

# VETERANS LAW: YEAR IN REVIEW

Gregg Maxon

Law Office of Richard G. Maxon

[gmaxon@gmaxonlaw.com](mailto:gmaxon@gmaxonlaw.com)

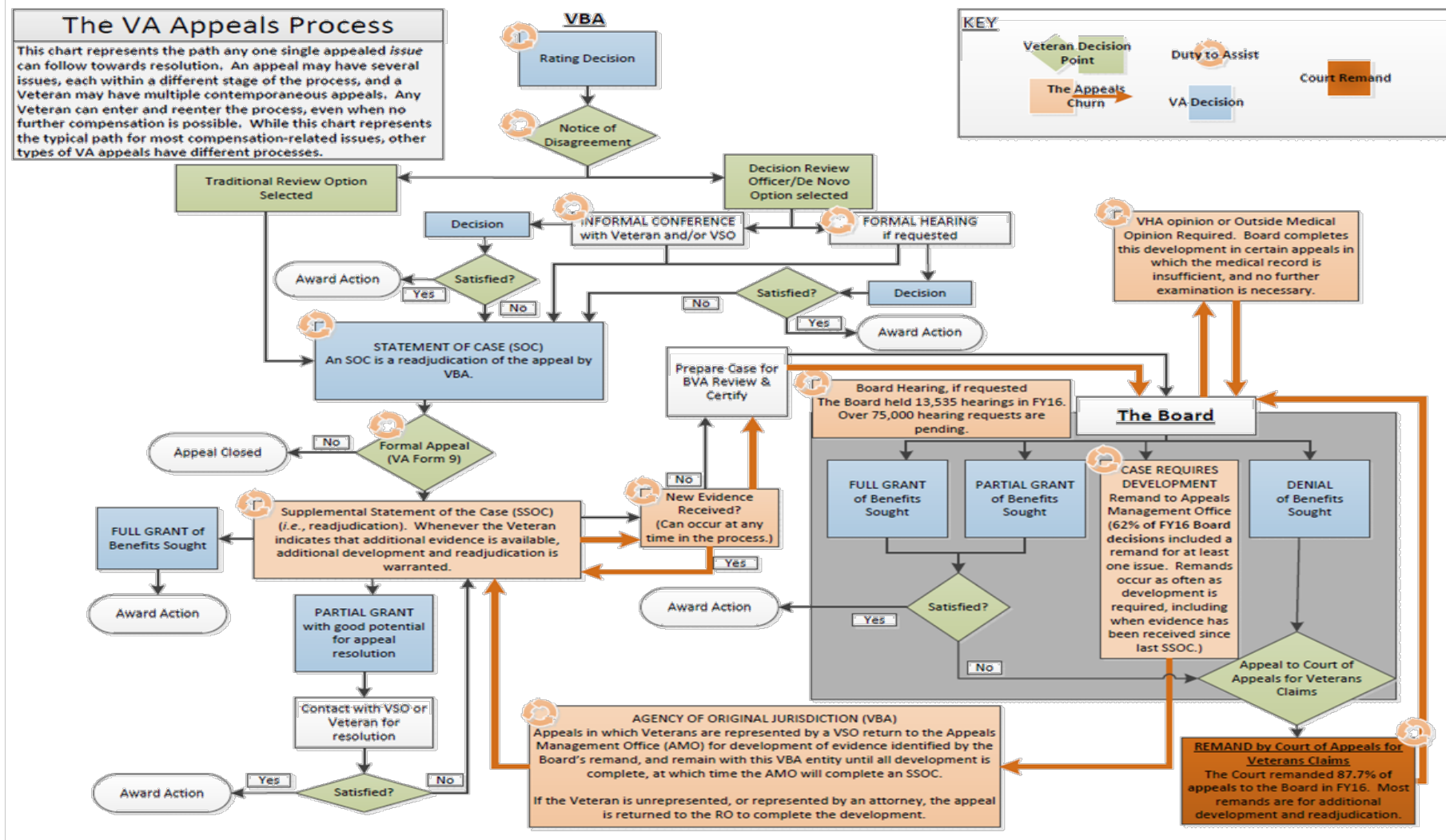
# Order of Presentation

- VA Rules and Policy Changes
  - Veterans Appeals Improvement Act of 2017
    - RAMP
  - Decision Ready Claim
- Recent Cases
- Proposed Federal Legislation
- State Legislation

