

No. 2024-1543

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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DAVID A. HAMILL,

Claimant-Appellant,

v.

DENIS McDONOUGH,  
Secretary of Veterans Affairs,

Respondent-Appellee.

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On Appeal from the United States Court of Appeals for Veterans Claims in Case No.  
22-7344, Judges Toth, Laurer, and Jaquith.

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**CORRECTED RESPONDENT-APPELLEE'S BRIEF**

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### **STATEMENT OF RELATED CASES**

No other appeal in or from the present civil action has previously been before this or any other appellate court. The respondent-appellee is not aware of any related cases within the meaning of Federal Circuit Rule 47.5(b).

## INTRODUCTION

Veterans benefits administered by the Department of Veterans Affairs (VA) are generally authorized only for veterans—defined as former service members discharged under conditions other than dishonorable. *See* 38 U.S.C. § 101(2). An exception applies for certain healthcare benefits—referred to as chapter 17 benefits—that remain available to certain “former service persons” whose discharge is determined to be dishonorable for purposes of VA benefits. *See* 38 C.F.R. § 3.360(a); *see also* P.L. 95-126, § 2. In 2014, VA found that Mr. Hamill’s character of discharge was dishonorable for purposes of VA benefits. On May 10, 2021, Mr. Hamill applied for veterans benefits, implicitly seeking to reopen the prior character-of-discharge decision.

This appeal arises from Mr. Hamill’s mandamus petition asking the United States Court of Appeals for Veterans Claims (Veterans Court) to compel the VA to issue an appealable character-of-discharge decision in response to his May 2021 claims. By the time he filed the petition, however, Mr. Hamill had already received such a decision. On May 19, 2021, the VA issued a decision on the May 10, 2021 claim, addressing service connection only for the purposes of chapter 17 healthcare benefits. As the Veterans Court found, by limiting its decision to chapter 17 healthcare benefits—and citing the 2014 character-of-discharge decision—VA sufficiently notified Mr. Hamill and his counsel that his character of discharge remained unfavorable.

Because Mr. Hamill had already received an appealable decision regarding character of discharge when he filed the mandamus petition, there was no case or controversy and the Veterans Court correctly dismissed the petition.

### STATEMENT OF THE ISSUES<sup>1</sup>

1. The Veterans Court found that a VA decision issued in May 2021 said enough “to notify Mr. Hamill how it had decided” his character of discharge. Appx6. The issue is whether this Court lacks jurisdiction to review the finding of fact that Mr. Hamill had notice of the VA’s decision.

2. Pursuant to the implicit denial rule, a claim for benefits may be deemed denied when “it would be clear to a reasonable person” that the VA’s decision expressly referring to one claim “is intended to dispose of others as well.” *Adams v. Shinseki*, 568 F.3d 956, 964 (Fed. Cir. 2009). The issue is whether the Veterans Court correctly held that amendments to 38 U.S.C. § 5104(b) in the Veteran Appeals Improvement and Modernization Act of 2017 (AMA) do not supersede this longstanding aspect of veterans law.<sup>2</sup>

3. In February 2023, the VA issued a new, appealable decision regarding character of discharge, mooting any individual claim by Mr. Hamill to compel such a

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<sup>1</sup> We disagree with the petitioner’s statement of the issues and the case and therefore include these sections in the response brief.

<sup>2</sup> If the Court agrees with the Secretary on issues one and two, there is no need to reach the remaining issues. Mr. Hamill must prevail on all four issues to succeed on appeal.

decision. The issue is whether Mr. Hamill fails to show that his subsequent request for class action—filed in March 2023—establishes any exception to mootness.

4. In the alternative, whether Mr. Hamill fails to demonstrate error in the dismissal of the mandamus petition when there are adequate alternative avenues for appeal—both for Mr. Hamill’s individual claim and any potential class claims.

## STATEMENT OF THE CASE

### A. Statutory Background

A “veteran” for purposes of VA benefits “means a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. § 101(2); *see also* 38 U.S.C. §§ 1110, 1131 (defining basic entitlement to veterans benefits); 38 C.F.R. § 3.12(a). The service department’s designation of a discharge as “honorable” is binding on the VA. 38 C.F.R. § 3.12(a). However, when a former service member was discharged under “other than honorable” conditions, the VA must make a factual determination as to whether the discharge was “dishonorable” for purposes of obtaining veterans benefits. *See, e.g.*, 38 U.S.C. § 101(2); *see also* 38 C.F.R. § 3.12(a), (c), (d); *Robertson v. Gibson*, 759 F.3d 1351, 1356 (Fed. Cir. 2014).

The VA considers discharges based on an offense listed in 38 C.F.R. § 3.12(d) as “issued under dishonorable conditions.” *See generally Garvey v. Wilkie*, 972 F.3d 1333, 1335-37 (Fed. Cir. 2020), *cert. denied sub nom. Garvey v. McDonough*, 142 S. Ct. 79 (2021). A discharge is dishonorable for VA purposes when (among other things) a

former service member accepted “a discharge under other than honorable conditions or its equivalent in lieu of trial by general court-martial,” or engaged in “willful and persistent misconduct.” 38 C.F.R. § 3.12(d)(1)(i), (d)(2)(ii) (2024).<sup>3</sup>

Certain former service members who are ineligible for “veterans” benefits due to an unfavorable character-of-discharge determination by the VA may still be eligible for certain healthcare benefits under chapter 17 of title 38. “The health-care and related benefits authorized by chapter 17 of title 38 U.S.C. shall be provided to certain *former service persons* with administrative discharges under other than honorable conditions” for service-connected disabilities. 38 C.F.R. § 3.360 (emphasis added); *see also* P.L. 95-126, § 2.<sup>4</sup>

## **B. Factual Background**

### **1. After Serving in the U.S. Marine Corps, Mr. Hamill Receives an Other than Honorable Discharge in Lieu of Trial by Court-Martial**

Mr. Hamill served in the U.S. Marine Corps from February 2009 to March 2013. Appx2. During service, Mr. Hamill received numerous decorations, medals,

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<sup>3</sup> The version of the regulation in effect in 2014 provided that accepting an “undesirable discharge to escape trial by general court-martial” qualifies as discharge “under dishonorable conditions.” 38 C.F.R. § 3.12(d)(1) (2014).

<sup>4</sup> “Notwithstanding any other provision of law,” the VA “shall provide the type of health care and related benefits authorized to be provided under chapter 17 of title 38, United States Code . . . for any disability incurred or aggravated during active military, naval, or air service in line of duty *by a person* other than a person barred from receiving benefits by section 3103(a) of such title,” or during a period of service with “a bad conduct discharge.” PL 95–126, § 2 (emphasis added).

badges, and other commendations, including the combat action ribbon, the Navy unit commendation, and the Navy meritorious unit commendation. Appx26.

In January 2013, the Department of the Navy charged Mr. Hamill with using 3,4-methylenedioxyamphetamine (MDA). Appx38. This occurred after Mr. Hamill previously received a non-judicial punishment for smoking marijuana. Appx38. After testing positive for MDA, Mr. Hamill was “placed in pretrial confinement,” and charged with violating Article 112a of the Uniform Code of Military Justice. Appx38. Instead of contesting the charges, Mr. Hamill opted to receive separation in lieu of trial by court-martial. Appx38. Thus, Mr. Hamill received an other-than-honorable discharge “in lieu of tr[ia]l by court martial.” Appx26 (capitalization altered).

**2. In 2014, The VA Determines that Mr. Hamill’s Character of Discharge Is Dishonorable for Purposes of VA Benefits**

In April 2013, Mr. Hamill applied for disability compensation and related benefits for post-traumatic stress disorder (PTSD), psychiatric issues, and back pain. Appx28-29. After learning that Mr. Hamill was discharged under other than honorable conditions, the VA notified Mr. Hamill that it would assess the character of his service to determine his eligibility for veterans benefits. Appx30. The VA invited Mr. Hamill to submit evidence to assist the VA in that decision. Appx30-31, *see also* Appx38. Mr. Hamill did not respond to the notice. Appx38.

In May 2014, the VA determined that Mr. Hamill’s character of discharge was dishonorable for VA purposes. Appx36-38. However, the VA stated that Mr. Hamill

would remain eligible for “health care under Chapter 17 of Title 38, U.S.C. for any disabilities determined to be service connected” during the relevant period of service. Appx36.<sup>5</sup> Mr. Hamill did not appeal the May 2014 decision. *See* Appx45.

**3. In 2017, the VA Declines to Reopen Mr. Hamill’s Character of Discharge**

In May 2017, Mr. Hamill filed another claim for veterans benefits, alleging service connection for PTSD, chronic fatigue syndrome, fibromyalgia, depression, lower back pain, and hearing loss. Appx41-43. Although the 2017 claim did not mention character of discharge, Appx41, by requesting *veterans* benefits that are not available to former service members with dishonorable character of discharge, Mr. Hamill implicitly sought to reopen the prior character-of-discharge determination. *See* 38 U.S.C. § 101(2)); *see also* Appx45.

In July 2017, the VA declined to reopen character of discharge, finding that Mr. Hamill had not submitted new and material evidence. Appx45. Mr. Hamill did not appeal the July 2017 decision.

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<sup>5</sup> As the Veterans Court explained, “[t]here seems to be a discrepancy within VA’s letter over whether petitioner was eligible for chapter 17 benefits.” Appx3 n.6; *see also* Appx39 (stating that Mr. Hamill is “not” entitled to Chapter 17 healthcare benefits). Nevertheless, the court explained that Mr. Hamill “was eventually granted chapter 17 benefits and neither party argues over the discrepancy in the May 2014 decision.” Appx3 n.6.

