No. 21-____

In the Supreme Court of the United States

THOMAS H. BUFFINGTON,
Petitioner,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS H. BUFFINGTON,
Claimant-Appellant

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2020-1479

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-4382, Judge Amanda L. Meredith, Judge Joseph L. Falvey Jr., Judge William S. Greenberg.

Decided: August 6, 2021

DORIS JOHNSON HINES, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, argued for claimant-appellant. Also represented by ANDREA GRACE GLOCK MILLS; BARTON F. STICHMAN, National Veterans Legal Services Program, Washington, DC.

SHARIA ROSE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by JEFFREY B. CLARK, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; BRIAN D. GRIFFIN, SAMANTHA ANN SYVERSON, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

RICHARD ABBOTT SAMP, New Civil Liberties Alliance, Washington, DC, for amicus curiae New Civil Liberties Alliance. Also represented by ADITYA DYNAR.

Before MOORE, Chief Judge[*], LOURIE and O'MALLEY, Circuit Judges.

Opinion for the court filed by *Chief Judge* MOORE.

Dissenting opinion filed by *Circuit Judge* O'MALLEY.

MOORE, *Chief Judge*.

Thomas H. Buffington appeals a final decision of the United States Court of Appeals for Veterans Claims. *Buffington v. Wilkie*, 31 Vet. App. 293 (2019) (*Veterans Court Op.*). Under 38 C.F.R. § 3.654(b)(2), the Veterans Court denied Mr. Buffington an earlier effective date for recommencement of his disability benefits after periods in which he received active service pay. *Id.* at 296. Mr. Buffington contends

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[*] Chief Judge Kimberly Moore assumed the position of Chief Judge on May 22, 2021.

§ 3.654(b)(2) conflicts with and is an unreasonable interpretation of 38 U.S.C. § 5304(c). Because we hold § 3.654(b)(2) reasonably fills a statutory gap, we affirm.

BACKGROUND

Mr. Buffington served on active duty in the United States Air Force from September 1992 until May 2000. After leaving active duty service, Mr. Buffington sought disability benefits. The Department of Veterans Affairs (VA) found that Mr. Buffington suffered from service-connected tinnitus, rated his disability at ten percent, and awarded him disability compensation. In 2003, Mr. Buffington was recalled to active duty in the Air National Guard. He informed the VA of his return to active service, and the VA discontinued his disability compensation. See 38 U.S.C. §§ 5112(b)(3), 5304(c). In 2004, Mr. Buffington completed his term of active service. Later that year, he was again recalled to active duty, serving until July 2005. It was not until January 2009, however, that Mr. Buffington sought to recommence his disability benefits. The VA determined Mr. Buffington was entitled to compensation effective on February 1, 2008—one year before he sought recommencement. *See* 38 C.F.R. § 3.654(b)(2) (setting effective date for recommencement of compensation, at the earliest, one year before filing).

Mr. Buffington filed a Notice of Disagreement, challenging the VA's effective-date determination. The VA Regional Office issued a Statement of the Case rejecting his challenge and providing further reasoning for the February 1, 2008 effective date. Mr. Buffington then appealed to the Board of Veterans Appeals, which affirmed the VA's decision. He next appealed to the

Veterans Court. That court held that § 3.654(b)(2) was a valid exercise of the Secretary of Veterans Affairs rulemaking authority and was not inconsistent with 38 U.S.C. § 5304(c). *See Veterans Court Op.*, 31 Vet. App. at 300–04. Mr. Buffington appeals. We have jurisdiction under 38 U.S.C. § 7292(a).

DISCUSSION

Title 38 codifies a complex statutory scheme aimed at providing benefits to veterans. For example, it provides veterans with a general entitlement to compensation "[f]or disabilit[ies] resulting from personal injur[ies] suffered ... in [the] line of duty" during a period of war, § 1110, or during peacetime, § 1131. As a shorthand, Congress refers to those disabilities as service-connected disabilities. *See* 38 U.S.C. ch. 11 ("Compensation for Service-Connected Disability or Death"). And it refers to benefits paid as a result of service-connected disabilities as compensation. *Id.* § 101(13). Title 38 also provides pensions for veterans who served in a period of war and for veterans who appear on the Army, Navy, Air Force, or Coast Guard Medal of Honor Roll. *See id.* §§ 1511–25.

To receive disability benefits, a veteran must apply. *Id.* § 5101(a)(1)(A) ("[A] specific claim in the form prescribed by the Secretary ... must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary."). Based on that application, the VA must determine whether the veteran has a general entitlement to disability benefits—for example, because he has a service-connected disability. If a veteran has a service-connected disability, the VA must assign him a disability rating, which corresponds

to the amount of compensation paid. *See, e.g.*, *id.* § 1134 (setting rates of peacetime disability compensation by reference to § 1114, which sets those rates for wartime disability). It must also set the effective date for the award of benefits. *Id.* § 5110. Occasionally, under the statutory framework, benefits must be reduced or discontinued. When a veteran returns to active service, for example, he cannot receive both active service pay and disability compensation. *Id.* § 5304(c). When a reduction or discontinuance is in order, § 5112 dictates how the VA must determine the effective date for that reduction or discontinuance.

This appeal requires us to interpret VA-administered statutes to determine the effective date for recommencing (as opposed to awarding or discontinuing) service-connected disability benefits once a veteran leaves active service.[1] The Secretary of Veterans Affairs has answered that interpretive question, promulgating 38 C.F.R. § 3.654(b)(2) through notice-and-comment rulemaking. In such circumstances, we apply the two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837.[2] Step one asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress

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[1] Mr. Buffington argues the question at issue should be framed as whether the VA can effect a forfeiture of benefits. But that framing assumes the interpretive conclusion.

[2] Amicus New Civil Liberties Alliance (NCLA) argues the *Chevron* framework should not apply. Neither party adopts this position, *see* Appellant's Br. at 7 ("This question is governed by the two-step framework of *Chevron* ....") and Appellee's Brief at 12, and we do not find it persuasive given the facts and arguments presented here.

is clear, that is the end of the matter," and we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If, however, "the statute is silent or ambiguous with respect to the specific issue," we proceed to step two of the *Chevron* framework, at which we determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. We must defer in the face of statutory silence because, "as a general rule, agencies have authority to fill gaps where the statutes are silent." *Nat'l Cable & Telecom. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (citing *Chevron*, 467 U.S. at 843–44); *see also Canadian Solar, Inc. v. United States*, 918 F.3d 909, 917 (Fed. Cir. 2019).

I.

At step one, we hold that Congress left a gap in the statutory scheme. Section 5304(c) bars duplicative compensation when a veteran receives active service pay:

> Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.

38 U.S.C. § 5304(c). Thus, a veteran cannot receive both service-connected disability payments and active service pay. And Congress set the effective date (start date) for discontinuing disability benefits based on active service:

> The effective date of a reduction or discontinuance of compensation ... by reason of receipt of active service pay or retirement pay shall be the day before the date such pay began.

38 U.S.C. § 5112(b)(3). But Congress did not establish when or under what conditions compensation recommences once a disabled veteran leaves active service. Nowhere in § 5304(c)'s plain terms or in the broader statutory structure did Congress speak directly to that issue.

The "any period" phrase in § 5304(c) does not set the effective date for recommencing disability benefits. Of course, the word period refers to a length of time: here, the time during which a veteran is receiving active service pay. And that period has a beginning date—when active service compensation starts—and an end date—when active service compensation ends. But § 5304(c) does not say compensation must cease *only* for that period. Congress was silent regarding whether other conditions, such as timely filing of an application, could justify a later effective date for any recommencement of compensation. Congress neither required nor prohibited consideration of such conditions. And we must not read into § 5304(c) words that Congress did not enact—like reading "any period" as "*only* any period." *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.").

Mr. Buffington argues, relying on statutory context, that his interpretation does not read "only" (or any other language) into § 5304(c). He claims Title 38 obligates the VA to pay compensation for service-connected disabilities, *see* 38 U.S.C. § 1131;[3]

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[3] Mr. Buffington cites 38 U.S.C. § 1110 for his general entitlement to compensation, which relates to wartime disabilities. But because Mr. Buffington did not serve during a period of war, *id.* § 1101(2), a different provision controls. *See id.*

sets the effective date for those awards, *see id.* § 5110; and provides a limited exception for when payment is barred based on active service pay, *see id.* § 5304(c). Thus, to Mr. Buffington, "compensation runs parallel to the period of service: stopping on re-entry to active military service and restarting at discharge from active military service." Appellant's Reply Br. at 14–15 (internal quotation marks omitted).

Mr. Buffington's concessions throughout this case, however, undermine that position. In his opening brief, Mr. Buffington agreed the VA can "require that a veteran notify it that the veteran is no longer receiving active duty pay before benefits can be *paid*." Appellant's Br. at 32 (emphasis in original). That is, the VA can require a veteran to apply for recommencement of disability benefits. *See* 38 C.F.R. § 3.654(b)(2) (creating just such a requirement). And at argument, Mr. Buffington went further. Questioned about Mr. Buffington's admissions in his briefing, Mr. Buffington's counsel conceded that "the government can certainly require reapplication[,] ... can require a veteran to appear for an additional medical exam[, and] ... can reconsider the amount of disability compensation." *See* Oral Arg.[4] at 4:50–5:45. Implicit in that view is the understanding that § 5304(c) does not create a limited exception to a general entitlement to benefits. Instead, when a disabled veteran returns to active service, his disability benefits are discontinued. *See* 38 U.S.C. § 5112 (setting effective date for

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§ 1131. Still, any differences between §§ 1110 and 1131 are immaterial for purposes of this appeal.

[4] Available at http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-1479_05032021.mp3.

"discontinuance"). After leaving active service, the veteran can once again seek disability benefits, but nothing in the statutory scheme speaks to when or how those benefits are recommenced.

Mr. Buffington's interpretation would lead to impermissible surplusage, which is not present under the government's interpretation. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 500 (1998) (holding an interpretation was "impermissible under the first step of *Chevron*" in part because it created surplusage). Under Mr. Buffington's interpretation the word period in § 5304(c) would set both the date for discontinuing benefits and the date for recommencing benefits based on active service. Congress, however, already enacted a statute that sets the date for discontinuing benefits based on active service. *See* 38 U.S.C. § 5112(b)(3). Adopting Mr. Buffington's construction, then, would render § 5112(b)(3) superfluous.

To avoid reading language into § 5304(c) and rendering § 5112(b)(3) superfluous, we hold the statutory scheme is silent regarding the effective date for recommencing benefits when a disabled veteran leaves active service.[5] Since Congress has not "directly spoken to the precise question at issue," we must continue on to step two. *Chevron*, 467 U.S. at 842.

II

At step two, we ask "whether the agency's answer [to the question at issue] is based on a

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[5] Because we hold the statutory scheme is silent, we need not resolve the parties' dispute regarding the pro-veteran canon. *See Terry v. Principi*, 340 F.3d 1378, 1383 (Fed. Cir. 2003).

permissible construction of the statute." *Id.* at 843. Filling the statutory gap, the Secretary promulgated 38 C.F.R. § 3.654(b)(2). In relevant part, that regulation defines the effective date for any recommencement of benefits after a disabled veteran leaves active service:

> Payments, if otherwise in order, will be resumed effective the day following release from active duty if claim for recommencement of payments is received within 1 year from the date of such release: otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim.

Id.

As a preliminary matter, Mr. Buffington challenges the Secretary's statutory authority to promulgate 38 C.F.R. § 3.654(b)(2). But the Secretary was within the scope of his authority "to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws." 38 U.S.C. § 501(a). That authority gives the Secretary power to fill gaps in the veterans' benefits scheme. *See Contreras v. United States*, 215 F.3d 1267, 1274 (Fed. Cir. 2000) (holding grant of authority to promulgate regulations "necessary to the administration of a program" that an agency oversees allows the agency to fill gaps); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (holding authorization for Secretary of Labor to "prescribe necessary rules, regulations, and orders" provided the Department of Labor "with the power to fill [explicit statutory] gaps"). Accordingly, the Secretary had power to fill the gap in

§ 5304(c) regarding the effective date of recommencement with a reasonable regulation.

