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Justice Should Not Be a Lottery: An Examination of Disparate Outcomes in Hearing Loss Cases at the Veterans Court

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, 2017; B.A. Criminology and Restorative Justice, Fresno Pacific University, Visalia, 2014. No success occurs without help. I would not have been able to write this Comment without the help and support of my friends and family whose seemingly inexhaustible supply of patience, love, and support. I would also like to thank my editors on the *UPLR*, most notably Erika Lewis, who did the tireless work of making sure that every comma was in the right place while I was abroad. In addition, I would like to thank my friends and mentors for their infinite patience and guidance while I studied abroad in Cambodia and Northern Ireland: Professors John Sims, Michael Vitiello, Professor Emeritus Linda Carter, Kristin Rosella and Devina Douglas. I am also thankful to everyone at the Veterans Court for their guidance and support during the summer of 2015.

I. INTRODUCTION TO DISPARATE OUTCOMES IN HEARING LOSS CASES AT THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

In mid-August 2015, five days apart, two different judges in the United States Court of Appeals for Veterans Claims (the Veterans Court) decided identical disability claims from two different veterans.[1] Each veteran argued that the Board of Veterans' Affairs (Board) had erred in failing to refer their respective hearing loss cases[2] for extraschedular consideration.[3] The Department of Veterans Affairs (VA) previously assigned both veterans noncompensable ratings for their hearing loss cases.[4] Both veterans argued that the Board supplied

1. *See* Kennison v. McDonald, No. 14-3729, 2015 WL 4879201, at *1 (Vet. App. Aug. 17, 2015) (deciding a veteran's entitlement for disability benefits for bilateral hearing loss); McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508, at *1 (Vet. App. Aug. 12, 2015) (deciding a veteran's entitlement for disability benefits for bilateral hearing loss).

2. Due to the confusing language commonly used in Veterans Law, whenever possible, this Comment uses the term "hearing loss cases" when describing the relevant disability claims that arrive at the Veterans Court.

3. *Kennison,* 2015 WL 4879201, at *1; *McSparrin,* 2015 WL 4756508, at *2; *see* Part II.B.2 (defining extraschedular consideration in Veterans Law as the awarding of benefits beyond what the veteran is initially entitled to, in a process controlled by a three-element test administered by the VA).

4. Brief of Appellant at 1–2, *Kennison*, 2015 WL 4879201 (Vet. App. Aug. 17, 2015) (No. 14-3729); Brief of Appellant at 1–2, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (No. 14-2417); *see infra* Part II.A (defining a noncompensable claim in Veterans Law that satisfies the VA's criteria for disability but results in no monetary compensation).

inadequate reasons for the Board's decisions.[5] Both Board findings used the "clearly erroneous" standard.[6] And both veterans even had representation by attorneys from the same law firm.[7]

However, the outcomes of the two cases could not have been more different.[8] In *McSparrin v. McDonald,* Chief Judge Lawrence B. Hagel affirmed the Board's reasoning to deny referral for extraschedular consideration for Mr. McSparrin.[9] In *Kennison v. McDonald,* Judge Coral W. Pietsch vacated the Board's decision to deny referral for extraschedular consideration for its failure to provide adequate reasons or bases for its decision to Mr. Kennison.[10] Inconsistent rulings on identical cases at the Veterans Court undermine one of the core principles of law: precedent.[11] Accordingly, disparate outcomes occur because of the Court's unique procedural rules and the lack of controlling precedent for disability cases.[12] The primary difference between identical cases is the Veterans Court judge presiding over the case.[13]

Commentators have begun to notice this problem of disparate outcomes at the Veterans Court, sometimes even referring to it as "churn" or "the hamster wheel."[14] This Comment presents a case study of identical hearing loss cases to

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5. *See* Brief of Appellant at 1-2, *Kennison*, 2015 WL 4879201 (No. 14-3729) (stating plainly that the claim was assigned as noncompensable); Brief of Appellant at 3–4, *McSparrin*, 2015 WL 4756508 (No. 14-2417) ("Mr. McSparrin was not entitled to compensation for his bilateral hearing loss.").

6. Brief of Appellant at 1–2, *Kennison*, 2015 WL 4879201 (Vet. App. Aug. 17, 2015) (No. 14-3729); Brief of Appellant at 1–2, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (No. 14-2417); *see infra* Part II.A (defining a noncompensable claim in Veterans Law that satisfies the VA's criteria for disability but results in no monetary compensation).

7. Brief of Appellant at 9, *Kennison*, 2015 WL 4879201 (stating Counsel for Appellant was Michael S. Just of Chisholm, Chisholm, and Kilpatrick in Providence, RI); Brief of Appellant at 11, *McSparrin*, 2015 WL 4756508 (stating Counsel for Appellant was Judy J. Donegan of Chisholm, Chisholm, and Kilpatrick in Providence, RI).

8. *See infra* Part III.A.1–2 (explaining that *McSparrin* and *Kennison* had opposite outcomes at the Veterans Court).

9. *McSparrin*, 2015 WL 4756508, at *7.

10. *Kennison*, 2015 WL 4879201, at *5 (holding that remand to the Board for further development is the appropriate solution in this case).

11. *Precedent*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/precedent (last visited on Apr. 1, 2016) (on file with *The University of the Pacific Law Review*) (providing the definition of *precedent*—something done or said that may serve as an example or rule to authorize or justify a subsequent act of the same or an analogous kind).

12. *Infra* Part III.3; *see* James D. Ridgway, Barton F. Stichman & Rory E. Riley, "*Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 28–30 (Aug. 2015) [hereinafter Ridgway] (describing the instances in case law that demonstrates disparate outcomes at the Veterans Court in mental health cases).

13. *See infra* Part III.A.1–2 (discussing underlying facts of *Kennison* and of *McSparrin* case). *Compare Kennison*, 2015 WL 4879201 at *4 (holding issued by Judge Coral W. Pietsch), *with McSparrin*, 2015 WL 4756508, at *3 (holding issued by Chief Judge Lawrence B. Hagel) (demonstrating different judges and different results).

14. Ridgway, *supra* note 12, at 31–33 (arguing the Board's failure to provide adequate reasons or bases is the most common type of error for which the Veterans Court will vacate and remand a decision, leading to inconsistent decisions); *see* Alan Zarembo, *VA Is Buried In A Backlog Of Never-Ending Veterans Disability*

demonstrate the broader problem of disparate outcomes at the Veterans Court.[15] The problem of disparate outcomes at the Veterans Court is of general concern to other commentators, who have described disparate outcomes in mental health and hearing loss cases.[16]

Prior to the modification of the Court's procedural rules, U.S. Vet. App. Rule 30(a)—the rule that primarily governs the precedential value of these cases—stated that these cases generally had no precedential value. [17] It is beyond dispute that the Veterans Court became aware of the problem of disparate outcomes in certain cases because of the modification of the procedural rules.[18] In the summer of 2015, the Court proposed a modification of its rules that would allow veterans to cite Rule 30(a)[19] on cases only for "the persuasive value of their logic and reasoning," while maintaining the non-precedential approach.[20] The Court adopted the revised Rule 30(a) on November 19, 2015.[21]

Appeals, L.A. TIMES (Nov. 23, 2015), [hereinafter Zarembo] http://www.latimes.com/nation/la-na-veterans-appeals-backlog-20151123-story.html (last visited on December 29th, 2015) (on file with *The University of the Pacific Law Review*) ("Cases often remain in the system for years in a slow-motion volley between the appeals board and the regional offices, with occasional detours to federal court.").

15. *See infra* Part III (discussing the nature of disparate outcomes of hearing loss cases compared to the general outcomes of cases at the Veterans Court).

16. *See generally* Ridgway, *supra* note 12, at 28–33 (examining the problem of disparate outcomes in the context of mental health and hearing loss cases).

17. U.S. VET. APP. R. 30(a).

> A party, intervenor, or amicus curiae may not cite as precedent any action designated as nonprecedential by the Court or any other court, or that was withdrawn after having been published in a reporter, except when the cited action has binding or preclusive effect in the case on appeal (such as via the application of the law-of-the-case doctrine). A copy of any unpublished action referred to shall be attached to the document containing the reference.

Id. (stating the rule in effect as of 2011).

18. *See* U.S COURT OF APPEALS FOR VETERANS CLAIMS, MISC. ORDER NO. 07-15, IN RE: RULES OF PRACTICE AND PROCEDURE (July 28, 2015), https://www.uscourts.cavc.gov/documents/MiscOrder07-15.pdf (last visited Jan. 4, 2016) [hereinafter July 2015 Veterans Court Order] (on file with *The University of the Pacific Law Review*) ("[T]he Court has determined the need to revise Rule 30(a) of its Rules of Practice and Procedure regarding citation to non-precedential authority" and seeks public comment).

19. U.S. VET. APP. R. 30(a).

> A party, intervenor, or amicus curiae may not cite as precedent any action designated as nonprecedential by the Court or any other court, or that was withdrawn after having been published in a reporter, except when the cited action has binding or preclusive effect in the case on appeal (such as via the application of the law-of-the-case doctrine). *Actions designated as nonprecedential by this Court or any other court may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and the party includes a discussion of the reasoning as applied to the instant case.* With the exception of decisions of this Court available electronically, a copy of any unpublished action referred to shall be attached to the document containing the reference.

Id. (emphasis added).

20. *Id.*

21. U.S COURT OF APPEALS FOR VETERANS CLAIMS, MISC. ORDER NO. 16-15, IN RE: RULES OF PRACTICE AND PROCEDURE (Nov. 2015), https://www.uscourts.cavc.gov/documents/MiscOrder15-16.pdf (last visited on Jan. 4, 2016) [hereinafter November 2015 Veterans Court Order] (on file with *The University of the Pacific Law Review*).

However, this change of procedure does not go far enough to fix the problem of disparate outcomes for the cases decided under the old procedural rule and for future cases yet to occur.[22] Currently, veterans' cases under the new Rule 30(a) can draw upon the reasoning with disparate outcomes, as there is still a lack of controlling precedent.[23] In essence, justice has become a lottery at the Veterans Court, with outcomes wholly dependent on which judge decides the case.[24]

To fix the problem of disparate outcomes, the Veterans Court needs to do two things.[25] First, the Court needs to further modify its procedural rules by applying the relevant factors to create a mandatory procedural framework to ensure precedential decisions so that this problem of disparate outcomes will not occur again.[26] Second, the Court needs to issue an *en banc* decision that establishes the authority of the reasoning used in cases like *McSparrin* as the standard for hearing loss cases going forward.[27] Now is the time to bring attention to this problem of disparate outcomes.[28]

Part II of this Comment does the following: (1) provides necessary background on Veterans' Law, including an explanation of disability claims and extraschedular consideration; (2) examines the Court's background and unique procedural rules that allowed disparate outcomes to occur; and (3) analyzes the "clearly erroneous" standard.[29] Part III analyzes *McSparrin* and *Kennison*, compares them to other Veterans Court cases over the past six years,[30] and also addresses the Court's effort to address its problem of disparate outcomes due to a recent alteration of its procedural rules.[31] Finally, Part IV argues for specific

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22. *Compare Kennison*, 2015 WL 4879201, at *1–2 (Vet. App. Aug. 17, 2015), *with McSparrin*, 2015 WL 4756508, at *1–3 (Vet. App. Aug. 12, 2015) (demonstrating that two cases involving the similar facts and law resulting in two different results); *see also infra* Part III.B.1–2 (explaining that the disparity of results in hearing loss disability claims is in stark contrast with the average results for all claims at the Veterans Court).

23. The revised Rule 30(a) has not stopped disparate outcomes at the Veterans Court. *Compare* Payne v. McDonald, No. 15-0228, 2016 WL 193496, at *3 (Vet. App. Jan. 15, 2016) (affirming, without precedential value, that the Board's decision provided an adequate rationale to not refer the veteran's claim for extraschedular consideration), *with* Graham v. McDonald, No. 15-0084, 2015 WL 9488190, at *6 (Vet. App. Dec. 30, 2015) (vacating and remanding, without precedential value, the Board's decision because it failed to provide adequate reasons or bases).

24. *Compare Payne*, 2016 WL 193496 (holding issued by Judge Alan G. Lance), *with Graham*, 2015 WL 9488190 (holding issued by Judge Mary J. Schoelen) (demonstrating again that different judges led to different results at the Veterans Court).

25. *See infra* Part IV (outlining the details of two recommendations of this article).

26. *See infra* Part IV.A (discussing recommendation to alter Rule 30(a)).

27. *See infra* Part IV.B (recommending the court issue a full court decision adopting the rational of *McSparrin v. McDonald*).