**4. In 2021, the VA Considers Mr. Hamill’s Eligibility for Healthcare Benefits Available to Non-Veterans, Citing the 2014 Adverse Character-of-Discharge Decision**

On May 10 2021, counsel for Mr. Hamill filed a new claim for veterans compensation, seeking service connection for irritable bowel syndrome (IBS), acid reflux, equilibrium issues, stuttering, memory issues, sensitivity to light, headaches, and traumatic brain injury. Appx51-55. On the same date, counsel for Mr. Hamill filed a supplemental claim for PTSD, chronic fatigue syndrome, fibromyalgia, depression, a lower back condition, and hearing loss. Appx49. Despite not explicitly mentioning the character of discharge, Mr. Hamill implicitly sought to reopen the prior character-of-discharge determination that otherwise precluded payment of veterans compensation. *See* Appx38.

On May 19, 2021, the VA notified Mr. Hamill of its “decision on [his] claim for service connected compensation received on May 10, 2021”—addressing “all claims that the VA “understood to be specifically made, implied, or inferred in” the 2021 claim. Appx56; Appx56-65. The VA granted service connection for Mr. Hamill’s PTSD, but *only* for purposes of chapter 17 healthcare benefits, and noted that “[c]ompensation is not payable for this condition.” Appx61-62. The decision cited Mr. Hamill’s “Certificate of Release or Discharge from Active Duty,” documenting his other-than-honorable discharge, and the 2014 “Administrative Decision” finding that Mr. Hamill’s character of discharge was dishonorable for VA purposes. Appx62; *see also* Appx38 (May 15, 2014 character-of-discharge determination). In considering

eligibility for chapter 17 healthcare benefits, the VA “denied” service connection for the remaining conditions claimed by Mr. Hamill. Appx61-62.

The VA notified Mr. Hamill that he had “one year from the date of this letter” to select a review option, including filing a supplemental claim, requesting higher level review, or filing a notice of disagreement to initiate an appeal. Appx57.

### **C. Prior Proceedings**

#### **1. In 2022, Mr. Hamill Files an Individual Mandamus Petition with the Veterans Court, Seeking to Compel an Appealable Character-of-Discharge Decision**

On July 7, 2022, more than a year after the May 2021 decision—and after the deadline to appeal that decision had passed—Mr. Hamill submitted a letter to VA requesting “a decision regarding his discharge characterization.” Appx66. The VA interpreted the letter as a “request to upgrade” Mr. Hamill’s military discharge and responded with information regarding how to request an upgrade from the military. Appx67.

On December 19, 2022, Mr. Hamill filed an individual mandamus petition for extraordinary relief with the Veterans Court. Appx1.<sup>6</sup> Mr. Hamill requested that the

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<sup>6</sup> The record for this mandamus petition consists of materials submitted on the Veterans Court’s docket by Mr. Hamill or the Secretary, without agency-level development of the record through the statutory appellate process. *See, e.g.*, 38 U.S.C. §§ 511(a), 7104, 7113. While preparing this brief, certain relevant documents have come to light that were not included in the record before the Veterans Court, including a May 2021 letter regarding Mr. Hamill’s supplemental claim. Appx169-171. We include these documents for the sake of completeness, but do not rely on them when addressing the correctness of the Veterans Court’s decision.

court “compel the Secretary to adjudicate his claim for a character of service determination . . . on the merits.” Appx91.

On February 21, 2023, VA notified Mr. Hamill that it had issued a new, appealable decision declining to reopen his character of discharge. Appx76-78. As Mr. Hamill later conceded, the VA’s February 2023 decision “satisfied” the individual relief requested in the petition. Appx117.

On March 6, 2023, almost two weeks after the VA issued the additional, appealable decision regarding character of discharge, Mr. Hamill filed a request for a class action. Appx108, Appx136. Mr. Hamill had previously alerted the Court that he intended to file a motion for class action, requesting an extension of time to file such a motion. Appx17. Mr. Hamill contended that the case was not moot and argued that the request for class relief created exceptions to mootness. *See* Appx117.

**2. The Veterans Court Dismisses Mr. Hamill’s Mandamus Petition, Finding the VA Issued an Appealable Character-of-Discharge Decision in 2021**

The Veterans Court dismissed the mandamus petition and denied class certification. Appx2-10. The Veterans Court held that there was no case or controversy because the VA had already issued an appealable decision regarding character of discharge in May 2021, before Mr. Hamill filed his petition.<sup>7</sup> Appx4-8.

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<sup>7</sup> Although phrased as mootness, the Veterans Court’s holding that the May 2021 letter “mooted Mr. Hamill’s petition before he filed it” actually relates to standing. *See* Appx5, *see also* Appx5-8; *see also* *U.S. Parole Comm’n v. Geraghty*, 445 U.S.

*Continued on next page.*

As the Veterans Court explained, the May 2021 decision sufficiently notified Mr. Hamill and his counsel that VA was not revising his character of discharge; in other words, VA implicitly denied his request regarding character of discharge. Appx6-7. The VA's consideration of chapter 17 benefits only (and not veterans benefits generally) showed that Mr. Hamill's prior adverse character of discharge "remained in place." Appx6-7. The VA also cited the 2014 character-of-discharge decision as "evidence it had considered," Appx7, and that decision prevented "VA from granting benefits beyond chapter 17." Appx6-7. Because the May 2021 decision "hinged on" the adverse character of discharge, the Veterans Court found that "it gave Mr. Hamill sufficient notice that VA had declined to revisit" character of discharge, and constituted an appealable decision on the matter. Appx7.

The Veterans Court rejected Mr. Hamill's argument that the AMA's amendments to 38 U.S.C. § 5104(b) superseded the implicit denial rule, holding that Mr. Hamill did not show "that Congress intended through the AMA to sweep away this longstanding aspect of veterans law." Appx7-8. The Court explained that Mr. Hamill's theory could also be leveled against the pre-AMA version of section 5104, which "coexisted" with the implicit denial rule. Appx7-8.

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388, 397 (1980) (standing relates to the case or controversy requirement "at the commencement of the litigation").

The Veterans Court further acknowledged Mr. Hamill’s argument that the request for class action established exceptions to mootness, Appx4, but determined that Mr. Hamill’s petition “was mooted *before* he sought aggregate litigation.” Appx9 (emphasis added). The court also held that the class-action mechanism would not be superior to a precedential decision, given the need for “individualized review of each claimant’s records” to assess whether a claim was implicitly denied in each potential class member’s case. Appx9-10.

Finally, the Veterans Court acknowledged that the VA had “updated the relevant portion of the *Veterans Affairs Adjudication Procedures Manual, M21-1*,” to require the VA to “issue explicit new and material evidence determinations” when deciding whether to reopen a prior character-of-discharge decision. Appx10; *see also* Add6-7.<sup>8</sup> Although not dispositive given the lack of any case or controversy, the Veterans Court remarked that the policy change showed that “the Secretary is doing what Mr. Hamill wanted done.” Appx10.

Judge Jaquith dissented, stating that (1) the May 2021 decision did not implicitly decide character of discharge, and (2) “the picking off exception” to mootness applied in this case. *See, e.g.*, Appx11-18. Even though the request for class action was not filed until March 6, 2023—after the individual petition was undisputedly moot—Judge Jaquith reasoned that Mr. Hamill’s “January 2023 motion

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<sup>8</sup> Citations to Add\_\_ refer to the addendum appended to this brief.

for an extension of time” to file the request for class action “made clear” he was planning to seek class-wide relief. Appx18.

### SUMMARY OF ARGUMENT

The Veterans Court correctly dismissed Mr. Hamill’s mandamus petition seeking an appealable decision regarding his May 2021 implicit request to reopen character of discharge. There was no case or controversy when Mr. Hamill filed the petition—and thus, he lacked standing—because the VA had already issued an appealable decision on that claim. The Veterans Court found that the May 2021 decision provided sufficient notice to Mr. Hamill and his counsel that the VA had denied relief regarding character of discharge. Among other indicators, the May 2021 decision addressed healthcare benefits available to certain former service members who *do not* qualify as veterans due to an unfavorable character of discharge, and cited the prior character-of-discharge decision from 2014.

Mr. Hamill’s challenges to this decision are unpersuasive. As an initial matter, the Court does not possess jurisdiction to entertain Mr. Hamill’s challenges to the Veterans Court’s factual findings regarding the scope of the May 2021 decision. Thus, the appeal should be dismissed-in-part. Further, there is no merit to the only legal argument presented—Mr. Hamill’s claim that the AMA’s amendments to 38 U.S.C. § 5104(b) foreclosed or fundamentally altered this Court’s long-standing implicit denial rule. As the Veterans Court explained, Mr. Hamill’s view of a conflict between section 5104(b) and the implicit denial rule would apply equally to the pre-AMA

version of section 5104(b), which has long coexisted with the implicit denial rule. If accepted, moreover, Mr. Hamill's argument would route claimants *away* from the statutory appellate process and toward extraordinary mandamus relief. Nothing in the AMA requires such a result.

In any event, there are numerous additional and independent reasons to affirm the Veterans Court's dismissal of Mr. Hamill's mandamus petition. There is no dispute that the VA issued an additional, appealable character-of-discharge determination in February 2023, which mooted any remaining controversy raised in Mr. Hamill's individual petition. Mr. Hamill argues that his subsequent request for class certification keeps the case alive, but he has not shown that he had standing to pursue the class claims at the time he filed for class certification or (if he had standing) that an exception to mootness applies.

