to the contrary).

and if the veteran fails to object to the examiner's qualifications in a particular way (specifically rather than generally), the veteran loses the right to challenge the examiner's qualifications on appeal.⁴

That is a puzzling rule.⁵ In every other legal context—tort cases; contract disputes; murder trials—the burden of qualifying an expert falls on the party who wants to admit the expert's testimony.⁶ In a criminal trial, for example, the burden of qualifying a witness for the prosecution falls on the *prosecution*—who must then prove the expert's qualifications through evidence of her education, experience, and training.⁷ But the (so-called) “presumption of medical examiner competence” pushes that burden in the opposite direction.⁸ It inexplicably relieves the government of its duty of qualifying one particular kind of expert—VA medical examiners—and it shifts to the veteran a duty not only of discovering the expert's deficiencies but also of expressing these deficiencies with a specific objection.⁹

That rule would be odd in any legal context but is particularly odd as applied to the non-adversarial VA disability program.¹⁰

4. See *Mathis v. McDonald*, 834 F.3d 1347, 1357 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (“Even if a veteran objects to an examiner's competence before the Board, a veteran must make a specific objection to an examiner's competence—not merely a general one—before the Board will review the examiner's competence.”).

5. See *id.* at 1353 (criticizing the presumption of competence for the VA's experts in the disability review process in front of the Board of Veterans' Appeals).

6. See FED. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion . . .”).

7. See *id.* (setting forward the rule for expert witness qualification).

8. *Mathis*, 834 F.3d at 1357–58 (Reyna, J., dissenting from the denial of rehearing *en banc*) (“Ordinarily, before an expert opinion may be relied upon, the expert's competence must be established.”).

9. See *Parks v. Shinseki*, 716 F.3d 581, 586 (Fed. Cir. 2013) (treating a veteran's general expression of concern over an examiner's qualifications as insufficient to constitute a formal objection).

10. See *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, C.J., dissenting) (“The purpose [of the Veterans' disability program] is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.”), *superseded in part by statute*, Pub. L. No. 107-330, § 402(a), 116 Stat. 2820, 2832 (2002), *as recognized in* *Maehr v. United States*, 2019 WL 1552562, at *2 (Fed. Cir. Apr. 10, 2019).

That program is described variously by courts as “informal;”¹¹ “paternalistic;”¹² “claimant friendly.”¹³ The program expressly prohibits adversarial burdens such as formal evidentiary standards and “a strict adherence [to] the burden of proof.”¹⁴ To effectuate its non-adversarial purpose, the program puts a duty on the Veterans Administration to help veterans develop their claims and to weigh all doubts in their favor.¹⁵ It would stand to reason, then, that the Veterans Administration—in that atmosphere of pro-claimant solicitude—would carry a burden of expert qualification at least commensurate to that of a litigant in a tort case: A burden at least of furnishing enough information about its examiners to support appellate review of their qualifications.¹⁶

Instead, the presumption of competence permits the VA to withhold all information about its examiners except the most basic—their names; their phone numbers; their addresses; so on.¹⁷

11. See *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (“The VA’s adjudicatory process is designed to function throughout with a high degree of *informality* and solicitude for the claimant.” (emphasis added) (quoting *Walters v. Nat’l Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985))).

12. See *Cook v. Principi*, 318 F.3d 1334, 1354 (Fed. Cir. 2002) (Gajarsa, J., dissenting) (describing the VA’s interest in protecting the veteran as “paternalistic”).

13. See *Hayre v. West*, 188 F.3d 1327, 1331 (Fed. Cir. 1999) (“Congressional mandate requires that the VA operate a unique system of processing and adjudicating claims for benefits that is both claimant friendly and non-adversarial. An integral part of this system is embodied in the VA’s duty to assist the veteran in developing facts pertinent to his or her claim.”).

14. H.R. REP. NO. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795.

15. See 38 U.S.C. § 5107(b) (2000) (“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.”); see also *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (describing the VA’s duty to “sympathetically develop the veteran’s claim to its optimum.”) (citations omitted).

16. See *Mathis v. McDonald*, 643 Fed. Appx. 968, 975 (Fed. Cir. 2016) (Reyna, J., concurring) (advocating that the presumption of competence be overturned).

17. See *Mathis v. McDonald*, 834 F.3d 1347, 1351–52 (Fed. Cir. 2016) (Hughes, J., concurring in the denial of rehearing *en banc*) (“Every examination report or Disability Benefits Questionnaire (DBQ) must contain the signature, printed name and credentials, phone number and preferably a fax number, medical license number, and address of the examiner, as well as his or her specialty, if a specialist examination is required.”) (citations omitted) (internal quotations omitted).

Although veterans may ask for more information, the VA will often refuse to hand the information over until an appellate court orders them to do so.¹⁸ And by refusing to hand over the information, the VA puts the veterans in a double bind: It withholds from the veterans exactly the information that they need to raise a specific objection until it is too late for them to raise one.¹⁹ That double bind is just one way—of the many discussed in this note—that the presumption of competence insulates the veterans’ disability program from meaningful judicial review.²⁰

Even several members of the court that created the presumption—the Federal Circuit—have dedicated themselves to overturning it.²¹ One judge in particular—the Honorable Jimmie Reyna—has written two separate opinions (one a concurrence, the other a dissent) challenging the presumption.²² In these opinions, he not only proves the illegitimacy of the presumption but also offers a straightforward method of eliminating it.²³ He advocates that the court put on the Veterans Administration the same evidentiary burden that belongs to a litigant in a tort case: The burden of laying a foundation for its own expert witnesses.²⁴ Because that approach is sensible, this note advocates that the Federal Circuit adopt it.

The roadmap for the Note is as follows: First, it tells how the presumption came to exist; second, it tells what consequences the presumption has wrought; third, it tells about the split at the

18. *See id.* at 1357 (Reyna, J., dissenting from denial of rehearing *en banc*) (“If a veteran asks for an examiner’s qualifications, the VA will not provide them unless it is ordered to do so by the Board, the Veterans Court, or this court.”).

19. *See id.* (“The veteran is rendered hapless, caught in a classic Joseph Heller catch-22-like circumstance.”).

20. *See id.* (explaining that the presumption of competence “almost entirely insulates the VA’s choice of medical examiners from review”).

21. *See, e.g., id.* at 1353 (admonishing the court to overturn the presumption of competence).

22. *See id.* (challenging the presumption); *see also Mathis v. McDonald*, 643 Fed. Appx. 968, 975 (Fed. Cir. 2016) (Reyna, J., concurring) (same).

23. *See Mathis*, 643 Fed. Appx. at 975 (Reyna, J., concurring) (suggesting the court replace its presumption of competence with a more sensible rule).

24. *See id.* (“Eliminating the presumption will require the VA to provide the Board with evidence that an examiner is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions on the issue that the examiner is testifying about.”) (internal quotations omitted).

Federal Circuit; and fourth, it tells about a solution to the presumption of competence.

II. The Story

A. Congress Creates a Non-Adversarial Disability Scheme.

The veterans' disability program is a kind of bureaucratic utopia where veterans may seek disability benefits without the help of lawyers.²⁵ The program in fact discourages lawyers from even participating by capping the fees that they may charge veterans at the earliest stages of disability claims.²⁶ After the earliest stages, the program allows paid representation but treats represented veterans differently from unrepresented ones, affording to latter greater protections.²⁷ Unsurprisingly, many veterans pursue their claims as the program encourages them to: *Pro se*.²⁸

Because many veterans pursue their claims *pro se*, they often arrive at their disability hearings unprepared to argue the nuances of the law; unprepared to overcome procedural objections and to cross-examine witnesses—they come unprepared to argue their

25. See Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism"*, 1 VETERANS L. REV. 2, 2–3 (2009) (noting the pro-claimant and non-adversarial nature of the veterans' disability program).

26. See *id.* at 3 n.10 (stating that lawyers often forbear representing clients at earliest stages of disability claims due to the statutory fee cap); see also 38 C.F.R. § 14.636 (2019) (providing that attorney's fees in VA proceedings must be reasonable).

27. See Reiss & Tenner, *supra* note 25, at 47–48 (stating that the veterans' courts deal more paternalistically with unrepresented veterans than represented ones).

28. See *id.* at 2–3 (noting that claims are usually filed *pro se* and describing how *pro se* claims fare at the later stages of disability claims as compared to represented claims); see also *Frequently Asked Questions: The Veterans Consortium Pro Bono Program*, VETERANS CONSORTIUM, [https://www.vetsprobono.org/helpavet/item.7653-Attorney Training Brochure FAQs#thirteen](https://www.vetsprobono.org/helpavet/item.7653-Attorney%20Training%20Brochure%20FAQs#thirteen) (last visited Mar. 2, 2019) (listing "some of the reasons that many veterans remain unrepresented at the time they file their appeal with the U.S. Court of Appeals for Veterans Claims") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

cases as real lawyers would argue them.²⁹ But that is okay.³⁰ The disability program accounts for the non-adversarial nature of its proceedings by removing all adversarial burdens: Burdens such as “cross examination, [the] best evidence rule, [the] hearsay evidence exclusion, or [a] strict adherence to burden of proof.”³¹ Instead, the program puts an affirmative duty on the VA—the VA being here the theoretically *adverse* party—to actually help veterans develop their claims and to weigh all doubts in their favor.³² After all: “The government's interest in veterans cases is not that it shall win, but rather that justice shall be done”³³

Perhaps the most salient feature of the veterans’ disability program is the relaxed way that it allows veterans to establish a link between their past services and their present disabilities.³⁴ Unlike other disability programs—where the claimant must show not only the existence of a present disability but also the connection between that disability and her earlier work—the veterans’ program disregards the question of causality altogether.³⁵ It instead considers only a simple “temporal”

29. See *id.* at 47–48 (clarifying that the veterans’ courts compensate for the veterans’ lack of legal sophistication by affording them more paternalistic proceedings).