28. Another reason for the urgency of this issue is that the Court seeks someone to write about its own history. *See Request for Proposals,* THE SUPREME COURT HISTORICAL SOCIETY, http://www.supremecourthistory.org/uscavc/index.html (last accessed on Jan. 6, 2016) (on file with *The University of the Pacific Law Review*).

29. *Infra* Part II.A–D.

30. *Infra* Part III.A–B.

31. *Infra* Part III.C.

procedural alterations of the Veterans Court's rules and for issuing a full court precedential decision, similar to *McSparrin*, to resolve the controversy surrounding referral for extraschedular consideration in hearing loss disability cases.[32]

II. BACKGROUND OF VETERANS LAW AND THE COURT PROCEDURES THAT HAVE LED TO DISPARATE OUTCOMES IN HEARING LOSS CASES AT THE VETERANS COURT

The history of Veterans Law sheds light on why single-judge decisions result in disparate outcomes in hearing loss cases at the Veterans Court.[33] This Section includes: (1) an explanation of the elements of a claim in Veterans Law and the elements of a hearing loss case; (2) the governing law for referrals of extraschedular consideration; (3) an overview of the Veterans Court, including its judicial review and procedural rules; and (4) an explanation of the "clearly erroneous" standard.[34]

A. The General Requirements for Hearing Loss Cases at the Veterans Court.

The general requirement for the VA to pay any disability claim of benefits is that the disability must occur or be aggravated during active military, naval, or air service.[35] The service must also discharge or release the veteran under conditions other than a dishonorable discharge.[36]

Today, there are five elements to a veteran's application for benefits: "[1] status as a veteran, [2] the existence of a disability, [3] the connection between the veteran's service and the disability, [4] the degree of disability, and [5] the effective date of the disability."[37] The veteran's claim is "service-connected" if all five elements are present.[38]

32. *Infra* Part IV.A–B.

33. *See infra* Part II (providing background of Veterans Law and Veterans Court procedure).

34. *Infra* Part II.A–D.

35. 38 U.S.C. §§ 1110, 1131 (West 2015); 38 C.F.R. § 3.4(b)(1) (2015).

36. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. §§ 3.12, 3.301 (2015); *see* 38 U.S.C. § 101(2) (West 2015) (defining "veteran" for establishing veteran benefits as a service member "who was discharged or released under conditions other than dishonorable").

37. Dingess v. Nicholson, 19 Vet. App. 473, 484 (2006) (quoting Collaro v. West, 136 F.3d 1304, 1308 (Fed. Cir. 1998)).

38. *Id.* at 484–85. The common practice of calling a claim "service-connected" is repetitive and confusing, as one of the elements required for a claim is the requirement of service connection. As previously stated, for reasons of clarity, this Comment bypasses the confusion of the requisite language and uses the equivalent terms of "claim of disability benefits" and "disability claims" in reference to hearing loss cases.

The VA has a general statutory duty to assist veterans in the administration of their claims to the VA[39]; as such, the posture of the VA in the claims process is non-adversarial.[40] Congress requires that the VA assist a veteran by both notifying the veteran of the information necessary to prove his claim and by helping the veteran obtain the evidence and information to substantiate his claim.[41] Moreover, the VA's duty to assist also includes a duty to make reasonable efforts to assist a veteran in obtaining evidence necessary to substantiate his claim.[42]

The legal test the Veterans Court uses to determine hearing loss cases is fundamentally straightforward.[43] Any VA medical examination must be thorough enough so that the evaluation of the veteran's filed disability claim will be a fully informed one.[44] Accordingly, pursuant to VA regulations, any medical examination must also "include a full description of the effects of the disability upon the person's ordinary activity."[45]

The VA assigns disability ratings for hearing loss cases through a "mechanical application of the [disability] rating schedule" to the results of the required audiometric evaluations.[46] The VA designed the test to give ratings on a range of zero to 100, with a zero rating resulting in the veteran's hearing loss being non-compensable, even if the veteran claims that he cannot hear.[47] The audiometric exam rates each ear separately and accordingly awards a financial

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39. *See* Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (reaffirming and clarifying "the duty of the Secretary of Veterans Affairs to assist claimants for benefits. . . . " Codified as amended in scattered sections of 38 U.S.C.).

40. *See id.* (stating that the Secretary of Veteran Affairs should provide any assistance to the veteran in gathering evidence and provide the veteran with the "benefit of the doubt" when evaluating the evidence).

41. 38 U.S.C. § 5103(a) (West 2015).

42. 38 U.S.C. § 5103(b) (West 2015); *Dingess*, 19 Vet. App. at 484; 38 C.F.R. § 3.159(b) (2015); *see also* Sizemore v. Principi, 18 Vet. App. 264, 273–74 (2004) (recognizing that the Secretary of Veteran Affairs has a duty to assist veterans).

43. *See* Lendenmann v. Principi, 3 Vet. App. 345, 349 (1992) ("Assignment of disability rating for hearing impairment are derived by a *mechanical application* of the rating schedule. . . . ") (emphasis added).

44. Green v. Derwinski, 1 Vet. App. 121, 124 (1991).

45. Martinak v. Nicholson, 21 Vet. App. 447, 454 (2007).

46. *See Lendenmann,* 3 Vet. App. at 349 (stating the requirements as to referral for extraschedular consideration); *see also Martinak,* 21 Vet. App. at 454 (stating the Board must include the hearing loss's effect on the veteran's ordinary activity). *See also* 38 C.F.R. § 4.85 (2015) (stating that examinations for hearing impairment must be conducted by a state-licensed audiologist and must include a controlled speech discrimination test and a puretone audiometry test); 38 C.F.R. § 4.86 (2015) (stating that the test results for each ear must meet a decibel threshold, and the results of examinations will be compared to predefined Hertz levels to determine whether a claim for benefits should be awarded, with the worst result controlling the award).

47. *See* Thun v. Peake, 22 Vet. App. 111, 115 (2008) ("Under the approach prescribed by VA, if the criteria reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule, the assigned schedular evaluation is, therefore, adequate, and no referral is required."); Cromley v. Brown, 7 Vet. App. 376, 378 (1995) ("The [VA] regulations are clear. Under the schedule of ratings, level I and level II hearing are noncompensable [and thus require no payment of benefits].") (citation omitted).

award.[48] However, the VA has a duty to analyze the filed hearing loss claim for referral for extraschedular consideration.[49]

B. Explaining Extraschedular Consideration in Veterans Law.

Understanding extraschedular consideration requires knowing both the underlying law and regulations governing the general rules of referral for extraschedular consideration, as well as the specific differences of these rules as to hearing loss cases in the current controversy.[50]

1. The VA's General Regulation about Extraschedular Consideration.

The VA's regulations arise from Congressional statutory authority,[51] which determines the Schedule for Rating Disabilities used in evaluating the degree of disability in veterans' claims for disability compensation.[52] As previously discussed, the VA has a duty to examine the merits of referral for extraschedular consideration, regardless if the veteran seeks the status.[53]

Referral for extraschedular consideration is for exceptional cases of disability.[54] Under 38 C.F.R. 3.321(b), the VA has a duty to examine whether referral for extraschedular consideration is justified in every claim, regardless of whether the veteran seeks the status:

> [T]o afford justice . . . to the exceptional case where the scheduler evaluations are found to be inadequate, the Under Secretary for Benefits [of the VA] or the Director, Compensation and Pension Service . . . is authorized to approve on the basis of the criteria set forth in this paragraph, an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities.[55]

Therefore, under certain conditions, the VA has the discretion to award benefits that exceed what a veteran is normally entitled to in his disability claim.[56]

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48. *See* 38 C.F.R. § 4.86 (stating that each ear will be rated separately in the context of determining disability for benefits).

49. *See infra* Part II.B (defining the process that governing awarding additional monetary benefits for hearing loss disability claims).

50. *Infra* Part II.B.1–3.

51. 38 U.S.C. 1155 (West 2015).

52. 38 C.F.R. § 3.321(a) (2015).

53. *Supra* Part II.A.

54. 38 C.F.R. § 3.321(b) (2015).

55. *Id*.

56. *See id.* ("To accord justice . . . to the exceptional case where the scheduler evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service . . . is

The governing regulation, 38 C.F.R. § 3.321(b), also states the conditions for referral for extraschedular consideration, in that the disability must present "such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization" to make the regular rating schedule inadequate.[57]

The Veterans Court held that the rating schedule for disabilities applies unless there are "exceptional or unusual" factors that render application of the rating schedule impractical, which established the VA regulation of 38 C.F.R. § 3.321(b) as Court precedent.[58] The Veterans Court defined the test on referral for extraschedular consideration in *Thun v. Peake*.[59]

In a recent development at the end of 2015 in *Kuppamala v. Nicholson,* the Veterans Court modified its holding as to the application of referrals of cases for extraschedular consideration.[60] The *Kuppamala* Court held that the Board itself had the statutory authority to review the Director's decisions regarding referral on a *de novo* basis and had the authority to "assign an extraschedular rating when appropriate."[61]

2. The Thun v. Peake Three-Step Inquiry.

In *Thun*, the Court held that the VA is supposed to undertake a three-step inquiry to make the determination of referral for extraschedular consideration.[62] The first step of the inquiry is an application of the requirements described in 38 C.F.R. § 3.321(b):

> [I]f the scheduler evaluation does not contemplate the [veteran]'s level of disability and symptomology and is found [to be] inadequate, the [VA regional office] or Board must determine whether the [veteran]'s exceptional disability picture exhibits other related factors such as those provided by the [VA] regulation as "governing norms."[63]

The second step of the inquiry further applies section 3.321(b) as the VA is supposed to determine whether there are "related factors [that] include 'marked

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authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities.").

57. *Id.*

58. *See* Fisher v. Principi, 4 Vet. App. 57, 60 (1993) ("[T]he rating schedule will apply unless there are "exceptional or unusual" factors which render application of the schedule impractical.").

59. Thun v. Peake, 22 Vet. App. 111, 115 (2008).

60. Kuppamala v. McDonald, 27 Vet. App. 447, 458 (2015).

61. *Id.* (holding in a disability case outside the scope of this Comment that the underlying statutes that created the Veterans Court provided the Board the power to review and assign an extraschedular rating if appropriate).

62. *Id*.

63. *Id.* at 116 (citing 38 C.F.R. § 3.321(b)(1)).

interference with employment' and 'frequent periods of hospitalization.'"[64] The final step of the inquiry requires the Under Secretary for Benefits to review the veteran's claim only if both elements are present.[65]

In *Anderson v. Shinseki*, the Veterans Court refined the *Thun* inquiry by holding that referring to the *Thun* inquiry as a three-step inquiry can be misleading, implying that there is a sequence of the first two steps.[66] Accordingly, the *Thun* inquiry is a required three-element test before referring any claim for an extraschedular rating.[67] As such, the first two elements do not have a required order.[68] In any event, if the Board does not refer a claim for extraschedular consideration, the Board has an obligation to provide the veteran an "adequate statement of reasons or bases for its decision not to do so."[69]

3. The Governing Law regarding Extraschedular Consideration for Hearing Loss Cases.

The VA's test for determining and rating hearing loss cases is a relatively straightforward and mechanical process.[70] Any VA medical examination and the results therein must contain sufficient detail "that the evaluation of the claimed disability will be a fully informed one."[71] The Board commits reversible error if the statement of reasons or bases it provides to the veteran is a mere conclusory statement that "an extraschedular evaluation is not appropriate."[72]

In *Martinak v. Nicholson*, the Veterans Court held that the VA regulation for extraschedular consideration "does not rely exclusively on objective test results to determine whether a referral for an extraschedular rating is warranted."[73] The *Martinak* Court also held that the Secretary and the VA committed reversible error in its decision by not including any additional description of the functional effects caused by a hearing disability.[74] This holding relied on the fact that the Secretary of the VA circulated an internal memo within the VA affirming "the

64. *Id.* at 116.

65. *Id.*

66. Anderson v. Shinseki, 22 Vet. App. 423, 427 (2009).

67. *Id.* (holding that the *Thun* elements are also Board reviewable).

68. *See id.* (stating that the steps in *Thun* are actually "elements that must be established").

69. Brambley v. Principi, No. 01-1156, 17 Vet. App. 20 (2003) (quoting Colayong v. West, 12 Vet. App. 524, 537 (1999)).

70. *Supra* Part II.A; Lendenmann v. Principi, 3 Vet. App. 345, 349 (1992).

71. Green v. Derwinski, 1 Vet. App. 121, 124 (1991).

72. *See* Johnston v. Brown, 10 Vet. App. 80, 86 (1997) (holding that the mere statement that "an extraschedular evaluation is not appropriate" was not enough of an explanation).