# Veterans Appeals and Modernization Act of 2017

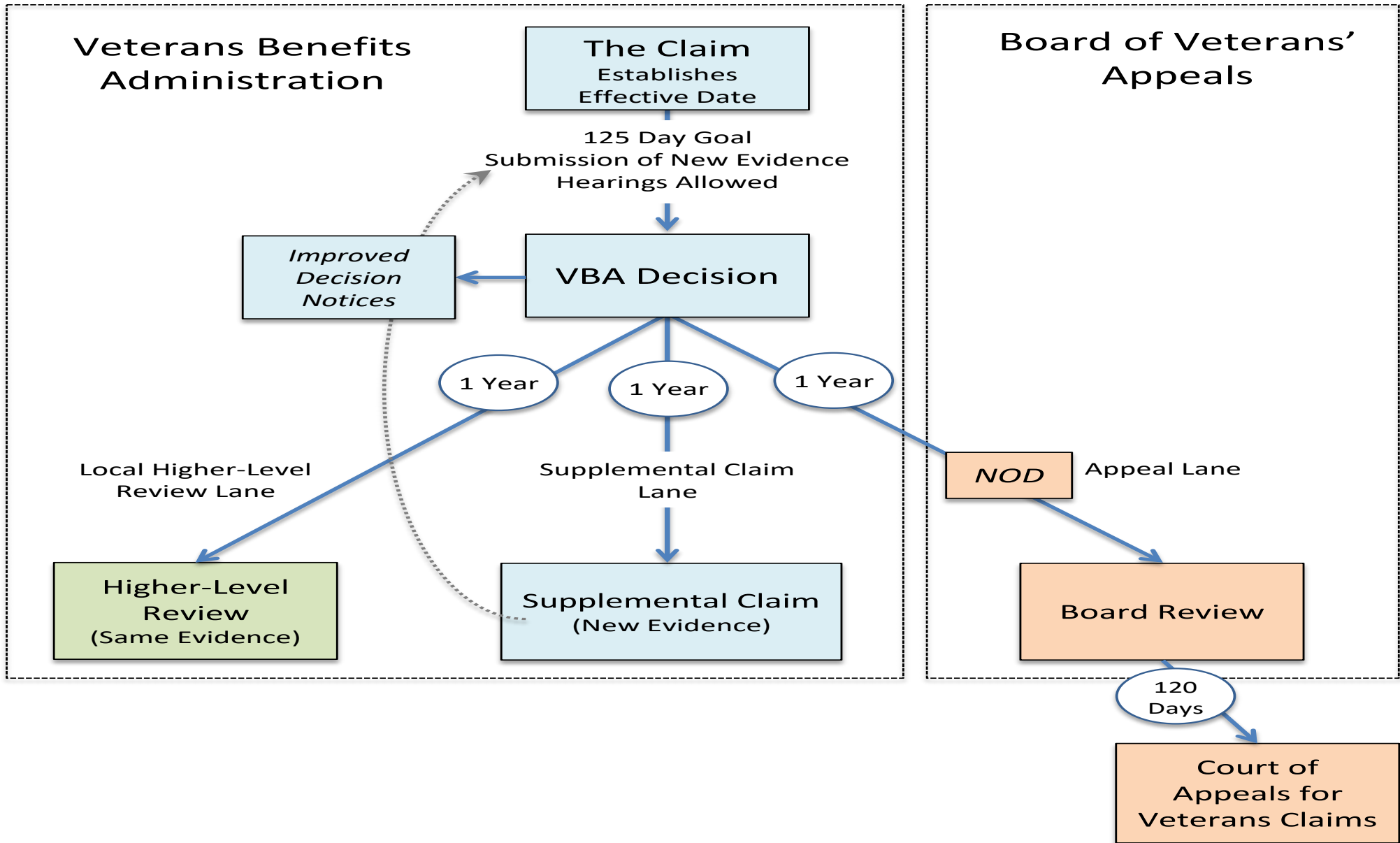
- Enacted August 23, 2017
- Targeted Implementation Date is February 2019
- Creates Shortened Appeals Process
- Eliminates Statement of the Case Step
- Notice of Disagreement only filed to take case to BVA
- Creates three lanes for appeal, two of which are at Regional Office
- Effective date stays date of claim so long as case continuously pursued
- Substantially changes duty to assist rules

# VA Appeal Process Today



# Three Lane Process

- The law creates a new claims and appeals process, which features three lanes:
  - **Higher-Level Review** lane, which consists of an entirely new review of the claim by an experienced adjudicator.
  - **Supplemental Claim** lane, which provides an opportunity to submit additional evidence.
  - **Appeal** lane, which provides an opportunity to appeal directly to the Board of Veterans' Appeals.