Finally, a writ of mandamus is extraordinary relief and must be dismissed when there are alternative avenues for appeal. Since receiving the February 2023 decision, Mr. Hamill has pursued administrative remedies regarding character of discharge, confirming that the case presents alternative avenues of appeal. Likewise, the VA's liberalizing amendments to its regulations and adjudication manual demonstrate alternative avenues are available for any putative class members.

## ARGUMENT

### I. Standard of Review

“This [C]ourt’s jurisdiction to review decisions by the Veterans Court is limited.” *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). The Court may review a Veterans Court decision “with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation” (or any interpretation thereof) “that was relied on by the Court in making the decision.” 38 U.S.C. § 7292(a). This Court reviews legal issues, “including whether the Veterans Court properly declined to assert jurisdiction, without deference.” *Andre v. Principi*, 301 F.3d 1354, 1358 (Fed. Cir. 2002) (citing *Maggitt v. West*, 202 F.3d 1370, 1374 (Fed. Cir. 2000)).

Absent a constitutional issue, the Court may not review the Veterans Court’s factual findings or its application of law to facts. 38 U.S.C. § 7292(d)(2); *Singleton v. Shinseki*, 659 F.3d 1332, 1334 (Fed. Cir. 2011). For appeals involving petitions for a writ of mandamus, this Court possesses jurisdiction to “review the [Veterans Court’s] decision whether to grant a mandamus petition that raises a non-frivolous legal question,” but cannot “review the factual merits of the veteran’s claim.” *Beasley v. Shinseki*, 709 F.3d 1154, 1158 (Fed. Cir. 2013).

### II. The Veterans Court Correctly Dismissed Mr. Hamill’s Mandamus Petition Because There Was No Article III Case or Controversy at the Time of Filing

The Veterans Court found that when Mr. Hamill’s petition was filed in December 2022, the VA had already issued an appealable decision in 2021 sufficiently

notifying Mr. Hamill that it was declining his request regarding character of discharge, and thus implicitly denying the claim. Appx4-8. Thus, there was no live case or controversy at the time the petition was filed. Appx4-8.

Mr. Hamill challenges the Veterans Court's application of the implicit denial rule in this case, but his arguments involve the application of fact to law and, thus, lie outside of this Court's jurisdiction. The only question of law presented by Mr. Hamill is whether the AMA's amendments to section 5104(b) supersede the implicit denial rule. The Veterans Court correctly rejected Mr. Hamill's view of a conflict between section 5104(b) and the implicit denial rule, explaining that "the same allegation could be leveled" based on the prior version of section 5104, "yet the two coexisted." Appx7. Each of these points is addressed in further detail below.

**A. An Article III Case or Controversy Is a Threshold Jurisdictional Requirement**

The Veterans Court determined that Mr. Hamill's petition presented no case or controversy because—at the time it was filed—the VA had already issued the requested relief. Appx7-8. "Article III of the Constitution confines the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 378 (2024). "[A]lthough not formally bound by the 'case or controversy' requirement of Article III of the United States Constitution," the Veterans Court "does not decide cases that do not present an actual case or controversy." *Richard v. West*, 161 F.3d 719, 721 (Fed. Cir. 1998) (citation omitted); *see*

also Appx4 (citing *Cardona v. Shinseki*, 26 Vet. App. 472, 474 (2014) (per curiam order); *Mokal v. Derwinski*, 1 Vet. App. 12, 13 (1990); *Bond v. Derwinski*, 2 Vet. App. 376, 377 (1992) (per curiam)).

The doctrine of standing relates to the case or controversy requirement “at the commencement of the litigation,” and mootness addresses whether the requisite controversy continues throughout the existence of the case. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quotation marks omitted). To establish standing at the outset of the case, a plaintiff must show: (i) injury in fact that is (ii) caused by the defendant, and (iii) redressable by the requested judicial relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). “[T]he core component of standing is an essential and unchanging part of the case or controversy requirement of Article III.” *Id.* at 560 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

“The party invoking federal jurisdiction bears the burden” to establish standing, “with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561.

**B. Mr. Hamill Lacked Standing to Compel an Appealable Decision Regarding Character of Discharge, which Was Already Implicitly Decided in May 2021**

The Veterans Court held that Mr. Hamill’s mandamus petition was already moot when it was filed in December 2022 because the May 2021 decision sufficiently notified Mr. Hamill that it was denying his request regarding character of discharge. Appx6-7. Although the Veterans Court phrased the issue as whether “the May 2021

letter *mooted* Mr. Hamill’s petition before he filed it,” Appx5, the presence of a case or controversy upon initiation of a case is a matter of *standing*, not mootness. *Geraghty*, 445 U.S. at 397. Regardless, given the facts found, the Veterans Court correctly determined that there was no case or controversy when Mr. Hamill filed the mandamus petition in December 2022. *See* Appx4-8.

**1. The Implicit Denial Rule Applies When a Decision Provides Reasonable Notice that a Claim or Issue Was Denied**

“[T]he implicit denial rule applies where a regional office’s decision provides a veteran with reasonable notice that his claim for benefits was denied.” *Adams*, 568 F.3d at 964. The implicit denial rule is, “at bottom, a notice provision,” and the core inquiry is “whether it would be clear to a reasonable person that [VA’s] action that expressly refers to one claim is intended to dispose of others as well.” *Id.* at 964-65. The key question is “whether sufficient notice has been provided so that a veteran would know, or reasonably can be expected to understand, that he will not be awarded benefits for the disability asserted in his pending claim[.]” *Jones v. Shinseki*, 619 F.3d 1368, 1373 (Fed. Cir. 2010) (citing *Adams*, 568 F.3d at 965; *Williams v. Peake*, 521 F.3d 1348, 1351 (Fed. Cir. 2008)). In such cases, the claimant “can decide for himself whether to accept the decision or seek redress elsewhere.” *Id.* (citing *Adams*, 568 F.3d at 965; *Williams*, 521 F.3d at 1351).

In assessing implicit denial, the question is ultimately a factual one—considering multiple “factor[s] bearing on whether an adjudication” occurred. *See*

*Adams*, 568 F.3d at 963-964. Relevant factors include: (1) “the relatedness of the claims,” (2) the language of the notice provided, (3) the timing of the claims, and (4) whether the claimant is represented. *Cogburn v. Shinseki*, 24 Vet. App. 205, 212-213 (2010) (citing, e.g., *Deshotel v. Nicholson*, 457 F.3d 1258, 1261–62 (Fed. Cir. 2006); *Adams*, 568 F.3d at 963-964).

Similar factors inform VA’s interpretation of the scope of a formal claim for benefits. *See Standard Claims and Appeals Forms*, 79 Fed. Reg. 57,660, 57,673 (Dep’t of VA, Sept. 25, 2014). The VA’s analysis of the “permissible scope of claims that are reasonably raised by the evidence” overlaps with the implicit denial rule. *Id.* (citing e.g., *Adams*, 568 F.3d at 963). Thus, just as claims can be implicitly raised, they can be implicitly denied. *See id.*

**2. The Veterans Court Found that the May 2021 Decision Provided Sufficient Notice that Mr. Hamill’s Request Regarding Character of Discharge Was Denied**

Applying the implicit denial rule to the facts of Mr. Hamill’s case, the Veterans Court found that there was “only one way to read VA’s May 2021 decision.” Appx7. Because the May 2021 decision’s assessment of chapter 17 benefits “hinged on” the prior determination regarding character of discharge, “it gave Mr. Hamill sufficient notice that VA had declined to revisit the [character of discharge] issue.” Appx7.

The Veterans Court detailed the VA’s decisions regarding character of discharge. In May 2014, “VA explicitly adjudicated” Mr. Hamill’s character of discharge, “and he didn’t appeal.” Appx7 (citing Appx36-38). “Three years later, Mr.

Hamill tried to reopen the 2014 decision,” and the “VA explicitly found that Mr. Hamill hadn’t submitted new or material evidence” to reopen character of discharge “and it included a notice of appellate rights.” Appx7 (citing Appx45-48 (July 2017 decision)). “Mr. Hamill didn’t appeal” the July 2017 decision. Appx8.

In 2021, Mr. Hamill “filed a new application for benefits and another claim.”<sup>9</sup> Appx8. Although these claims did not mention character of discharge, Appx49-55, by requesting *veterans* benefits that would be unavailable with an adverse character of discharge, they implicitly requested to reopen the issue. *See* 38 U.S.C. § 101(2) (defining “veteran”). “Two months later, VA adjudicated both filings,” and included “another notice of appeal rights.” Appx7 (citing Appx56-65). The VA “granted chapter 17 benefits for PTSD, denied the remaining claims, and implicitly adjudicated the [character of discharge] question.” Appx7 (citing Appx56-65).

The Veterans Court applied the implicit denial factors to the facts of this case and found that they “all weigh[ed] one way.” Appx6. The Veterans Court found that the “VA denied Mr. Hamill’s new benefits application because of his adverse [character of discharge], which remained in place and which VA cited as evidence it had considered.” Appx6-7. As the court explained, the language of the May 2021 decision “more than alludes to the relationship between the claims and petitioner’s

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<sup>9</sup> Mr. Hamill’s claims were dated in March of 2021, but filed in May. *See* Appx49-55.