And § 3.654(b)(2) is a reasonable gap-filling regulation. Section 3.654(b)(2) encourages veterans to seek recommencement of disability benefits in a timely fashion, but it always provides a veteran with some compensation. If a veteran seeks recommencement within a year of his release from active service, he is entitled to benefits effective on the day after he left service. If he seeks benefits later, he is entitled to compensation effective one year before his filing date. By incentivizing early filing, § 3.654(b)(2) promotes the efficient administration of benefits, but it does not promote efficiency at all costs. Mr. Buffington does not explain how this incentive structure is unreasonable. As we have noted, "the VA is in a better position than this court to evaluate inefficiencies in its system." *Veterans Just. Grp., LLC v. Sec'y of Veterans Affs.*, 818 F.3d 1336, 1351 (Fed. Cir. 2016). It is likewise reasonable for the VA to require timely reapplication, since a disability may improve or worsen over time. *See* 38 C.F.R. § 3.654(b)(2) (providing that "[c]ompensation will be authorized based on the degree of disability found to exist at the time the award is resumed").[6]

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[6] Mr. Buffington argues that § 3.654(b)(2) leads to an absurd result because, in at least one case where the veteran never notified the agency of her active service and thus received duplicative benefits, that veteran was only forced to return the duplicative benefits. Appellant's Br. 43–46. Mr. Buffington's fairness argument does not bear on the reasonableness of § 3.654(b)(2), but rather on the VA's failure to require regulatory compliance in that case.

CONCLUSION

Because the VA reasonably filled a statutory gap when promulgating 38 C.F.R. § 3.654(b)(2), we must defer to that regulation. Because the Veterans Court recognized the statutory gap and afforded the VA's regulation appropriate deference, we affirm.

AFFIRMED

COSTS

No costs.

O'MALLEY, *Circuit Judge*, dissenting.

It is undisputed that Thomas Buffington suffers from tinnitus, arising from his active military duty in the United States Air Force from 1992 through May 2000. Because of that disability, he was awarded disability compensation, with an effective date corresponding to the end of his active duty service. It is also undisputed that, when he was called back to active duty in July 2003—and began receiving active duty pay—his disability payments ceased. And it is undisputed that, when Mr. Buffington finished serving his country yet again in July 2005, he continued to suffer from tinnitus. Despite his continuing disability, however, his disability payments were not restored until February 1, 2008. The majority endorses the Department of Veterans Affairs' treatment of Mr. Buffington. I do not. I, thus, respectfully dissent.

The majority claims it reaches its conclusion by finding a "statutory gap" in those statutory provisions governing payments to veterans at step one of its *Chevron* analysis. It claims it has found this gap without needing to determine whether the governing provision—38 U.S.C. § 5304(c)—is ambiguous. Turning

to step two of *Chevron*, it then finds that the VA acted reasonably when it filled that supposed gap with regulations (1) requiring a veteran to go through the process of reapplying for disability benefits and requalifying for the very benefits for which he was already deemed qualified; and (2) setting the effective date of the resumption of benefits by reference to that reapplication process, and not by reference to the end of his receipt of active duty pay. I disagree on both steps of that analysis.

I.

A. There is no "statutory gap"

As noted, at *Chevron* step one the majority does not conclude that 38 U.S.C. § 5304 is ambiguous. It, instead, finds that, while Congress made clear during what period disability payments cannot be paid, it forgot to mention when they would restart. This oversight, according to the majority, gave the VA the right to legislate via regulation the time period and circumstances under which such payments would recommence—the right to fill the congressionally created "gap."

The majority puts the cart before the horse in its *Chevron* analysis. Rather than apply traditional tools of statutory construction to determine whether there is an ambiguity in § 5304(c), it fast-tracks past this step and finds what it believes is a statutory gap that the agency may fill. The Supreme Court made clear in *Chevron*, however, that step one always begins by asking whether the statute at issue is ambiguous. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the

precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). It is only after finding a statutory ambiguity that courts may consider the possibility that Congress delegated to an agency the power to fill a gap. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012) ("*Chevron* and later cases find in unambiguous language a clear sign that Congress did *not* delegate gap-filling authority to an agency; and they find in ambiguous language at least a presumptive indication that Congress did delegate that gap-filling authority.") (emphasis in original). The majority may not avoid determining whether § 5304(c) is ambiguous. Instead, it must first focus on whether there is an ambiguity in the relevant statute, taking into account any purported statutory silence in the process.

But, a plain reading of the relevant portions of the governing statute and careful consideration of the context in which they appear demonstrate that there is no statutory gap to fill. Section 5304(c)'s text and context militate against finding an ambiguity in the statute. To begin, statutory silence does not always create a statutory gap for the purposes of *Chevron*'s step one analysis. It, instead, often indicates the "rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 223 (2009) (citing *Whitman v. Am. Trucking Ass'ns, Inc.,* 531 U.S. 457 (2001)); *see also Burns v. United States*, 501 U.S. 129, 136 (1991) ("[N]ot every silence is pregnant.") (citation omitted), *abrogated on other grounds by*

Dillon v. United States, 560 U.S. 817 (2010). Indeed, "[a]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Burns*, 501 U.S. at 136. Here, congressional intent is not difficult to divine.

38 U.S.C. §§ 1110 and 1131 state that "the United States will pay to any veteran" compensation for service-connected disabilities.[1] Section 5110 contains numerous provisions regarding precisely when such disability payments are to begin, and after which those payments "will" be paid. Section 5110(a) of Title 38 establishes the general rule that effective start dates of veterans' benefits will not begin "earlier than the date of receipt" of the veteran's application for benefits. 38 U.S.C. § 5110(a)(1). Section 5110 is subject to certain exceptions, all of which are designed to *increase* the benefits to veterans in certain circumstances. *See, e.g.*, 38 U.S.C. §§ 5110(b)(1)–(b)(2) (establishing effective date based on variant of one-year look back period for disability benefits after veterans are discharged from active duty); *id.* § 5110(b)(3) (establishing a one-year look back period when veterans submit claims for increase); *id.* § 5110(b)(4) (establishing a one-year look back period when veterans submit claims for disability pension); *id.* § 5110(d) (establishing a one-year look back period for claims submitted for death, dependency, and indemnity compensation); *id.* § 5110(g) (establishing a

[1] As the majority notes, Mr. Buffington's disability payments were authorized pursuant to 38 U.S.C. § 1131, not § 1110. As the majority also notes, however, there is no material difference between the provisions as it relates to the issue before us.

one-year look back period for claims arising from liberalizing law or new administrative issue). In other words, Congress knew how to set dates for commencement of benefits when it deemed it necessary to do so, and, when doing so, it always assured that benefits would commence sooner rather than later.

38 U.S.C. § 5304(c) is an exception to the continuous payment obligation, calling for a pause in such payments while a veteran is receiving active duty pay. Indeed, it calls for a pause in *all* retirement and pension benefits while active duty pay is received.[2] 38 U.S.C. § 5112(b)(3) provides that all such post-active duty payments shall cease the day before any active duty pay begins. While it is true that § 5304(c) does not mention a recommencement date, it is clear that Congress only wanted a veteran's benefits to discontinue for "*any period* for which such person receives active service pay." 38 U.S.C. § 5304(c) (emphasis added). While Congress did not explicitly state in § 5304(c) that disability and retirement benefits will recommence only upon active duty ceasing, it did not need to; the contrapositive of this statutory section says as much. *See id.* (noting that "any period" of active service pay will result in a loss of disability benefits). That § 5304(c) is silent on when benefits will "recommence" is of no moment. The plain text of Title 38 indicates that Congress intended for veterans' benefits to discontinue during "any period" of active service pay. Outside this "period," the veteran

[2] Technically, veterans have a choice to continue disability and other retirement payments during active duty *or* receive active duty pay. The point is that they cannot receive both.

remains entitled to the benefits for which he originally qualified.

Reading § 5304(c) as the majority does means the veteran loses his original effective start date for disability benefits and must be assigned a later start date, depending on when he "reapplies" for benefits. *See* Maj. Op. at 1365–66 ("[W]hen a disabled veteran returns to active service, his disability benefits are discontinued. ... After leaving active service, the veteran can once again seek disability benefits ...."). Indeed, because § 5112(b)(3), like § 5304(c), also applies to all disability compensation, dependency and indemnity compensation and pension payments, the majority's reading of § 5304(c) would mean that *none* of those payments would automatically recommence. That means that those veterans who return from temporary active duty would not only receive no active duty pay, but, absent strict compliance with 38 C.F.R. § 3.654(b)(2), would receive no disability benefits, no pension, and no other retirement compensation during at least some post-active duty period, despite previously having been deemed qualified for such payments. That cannot be right. As it relates to disability benefits specifically, it is not right because it flies in the face of § 1131's directive that disability payments will be paid once the criteria therefore is satisfied. Notably, the government does not contend that active duty pay continues until it receives notice that active duty has ended or a veteran has reapplied for his other benefits. As to these payments, the Secretary apparently has no problem giving the "any period" language in § 5304(c) its plain and ordinary meaning.

The broader context in which these provisions were enacted confirms the conclusion that disability

payments should recommence effective the day after active duty pay ceases. According to the Supreme Court, Congress's solicitude towards veterans is "plainly reflected in the [Veterans Judicial Review Act ("VJRA")], as well as subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). In legislating the VJRA, Congress noted that it "has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits." H.R. Rep. No. 100–963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95. Indeed, the VJRA is replete with provisions designed to make it easier for veterans to obtain benefits and to challenge denial of such benefits. The development of this veteran-friendly scheme and its remedial nature was the very raison d'être for passage of the VJRA.

In addition to the VJRA, one such "subsequent law[ ]" Congress passed to favor veterans comprises the Veterans Appeals Improvement and Modernization Act of 2017 ("AMA"). Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115–55, 131 Stat. 1105 (codified in scattered sections of 38 U.S.C.). Section 5110(a)(2), which was enacted as part of the AMA, amended § 5110. *See id.* § (2)(*l*)(1), 131 Stat. 1110 (codified as amended at § 5110(a)). Prior to the AMA, effective dates for disability benefits were based on the "original claim, a claim reopened after final adjudication, or a claim for increase of [benefits]." 38 U.S.C. § 5110(a) (2012). The practical reality of this scheme meant that veterans who appealed their benefits claims by either reopening them or filing for an increase in benefits would be subject to the VA's "legacy appeals" process. Legacy appeals were

notoriously fraught with lengthy wait times that risked greatly delaying a veteran's effective start date. *See* H.R. Rep. No. 115-135, at 4–5 (2017) (noting the increasing number of undecided VA legacy appeals and the long wait times for a final decision); *see also Legislative Hearing on the Veterans Appeals Improvement and Modernization Act of 2017 Before the H. Comm. on Veterans' Affs.*, 115th Cong. 15–16 (2017).

The AMA, however, amended § 5110(a) in two salient ways. First, § 5110(a)(1) now centered the effective start date of benefits around "initial" or "supplemental" claims. By no longer tying effective dates to when veterans reopened their claims or filed for increases in benefits, Congress signaled its desire for veterans to receive the *earliest* effective start date possible. Second, Congress added § 5110(a)(2), which states: "[f]or purposes of determining the effective date of an award under this section, the date of application shall be considered the date of the filing of the initial application for a benefit *if the claim is continuously pursued*." 38 U.S.C. § 5110(a)(2) (emphasis added). Within this same subsection, Congress delineated various ways in which veterans could "continuously pursue[ ]" their claims and receive the earliest effective date possible. *Id.* § 5110(a)(2)(A)–(E). By effectively providing veterans with more options to "continuously pursue[ ]" their claims while receiving the earliest effective date possible, Congress again signaled its intention to safeguard effective start dates.