30. See *Comer v. Peake*, 552 F.3d 1362, 1368–69 (Fed. Cir. 2009) (affording pro se veterans a “liberal and sympathetic reading of” the record).

31. See H.R. REP. NO. 100-963, at 13 (1988). *But see* Reiss & Tenner, *supra* note 25, at 47–48 (noting that the Congress has somewhat amended the veterans’ disability statutes since the 1980’s).

32. See 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.”); see also *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (describing the VA’s duty to “sympathetically develop the veteran’s claim to its optimum.” (citations omitted)).

33. *Comer*, 552 F.3d at 1369 (citations omitted).

34. See H.R. REP. NO. 100-963, at 13 (1988) (“Congress has designed . . . a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.”).

35. Compare *Eligibility for Disability Benefits*, U.S. DEP’T VETERANS AFF., <https://www.va.gov/disability/eligibility/> (last visited Jan. 19, 2019) (detailing eligibility requirements for disability benefits) (on file with the Washington & Lee Journal of Civil Rights & Social Justice), with *Benefits Planner: How You Qualify*, SOC. SECURITY ADMIN., <https://www.ssa.gov/planners/disability/qualify.html> (last visited Feb. 6, 2019) (detailing eligibility requirements for Social Security

question: Did the veteran's disability arise during the time of service?³⁶ If the answer to that question is yes, the veteran is entitled to benefits no matter the cause (with exceptions).³⁷

But under the relaxed service-connection standard, a common problem arises.³⁸ What happens when the origin of a veteran's disability is unclear? What happens, for example, when a veteran is diagnosed with a complex neurological condition thirty years into his retirement and has no idea when the condition began: During service or after?

In cases such as that one, the role of the VA medical examiner becomes particularly important.³⁹ The VA medical examiner—usually a doctor or a nurse—will evaluate the veteran's disability claim (either by personally examining him or by simply reviewing his file) and then offer a professional opinion about when the veteran's disability began.⁴⁰ On the basis of that opinion, the VA will then decide whether to award the veteran benefits.⁴¹ In the event that the veteran disagrees with the VA's decision, she has the right to appeal the decision according to the following hierarchy: She may appeal first to the Board of Veterans' Appeals and from there to the U.S. Court of Appeals for Veterans Claims, the Federal Circuit, and the Supreme Court of the United States.⁴²

In the ways that matter, the job of the VA medical examiner matches that of an expert witness at trial.⁴³ Both give professional

disability benefits) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

36. See H.R. REP. NO. 100-963 (examining the question that must be asked in order to determine disability eligibility).

37. See U.S. DEP'T VETERANS AFF., *supra* note 375 (detailing eligibility requirements for disability benefits).

38. See, e.g., *Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009) (deciding in 2009 a case about a veteran whose disability arose decades earlier).

39. See 38 U.S.C. § 5103A(d) (2018) (setting on the VA a duty to provide veterans' medical examinations so as to decide whether veterans qualify for disability benefits).

40. See VA ADJUDICATION PROCEDURES MANUAL, M21-1MR, pt. III, subpart iv, ch. 3, § A(6) (setting forth VA policy for medical examinations).

41. See 38 U.S.C. § 5103A(d) (2018) (describing the role of the VA medical examiner in assisting the VA decide disability claims).

42. See James D. Ridgeway, *The Veterans' Judicial Review Act Twenty Years Later*, 66 N.Y.U. ANN. SURV. AM. L. 251, 257 (2010) (laying out the multiple layers of judicial review).

43. See *Townsend v. Shinseki*, No. 12-0507, 2013 WL 2152126, at *5 (Vet.

opinions on sophisticated topics; the opinions of both influence the legal rights of real people.⁴⁴ Given the similarities between the two positions, it would stand to reason that the rules governing one should apply with equal force to the other.⁴⁵ Consider, for example, that foundational rule of expert testimony: That the burden of qualifying an expert rests with the party who wants to admit the expert's testimony.⁴⁶ That rule serves at least two important purposes. First, it ensures that only true experts may give expert opinions to the jury; and second, it furnishes to the appellate record enough information to support a review of the expert's opinion on appeal.⁴⁷

Both of these rationales hold true even more in the veterans' disability context than they do in the trial context.⁴⁸ The veterans' disability program, after all, is a supposedly non-adversarial affair organized in the veteran's favor.⁴⁹ It confers on the veteran every possible advantage and the benefit of every doubt.⁵⁰ Within that

App. May 20, 2013) (stating that VA medical examiners are "nothing more or less than expert witnesses' who provide opinions on medical matters" (quoting *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302 (2008))).

44. See *Expert Witness*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A witness qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact issue.").

45. See *Townsend*, 2013 WL 2152126, at *5 (noting the similarities between the two positions).

46. See FED. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion . . .").

47. See *Expert Opinion*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that to the extent an expert opinion is backed by education, training, and experience, it can help a trier of fact arrive at a decision on a sophisticated topic).

48. See *Mathis v. McDonald*, 834 F.3d 1347, 1357 (Fed. Cir. 2016) (*en banc*) (Reyna, J., dissenting from the denial of rehearing) (advocating that veterans' medical examiners be held to a standard similar to that of Rule 702).

49. See *Hayre v. W.*, 188 F.3d 1327, 1331 (Fed. Cir. 1999) ("Congressional mandate requires that the VA operate a unique system of processing and adjudicating claims for benefits that is both claimant friendly and non-adversarial. An integral part of this system is embodied in the VA's duty to assist the veteran in developing facts pertinent to his or her claim.").

50. See 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."); see also *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (describing the VA disability program as one "designed to function . . . with a high degree of

program, it stands to reason that the VA should carry a burden of expert qualification at least equal to that of a litigant in a tort trial.⁵¹

But for reasons that defy comprehension, the VA does not carry that burden.⁵² The burden instead rests on the veteran to affirmatively object to her examiner's qualifications—to discover on her own initiative the deficiencies of her examiner's education and experience and communicate these deficiencies as a specific objection.⁵³ Veterans carry that burden because ten years ago the Federal Circuit, with a hollow ruling, entitled the veterans' medical examiners to a presumption of competence.⁵⁴ The explanation as to how that rule came to exist begins with the sad story of a veteran named David Rizzo.⁵⁵

B. The Federal Circuit Adds to The Non-Adversarial Disability Scheme an Adversarial Burden.

During one year of service in late 1940's, veteran David Rizzo traveled three times to the Marshall Islands Bikini Atoll as part of a radiation monitoring effort.⁵⁶ The army had set off twenty-three nuclear bombs there, and he was part of the clean-up team.⁵⁷ Rizzo

informality and solicitude for the claimant.”) (citations omitted).

51. See *Mathis*, 834 F.3d at 1357 (*en banc*) (Reyna, J., dissenting from the denial of rehearing) (“Ordinarily, before an expert opinion may be relied upon, the expert's competence must be established.”).

52. See *Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (holding that the VA need not affirmatively establish the competency of its expert medical examiners).

53. See *id.* (assuming a medical examiner's competency in the absence of a formal objection from the veteran).

54. See *id.* (“[T]his court holds that VA need not affirmatively establish that expert's competency.”).

55. See discussion *infra* Part II (discussing the life story of David Rizzo that led to the case in question).

56. See *Rizzo*, 580 F.3d at 1289 (talking about the number of times David Rizzo traveled to the Bikini Atoll as part of his military service).

57. See Brief for Appellant at A24, *Rizzo v. Peake*, No. 2009-7026 (Fed. Cir. Feb. 3, 2009) (describing the job David Rizzo held on Bikini Atoll). See generally *Bikini Atoll, Marshall Islands*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Bikini-atoll-Marshall-Islands> (last visited Jan. 20, 2019) (telling the history of the islands) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

testified before an administrative board that his job on the islands was to shovel radioactive soil into crates; then when he had filled the crates, he would help load them on an airplane and then unload them somewhere else.⁵⁸ He said that he was exposed to radiation from moving the radioactive topsoil, swimming in radioactive water, inhaling radioactive dust, eating radioactive foods, and drinking radioactive water.⁵⁹ In the mid-1980's, he began losing his vision from cataracts and other eye diseases and sought treatment.⁶⁰ According to one heartbreaking line in his appellate record, he visited a hospital and “was given a white cane and instructions on how to cook at home.”⁶¹

He filed a claim for disability benefits.⁶² To support his claim, he presented not only some evidence but a great deal of evidence to show a link between his vision problems and the work that he did on the islands.⁶³ Notably, he presented the testimony of an atomic physicist with four degrees including a Doctorate in Radiation Physics and Radioecology.⁶⁴ That physicist also had twenty-years' experience in the field and had spent the last six of those years as lead investigator on a number of studies assessing the radiological conditions at the Marshall Islands.⁶⁵ The physicist testified that a large concentration of radiation obtained over the area where Rizzo dug topsoil and that his moving of radioactive crates for hours at a time exposed Rizzo to a “potentially high dose” of radiation.⁶⁶ He testified that the radiation probably caused Rizzo's eye problems.⁶⁷

58. *See id.* at A24 (detailing the tasks David Rizzo was assigned on the island).

59. *See id.* at A13 (discussing the interaction David Rizzo had with the radioactive landscape on Bikini Atoll).

60. *See Rizzo*, 580 F.3d at 1289 (describing the symptoms that Davis Rizzo began to feel forty years after his military service).

61. *See* Brief for Appellant at A23, *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009).

62. *See Rizzo*, 580 F.3d at 1289.

63. *See* Brief for Appellant at 8–9, *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009) (summing up Rizzo's evidence).

64. *See id.* at A29–41 (detailing the expert's qualifications).

65. *See id.* (describing the expert's field experience).

66. *See id.* at A4–A5 (describing the likely source of radiation exposure).