73. Martinak v. Nicholson, 21 Vet. App. 447, 455 (2007).

74. *See id.* ("[T]he Court . . . holds that, in addition to dictating objective test results, a VA audiologist must fully describe the functional effects caused by a hearing disability in his or her final report.").

need for VA audiologists to describe the effect of a hearing disability on a [veteran]'s occupational functional and daily activities."[75]

Accordingly, the *Martinak* Court held that "in addition to dictating objective test results, a VA audiologist must fully describe the functional effects caused by a hearing disability in his or her final report."[76] As such, *Martinak* requires that the analysis for referral of an extraschedular hearing loss case contains both objective and subjective elements.[77]

C. An Overview of the Veterans Court.

A veteran's case reaches the Veterans Court only after the VA and the veteran exhaust all administrative avenues at the Board.[78] The Board is the adjudicatory branch of the VA, which oversees all veterans' affairs in the United States[79] and, until 1988, these decisions were outside the scope of judicial review.[80] The Court now issues holdings regarding the validity of Board decisions on denied claims of veterans' compensation benefits.[81]

Congress granted the Veterans Court the exclusive jurisdiction to review decisions of the Board that the veteran has appealed.[82] The Court's holdings on these contested Board decisions typically lack precedential weight because of the Court's unique procedural rules[83] and limited judicial review.[84] Accordingly,

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75. *Id*.

76. *Id.*

77. *See* discussion *supra* Part II.B.3 (explaining the requirements regarding referral for extraschedular consideration in hearing loss disability claims).

78. *See* Howard v. Gober, 220 F.3d 1341, 1344 (Fed. Cir. 2000) (holding that the "Court of Appeals for Veteran Claims correctly held that it lacked jurisdiction" when there was no final decision from the Board of Veteran Appeals); 38 U.S.C. § 7266(a) (West 2015) (stating that an appeal should be made after a "final decision" of the Board of Veteran Appeals).

79. 38 U.S.C. §§ 7103, 7104 (West 2015).

80. *History*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, https://www.uscourts.cavc.gov/history.php (last visited Dec. 31, 2015) (on file with *The University of the Pacific Law Review*).

81. Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100 P.L. 687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.).

82. 38 U.S.C. § 7252(a) (West 2015).

83. U.S. VET. APP. R. 30(a).

> A party, intervenor, or amicus curiae may not cite as precedent any action designated as nonprecedential by the Court or any other court, or that was withdrawn after having been published in a reporter, except when the cited action has binding or preclusive effect in the case on appeal (such as via the application of the law-of-the-case doctrine). Actions designated as nonprecedential by this Court or any other court may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and the party includes a discussion of the reasoning as applied to the instant case. With the exception of decisions of this Court available electronically, a copy of any unpublished action referred to shall be attached to the document containing the reference.

Id. (describing the version of the rule currently in effect).

84. *See* 38 U.S.C. § 7261(c) (West 2015) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the [Veterans] Court").

appealed veterans' disability cases that do not trigger precedential review and have identical facts can, and often do, result in disparate outcomes under the same laws, depending on the disability case.[85]

The Veterans Court's judicial review focuses exclusively on the record of proceedings presented before the Secretary of the VA and the Board.[86] Pursuant to statute, the Veterans Court has the authority to: (1) decide all relevant questions of law; (2) interpret constitutional, statutory, and regulatory provisions; and (3) determine the meaning or the applicability of the terms of actions of the Secretary of the VA.[87]

For findings of material fact, the Veterans Court can only set aside or reverse if the finding is "clearly erroneous."[88] However, the Veterans Court requires that the Board include "a written statement of the reasons or bases for its findings and conclusions" in its decision.[89] This statement of reasons or bases "must be adequate to enable a veteran to understand the precise basis for the Board's decision and facilitate review in the Court."[90]

By default at the Veterans Court, a single judge can adjudicate a veterans' claim for disability benefits under Rule 30(a).[91] The appropriate factors for deciding a case under Rule 30(a) are limited to the conditions that the claim:

> [1] does not establish a new rule of law; [2] does not alter, modify, criticize, or clarify an existing rule of law; [3] does not apply an established rule of law to a novel fact pattern; [4] does not constitute the only recent, binding precedent on a particular point of law within the power of the [Veterans] Court to decide; [5] does not involve a legal

85. *Compare* Kennison v. McDonald, No. 14-3729, 2015 WL 4879201 (Vet. App. Aug. 17, 2015), *with* McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (focusing on the Board's decision to deny consideration of the veteran's claim for extraschedular consideration as to hearing loss, whether the Board incorporated the veteran's statements as to his disability in providing adequate reasons or bases); *see also* Ridgway, *supra* note 12, at pp. 28–33 (describing the two most common scenarios for disparate outcomes at the Veterans Court: mental health disability cases and hearing loss disability cases).

86. 38 U.S.C. § 7252(b) (West 2015); Rogozinski v. Derwinski, 1 Vet. App.19, 20 (1990).

87. *See* 38 U.S.C. §§ 7261(a)(1)–(2) (West 2015) (stating that the Court also has the authority to compel action of the Secretary if the Secretary acts unlawfully or unreasonably delays a proceeding).

88. *Id.* at § 7261(a)(4); *see also id.* § 7261(a)(3)(A) (stating that the Veterans Court has the authority to use the arbitrary and capricious standard to hold unlawful and set aside decisions, findings, conclusions, rules and regulations issued or adopted by the Secretary, or the Board); *infra* Part II.D (explaining the definition of the "clearly erroneous" standard).

89. Allday v. Brown, 7 Vet. App. 517, 527 (1995) (citation omitted); Gilbert v. Derwinski, 1 Vet. App. 49, 56–57 (1990) (citing SEC v. Chenery (Chenery II) 332 U.S. 194 (1947) (analogizing the requirement to have administrative decisions be supported by "reasons or bases")); *see* 38 U.S.C. § 7104(d)(1) (2015) ("Each decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.").

90. 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet. App. at 527 (citation omitted).

91. *See* Frankel v. Derwinski, 1 Vet. App. 23, 25 (1990) ("The Court may hear cases by judges sitting alone or in panels . . .") (citing 38 U.S.C.A § 4054(b)).

> issue of continuing public interest; and [6] the outcome [of the case] is not reasonably debatable.[92]

These factors are the *Frankel* factors.[93] Accordingly, using the *Frankel* factors, single-judge Veterans Law cases decided under Rule 30(a) typically lack precedential weight.[94]

The Secretary of the VA cannot seek review of any decision of the Board.[95] However, if the veteran in a case decided under the *Frankel* factors by a single judge disagrees with the decision, the veteran has two options.[96] The veteran may either make a motion for reconsideration by the judge who decided the case or make a motion for a panel decision of three judges.[97] Pursuant to the Court rules, the veteran has to state either the law or the facts that the veteran believes the Court overlooked or misunderstood,[98] or state why the *Frankel* factors do not apply.[99]

Currently, the Veterans Court is restrictive in how it issues precedential decisions.[100] Assuming a panel is convened, the Court will randomly assign three judges to decide the case if the veteran's case does not meet the *Frankel* factors for single-judge consideration,[101] and the panel's published decision has precedential value.[102] If the veteran disagrees with the panel's decision, the veteran can make a motion for reconsideration by the panel of three judges, or make a motion for full Court review.[103]

A motion for full Veterans Court review must state how the review will secure or maintain uniformity of the Court's decisions or state what question of exceptional importance is involved.[104] However, the Veterans Court does not favor motions for full Court decisions.[105] If the veteran disagrees with the full

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92. *Id.* at 25–26.

93. *Id.*

94. *See id.* (holding that a decision may be reviewed by one judge and, upon review, it will use the listed factors).

95. 38 U.S.C. § 7252(a) (West 2015).

96. U.S. VET. APP. R. 35.

97. U.S. VET. APP. R. 35(a)–(b) (stating that a veteran in a single motion can request both reconsideration by the single judge and request a panel decision of three judges in the event the single judge denies reconsideration).

98. U.S. VET. APP. R. 35(e)(1).

99. U.S. VET. APP. R. 35(e)(2).

100. *See generally* Frankel v. Derwinski, 1 Vet. App. 23, 25–26 (1990) ("By statute, this Court may sit by single judge, in panels of three or [by the full Court]. . . . Single judges will consider and decide cases identified for summary consideration and decision. Under the internal operating procedures of the Court, there will be internal circulation of a proposed decision with time and opportunity for non-sitting judges to respond.").

101. *Id.* at 25–26.

102. *Id.* at 26.

103. U.S. VET. APP. R. 35(a)(1) (stating that the veteran in a single motion can request reconsideration by the panel of three judges and request full Court review in the event that the panel denies reconsideration).

104. U.S. VET. APP. R. 35(e)(3)(A)–(B).

105. U.S. VET. APP. R. 35(c).

Court decision, the veteran may make a motion for reconsideration by the full Court,[106] or appeal his claim to the United States Court of Appeals of the Federal Circuit (Federal Circuit).[107]

D. The "Clearly Erroneous" Standard used for Reviewing Agency Findings of Material Fact

The Veterans Court uses the "clearly erroneous" standard when reviewing agency findings of material fact.[108] The Supreme Court defined the "clearly erroneous" standard as a finding "when although there is evidence to support [the agency's finding of material fact], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[109]

The Supreme Court, in a later case, also held that the "clearly erroneous" standard does not entitle a reviewing court to reverse the finding of a lower court or agency because the court is convinced that it would have decided the case differently, because this action would be an overreach of judicial authority.[110] The Supreme Court held that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be "clearly erroneous."[111]

Accordingly, in *Gilbert v. Derwinski*, the Veterans Court stated that it would use the "clearly erroneous" standard to review the VA's findings of material fact by holding that:

> Congress has provided that this Court . . . to the extent necessary to its decision and when presented, shall . . . in the case of a finding a material fact made in reaching a decision in a case before the Department of Veterans Affairs with respect to [the] benefits under laws administered by the Department of Veterans Affairs, hold unlawful and set aside such finding if the finding is clearly erroneous.[112]

Moreover, the *Gilbert* Court also supported its decision to use the "clearly erroneous" standard by referencing the legislative history of the statute that created the Veterans Court.[113] Moreover, the *Gilbert* Court cited *Gypsum* and

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106. U.S. VET. APP. R. 35(a)(1).

107. It is worth noting that the veteran always has the option to appeal to the Federal Circuit, regardless of seeking a panel decision or a full court decision. 38 U.S.C. § 7292(a) (West 2015).

108. Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990) (quoting 38 U.S.C. § 4061(a)(4) (1988)); *see also* THE LAW DICTIONARY, *What is Material Fact?*, http://thelawdictionary.org/material-fact/ (last accessed Dec. 29, 2015) (on file with *The University of the Pacific Law Review*) (explaining that a "material fact" is a fact "crucial to the interpretation of a subject matter, or to the determination of the issue at hand").

109. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

110. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985).

111. *Id.* at 574 (citing United States v. Yellow Cab Co. 338 U.S. 338, 342 (1949)).

112. *Gilbert*, 1 Vet. App. at 52 (quoting 38 U.S.C. § 4061(a)(4) (1988)).

113. *Id.* at 52–53 (referencing 38 U.S.C. §§ 4051–4092 (1988) (codifying the creation of the Veterans Court); 134 Cong. Rec. S16648 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston); 134 Cong. Rec. H10360

Anderson in its reasoning, while analogizing its own oversight role of the Board to an appellate court reviewing a trial court.[114] The *Gilbert* Court held that under the "clearly erroneous" rule, the Court could not substitute its judgment for that of the Board on issues of material fact.[115] Accordingly, if there is a plausible basis in the record for the Board's factual determinations, even if the Court would have reached a different conclusion, the Court cannot overturn the Board's decision on findings of material fact.[116]

III. ANALYSIS OF DISPARATE OUTCOMES IN HEARING LOSS CASES AT THE VETERANS COURT

The following Sections focus on the noncompensable hearing loss cases of *McSparrin* and *Kennison*,[117] and the scope of disparate outcomes in the Veterans Court when compared to the Court's overall caseload.[118] This Part also discusses that the Veterans Court has recognized the problem of disparate outcomes and discusses the Veterans Court's attempt to fix it by altering Rule 30(a).[119]

A. *Introduction to Disparate Outcomes in Hearing Loss Cases at the Veterans Court:* McSparrin v. McDonald *and* Kennison v. McDonald

Comparing disability claims on a strict one-to-one ratio is the best way to understand the problem of disparate outcomes.[120] While the number of hearing loss cases is a fraction of the cases the Veterans Court adjudicates in a year, the fact remains that certain cases at the Veterans Court result in disparate outcomes.[121] People lose confidence in the law when, under the same facts, two entirely different results occur each having the force of law.[122] In addition, this

(daily ed. Oct. 19, 1988) (statement of Rep. Edwards) (showing that Congress wanted the Court to mirror Article III courts).

114. *Gilbert*, 1 Vet. App. at 53.

115. *Id*. at 52.

116. *Id.*

117. *Infra* Part III.A.