Nowhere in the AMA, VJRA, or Title 38 did Congress express an intention for disabled veterans to lose their original effective start dates upon return to active duty. Rather, the AMA demonstrates that Congress prioritized preserving a veteran's earliest possible effective start date. The majority's decision is

therefore irreconcilable with the congressional intent espoused in the AMA because it risks veterans receiving later effective start dates than were originally assigned. I find it implausible that Congress wanted disabled veterans who reenter the service of their country to be required to "reapply" for the same benefits to which they previously were entitled, and also risk having their previous effective start dates superseded by a new, later date if they do not reapply within the narrow timeframe set forth in 38 C.F.R. § 3.654(b)(2).

The majority's reading of "any period" in § 5304(c) also defies logic. The majority appears to agree that § 5304(c) prohibits veterans from receiving disability pay during "any period" of active service pay. *See* Maj. Op. at 1365 ("The 'any period' phrase in § 5304(c) ... refers to a length of time: here, the time during which a veteran is receiving active service pay."). This is correct. Where the majority errs, however, is in its assertion that "§ 5304(c) does not say compensation must cease *only* for that period. Congress was silent regarding whether other conditions, such as timely refiling of an application, could justify a later effective date." *Id.* (emphasis in original). In legislating § 5304(c), Congress chose to use classic conditional logic: "any period" during which a veteran receives active service pay will result in the veteran not receiving disability benefits. 38 U.S.C. § 5304(c). Receiving active service pay, then, sufficiently guarantees the necessary condition of not receiving disability benefits. The majority's insistence that other sufficient conditions, such as "timely refiling of an application," could also guarantee the loss of disability benefits improperly imports surplusage into § 5304(c)'s text. "[I]n general, 'a matter not covered is to be

treated as not covered'—a principle 'so obvious that it seems absurd to recite it.'" *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) (citing A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012)). Where Congress creates express exceptions courts should not elaborate unprovided for exceptions into the text. *Reading Law* at § 8 (citing *Petteys v. Butler*, 367 F.2d 528 (8th Cir. 1966) (Blackmun, J., dissenting)).

To make matters worse, despite initially appearing to agree that § 5304(c) prohibits veterans from receiving disability pay during "any period" of active service pay, the natural consequence of the majority's interpretation contravenes the statutory text. In addition to receiving active service pay, the majority contends that "other conditions, such as timely refiling of an application, could justify a later effective date." Maj. Op. at 1365. This means, then, that "any period" encompasses more than just the time period in which a veteran receives active service pay. Under the majority's reading of § 5304(c), "any period" must now encompass the period of active service pay *plus* the period in which the veteran has yet to reapply for benefits upon returning from active duty. As discussed above, "a matter not covered is to be treated as not covered." And, exceptions are to be deemed exclusive unless clear language to the contrary says otherwise. The majority errs by ignoring both of these principles of statutory construction.

B. No "concessions" by Mr. Buffington's counsel justify the majority's statutory interpretation

The majority contends that the following "concessions" made by Mr. Buffington during oral

argument undermine his assertion that veterans' disability benefits should be paid continuously, with a pause only under certain circumstances: (1) the VA may require additional medical exams; (2) the VA may "reconsider" the amount of benefits owed to a veteran based on such "reexaminations"; and (3) the VA can require "reapplication" for the "recommencement" of benefits following a veteran's return from active duty. *See* Maj. Op. at 1365–66. According to the majority, the VA's ability to independently discontinue a veteran's benefits award based on these three circumstances demonstrates that "§ 5304(c) does not create a limited exception to a general entitlement to benefits." *Id.*

The majority's reliance on these supposed "concessions" is misplaced. First, our duty is to review judgments, not counsel's comments during oral argument. And, where that judgment was based on statutory interpretation, nothing counsel could say could impact what the statute says, or does not say. Second, there is nothing meaningful about the fact that Mr. Buffington's counsel has no problem with the VA occasionally reassessing the scope of any disability award or with requiring a veteran to notify the VA that his active duty service has ended, just as the veteran is required to notify the VA that his active duty pay recommenced.

While there is no statutory provision granting the VA the right to conduct additional medical exams or to reconsider benefits awards, that authority arises from the VA's obligation to set the percentage of disability in the first instance. 38 C.F.R. § 3.327 states that the VA may require reexaminations whenever it "determines there is a need to verify either the continued existence or the current severity of a disability." 38 C.F.R. § 3.327(a). Though this VA

regulation does not use the word "reconsider," it intimates that the VA may adjust the amount of benefits owed to a veteran if the disability has changed since the initial award. *See id.* ("Generally, reexaminations will be required if it is likely that a disability has improved, or if evidence indicates there has been a material change in a disability or that the current rating may be incorrect."). This provision is unrelated to any pause in payment caused by active duty service.

This regulatory authority does nothing to undermine the notion that veterans' benefits should be continuously paid. Rather, § 3.327(a) simply makes clear that there are two levels of inquiry surrounding entitlement to veterans' benefits: (1) whether the veteran has a service-connected disability that qualifies for benefits; and (2) if so, what the level of disability is for ratings purposes. Section 3.327(a) involves the latter inquiry as it empowers the VA to reassess a veteran's disability for ratings purposes. We are concerned here, by contrast, with the former inquiry. Once a veteran has established a service-connected disability, he is entitled to benefits. Though the benefits ratings level may change depending on the disability, we are concerned here with the continuity of the underlying entitlement. Section 3.327(a) is thus irrelevant to our discussion.

The majority's reliance on the VA's "reapplication" requirement is similarly misplaced. Neither Title 38 nor the corresponding VA regulations speak to reapplying for veterans' benefits. Pursuant to 38 C.F.R. § 3.1(p), claims exist in two forms: (1) an "initial" claim; or (2) a "supplemental" claim. There are three types of initial claims: (1) an original claim, which is the first the VA receives; (2) a new claim for

different benefits relating to the veteran's service; and (3) a claim for an increase in the benefit amount for either type of claim. *See id.* §§ 3.1(p)(i)–(ii), 3.160(b). A supplemental claim is filed when a veteran disagrees with a prior VA decision. *See id.* §§ 3.1(p)(2), 3.2501. As discussed above, 38 U.S.C. § 5110(a) ensures that initial and supplemental claims receive the earliest possible effective start dates. The concept of a veteran "reapplying" for the same benefits to which he was previously entitled does not fit within any of these definitions. And, to the extent 38 C.F.R. § 3.654 requires reapplication vis-à-vis its focus on "recommencement" of benefits, it is contrary to the plain text of §§ 5304(c) and 1131, as discussed above.

What Mr. Buffington's counsel agreed was reasonable is a requirement that the veteran give notice to the VA of the date his active duty service ended so that the VA will know to recommence benefits *as of that date*. This is consistent with how the VA treated Mr. Buffington's notice of his return to active duty. Mr. Buffington notified the VA of his return to service in August 2003. In October 2003, the VA informed Mr. Buffington that his disability compensation was discontinued effective July 20, 2003—the day before his return to active duty. In other words, the VA did not allow his disability pay to continue until it received notice of his change in status; once it received notice, it had no problem backdating the cessation of benefits. Mr. Buffington argues that the VA similarly should have no problem backdating the recommencement of benefits, once it is notified of the date on which a veteran's active duty ceased.

The majority's focus on Mr. Buffington's concessions regarding reexamination, reconsideration, and reapplication is simply unpersuasive. To the

extent the VA implements these concepts, they do nothing to rebut the notion that veterans' benefits should be continuously administered but for any period when active duty pay is received.

C. There is no surplusage concern

The majority finally contends that reading the "any period" language of § 5304(c) to "set both the date for discontinuing benefits and the date for recommencing benefits based on active service" renders § 5112(b)(3) superfluous. Maj. Op. at 1366. According to the majority, Congress chose to define the effective date of the discontinuation of benefits in § 5112(b) but not to specify the effective date of recommencement of disability benefits following a veteran's period of active service. It claims that construing § 5304(c)'s "any period" language as setting the discontinuance and recommencement dates of awards requires reading into the statute a "day-before" discontinuance date and a "day-after" recommencement date. Since Congress already provided a "day-before" discontinuance date in § 5112(b)(3), the majority argues that interpreting "any period" in § 5304(c) to include a "day-before" and a "day-after" effective dates would create impermissible surplusage in § 5112(b)(3).

The majority's argument rests on a misinterpretation of the statutory text. Section 5304(c)'s "any period" language does not create new effective dates. As discussed above, §§ 5110 and 5112(b)(3) do this by establishing start and discontinuance effective dates, respectively. When read alongside § 5112(b)(3), § 5304(c) merely delineates the period of pause in benefits, with § 5112(b)'s discontinuance effective date giving effect to § 5304(c)'s bar on duplicate benefits. It is notable, moreover, that

§ 5112(b)(3) actually does extra work than the phrase "any period" in § 5304(c): it sets a discontinuance date the *day before* the period in § 5304(c) commences. If anything, the existence of § 5112(b)(3) proves that when Congress wanted to set a commencement or recommencement date that differed from the start and end of the "period" referenced in § 5304(c), it knew how to do so expressly.

D. Doubt regarding any recommencement date must be resolved in Mr. Buffington's favor

The majority asserts that, because it finds a "statutory gap" regarding the recommencement of benefits, it may ignore the pro-veteran canon of construction in its *Chevron* step one analysis. But that logic does not withstand dissection. What the majority appears to really say is that, by not expressly setting a date for recommencement of benefits as clearly as it did for a discontinuation of benefits, Congress gave the VA the greenlight to finish the statute via regulation. Calling what it finds a "statutory gap" does not alter the reality of what the majority concludes, however, or what the implications of that conclusion are.

As described above, the majority failed to correctly apply *Chevron*'s step one analysis because it found a statutory gap in § 5304(c) without first finding an ambiguity. As part of a correct *Chevron* step one analysis, the majority must take into account all other traditional canons of construction along the way, including the pro-veteran canon of construction. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) ("*Kisor II*") ("[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even

after a court has resorted to all the standard tools of interpretation.").

The majority cites *Terry v. Principi*, 340 F.3d 1378, 1383 (Fed. Cir. 2003) as support for its decision to jettison any discussion of *Brown v. Gardner*, 513 U.S. 115 (1994) and the presumption in favor of veteran-friendly statutory interpretations *Gardner* creates. But *Terry* is materially distinguishable. *Terry* expressly found that the statute at issue was unambiguous; that it was not open to any interpretive doubt once its terms were given their common and ordinary meaning. *See Terry*, 340 F.3d at 1383. It found that Congress gave the VA the right to regulate so as to give effect to that unambiguous statutory scheme.

That is very different from what the majority does here. It does not say that Congress unambiguously required that disability benefits end, rather than pause, and unambiguously authorized the VA to require veterans to go through the onerous disability application process anew merely because they answered the call to return to active duty. It simply finds a silence that needs filling. But, to the extent there is any silence, it is our job to interpret what that silence means in the first instance, not the VA's.

On the way to resolving that question, to the extent any interpretive doubt remains, we must apply the *Gardner* presumption and resolve any ambiguity about what Congress meant in Mr. Buffington's favor. *See Kisor II*, 139 S. Ct. at 2414; *see also Henderson*, 562 U.S. at 441 ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'") (citing *King v. St. Vincent's Hosp.*, 502 U.S.

215, 220–21, n.9 (1991)). Even if its use is to be limited to circumstances in which interpretive doubt remains after considering various other tools of construction during the step one *Chevron* analysis, *see Kisor v. McDonough*, 995 F.3d 1316 (Fed. Cir. 2021) ("*Kisor IV*"), it remains an interpretive tool in the court's statutory construction toolbox that is to be employed before resorting to *Chevron* deference, *see Kisor II*, 139 S. Ct. at 2415 ("[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction."); *see also Arangure v. Whitaker*, 911 F.3d 333, 346 (6th Cir. 2018) (noting that the Supreme Court applies a "canons first" before deference approach to *Chevron*, even considering policy-based or normative canons at *Chevron* step one); *see also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64, 77 (2008) ("[C]anons trump deference.").[3] The majority cannot avoid addressing the *Gardner* presumption by avoiding determining whether § 5304(c) is ambiguous. To do so is to ignore our job under *Chevron*. As noted above, there is nothing ambiguous about the "any period" language in § 5304(c).