67. *See id.* at A25 (“So my testimony will try to establish today with a certain degree of high probability that Mr. Rizzo was exposed to doses of radiation that

In response to the testimony of the atomic physicist, the VA heard testimony from another expert.⁶⁸ This expert was a VA doctor who served at the time as an undersecretary for the agency but whose qualifications to opine on radiation-linked diseases were unknown.⁶⁹ He came to the opposite conclusion as the atomic physicist: That the radiation on the islands probably did not cause Rizzo's eye diseases.⁷⁰ The expert based his opinion on government reports and academic findings without personally examining Mathis.⁷¹

Although both experts were at least somewhat qualified to assess Rizzo's health, there is no question as to who was the more qualified: The physicist.⁷² Had both experts testified before a jury, the jury would have—it is a virtual certainty—afforded greater weight to that expert and granted Rizzo's benefits.⁷³ And given that Rizzo probably could have won his case in the adversarial world of civil lawsuit, it stands to reason that he should even more easily have won his suit in the *non*-adversarial world of the VA disability scheme—the principle of greater-to-lesser reasoning pretty-well dictating that outcome.⁷⁴

But for reasons not abundantly clear, Rizzo lost his case at the VA.⁷⁵ He appealed to the Veterans Court and the Federal Circuit.⁷⁶ Notably, neither appellate court weighed the credentials of the two

caused these cataracts.”).

68. See *Rizzo v. Shinseki*, 580 F.3d 1288, 1289 (Fed. Cir. 2009) (discussing the testimony of the opposing witness).

69. See Brief for Appellant at 9–10, A42, *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009) (summing up the witness's qualifications and noting the absence of any qualifications to state an opinion on radiation-induced diseases).

70. See *Rizzo*, 580 F.3d at 1289 (summarizing the expert's conclusion).

71. See Brief for Appellant at A27–28, *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009) (setting forth the expert's opinion).

72. See *id.* at 7–9 (comparing the qualifications of the two experts).

73. See *id.* (comparing the qualifications of the two experts).

74. See *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, J., dissenting) (“The purpose [of the Veterans' disability program] is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.”), *superseded in part by statute*, Pub. L. No. 107-330, § 402(a), 116 Stat. 2820, 2832 (2002), *as recognized in Maehr v. United States*, 2019 WL 1552562, at *2 (Fed. Cir. Apr. 10, 2019).

75. See *Rizzo v. Shinseki*, 580 F.3d 1288, 1289 (Fed. Cir. 2009) (delivering the procedural history).

76. See *id.* at 1290 (describing the process that Rizzo pursued to seek relief).

experts against each other.⁷⁷ Instead, both courts entitled the VA to a presumption that it had picked a competent examiner and deferred to its decision.⁷⁸ The Federal Circuit included in its opinion only sparse authority to support the presumption of medical examiner competence.⁷⁹ Here is a paragraph summarizing the court's holding:

Absent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that that the VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion. Indeed, whereas here, the veteran does not challenge a VA medical expert's competence or qualifications before the Board, this court holds that VA need not affirmatively establish that expert's competency.⁸⁰

Stated differently, the court held flatly that what is true for civil litigants at trial is not true for the VA in the disability program: The agency carries no burden of laying a foundation for the testimony of its own experts.⁸¹ To support that decision, the court offered practically no reasoning and made reference to only a handful of cases.⁸² Of the cases the court referenced, none actually supported a presumption of medical examiner competence.⁸³ Instead, the cases supported a different presumption—one known as the presumption of regularity.⁸⁴ That

77. See *id.* at 1291 (adopting from the Veterans Court a presumption of medical examiner competence).

78. See *id.* (“[T]his court holds that VA need not affirmatively establish that expert’s competency.”).

79. See *id.* (building the presumption of competence on a shaky foundation).

80. *Id.*

81. See *Mathis v. McDonald*, 834 F.3d 1347, 1353 (Fed. Cir. 2016) (Reyna, J., dissenting from the denial of rehearing *en banc*) (“The presumption, that the Veterans Administration ordinarily and routinely selects competent medical examiners as a matter of due course, was created void of any evidentiary basis.”).

82. See *Rizzo v. Shinseki*, 580 F.3d 1288, 1291–92 (Fed. Cir. 2009) (adopting the presumption of competence without putting forward evidence that medical examiners are routinely competent).

83. See *id.* (referencing cases about a different administrative presumption—the presumption of regularity—without giving reasons why that presumption should apply here).

84. See *id.* (using the presumption of regularity to support the presumption of competence).

presumption is an obscure administrative rule and an odd fit to veterans' medical examinations.⁸⁵ Because it forms the (rather tremulous) foundation of this Note's topic, it is worth taking a moment to ask the obvious question: What does it even do?

C. The Adversarial Burden Turns the Non-Adversarial Scheme Inside out.

The presumption of regularity does a straightforward thing most easily explained by an example.⁸⁶ Suppose that someone (Janice) has a job shipping important government notices to people across the country. She folds each day the important government notices into hundreds of perfect trifolds and sends them off in envelopes bearing the insignias of impressive-sounding government agencies: FBI, DOJ, DOE, so on. And then suppose that one day, one of Janice's notices (addressed to Steve) goes missing—either lost in the mail or stolen by malicious postal bandits. Steve is understandably upset about the mishap. Steve depended on the notice to do something important, like file an appeal or claim benefits. But now Steve has missed his deadline. Steve wants the deadline extended on the theory that his missing it was Janice's fault, not his. He takes his case first to an administrative review board but having no luck there resorts to a federal appeal.

The question is how does the appeals court determine what actually happened to the notice. It can of course demand proof from Janice that she sent the notice properly; that she put the right address on it and attached adequate postage. But given that Janice sends hundreds of these notices a day, it is doubtful that she can muster that kind of evidence—she probably cannot even remember sending this particular notice in the first place. But does that mean that the blame falls on Janice by default? If so, does that not create

85. See *Latif v. Obama*, 677 F.3d 1175, 1207 (D.C. Cir. 2012) (Tatel, J., dissenting) (“[E]very case applying the presumption of regularity . . . [has] something in common: [A]ctions taken or documents produced within a process that is generally reliable because it is, for example, transparent, accessible, and often familiar.”).

86. See *Crain v. Principi*, 17 Vet. App. 182, 186 (Vet. App. 2003) (“[T]he law presumes the regularity of the administrative process ‘in the absence of clear evidence to the contrary.’”) (citations omitted).

a rather huge problem? Can notice-recipients all across the country escape their deadlines by simply pointing the finger at Janice? Do the floodgates now open on frivolous administrative appeals?

Thankfully, the presumption of regularity keeps the floodgates shut.⁸⁷ It allows Janice (and the agency Janice works for) to prove that she sent one notice reliably by proving simply that she generally sends her notices reliably.⁸⁸ In other words, it allows Janice to prove the reliability of her process rather than the reliability of her one particular action.⁸⁹ Applied to these facts, it would allow Janice to prove the consistency of her mailing procedure by presenting evidence of the procedure's manifold safeguards; of its astonishingly low error rate—so on.⁹⁰ Based on that evidence, the court could then conclude that Janice in fact sent the notice to Steve.⁹¹

The presumption of regularity makes good sense applied to administrative procedures such as the mail.⁹² The consequences of negligent mailing are generally low; the burden of litigating every negligently mailed letter would be fairly high.⁹³ The mail is a consistent, reliable—entirely “non-discretionary”—kind of procedure.⁹⁴ But to the degree that the presumption makes sense

87. See *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004) (“The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties.”).

88. See, e.g., *id.* (applying the presumption of regularity to a mailing procedure).

89. See *id.* (“We perceive no legal basis for holding that the presumption of regularity may not be employed to establish, in the absence of evidence to the contrary, that certain ministerial steps were taken in accordance with the requirements of law.”).

90. See *Posey v. Shinseki*, 23 Vet. App. 406, 410 (Vet. App. 2010) (noting that at its “root,” the presumption of reliability applies to government jobs that are “the product[s] of a consistent, reliable procedure”).

91. See *Crain v. Principi*, 17 Vet. App. 182, 186 (Vet. App. 2003) (“[T]he law presumes the regularity of the administrative process ‘in the absence of clear evidence to the contrary.’”) (citations omitted).

92. See *Miley*, 366 F.3d at 1347 (comparing the application of the presumption of regularity to a mailing procedure with its application to administrative processes).

93. See *Crain*, 17 Vet. App. at 186 (explaining that presumption of regularity applies to generally reliable administrative processes).

94. See *Nondiscretionary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/procedure> (last visited Jan. 28, 2018) (“[N]ot left to

as applied to the mail it proves equally foolish as applied to veterans' medical examinations.⁹⁵ Medical examinations are emphatically not like the mail.⁹⁶ They are not procedural, and they are not non-discretionary.⁹⁷ They are in fact the opposite of non-discretionary—they are about as discretionary as a job can be.⁹⁸ The whole point of the job is to make determinations; to exercise judgment over who qualifies for benefits and who does not.⁹⁹ Whereas the action of sending a letter is automatic, almost mechanical—similar to a “habit” under the Federal Rules of Evidence¹⁰⁰—the action of performing a medical examination is deliberate and nuanced and even under the best of circumstances

discretion or exercised at one's own discretion.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *Procedure*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/procedure> (last visited Jan. 20, 2019) (“[A] series of steps followed in a regular definite order.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

95. See *Mathis v. McDonald*, 834 F.3d 1347, 1355 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (arguing that the presumption of regularity should not apply to veterans' medical evaluations).

96. See *Mathis v. McDonald*, 643 Fed. Appx. 968, 973 (Fed. Cir. 2016) (“[T]he presumption should be predicated on evidence that gives us confidence that a particular procedure is carried out properly and yields reliable results in the ordinary course.”).

97. See *Mathis v. McDonald*, 834 F.3d 1347, 1355 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (“[T]he presumption of regularity has is only typically been only applied to routine, non-discretionary, and ministerial procedures.”).