118. *Infra* Part III.B.

119. *Infra* Part III.C.

120. *See infra* Part III.A–B (using a one-to-one ratio to analyze disparate outcomes in hearing loss cases at the Veterans Court).

121. *See infra* Part III (analyzing instances of disparate outcomes); *see generally* 2015 Veteran Benefits Admin. Rep., *Compensation* at 26 (stating that 250,436 of the 1,642,994 (approx. 15.24%) of all new compensation recipients in 2015 were auditory).

122. *See* JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 283 (T. & J. W. Johnson, Law Booksellers, 1839) [hereinafter Bouvier Law Dictionary] ("[T]he decision of courts of justice: when exactly in point with a case before the court, they are generally held to have a binding authority, as well to keep the scale of justice even and steady, as because the law in that case has been solemnly declared and determined.").

Comment builds upon previous work that has come before on disparate outcomes at the Veterans Court in more detail to better illustrate the problem.[123] For veterans and the American public to have confidence in Veterans Court decisions, there must be consistency of fair results.[124]

1. McSparrin v. McDonald

William McSparrin served with the U.S. Army.[125] Shortly after his honorable discharge, Mr. McSparrin applied for benefits stemming from hearing loss.[126] In June 1980, the VA examined him.[127] In July 1980, the VA regional office granted his hearing loss disability claim at a non-compensable rating.[128]

In July 2003, Mr. McSparrin unsuccessfully sought an increased disability rating for his hearing loss disability claim.[129] In October 2007, Mr. McSparrin again sought an increased disability rating for his hearing loss claim; and in December 2007, the VA examined him via audiometric examination.[130] However, in July 2008, the VA regional office denied his request.[131]

In December 2009, Mr. McSparrin testified to the Board that "he had to lip read because he could not hear well," and his wife added "he could 'hear nothing' in the presence of background noise."[132] Accordingly, in November

123. *See* Ridgway, *supra* note 12, at pp. 33–34 (discussing disparate outcomes for all Veterans Court single-judge decisions over a two-year period in 2013 and 2014).

124. *See* Bouvier Law Dictionary, *supra* note 122.

125. Brief of Appellant at 1–2, McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (stating that Mr. McSparrin worked as a heavy construction equipment operator during his service from 1971 to 1979 and as a truck driver in civilian life from 1983 to 2000).

126. Brief of Appellant at 1, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015).

127. *McSparrin*, 2015 WL 4756508, at *2 (Vet. App. Aug. 12, 2015).

128. Brief of Appellant at 1–2, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (stating that Mr. McSparrin did not contest this decision at the time, and a result, the decision became final); *see also McSparrin*, 2015 WL 4756508 at *1 n.1 (holding also references what the Court does with Mr. McSparrin's other disability benefit claims, which fall outside the scope of the Comment).

129. *McSparrin*, 2015 WL 4756508, at *2 (stating that in January 2004, the VA regional office continued the noncompensable rating which Mr. McSparrin did not contest which became final).

130. *Id.* at n.2 (stating Mr. McSparrin had sensorineural hearing loss, which is defined as "hearing loss due to a lesion in either the cochlea (sensory mechanism of the ear), the vestibulocochlear nerve, the central neural pathways, or a combination of these structures") (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 825 (32nd ed. 2012)). As previously mentioned, the VA regulations that govern audiometric examination define it as follows: 38 C.F.R. § 4.85 (2015) (stating that examinations for hearing impairment must be conducted by a state-licensed audiologist and must include a controlled speech discrimination test and a puretone audiometry test); 38 C.F.R. § 4.86 (2015) (stating that the test results meet a decibel threshold, the results of examinations will be compared to predefined Hertz levels to determine whether a claim for benefits should be awarded, with the worst result controlling the award, with ear being evaluated).

131. *Id.* at *2 (stating the VA continued the assigned noncompensable disability rating and Mr. McSparrin submitted a Notice of Disagreement challenging the VA's decision to the Board).

132. *Id.*

2011, the Board remanded Mr. McSparrin's hearing loss disability claim "for additional development," requesting another audiometric examination.[133]

When Mr. McSparrin underwent that examination in January 2012, he reported to the examiner that he encountered loud noises throughout his military tour that damaged his hearing.[134] Mr. McSparrin reported he had a hard time hearing at work and at home.[135] The VA examiner acknowledged Mr. McSparrin's hearing loss may cause him occupational issues.[136] While the examiner found hearing loss, the Board decided that his hearing loss was not severe enough to qualify for a compensable disability rating.[137] Accordingly, the Board found Mr. McSparrin's hearing loss disability merited only a noncompensable rating and that "referral for extraschedular consideration was not warranted."[138]

Mr. McSparrin appealed to the Veterans Court and argued that the Board provided inadequate reasons or bases for denying referral for extraschedular consideration.[139] Mr. McSparrin argued for remand because the Board failed to discuss in its analysis whether his reliance on face-to-face communication caused marked interference with his employment.[140]

The Secretary of the VA argued that the Veterans Court cannot substitute its judgment for that of the Board under the "clearly erroneous" standard on issues of material fact, and that "if a 'plausible' basis appears in the record for the factual determination, the Court cannot overturn them."[141] The Secretary also argued that the threshold factor of referral for extraschedular consideration in the

133. *Id.* at *3 (stating that the VA examiner was to fully describe any functional effects associated with Mr. McSparrin's hearing disability, the impact of his hearing loss disability upon his vocational pursuits, and the effect the disability has, if any, on his current level of occupational impairment in his report).

134. *Id.* (referencing noise via earth movers, heavy equipment, and assorted weapon fire from various forms of weaponry on the firing range).

135. *Id.* (stating that it was hard to hear general conversation and communication on the CB radio in the truck, and that Mr. McSparrin was unable to understand lyrics in music and had to rely on face-to-face communication).

136. *Id.* ("He may have trouble working well in very noisy environments, and in environments which required him to use non face-to-face communications equipment (such as CB radios, intercoms, etc.) or in jobs which required a great deal of attention to high[-]pitched sounds (such as monitoring medical equipment or other altering signals.")).

137. *Id.*

138. *Id.*

139. *Id.* at *3–4 (Vet. App. Aug. 12, 2015); Brief of Appellant at 7, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (arguing that the Board also failed to compare the severity and symptoms of his disability with the established rating schedule for hearing loss disabilities) (citing Thun v. Peake, 22 Vet. App. 111, 115 (2008)).

140. Brief of Appellant at 8, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (arguing that inability to communicate on a CB radio interfered with his work as a truck driver).

141. Brief for the Appellee at 3–4, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (arguing also that Mr. McSparrin's hearing loss did not meet the criteria for a compensable rating).

Thun inquiry is whether the available rating schedule is adequate.[142] Ultimately, the Secretary argued that the Board properly conducted the *Thun* inquiry by acknowledging and incorporating Mr. McSparrin's statements to the VA examiner about his hearing loss in its final reasoning that denied referral for extraschedular consideration.[143]

On August 12, 2015, Chief Judge Lawrence B. Hagel affirmed the Board's decision.[144] Chief Judge Hagel cited the Veterans Court's three-element test established by *Thun* to satisfy the requirements of 38 C.F.R. § 3.321(b).[145] Chief Judge Hagel cited the relevant portion in *Martinak*, which provides that the VA audiologist must "fully describe the functional effects caused by a hearing disability in his or her final report."[146] Chief Judge Hagel held that the Board properly considered Mr. McSparrin's symptoms and lay statements about his disability in its decision to not refer the claim for extraschedular consideration,[147] and that the Board was correct in finding that Mr. McSparrin had not described exceptional or unusual features to his hearing loss.[148]

Accordingly, Mr. McSparrin failed to demonstrate error, making remand unnecessary.[149] Chief Judge Hagel concluded that the Board's corresponding explanation adequately allowed Mr. McSparrin to understand the precise basis of its decision not to refer his claim for extraschedular consideration.[150]

2. Kennison v. McDonald

Everett Kennison served with the U.S. Army on two non-consecutive tours.[151] In March 2010, Mr. Kennison filed for entitlement to disability benefits for

142. Brief for the Appellee at 6, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (arguing also that the test on referral for extraschedular consideration is not whether the rating schedule precisely describes Mr. McSparrin's level of severity and symptoms) (citing *Thun*, 22 Vet. App. at 115).

143. Brief for the Appellee at 9, *McSparrin*, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (arguing that if one *Thun* element is absent in the claim, analysis can stop and referral is not required).

144. *McSparrin*, 2015 WL 4756508, at *7 (Vet. App. Aug. 12, 2015).

145. *Id.* at *4 (citing 38 C.F.R. § 3.321(b)(1) (2015)).

146. *Id.* at *5 (holding that the disability rating for a hearing loss disability claim is assigned through a mechanical application of the VA audiometric evaluation and that the Board properly conducted this analysis) (referencing Lendenmann v. Principi, 3 Vet. App. 345, 349 (1992); and quoting Martinak v. Nicholson, 21 Vet. App. 447, 454–55 (2007)).

147. *McSparrin*, 2015 WL 4756508, at *5 ("Mr. McSparrin's degree of bilateral hearing loss can cause significant communication problems and that he may have trouble working in very noisy environments, as well as environments that require him to use non face-to-face communications equipment, or in jobs that require attention to high pitched sounds.").

148. *Id.* (holding also that the Board's analysis of the first *Thun* element, whether the disability is unique or exceptional, was correct).

149. *Id.*

150. *Id.* at *7 (citing 38 U.S.C. § 7104(d)(1); Caluza v. Brown, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); Gilbert v. Derwinski, 1 Vet. App. 49, 57 (1990)).

151. Kennison v. McDonald, No. 14-3729, 2015 WL 4879201, at *1 (Vet. App. Aug. 17, 2015) (stating the two tours were from September 1974 to January 1975 and from March 1977 to October 1978).

hearing loss and, in November 2010, the VA regional office granted the claim and assigned a noncompensable disability rating.[152]

In December 2010, Mr. Kennison filed a Notice of Disagreement, arguing that "he [was] not able to hear [his] spouse's voice at all," that she had to tap him to get his attention, and that he had to read lips to understand people.[153] At Mr. Kennison's VA examination in December 2011, the examiner noted that Mr. Kennison's hearing loss impacted his ability to work due to his difficulty understanding speech.[154]

In July 2012, after appealing to the Board, Mr. Kennison underwent another VA examination where the examiner noted that Mr. Kennison's hearing loss impacted his ability to work since it negatively affected his ability to communicate.[155] In October 2014, the Board found that Mr. Kennison's hearing loss disability merited only a noncompensable rating and that referral for extraschedular consideration was not warranted,[156] much like Mr. McSparrin.[157]

Moreover, Mr. Kennison appealed to the Veterans Court and argued that the Board provided inadequate reasons for denying referral for extraschedular consideration, making the same argument as Mr. McSparrin.[158] Like Mr. McSparrin, Mr. Kennison argued for remand because the Board failed to discuss in its analysis the effects of his hearing loss beyond a conclusory statement that his disability is not so unusual or exceptional as to warrant a higher rating.[159]

As in *McSparrin,* the Secretary of the VA argued that the Veterans Court cannot substitute its judgment for that of the Board under the "clearly erroneous" standard on issues of material fact, and if a plausible basis appears in the record for the factual determination, the Court cannot overturn the Board's decision.[160] Additionally, as in *McSparrin,* the Secretary argued that the threshold factor of referral for extraschedular consideration in the *Thun* inquiry is whether the available rating schedule is adequate.[161] Finally, just like in *McSparrin*, the Secretary argued that the Board properly conducted the *Thun* inquiry by

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152. *Id.*

153. *Id.* at *2.

154. Brief of Appellant at 2, *Kennison*, 2015 WL 4879201.

155. *Id.*

156. *Kennison*, 2015 WL 4879201, at *2.

157. *Supra* Part III.A.1.

158. *Supra* Part III.A.1; Brief of Appellant at 3, *Kennison*, 2015 WL 4879201 at 1 (Vet. App. Aug. 17, 2015).

159. *Supra* Part III.A.1; Brief of Appellant at 2–3, 5–6, *Kennison*, 2015 WL 4879201 (Vet. App. Aug. 17, 2015) (arguing that the Veterans Court found reversible error when the VA only provided a conclusory statement) (citing Johnson v. Brown, 10 Vet. App. 80, 86 (1997)).

160. *Supra* Part III.A.1; Brief for the Appellee at 6, *Kennison*, 2015 WL 4879201 (Vet. App. Aug. 17 2015) (citing Thun v. Peake, 22 Vet. App. at 111, 115 (2008)) (holding that where there are two permissible views of the evidence, the factfinder's choice between them cannot be "clearly erroneous"); Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990); and Anderson v. Bessemer City, N.C., 470 U.S. 564, 574 (1985).