II.

After finding a gap in § 5304(c)'s statutory text, the majority moves on to *Chevron* step two. The majority concludes that 38 C.F.R. § 3.654(b)(2) is a

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[3] To the extent this court has previously placed consideration of the *Gardner* presumption after considerations of deference, *Kisor II* made clear that the inquiry is to be done in the reverse order.

reasonable gap-filling measure because it "incentivizes early filing" of recommencement of benefits, thereby promoting efficiency within the VA. Maj. Op. at 1367. But requiring veterans to reapply for benefits to which they previously were entitled seems anything but efficient. If efficiency is paramount, then interpreting § 5304(c) as enacting a pause in benefits for "any period" during which a veteran returns to active duty better achieves that goal.

The majority also reasons that 38 C.F.R. § 3.654(b)(2)'s requirement of "timely reapplication" for benefits is reasonable because a veteran's "disability may improve or worsen over time." *Id.* Impliedly, the "reasonable" functions served by "reapplication" for benefits involve modifying the amount of benefits according to the severity of the veteran's disability.

As noted above, several other regulatory and statutory mechanisms, however, serve these functions. The VA uses reexaminations to monitor the changing levels of a veteran's disability and to adjust the award amount based on the disability rating. *See* 38 C.F.R. § 3.327(a). And, in the event of a veteran's disability worsening, 38 U.S.C. § 5110(b)(3) allows veterans to file claims for increased awards. The means of addressing different disability ratings are thus already baked into the statutory and regulatory framework. They should not muddy our analysis, which focuses on whether 38 C.F.R. § 3.654(b)(2)'s complex benefits scheme comports with the statutory text of Title 38's effective start and discontinuance dates—as well as any pauses pursuant to § 5304(c)'s "any period" language.

Quite simply, 38 C.F.R. § 3.654(b)(2) serves no purpose other than to deny disability benefits (and other critical retirement benefits) to veterans entitled

to them solely because these men and women answered the call to return to active duty. That is wholly inconsistent with the beneficent scheme in which the relevant statutory provisions appear and with the congressional intent behind both the VJRA and the AMA. I dissent from the majority's endorsement of this offensive regulation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
No. 17-4382

THOMAS H. BUFFINGTON, Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs, Appellee.

Argued April 10, 2019
Decided July 12, 2019

On Appeal from the Board of Veterans' Appeals

Attorneys and Law Firms
Stacy A. Tromble, with whom Raymond J. Kim and Barton F. Stichman were on the brief, all of Washington, D.C., for the appellant.

Debra L. Bernal, with whom Catherine C. Mitrano, Acting General Counsel; Mary Ann Flynn, Chief Counsel; Joan E. Moriarty, Deputy Chief Counsel; and Michael M. Epsten, Non-Attorney Practitioner, were on the brief, all of Washington, D.C., for the appellee.

Before GREENBERG, MEREDITH, and FALVEY, Judges.

MEREDITH, Judge, filed the opinion of the Court. GREENBERG, Judge, filed a dissenting opinion.

MEREDITH, Judge: The appellant, Thomas H. Buffington, through counsel appeals a July 20, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than February 1, 2008, for the reinstatement of VA benefits. Record (R.) at 1-13. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). This matter was referred to a panel of the Court to address whether the Secretary's regulation, 38 C.F.R. § 3.654(b)(2), which governs the effective date for the recommencement of VA benefits following a period of active duty, is inconsistent with 38 U.S.C. § 5304(c), which prohibits concurrent receipt of active service pay and pension, compensation, or retirement pay. For the reasons discussed below, the Court holds that § 3.654(b)(2) is a valid exercise of the Secretary's broad rulemaking authority, pursuant to 38 U.S.C. § 501, to issue regulations necessary to carry out the laws administered by VA and is not inconsistent with 38 U.S.C. § 5304(c). Accordingly, the Court will affirm the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from September 1992 to May 2000, and in the Air National Guard from July 2003 to June 2004, from November 2004 to July 2005, in December 2009, and from February 2016 to May 2016. R. at 14-21. In March 2002, he was granted entitlement to VA disability compensation for tinnitus, rated 10% disabling. R. at 1261-64, 1272-78. The appellant submitted a VA Form 21-8951, Notice of Waiver of VA Compensation or Pension to Receive Military Pay and Allowances, in August 2003. R. at 1233. This form

reflects that he elected to receive military pay and allowances for the performance of active and inactive duty in lieu of VA benefits and provides that the "waiver will remain in effect, while [he was] entitled to receive VA disability payments, unless [he] notif[ies] VA otherwise in writing." *Id*.

In October 2003, VA advised him that it was proposing to terminate his VA benefits, effective July 20, 2003, because his National Guard unit had been activated on July 21, 2003. R. at 1229. In response, the appellant executed and submitted VA Form 21-8951-2, in which he again elected to waive VA benefits in lieu of military pay. R. at 1224-25. In December 2003, VA informed him that it had stopped his benefits the day before he was recalled to active duty. R. at 1222-23. The letter further instructed: "When you have been released from active duty, please provide our office with a copy of your DD[-]214, so that we may re[ ]instate your benefits." R. at 1222.

Following two periods of active duty—July 2003 to June 2004, and November 2004 to July 2005—in January 2009, the appellant requested that his benefits be reinstated. R. at 1210. In August 2009, a VA regional office (RO) reinstated his VA disability compensation, effective February 1, 2008. R. at 1196-99. The RO informed him that, in December 2003, "[we ... told you to provide us with copies of your DD Form 214[ ] upon your release from active duty so that we could re[ ]instate your benefits." R. at 1196. The RO then explained: "We received your request for the reinstatement of your VA [compensation benefits more than [1] year after your release from active duty. By law we are only permitted to make payments retroactive to [1] year prior to the date we received your request." R. at 1197.

The appellant filed a Notice of Disagreement (NOD), asserting that the RO's December 2003 letter "did not address the [1-]year requirement for informing ... VA of [his] release from active duty," R. at 1193, and he perfected an appeal to the Board, R. at 1153-55, 1159-81. He also testified at a November 2015 Board hearing that, in 2003, VA did not clarify that there was a time line for when he needed to submit his DD-214s to reinstate benefits. R. at 643-44. He explained that, between 2003 and 2009, he had three different activations and "kind of forgot about it." R. at 643. He said: "I'm in the Guard and it was kind of like my full-time job." *Id*.

In the July 20, 2017, decision on appeal, the Board concluded, as a matter of law, that VA cannot resume payment of the appellant's benefits more than 1 year prior to the date of his claim for reinstatement, which was received on January 20, 2009. R. at 7-9 (citing 38 U.S.C. § 5304(c), 38 C.F.R. §§ 3.31, 3.654(b)(2) (2017)). Regarding the appellant's contention that VA did not provide notice as to the time to submit copies of his DD-214s, the Board found that the VA Form 21-8951, submitted by him in August 2003, and the RO's December 2003 letter "clearly informed [him] that the consequence of failing to notify VA of his cancelling his waiver of VA benefits would be the continued waiver of those benefits." R. at 9-10. Thus, applying § 3.654(b)(2) to the undisputed facts, the Board denied an effective date earlier than February 1, 2008, for the reinstatement of VA benefits. R. at 1-13. This appeal followed.

II. ANALYSIS

A. The Parties' Arguments

The appellant argues that the language of 38 U.S.C. § 5304(c) is clear—VA must "withhold or suspend a veteran's benefits only 'for any period for which such person receives active service pay.'" Appellant's Brief (Br.) at 6 (quoting 38 U.S.C. § 5304(c)). He asserts that § 3.654(b)(2) is inconsistent with the statute because section 5304(c) "does not predicate payment or reinstatement of benefits upon notice by the veteran." *Id*. at 10. He further asserts that reading section 5304(c) in the context of 38 U.S.C. § 1110(a), which provides that VA "will pay" disability compensation benefits once service connection is established, demonstrates that "Congress has prohibited VA from withholding or suspending benefits due to a veteran's receipt of active pay during any period ... section 5304(c) does not encompass." *Id*. at 9. He therefore maintains that the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and seeks reversal of the Board's decision denying an effective date earlier than February 1, 2008. Id. at 10-11.

In the alternative, he argues that equitable tolling is warranted because "the Board treated [§] 3.654(b)(2) as a statute of limitations," and VA effectively misled him into believing that there was no deadline to notify VA that he had been released from active duty. *Id*. at 13. Also in the alternative, he argues that, because he has a property interest in VA benefits and he relied to his detriment on the allegedly misleading notice, VA violated his constitutional right to due process. *Id*. at 14-16.

The Secretary argues that VA promulgated § 3.654(b)(2) pursuant to his broad congressional authority under 38 U.S.C. § 501 to " 'prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws.' " Secretary's Br. at 6 (quoting 38 U.S.C. § 501). He asserts that section 5304(c) does not address the recommencement of payments; rather, "Congress unambiguously delegated the authority to create the procedural structure to prevent duplication of benefits to VA." *Id*. at 9. In that regard, he maintains that the regulation "effectively establishes 'the nature of proof and evidence and the method of taking and furnishing them' for purposes of resumption of benefits." *Id.* at 10 (quoting 38 U.S.C. § 501(a)). The Secretary further maintains that, when sections 5304 and 1110 are read together, a gap remains, and VA's regulation should be afforded deference. Secretary's Br. at 11-12 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

In response to the appellant's argument for equitable tolling, the Secretary asserts that the doctrine is not applicable to § 3.654(b)(2) because the regulation is not a statute of limitations; there is no filing deadline to toll. *Id*. at 16-18. He also asserts that the Board did not "treat" the regulation as a statute of limitations and, in either event, the appellant fails to demonstrate that VA provided misleading notice. *Id*. at 18-20. The Secretary similarly maintains that the appellant's due process argument must fail because he has not demonstrated that VA provided misleading notice or that he relied to his detriment on the notice. *Id*. at 20-22. Finally, he avers in the alternative that, even assuming the notice was improper, the appellant

is charged with knowledge of the regulatory requirements. *Id*. at 22-23 (citing *Morris v. Derwinski*, 1 Vet.App. 260, 265 (1991)).

In his reply brief, the appellant responds that the Secretary's argument would lead to an absurd result—that the Secretary could promulgate regulations pursuant to section 501, even though the "regulation conflicts with other statutes with which the Secretary is obligated to comply." Reply Br. at 2-3. He asserts that there is no gap to fill; rather, "[§] 3.654(b)(2)'s [1]-year requirement ... imposes on veterans a requirement that the relevant statutes simply do not contain .... [and] violates VA's obligation to compensate veterans who are not on active duty for their service-connected disabilities." *Id*. at 3-4. The appellant maintains that he was effectively misled regarding the time to file a claim to reinstate benefits because the 2003 letter did not include information regarding the 1-year requirement and, consequently, the Court should reverse the Board's decision on the grounds of equitable tolling or a violation of his right to due process. *Id.* at 6-13. Regarding notice, he contends that the Secretary's reliance on *Morris* is misplaced because, in that case, the veteran received proper notice, whereas here, the notice effectively misled him as to what was required to reinstate his benefits. *Id*.