98. See generally U.S. DEP'T OF VETERANS AFFAIRS, VA ADJUDICATION PROCEDURES MANUAL, M21-1MR, Part III, Subpart iv, ch. 3, § A(6) (2015), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/helpp/customer/locale/en-US/portal/55440000001018/topic/55440000004115/Chapter-03-Examinations (describing the role of the medical examiner in deciding veterans' disability claims) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

99. See, e.g., *Parks v. Shinseki*, 716 F.3d 581, 586 (Fed. Cir. 2011) (deferring to a nurse's decision that a veteran did not qualify for disability benefits).

100. See FED. R. EVID. 406 (allowing admission at trial certain evidence of a habit or act which becomes a “semi-automatic” response or a “regular practice” in light of specific conduct or stimuli).

subject to error.¹⁰¹ It should not be entitled to a presumption of regularity.¹⁰²

The Federal Circuit's own reasoning supports this conclusion.¹⁰³ In a decision called *Kyhn v. Shinseki*, the court refused to extend the presumption to a particular government procedure because the lower courts had failed to properly establish the reliability of the procedure.¹⁰⁴ Interestingly, the government procedure in that case actually did involve sending a letter.¹⁰⁵ More interestingly, the particular letter was one that notified a veteran of—get this—his right to a medical examination.¹⁰⁶ This is an astounding decision. As things apparently stand, the Federal Circuit will presume the regularity of medical examinations themselves—but will not presume the regularity of letters that notify veterans of those medical examinations.¹⁰⁷

The Federal Circuit contravened its own case law in crafting the presumption of medical examiner competence.¹⁰⁸ Were that its

101. See Sarah Kolinovsky, *VA Admits 25,000 Veterans Received Improper Brain Injury Screening*, ABC NEWS (2016), <http://abcnews.go.com/US/va-admits-25000-veterans-received-improper-brain-injury/story?id=39734423> (reporting that over the course of seven years, unqualified or non-certified VA medical perform examiners professionals performed over 24,000 traumatic brain exams injury exams) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

102. See *Mathis*, 834 F.3d at 1355 (Reyna, J., dissenting from denial of rehearing *en banc*) (admonishing the court for applying the presumption of regularity to medical examinations, as medical examinations are not “routine, ministerial procedure[s]”).

103. See *Kyhn v. Shinseki*, 716 F.3d 572 (Fed. Cir. 2013) (refusing to extend the presumption of regularity to a procedure whose reliability had not been properly established).

104. See *id.* at 575–78 (concluding that the lower court—the Veterans Court—had improperly used evidence not in the record to support its finding of regularity).

105. See *id.* at 574 (describing the letter).

106. See *id.* (“To determine whether the presumption of regularity applied, the Veterans Court ordered the Secretary of the Department of Veterans Affairs . . . to provide the court with ‘information concerning the regular process by which VA notifies veterans of scheduled VA examinations.’”).

107. Compare *id.* at 575–78 (refusing to apply the presumption of regularity to examination notification letters), with *Rizzo v. Shinseki*, 580 F.3d 1288, 1291–92 (Fed. Cir. 2009) (applying the presumption of regularity to medical examinations).

108. See *Mathis v. McDonald*, 834 F.3d 1347, 1355 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (admonishing the court for applying

only flaw, the presumption perhaps could be forgiven. But unfortunately, the precedential problems only scratch the surface.

III. The Consequence

After *Rizzo*, a vicious pattern emerged.¹⁰⁹ Veterans across the country would file claims for disability benefits, just as *Rizzo* had done, and would receive medical evaluations from the expert VA examiners.¹¹⁰ The examiners would then deny the veterans' claims, just as they had done to *Rizzo*, without delivering extensive analysis and without providing their qualifications¹¹¹—instead providing only their names, phone numbers, and other basic information.¹¹² Veterans would then appeal their decision but would lose after a lengthy fight, often spanning many years.¹¹³ That cycle has produced a number of serious consequences.¹¹⁴ It is worth taking a moment to catalog them here.

the presumption of regularity to medical examinations, as medical examinations are not “routine, ministerial procedure[s]”).

109. See *id.* at 1357 (Reyna, J., dissenting from denial of rehearing *en banc*) (arguing that the presumption of competence would shield the VA disability program from judicial review).

110. See, e.g., *Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010) (finding that the VA appropriately relied on its own medical examiner although it had not affirmatively established the examiner's credentials).

111. See, e.g., *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (“[I]t should be clear from our logic that the Board is . . . not mandated . . . to give reasons and bases for concluding that a medical examiner is competent unless the issue is raised by the veteran.”) (citations omitted).

112. See *Mathis*, 834 F.3d 1347 at 1351–52 (Hughes, J., concurring in the denial of rehearing *en banc*) (“Every examination report or Disability Benefits Questionnaire (DBQ) must contain the ‘signature, printed name and credentials, phone number and preferably a fax number, medical license number, and address’ of the examiner, as well as his or her specialty, if a specialist examination is required.”) (citations omitted).

113. See, e.g., *Mathis v. McDonald*, 643 Fed. Appx. 968, 969 (Fed. Cir. 2016) (affirming the denial of a veteran's disability benefits after a years-long appeal process).

114. See *id.* at 976–86 (Reyna, J., concurring) (presenting the consequences of the presumption of competence).

*A. The Presumption of Competence Shields the Veterans’
Disability Program from Judicial Review.*

Veterans can overcome the presumption of competence in only one way: By raising specific objections against their examiners’ qualifications at the first stage of the administrative appeals process—before the Board of Veterans’ Appeals.¹¹⁵ But for three reasons—one of them obvious, the other two less so—veterans often fail to clear that hurdle.¹¹⁶

The obvious reason that veterans do not clear that hurdle is that they do not know how to clear it.¹¹⁷ They are not professionally trained lawyers, and they do not know the intricacies of civil procedure.¹¹⁸ They either fail to object at all or fail to object with the requisite degree of specificity.¹¹⁹ And because veterans often forbear hiring counsel¹²⁰—because the disability program itself *discourages* representation¹²¹—they often do not have assistance in navigating this obscure requirement.¹²² The veterans fall victim

115. See *Mathis*, 834 F.3d 1347 at 1357 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (“Even if a veteran objects to an examiner’s competence before the Board, a veteran must make a ‘specific’ objection to an examiner’s competence—not merely a ‘general’ one—before the Board will review the examiner’s competence.”).

116. See *id.* (Reyna, J., dissenting from denial of rehearing *en banc*) (explaining that the presumption of competence “almost entirely insulates the VA’s choice of medical examiners from review”).

117. See Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA*, 1 VETERANS L. REV. 2, 2–3 (2009) [hereinafter Reiss] (noting the pro-claimant and non-adversarial nature of the of the veterans’ disability program).

118. See *id.* at 47–48 (stating that the veterans’ courts compensate for the veterans’ lack of legal sophistication by affording them more paternalistic proceedings).

119. See, e.g., *Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010) (“A request for information about an expert’s qualifications, however, is not the same as a challenge to those qualifications. Indeed, one may assume that litigants who are told an expert witness’s qualifications frequently may conclude that there is no reasonable basis for challenging those qualifications.”).

120. See Reiss, *supra* note 117, at 3 n.10 (stating that lawyers often forbear representing clients at the earliest stages of disability claims due to statutory fee caps).

121. See *id.* at 47–48 (stating that the veterans’ courts deal more paternalistically with unrepresented veterans than represented ones).

122. See, e.g., *Comer v. Peake*, 552 F.3d 1362, 1368–69 (Fed. Cir. 2009) (considering the appeal of a pro se veteran).

to the very aspect of the benefits program that is supposed to be working in their favor: Its informality.¹²³

The second reason that veterans do not offer specific objections is that the Federal Circuit has failed to explain what objecting specifically even means.¹²⁴ In one case, for example, a veteran expressed to the VA a general concern that his medical examiner—a nurse—was unqualified to perform his evaluation.¹²⁵ On appeal, he tried to raise the issue of his examiner’s qualifications—namely, that the nurse was unqualified to diagnose his particular disability.¹²⁶ But apparently the veteran’s general expression of concern did not rise to the level of a formal objection—perhaps he needed to use certain magic words.¹²⁷ Whatever the requirement, it seems out of place in the non-adversarial veterans’ disability program, especially since that program expressly prohibits formal, adversarial-style burdens.¹²⁸

The last reason that veterans fail to win their objections is the most disturbing: Even when a veteran *does* try to object to her examiner’s qualifications, she is often barred from doing so.¹²⁹ She

123. See *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (describing the VA disability program as one “designed to function . . . with a high degree of *informality* and solicitude for the claimant.”) (emphasis added) (citations omitted).

124. See *Parks v. Shinseki*, 716 F.3d 581, 586 (Fed. Cir. 2011) (applying the presumption of competence although the veteran raised a general expression of concern as to his examiner’s qualifications before the Board of Veterans’ Appeals).

125. See *id.* at 586 (“[A]t the Board and with the assistance of a non-lawyer from the DAV, Mr. Parks had asserted only that the report prepared by Ms. Larson should have been excluded because, contrary to VA operating procedures, a physician had not signed it.”).

126. See *id.* (“Mr. Parks never raised any concern over Ms. Larson’s qualification or those of an ARNP generally, let alone sought to overcome the presumption until his appeal to the Veterans Court.”).

127. See *id.* at 585–86 (holding that the veteran had waived his objection by failing to argue that the VA’s selection of the examiner was improper or that Ms. Larson was incompetent).

128. See *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, J., dissenting) (“The purpose [of the Veterans’ disability program] is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.”), *superseded in part by statute*, Pub. L. No. 107-330, § 402(a), 116 Stat. 2820, 2832 (2002), *as recognized in* *Maehr v. United States*, 2019 WL 1552562, at *2 (Fed. Cir. Apr. 10, 2019).