161. *Supra* Part III.A.1; Brief for the Appellee at 5–6, *Kennison*, 2015 WL 4879201 (Vet. App. Aug. 17, 2015).

acknowledging and incorporating Mr. Kennison's statements to the VA examiner about his hearing loss in its final reasoning that denied referral for extraschedular consideration.[162]

On August 17, 2015, Judge Coral W. Pietsch vacated the Board's decision.[163] Judge Pietsch cited the Veterans Court's three-element test established by *Thun* to satisfy the requirements of 38 C.F.R. § 3.321(b).[164] Judge Pietsch cited the "clearly erroneous" standard and noted the Board must provide a written statement of the reasons for its factual findings to enable the veteran to understand the precise basis of its decision.[165]

Judge Pietsch held that the Board did not properly consider Mr. Kennison's symptoms and lay statements about his disability because it failed to include enough of Mr. Kennison's lay statements about his hearing loss in its final report and decision to not refer the claim for extraschedular consideration.[166] Specifically, Judge Pietsch emphasized that the Board incorrectly focused solely on Mr. Kennison's statements from one examination.[167] In her reasoning, Judge Pietsch cited to testimony in the record before the Court that neither side used in their arguments.[168]

On remand, Judge Pietsch held that the Board must analyze Mr. Kennison's credibility and competency.[169] If the Board finds Mr. Kennison credible and competent, then the Board should compare the rating schedule to Mr. Kennison's symptoms.[170]

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162. Brief for the Appellee at 5–6, 8, *Kennison*, 2015 WL 4879201 (Vet. App. Aug. 17, 2015) (arguing that if one *Thun* element is absent in the claim, analysis can stop and referral is not required) (citing *Thun*, 22 Vet. App. at 115; Anderson v. Shinseki, 22 Vet. App. 423, 427 (2009); 38 C.F.R § 3.321(b) (2015)).

163. *Kennison*, 2015 WL 4879201, at *5 (Vet. App. Aug. 17, 2015) (holding that remand to the Board was the appropriate remedy).

164. *Id.* at *2–3 (citing 38 C.F.R. § 3.321(b)(1)).

165. *Kennison*, 2015 WL 4879201, at *3–4 (Vet. App. Aug. 17, 2015) (citing 38 U.S.C. § 7104(d)(1) (West 2015)); Allday v. Brown, 7 Vet. App. 517, 527 (1995); *Gilbert*, 1 Vet. App. at 56–57.

166. *Kennison*, 2015 WL 4879201, at *4 (holding that while the majority of the Board's analysis focused on the first *Thun* element, the Board's error occurred by failing "to discuss a majority of [Mr. Kennison]'s lay statements describing the effects of his disorder.").

167. *Id.* at *4 (referring to Mr. Kennison's testimony on page 123 of the record and holding that the Board's inclusion of the December 2011 remarks at the expense of any other of his other lay statements appears to suggest that the Board believed that his hearing loss symptoms were less severe than they actually were).

168. *Id.*

169. *Id.* (citing Jandreau v. Nicholson, 492 F.3d 1372, 1377 (Fed. Cir. 2007); and Buchanan v. Nicholson, 451 F.3d 1331, 1336–37 (Fed. Cir. 2006)).

170. *Kennison*, 2015 WL 4879201, at *4–5 (holding that if the Board finds that the rating schedule adequately describes Mr. Kennison's symptoms, there should be no referral for extraschedular consideration, otherwise full *Thun* analysis is required).

3. The Disparate Outcomes in Hearing Loss Cases Demonstrated by McSparrin *and* Kennison

Due to the version of Rule 30(a) in force at the time of both cases, both cases have equal force of law and cannot serve as precedent for any veteran going forward.[171] With the Veterans Court's alteration to Rule 30(a), veterans can only cite to single-judge decisions for the "persuasive value of their logic and reasoning," and considering how similar the reasoning in both cases is, that rule does not appear to be very helpful.[172]

As demonstrated, *McSparrin* and *Kennison* are similar in the underlying facts and the underlying laws used.[173] The critical distinction between the two cases is how the judges treated the Board's handling of the veterans' lay testimony regarding his disability hearing loss claim.[174] However, other than the outcome, there are two primary differences between *McSparrin* and *Kennison*: *McSparrin* does not discuss the "clearly erroneous" standard,[175] and *Kennison* does not discuss the *Martinak* decision.[176] These differences do not explain the disparate outcomes.[177] Binding precedent and statutes require the Veterans Court to use the "clearly erroneous" standard,[178] so by default *McSparrin* used the "clearly erroneous" standard.[179]

Martinak held the VA was to describe the functional effects of the veteran's hearing disability in the final report.[180] Judge Pietsch held that the Board did not discuss enough of Mr. Kennison's statement without mentioning *Martinak.*[181] This decision is puzzling considering that both Mr. Kennison and the VA argued about *Martinak* in their respective briefs to the Court.[182]

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171. Gilbert v. Derwinski, 1 Vet. App. 49, 52–53 (1990); U.S. VET. APP. R. 30(a) (stating the version of the rule that was in effect at the time).

172. November 2015 Veterans Court Order, *supra* note 21.

173. *Supra* Part III.A.1–2.

174. *Compare Kennison*, 2015 WL 4879201, at *4–5 *with* McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508, at *5–6 (Vet. App. Aug. 12, 2015) (arguing that the cases ultimately were judged on the quality of the Board's analysis).

175. *McSparrin*, 2015 WL 4756508, at *5–6.

176. *Kennison*, 2015 WL 4879201, at *4–5.

177. *See* discussion *supra* Part III.A.3 (arguing that the minor differences in the cases should not have resulted in different outcomes in *McSparrin* and *Kennison*).

178. 38 U.S.C. § 7261(a)(4) (West 2015); Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985); United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

179. *See McSparrin*, 2015 WL 4756508, at *7 (*McSparrin* does cite *Gilbert* in a parenthetical albeit for a different, unrelated issue).

180. Martinak v. Nicholson, 21 Vet. App. 447, 454–55 (2007).

181. *Kennison*, 2015 WL 4879201, at *4–5.

182. Brief of Appellant at 6, *Kennison*, 2015 WL 4879201 (Vet. App. Aug. 17, 2015); Brief for the Appellee at 9–10, *Kennison*, 2015 WL 4879201 (Vet. App. Aug. 17, 2015).

The fact remains that both noncompensable disability hearing loss cases resulted in two entirely different outcomes.[183] However, a true examination would likely require comparing *McSparrin* to a veteran's case with identical facts that also cites *Martinak* in the decision. The cases of Gale Gundersdorff illustrate the moving target that is judicial consistency at the Veterans Court.[184]

4. Gundersdorff v. Shinseki *and* Gundersdorff v. McDonald

Gale E. Gundersdorff served in the U.S. Army.[185] During her service, Ms. Gundersdorff successfully applied for disability benefits for a hearing loss claim.[186] In May 2005, the VA granted the claim at a noncompensable level.[187] In 2012, Ms. Gundersdorff complained to her VA examiner of difficulty hearing the television and in-person conversations and unsuccessfully tried to increase her disability rating for her hearing loss.[188] In April 2012, the Board maintained the rating and denied referral for extraschedular consideration.[189]

Ms. Gundersdorff appealed to the Veterans Court and, like in *McSparrin* and *Kennison*, she argued that the Board provided an inadequate explanation of its decision to not refer her hearing loss claim for extraschedular consideration.[190] As the claimants did in *McSparrin* and *Kennison*, the veteran argued that the Board failed to consider her lay statements about her disability, while the Secretary argued that the Board properly conducted the *Thun* analysis required for extraschedular consideration.[191]

On March 27, 2014, Judge William S. Greenberg vacated the Board's decision.[192] Citing *Martinak*, Judge Greenberg held that the VA's examiners failed to adequately describe the functional effects of Ms. Gundersdorff's disability in the final report.[193] In addition, like in *Kennison*, Judge Greenberg took issue with the Board ignoring other lay statements that Ms. Gundersdorff

183. *Supra* Part III.A.

184. *Infra* Part III.A.4.

185. Gundersdorff v. Shinseki, No. 13-123, 2014 WL 1246682, at *2 (Vet. App. Mar. 27, 2014) (stating that Ms. Gundersdorff worked in personnel system management and public affairs); *see also* Gundersdorff v. McDonald, No. 14-4376, 2015 WL 7696304, at *2 (Vet. App. Nov. 30, 2015) (stating that her service was from July 1980 to December 2004). For clarity, the 2015 Gundersdorff case is short-cited as *Gundersdorff II.*

186. *Gundersdorff*, 2014 WL 1246682, at *2.

187. *Id.*

188. *Id.* (arguing that the VA providing a TV amplifier and hearing aids was insufficient to cope with Gundersdorff's disability).

189. *Id.*

190. *Supra* Part III.A.1–2; *Gundersdorff*, 2014 WL 1246682, at *3.

191. *Supra* Part III.A.1–2; *Gundersdorff*, 2014 WL 1246682, at *2–4.

192. *Gundersdorff*, 2014 WL 1246682, at *5.

193. *Id.* at *4 (holding where VA's statement that Ms. Gundersdorff's hearing difficulty as having a significant effect on her occupation was inadequate alone as a description of her symptoms).

made in previous examinations in the final report.[194] On remand, Judge Greenberg ordered the Board to consider additional evidence.[195]

In November 2014, the Board received the case and again denied Ms. Gundersdorff referral for extraschedular consideration for her hearing loss case.[196] Accordingly, Ms. Gundersdorff appealed to the Veterans Court and argued, similar to *McSparrin* and *Kennison*, that the Board failed to provide an adequate explanation in its denial of referral.[197] The Secretary made the same arguments as before.[198]

On November 30, 2015, Judge William S. Greenberg again vacated the Board's decision to deny referral for extraschedular consideration.[199] Without citing *Martinak*, Judge Greenberg held that the Board insufficiently explained its decision by including in its report Ms. Gundersdorff's statement that she "struggled to comprehend verbal conversation and [that she had] difficulty hearing the television."[200] This decision not to cite *Martinak* is curious considering that the previous decision used *Martinak* in its rationale,[201] and the parties were actively arguing about *Martinak* in their respective briefs to the Court.[202] In any event, Ms. Gundersdorff's claim returned to the Board.[203]

B. Statistical Evidence that Proves McSparrin *and* Kennison *are Emblematic of the Disparate Outcome Problem at the Veterans Court*

The simplest way to demonstrate that cases like *McSparrin* and *Kennison* are not outliers and are demonstrative of the disparate outcome problem is to compare these cases to all the single-judge hearing loss cases decided over the past six years at the Veterans Court to see if other cases are resulting in the same pattern.[204]

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194. *Supra* Part III.A.2; *Gundersdorff*, 2014 WL 1246682, at *4–5 (holding that the VA's omission of additional lay statements frustrated judicial review).

195. *Gundersdorff*, 2014 WL 1246682, at *5.

196. Gundersdorff v. Shinseki, No. 14-4376, 2015 WL 7696304, at *1 (Vet. App. Nov. 30, 2015).

197. *Id.* at *1; *see* discussion *supra* Part III.A.3 (explaining the similarity of the veterans' arguments in McSparrin and Kennison).

198. Brief for the Appellee at 5, *Gundersdorff II*, 2015 WL 7696304 (Vet. App. Nov. 30, 2015).

199. *Gundersdorff II*, 2015 WL 7696304, at *5.

200. *Id.* at *4–5 (holding that the VA's explanation was inadequate because it did not provide detail explaining how Ms. Gundersdorff's hearing loss was contemplated by the rating schedule).

201. Gundersdorff v. Shinseki, No. 13-123, 2014 WL 1246682, at *2 (Vet. App. Mar. 27, 2014).

202. Brief of Appellant at 5, *Gundersdorff II*, 2015 WL 7696304; Brief for the Appellee at 5, *Gundersdorff II*, 2015 WL 7696304.

203. *Gundersdorff II*, 2015 WL 7696304, at *5.

204. *Infra* Part III.B.

1. The General Results of all Cases at the Veterans Court over the Past Six Years

As previously stated, the Veterans Court maintains the exclusive jurisdiction to review contested Board decisions.[205] The number of total cases and the length of time for their adjudication only emphasize how important it is for the Veterans Court to come to consistent outcomes, lest the veteran endure an unnecessary procedural delay.[206]

This Comment averages the Court's caseload for the past six years by calculating the average number of single-judge decisions for all filed disability cases. From the fiscal years of 2010 to 2015, the Veterans Court decided an average of about 1,830 single-judge cases a year.[207] During this timeframe, the Veterans Court affirmed in full or in part an average of about 957 disability cases of all types each year, an affirmance rate of 52.3 percent.[208] During this timeframe, the Veterans Court remanded or reversed an average of about 616

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205. 38 U.S.C. § 7252(a) (West 2015).