Prior to oral argument, the appellant also submitted a Notice of Supplemental Authorities, consisting of six Board decisions dated from February 2015 to December 2018. The Board decisions essentially reflect that, if a veteran erroneously receives disability compensation and active duty pay or military drill pay, VA may recoup the compensation benefits to which the veteran was not entitled, *i.e.*, for

the period beginning on entry to active service and ending upon the release from active duty. See, *e.g.*, BVA 12-08 113 (Dec. 19, 2018). At oral argument, the appellant maintained that these decisions demonstrate that VA's regulation is arbitrary and capricious. Oral Argument at 23:30-23:40, *Buffington v. Wilkie*, U.S. Vet. App. No. 17-4383 (oral argument held Apr. 10, 2019). He argued that the decisions reflect that veterans who fail to inform VA of their return to active duty are treated better than veterans, like himself, whom he asserts are "penalized" for doing the right thing. *Id*. at 24:20-24:50. He explained that, had he received dual compensation, VA would only recoup the compensation paid during his period of active duty; but now, § 3.654(b)(2) operates to limit his VA compensation to 1 year prior to his claim for recommencement. *Id*. at 23:30-24:50.

B. Law

Under certain circumstances, the United States "will pay to any veteran" compensation "[f]or disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service." 38 U.S.C. § 1110. However, as early as 1891, Congress has prohibited members of the uniformed services from receiving VA benefits and active service pay. Act of March 3, 1891, ch. 548, 26 Stat. 1082; see *Absher v. United States*, 9 Cl. Ct. 223, 224-25 (1985) (discussing the legislative history of the prohibition against dual compensation), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986).

The prohibition against the duplication of benefits now appears in section 5304 of title 38, U.S. Code, and provides in pertinent part: "Pension,

compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay." 38 U.S.C. § 5304(c). "Active service pay" is defined as "pay received for active duty, active duty for training[,] or inactive duty training." 38 C.F.R. § 3.654(a) (2019).

Congress generally allows members of the Reserve or National Guard who are called to active duty to elect to receive, for that duty, the pension, compensation, or retirement pay that the member had been receiving because of his or her earlier service, or, upon waiver of those payments, the pay and allowances authorized by law for the period of active service. 10 U.S.C. § 12316. In 1962, VA promulgated 38 C.F.R. § 3.654(b), which establishes the effective date for the discontinuance of VA benefits when veterans return to active duty status and the effective date for recommencement of payments following their release from active duty. Pertinent to the issue on appeal, § 3.654(b)(2) provides:

> Payments, if otherwise in order, will be resumed effective the day following release from active duty if claim for recommencement of payments is received within 1 year from the date of such release: otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim. Prior determinations of service connection will not be disturbed except as provided in [38 C.F.R.] § 3.105. Compensation will be authorized based on the degree of disability found to exist at the time the award is resumed. Disability will be

> evaluated on the basis of all facts, including records from the service department relating to the most recent period of active service. If a disability is incurred or aggravated in the second period of service, compensation for that disability cannot be paid unless a claim therefor is filed.

38 C.F.R. § 3.654(b)(2).

Here, there is no dispute that the appellant did not file a claim for recommencement of disability compensation until January 20, 2009, more than 1 year after his release from his second and third periods of active duty. He contends only that section 5304(c), together with section 1110, requires VA to reinstate his benefits as of the date following his release from active duty or, in the alternative, that the Court find that VA provided misleading notice warranting equitable tolling or a finding that VA violated his right to due process. The Court will address his statutory argument first.

C. Statutory Interpretation

"When a statute is at issue, we begin with the statutory language." *McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008); *see Williams v. Taylor*, 529 U.S. 420, 431 (2000). "The statute's plain meaning is derived from its text and its structure." *McGee*, 511 F.3d at 1356; *see Gardner v. Derwinski*, 1 Vet.App. 584, 586 (1991) ("Determining a statute's plain meaning requires examining the specific language at issue and the overall structure of the statute."), *aff'd sub nom. Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd*, 513 U.S. 115 (1994). The "plain meaning must be given effect unless a 'literal application of [the] statute will produce a

result demonstrably at odds with the intention of its drafters.'" *Gardner*, 1 Vet.App. at 586-87 (quoting *Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 571 (1982)); *see Roper v. Nicholson*, 20 Vet.App. 173, 180 (2006), *aff'd*, 240 F. App'x 422 (Fed. Cir. 2007). In assessing the language of a statute, courts review the overall statutory scheme "'so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.'" *Roper*, 20 Vet.App. at 178 (quoting SINGER, SOUTHERLAND ON STATUTORY CONSTRUCTION, § 46:06 (6th ed. 2000)).

The first question in statutory interpretation is always "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. However, if the statute is silent or ambiguous with respect to the specific issue, the question becomes whether the agency's interpretation is based on a permissible construction of the statute. *Id*. at 843. The agency's interpretation will not be set aside unless it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 38 U.S.C. § 7261(a)(3)(A); *see Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011). The interpretation of a statute is a question of law that the Court reviews de novo, without deference to the Board's interpretation. *See Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc).

1. Chevron Step One

As noted above, section 1110 generally establishes that, under certain circumstances, the United States "will pay" disability compensation for disability resulting from or aggravated by military service. 38 U.S.C. § 1110. By its terms, it does not establish when disability compensation payments shall begin or impose any limitation on continued receipt of compensation benefits. *Cf.* 38 U.S.C. § 5110 (Effective dates of awards). Section 5304(c), however, imposes one such limitation: VA "shall not" pay pension or compensation benefits to any person on account of that person's service during any period for which that person receives active service pay. 38 U.S.C. § 5304(c). By its terms, section 5304(c) establishes an unequivocal bar to dual compensation.

The appellant thus maintains that, when sections 1110 and 5304(c) are read together, Congress's intent is clear and VA has no discretion: "VA must suspend or withhold benefits, but only 'for any period for which such person receives active service pay.'" Appellant's Br. at 9 (quoting 38 U.S.C. § 5304(c)); Oral Argument at 2:50-3:20. However, the word "only" does not appear in the statute and the Court will not insert limiting language that is not present in the statute. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[We ordinarily resist reading words or elements into a statute that do not appear on its face."). The statutory language does not address the effective date for the discontinuation of benefits or, as relevant here, the effective date and terms for the recommencement of benefits.

To the contrary, Congress separately addressed the effective date for the discontinuation of benefits by reason of active service pay in section 5112(b)(3)—benefits "shall be" discontinued the day before active service pay begins. 38 U.S.C. § 5112(b)(3).

Although Congress did not separately address the effective date for the recommencement of benefits, the Court will not adopt the appellant's construction of sections 1110 and 5304(c) as the governing authority because doing so would effectively render Congress's specific directive in section 5112(b)(3) superfluous. *See Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) (noting that the canon against surplusage requires courts to avoid an interpretation that results in portions of text being read as meaningless); *see also Duncan v. Walker*, 533 U.S. 167, 174. In sum, Congress did not speak to the precise question at issue: Whether the Secretary may predicate the effective date for the recommencement of benefits on the date of the veteran's claim.[1] The Court thus agrees with the Secretary that neither section 5304(c) individually, nor sections 5304(c) and 1110 together, address how interruptions in the payment of benefits shall be administered. *Cf.* 38 U.S.C. § 5313 (establishing both the beginning and ending date of the limitation on payment of compensation to persons incarcerated for conviction of a felony).

Because there is a gap in the statute, the Court must now turn to step two of the *Chevron* analysis, "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see id.* ("'The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the

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[1] The appellant does not dispute that the Secretary may require a veteran to notify VA that a term of active duty has ended. His argument is limited to whether the Secretary may "tie the effective date of the resumption of benefits to the date of such notification because doing so conflicts with the plain language of 38 U.S.C. § 5304(c)." Appellant's Br. at 10 n.3.

making of rules to fill any gap left, implicitly or explicitly, by Congress.'" (quoting *Morton v. Ruiz*, 415 U.S. 199, 231(1974)).

2. Chevron Step Two

Congress conferred on the Secretary broad authority to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws." 38 U.S.C. § 501(a). That authority includes establishing "regulations with respect to the nature and extent of proof and evidence ... in order to establish the right to benefits under such laws," "the forms of application by claimants under such laws," and "the manner and form of adjudications and awards." 38 U.S.C. § 501(a)(1), (2), (4).

The Secretary asserts that § 3.654(b) fills the gap left by Congress by "delineating the procedure by which benefits are suspended and reinstated as a veteran comes in and out of active service." Secretary's Br. at 12. He maintains that VA is charged with managing the flow of benefits for millions of veterans and asserts that his regulation operates in a veteran friendly manner, affording veterans a 1-year grace period to inform VA that they have been released from active duty or, in the alternative, to have payments resumed 1 year prior to the date of the claim. Oral Argument at 28:25-28:52, 31:15-32:00; see Secretary's Br. at 10.

The appellant counters that § 3.654(b)(2) is inconsistent with and not necessary or appropriate to carry out the requirements of section 5304(c). Oral Argument at 6:15-6:42. In this regard, he maintains that the regulation does nothing to prevent the duplication of benefits and imposes a substantive limitation on entitlement to VA benefits that is contrary

to the mandate in section 1110 that the United States "will pay" disability compensation. *Id*. at 4:48-5:56. Although the Court is sympathetic to the appellant's circumstances, the Court is not persuaded by his arguments.

As argued by the Secretary, VA promulgated § 3.654(b) pursuant to his broad authority derived from section 501; the regulation creates a mechanism by which VA manages compensation benefits when veterans return to active duty, § 3.654(b)(1), and provides a procedure and structure for recommencing benefits upon release from active duty, § 3.654(b)(2). Oral Argument at 27:00-27:30. In that general sense, the regulation effectively establishes "the nature and extent of proof and evidence and the method of taking and furnishing them" and falls within the Secretary's authority "to determine the forms of application [for] benefits, and the manner of awards." Secretary's Br. at 10-11. A veteran must file a claim for recommencement and the regulation provides for an earlier effective date of the day following discharge if the claim is received within 1 year from the date of release from active duty or, in the alternative, 1 year prior to the date of the claim. 38 C.F.R. § 3.654(b)(2).

The Secretary explained that, when veterans return to active duty, their awards of compensation benefits are terminated. Oral Argument at 32:22-33:18, 42:20-43:33; see VA Gen. Coun. Prec. 05-95 at 2 (Feb. 6, 1995) (providing that VA's action of discontinuing compensation upon return to active duty is suggestive of an adjudicative determination terminating the veteran's award, such that the continuity of a veteran's rating is interrupted). He further clarified that, although service connection remains in place, it is necessary for VA to readjudicate and evaluate a

veteran's service-connected disability upon return from active duty to ascertain the current level of severity, see 38 C.F.R. § 3.654(b)(2) (providing that "[c]ompensation will be authorized based on the degree of disability found to exist at the time the award is resumed"), and VA's regulation reasonably requires a veteran to file a claim for recommencement. Oral Argument at 42:20-43:33. As for the 1-year period, the Secretary analogized it to 38 U.S.C. § 5110(b)(1), which provides that "[t]he effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within [1] year from such date of discharge or release." *Id*. He asserted that, just as Congress provided 1 year for a veteran to file a claim following discharge, his regulation provides the same reasonable period. *Id*.

In that regard, the Court has previously upheld time limitations for filing a claim and "1 year" is generally used throughout title 38. *See* Oral Argument at 31:15-31:20; Secretary's Br. at 14-15. For example, in *Jernigan v. Shinseki*, the Court addressed whether the Secretary's creation of a time limit to file a formal application form was a reasonable interpretation of Congress's direction that VA prescribe the "form" in which applications for benefits may be made. 25 Vet.App. 220, 225-27 (2012). The Court found in the affirmative, explaining that the most appropriate definition of "form" is an "[e]stablished behavior or procedure, usu[ally] according to custom or rule," BLACK'S LAW DICTIONARY 723 (9th ed. 2004), and that "[u]nder this definition, it is eminently reasonable to interpret 'form'—that is, the procedure for filing an application for benefits—to include a timing requirement, particularly in the context of VA, where

finality often plays a crucial role." 25 Vet.App. at 226. The Court rejected Ms. Jernigan's assertion that "VA is not permitted to disguise the creation of additional requirements or limitations as interpretive regulations," *id.* at 226 (internal quotation marks omitted), explaining that "Congress expressly delegated authority to VA to determine the appropriate 'forms of application[,]'" *id.* at 226-27 (quoting 38 U.S.C. § 501(a)(2)). The Court thus concluded that Congress's "express delegation, along with the Court's determination that the Secretary's interpretation of 'form' to include a timing requirement is reasonable, is sufficient to hold that [the Secretary's regulation] is not 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" *Id.* at 227 (quoting *Mayo Found. for Med. Educ. & Research*, 562 U.S. at 53).