129. See *Mathis v. McDonald*, 834 F.3d 1347, 1357 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (explaining how the VA sometimes bars veterans from even raising objections against their examiners’

is barred because the VA often will simply refuse to give the veteran enough information to raise a specific objection, putting her in a double bind:

If a veteran asks for an examiner's qualifications, the VA will not provide them unless it is ordered to do so by the Board, the Veterans Court, or this court. The Board may refuse to order the VA to do so when the veteran has not already raised a specific objection to the examiner's competence. This can create a situation in which the veteran must make a specific objection to an examiner's competence before she can learn the examiner's qualifications; otherwise, the Veterans Court and this court will deny a veteran's challenge to the competency of the examiner. The veteran is rendered hapless, caught in a classic Joseph Heller catch-22-like circumstance.¹³⁰

That the VA may place the burden of challenging an examiner's competence on the veteran himself, and then not give the veteran enough information to actually raise a challenge, is one of the presumption of competence's most troubling aspects, according to Justice Gorsuch:

[C]onsider how the presumption works in practice. The VA usually refuses to supply information that might allow a veteran to challenge the presumption without an order from the Board of Veterans' Appeals. And that Board often won't issue an order unless the veteran can first supply a specific reason for thinking the examiner incompetent. No doubt this arrangement makes the VA's job easier. But how is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve?¹³¹

Imagine going to court and the judge putting the burden on *you* to discredit the other side's expert witness—a formidable obstacle in itself. But then imagine that you ask the other side: Well, who exactly *is* your witness—and they refuse to tell you. And

qualifications); *see also* No. 1452787, 2014 WL 7740599, at *8 (Bd. Vet. App. Dec. 1, 2014) (refusing a veteran's request for access to her examiner's CV because the veteran had not rebutted the presumption of competence).

130. *See Mathis v. McDonald*, 834 F.3d 1347, 1357 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (citations omitted).

131. *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from the denial of certiorari).

then imagine that the judge allows the expert to deliver withering testimony against your case, his qualifications totally unestablished. Imagine that all of this happens in a theoretically solicitous disability scheme that is supposedly oriented in your favor. Imagine all of this, and you have imagined the presumption of competence.¹³²

This presumption shields the veterans' disability program from judicial review.¹³³ After all, if a veteran cannot *object* to his examiner's opinion, how can the veteran *appeal* the examiner's opinion?¹³⁴ Even when a veteran can appeal his examiner's opinion, the presumption of competence still prevents an effective review by limiting the information that comes before the appeals court.¹³⁵ That is especially true when you consider that in some of its more recent decisions, the Federal Circuit has extended the presumption beyond the mere question of the examiner's qualifications all the way to the examiner's reasoning itself—assuming not only the competence of the examiner but also the competence of his opinion.¹³⁶ That presumption might be warranted if evidence proved the general reliability of medical examiners. Unfortunately, the evidence shows the opposite.¹³⁷

132. See *Mathis v. McDonald*, 834 F.3d 1347, 1357 (Reyna, J., dissenting from denial of rehearing *en banc*) (describing the struggles experienced by veterans when raising an adequate objection in front of the VA Board of Veterans' Appeals).

133. See *id.* (explaining that the presumption of competence "almost entirely insulates the VA's choice of medical examiners from review").

134. See, e.g., *Parks v. Shinseki*, 716 F.3d 581, 586 (Fed. Cir. 2013) (applying the presumption of competence although the veteran had raised a general expression of concern before the Board of Veterans' Appeals).

135. See, e.g., *Rizzo v. Shinseki*, 580 F.3d 1288, 1291–92 (Fed. Cir. 2009) (adopting the presumption of competence rather than weighing the relative qualifications of two competing experts).

136. *But see Bruner v. Wilkie*, 2018 WL 1750944, at *2 (Vet. App. April 12, 2018) (refusing to extend the presumption of competence to the adequacy of an examiner's opinion).

137. See, e.g., Brief of Law School Veterans Clinics and Attorneys as *Amici Curiae* in Support of the Petition for a Writ of Certiorari at 17–19, *Mathis v. McDonald*, No. 16-677 (U.S. Dec. 22, 2016) (putting forward evidence that VA medical examinations are often unreliable).

B. The Presumption of Competence Protects Incompetent Medical Examiners

One of the biggest problems with categorically presuming the competence of veterans' medical examiners is that VA medical examiners—emphatically—are not categorically competent.¹³⁸ One study, for example, picked a random sample of 100 Veteran's Court opinions and then picked within that sample the cases where the court actually reviewed a medical examiner's opinion.¹³⁹ Among these cases, the court held 76 percent of the time that the examiner's opinion was either wrong or inaccurate.¹⁴⁰ That is not an isolated finding. Here is a report summarizing the VA's extensive history of procedural error:

Ultimately, the best measure of how well the [VA] system is performing is the accuracy of the decision making [T]he small sample of cases appealed to the [Veterans' Court of Appeals] suggests agency errors are frequent, as the [court] affirms fewer than 35% of the [VA's] decisions that it addresses on the merits. On a wider scale, VA's Office of Inspector General released a report in March 2009 concluding that VA's internal quality control system was under-reporting errors, and estimated that 203,000 of the 882,000 (24%) compensation claims decided over a one-year period contained non-technical errors that affected the amount of benefits paid. This report followed a previous one that found disturbing variances in the treatment of claims between different [VA offices], and a 2000 GAO [Government Accounting Office] report stating that stricter quality review measures implemented in 1999 showed that *initial [VA] decisions were correct only 68% of the time*. Thus, there is ample reason to be concerned about how well the current VA adjudication process works.¹⁴¹

138. See *Mathis v. McDonald*, 643 Fed. Appx. 968, 982–83 (Fed. Cir. 2016) (Reyna, J., concurring) (describing the process by which the VA picks its examiners as “largely unknown” and noting the agency's preference for generalist examiners as opposed to specialists).

139. Brief of Law School Veterans Clinics and Attorneys as *Amici Curiae* in Support of the Petition for a Writ of Certiorari at 17–19, *Mathis v. McDonald*, No. 16-677 (U.S. Dec. 22, 2016) (putting forward the findings of the study).

140. *Id.*

141. James D. Ridgeway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits*, 66 N.Y.U. ANN. SURV. AM. L. 251, 270 (2010).

Besides the numbers, there is also plenty of anecdotal evidence to support the proposition that the VA does not routinely pick competent medical examiners.¹⁴² Two examples come to mind immediately.

The first example is about a veteran named Charles Gatlin.¹⁴³ Gatlin suffered a brain injury from a car bomb in Iraq and was discharged from the Army with a 70 percent disability rating.¹⁴⁴ But on returning home, he visited a medical office where a psychologist inexplicably reduced his disability rating to thirty percent after a brief exam.¹⁴⁵ Why did the psychologist do this? Because the psychologist did not know what he was doing.¹⁴⁶ According to the VA's own regulations, the psychologist was unqualified to diagnose traumatic brain injuries—only psychiatrists, physiatrists, neurologists could perform those kinds of examinations.¹⁴⁷ The good news is that Gatlin did eventually receive his benefits.¹⁴⁸ The bad news is that it took three years and put significant pressure on his life and marriage.¹⁴⁹ The worse news is that Gatlin was not the only veteran to receive an unqualified brain examination—not even close.¹⁵⁰ In 2014, the VA admitted that over the course of seven years, unqualified examiners performed 24,000 traumatic brain injury evaluations.¹⁵¹ Let the record reflect: The Federal Circuit presumes all medical examiners competence—but at least 24,000 of them have given incompetent brain exams.¹⁵²

142. See, e.g., Sarah Kolinovsky, *VA Admits 25,000 Veterans Received Improper Brain Injury Screening*, ABC NEWS (June 9, 2016, 4:48PM), <http://abcnews.go.com/US/va-admits-25000-veterans-received-improper-brain-injury/story?id=39734423> (reporting that over the course of seven years incompetent VA medical examiners perform 24,000 brain exams) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

The second example involves an anesthesiologist.¹⁵³ Dr. Richard Krugman had not treated a patient in nearly ten years.¹⁵⁴ After accepting a job as a VA medical examiner, he went through an online training course that lasted a week and received no in-person training.¹⁵⁵ When asked to perform a medical evaluation, he refused on grounds that he was unqualified.¹⁵⁶ The VA fired Dr. Krugman, due at least in part to his refusal.¹⁵⁷ Let the record reflect: The Federal Circuit presumes all medical examiners competent—but at least one of them refused to do a job on grounds of incompetence and was fired over it.¹⁵⁸

C. The Presumption of Competence Contravenes Veterans' Benefits Statutes

Already this Note has established that the veterans' disability program is a non-adversarial, solicitous affair organized in the veteran's favor.¹⁵⁹ And it has established also that the presumption of competence adds to that non-adversarial affair an adversarial burden—that veterans affirmatively object to their examiner's qualifications.¹⁶⁰ What, then, is the legal consequence?

The Supreme Court answered that question in 2000 with *Sims v. Apfel*.¹⁶¹ Admittedly, *Sims* was about Social Security benefits, not veterans' disability benefits, but the case is relevant for the principle it sets forward:

153. *Mathis v. McDonald*, 834 F.3d 1347, 1355 n.3 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (noting *Krugman v. Dep't of Veterans Affairs*, 645 Fed. Appx. 1000 (Fed. Cir. 2016) in support of Mr. Mathis's argument that "the presumption of regularity should not have been applied to the VA and its outside contractors' processing of selecting examiners").

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *See Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (describing the VA disability program as one "designed to function . . . with a high degree of informality and solicitude for the claimant" (citations omitted)).

160. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (establishing the presumption of medical examiner competence).

161. *See Sims v. Apfel*, 530 U.S. 103, 109–10 (2000) (prohibiting adversarial burdens such as issue exhaustion in non-adversarial schemes).