[other-than-honorable] discharge.” Appx6. The decision “specifically turns on the fact that an adverse [character of discharge] bars VA from granting benefits beyond chapter 17.” Appx6. “The one directly controls the other.” Appx6. “Had VA reached a different conclusion” regarding character of discharge, it would have been required to “address his disability claims on the merits rather than granting only limited chapter 17 benefits and denying his new disability claims outright.” Appx7.<sup>10</sup>

Accordingly, the Veterans Court found that “VA implicitly denied [Mr. Hamill’s] request to reopen his prior [character-of-discharge] determination and said enough in its May 2021 decision to notify Mr. Hamill how it had decided the issue.” Appx6. That factual finding is unreviewable by this Court under 38 U.S.C. § 7292(d)(2).

**C. The Court Lacks Jurisdiction to Entertain Mr. Hamill’s Challenge of the Veterans Court’s Application of Law to Fact**

Mr. Hamill argues that the Veterans Court wrongly extended the implicit denial rule to character of discharge. Hamill Br. at 31-32. That is inaccurate. The implicit denial rule is a factual inquiry into notice of the VA’s decision, and applies regardless of the subject-matter or the issue or claim. *See Adams*, 568 F.3d at 965. At bottom,

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<sup>10</sup> The Veterans Court also considered that “Mr. Hamill was represented by his current counsel when he filed the applications that prompted VA’s May 2021 letter”—supporting the conclusion that “that Mr. Hamill had a reasonable understanding of the implications of VA’s actions.” Appx7 (citing *Cogburn*, 24 Vet. App. at 213).

Mr. Hamill’s arguments challenge the Veterans Court’s factual analysis—but this Court lacks jurisdiction to entertain such application of law to fact. 38 U.S.C. § 7292(d)(2). To the extent the Court reaches them, moreover, Mr. Hamill’s factual arguments lack merit.

**1. Mr. Hamill Challenges the Veterans Court’s Application of Law to Fact**

The Court lacks jurisdiction to entertain Mr. Hamill’s specific arguments regarding the application of the implicit denial doctrine to the facts of this case. “[W]ith the exception of constitutional issues, [this Court] cannot review decisions of the Veterans Court with respect to factual issues or the application of law to fact.” *Adams*, 568 F.3d at 961 (citing 38 U.S.C. § 7292(d)(2)). In light of this jurisdictional limitation, this Court has previously explained that its review of implicit denial is limited to “whether the Veterans Court applied the correct *legal* standard.” *Id.* (emphasis added).

Despite this limitation on the Court’s jurisdiction, Mr. Hamill challenges the Veterans Court’s factual finding that the VA’s May 2021 decision “gave Mr. Hamill sufficient notice that VA had declined to revisit the [character-of-discharge] issue.” *See Appx7*.<sup>11</sup> Specifically, Mr. Hamill argues a “reasonable person” could “not infer”

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<sup>11</sup> The Veterans Court may not conduct de novo review of the VA’s or board’s findings of fact. 38 U.S.C. § 7261(c). In this case, the Veterans Court made factual findings regarding implicit denial in the context of assessing its own jurisdiction to entertain a petition for mandamus.

whether the May 2021 decision declined to reopen the character-of-discharge decision. Hamill Br. at 27. He contends that “the service connection and [character-of-discharge] determinations are not intertwined, and a decision on one does not provide an implied decision on the other.” *See id.* at 31. Mr. Hamill also appears to argue that certain provisions of the M21-1 manual would impact a reasonable claimant’s understanding of the scope of a VA decision. *Id.* at 31.

Because each of these arguments presents a factual dispute that the Court does not possess jurisdiction to entertain, the Court should dismiss-in-part Mr. Hamill’s appeal. *See* 38 U.S.C. § 7292(d).

**2. Regardless, Mr. Hamill’s Factual Arguments Lack Merit**

Regardless, there is no merit to Mr. Hamill’s disagreement with the Veterans Court’s determination of the facts. For example, Mr. Hamill argues that “the VA’s own manual directs adjudicators *not* to decide the two issues in the same decisional document, and instead to provide a COD determination separately from a service-connection decision.” Hamill Br. at 31 (citing M21-1 Chapter X.iv.1.A.1.n); *see also* Add17-18. He appears to refer to a portion of the current manual governing decision notices *if* the character-of-discharge decision “precludes eligibility to all benefits other than medical treatment under 38 U.S.C. Chapter 17.” M21-1 Chapter X.iv.1.A.1.n. However, to the extent Mr. Hamill relies on the M21-1 manual to inform the scope of

the *May 2021* decision, it is the *May 2021* manual that would bear on that question. *See* Add25-30.

The May 2021 version of the manual does not support Mr. Hamill’s argument. Instead, it states that *if* the former service member’s service “is dishonorable for VA purposes, but does not adversely affect” eligibility for health care benefits under 38 U.S.C. Chapter 17, *then* the VA should (among other things) “refer the case” for consideration of chapter 17 treatment benefits for specified conditions. Add30. By contrast, if the service is honorable for VA purposes, the manual instructs preparation of a rating decision addressing service connection in general—not limited to service connection for treatment purposes under Chapter 17. Add29-30.

Thus, consideration of the M21-1 manual supports the Veterans Court’s finding that if VA had “reached a different conclusion” on character of discharge, it would have had to “address his disability claims on the merits rather than granting only limited chapter 17 benefits and denying his new disability claims outright.” Appx7. Consistent with the instructions in the M21-1 manual, the Veterans Court found that May 2021 decision—granting chapter 17 healthcare benefits only—“hinged on” the adverse character of discharge and “gave Mr. Hamill sufficient notice that VA had declined to revisit the [character-of-discharge] issue.” Appx7.<sup>12</sup>

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<sup>12</sup> Even the current version reflects that the VA does not reach the question of eligibility for healthcare benefits under Chapter 17 absent a negative character-of-discharge determination. In such cases, the current version of the M21-1 manual

*Continued on next page.*

In any event, focusing on the M21-1 manual is not the proper approach under *Adams*, which considers a reasonable claimant’s understanding based on the language provided in the decision and the relatedness of the claims. 568 F.3d at 963. As the Veterans Court explained, the May 2021 decision’s assessment of chapter 17 benefits “specifically turns on the fact that an adverse [character of discharge] bars VA from granting benefits beyond chapter 17.” Appx6. The decision thus provided notice to Mr. Hamill and his counsel that the VA had denied his requested relief regarding character of discharge. Appx6-7.

Mr. Hamill further argues that even if he knew that the VA had declined to grant other-than-dishonorable character of discharge, he could not discern the basis for that decision. Hamill Br. at 31 (citations omitted). Mr. Hamill contends he could not know whether the VA declined to reopen the claim *or* whether the VA had reopened the claim and denied it on the merits. *Id.* However, this argument does not contradict the Veterans Court’s finding that Mr. Hamill had notice of the VA’s denial of relief regarding character of discharge. Appx6-7. Mr. Hamill could have appealed or sought further review of that decision. *See* 38 U.S.C § 5104C. Given the fact of that May 2021 determination—and Mr. Hamill’s “sufficient notice” of it, Appx7—

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requires the VA to notify the former service member of the unfavorable character-of-discharge decision and state that “a decision will be made on whether the claimed conditions are service connected . . . for healthcare purposes” under Chapter 17. M21-1 Chapter X.iv.1.A.1.n.

there was no live controversy over the petition's demand for the VA to issue an appealable decision regarding character of discharge.

Finally, Mr. Hamill contends that the VA engaged in post hoc reasoning by addressing implicit denial after previously failing to mention it in communications dated July 2022 and March 2023. Hamill Br. at 33 (citing Appx67-68, Appx166-171). Mr. Hamill argues that “[c]ourts may not accept appellate counsel’s post hoc rationalization for agency action.” Hamill Br. at 33 (quoting *In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))). Mr. Hamill further states that “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself,” rather than that of the agency’s lawyers making arguments in court. *Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983)).

There is no concern of a post hoc rationalization in this case. The question is not whether the May 2021 character-of-discharge decision should be “upheld.” *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 49. Instead, the question is whether that decision occurred. The issuance of the May 2021 decision is an adjudicative fact. *See* Appx56-65. The Veterans Court’s determinations regarding the scope of that decision and Mr. Hamill’s notice of it involve factual findings regarding the scope of that decision—not any post hoc rationalization.

Also unpersuasive is Mr. Hamill’s reliance on post-2021 communications from the VA to dispute the finding of implicit denial. Hamill Br. at 33. These

communications were issued long after the May 2021 decision—and post-date the one-year deadline to seek further review of that decision. *See* Appx67-68, Appx76-78 (February 2023 decision, communicated to the Court on March 6, Appx102-106). Thus, the communications are not relevant to understanding the scope of the May 2021 decision at the time that decision was issued. *See Adams*, 568 F.3d at 964.

In sum, even if the Court had jurisdiction to address Mr. Hamill’s factual arguments—and it does not—the arguments provide no basis to overturn the Veterans Court’s factual findings regarding implicit denial.

**D. The Appeals Modernization Act Does Not Supersede the Longstanding Precedent Regarding Implicit Denial**

Mr. Hamill argues that the Veterans Court erred in applying the implicit denial rule to his case, claiming the rule has been superseded by the AMA. Hamill Br. at 14-26. However, the Veterans Court correctly held that Mr. Hamill failed to show that the AMA “intended . . . to sweep away” the implicit denial rule—a “longstanding aspect of veterans law.” Appx7-8.

Mr. Hamill contends that the Veterans Court’s determination is (1) “contrary to the Appeals Modernization Act,” Hamill Br. at 14, (2) contrary to congressional intent, *id.* at 16-18, 19-20, and (3) violates due process, *id.* at 21-22. All three arguments are incorrect.