Similarly, here, the Secretary promulgated § 3.654(b)(2) pursuant to Congress's express delegation to establish "forms of application." 38 U.S.C. § 501(a)(2). Although Congress chose to govern the date that VA benefits shall be discontinued upon a veteran's return to active duty, 38 U.S.C. § 5112(b)(3), Congress was silent regarding when and how VA shall resume the payment of benefits after a veteran's release from active duty. The Secretary filled the gap left by Congress and, therefore, contrary to the appellant's contention, his regulation is necessary and appropriate to carry out the laws administered by the Department. See 38 U.S.C. § 501(a).

Further, the Court notes that the language of § 3.654(b)(2) has remained unchanged since 1962. *See* 27 Fed. Reg. 11,886 (Dec. 1, 1962). Despite ample opportunity to modify section 5304(c) or circumscribe this regulation, Congress has left both untouched for over half a century. *See Heino v. Shinseki*, 24 Vet.App.

367, 375 (2011) (holding that Congress's failure to reject the Secretary's construction of a statute or circumscribe its regulation "indirectly indicated" its "sanction[ ]" of the regulation), *aff'd*, 683 F.3d 1372 (Fed. Cir. 2012).

Moreover, the Court is not persuaded that the supplemental authorities submitted by the appellant compel finding the Secretary's regulation arbitrary and capricious. As noted above, the appellant asserts that veterans who do not inform VA of their return to active duty may, in the end, receive and retain more monthly benefits than veterans, like the appellant, who waive benefits during a period of active service but who do not inform VA of their release within 1 year following release from service. The Secretary, however, is charged with managing compensation benefits for all veterans and the appellant has not demonstrated that it is unreasonable to craft rules with the expectation that they will be followed. *Cf. Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) ("Perfection in making the necessary classifications is neither possible nor necessary."). The Court thus concludes that VA's decision to predicate the effective date of recommencement of benefits on the date of the application therefor is not "arbitrary, capricious, or manifestly contrary to" section 5304(c). *Chevron*, 467 U.S. at 844.

Because the Court finds § 3.654(b)(2) a valid exercise of the Secretary's rulemaking authority, the Court must turn to the appellant's alternative arguments that equitable tolling is warranted or that VA deprived him of his constitutional right to due process. The Court will address his argument for equitable tolling first. *See Bucklinger v. Brown*, 5 Vet.App. 435, 441 (1993) ("It is '[a] fundamental and long-standing principle of judicial restraint ... that

courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).

D. Equitable Tolling

As noted above, the appellant argues that VA provided misleading notice regarding the 1-year period to submit a claim to recommence the payment of VA benefits and, therefore, the Court should apply its equitable tolling authority to afford him earlier effective dates of July 1, 2004, and August 1, 2005, the dates following his release from two periods of active duty, for the reinstatement of VA benefits. Although equitable tolling may be applied against the government in certain circumstances, such as "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990), it is generally applied to toll a statute of limitations to allow a claim that would otherwise be time barred. *See, e.g., Bove v. Shinseki*, 25 Vet.App. 136, 140 (2011) (per curiam order) (holding that the 120-day period in 38 U.S.C. § 7266(a) is subject to equitable tolling).

Both the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) and this Court have considered whether equitable tolling may be applied to statutes that govern the effective date of awards of VA benefits and authorities that operate similar to effective-date provisions, and have found that it may not. *See Andrews v. Principi*, 351 F.3d 1134, 1138 (Fed. Cir. 2003); *Noah v. McDonald*, 28 Vet.App. 120, 128-29 (2016). Statutes

and regulations that "merely indicate when benefits may begin, not whether a veteran is entitled to benefits at all," are not statutes of limitation subject to equitable tolling. *Noah*, 28 Vet.App. at 129; see *Andrews*, 351 F.3d at 1138 ("Passage of the [1]-year period in [38 U.S.C.] § 5110(b)(1) for filing a claim of disability compensation ... does not foreclose payment for the veteran and thus cannot be construed as establishing a statute of limitations."); *Noah*, 28 Vet.App. at 129 ("[T]he 1-year period provided in 38 U.S.C. § 3003(a) [(1981)] to submit evidence following VA's notification of the evidence necessary to complete the application cannot be construed as a statute of limitations.").

Here, the Court agrees with the Secretary that § 3.654(b)(2) is not a bar to VA benefits and does not contain a statute of limitations that may be equitably tolled. Rather, the regulation governs the date VA benefits may be resumed following release from active duty, which is dependent on when the veteran files a claim to recommence payment of benefits. In that regard, it operates similar to effective-date provisions for awards of VA benefits, which the Federal Circuit in *Andrews* unequivocally held may not be equitably tolled, 351 F.3d at 1138, and the statute and regulation at issue in *Noah*, 28 Vet.App. at 128-29.

The appellant does not dispute that § 3.654(b)(2) is not a statute of limitations. Instead, he argues that "the Board treated [§] 3.654(b)(2) as a statute of limitations in finding that, because [he] did not notify VA of his separation from active duty within [1] year of the date of separation, he had waived his right to an earlier effective date." Appellant's Br. at 13. Hence, he contends that the Board's "application of [§] 3.654(b)(2) ... does not fall within the category of VA regulations

that may evade equitable tolling." Appellant's Br. at 13 (citing *Noah*, 28 Vet.App. at 127).

His argument is not persuasive. First, it is clear from the Board decision as a whole that, in applying § 3.654(b)(2), the Board determined that the effective date for resuming payment of VA benefits must be based on the date of the appellant's claim—January 20, 2009. R. at 8-9; *see Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (per curiam) (rendering a decision on the Board's statement of reasons or bases "as a whole"). And, because the claim was filed more than 1 year after his release from active duty, a date more than 1 year prior to the date of the claim was impermissible. R. at 9. Although application of the regulation to the undisputed facts precluded an earlier effective date, it did not operate as a complete bar to benefits.

Second, even if the Board treated the regulation as a statute of limitations, the appellant cites no authority to support the proposition that the Court may apply equitable tolling under that circumstance. The Court thus need not address this argument further. See *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain undeveloped arguments); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

E. Due Process

The Fifth Amendment to the U.S. Constitution provides that "No person shall ... be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of*

Educ. v. Loudermill, 470 U.S. 532, 541 (1985). An essential principle of due process is that deprivation of a protected interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Court reviews constitutional questions de novo. See *Buzinski v. Brown*, 6 Vet.App. 360, 365 (1994).

Nearly 10 years ago, the Federal Circuit held that a veteran's entitlement to disability benefits is a property interest protected by the Due Process Clause. *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009). The amount of process that is constitutionally due depends on the situation and generally requires consideration of three distinct factors: "[T]he private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and "the Government's interest." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The appellant argues that VA violated his constitutional right to due process because the August 2003 VA Form 21-8951 and the RO's December 2003 letter "effectively misled [him] into believing that there was no deadline for him to inform VA of his separation from active duty." Appellant's Br. at 16; see R. at 1222 (December 2003 letter: "When you have been released from active duty, please provide our office with a copy of your DD[-]214, so that we may re-instate your benefits."), 1233 (August 2003 VA Form 21-8951: "This waiver will remain in effect ... unless you notify VA otherwise in writing."). At oral argument, he asserted that, because the notice was silent regarding when payment would be resumed, a reasonable person would

not think that a failure to notify VA within a particular time frame would result in a forfeiture of benefits. Oral Argument at 9:20-10:04. He thus maintained that the December 2003 letter was affirmatively misleading: He argued that VA told him that he needed to submit his DD-214s but did not tell him any other information. So, VA "affirmatively misled him in the sense that he was told he needed to do 'A' and, if he did 'A,' he would get his benefits reinstated." *Id.* at 10:30-11:00.

The Court need not reach the question whether VA provided misleading notice because, even assuming the notice was misleading, to prevail on his argument, the appellant must also show that he relied to his detriment on the allegedly misleading notice. *See Noah*, 28 Vet.App. at 133; *see also Day v. Shalala*, 23 F.3d 1052, 1066 (6th Cir. 1994) (although the denial notice "failed to satisfy the requirements of due process, the only claimants who could have been injured by the inadequacy are those who detrimentally relied on the inadequate denial notice"); *Burks–Marshall v. Shalala*, 7 F.3d 1346, 1349 (8th Cir. 1993) (the appellant has no standing to raise a due process issue where he "has not shown that the alleged deficiency in the notice had any connection in fact with h[is] own failure to seek review of" the denial of his claim). "Without such reliance, the injury is not fairly traceable to the challenged action." *Gilbert v. Shalala*, 45 F.3d 1391, 1394 (10th Cir. 1995).

Here, it is undisputed that the appellant knew that he needed to inform VA that he had been released from active duty to reinstate his benefits; he contends only that his statements and testimony reflect that he relied to his detriment on the allegedly misleading notice. Appellant's Br. at 16 (citing R. at 644 (Nov. 2015 testimony that the RO "didn't clarify" in 2003 that VA could only make payments 1 year prior to the date of his

request), 1193 (Sept. 2009 NOD noting that the December 2003 letter "did not address the [1-]year requirement for informing ... VA of my release from active duty")). But he does not explain how his statements reflect more than a general lack of knowledge of the regulation.

The Court addressed a similar situation in *Jernigan*. In that case, the appellant argued that VA's notice, which failed to inform her of the timeframe to return a formal application, was misleading or confusing. 25 Vet.App. at 229. Without determining whether VA had a duty to notify or whether the notice was defective, the Court concluded that the appellant failed to demonstrate that she relied to her detriment on the purportedly misleading notice. *Id.* Pertinent to resolution of this appeal, the Court rejected the notion that "one could presume that [the claimant relied on the allegedly misleading notice] from the notice itself and the subsequent delay in submitting a formal application." *Id*. The Court stated that the appellant had not cited any authority for such a presumption, "and our caselaw does not allow it." *Id*. The Court concluded: "'The record simply does not support any assertion that the notice lulled the appellant into failing to act, and [her] arguments must be rejected because they are not supported by any demonstrable prejudice.'" *Id*. (quoting *Edwards v. Peake*, 22 Vet.App. 29, 35 (2008), *aff'd sub nom. Edwards v. Shinseki*, 582 F.3d 1351 (Fed. Cir. 2009)); *see id.* at 231 (rejecting the appellant's due process argument in part due to the lack of "evidence that [she] relied on VA's allegedly misleading notice to her detriment"); see also *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant

to show that he or she suffered prejudice as a result of VA error).

Similarly, here, the record does not support the assertion that the appellant detrimentally relied on the allegedly misleading notice. *See Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (holding that this Court's statutory duty to take due account of the rule of prejudicial error permits the Court "to go outside of the facts as found by the Board to determine whether an error was prejudicial by reviewing 'the record of the proceedings before the Secretary and the Board'" (quoting *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007))); *Vogan v. Shinseki*, 24 Vet.App. 159, 164 (2010) ("[I]n assessing the prejudicial effect of any error of law or fact, the Court is not confined to the findings of the Board but may examine the entire record before the Agency, which includes the record of proceedings."). The record is silent from December 1, 2003, until January 20, 2009, when the appellant requested that his benefits be reinstated. Although he asserted in his NOD and Board testimony that the 2003 documents did not "clarify" that payments could only be resumed up to 1 year prior to the date of his request, he has not argued that they lulled him into inaction; rather, as noted by the Board, the appellant testified that "between that time period of 2003 until 2009, I kind of forgot about it because I'm in the Guard and it was kind of like my full-time job." R. at 643; see R. at 9. The Court thus concludes that the appellant has not met his burden of demonstrating that any due process error was prejudicial to the outcome of his appeal. *See Jernigan*, 25 Vet.App. at 231; *see also Sanders*, 556 U.S. at 409; *Berger v. Brown*, 10 Vet.App. 166,169 (1997).

