



# **Lesson 25**

## **Recent Court Decisions**

*The American Legion DSO School*

*March 2022*

# Lesson 25 Learning Objectives

- **Learn about the federal courts over VA:**
  - Identify the different courts over VA.
  - Learn about some recent decisions from the courts.
  - Learn arguments to make based off these recent decisions.

# Brief Overview of VA's Judicial Review

- The **Board of Veterans' Appeals** (Board) is the highest appellate body within VA.
- Denials from Board can be appealed to the **U.S. Court of Appeals for Veterans Claims** (CAVC).
  - Only handles appeals from VA.
  - Claimants cannot take VA appeals to any other court.
- Denials from CAVC can be appealed to the **U.S. Court of Appeals for the Federal Circuit** (Fed. Cir.).
  - Only decides questions of law.
  - The next and highest court is the U.S. Supreme Court.



***Foster v. McDonough***  
34 Vet. App. 388  
(2021) &  
**Breland v.  
McDonough**, 2022 U.S.  
App. LEXIS 731 (Fed. Cir.  
Jan. 11, 2022)



## Quiz

Click the **Quiz** button to edit this object

Veteran Willis applied for service connection for tongue cancer in 2006. VA denied his claim and he appealed. He completed treatment in 2008 and had no signs of cancer afterward. In 2015, VA finally granted service connection as part of his appeal and awarded a staged rating back to 2006.

Under 38 C.F.R. § 4.114, Diagnostic Code 7343, active tongue cancer is rated at 100%, but may be reduced six months after treatment is complete if a VA examination shows that there are no residuals. Willis never received a VA examination while his claim was pending. Nonetheless, VA rated his cancer at 100% initially and reduced it to noncompensable as of 2008. Willis disagrees. He argues that his initial 100% rating must be continued until a VA examination is provided as required by the regulation.

Is Willis correct? (This question does not count towards your grade.)

- No
- Yes

# Foster & Breland

## No.

- These are the tongue cancer facts of *Breland*. *Foster* involved a similar situation under the diagnostic code for prostate cancer.
- In both cases, the courts held that a diagnostic code that requires a VA examination to reduce a cancer rating does not apply when VA is retroactively considering the severity of a Veteran's condition as part of a staged rating. The Court opinion was unfavorable to Veterans.

***Larson v.  
McDonough***  
10 F.4th 1325  
(Fed. Cir. 2021)



## Quiz

Click the **Quiz** button to edit this object

True or False: Service connection may be granted for obesity. (This question does not count towards your final grade.)

- Yes
- We do not have a clear answer.
- No



# *Larson v. McDonough*

## **We do not have a clear answer.**

- Previously, the CAVC held that it had no jurisdiction to review VA's position that obesity is not a disability.
- In this decision, the Federal Circuit reversed that decision by the CAVC and sent the case back for a new decision.
- The Federal Circuit did not answer the question. It merely sent it back to the CAVC for another review.
- We do not yet have a new decision from the CAVC.

***Petite v.  
McDonough,***  
2021 U.S. App. Vet.  
Claims LEXIS 2199  
(Dec. 16, 2021)



## Quiz

Click the **Quiz** button to edit this object

Florence is the daughter of a permanently and totally disabled Veteran. She receives health care benefits through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA). To remain in the program after she turns 18, is it sufficient that she is a part-time student or must she be enrolled full time? (This question does not count towards your final grade.)

- She must be a full-time student to remain in the CHAMPVA health-care program.
- She may remain in CHAMPVA even if she is only a part-time student.

# *Petite v. McDonough*

## **She may remain in CHAMPVA even if she is only a part-time student.**

- The court held that even though CHAMPVA is patterned after TRICARE (a military program), VA does not have the same explicit definition of “child” as DoD.
- VA uses the default definition of “child” for all Veterans benefits programs and that’s a win for Veterans.
- A Veteran’s dependent between the ages of 18 and 23 need only be a part-time student to qualify as a “child.”