## 1. Background Regarding the Appeals Modernization Act

In 2017, Congress passed the AMA to reform the VA administrative appeals process. The prior (legacy) system involved a “one-size-fits-all-claims pathway” that was “long and complicated” and an open-record system that required “continuous evidence gathering and readjudication of the same matters,” resulting in churn, delay, and backlog. *Military-Veterans Advocacy v. Secretary of Veterans Affairs (MVA)*, 7 F.4th 1110, 1118 (Fed. Cir. 2021).

In its stead, the AMA created three different appellate lanes, with different features based on the claimant’s circumstance and priorities. *Id.* at 1119; *see* 38 U.S.C. § 5104C. Instead of filtering all appeals through the board, the AMA created a specific appellate lane—higher-level review—for making straight-forward corrections. 38 U.S.C. § 5104B. A claimant may also file a supplemental claim, or a notice of disagreement to pursue an appeal with the Board of Veterans’ Appeals (board). 38 U.S.C. §§ 5104C(a)(C) (citing 38 U.S.C. § 7105), 5108. If dissatisfied with the agency’s response after a board appeal, a claimant may seek judicial review before the Veterans Court and, ultimately, this Court. 38 U.S.C. § 7261; 7292; 38 C.F.R. § 3.2500(a).

Congress also revised the timeframes for claimant submissions and VA assistance, but allowed claimants to retain an effective date in accord with their original date of claim, so long as they continuously pursued the claim through one of the appellate lanes (or through judicial review). *MVA*, 7 F.4th at 1119-1120; *see* 38

U.S.C. §§ 5103A(e), 5108, 5110(a)(2), 7113. Moreover, “[t]o help veterans better understand VA’s decision on their claims,” the AMA amended 38 U.S.C. § 5104(b) to require VA to issue more “detailed decision notification letters.” H.R. Rep. 115-135, at 3 (2017); *see* Pub. L. 115-55, § 2(e), 131 Stat. at 1106.

In the legacy system, notice of the VA’s denial of a claim was required to contain “(1) a statement of the reasons for the decision, and (2) a summary of the evidence considered by the Secretary.” 38 U.S.C. § 5104(b) (2016). Under the AMA, VA requires additional specified areas of notice, such as identification of favorable findings and identification of unmet elements resulting in any denial:

- (1) Identification of the issues adjudicated.
- (2) A summary of the evidence considered by the Secretary.
- (3) A summary of the applicable laws and regulations.
- (4) Identification of findings favorable to the claimant.
- (5) In the case of a denial, identification of elements not satisfied leading to the denial.
- (6) An explanation of how to obtain or access evidence used in making the decision.
- (7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.

38 U.S.C. § 5104(b) (2024).

**2. Mr. Hamill’s Position Would Undermine—Not Promote—the Reformed System of Appeals Enacted by the Appeals Modernization Act**

Contrary to Mr. Hamill’s argument (Hamill Br. at 15-16), nothing in the AMA supersedes the longstanding implicit denial rule. *See, e.g., Deshotel*, 457 F.3d 1258; *Adams*, 568 F.3d at 964; *Jones*, 619 F.3d 1368. Instead, by recognizing the presence of

an appealable decision upon reasonable notification, *see Adams*, 568 F.3d at 963-964, the implicit denial rule facilitates the appeal process reformed by the AMA. By contrast, Mr. Hamill’s position would undermine—not promote—the AMA by routing claimants away from the appellate system carefully crafted by Congress and toward complex and extraordinary mandamus relief.

Mr. Hamill argues that the Veterans Court’s decision is contrary to the AMA’s amendment of 38 U.S.C. § 5104(b). *See, e.g.*, Hamill Br. at 14-25. Specifically, Mr. Hamill contends that even if the claimant “know[s] that an adjudication has occurred,” the Court should find that the claim remains pending (i.e., without any appealable decision) unless “a reasonable claimant can infer *each* of the required notice elements of Section 5104.”<sup>13</sup> *Id.* at 25 (emphasis added).

If accepted, however, Mr. Hamill’s argument would adversely affect claimants. His argument would treat decisions that allegedly fail to comply with one of the requirements of section 5104(b) as *no appealable decision at all*—even when it is apparent to a reasonable claimant that such a decision was, in fact, made. *See Adams*, 568 F.3d at 963-964. This result would prevent a claimant from appealing or seeking further review to resolve any alleged noncompliance with section 5104(b).

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<sup>13</sup> Absent a showing that there was no appealable decision regarding character of discharge, Mr. Hamill cannot establish any case or controversy over his demand for the VA to issue an appealable decision. *See Appx91, Appx93.*

That result is not required by the AMA. Instead, once VA issues a decision, a claimant may challenge any alleged errors—including alleged noncompliance with section 5104(b)—by (among other things) pursuing higher level review or filing an appeal with the board. *See* 38 U.S.C. §§ 5104B, 5104C; 38 C.F.R. 3.2500(a). In one case, for example, the Veterans Court remanded for the board to “adequately address” the “argument that VA failed to provide proper notice under section 5104.” *Cowan v. McDonough*, 35 Vet. App. 232, 234 (2022), *appeal dismissed*, No. 2022-2227, 2024 WL 1506616 (Fed. Cir. Apr. 8, 2024). Allegations that inadequate notice prevented a timely appeal may also be raised in the appellate process. *See, e.g., Knowles v. Shinseki*, 571 F.3d 1167, 1170 (Fed. Cir. 2009) (citing, *e.g.*, 38 C.F.R. § 3.109(b)).<sup>14</sup>

This Court’s past cases reinforce the importance of routing claims through the appellate system. In *Deshotel*, for example, the Court held that the VA implicitly denied compensation for a psychiatric issue that was not explicitly mentioned in the VA’s decision. *Deshotel*, 457 F.3d at 1261-1262. As the Court explained, the proper approach was not to treat that issue as “pending and unadjudicated,” but “to file a timely direct appeal” arguing that the issue was not properly addressed. *Id.* at 1262.

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<sup>14</sup> This Court has also allowed further proceedings on a late appeal from a 1985 decision that failed to provide notice of appeal rights. *AG v. Peake*, 536 F.3d 1306, 1308 (Fed. Cir. 2008). However, neither *Knowles* nor *AG* supports Mr. Hamill’s claim that *a decision that contains appeal rights* is nevertheless not appealable. *See* Appx91, Appx93 (seeking to compel the VA to issue an appealable decision regarding character of discharge).

In *Andrews v. Nicholson*, similarly, the Court explained that when the VA issues a decision that fails to “construe the veteran’s pleadings to raise a claim, such claim is not considered unadjudicated,” but instead is reviewable through statutory processes. 421 F.3d 1278, 1284 (Fed. Cir. 2005) (holding the allegedly unadjudicated claim was not pending, but was subject to challenge through a CUE motion).

At the board stage, this Court has similarly recognized that the board’s implicit or explicit decision “not to deal with an issue” is itself “a decision by the Board” that is properly appealed to the Veterans Court. *Bean v. McDonough*, 66 F.4th 979, 988–90 (Fed. Cir. 2023) (quoting *Travelstead v. Derwinski*, 1 Vet. App. 344, 346 (1991)) (brackets omitted). Thus, the implicit denial rule facilitates review through the appellate process, rather than through extraordinary vehicles like mandamus relief. *See Adams*, 568 F.3d at 963-964.

By contrast, adopting Mr. Hamill’s argument that *there is no decision to appeal* would undermine the system of administrative review fashioned by the AMA. Mr. Hamill argues that there is no implicit denial unless “a reasonable claimant can infer each of the required notice elements of Section 5104.” Hamill Br. at 25. He contends that the May 2021 decision did not include all of the requirements set forth in section 5104(b), *see id.* at 25-27, and thus no appealable decision was issued. For that reason, Mr. Hamill claims that a writ of mandamus is required to compel the VA to issue such a decision, *see Appx91, Appx93*, and seeks to compel “a VA decision that will allow

him to avail himself of the regular appeals process,” Appx96 (quoting *Harris*, 33 Vet. App. at 274).

Far from supporting the reformed system for appeals, Mr. Hamill’s argument would route claimants away from the statutory process for appellate review in favor of mandamus relief—a “drastic and extraordinary” remedy “reserved for really extraordinary causes.” *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–260 (1947)). The AMA was enacted “to reform the administrative appeals system” of the VA. *MVA*, 7 F.4th at 1117 (citing Pub. L. No. 115–55, 131 Stat. 1105 (2017)). Mr. Hamill identifies no provision of the AMA indicating that Congress wished to turn claimants *away* from the appeal system and into the complex world of mandamus relief.

Writing in support of Mr. Hamill’s claim for relief, amicus curiae the National Law School Veterans Clinic Consortium (VCC) argues that “pro se accessibility has long been the adjudicatory system’s polestar.” VCC Br. at 2. Yet, adopting Mr. Hamill’s position would not assist pro se accessibility. To the contrary, mandamus relief is complex and limited to “extraordinary” cases. *See Cheney*, 542 U.S. at 380. Routing more claimants towards such relief would undermine—not enhance—accessibility. By deeming there to be no appealable decision at all, moreover, Mr. Hamill’s position would prevent the claimant from seeking quick correction using higher-level review and lead to indefinite waiting—contrary to the purposes of the

AMA. *See MVA*, 7 F.4th at 1118-1119 (discussing lengthy delays associated with the legacy system).