Considering the foregoing, and the undisputed fact that the appellant did not file a claim for

reinstatement of benefits until January 20, 2009, the Board did not clearly err when it determined that an effective date prior to February 1, 2008, for the reinstatement of benefits was not warranted. See 38 U.S.C. § 7261(a)(4); *Evans v. West*, 12 Vet.App. 396, 401 (1999); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990); 38 C.F.R. § 3.654(b)(2).

III. CONCLUSION

After consideration of the parties' pleadings, oral argument, and a review of the record, the Board's July 20, 2017, decision is AFFIRMED.

GREENBERG, Judge, filed a dissenting opinion.

GREENBERG, Judge, dissenting:

I respectfully dissent. "I would stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court of appeals to afford 'a claimant' its best independent judgment of the law's meaning." *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) (Gorsuch, J. concurring), *vacating and remanding Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017), *aff'g Kisor v. McDonald*, No. 14-2811, 2016 WL 337517 (Vet. App. Jan. 27, 2016) (mem. dec.). The majority opinion reflects nothing more than a rubber stamping of the Government's attempt to misuse its authority granted under 38 U.S.C. § 501(a). The Secretary may only prescribe rules and regulations that are "necessary and appropriate to carry out the laws administered by the Department." 38 U.S.C. § 501(a). The statute already delineates the period for which veterans may not receive VA benefits—while they are on active duty. 38 U.S.C. § 5304(c). Section 3.654(b) does not merely "create a mechanism by which VA

manages compensation benefits when veterans return to active duty," as the majority states, *ante* at 302, it also creates an unnecessary and inappropriate impediment to a veteran receiving benefits he has already established entitlement to. The fact that VA could have adopted a regulation that prescribed the procedure of reinstating benefits without including an effective date provision is dispositive of whether 38 C.F.R. § 3.654(b) is a "necessary or appropriate" regulation. The Secretary has exceeded his statutory authority here at the expense of service-connected veterans who were called back to active duty. For this reason, I dissent.

APPENDIX C

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF THOMAS H. BUFFINGTON
SS [redacted]
DOCKET NO. 10-06 046
DATE - July 20, 2017

On appeal from the Department of Veterans Affairs
Regional Office in Cleveland, Ohio

THE ISSUE

Entitlement to an effective date prior to February 1, 2008, for the reinstatement of VA benefits.

REPRESENTATION

Veteran represented by: The American Legion

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

David Gratz, Counsel

INTRODUCTION

The Veteran served on active duty in the United States Air Force from September 1992 to May 2000, and on active duty in the Air National Guard from July 2003 to June 2004, November 2004 to July 2005, and February 2016 to May 2016.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an August 2009 decision issued by the Department of Veterans Affairs (VA) Regional Office (RO) in Denver, Colorado. Jurisdiction over the Veteran's file was subsequently transferred to the RO in Cleveland, Ohio.

In November 2014, the Board remanded the case in order to afford the Veteran his Board requested hearing. Thereafter, in November 2015, the Veteran testified at a Board hearing before the undersigned Veterans Law Judge (VLJ) sitting at the Cleveland RO. At such time, he submitted additional evidence with a waiver of Agency of Original Jurisdiction (AOJ). 38 C.F.R. § 20.1304(c) (2016). Therefore, the Board may prperly consider such newly received evidence. Additionally, the undersigned held the record open for 60 days for the receipt of any further evidence referable to the instant appeal; however, to date, none has been received.

1. The Veteran served on active duty in pertinent part from July 2003 to June 2004, and from November 2004 to July 2005.

2. The Veteran is in receipt of service connection for tinnitus (10 percent), a low back strain (noncompensable), and a left lower lip scar (noncompensable), effective as of May 31, 2000.

3. In August 2003, the Veteran submitted VA Form 21-8951, whereby he notified VA that he elected to receive pay and allowances for the performance of active/inactive duty in lieu of his VA benefits.

4. In October 2003, the Veteran informed VA that he was recalled to active duty in July 2003, and asked that VA stop his payments.

5. On December 1, 2003, VA informed the Veteran that it had stopped his benefits as of July 21, 2003, the day before he was recalled to active duty. The letter informed that [sic] the Veteran that "[w]hen you have been released from active duty, please provide our office with a copy of your DD214, so that we may reinstate your benefits."

6. On January 20, 2009, the Veteran requested that VA restart his benefits.

CONCLUSIONS OF LAW

The criteria for an effective date prior to February 1, 2008, for the reinstatement of VA benefits are not met. 38 U.S.C.A. §§ 5304, 5110 (West 2014); 38 C.F.R. §§ 3.31, 3.400(j), 3.654, 3.700(a)(1)(i) (2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Due Process Considerations

The Veterans Claims Assistance Act of 2000 (VCAA) and implementing regulations impose obligations on VA to provide claimants with notice and assistance. 38 U.S.C.A. §§ 5102, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2016).

While the Veteran was not provided with VCAA notice prior to the adjudication of his claim in the August 2009 decision, the Board finds that any prejudice due to such error has been overcome in this

case by the following: (1) based on the communications sent to the Veteran over the course of this appeal, the Veteran clearly has actual knowledge of the evidence he is required to submit in this case; and (2) based on the Veteran's contentions as well as the communications provided to him by VA, it is reasonable to expect that the Veteran understands what is needed to prevail. *See Shinseki v. Sanders/Simmons*, 129 S. Ct. 1696 (2009); *Fenstermacher v. Phila. Nat'l Bank*, 493 F.2d 333, 337 (3d Cir. 1974) (stating that "no error can be predicated on insufficiency of notice since its purpose had been served."). In order for the United States Court of Appeals for Veterans Claims (Court) to be persuaded that no prejudice resulted from a notice error, "the record must demonstrate that, despite the error, the adjudication was nevertheless essentially fair." *Dunlap v. Nicholson*, 21 Vet. App. 112, 118 (2007).

In the instant case, the August 2009 decision and January 2010 statement of the case informed the veteran that his VA benefits were reinstated effective February 1, 2008, as his request for such reinstatement was received more than one year after his release from active duty and, by law, VA is only permitted to make payments retroactive to one year prior to the date his request was received. The January 2010 statement of the case further explained that payment of VA benefits is resumed effective the day following release from active duty if the claim is received within one year of release from active duty. Otherwise, VA benefits are resumed one year prior to the date of receipt of claim. In the instant case, the Veteran was informed that he was released from active duty in 2005, but did not submit his claim until January 20, 2009. Thus, by law, his VA benefits were

reinstated one year prior to such claim, *i.e.*, January 20, 2008; however, payment is not effective until the first of the following month, *i.e.*, February 1, 2008. Furthermore, the Veteran, in written statements and at his Board hearing, offered argument as to why he believed his VA benefits should have been reinstated prior to February 1, 2008. Therefore, the Board finds that no prejudice resulted from a notice error as the record demonstrates that the adjudication was nevertheless essentially fair. *Id.*

The VCAA also requires VA to make reasonable efforts to help a claimant obtain evidence necessary to substantiate his claim. 38 U.S.C.A. § 5103A; 38 C.F.R. §§ 3.159(c), (d). This "duty to assist" contemplates that VA will help a claimant obtain records relevant to his claim, whether or not the records are in Federal custody, and that VA will provide a medical examination or obtain an opinion when necessary to make a decision on the claim. 38 C.F.R. § 3.159(c)(4).

In the instant case, the Board finds that all relevant facts have been properly developed and that all evidence necessary for equitable resolution of the issue decided herein has been obtained. The appellant's service personnel records, as well as all relevant correspondence to and from VA, have been obtained and considered.

The Veteran also offered testimony before the undersigned Veterans Law Judge at a Board hearing in November 2015. In *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), the Court held that 38 C.F.R. § 3.103(c)(2) requires that the Decision Review Officer or Veterans Law Judge who chairs a hearing to fulfill two duties: (1) the duty to fully explain the issues and (2) the duty to suggest the submission of evidence that may have been overlooked.

Here, during the November 2015 hearing, the undersigned Veterans Law Judge noted the issue on appeal. Also, information was solicited regarding the Veteran's contentions as to why he believed he was entitled to an effective date prior to February 1, 2008, for the reinstatement of VA benefits and the undersigned explained the basis for the assignment of February 1, 2008. as the date his VA benefits were reinstated. Therefore, not only were the issue[s] "explained ... in terms of the scope of the claim for benefits," but "the outstanding issues material to substantiating the claim," were fully explained. *See Bryant*, 23 Vet. App. at 497. The hearing discussion did not reveal any outstanding evidence pertinent to the instant claim and the Veteran and his representative have not alleged any prejudice in the conduct of the hearing. Under these circumstances, nothing gives rise to the possibility that evidence had been overlooked with regard to the Veteran's claim decided herein. As such, the Board finds that, consistent with *Bryant*, the undersigned Veterans Law Judge complied with the duties set forth in 38 C.F.R. 3.103(c)(2) and that the Board may proceed to adjudicate the claim based on the current record.

Furthermore, Board finds there has been substantial compliance with the Board's November 2014 remand directives and no further action in this regard is necessary. *See D'Aries v. Peake*, 22 Vet. App. 97 (2008). (holding that only substantial, and not strict, compliance with the terms of a Board remand is required pursuant to *Stegall v. West*, 11 Vet. App. 268, 271 (1998)). In this regard, the matter was remanded in order to afford the Veteran his requested Board hearing, which was held in November 2015. Therefore, the Board finds that there has been substantial

compliance with the Board's November 2014 remand directives, and no further action in this regard is necessary.

Furthermore, as will be discussed below, the Board finds that there is no legal basis to award an effective date prior to February 1, 2008, for the reinstatement of VA benefits. In this regard, VA's General Counsel has held that in cases where a claim cannot be substantiated because there is no legal basis for the claim or because undisputed facts render the claimant ineligible for the claimed benefit, VA is not required to provide notice of, or assistance in developing, the information and evidence necessary to substantiate such a claim under 38 U.S.C.A. §§5103(a) and 5103A. *See* VAOPGCPREC 5-04 (June 23, 2004). Consequently, the Board finds that VA's duties to notify and assist have been satisfied. Thus, appellate review may proceed without prejudice to the Veteran. *See Bernard v. Brown*, 4 Vet. App. 384, 394 (1993).

II. Analysis

Compensation pay on account of a veteran's own service will not be paid to any person for any period for which he receives active service pay. 38 U.S.C.A. § 5304(c); 38 C.F.R. §§ 3.654(a), 3.700(a)(1)(i). That is, a veteran is prohibited from receiving VA disability compensation concurrently with active service pay.

Unless otherwise provided, the effective date of an election of VA compensation benefits is the date of VA's receipt of the veteran's election, subject to prior payments. 38 C.F.R. § 2.400(j). Payment of VA benefits following active service, if otherwise in order, will be resumed effective the day following release from active duty if a claim for commencement of payments is received within 1 year from the date of such release;

otherwise, payments will be resumed effective 1 year prior to the date of receipt of a new claim. 38 C.F.R. § 3.654(b)(2).

Notwithstanding exceptions inapplicable to this case, payment of monetary benefits based on compensation may not be made for any period prior to the first day of the calendar month following the month in which the award became effective. 38 C.F.R. § 3.31.

An effective date prior to February 1, 2008, for the reinstatement of VA benefits is impermissible under law because VA cannot resume compensation payments more than one year prior to the date of claim, and payment of monetary benefits may not be made for any period prior to the first calendar month following the effective date of the award. Moreover, in 2003, the Veteran received notice that his waiver of VA benefits would remain in effect until he notified VA otherwise in writing and provided a copy of his DD214. Finally, the provision regarding retroactive application of elections applies only if the claimant was not advised of his right of election and its effect, and applies only to elections between retirement pay and disability compensation—not between active duty pay and VA benefits.