[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding [W]here . . . an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker.¹⁶²

The paraphrased version of the Court’s reasoning is that adversarial burdens do not belong in non-adversarial proceedings—particularly burdens such as issue exhaustion.¹⁶³ That reasoning applies squarely here given that the presumption of competence is, at bottom, a rule of issue exhaustion—it exhausts in some circumstances the veteran’s right to appeal.¹⁶⁴ By imposing that rule against veterans, the court has undermined the solicitous, pro-claimant nature of the veterans’ disability statutes.¹⁶⁵

D. The Presumption of Competence Violates the Fifth Amendment

Because the presumption of competence undermines the non-adversarial VA disability program, it also violates the Fifth Amendment.¹⁶⁶ That Amendment prohibits the state from taking “life, liberty, or property, without due process of law.”¹⁶⁷ As the Supreme Court has long recognized, the Amendment’s protections

162. *Id.* (citations omitted).

163. *See id.* (“The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings.”).

164. *See Rizzo*, 580 F.3d at 1291 (requiring veterans to challenge the qualifications of their medical examiner affirmatively, lest they lose the right to challenge them on appeal).

165. *See Mathis v. McDonald*, 834 F.3d 1347, 1353 (Fed. Cir. 2016) (Reyna, J., dissenting from the denial of rehearing *en banc*) (“[The Presumption’s] application has resulted in a process that is inconsistent with the Congressional imperative that the veterans’ disability process be non-adversarial, and that the VA bears an affirmative duty to assist the veteran.”).

166. *See id.* at 1356 (Reyna, J., dissenting from the denial of rehearing *en banc*) (“Since the presumption of competence leaves veterans with no way to effectively challenge the nexus between the VA examiners’ qualifications and their opinions, due process afforded other individuals in other legal disciplines is not extended to veterans.”).

167. *See* U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

against the taking of property extend to certain government benefits.¹⁶⁸ To determine whether a government benefit counts as a constitutionally protected property interest, courts ask whether the claimant has a mere “abstract need or desire” for the benefits or, on the other hand, a “legitimate entitlement” to them.¹⁶⁹ In past decisions, the Federal Circuit has recognized that veterans *do* have a legitimate entitlement to disability benefits.¹⁷⁰ And in a 2009 decision, the court decided that a veteran’s entitlement to benefits begins even before the benefits have been awarded—they begin as soon as the veteran submits an application.¹⁷¹ Under these decisions, the Federal Circuit should have held that the presumption of competence contravened the Fifth Amendment.¹⁷²

That constitutional problem combined with the others—the obscured review; the incompetent examiners; the undermined disability scheme—warrant overturning the presumption of competence. As the next section explains, some members of the Federal Circuit agree with that proposition.

IV. *The Split*

Over the past three years, a faction has formed of several Federal Circuit judges dedicated to overturning the presumption of competence.¹⁷³ Although the judges represent the minority of the court, their opposition signals a flash of recognition, an impending

168. See *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976) (stating that disability benefits can be a property interest protected under the Fifth Amendment).

169. See *Cushman v. Shinseki*, 576 F.3d 1290, 1297 (discussing Supreme Court precedent requiring a legitimate entitlement over an abstract need or unilateral expectation) (citations omitted).

170. See *id.* at 1297 (noting that veterans’ disability statutes provide “an absolute right of benefits to qualified individuals”).

171. See *id.* at 1298 (“A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.”).

172. See *Mathis*, 834 F.3d at 1356 (Reyna, J., dissenting from the denial of rehearing *en banc*) (demonstrating the presumption of competence raises a due process problem).

173. See, e.g., *id.* at 1353 (Reyna, J., dissenting from denial of rehearing *en banc*) (admonishing the court over the presumption of competence).

realization, that the presumption of competence deserves no place in veterans' disability law.¹⁷⁴ The ferocity of their opposition was on full display in a 2009 case about a United States Air Force veteran.¹⁷⁵ Because that case both illustrates the danger of the presumption and also provides a useful map of the court's diverging opinions, this Section tells of what happened in that case during each of its three constituent phases.

A. First Stage: The Board of Veterans' Appeals

The case began in in the fall of 2009, one month after veteran Freddie Mathis had been diagnosed with a rare pulmonary condition called Sarcoidosis.¹⁷⁶ Cells had inflamed on the linings of Mathis' lungs,¹⁷⁷ forming scars that labored his breathing and caused episodes of fatigue and sent him at one point to the emergency room.¹⁷⁸ No one disputed that Mathis had Sarcoidosis.¹⁷⁹ The only question was whether his Sarcoidosis manifested during service.¹⁸⁰ The whole case turned on *when* he

174. *See id.* (Reyna, J., dissenting from denial of rehearing *en banc*) (“The presumption, that the Veterans Administration ordinarily and routinely selects competent medical examiners as a matter of due course, was created void of any evidentiary basis.”).

175. *See id.* at 1353–54 (Reyna, J., dissenting from denial of rehearing *en banc*) (telling Mathis's story, when the presumption of competence failed).

176. *Id.*

177. *See Pulmonary Sarcoidosis*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/healthlibrary/conditions/respiratory_disorders/pulmonary_sarcoidosis_85,P01325 (last visited Jan. 28, 2019) (“Sarcoidosis in the lungs is called pulmonary sarcoidosis. It causes small lumps of inflammatory cells in the lungs. These lumps are called granulomas and can affect how the lungs work . . . [I]f they don't heal, the lung tissue can remain inflamed and become scarred and stiff.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

178. *See* Brief for Appellant at 4, *Mathis v. McDonald*, 643 Fed. Appx. 968 (Fed. Cir. 2016) (No. 15-7094) (describing Mathis' symptoms and explaining that Mathis' trip to the emergency room was the result of these symptoms).

179. *See Mathis v. McDonald*, 834 F.3d 1347, 1354 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (providing the opinion of Mathis' medical examiner, who concedes that Mathis does at least have Sarcoidosis).

180. *See id.* at 1353 n.1 (“[A]s in this case, the service connection issue is often dispositive.”) (citations omitted).

contracted it.¹⁸¹ Mathis believed that he developed it in the late 1990's, several years before he retired.¹⁸² He filed for benefits.¹⁸³

Six months later, the VA denied his claim.¹⁸⁴ Mathis appealed to the Board of Veterans' Appeals, where his case languished.¹⁸⁵ As part of that appeal, he testified before a review board that his symptoms began during service: The fatigue, the weakness, the shortness of breath.¹⁸⁶ He testified that he was treated for these symptoms while serving and that the cause of his condition may have been environmental exposure while he was stationed in Italy.¹⁸⁷ His ex-wife testified as well, backing up what he said.¹⁸⁸ He submitted statements from two fellow service members who confirmed that his heavy breathing began in the late 1990's, before he retired.¹⁸⁹

More years passed, and it was now 2012.¹⁹⁰ The VA requested a medical opinion from a doctor about whom little was known.¹⁹¹ His name was Dr. John Dudek, and he did not examine Mathis.¹⁹² He did not perform tests.¹⁹³ He determined from Mathis's claim file, his hearing transcript, and lay statements that Mathis' Sarcoidosis probably did not develop while he was serving.¹⁹⁴ Dudek made this determination in an opinion spanning two

181. *See id.* (noting that the outcome of the case on the question of service connection).

182. *Mathis v. McDonald*, 643 Fed. Appx. 968, 969 (Fed. Cir. 2016).

183. *Id.*

184. *Id.*

185. *See id.* at 969–70 (describing Mathis' appeal before the Board as beginning in March 2010 ending in June 2013).

186. *Id.* at 969.

187. *Id.*

188. *Id.*

189. *See id.* ("Mathis submitted two statements from veterans who . . . described his shortness of breath during his active service and since that time.").

190. *See id.* (stating that the VA obtained Dr. John K. Dudek's medical opinion in 2012).

191. *See Mathis*, 834 F.3d at 1354 (Reyna, J., dissenting from denial of rehearing *en banc*) ("The record indicated merely that the examiner was a 'staff physician.'") (citations omitted).

192. *See Mathis*, 643 Fed. Appx. at 969 (stating Dr. Dudek reviewed Mathis's claims file but did not examine Mathis).

193. *See id.* (stating Dr. Dudek did not perform any tests).

194. *See id.* (describing Dr. Dudek's conclusion).

paragraphs, a whopping six sentences.¹⁹⁵ The opinion made no reference to medical authority and included little in the way of actual reasoning.¹⁹⁶ Sentence number five of the opinion he dedicated to the following specious argument: “Had veteran had significant breathing issues post service, one can assume he would have sought medical care, and a simple CXR would have been ordered.”¹⁹⁷

The opinion assumed, in other words, that because Mathis did not seek treatment in the year immediately following service, that he must not have had symptoms in that year following service.¹⁹⁸ Based on the opinion, the Appeals Board denied Mathis’ claim for benefits.¹⁹⁹

195. *See Mathis*, 834 F.3d at 1354 (Reyna, J., dissenting from denial of rehearing *en banc*). Dr. Dudek’s opinion in its entirety:

While veteran claims to have had some pulmonary symptoms while in service, there is nothing to support that they were related to sarcoidosis. I am not doubting the validity of the letters written by Mr. Jackson and Mr. Adams stating that veteran had some breathing issues while in service. He may very well have had such issues. But the Sarcoidosis was diagnosed 7 years after service. There is nothing to indicate that it existed within one year of service. Had veteran had significant breathing issues post service, one can assume he would have sought medical care, and a simple CXR would have been ordered.

As the present lack of documentation exists, it would be an extreme stretch, and unreasonable, to opine that veteran's sarcoidosis existed with one year of service.

196. *See id.* (discussing Mathis’s argument that the report contained inadequate analysis and minimal effort given that the examiner cited no medical authorities).

197. *Id.*

198. *See id.* (“As the present lack of documentation exists, it would have been an extreme stretch, and unreasonable, to opine that veteran’s sarcoidosis existed within one year of service.”).