### Veterans Benefits Administration

The Claim Establishes Effective Date

125 Day Goal Submission of New Evidence Hearings Allowed

Improved Decision Notices

VBA Decision

1 Year

1 Year

1 Year

Local Higher-Level Review Lane

Higher-Level Review (Same Evidence)

Supplemental Claim Lane

Supplemental Claim (New Evidence)

### Board of Veterans' Appeals

NOD Appeal Lane

Board Review

120 Days

Court of Appeals for Veterans Claims

## New Framework – Overview

- Choosing one lane over another does not preclude Veterans from later choosing a different lane.
- There are no limits to the number of times a Veteran may pursue a claimed issue in any of the given lanes.
- Effective date is protected as long as the Veteran pursues the same claimed issue in any of the lanes within the established timeframes.
- Duty to assist applies only in initial claims and the new framework's supplemental claim lane. It does not apply to the higher-level review or appeal lanes.
- Higher-level review replaces the current *de novo* Decision Review Officer process.
- Veterans cannot choose multiple lanes concurrently. They may pursue only one lane at a time for the same claimed issue.

# New Framework – VBA Lanes

## Supplemental Claim Lane

- VA will readjudicate a claim if “new and relevant” evidence is presented or secured with a supplemental claim.
- VA will assist in gathering new and relevant evidence (**duty to assist**).
- This process replaces “reopening” claims with “new and material” evidence.

## Higher-Level Review Lane

- Provides a second look at the **same evidence** before the initial adjudicator by a more experienced VA employee.
- Includes option for a one time telephonic **informal conference** with the higher-level reviewer.
- *De novo* review with difference of opinion authority.
- **Closed evidentiary record.**
- Return to lower-level for correction of duty to assist errors (quality feedback).



# New Framework – Appeal Lane

## Evidence Only Docket

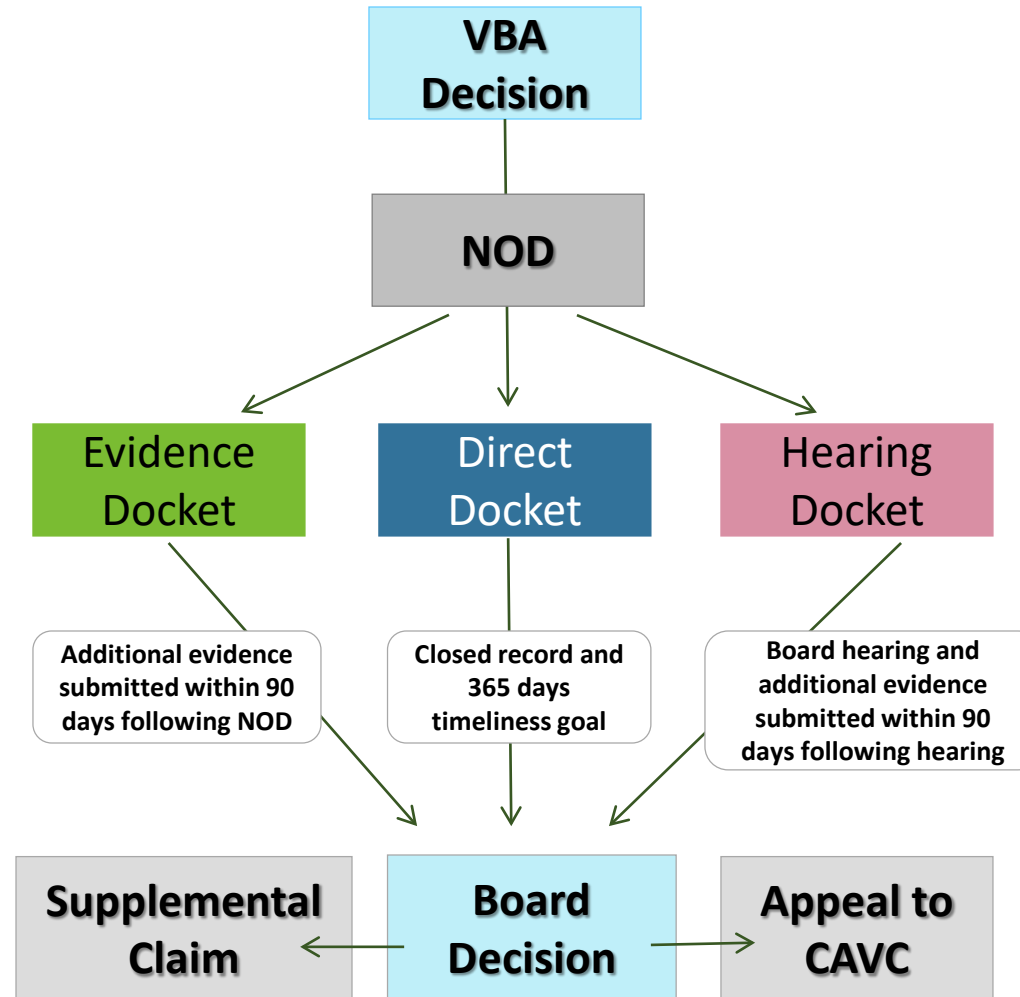
When this option is selected on the NOD, the appellant may submit evidence within the 90 day window following submission of the NOD.