Mr. Hamill's argument is also at odds with the AMA's reporting requirements and provisions incentivizing continuous pursuit. By imposing reporting requirements, the AMA sought to increase accountability and tracking of claims. Pub. L. 115-55, § 3, 131 Stat. 1116-1119. Meanwhile, continuous pursuit reflects the principle that a claimant can retain the original effective date by continuously pursuing one of the appellate lanes (or judicial review) for the claim—thus encouraging resort to the appellate process. 38 U.S.C. § 5110(a)(2). Mr. Hamill's position that alleged noncompliance with section 5104(b) results in *no appealable decision* would undermine both provisions. Rather than encouraging resort to the appellate system, his approach would have claimants filing for extraordinary relief, rather than continuously pursuing their claim in the appeal system, which jeopardizes their effective date under section 5110(a)(2). It also would create an unknown number of pending claims that cannot be identified absent mandamus relief—detracting from the AMA's accountability objectives.

### **3. Mr. Hamill's Reliance on Congressional Intent Is Unpersuasive**

Mr. Hamill and amici discuss at length the purpose of the amendments to 38 U.S.C. § 5104(b), and the importance of notice to the reformed appeal process of the AMA. *See* Hamill Br. at 16-18, 19-20; 22-25; VCC Br. at 2-12. They further

contend that “[t]he continued use of the implicit denial doctrine . . . does not align with the Congressional intent in enacting the AMA[.]” Hamill Br. at 24; *see also* Veterans of Foreign Wars of the United States (VFW) Br. at 9-14 (arguing implicit denial “def[ies] congressional intent”) (capitalization altered).

But none of these arguments show that the AMA superseded the longstanding precedent regarding implicit denial. We agree that notice generally, and compliance with section 5104(b) specifically, is important. But, so long as it “would be clear to a reasonable person” that the VA has disposed of a claim, *Adams*, 568 F.3d at 964, claimants may pursue any of the AMA’s review options to challenge a decision’s compliance with the requirements of section 5104(b). 38 U.S.C. §§ 5104B, 5104C, 7105; 38 C.F.R. § 3.2500(a). The importance of section 5104(b) does not support Mr. Hamill’s proposal to preclude resort to the AMA’s review options and route claimants towards mandamus relief.

Moreover, if Congress had intended to take the drastic step of overruling multiple, well-established precedents of this Court, one would expect at least some indication that it wished to do so. *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 848-49 (Fed. Cir. 2008). “Congress is presumed to legislate against the backdrop of existing law,” and “is not presumed to overrule existing law sub silentio.” *Id.* (internal quotation marks and citations omitted). Mr. Hamill has failed to show that Congress intended to overrule the longstanding precedents of this Court regarding implicit denial. *See, e.g., Adams*, 568 F.3d at 960-963 (citing cases).

Mr. Hamill argues that the AMA’s “fundamental[] change” in the appellate process necessitates a change in the implicit denial doctrine. Hamill Br. at 18. This is also incorrect. The precedent governing implicit denial was never based on the requirements of statutory notice. *See, e.g.*, 38 U.S.C. § 5104(b) (2009); Appx7. Instead, it focuses on whether “a reasonable veteran would have known that his claim” was denied, *Adams*, 568 F.3d at 963. Because the doctrine was never about section 5104(b), the doctrine is not affected by the AMA’s change to section 5104(b).

Mr. Hamill argues that the “under the AMA, veterans need to know not just *that* the VA decided their claim, but *on what basis*.” Hamill Br. at 22. But as the Veterans Court explained, “the same allegation could be leveled against the [implicit denial] doctrine and the pre-amendment version of section 5104, yet the two coexisted.” Appx7. Indeed, the pre-AMA version of section 5104(b) required “a statement of the reasons for the decision” and “a summary of the evidence considered” for any denial of benefits. 38 U.S.C. § 5104(b) (2016). Thus, as with the current version of the statute, the pre-AMA version of the statute required notice of the “basis” for any VA decision denying benefits. *See* Hamill Br. at 22. This longstanding notice requirement does not undermine the underpinnings of the precedent governing implicit denial. *See Adams*, 568 F.3d at 964; Appx7.

Thus, Mr. Hamill has not shown that alleged noncompliance with section 5104(b) means that no appealable decision was made.

**4. This Court Has Already Held the Implicit Denial Rule Comports with Constitutional Due Process, and the Appeals Modernization Act Does Not Change that Analysis**

Mr. Hamill and amici argue that the implicit denial rule “is incompatible with due process in the AMA regime.” Hamill Br. at 21-22 (capitalization altered); VFW Br. at 3-8. But the Court has previously rejected the claim that the implicit denial rule violates due process, *Adams*, 568 F.3d at 964–65, and nothing in the AMA changes that constitutional analysis.

“The Due Process Clause of the Fifth Amendment guarantees that an individual will not be deprived of life, liberty, or property without due process of law.” *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009) (citing U.S. Const. amend. V). “Due process of law has been interpreted to include notice and a fair opportunity to be heard.” *Id.* (citing *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 313 (1950)).

In *Adams*, this Court rejected the argument that “application of the implicit denial rule” violated the claimant’s “due process right to receive fair notice of the regional office’s decision denying his claim for benefits.” *Adams*, 568 F.3d at 964–65. So long as a regional office’s decision put the claimant on notice that his claim was denied—and thus provided notice of, and an opportunity to respond to, that decision—the Court held there was no deprivation of due process. *Adams*, 568 F.3d at 964-965.

Mr. Hamill and amici have not fully developed the argument that that the AMA changes this analysis. *See* Hamill Br. at 21-22; VFW Br. at 3-8. As this Court reasoned in another context involving Federal employment, the scope of a property interest “is not defined by, or conditioned on, Congress’ choice of procedures for its deprivation.” *Stone v. F.D.I.C.*, 179 F.3d 1368, 1375 (Fed. Cir. 1999) (*Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)). By the same token, Congress is free to require provision of notice beyond the minimum constitutional requirements—as it has done in the requirements of section 5104, both before and after the AMA. *See* 38 U.S.C. § 5104(b). Congress’s enactment of enhanced notice in the AMA does not alter the constitutional analysis in *Adams*, holding that the implicit denial rule does not violate the due process clause. *Adams*, 568 F.3d at 964.

### **III. Even If the Petition Did Not Become Moot until February 2023, The Petition Should Be Dismissed**

Even setting aside the May 2021 decision, the Veterans Court found the parties effectively agreed that there was “no case or controversy for the Court to rule on with respect to” Mr. Hamill. Appx4. This is because the VA issued another appealable decision in February 2023, explicitly declining to reopen the prior character-of-discharge decision. Appx76-78. Thus, even assuming Mr. Hamill presented a live controversy when he filed the petition (and he did not), the February 2023 decision mooted the case.

Mr. Hamill contends that his case should not be dismissed based on his later request for class action, filed on March 6, 2023. Hamill Br. at 34. Specifically, Mr. Hamill believes that his case should proceed because of an exception to mootness, relying on the “picking off” exception and the “relation back” doctrine. App. Br. at 34-40. Both arguments are incorrect.

**A. Mr. Hamill’s Individual Petition Was Mooted No Later than February 2023, Before He Filed the Request for Class Action**

A case is moot when “the relief sought by a plaintiff is satisfied.” *Monk v. Shulkin*, 855 F.3d 1312, 1316 (Fed. Cir. 2017) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974)). In this case, there is no dispute that the VA’s issuance of an additional appealable decision in February 2023 provided the sole petitioner—Mr. Hamill—all the relief he requested in the petition. *See* Appx4. Thus, the petition is moot.

Mr. Hamill’s request for class relief does not change the analysis, because it was not filed until March 2023—*after* Mr. Hamill’s petition was undisputedly moot. Although a variety of mootness exceptions apply in the context of class actions, Mr. Hamill’s petition sought only individual relief—and was not filed on behalf of a proposed class. Appx91-101. The request for Mr. Hamill to represent the interests of a proposed class was not filed until after Mr. Hamill’s petition became moot. Appx108-109, Appx135-136.

Mr. Hamill contends that a mootness exception applies based on the request for class relief (Hamill Br. at 34-41), but this argument skips an important step of the

Article III analysis. By asserting an exception to mootness, Mr. Hamill assumes—without demonstrating—that Mr. Hamill ever had *standing* to pursue claims on behalf of any proposed class.<sup>15</sup>

“[S]tanding is not dispensed in gross.” *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (quoting *Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996)) A plaintiff—or in this case, the petitioner—“must demonstrate standing separately for each form of relief sought.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citations omitted). Under this standard, Mr. Hamill never “sought” class action status until after his individual claim was already moot. Instead, Mr. Hamill’s petition sought only individual relief at the outset of the case. Appx91-102. Mr. Hamill’s individual claim was mooted in February 2023—*before* any class complaint, class petition, or request for class action was filed. Mr. Hamill did not file the request for class action until March 6, 2023. Appx109, Appx135-136.

Citing Judge Jaquith’s dissent, Mr. Hamill argues that the “January 2023 motion for an extension of time made clear that he was seeking class certification and class action.” Hamill Br. at 37 (quoting Appx18). Yet, neither the dissent nor Mr. Hamill cites authority that such a stated *intent* to pursue class action status—without an

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<sup>15</sup> Although the Veterans Court also did not separately address standing, this Court has “a special obligation to ‘satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[.]’” *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

accompanying class action complaint, motion for class certification, or (in the Veterans Court) request for class action—converts an individual case into a proposed class action. There is no dispute that, by the time Mr. Hamill eventually filed the request for class relief, his individual claim was already moot. Appx4. Thus, there was never a point in the case when Mr. Hamill—as the sole proposed class representative—had standing to pursue relief on behalf of a proposed class.

Because the question of mootness may arise only *after* standing has been established, *Geraghty*, 445 U.S. at 397, there is no cause to assess whether any exception to mootness applies based on the March 6, 2023 request for class action.