199. *See Mathis*, 643 Fed. Appx. at 970 (describing the Board’s findings).

B. Second Stage: The Veterans Court

Mathis appealed to the Veterans Court,²⁰⁰ where he argued that Dr. Dudek's opinion afforded the VA an inadequate basis to deny his claim.²⁰¹ For one thing, the VA had failed to establish Dr. Dudek's credentials.²⁰² Mathis was suffering from a complex disease, the assessment of which (arguably) would have required specialized training in the field of pulmonology.²⁰³ But the VA did not prove that Dr. Dudek had any specialized training in that field; nor did it prove that Dr. Dudek had enough training to determine accurately when a case of Sarcoidosis began.²⁰⁴ Remember: The examiner's job is to decide not only whether a veteran has a disease but also when it started.²⁰⁵ Here, Dr. Dudek needed to determine if Mathis had contracted Sarcoidosis before 2002—ten years earlier.²⁰⁶ Whether Dr. Dudek had the qualifications to make that sort of determination is a mystery.²⁰⁷ The record showed merely that he was a staff physician who (maybe) specialized in family practice.²⁰⁸

200. See *Mathis*, 834 F.3d at 1353 n.1 (Reyna, J., dissenting from denial of rehearing *en banc*) (“[T]he veteran may appeal to the Board of Veterans' Appeals (the ‘Board’), and then the United States Court of Appeals for Veterans Claims (the ‘Veterans Court’), this court, and the U.S. Supreme Court.”).

201. See *Mathis*, 643 Fed. Appx. at 970 (stating that the Veterans Court relied on an inadequate medical opinion instead of a proper medical examination).

202. See *id.* (“Mathis argued to the court that: . . . the VA failed to establish that the examiner was competent to provide an opinion in this case.”).

203. See *Mathis*, 834 F.3d at 1354 (“Mr. Mathis also objected to the VA's failure to establish that the examiner was ‘qualified to offer an expert opinion’ on the issue, which he argued required ‘specialized knowledge, training or experience in the field of pulmonology.’”) (citations omitted).

204. See *id.* (“The record indicated merely that the examiner was a ‘staff physician.’”) (citations omitted).

205. See *Mathis*, 643 Fed. Appx. at 970 (“[E]ntitlement to service connection for a particular disorder requires (1) evidence of the existence of a current disorder, and (2) evidence that the disorder resulted from a disease or injury incurred in or aggravated during service.”).

206. See *id.* at 969 (stating that Mathis resigned from the Air Force in 2002 and that the VA appointed Dr. Dudek to examine his claim in 2012).

207. See *Mathis v. McDonald*, 834 F.3d 1347, 1354 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (stating that the VA presumes is has properly chosen a qualified person).

208. See *id.* at 1354 (“The record indicated merely that the examiner was a ‘staff physician.’”) (citations omitted); *id.* at 1354 n.1 (“The briefing in this case indicates that Mr. Mathis believes that the examiner was a family practice doctor,

Another problem was Dr. Dudek's opinion itself, it being totally devoid of any reference to medical literature and serious adult-level reasoning.²⁰⁹ Take, for example, Dr. Dudek's assumption that because Mathis failed to visit a doctor within one year of service he must therefore not have had any symptoms during that year. What the opinion failed to consider was that Mathis was a tough member of the military who perhaps would not have been alarmed by the early symptoms of Sarcoidosis, with its rather mild onset; that Mathis perhaps *was* breathing heavily and experiencing episodes of fatigue, but being a hardened soldier, did not consider these reasons to see a doctor.²¹⁰ Mathis provided medical analysis of his own showing a few key facts about Sarcoidosis: (1) that there are multiple forms of the disease;²¹¹ (2) that some forms of the disease manifest symptoms early while others develop symptoms more slowly, more insidiously;²¹² and (3) that Sarcoidosis sometimes takes up to a year to diagnose, even when a patient is seeking continuous treatment from an experienced practitioner.²¹³ Mathis argued that Dr. Dudek ignored these facts in coming to his conclusion.²¹⁴

but support for this is not in the record.") (citations omitted).

209. *See* Mathis v. McDonald, 643 Fed. Appx. 968, 970 (Fed. Cir. 2016) ("Mathis argued to the court that: . . . [T]he Board erred in relying on an inadequate VA examiner opinion . . .").

210. *See* Brief for Appellant at 4, Mathis v. McDonald, 643 Fed. Appx. 968 (Fed. Cir. 2016) (No. 2015-7094) ("Mr. Mathis testified that his wife would nag him to see a physician. Nonetheless, Mr. Mathis stubbornly refused to seek medical attention, brushing-off his symptoms as long as possible.") (citations omitted).

211. *See id.* at 38–39 ("[T]here are several different types of sarcoidosis . . ." (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1668 (32d ed. 2012))).

212. *See id.* (explaining that one type of Sarcoidosis is "characterized by a slow and gradual development of symptoms" (citing DORLAND'S ILLUSTRATED MED. DICTIONARY 1668 (32d ed. 2012))).

213. *See id.* ("[D]ue to the non-specific nature of pulmonary symptoms, many physicians would not suspect sarcoidosis at its early phase and thus would not immediately order a chest x-ray." (citing 2 HARRISON'S PRINCIPLES OF INTERNAL MED. 2136 (17th ed. 2008))); *id.* at 29 n.21 ("This treatise notes that it may take up to one-year to confirm a diagnosis of sarcoidosis. But this statement assumes that the patient has continuously sought medical attention. The timeline would obviously be longer if the patient did not seek continuous treatment." (citing 2 HARRISON'S PRINCIPLES OF INTERNAL MED. 2136 (17th ed. 2008))).

214. *See id.* (stating that Dr. Dukek provided no support for his conclusory opinion based on false assumptions).

But the Veterans' Court rejected Mathis' arguments.²¹⁵ It assumed the correctness of Dr. Dudek's opinion without knowing anything about him.²¹⁶ It made no effort to discover his credentials or to make sense of his sparse reasoning.²¹⁷ It presumed his competency and threw the burden on Mathis of showing otherwise.²¹⁸ Mathis could have overcome this presumption only by offering specific objections at the first stage of the appeal—before the Appeals Board.²¹⁹ But because Mathis was not a lawyer—merely a United States veteran, seven years removed from twenty-two years of service, with trouble breathing—he failed to make the objections and lost his case.²²⁰

C. Third Stage: The Federal Circuit

Mathis appealed to a three judge panel of the Federal Circuit, which had no choice but to but to affirm, it being bound by the presumption of competence.²²¹ Mathis petitioned for rehearing *en banc* in hopes of convincing the full bench to disavow the presumption.²²² The court denied the petition with five judges

215. See *Mathis v. McDonald*, 834 F.3d 1347, 1354 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing *en banc*) (“The VA denied Mr. Mathis’s claim for benefits after reviewing the examiner’s opinion and the Board affirmed.”)

216. See *id.* (“The record indicated merely that the examiner was a ‘staff physician.’”) (citations omitted).

217. See *Mathis v. McDonald*, 643 Fed. Appx. 968, 970 (Fed. Cir. 2016) (summarizing the findings of the Veterans’ court: That the Board of appeals was within its right to presume the competency of Mathis’s examiner, and the burden of showing otherwise rested with Mathis).

218. See *id.* (“[T]he Veterans Court noted that Mathis recognized legal authority that placed the burden on the claimant to challenge the competency of VA medical examiners.”).

219. See *Mathis*, 834 F.3d at 1357 (“Even if a veteran objects to an examiner’s competence before the Board, a veteran must make a ‘specific’ objection to an examiner’s competence—not merely a ‘general’ one—before the Board will review the examiner’s competence.”) (citations omitted).

220. See *Mathis*, 643 Fed. Appx. at 971 (“The Veterans Court held that the mere fact that the VA examiner was not a pulmonologist did not, by itself, render the opinion inadequate. Therefore, it affirmed.”).

221. See *id.* at 975 (“We need not—and cannot—resolve this debate. We . . . are bound by clear precedent to presume that Dr. Dudek was competent to render the opinion he did.”).

222. See *Mathis v. McDonald*, 834 F.3d 1347 (Fed. Cir. 2016) (“A petition for rehearing *en banc* was filed by claimant-appellant.”).

dissenting.²²³ It is worth pausing here to identify the points of disagreement between the judges.

1. *The Fight in the Federal Circuit*

One of the chief difficulties with analyzing the presumption of competence is that some of its most insidious reasoning lives in mounds of abstruse case law. This is an area of law filled with confusing Federal Circuit opinions and with opinions from Veterans' Court and the Board of Appeals that are even more confusing.²²⁴ The Board decisions are particularly dense. Many of them do not even have captions.²²⁵ One especially troubling opinion referenced *supra* is called simply: "No. 1452787."²²⁶ That title of seven innocuous digits serves to obscure how dangerous the opinion is. The lack of a caption makes the opinion seem ordinary, routine. And because the case law is confusing, and because the really dangerous reasoning hides in title-less opinions, the points of disagreement between the judges of the Federal Circuit can be difficult to identify.

By all appearances, the most prominent voice in the keep-the-presumption-of-competence camp is Judge Todd Hughes who wrote a concurring opinion to the order denying Mathis' petition for re-hearing.²²⁷ He believes that the concerns over the presumption of competence are overstated and fears that overturning it would create an unmanageable administrative burden for the VA:

The VA provides over 1 million disability evaluations yearly and in 2015 alone, the Veterans Health Administration completed 2,899,593 individual disability benefits questionnaires and/or disability examination templates. The dissent has provided no

223. *See id.* at 1353 (Reyna, J., dissenting from the denial of rehearing *en banc*) (dissenting with judges Newman and Wallach joining); *id.* at 1360 (Stoll, J., dissenting from the denial of rehearing *en banc*) (dissenting with Judges Newman, Moore, and Wallach joining).