## Direct Docket

When this option is selected on the NOD, the appellant receives direct review by the Board of the evidence that was before the AOJ in the decision on appeal. VA has established a 365-day timeliness goal for the Direct Docket.

## Hearing Docket

When this option is selected on the NOD, the appellant will be scheduled for a Board hearing. Additionally, the appellant may submit evidence within the 90 day window following the scheduled hearing.



# New Framework – Benefits

## **New framework provides:**

- Multiple options for Veterans instead of one.
- Improved notice as to which option might be best.
- Early resolution of disagreements.
- Each lane with a clearly defined start/end point.
- Higher-Level Review and Appeal lanes provide quality feedback to VBA.
- Workload transparency for better workload/resource projections.
- VBA as claims agency, Board as appeals agency.
- Efficient use of resources for long-term savings.

## Rapid Appeals Modernization Program

- VA began a new program known as the ***Rapid Appeals Modernization Program (RAMP)*** on November 1, 2017.
- RAMP is a test program that allows eligible Veterans **with pending compensation appeals** the option to have their decisions reviewed in VBA's **Higher-Level Review** or **Supplemental Claim** lanes outlined in the new law.

# RAMP Supplemental Claim Lane

## **Supplemental claims consist of:**

- Review of additional evidence that is ***new and relevant*** to support granting the benefit(s) sought.
- Open evidentiary record with **duty to assist** Veterans in gathering evidence to support the claim.
- Decision authority given to **RVSRs** for rating issues and **VSRs** for non-rating issues.
- Any decision to award benefits under the supplemental claim lane must be based on **new and relevant evidence** or a **clear and unmistakable error** in the prior decision.

# RAMP Higher-Level Review Lane

## Higher-level reviews (HLRs) consist of:

- ***De novo* review** of the issue(s) previously on appeal.  
(difference of opinion authority)
- Decision authority granted to **Decision Review Officers (DROs)**.
- **Evidence review limited** to only evidence that was of record prior to VA's receipt of the Veteran's RAMP election.  
(NO duty to assist)
- Optional one-time telephonic **informal conference** to identify specific errors in the case.
- Return of the claim for correction when a **duty to assist error or missed development** is found and the reviewer cannot grant the maximum benefit.

# RAMP Features

- Must be invited into RAMP by the BA (although it has been indicated they will accept uninvited applications)
- No BVA participation during “test phase” announced yet
- VA will take new evidence for higher level review lane up to the time RAMP option is exercised
- Same potential effective date for benefits regardless of the Veteran’s choice of review option.
- Requires VA to have clear and convincing evidence to change any findings favorable to the Veteran in a VA decision.

# Decision Ready Claim

- New VA program promising decisions on claims in 30 days or less.
  - Must work through Veterans Service Organization
  - Must gather all relevant evidence yourself. No VA duty to assist
  - Must attend VA exam, if necessary, before claim is filed. VSO will arrange
- 
- Note: All the tasks remain the same, it is just most of them are now shifted to the veteran

# Types of Claims Under DRC Process

- Direct Service Connection Claims
- Presumptive Service Connection Claims
- Secondary Service Connection Claims
- Increased Disability Claims
- Dependency and Indemnity Compensation Claims
- Pre-Discharge Claims (less than 90 days left on Active Duty)



# Recent Cases

- Saunders v. Wilkie
- Molitor v. Shulkin
- Sharp v. Shulkin
- Frost v. Shulkin
- Crediford v. Shulkin

# Saunders V. Wilkie

\_\_\_\_\_ F. 3d \_\_\_\_\_ (Fed.Cir. April 3, 2018)

- Pain alone, absent a specific diagnosis of disease or injury, can be a compensable condition.
- Disability is a functional impairment of earning capacity, not the underlying cause of the disability.
- Pain is an impairment because it diminishes the body's ability to function.
- Veteran will need to show pain reaches the level of a functional impairment of earning capacity.

# Molitor v. Shulkin

## 28 Vet. App. 397 (2017)

- Issue in Case was access to another service members records to establish a fact needed to prove a different veteran's claim.
- VA denied on the basis that giving access to records would be an unwarranted intrusion into privacy of second veteran.
- Once records are adequately identified VA must attempt to obtain records or explain why.
- Once duty to assist triggered VA has responsibility to make as many attempts to get records as are necessary.
- VA can get records to verify events, just not disclose them to the claimant.