February 1, 2008, is the earliest date on which VA can resume compensation benefits. The Veteran filed VA Form 21-8951 in August 2003, wherein he informed VA that he was receiving VA compensation benefits as a result of prior service, and was electing to receive pay and allowances for the performance of active/inactive duty in lieu of his VA benefits. In October 2003 and December 2003, he was advised that VA must stop payment of his benefits as he had returned to active duty. He was further informed that, when he was released from active duty, he should

provide VA with a copy of his DD 214 so that his benefits may be reinstated.

On January 20, 2009, the Veteran wrote to VA and requested that his VA benefits be restarted; he explained that his VA benefits had stopped from July 21, 2003, the date that he was called to active duty, and that he had served on active duty from that date until June 21, 2004, and had another period of active service from November 1, 2004 to July 30, 2005. Since the Veteran's January 2009 letter was not received within one year of either his June 2004 or July 2005 date of separation from active service his payments will be resumed effective 1 year prior to the date of receipt of a new claim. 38 C.F.R. § 3.654(b)(2). Here, one year prior to January 20, 2009 is January 20, 2008. Further, because payment of monetary benefits based on compensation may not be made for any period prior to the first day of the calendar month following the month in which the award became effective, the earliest date of his first payment is February 1, 2008. 38 C.F.R. § 3.31. In this regard, the Board observes that the veteran does not assert that he filed a request to resume his VA compensation benefits prior to January 20, 2009; rather, he testified at his November 2015 hearing that "[b]etween that time period of 2003 until 2009, I kind of forgot about [notifying VA of his duty status and election of benefits] because I'm in the guard and it was kind of like my full-time job." *See transcript*, p. 5. Thus, a date prior to February 1, 2008, for the resumption of his VA compensation benefits is impermissible.

The Board also notes that the Veteran asserted in his September 2009 notice of disagreement that:

> In my letter received from the Albuquerque Office dated DEC 01, 2003, it did not address the one year requirement for informing VA of my release from active duty. Furthermore, I talked to the Cleveland VA Office in 2003 and they stated that since I am still a member of the guard I was unable to collect my compensation and drill pay.

Similarly, at his November 2015 hearing, the Veteran testified that he received a letter from VA in 2003 telling him to send in his DD 214 when he was released from active duty, but "there was no time stated on when we should notify the VA." *See transcript*, pp. 4-5. Essentially, the Veteran contends that there was a notice problem with regard to when the DD 214s had to be submitted in order to reinstate his VA benefits, and he did not understand that he had to submit the information to VA within one year of his date of separation from active duty. *Id*., pp. 7-9.

The Board observes that the VA Form 21-8951, which the Veteran signed and submitted to VA in August 2003, includes the following statement: "[t]his waiver will remain in effect, while you are entitled to receive VA disability payments, unless you notify VA otherwise in writing." Additionally, in the December 2003 letter from the RO to which the Veteran refers above, VA notified the Veteran that "[w]hen you have been released from active duty, please provide our office with a copy of your DD 214, so that we may re-instate your benefits." Those letters clearly informed the Veteran that the consequences of failing to notify VA of his cancelling his waiver of VA benefits would be the continued waiver of those benefits. While the notice

letters did not specify that the Veteran would be eligible for payment up to a year prior to his notification, VA has nevertheless afforded him those benefits pursuant to 38 C.F.R. § 3.654(b)(2). Regrettably, VA has no authority under the current laws or regulations to provide benefits prior to that date.

With respect to the communication from the Cleveland VA Office in 2003, the Board observes that the Veteran remained in active duty from the onset of active duty in July 2003 through the remainder of that year. As such, the RO was correct in informing the Veteran that he could not collect both VA benefits and active duty pay at the same time. 38 U.S.C.A. § 5304(c); 38 C.F.R. §§ 3.654(a), 3.700(a)(1)(i).

Finally, the provision regarding retroactive application of elections applies only if the claimant was not advised of his right of election and its effect, and applies only to elections between retirement pay and disability compensation—not to elections between active duty pay and VA benefits. 38 C.F.R. § 3.750(d)(2). As such, even if the Board accepted the Veteran's contention that he was not adequately notified of the effect of waiting more than a year after his separation from active service to request the resumption of his VA benefits, the provision allowing for retroactive application does not apply in this case.

The Board appreciates the Veteran's honesty throughout his appeal and regrets that he has no remedy or method under current law for automatically providing him with the higher of either the VA benefits or active duty pay that he earned through his service. Absent such authority, the appeal must be denied.

ORDER

An effective date prior to February 1, 2008, for the reinstatement of VA benefits is denied.

A. Jaeger
Veterans Law Judge
Board of Veterans' Appeals

APPENDIX D

2009 Letter Informing Buffington of Start Date:

DEPARTMENT OF VETERANS AFFAIRS
Regional Office
155 Van Gordon Street
Box 25126
Denver CO 80225

August 20, 2009
In Reply Refer To:
339/215/GS
CSS [redacted]

THOMAS H BUFFINGTON
[address redacted]

Dear Mr. Buffington:

We reinstated your benefits at the same 10 percent service connected disability rating you were awarded prior to your return to active duty, with compensation in the amount of $123 per month.

On December 1, 2003, we sent you a letter notifying you that we were terminating your VA Compensation because we were told that you had returned to active duty effective July 21, 2003. We also told you to provide us with copies of your DD Form 214's upon your release from active duty so that we could reinstate your benefits.

On January 20, 2009, we received copies of your DD Form 214's for the periods of July 21, 2003 through June 21, 2004 and November 1, 2004 to July 30, 2005.

We have re-instated your benefits effective February 1, 2008.

This letter tells you about your entitlement amount and payment start date and what we decided. We have also included information about additional benefits, what to do if you disagree with our decision, and who to contact if you have any questions or need assistance.

Your Award Amount and Payment Start Date

Your monthly entitlement amount is shown below:

Monthly Entitlement Amount	**Payment Start Date**	**Reason for Change**
$117.00	Feb. 1, 2008	Compensation benefits reinstated
$123.00	Dec. 1, 2008	Cost of living adjustment

You Can Expect Payment

Your payment begins the first day of the month following your effective date. You will receive a payment covering the initial amount due under this award minus any withholdings, in approximately 15 days. Payment will then be made at the beginning of each month for the prior month. For example, benefits due in May are paid on or about June 1.

We Decided

We have reinstated your benefits at the 10% rate.

We enclosed a VA Form 21-8764, "Disability Compensation Award Attachment-Important Information," which explains certain factors concerning your benefits.

How Did We Make Our Decision?

We received your request for the reinstatement of your VA Compensation benefit more than one year after your release from active duty. By law we are only permitted to make payments retroactive to one year prior to the date we received your request.

This letter constitutes our decision based on your claim received on [sic]. It represents all claims we understand to be specifically made, implied, or inferred in that claim.

Evidence Used to Decide Your Claim

In making our decision, we used the following evidence:

- Your VA Form 21-4138, "*Statement in Support of Claim*" dated January 12, 2009
- The information on your DD-214's

How Do You Start Direct Deposit?

Your money may be deposited directly into your checking or savings account. This is the safest and most reliable way to get your money. For more information about Direct Deposit, please call us toll free by dialing 1-877-838-2778.

Are You Entitled to Additional Benefits?

You may be eligible for medical care by the VA health case system for any service connected disability. You may apply for medical care or treatment at the nearest medical facility. If you apply in person, present

a copy of this letter to the Patient Registration/Eligibility Section. If you apply by writing a letter, include your VA file number and a copy of this letter.

What You Should Do If You Disagree With Our Decision

If you do not agree with our decision, you should write and tell us why. You have *one year from the date of this letter to appeal the decision.* The enclosed *VA Form 4107, "Your Rights to Appeal Our Decision*," explains your right to appeal.

If You Have Questions or Need Assistance

If you have any question, you may contact us by telephone, email, or letter.

If you	**Here is what to do.**
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.
Use the Internet	Send electronic inquiries through the Internet at htpps://iris.va.gov
Write	Put your full name and VA file number on the letter. Please send all correspondence to the address at the top of this letter.

In all cases, please refer to your VA file number CSS [redacted].

If you are looking for general information about benefits and eligibility, you should visit our website at

https://www.va.gov, or search the Frequently Asked Questions at https://iris.va.gov.

We sent a copy of this letter to your representative, American Legion, whom you can also contact if you have any questions or need assistance.

Sincerely yours,

/s/ K. Malin
K. Malin
Veterans Service Center Manager

Email us at: https://iris.va.gov

Enclosure(s): VA Form 21-8764
VA Form 4107

cc: American Legion

APPENDIX E

RELEVANT STATUTES AND REGULATIONS

38 U.S.C. § 1131. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, air, or space service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 U.S.C. § 5304. Prohibition against duplication of benefits

(a)(1) Except as provided in section 1414 of title 10 or to the extent retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, or initial award of naval pension granted after July 13, 1943, shall be made concurrently to any person based on such person's own service or concurrently to any person based on the service of any other person.

(2) Notwithstanding the provisions of paragraph (1) of this subsection and of section 5305 of this title, pension under section 1521 or 1541 of this title may be paid to a person entitled to receive retired or

retirement pay described in section 5305 of this title concurrently with such person's receipt of such retired or retirement pay if the annual amount of such retired or retirement pay is counted as annual income for the purposes of chapter 15 of this title.

(b)(1) Except as provided in paragraphs (2) and (3) of this subsection and in section 1521(i) of this title, the receipt of pension, compensation, or dependency and indemnity compensation by a surviving spouse, child, or parent on account of the death of any person, or receipt by any person of pension or compensation on account of such person's own service, shall not bar the payment of pension, compensation, or dependency and indemnity compensation on account of the death or disability of any other person.

(2) Benefits other than insurance under laws administered by the Secretary may not be paid or furnished to or on account of any child by reason of the death of more than one parent in the same parental line; however, the child may elect one or more times to receive benefits by reason of the death of any one of such parents.

(3) Benefits other than insurance under laws administered by the Secretary may not be paid to any person by reason of the death of more than one person to whom such person was married; however, the person may elect one or more times to receive benefits by reason of the death of any one spouse.

(c) Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.

(d)(1) Other than amounts payable under section 1413a or 1414 of title 10, the amount of pension and compensation benefits payable to a person under this title shall be reduced by the amount of any lump sum payment made to such person under section 1415 of title 10.

(2) The Secretary shall collect any reduction under paragraph (1) from amounts otherwise payable to the person under this title, including pension and compensation payable under this title, before any pension and compensation payments under this title may be paid to the person.

38 C.F.R. § 3.654. Active service pay.

(a) General. Pension, compensation, or retirement pay will be discontinued under the circumstances stated in § 3.700(a)(1) for any period for which the veteran received active service pay. For the purposes of this section, active service pay means pay received for active duty, active duty for training or inactive duty training.

(b) Active duty.

(1) Where the veteran returns to active duty status, the award will be discontinued effective the day preceding reentrance into active duty status. If the exact date is not known, payments will be discontinued effective date of last payment and as of the correct date when the date of reentrance has been ascertained from the service department.

(2) Payments, if otherwise in order, will be resumed effective the day following release from active duty if claim for recommencement of payments is received within 1 year from the date of such release: otherwise payments will be resumed effective 1 year

prior to the date of receipt of a new claim. Prior determinations of service connection will not be disturbed except as provided in § 3.105. Compensation will be authorized based on the degree of disability found to exist at the time the award is resumed. Disability will be evaluated on the basis of all facts, including records from the service department relating to the most recent period of active service. If a disability is incurred or aggravated in the second period of service, compensation for that disability cannot be paid unless a claim therefor is filed.

(c) Training duty. Prospective adjustment of awards may be made where the veteran waives his or her Department of Veterans Affairs benefit covering anticipated receipt of active service pay because of expected periods of active duty for training or inactive duty training. Where readjustment is in order because service pay was not received for expected training duty, retroactive payments may be authorized if a claim for readjustment is received within 1 year after the end of the fiscal year for which payments were waived.