***Wilson v.  
McDonough,***  
2021 U.S. App.  
Vet. Claims  
LEXIS 2208  
(Dec. 20, 2021)



## Quiz

Click the **Quiz** button to edit this object

Veteran Leon applies for service-connection for hypertension. At the time of his application, his hypertension is under control by medication. However, two years prior to his application, he regularly had diastolic pressure readings over 100. Under 38 C.F.R. § 4.104, DC 7101, a Veteran who has “a history of diastolic pressure predominantly 100 or more [and] requires continuous medication for control” should be rated at 10%. Is Leon eligible for a 10% rating even though his diastolic pressure readings over 100 were all prior to the period being rated?

- No
- Yes

# *Wilson v. McDonough*

## **Yes.**

- The CAVC held that the relevant “historical blood pressure readings” are those taken before the Veteran began receiving medication.
- It does not matter when the readings occurred so long as the history exists.

**Advocacy Tip:** Help the Veteran file a VA Form 21-4142 to obtain past private treatment if the readings are not in their VA records



***Ventris v.  
McDonough,***  
34 Vet. App. 300  
(2021)





## Quiz

Click the **Quiz** button to edit this object

A surviving spouse who remarries is generally not eligible for DIC or other benefits. However, Congress provided that “On or after January 1, 1971, remarriage of a surviving spouse terminated prior to November 1, 1990” will not be a bar to benefits.

Sylvia is the widow of the Veteran James. They married in 1955 and he died two years later. In 1958, Sylvia remarried but that marriage ended in divorce in 1962. She applied for benefits as the surviving spouse of the Veteran in 2010.

Is Sylvia eligible for recognition as the Veteran’s surviving spouse? (This question does not count towards your grade.)

- No, because her remarriage was not on or after January 1, 1971.
- Yes, because her application for benefits was on or after January 1, 1971.

# *Ventris v. McDonough*

**Yes, because her application for benefits was on or after January 1, 1971.**

- The CAVC held that the relevant date under the law is the date of the claim, not the date of remarriage.
- The Court looked at the history of the legislation in Congress, which made the intention behind the law clear.

**Advocacy Tip:** Just because VA interpreted a confusing law in a particular way for years does not mean VA is correct.

# **Schedule for Rating Disabilities: Cardiovascular System**

86 Fed. Reg. 54,089  
(Sept. 30, 2021)



## Quiz

Click the **Quiz** button to edit this object

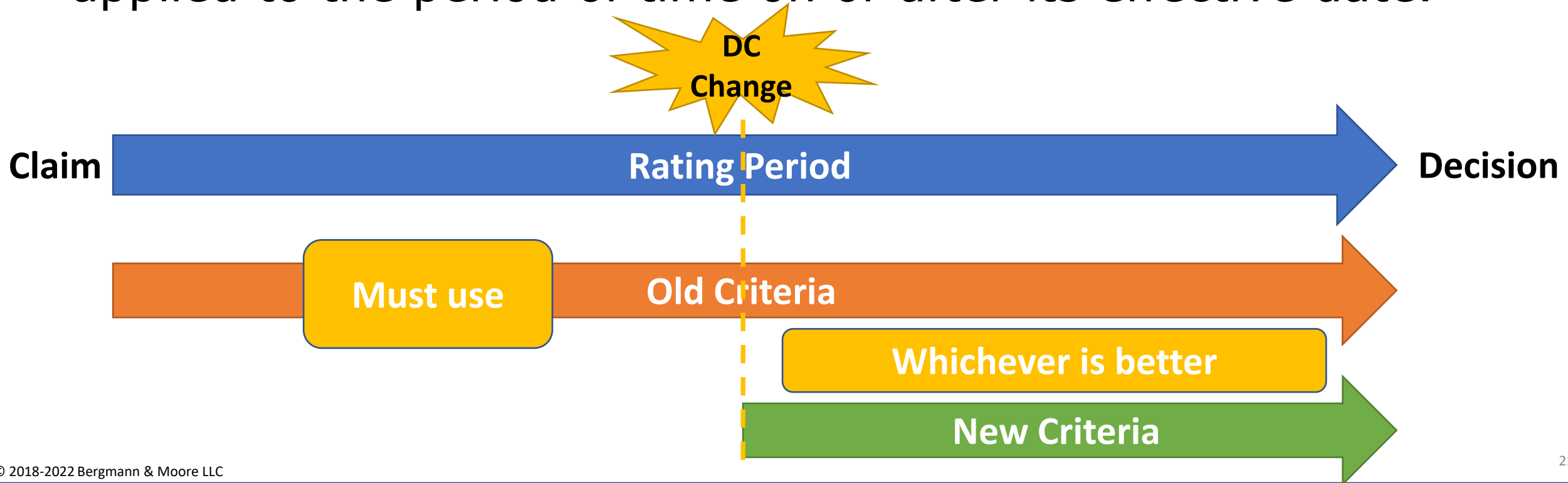
When the rating criteria for a condition change while a claim is pending before VA . . .