206. *See infra* Part III.B.1 (explaining the data that demonstrates how long the Veterans Court takes to decide disability claim cases).

207. Note: Fiscal Year shortens to (FY) for calculation purposes. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, FISCAL YEAR 2015 at 2, https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf (last accessed on Apr. 1, 2016) [hereinafter 2015 Veterans Court Report] (on file with *The University of the Pacific Law Review*) (calculation FY 2015); U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, FISCAL YEAR 2014 at 2, https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf (last accessed Jan. 4, 2016) [hereinafter 2014 Veterans Court Report] (on file with *The University of the Pacific Law Review*) (calculation FY 2014); U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, FISCAL YEAR 2013 at 2, https://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf (last accessed on Jan. 4, 2016) [hereinafter 2013 Veterans Court Report] (on file with *The University of the Pacific Law Review*) (calculation FY 2013); U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, FISCAL YEAR 2012 at 2, https://www.uscourts.cavc.gov/documents/FY2012AnnualReport.pdf (last accessed on Jan. 4, 2016) [hereinafter 2012 Veterans Court Report] (on file with *The University of the Pacific Law Review*) (calculation FY 2012); U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, FISCAL YEAR 2011 at 2, https://www.uscourts.cavc.gov/documents/FY_2011_Annual_Report_FINAL_Feb_29_2012_1PM_.pdf (last accessed on Jan. 4, 2016) [hereinafter 2011 Veterans Court Report] (on file with *The University of the Pacific Law Review*) (calculation FY 2011); U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, FISCAL YEAR 2010 at 2, https://www.uscourts.cavc.gov/documents/FY_2010_Annual_report_June_27 _2011_.pdf (last accessed Jan. 4, 2016) [hereinafter 2010 Veterans Court Report] (on file with *The University of the Pacific Law Review*) (calculation FY 2010). Calculating the single-judge cases from 2010 to 2015 and averaging them ((FY 2015 (1,313) + FY 2014 (1,615) + FY 2013 (1,672) + FY 2012 (2,179) + FY 2011 (2,242) + FY 2010 (1,955) / 6 = 1,829.33 ≈ 1,830).

208. *See* 2015 Veterans Court Report, *supra* note 207 (calculation FY 2015); 2014 Veterans Court Report, *supra* note 207 (calculation FY 2014); 2013 Veterans Court Report, *supra* note 207 (calculation FY 2013); 2012 Veterans Court Report, *supra* note 207 (calculation FY 2012); 2011 Veterans Court Report, *supra* note 207 (calculation FY 2011); 2010 Veterans Court Report, *supra* note 207 (calculation FY 2010). Calculating the affirmance rate from 2010 to 2015 and by adding and averaging them ((FY 2015 (438+151) + FY 2014 (578+163) + FY 2013 (703+162) + FY 2012 (1,051+231) + FY 2011 (1,044+292) + FY 2010 (727+201) / 6) = 956.83; 956.83/1,829.33 = .523).

disability cases of all types each year, a remand rate of 33.6 percent.[209] The Veterans Court dismissed an average of 257 disability cases each year for various procedural reasons that fall outside the scope of this Comment at a rate of 14 percent.[210] From 2010 to 2015, the average length of time for a disability case of any type to go from the filing of the initial appeal to disposition on the merits by a single judge at the Veterans Court was about 481 days, or 17 months.[211]

2. The Prevalence of Disparate Outcomes in Hearing Loss Cases at the Veterans Court

The procedural rules of the Veterans Court allowed single-judge disability cases to result in disparate outcomes.[212] This Section examines how many times there has been a split on referral for extraschedular consideration in hearing loss cases in the Veterans Court during the past six–plus years.[213]

209. *See* 2015 Veterans Court Report, *supra* note 207 (calculation FY 2015); 2014 Veterans Court Report, *supra* note 207 (calculation FY 2014); 2013 Veterans Court Report, *supra* note 207 (calculation FY 2013); 2012 Veterans Court Report, *supra* note 207 (calculation FY 2012); 2011 Veterans Court Report, *supra* note 207 (calculation FY 2011); 2010 Veterans Court Report, *supra* note 207 (calculation FY 2010). Calculating the remand rate from 2010 to 2015 by adding and averaging them (FY 2015 (548+5) + FY 2014 (680+6) + FY 2013 (584+6) + FY 2012 (610+9) + FY 2011 (687+6) + FY 2010 (546+6) / 6) = 615.5; 615.5/1,829.33 = .336).

210. 2015 Veterans Court Report, *supra* notes 207–09 (calculation FY 2015); 2014 Veterans Court Report, *supra* notes 207–09 (calculation FY 2014); 2013 Veterans Court Report, *supra* notes 207–09 (calculation FY 2013); 2012 Veterans Court Report, *supra* notes 207-09 (calculation FY 2012); 2011 Veterans Court Report, *supra* notes 207–09 (calculation FY 2011); 2010 Veterans Court Report, *supra* notes 207–09 (calculation FY 2010). Calculating the remaining dismissed cases by adding up the figures and subtracting them from the overall average, then dividing to find the percentage: (Average of 1,829.33─(Average of Affirmance (956.83) + Average of Remand / Reversal (615.5)) = 257; 257/1,829.33 = .140).

211. *See* 2015 Veterans Court Report, *supra* note 207, at 3 (FY 2015); 2014 Veterans Court Report, *supra* note 207, at 3 (FY 2014); 2013 Veterans Court Report, *supra* note 207, at 3 (FY 2013); 2012 Veterans Court Report, *supra* note 207, at 3 (FY 2012); 2011 Veterans Court Report, *supra* note 207, at 3 (FY 2011); 2010 Veterans Court Report, *supra* note 207, at 3 (FY 2010). Calculating the processing time at the Veterans Court by adding up the average wait time and dividing: ((FY 2015 (383) + FY 2014 (423) + FY 2013 (452) + FY 2012 (470) + FY 2011 (584) + FY 2010 (572) / 6) = 480.67; 480.67/28 = 17.2).

212. *Supra* Part III.B.1–3.

213. Anderson v. Shinseki, 22 Vet. App. 423, 427 (2009) (describing the last precedent holding on extraschedular referral which focused on a hearing loss disability claim rated 10% compensable and clarified the requisite analysis of Thun v. Peake).

Table 1 presents all noncompensable hearing loss cases exactly like *McSparrin* and *Kennison* decided at the Veterans Court from *Anderson* in 2009 to the end of 2015:[214]

Table 1 – Noncompensable Hearing Loss Cases at the Veterans Court from *Anderson* to 2015			
Fiscal Year	Affirmed	Remanded	Percentages
2015	5	15	25%/75%[215]
2014	5	9	35.7%/64.3%[216]
2013	5	5	50%/50%[217]
2012	3	6	33.3%/66.7%[218]
2011	7	5	58.3%/41.7%[219]
2010	6	3	66.7%/33.3%[220]
2009 (starting from *Anderson*)	9	1	90%/10%[221]

214. Note: hearing loss cases decided on grounds other than whether the Board provided sufficient rationale as to the referral for extraschedular consideration, such as an overarching disability outside the scope of this Comment or other non-relevant procedural grounds are omitted from this case study.

215. *See, e.g.*, Kennison v. McDonald, No. 14-3729, 2015 WL 4879201, at *5 (Vet. App. Aug. 17, 2015) (providing an example of the Veterans Court's vacatur and remand of the aforementioned set of cases in 2015); McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (providing an example of the Veterans Court's affirmance of the aforementioned set of cases in 2015).

216. *See, e.g.*, Guidry v. McDonald, No. 13-2835, 2014 WL 7336953 (Vet. App. Dec. 24, 2014) (providing an example of Veterans Court affirmance of the aforementioned set of cases in 2014); Gundersdorff v. Shinseki, No. 13-123, 2014 WL 1246682 (Vet. App. Mar. 27, 2014) (providing an example of the Veterans Court's vacatur and remand of the aforementioned set of cases in 2014).

217. *See, e.g.*, Evans v. Shinseki, No. 12-1266, 2013 WL 6511506 (Vet. App. Dec. 13, 2013) (providing an example of Veterans Court affirmance of the aforementioned set of cases in 2013); Lundin v. Shinseki, No. 12-1193, 2013 WL 4067622 (Vet. App. Aug. 13, 2013) (providing an example of the Veterans Court's vacatur and remand of the aforementioned set of cases in 2013).

218. *See, e.g.*, Trapani v. Shinseki, No. 11-3176, 2012 WL 6099063 (Vet. App. Dec. 10, 2012) (providing an example of Veterans Court affirmance of the aforementioned set of cases in 2012); Chisholm v. Shinseki, No. 11-2156, 2012 WL 5869380 (Vet. App. Nov. 20, 2012) (providing an example of the Veterans Court's vacatur and remand of the aforementioned set of cases in 2012).

219. *See, e.g.*, Formby v. Shinseki, No. 10-1258, 2011 WL 6831956 (Vet. App. Dec. 29, 2011) (providing an example of Veterans Court vacatur and remand of the aforementioned set of cases in 2011); Causey v. Shinseki, No. 10-1298, 2011 WL 6382115 (Vet. App. Dec. 21, 2011) (providing an example of the Veterans Court's affirmance of the aforementioned set of cases in 2011).

220. *See, e.g.*, Blackmon v. Shinseki, No. 08-2707, 2010 WL 1534200 (Vet. App. Apr. 19, 2010) (providing an example of Veterans Court vacatur and remand of the aforementioned set of cases in 2010); Stewart v. Shinseki, No. 08-2568, 2010 WL 318534 (Vet. App. Jan. 28, 2010) (providing an example of the Veterans Court's affirmance of the aforementioned set of cases in 2010).

221. Dillon v. Shinseki, No. 07-3449, 2009 WL 891078 (Vet. App. Mar. 31, 2009) (table) (holding where the Secretary conceded that the Board provided inadequate reasons or bases in its decision not to refer the veterans claim, the only remand); *see e.g.,* Sangi v. Shinseki, No. 06-2721, 2009 WL 3063039 (Vet. App. Sept. 24, 2009) (providing an example of the Veterans Court vacatur and remand of the aforementioned set of cases in 2009).

Table 2 presents all relevant, hearing loss cases, regardless of disability rating, decided at the Veterans Court from *Anderson* in 2009 to the end of 2015:

Table 2 – All Relevant Hearing Loss Cases at the Veterans Court from *Anderson* to 2015			
Fiscal Year	Affirmed	Remanded	Percentages
2015	8	23	25.8%/74.2%[222]
2014	8	15	34.8%/65.2%[223]
2013	12	12	50%/50%[224]
2012	8	9	47%/53%[225]
2011	10	7	58.8%/41.2%[226]
2010	8	4	75%/25%[227]
2009 (starting from *Anderson*)	12	2	85.7%/14.3%[228]

At the time of *Anderson v. Shinseki*, there was near uniformity in noncompensable and compensable hearing loss cases as evidenced by how many

222. *See, e.g.*, Kennison v. McDonald, No. 14-3729, 2015 WL 4879201 (Vet. App. Aug. 17, 2015) (providing an example of Veterans Court vacatur and remand of the aforementioned set of cases in 2015); McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508 (Vet. App. Aug. 12, 2015) (providing an example of Veterans Court affirmance of the aforementioned set of cases in 2015).

223. *See, e.g.*, Guidry v. McDonald, No. 13-2835, 2014 WL 7336953 (Vet. App. Dec. 24, 2014) (providing an example of Veterans Court affirmance of the aforementioned set of cases in 2014); Gundersdorff v. Shinseki, No. 13-123, 2014 WL 1246682 (Vet. App. Mar. 27, 2014) (providing an example of the Veterans Court's vacatur and remand of the aforementioned set of cases in 2014).

224. *See, e.g.*, Evans v. Shinseki, No. 12-1266, 2013 WL 6511506 (Vet. App. Dec. 13, 2013) (providing an example of Veterans Court affirmance of the aforementioned set of cases in 2013); Lundin v. Shinseki, No. 12-1193, 2013 WL 4067622 (Vet. App. Aug. 13, 2013) (providing an example of the Veterans Court's vacatur and remand of the aforementioned set of cases in 2013).

225. *See, e.g.*, Trapani v. Shinseki, No. 11-3176, 2012 WL 6099063 (Vet. App. Dec. 10, 2012) (providing an example of Veterans Court affirmance of the aforementioned set of cases in 2012); Chisholm v. Shinseki, No. 11-2156, 2012 WL 5869380 (Vet. App. Nov. 20, 2012) (providing an example of the Veterans Court's vacatur and remand of the aforementioned set of cases in 2012).