**B. Even if Mr. Hamill at Some Point Had Standing to Represent the Proposed Class, The Class Request Is Moot**

Even if Mr. Hamill had standing to represent the interests of the class at some point in the case, no exception to mootness applies. “The issue of mootness in the context of class actions has a long history.” *Monk v. Shulkin*, 855 F.3d 1312, 1316 (Fed. Cir. 2017). “In particular, significant litigation has focused on whether a class action suit can be maintained by a class representative whose own substantive claim has been satisfied.” *Id.* (citing, *e.g.*, *Geraghty*, 445 U.S. at 404; *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1974)).

On the one hand, a *certified* class “acquire[s] a legal status separate from the interest asserted by [the named plaintiff],’ with the result that a live controversy may continue to exist, even after the claim of the named plaintiff becomes moot.” *Genesis*

*Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74–75 (2013) (citing *Sosna*, 419 U.S. at 399).

This rule has also been narrowly extended to “to *denials* of class certification motions.”

*Id.* When an action would have acquired “independent legal status” but for the district court’s erroneous denial of class certification, “a corrected ruling on appeal ‘relates back’ to the time of the erroneous denial of the certification motion.” *Id.* (citing *Geraghty*, 445 U.S. at 404).

On the other hand, mootness of the named plaintiff’s claims *before* a ruling on class certification generally moots the class action. 1 Newberg and Rubenstein on Class Actions § 2:11 (6th ed. 2024). “Most courts that have addressed the question have adopted” this general rule. *See id.* at § 2:11 n.9 (citing decisions from 11 Federal courts of appeal). “The rule is so widely accepted that it is usually repeated without significant analysis.” *Id.* at § 2:11.<sup>16</sup>

Here, there is no dispute that the named petitioner’s personal interest in this case expired (at latest) in February 2023, *before* Mr. Hamill filed any request for class action and before the Veterans Court’s December 2023 ruling on class certification. Thus, even if Mr. Hamill had standing to represent the interests of the class, the request for class action is also moot. *Genesis Healthcare*, 569 U.S. at 75; *Monk*, 855 F.3d at 1317; 1 Newberg and Rubenstein on Class Actions § 2:11.

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<sup>16</sup> *See also Dolbin v. McDonough*, No. 2021-2373, 2023 WL 2981495, at \*3 (Fed. Cir. 2023) (“A class action is usually moot if the named plaintiff’s claim becomes moot before the class certification” (citation omitted), *cert. denied*, 144 S. Ct. 564 (2024)).

### C. The “Picking Off” and “Inherently Transitory” Exceptions to Mootness Do Not Apply

Mr. Hamill acknowledges that “[t]o reach certification, the named plaintiff in a prospective class action generally must have a live claim when the class action is certified by the trial court.” Hamill Br. at 35 (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)). But he argues that “where a named plaintiff’s claim is ‘inherently transitory,’ and becomes moot prior to certification, a motion for certification may ‘relate back’ to the filing of the complaint.” *Id.* (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 569 (2013) (quoting *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991))). The Veterans Court did not resolve these arguments, concluding instead that Mr. Hamill’s petition created no case or controversy even before the petition was filed. Appx5-7. To the extent the Court reaches these arguments on appeal, Mr. Hamill is incorrect in claiming that any exception to mootness applies here.

A mootness exception may arise when (among other criteria) the challenged conduct in a class action is “so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.” *Genesis Healthcare*, 569 U.S. at 76 (internal quotation marks and citation omitted). The Supreme Court has also recognized “an exception to mootness in cases where a defendant strategically ‘pick[s] off’ named plaintiffs by offering them the maximum amount of relief they could recover.” *Freund v. McDonough*, 114 F.4th 1371, 1380 n.8 (Fed. Cir. 2024) (quoting *Deposit Guar. Nat.*

*Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980)). “The circuits differ on whether to treat ‘picking off’ as a separate mootness exception or as a type of ‘inherently transitory’ claim.” *Id.* (citing *Wilson v. Gordon*, 822 F.3d 934, 948–49 (6th Cir. 2016) (discussing the different approaches)).<sup>17</sup>

The inherently transitory doctrine “was developed to address circumstances in which the challenged conduct was effectively unreviewable[.]” *Genesis Healthcare*, 569 U.S. at 76. That is not the case here regarding the character-of-discharge issue challenged by Mr. Hamill. Instead, the Veterans Court recently issued a precedential decision regarding the VA’s obligation to decide character of discharge. *Harris v. McDonough*, 33 Vet. App. 269, 274 (2021) (per curiam order). The issue is not effectively unreviewable.

Nor has Mr. Hamill shown that the either of the elements of the inherently transitory doctrine apply. First, the inherently transitory doctrine “has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim[.]” *Genesis Healthcare*, 569 U.S. at 76-77. Mr. Hamill has not shown that the character-of-discharge issue is so inherently “fleeting” that a court would not have enough time to

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<sup>17</sup> The court need not resolve the question in this case, in which Mr. Hamill presents no clear argument that picking off is a separate mootness exception. Instead, Mr. Hamill “blend[s] the ‘picking off’ exception with the ‘inherently transitory’ exception.” See *Wilson v. Gordon*, 822 F.3d 934, 948 (6th Cir. 2016) (describing the approach of certain decisions); Hamill Br. at 35-36 (mixing discussion of “inherently transitory” and “picking off”).

rule on a motion for class certification before the representative's interest expires. *See id.*

Second, Mr. Hamill has not shown it is “certain that other persons similarly situated will continue to be subject to the challenged conduct[.]” *Genesis Healthcare*, 569 U.S. at 76 (internal quotation marks and citation omitted). To the contrary, both the procedural rules and the substantive standards have changed since Mr. Hamill filed the petition in December 2022. *See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge (Regulatory Update)*, 89 Fed. Reg. 32,361 (Dep’t of VA, April 26, 2024); Add6-7, Add1-24 (adopting new procedures on May 12, 2023). For example, VA changed its instructions to adjudicators to provide an explicit new and relevant evidence determination upon the receipt of a subsequent claim by a claimant with a prior unfavorable character of discharge determination. *See* M21-1, X.iv.1.A.1.d (available at Add6-7). VA reiterated in the Federal Register that any claimant with a prior unfavorable character of discharge determination who requests a new determination will receive one under the updated § 3.12. *See Regulatory Update*, 89 Fed. Reg. at 32,371. In light of these liberalizing changes to the regulation and the manual, proposed class members are not subject to the same alleged conduct challenged in the petition, and the second requirement for the “inherently transitory” exception to apply is not met.

Even if the picking off exception could apply independently from the inherently transitory exception, (and Mr. Hamill has not preserved any argument that

it can), Mr. Hamill’s arguments regarding “picking off” are unpersuasive. In *Freund*, this Court declined to address the “picking off” exception because it did “not perceive that the VA is reactivating erroneously closed claims as a litigation strategy.” *Freund*, 114 F.4th at 1380 n.8. In this case, similarly, Mr. Hamill has not shown that VA acted pursuant to a litigation strategy. *See* Hamill Br. at 37. Instead, the VA amended the applicable standards for *all* veterans, who are free to request relief before the VA and raise any remaining challenges through the system of administrative appeals. *See* 38 U.S.C. § 5104C.

Mr. Hamill’s final argument regarding “relation back” is no more persuasive. Hamill Br. at 38-41. Mr. Hamill cites a number of cases in which courts applied an exception to mootness and found that the class certification may relate back to the filing of the class complaint. *Id.* (citations omitted).<sup>18</sup> But Mr. Hamill fails to identify a case involving relation back to an *individual* claim for relief in which no request for class action had yet been filed. Instead, the cited cases present, at a minimum, the filing of a class complaint—such that the later class certification relates “back to the

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<sup>18</sup> Hamill Br. at 38-41 (citing, *e.g.*, *Blankenship v. Secretary of HEW*, 587 F.2d 329, 335 (6th Cir. 1978); *Richardson v. Bledsoe*, 829 F.3d 283 (3d Cir. 2016); *Haro v. Sebelius*, 729 F.3d 993, 1003 (9th Cir. 2013); *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1142 (9th Cir. 2016); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011); *Jonathan R. v. Justice*, 41 F.4th 316 (4th Cir. 2022); *Robidoux v. Celani*, 987 F.2d 931, 938–939 (2d Cir. 1993); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994); *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011).

filing of the *class* complaint.” *See, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 347-348 (3d Cir. 2004) (emphasis added), abrogated on other grounds by *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016), *as revised* (Feb. 9, 2016). Thus, none of the cited cases support Mr. Hamill’s requested relief of “relation back” to an individual mandamus petition when the individual request is undisputedly moot.

In short, even if there was a live controversy when Mr. Hamill filed the petition—and there was not—the issuance of the February 2023 decision mooted the petition *before* any proposed class members were introduced to the case. Further, the requirements for mootness exceptions based on a request for class action are not satisfied. For all of these reasons, the Veterans Court correctly dismissed the petition.

#### **IV. Mr. Hamill Had Alternative Avenues to Appeal the May 2021 Decision—Providing Another Basis for Dismissal of Petition for Mandamus**

Finally, not only does Mr. Hamill fail to establish an Article III case or controversy—which alone suffices to dismiss the petition—the May 2021 decision also shows that he had adequate alternative means to pursue the desired relief. *See Cheney*, 542 U.S. at 380–81. This provides an additional basis for affirming the Veterans Court’s dismissal.