224. *See Mathis v. McDonald*, 643 Fed. Appx. 968, 977 (Fed. Cir. 2016) (discussing numerous cases regarding the presumption of competence).

225. *See id.* at n.6 (citing numerous caption-less cases).

226. No. 1452787, 2014 WL 7740599 at *8 (Bd. Vet. App. Dec. 1, 2014).

227. *See Mathis v. McDonald*, 834 F.3d 1347, 1349 (Fed. Cir. 2016) (Hughes, J., concurring in the denial of rehearing *en banc*).

guidance as to how the elimination of this limited presumption would work with regard to the millions of disability evaluations that have already been provided and form the basis for the continuing evaluation of the millions of pending claims for benefits.²²⁸

Heading up the effort to undue the Presumption of Competence is Judge Jimmie Reyna,²²⁹ whose dissent from the denial for re-hearing is a rhetorical masterpiece. Here is the opening paragraph:

In declining to undertake an *en banc* review, the court leaves in place a judicially created evidentiary presumption that in application denies due process to veterans seeking disability benefits. The presumption, that the Veterans Administration ordinarily and routinely selects competent medical examiners as a matter of due course, was created void of any evidentiary basis. Its application has resulted in a process that is inconsistent with the Congressional imperative that the veterans' disability process be non-adversarial, and that the VA bears an affirmative duty to assist the veteran. In the face of these circumstances, the government's cries concerning its administrative burdens do not resonate. I dissent . . .²³⁰

This paper will spend its third Part comparing the approaches of these two judges—Hughes and Reyna. But it is worth mentioning that these are not the only important voices in the presumption of competence debate. Following his denial for re-hearing, Freddie Mathis petitioned the Supreme Court for certiorari.²³¹ The Court denied the petition, but from the denial, Justice Gorsuch dissented.²³² He argued that the Supreme Court should take on the presumption of competence:

Now, you might wonder if our intervention is needed to remedy the problem. After all, a number of thoughtful colleagues on the Federal Circuit have begun to question the presumption's propriety. And this may well mean the presumption's days are numbered. But I would not wait in hope. The issue is of much

228. *Id.* at 1352.

229. *See Mathis*, 834 F.3d at 1353 (dissenting from the denial of rehearing *en banc*).

230. *Id.*

231. *See generally* *Mathis v. Shulkin*, 137 S. Ct. 1994 (2017).

232. *See id.* at 1995 (Gorsuch, J., dissenting from the denial of certiorari).

significance to many today and, respectfully, it is worthy of this Court's attention.²³³

Justice Sotomayor also attached a statement to the denial of certiorari.²³⁴ She agreed that the Court should review the presumption, but believed for procedural reasons that *Mathis* was the wrong case to decide the issue.²³⁵

2. *The Lesson of Mathis v. McDonald*

Here things stand. Five judges of the Federal Circuit and perhaps two members of the Supreme Court are prepared to do away with the presumption of competence for good. Meanwhile, a majority of the Federal Circuit remains obstinately opposed. In some respects, their hesitancy is understandable. Undoing the presumption of competence raises a host of questions, *e.g.*, what does the court replace it with?²³⁶ What will the administrative burden look like?²³⁷ What will the VA have to do to qualify its examiners, if the burden is on them?²³⁸

On the other hand, the Presumption of Competence occupies some pretty indefensible terrain.²³⁹ It places a heavy adversarial-style burden into a thoroughly non-adversarial program and in doing so reduces the likelihood that veterans will receive the benefits to which they are entitled under the law.²⁴⁰ *Mathis* shows the problem in a couple ways.

233. *Id.*

234. *Id.* at 1994 (Sotomayor, J., respecting the denial of certiorari).

235. *See id.* at 1995 (“Full review would require a petition . . . from a case in which the VA denied a veteran benefits after declining to provide the medical examiner's credentials. Until such a petition presents itself, staying our hand allows the Federal Circuit and the VA to continue their dialogue . . .”).

236. *See infra* Part 5.

237. *See infra* Part 5.

238. *See infra* Part 5.

239. *See Mathis v. McDonald*, 834 F.3d at 1353 (Reyna, J., dissenting from the denial of rehearing *en banc*) (“In declining to undertake an *en banc* review, the court leaves in place a judicially created evidentiary presumption that in application denies due process to veterans seeking disability benefits.”).

240. *See id.* at 1356 (“Yet, a veteran's ability to challenge an examiner's competency is limited because the VA does not by default disclose any information about the examiner's qualifications. Veterans are unable to confront examiners through voir dire, cross-examination, or interrogatories.”) (citations omitted).

First, it shows the absurdity of placing the burden on veterans to affirmatively challenge their examiners' competence. Logic would seem to dictate that if the VA wanted to deny Mathis' claim for benefits, and if it wanted to do so based on an expert medical examiner's opinion, the burden should have fallen to *it* of establishing the examiner's qualifications—the same way that during a criminal trial, the burden of qualifying a witness for the prosecution falls on the prosecution; the same way that during a civil trial the burden of qualifying a witness for the defense falls on the defense.²⁴¹ After all, the VA's job was to help *Mathis*.²⁴² The burden of providing a competent medical examination was *theirs*.²⁴³ The duty of developing Mathis' claim was on *them*.²⁴⁴ So why then did that fundamental rule of evidence—that the burden of qualifying a witness rests with the party who wants to rely on the witness—which applies in adversarial disputes, such as criminal trials, contract suits, and tort cases, not apply to Mathis' non-adversarial dispute in the totally solicitous VA disability scheme? Why did Mathis carry a tougher burden than a litigant in a tort trial?

Second, the case shows how difficult the presumption of competence makes the review of a medical examiner's opinion. Here, the reviewing courts knew nothing of Dr. Dudek's credentials; about his reasoning, they knew only what he conveyed

241. See *id.* at 1357 (Fed. Cir. 2016) (Reyna, J., dissenting from the denial of rehearing *en banc*) (“The regulation applicable here—38 C.F.R. § 3.159(a)(1)—is analogous to Federal Rule of Evidence 702. Under Rule 702, district courts first determine if an expert witness is competent to testify on a subject before relying on the expert's testimony.”).

242. See *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, J., dissenting) (“The purpose [of the Veterans' disability program] is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.”), *superseded in part by statute*, Pub. L. No. 107-330, § 402(a), 116 Stat. 2820, 2832 (2002), *as recognized in* *Maehr v. United States*, 2019 WL 1552562, at *2 (Fed. Cir. Apr. 10, 2019).

243. See 38 U.S.C § 5103A (2018) (“The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.”).

244. See *Hayre v. W.*, 188 F.3d 1327, 1331 (Fed. Cir. 1999) (“Congressional mandate requires that the VA operate a unique system of processing and adjudicating claims for benefits that is both claimant friendly and non-adversarial. An integral part of this system is embodied in the VA's duty to assist the veteran in developing facts pertinent to his or her claim.”).

within his six-sentence opinion.²⁴⁵ Thus, when the reviewing courts “reviewed” Dr. Dudek’s opinion, they were not actually reviewing anything at all; they were mechanically applying the presumption of competence without giving any thought as to whether Dr. Dudek was qualified or his opinion correct.²⁴⁶ When Congress overhauled the veterans review scheme so as to create a “[C]ompletely ex-parte system of adjudication,”²⁴⁷ this cannot be what it had in mind.

The Federal Circuit got it wrong in a big way. The presumption of medical examiner competence is a bad fit to the uniquely pro-claimant, non-adversarial, paternalistic veterans’ disability scheme. What this note will do from here on is explain how the court should go about getting rid of it.

V. *The Solution*

The presumption of competence survives for its supposed practicality. As Judge Hughes pointed out in his concurrence to *Mathis*, getting rid of the presumption of competence raises a host of questions:

The dissent has provided no guidance as to how the elimination of this limited presumption would work with regard to the millions of disability evaluations that have already been provided and form the basis for the continuing evaluation of the millions of pending claims for benefits. Would the Secretary be required to provide an affidavit or some other supporting evidence of the examiner’s competence before the Regional Office or the Board could rely on that examination report? Would the Secretary have to appoint a specialist for each particular ailment a veteran alleges, as *Mathis* implies would be necessary? If so, that will create an incredible burden and may impair the operations of the VA, a result that will negatively impact veterans. Consequently, this court should not revise a procedure that is one small piece of a very complicated and long process, especially in a case that does not demonstrate a problem with the use of that procedure.²⁴⁸

245. See *Mathis*, 834 F.3d at 1351.

246. *Id.*

247. H.R. REP. NO. 100-963, at 13 (1988).

248. *Mathis*, 834 F.3d at 1349 (Hughes, J., concurring in the denial of

On the one hand, it sounds a bit like Judge Hughes is supporting his interpretation of the law on the basis of a policy concern. That is problematic in itself, but it is even more problematic when you consider that his policy concern is largely unfounded. Judge Reyna proposes getting rid of the presumption of competence for good, and he proposes a way of doing so that would impose minimal administrative burden:

Eliminating the presumption will require the VA to provide the Board with evidence that an examiner “is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions” on the issue that the examiner is testifying about. The VA could meet this requirement by attaching an examiner's curriculum vitae (CV) to her report, and, if necessary, having her state in her report why she is qualified.²⁴⁹

In other words, courts should treat VA medical examiners the same way that they treat all other experts—meaning that if the VA would like to rely on an expert’s opinion, it must first lay a foundation. That way the courts will have actual information on review to review. Rather than imposing a steep administrative burden, it would merely require that VA examiners attach to their reports a brief copy of their credentials and perhaps a statement as to why they are qualified to examine a particular veteran.

I am not sure there has ever been a legal problem so gargantuan that could be so easily fixed.

rehearing *en banc*).

²⁴⁹ Mathis v. McDonald, 643 Fed. Appx. 968, 975 (Fed. Cir. 2016) (Reyna, J., concurring).