226. *See, e.g.*, Formby v. Shinseki, No. 10-1258, 2011 WL 6831956 (Vet. App. Dec. 29, 2011) (providing an example of Veterans Court vacatur and remand of the aforementioned set of cases in 2011); Causey v. Shinseki, No. 10-1298, 2011 WL 6382115 (Vet. App. Dec. 21, 2011) (providing an example of the Veterans Court's affirmance of the aforementioned set of cases in 2011).

227. *See, e.g.*, Blackmon v. Shinseki, No. 08-2707, 2010 WL 1534200 (Vet. App. Apr. 19, 2010) (providing an example of Veterans Court vacatur and remand of the aforementioned set of cases in 2010); Stewart v. Shinseki, No. 08-2568, 2010 WL 318534 (Vet. App. Jan. 28, 2010) (providing an example of the Veterans Court's affirmance of the aforementioned set of cases in 2010).

228. *See, e.g.*, Sangi v. Shinseki, No. 06-2721, 2009 WL 3063039 (Vet. App. Sept. 24, 2009) (providing an example of Veterans Court vacatur and remand of the aforementioned set of cases in 2009); Ramos v. Shinseki, No. 07-1396, 2009 WL 1617867 (Vet. App. Jun. 30, 2009) (table) (providing an example of the Veterans Court's affirmance of the aforementioned set of cases in 2009).

times the Court affirmed the Board's reasoning immediately after *Anderson*.[229] However, from 2011 to the present, there was an unexplained shift in outcomes in these types of cases, which is puzzling due to the lack of additional precedents.[230] The pronounced shift is evident when comparing the results of the case study discussed in Part III.B.2 to the general affirmance and remand rates of the Court.[231]

While it would be tempting to attribute the shift at the Veterans Court to a shift in presidential administrations, the newest members of the Veterans Court did not take the bench until 2012—well after the start of President Barack Obama's administration.[232] The significant split in outcomes is troubling, especially considering under the Court's rule only allows veterans to cite these cases "for the persuasive value of their logic and reasoning."[233] Considering the split, the value of the Rule 30(a), as well as the reasoning of any of these cases, will likely be low.[234] It would be a mistake to dismiss these results due to the small number of cases involved on a yearly basis[235] because this analysis demonstrates a clear trend of disparate outcomes with both noncompensable and compensable hearing loss cases and shows the current trend at the Veterans Court to remand hearing loss cases without any additional precedents providing guidance or explanation for the decision.[236]

It might seem artificial to pick *McSparrin* and *Kennison* because of the five-day gap of issuance, as it may initially seem like a fluke; however, considering that three different judges issued disparate holdings in one week in 2015, the problem remains very real.[237] In fact, in 2014, there was a single instance of

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229. Table 1, s*upra* note 221; Table 2, *supra* note 228.

230. Table 1, s*upra* note 221; Table 2, *supra* note 228 (describing the current case law for extraschedular referral).

231. *Compare* Tables 1–2, *with* 2015 Veterans Court Report, *supra* note 207, *and* 2014 Veterans Court Report, *supra* note 207, *and* 2013 Veterans Court Report, *supra* note 207, *and* 2012 Veterans Court Report, *supra* note 207, *and* 2011 Veterans Court Report, *supra* note 207, *and* 2010 Veterans Court Report, *supra* note 207 (demonstrating that remand and affirmance rates for all cases and hearing loss disability claims are vastly different, which is a clear indication that something is wrong).

232. *See Judges,* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, https://www.uscourts.cavc.gov/judges.php (last accessed on Feb. 21, 2016) (on file with *The University of the Pacific Law Review*) (stating that Judges Coral W. Pietsch, Margaret Bartley, and William S. Greenberg took the bench in 2012).

233. U.S. VET. APP. R. 30(a).

234. *See* discussion *supra* Part III.A.1–2 (demonstrating that the similarity of the reasoning and facts in *McSparrin* and *Kennison* resulted in two different outcomes and would not help any future veteran at the Veterans Court).

235. *See* discussion *supra* Part III.B.1–2 (demonstrating the trend that the results of hearing loss disability claims are in stark contrast to other results at the Veterans Court needs addressing).

236. *See* discussion *supra* Parts II.B.2–3, III.B.1–2 (demonstrating that there is no case law or shift in case law responsible for disparate outcomes at the Veterans Court since 2009).

237. Warlick v. McDonald, No. 14-3109, 2015 WL 5255012, at *3–4 (Vet. App. Sept. 10, 2015) (vacatur and remand to the Board); Roy v. McDonald, No. 14-3481, 2015 WL 5165743, at *2–3 (Vet. App. Sept. 3, 2015) (affirmance of the Board's decision); Langston v. McDonald, No. 14-1790, 2015 WL 5092625, at *5–6 (Vet. App. Aug. 31, 2015) (vacatur and remand to the Board).

disparate outcomes in two different cases, decided by two different judges on the same day, one of which is the aforementioned *Gundersdorff*.[238]

It would be appropriate if a circuit split caused these disparate outcomes in hearing loss cases. If that were the case, a higher court would decide the circuit split without further issue, and the law would proceed normally.[239] However, as previously stated, the Veterans Court is the only court permitted to hear these cases.[240] As such, this intra-jurisdictional split is illogical.[241] While this Comment focuses solely on hearing loss cases, the clear example of disparate outcome in hearing loss cases is illustrative of the same problem in other fields of Veterans Law.[242]

The Veterans Court is supposed to use the "clearly erroneous" standard for findings of material fact and is presumably unable to substitute its own judgment in place of the Board when there is a plausible basis in the record for the factual determination of the Board.[243] With each remand, the Veterans Court holds that "there is no plausible basis in the record."[244] To allow this situation of disparate outcomes to continue unchecked is to abandon the notion of precedent and embrace the notion of justice by lottery.[245]

These cases demonstrate disparate outcomes with three veterans; the same claim, the same law, and the same attorneys led to two entirely different results not justified by a variance in fact or law.[246] The new Rule 30(a) applies to *Gundersdorff III*, yet considering how similar the reasoning is to *McSparrin*, the

238. Withee v. Shinseki, No. 13-1537, 2014 WL 1246496, at *4–5 (Vet. App. Mar. 27, 2014) (holding affirming Board denial of extraschedular referral of his disability claim of noncompensable hearing loss because of adequate explanation of reasons or bases by Judge William A. Moorman); Gundersdorff v. Shinseki, No. 13-123, 2014 WL 1246682, at *4–6 (Vet. App. Mar. 27, 2014) (holding remanding Board denial of referral in regards to veteran's noncompensable hearing loss disability claim because of inadequate explanation of reasons or bases by Judge William S. Greenberg).

239. *See* SUP. CT. R. 10(a) (stating that the Supreme Court will only grant a writ of certiorari as a matter of judicial discretion, most notably in cases where there are U.S. Court of Appeals decisions in conflict with each other).

240. 38 U.S.C. § 7252(a) (West 2015).

241. *See* discussion *supra* Part III.B (demonstrating the inherent unfairness of disparate outcomes at the Veterans Court).

242. *Supra* Part III.A–B; *see* Ridgway, *supra* note 12 (discussing that mental health claims are a major source of disparate outcomes at the Veterans Court).

243. Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990).

244. *Id.*

245. Zarembo, *supra* note 14; *see also* Ridgway, *supra* note 12, at 41 (arguing that the underlying case law is the likeliest cause of the disparate outcomes at the Veterans Court).

246. *Supra* Part III.A.1–2, 4 (discussing the inadequacy of the Court's revision to Rule 30(a) is stopping disparate outcomes in hearing loss cases). Note that Ms. Gundersdorff was also represented by the same law firm as the veterans in *McSparrin* and *Kennison.* Brief of Appellant at 15, Gundersdorff v. Shinseki, No. 13-123, 2014 WL 1246682 (Vet. App. Mar. 27, 2014) (stating Counsel for Appellant was Alexandra Lio of Chisholm, Chisholm, and Kilpatrick in Providence, RI); Brief of Appellant at 10, Gundersdorff v. McDonald, No. 14-4376, 2015 WL 7696304 (Vet. App. Nov. 30, 2015) (stating Counsel for Appellant was Michael S. Just of Chisholm, Chisholm, and Kilpatrick in Providence, RI).

persuasive value appears low.[247] Barring an appeal to the Federal Circuit, Mr. McSparrin's claim is finished.[248] The Veterans Court remanded Ms. Gundersdorff's claim to the Board.[249] The Veterans Court also remanded Mr. Kennison's claim to the Board, [250] which again denied referral for extraschedular consideration.[251] As of this writing, Mr. Kennison's claim is pending at the Veterans Court,[252] with Mr. Kennison filing his brief with the Court in August 2016.[253]

C. The Veterans Court Alteration to Rule 30(a) in November 2015

The Veterans Court was aware of the problem of disparate outcomes, as evidenced by the Court seeking public comment on an amendment to Rule 30(a) during the summer of 2015.[254] Under the revised rule, veterans can cite to Rule 30(a) cases only for "the persuasive value of their logic and reasoning."[255] This change of procedure does not go far enough to fix the problem of disparate outcomes because the rule change does nothing for cases decided under the old rules.[256]

Disparate outcomes still exist despite the Veterans Court's amendment to Rule 30(a), as *Gundersdorff II* and cases like it illustrate.[257] Applying the revised Rule 30(a) to *McSparrin* also indicates that the remedy is inadequate for solving the problem of disparate outcomes.[258] Chief Judge Hagel's analysis addressed and

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247. *See* discussion *supra* Parts III.A.1, 4 (demonstrating that the similarity of the reasoning and facts in *McSparrin* and *Gundersdorff* resulted in two different outcomes and would not help any future veteran at the Veterans Court).

248. 38 U.S.C. § 7292(a) (West 2015); McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508, at *10 (Vet. App. Aug. 12, 2015).

249. *Gundersdorff II,* No. 13-123 2015 WL 7696304, at *5 (Vet. App. Nov. 30, 2015).

250. Kennison v. McDonald, No. 14-3729, 2015 WL 4879201, at *5 (Vet. App. Aug. 17, 2015).

251. Board Decision at 2, 4–9, Kennison v. McDonald, No. 16-923 (Vet. App. filed Mar. 15, 2016). Note: Kennison's new case will be short-cited as *Kennison II*.

252. Court Docket, *Kennison II*, No. 16-923 (Vet. App. filed Mar. 15, 2016).

253. Brief for the Appellant at 8–10, *Kennison II*, No. 16-923 (Vet. App. filed Mar. 15, 2016) (arguing that the Board failed to adequately give Mr. Kennison adequate reasons or bases for its decision to denial of his hearing loss claim for extraschedular consideration).

254. *See supra* note 18 (discussing the Veterans Court's alteration of Rule 30(a)).

255. *See supra* note 19 (discussing language change in Rule 30(a)).

256. *See* discussion Part III.B.1–2 (arguing that the revised Rule 30(a) would not change the result in either case).

257. *Supra* Part III.A.4; *compare* Payne v. McDonald, No. 15-0228, 2016 WL 193496 (Vet. App. Jan. 15, 2016), *with* Graham v. McDonald, No. 15-0084, 2015 WL 9488190 (Vet. App. Dec. 30, 2015) (holdings that lack precedential value, resulting in two different outcomes while focusing whether the Board's decision provided adequate reasons or bases to the veteran).

258. *See* 38 U.S.C. § 7292 (West 2015) (stating that either party can appeal to the Federal Circuit within 60 days of the Veterans Court entry of judgment); Kennison v. McDonald, 2015 WL 4879201, at *5 (Vet. App. Aug. 17, 2015). It is moot to consider *Kennison*, as the Veterans Court remanded his claim back to the Board–the desired outcome.

dismissed every argument that Mr. McSparrin made; as a result, the outcome would remain the same, especially under the "clearly erroneous" standard.[259]

The similar quality of the VA's work in *McSparrin* and *Kennison* does not merit such a stark difference in outcomes.[260] Chief Judge Hagel held that there was a plausible basis in the record to affirm the Board's decision and, as such, it would be very unlikely that the outcome of *McSparrin* would change even with the change in procedural rules.[261] Without further reforms, disparate outcomes will continue to occur at the Veterans Court, even with the revised Rule 30(a).[262]

IV. RECOMMENDATIONS FOR VETERANS COURT REFORM TO ADDRESS THE PROBLEM OF DISPARATE OUTCOMES

The best way to solve the problem of disparate outcomes in hearing loss cases is to further modify Rule 30(a) and for the Veterans Court to Issue a full court decision that uses the rationale of *McSparrin*.[263]

A. The Veterans Court Needs Additional Alterations to Rule 30(a)

Due to its organic statute and precedent, the Veterans Court cannot exercise judicial review over the decisions of the Secretary of the VA pertaining to the rating schedule.[264] In this limited context, the Secretary of the VA, and thus the Board, is given great deference in that rating and the Board has wide latitude in assigning a rating for a disability case.[265] The Veterans Court acknowledges this fact as the starting analysis for hearing loss cases and uses a "mechanical application of the rating schedule."[266]

The Veterans Court should further amend Rule 30(a). The amendments to Rule 30(a) should be as follows:

> U.S. VET. APP. R. 30(a)(1) A filed action can only be designated as non-precedential if:
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> A) The action does not establish new rule of law, does not alter, modify, criticize, or clarify an existing rule of law, does not apply an established rule of law to a novel fact pattern, does not constitute the

259. Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990).