- VA should apply whichever version of the rating criteria is more favorable to the Veteran.
- VA may apply whichever criteria it thinks is more appropriate in its discretion.
- VA should always apply the newer criteria in effect at the time that it prepares the decision.
- VA should always apply the older criteria in effect at the time the claim was filed.

# Rating with Changed Diagnostic Codes

**VA should apply whichever version of the rating criteria is more favorable to the Veteran.**

- Remember: changes to VA diagnostic codes may only be applied to the period of time on or after its effective date.



# Cardiovascular System Ratings

- The revisions to rating criteria are effective **November 14, 2021**.
- Removed ratings based on congestive heart failure (CHF) and left ventricular ejection fraction (LVEF).
- Streamlined criteria and created new general formula.
- Reduced temporary total rating following pacemaker.
- No change to hypertension ratings.

**VA's overall theme was to eliminate many of the separate rating schemes and use the general rating criteria more frequently.**

# New Cardiovascular General Formula

- New General Formula for Diseases of the Heart- 38 C.F.R. § 4.104.

Workload of 3 METs or less results in heart failure symptoms	100
Workload of 3.15 METs results in heart failure symptoms	60
Workload of 5.1-7 METS results in heart failure symptoms; or evidence of cardiac hypertrophy or dilation confirmed by echocardiogram or equivalent	30
Workload of 7.1-10 METs results in heart failure symptoms; or continuous medication required for control	10

- Note (3) defines heart failure symptoms as “breathlessness, fatigue, angina, dizziness, arrhythmia, palpitations, or syncope.”

# Schedule for Rating Disabilities: Genitourinary Systems

86 Fed. Reg. 54,081 (Sept. 30, 2021)





# Genitourinary System Ratings

- The revisions to rating criteria are effective **November 14, 2021**.
- Revised criteria for renal dysfunction and urinary tract infections.
  - Renal dysfunction criteria focus on glomerular filtration rate (GFR).
  - UTI criteria now define the frequency of hospitalizations and suppressive drug therapy needed for different ratings.
- Removed compensable rating for erectile dysfunction.
  - SMC(k) is still available.

# Key Veteran Court cases we are closely watching



# Pending Decisions

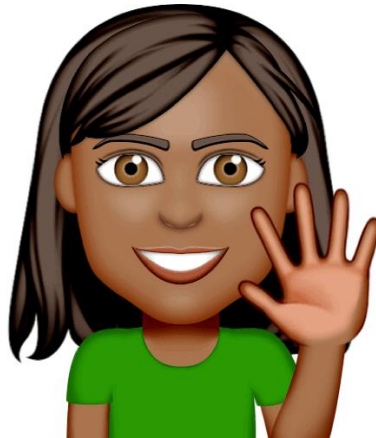
- *George v. McDonough*
  - Pending at the U.S. Supreme Court.
  - Can decisions that denied under VA's old interpretation of the presumption of sound condition be challenged for CUE?
- *Taylor v. McDonough*
  - Pending at the U.S. Court of Appeals for the Federal Circuit.
  - Does the Court of Appeals for Veterans Claims have the authority to provide equitable relief to Veterans who were prevented from filing claims due to the classified nature of their service?

**Reminder:** Please check the email that you used to register for this School for case updates from Bergmann & Moore!

# Thank you! See you in August!

Join Bergmann & Moore this summer and learn about winning VA appeals for Veterans:

- Appeals Modernization (AMA)
- More VA Forms
- Best Arguments



- This lesson is complete.
- A PDF version of these slides will be provided to you at the conclusion of the school for future reference.