# Sharp v. Shulkin \_\_\_\_\_ Vet. App. \_\_\_\_\_ (2017)

- Issue in the case was when can VA examiner “punt” by saying they cannot give an opinion without resorting to speculation.
- Here, examiner was asked to give an opinion about veteran’s level of disability during condition “flair-ups” and examiner did not examine him during a flair-up.
- Examiner must explain why cannot give an opinion and must clearly state they have considered all procurable and assembled data
- If examiner has not indicated they have done so, legal error of an inadequate examination.

# Frost v. Shulkin

\_\_\_\_\_ Vet. App. \_\_\_\_\_ (2017)

- Issue – may a veteran obtain a secondary service connected disability prior to the grant, or even diagnosis of, the primary service connected condition.
- Defendant severely injured while shot during an altercation, PTSD diagnosed and service connected years later. Determined altercation was related to PTSD,
- Yes – Vet may be service connected for a secondary condition before primary condition is diagnosed and service connected. Nothing in the law precludes that.

# Crediford v. Shulkin

## 877 F. 3d 1040 (2017)

- Veteran's service determined his injury was not the result of his willful misconduct and injury was in the line of duty.
- VA reviewed the circumstances and made its own determination that conduct was willful misconduct and denied benefits.
- Court ruled VA bound by the determination of the service and it was error for the VA to make its own determination to the detriment of the veteran
- Veteran went to local VFW after duty day and drank. Involved in car accident and had .12 BAC.

# PENDING FEDERAL LEGISLATION OF INTEREST

H.R. 1725 – **Quicker Veterans Benefits Delivery Act.** Would require study of VA’s use of private medical evidence. Passed both chambers and presented to President on 2.28.18.

H.R. 3122 - **Veterans Care Financial Protection Act.** Would require Secretary to work with federal agencies, states, and other experts to develop and implement standards “that protect individuals from dishonest, predatory, or otherwise unlawful practices relating to increased pension available . . . on the basis of need for regular aid and attendance.” Passed both chambers and presented to President on 2.28.18.

H.R. 512/S. 242 – **WINGMAN Act**. Would allow a covered congressional employee in office of veteran's member of Congress to have read-only access to veteran's records. Passed House; pending in SVAC.

H.R. 918 – **Veteran Urgent Access to Mental Healthcare Act**. Would allow VA to provide initial mental health assessment and urgent mental health care services to combat veterans at risk of suicide or harming others, even if they have OTH discharge. Passed House; pending in SVAC.

H.R. 3705/S. 2341 – **Veterans Fair Debt Notice Act**. Would require certified mail to be used when (1) VA sends a written demand to a debtor; (2) a debtor sends a request for a waiver; and (3) VA sends certain notification to a debtor. VA would also be required to use "plain language" in certain demands/notices. Passed House; pending in SVAC.



H.R. 299/S. 422 – **Blue Water Navy Vietnam Veterans Act**. Would amend 38 U.S.C. 1116(a)(1) and (f) by inserting “including the territorial seas of such Republic [of Vietnam].” Effective date = Sept. 25, 1985. Stalled due to funding concerns. House hearing held; pending in SVAC.

☐ H.R. 4843/S. 2105 – Would extend presumption of exposure to Agent Orange in **Thailand** to any part of base for those bases on list. Pending in committees.

☐ H.R. 3605/S. 2038 – **Fairness for Korean DMZ Veterans Act of 2017**. Would extend presumption of Agent Orange exposure for veterans who serve near or in DMZ from September 1, 1967 through August 31, 1971. Pending in committees.

# STATE LEGISLATION OF INTEREST

- SB 1089 **Purple Heart Day** – August 7 –Signed by Governor
- SB 1090 **Beirut Barracks Bombing Remembrance Day** - October 23 - Sent to Governor
- SB 1179 **Buffalo Soldiers Memorial** – Signed by Governor
- SB 1253 **Complimentary game and fish licenses** for 100% SCD veterans who have lived in Arizona at least 1 year. Signed by Governor
- SB 1431 ADOA to provide placement of **memorial for Veteran's Suicides**. Sent to Governor

# STATE LEGISLATION CONTINUED

- HB 2027 **Veterans Alternate Fuel License Plates** – Signed by Governor
- HB 2191 **Military Family Relief Fund Extension** to 2026 sent to Governor
- HB 2527 **Drivers Licenses or Identifications** for homeless veterans to be issued free. Pending Committee of the Whole Senate