260. *See* discussion *supra* Part III.A.1–2 (explaining the similarity of the facts and law does not result in enough difference to merit two different outcomes).

261. McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508, at *6–7 (Vet. App. Aug. 12, 2015); *see also* Part III.C (explaining how the Veterans Court altered Rule 30(a)).

262. *Supra* Part III.

263. *Infra* Part IV.A–B.

264. 38 U.S.C. § 7252(b) (West 2015); Wingard v. McDonald, 779 F.3d 1354, 1356–57 (Fed. Cir. 2015).

265. 38 U.S.C. § 7252(b); *Wingard,* 779 F.3d at 1356–57.

266. Lendenmann v. Principi, 3 Vet. App. 345, 349 (1992).

> only recent, binding precedent on a particular point of law within the scope of the Court's authority, does not involve a legal issue of continuing public interest, and the outcome of the case is not reasonably debatable or;
>
> B) The issue behind the filed action does not have a contradictory holding on file with the Court.
>
> U.S. Vet. App. R. 30(a)(2) If a filed action fails to satisfy either prong of U.S. Vet. App. R. 30(a)(1), the action cannot be classified as non-precedential and a three judge panel will be selected pursuant to the normal procedures of the U.S. Court of Appeals of Veterans Claims to adjudicate the claim.

These modifications codify the relevant *Frankel* factors and disallow the *Frankel* factors when there is an intra-jurisdictional split on file.[267] The modified language requires the Veterans Court to check if the veteran's claim for disability benefits has a controversy that would result in disparate outcomes; as such, the likelihood of disparate outcomes decreases significantly.[268]

The additions to Rule 30(a) would also allow the Veterans Court to continue using single-judge decisions for adjudicating appealed veterans' cases as it only requires a panel under certain conditions, which would allow the Veterans Court to retain its autonomy.[269] However, the Veterans Court needs to establish formal procedures resulting in more precedential rulings that would reduce the risk of disparate outcomes to veterans' cases.[270]

Additionally, scholars argue that the Veterans Court needs to start issuing more precedential cases, regardless of procedural modification.[271] However, given the current political climate, this argument misses a fundamental point: significant expansion of the Veterans Court seems very unlikely,[272] considering

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267. *See* discussion *supra* Part II.C (discussing the factors that came from Frankel v. Derwinski that govern most single-judge decisions at the Veterans Court).

268. *See* discussion *supra* Part II.C (discussing how the Veterans Court issues precedential decisions).

269. *See* discussion *supra* Part II.C (explaining the procedural rules and historical background of the Veterans Court while discussing the "clearly erroneous" standard).

270. *See supra* Part III.A.1–2 (arguing that a precedential decision would settle the controversy concerning cases like *McSparrin* and *Kennison*).

271. Ridgway, *supra* note 12, at 42 ("As a proxy for the amorphous goal of achieving more clarity of the law, reform of the [C]ourt's use of single-judge decisions should target increasing the rate of published decisions and then observing whether this succeeds in decreasing the variance between judges applying the "settled" law.").

272. *See* Patrick Caldwell, *Senate Republicans are Blocking Obama's Judges at a Nearly Unprecedented Rate,* MOTHER JONES, http://www.motherjones.com/politics/2015/11/senate-republicans-block-obama-judge-nominations (last accessed Dec. 31, 2015) (on file with *The University of the Pacific Law Review*) ("Republicans have been gumming up the works at each step of the process. Judicial nominations are generally put forward by the president only once they've been approved by both of the home-state senators. Republicans

the Court is not at full capacity.[273] Even the Court acknowledges the need for additional judges and financial resources due to an expected surge in claims in the coming years as two Veterans Court judges face retirement by the end of 2016.[274]

Therefore, simply adding more panel decisions without a plan will slow the pace of Veterans Court review even further, frustrating the purpose of reform; as of 2015, the Veterans Court issued 26 panel decisions stemming from 95 requests, and five full Court decisions stemming from fifteen requests.[275] This amount of cases pales when compared to the 1,313 single-judge cases the Court also decided that year,[276] considering that in 2015, on average, the Court took 383 days to decide a single-judge case.[277] That year, panel decisions at the Veterans Court added an additional 109 days on average, with a median procedural wait of 523 days for each case, a figure that does not include the minimum of 45 days required if the case is set for oral argument.[278] That outcome is untenable; accordingly, procedural reform must accompany any additional precedent that the Veterans Court issues.[279]

B. The Veterans Court Needs to Issue a Full Court Decision on Extraschedular Consideration Adopting Rationale that is Similar to McSparrin v. McDonald

For hearing loss cases at the Veterans Court, as demonstrated by *McSparrin, Kennison, Gundersdorff*, and the case study, there are disparate outcomes at the

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have been slow to give their consent to any nominee, with 55 [total] judicial vacancies currently lacking a nomination.").

273. Jeff Gerber, *Larger Court Would Decrease Delays*, BROKENVA.COM, http://www.brokenva.com/2015/10/17/larger-court-would-decrease-delays/ (last accessed Dec. 31, 2015) (on file with *The University of the Pacific Law Review*) ("Recently Judge William A. Moorman of the U.S. Court of Appeals for Veterans Claims assumed "Senior Status"—a form of semi-retirement. With Judge Moorman's departure from the Court, the number of active judges has been reduced to eight.").

274. 2015 Veterans Court Report, *supra* note 207, at 5 ("Of note, at the same time that the number of appeals filed at the Court is increasing, the Board of Veterans' Appeals has projected an alarming increase in its [Fiscal Year] 2017 workload. Additionally, the Court is quickly losing judges. The number of judges has currently fallen to eight and without congressional action[;] it will fall to six in December 2016.").

275. *Compare* 2015 Veterans Court Report, *supra* note 207, *with* 2014 Veterans Court Report, *supra* note 207 (stating in 2014, the Veterans Court issued 34 panel decisions stemming from 101 requests and one full Court decision stemming from seven requests, emphasizing the rarity of precedent at the Court).

276. *Compare* 2015 Veterans Court Report, *supra* note 207, *with* 2014 Veterans Court Report, *supra* note 207 (stating in 2014, the Veterans Court decided 1,615 single-judge disability claim cases, emphasizing the ratio of cases discussed in 2015 is not a statistical outlier).

277. *Compare* 2015 Veterans Court Report, *supra* note 207, at 3, *with* 2014 Veterans Court Report, *supra* note 207, at 3 (stating in 2014, the Veterans Court took an average of 420 days to decide a single-judge case, emphasizing the time taken to decide cases in 2015 is not a statistical outlier).

278. *Compare* 2015 Veterans Court Report, *supra* note 207, at 3, *with* 2014 Veterans Court Report, *supra* note 207, at 3 (stating in 2014, the Veterans Court added an additional 142 days once a panel is assigned, with a median procedural wait of 704 days, not including the minimum 45 days required if the parties ask for oral arguments).

279. *Supra* Part IV.A.

Veterans Court.[280] The quickest and most efficient way to resolve this problem is for the Veterans Court to issue a full court decision pursuant to its own Rules of Practice and Procedure that adopts reasoning similar to *McSparrin v. McDonald*.[281]

Pursuant to procedural rules, the Veterans Court disfavors full court opinions.[282] As shown in this Comment, there is a persuasive argument that in order to secure the uniformity of the Court's decisions, the Veterans Court needs to issue a full Court decision.[283]

The Veterans Court has had the opportunity since 2009 to refine case precedents as to hearing loss disability claims.[284] In fact, the Veterans Court declined to convene a panel on this very issue shortly after issuing *Anderson* in *Sangi v. Shinseki*.[285] Judge Kasold, in his dissent from the Court's decision to not convene a panel, stated that Mr. Sangi's hearing loss disability, while noncompensable, renders him "unable to hear smoke alarms go off and he has trouble hearing conversations."[286] Judge Kasold also argued that the *Frankel* factors may not be applicable and "at a minimum, the Board should weigh the evidence in the first instance and make the determination [for referral for extraschedular consideration], *not the Court.*"[287] While a single-judge holding has no precedential weight, and a dissent from the decision not convening a panel has even less persuasive value, this opinion indicates that the Court was aware of this controversy regarding noncompensable hearing loss cases back in 2009.[288]

There is an argument that one should merely focus on fixing disparate outcomes without deciding which set of cases is correct.[289] Ultimately, this argument is shortsighted, because it provides litigants no guidance.[290] The Court

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280. *Supra* Part III.A.

281. U.S. VET. APP. R. 35; *see also* McSparrin v. McDonald, No. 14-2417, 2015 WL 4756508, at *4–7 (Vet. App. Aug. 12, 2015) (affirming the Board's decision while explaining the rationale for respecting the "clearly erroneous" standard).

282. U.S. VET. APP. R. 35(c).

283. *See* discussion *supra* Part III.A (demonstrating that there are disparate outcomes at the Veterans Court); U.S. VET. APP. R. 35(c) (stating that before convening the entire to court to decide a case, the Veterans Court looks to determine whether there is a need for uniformity in cases).

284. *See supra* text accompanying notes 95–101 (stating that the veteran has the option to file a motion for both reconsideration and precedential panel review if he disagrees with the single-judge decision); Anderson v. Shinseki, 22 Vet. App. 423, 427 (2009) (holding that established the last refinement of the three-element test required by Thun v. Peake).

285. Sangi v. Shinseki, No. 06-2721, 2009 WL 3063039, at *1 (Vet. App. Sept. 24, 2009).

286. *Id.* at *2.

287. *Id.* (emphasis added).

288. *Id.*

289. Ridgway, *supra* note 12, at 21 ("This study attempts to avoid the most treacherous pitfalls of empirical analysis by eschewing the questions of which decisions are "correct" and whether ideology plays a role in outcomes.").

290. *See* discussion *supra* Part III.B.1–2 (arguing that data collected about the Veterans Court and hearing loss disability claims are just information without a purpose of their own without context explaining why they are important).

should definitively decide the issue; the rationale in *McSparrin* uses all of the precedent case law while respecting the "clearly erroneous" standard, and its reasoning would serve as an excellent foundation for future decisions to settle the controversy.[291]

However, if the Veterans Court instead desires an outcome that requires the VA to issue new standards on extraschedular referral for hearing loss cases, that is also an acceptable outcome as it would settle the controversy.[292] Accordingly, the reasoning in *Kennison* would likely serve well as a legal foundation for this outcome.[293] However, in the interests of justice, if the Court follows the line of reasoning in *Kennison* to settle the controversy, the Court needs to revisit every affirmed result since *Anderson* in 2009.[294]

V. CONCLUSION

Disparate outcomes exist in hearing loss disability claims in the Veterans Court because of the procedural rules regarding single-judge decisions and the seeming lack of adherence to the "clearly erroneous" standard.[295] For a subset of cases at the Veterans Court, justice has become a lottery.[296] In order to fix this interminable and unacceptable problem, the Veterans Court needs to further alter its procedural rules, as well as issue a full court decision that uses the rationale of cases like *McSparrin* to end the churn of cases back and forth between the Board and the Court.[297] Allowing justice to be subject to a lottery does a disservice to all parties involved.[298]

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291. *See* discussion *supra* Parts II.B.2–3, II.D, III.A.1 (demonstrating that a case like *McSparrin* adheres closest to current case law while respecting the "clearly erroneous" standard).

292. *See* discussion *supra* Parts II.B.2–3, II.D, III.A.2 (demonstrating that a case like *Kennison* demonstrates the paradigm for reforming allowing all veterans to receive reconsideration from the Board).

293. *See* discussion *supra* Part III.A.2 (demonstrating that a case like *Kennison* has rationale appropriate to govern new substantive VA conduct).

294. *See supra* text accompanying notes 213, 276–78 (explaining the length of time that the Veterans Court takes to decide cases).

295. *See* discussion *supra* Parts II.B.2–3, II.D, III.A, III.B (demonstrating disparate outcomes at the Veterans Court under existing case law and existing procedure).

296. *Supra* Part III; *see* Ridgway, *supra* note 12 (arguing that there is statistical evidence for disparate outcomes at the Veterans Court).

297. *See* discussion *supra* Part IV (arguing methods of reform to fix the problem of disparate outcomes at the Veterans Court).

298. *See* discussion *supra* Part III (discussing the inherent unfairness resulting from disparate outcomes in cases with the same facts and law).