“A writ of mandamus is an ‘extraordinary remedy.’” *Love v. McDonough*, 100 F.4th 1388, 1393 (Fed. Cir. 2024) (quoting *Hargrove v. Shinseki*, 629 F.3d 1377, 1379 (Fed. Cir. 2011)). To demonstrate entitlement to mandamus relief, the petitioner must (1) show a “clear and indisputable right” to issuance of the writ, (2) have “no

other adequate means” to obtain the desired relief, and (3) demonstrate to the satisfaction of the reviewing court that “the writ is appropriate under the circumstances.” *Id.* (quoting *Wolfe v. McDonough*, 28 F.4th 1348, 1354 (Fed. Cir. 2022); *Cheney*, 542 U.S. at 380–381).

In *Love v. McDonough*, the Court recognized that the availability of alternative avenues for appeal defeated jurisdiction to entertain the mandamus petitions in that case. *Love*, 100 F.4th at 1391, 1394. As the Court explained, “the party seeking issuance of the writ must have *no other adequate means* to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process.” *Id.* at 1393 (quoting *e.g.*, *Cheney*, 542 U.S. at 380–81) (emphasis added). The Court affirmed the dismissal of the mandamus petitions for lack of jurisdiction, given the petitioners’ adequate alternative avenues for appeal. *Id.* at 1391, 1394.

Although the Veterans Court did not reach the elements required for mandamus relief—having dismissed the case on Article III grounds—the court’s findings establish that Mr. Hamill had adequate alternatives for appeal at the time he filed the petition.<sup>19</sup> Mr. Hamill had the opportunity to appeal the VA’s appealable decision on the May 2021 claims. Appx7 (discussing the VA’s May 2021 decision). In

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<sup>19</sup> Courts have an “independent obligation to determine whether subject-matter jurisdiction exists”—including in petitions for mandamus—even if the government does not contest jurisdiction. *In re Nat’l Nurses United*, 47 F.4th 746, 755 (D.C. Cir. 2022) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)).

February 2023, moreover, the VA issued another, appealable decision regarding character of discharge. Appx76-78. Since then, Mr. Hamill has pursued administrative options for reviewing and developing his character-of-discharge arguments.<sup>20</sup> The VA will adjudicate Mr. Hamill's latest supplemental claim under the new, liberalized character-of-discharge criteria recently incorporated into 38 C.F.R. § 3.12. *See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge*, 89 Fed. Reg. 32,361, 32,362 (Apr. 26, 2024).

Similarly, all members of the proposed class—or any other person who may be entitled to relief—may seek consideration under the VA's liberalized regulations. *See id.* Such requests will be governed by the revised procedures detailed in the M21-1 manual, issued in May 2023. Add6-7; *see also* Add1-24.

“When, as here, there is a remedy by appeal, [i]t is well established that mandamus is unavailable.” *Love*, 100 F.4th at 1395 (quoting *Wolfe*, 28 F.4th at 1357; citing *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384–85 (1953)). Given the “alternative remedy by appeal, the Veterans Court did not err in dismissing” the

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<sup>20</sup> In March 2023, Mr. Hamill filed for higher-level review of VA's February 2023 determination. Appx172-174. After VA's higher-level review confirmed the prior character-of-discharge determination, Appx175-191, Mr. Hamill filed a supplemental claim in July 2023, Appx192-193, and another supplemental claim in June 2024, Appx194-196. Again, we include this information for completeness even though these documents were not included before the Veterans Court.

petition for writ of mandamus. *See id.* Thus, the alternative avenue for appeal independently supports the Veterans Court's dismissal of Mr. Hamill's petition.

### CONCLUSION

For these reasons, the Court should dismiss-in-part Mr. Hamill's appeal for lack of jurisdiction and otherwise affirm judgment of the Veterans Court.

Respectfully submitted,

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October 28, 2024

### CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,098 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

*/s/ Emma E. Bond*  
\_\_\_\_\_  
Emma E. Bond

**ADDENDUM**

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Department of Veterans Affairs  
 Veterans Benefits Administration  
 Washington, DC 20420

M21-1, Part X, Subpart iv  
 May 12, 2023

## Key Changes

### Changes Included in This Revision

The table below describes the changes included in this revision of Veterans Benefits Manual M21-1, Part X, “Character of Discharge (COD) and Bars to Benefits,” Subpart iv “Adverse Circumstances Affecting Benefit Entitlement.”

**Notes:**

- The term “regional office” (RO) also includes pension management center (PMC) and decision review operations center (DROC), where appropriate.
- Minor editorial changes have also been made to
  - improve clarity and readability
  - add references
  - update incorrect or obsolete references
  - update the labels of individual blocks to more accurately reflect their content, and
  - bring the document into conformance with M21-1 standards.

Reason(s) for Notable Change	Citation
To add a note explaining that the definition for character-of-discharge (COD) determination can encompass a decision addressing whether <ul style="list-style-type: none"> <li>• evidence submitted and/or obtained after a prior final COD determination was new and relevant</li> <li>• new and relevant evidence of record is sufficient to change a prior final COD determination, or</li> <li>• a clear and unmistakable error (CUE) was made in the prior COD determination.</li> </ul>	<a href="#">M21-1, Part X, Subpart iv, Chapter 1, Section A, Topic 1, Block b (X.iv.1.A.1.b)</a>
<ul style="list-style-type: none"> <li>• To clarify that a COD determination is required if a former service member requests revision of a prior final COD determination based on new and relevant evidence or CUE.</li> <li>• To add a note on making a COD determination based on a change of law or discovery of CUE by the claims processor.</li> <li>• To add a note on <i>Harris v. McDonough</i>, 33 Vet.App. 269 (2021).</li> </ul>	<a href="#">X.iv.1.A.1.d</a>
<ul style="list-style-type: none"> <li>• To qualify that the procedures for making a COD determination outlined in the table may vary as provided in X.iv.1.A.1.r.</li> <li>• To specify other blocks of guidance that are important to consider when making a formal COD determination.</li> </ul>	<a href="#">X.iv.1.A.1.h</a>
To add a note emphasizing the importance of including information in a decision notice on available options for reviewing determinations that are not fully favorable.	<a href="#">X.iv.1.A.1.n</a>
<ul style="list-style-type: none"> <li>• To revise and refocus the block on reviewing prior final COD determinations and corresponding actions to take.</li> </ul>	<a href="#">X.iv.1.A.1.q</a>

<ul style="list-style-type: none"><li>• To provide additional and enhanced instructions depending on whether a previous COD determination was made, and whether that COD determination is binding with respect to the current claim or issue.</li></ul>	
<ul style="list-style-type: none"><li>• To add a new Block r on making decisions involving a prior final COD determination based in part on material previously located in X.iv.1.A.1.q.</li><li>• To further clarify the guidance to emphasize that whether a change in a prior COD determination is justified, a decision must be made explaining the determination, and a decision notice must be provided that lists options for obtaining further review of the determination.</li></ul>	<a href="#">X.iv.1.A.1.r</a>

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**Authority** By Direction of the Under Secretary for Benefits

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**Signature**

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Beth Murphy, Executive Director  
Compensation Service

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**Distribution**

LOCAL REPRODUCTION AUTHORIZED

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## Section A. Character of Discharge (COD) and Bars to Benefits

### Overview

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**In This Section** This section contains the following topics:

Topic	Topic Name
1	Determinations of the Character of a Former Service Member's Discharge
2	Statutory Bars to Benefits
3	Regulatory Bars to Benefits

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# 1. Determinations of the Character of a Former Service Member's Discharge

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**Introduction** This topic contains general information about the relevance of the character of a former service member's discharge, including

- discharge character and basic eligibility to benefits
  - definition of COD determination
  - development and rating activity involvement in COD determinations
  - fact patterns when a COD determination is required
  - discharges that generally
    - require a COD determination, and
    - do not require a COD determination
  - avoiding premature COD determinations
  - procedure for making a COD determination
  - developing for facts and circumstances surrounding discharge
  - providing advance notice that a COD determination will be issued
  - COD determination template
  - favorable findings in a COD determination
  - additional considerations for completing the COD determination
  - providing decision notice of the COD determination
  - updating the corporate record after making a decision
  - claim processing after a determination that service was other than dishonorable
  - reviewing for prior final COD determinations, and
  - making decisions involving a prior final COD determination.
- 

**Change Date** May 12, 2023

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**a. Discharge Character and Basic Eligibility to Benefits** In order to establish Veteran status – and basic eligibility for Department of Veterans Affairs (VA) benefits that require Veteran status – a former service member must have had

- active military, naval, air, or space service (active service), and
- a discharge or release from that service under conditions other than dishonorable.

When a discharge for a period of service is found to be dishonorable for VA purposes, there will be no basic eligibility to any VA benefits requiring Veteran status based on that service.

**Notes:**

- Basic eligibility without Veteran status can be established for health care under [38 CFR 3.360](#). The regulation provides criteria for eligibility for

former service members.

- Eligibility for Chapter 18 benefits is not dependent on the character of a Veteran-parent's discharge.

**References:** For more information on

- the definition of a Veteran, see
    - [38 CFR 3.1\(d\)](#), and
    - [38 U.S.C. 101\(2\)](#)
  - the effect of discharge character on benefits, see [38 CFR 3.12](#)
  - establishing the active service component of Veteran status, see M21-1, Part III, Subpart i, 1.A
  - establishing basic eligibility to health care under [38 CFR 3.360](#), see M21-1, Part X, Subpart iv, 1.B.1, and
  - basic eligibility for Chapter 18, see M21-1, Part VIII, Subpart i, 3.C.1.f.
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**b. Definition:  
COD  
Determination**

An administrative decision on the question of whether a discharge or release from a period of active military, naval, air, or space service was under conditions other than dishonorable is called a *character-of-discharge (COD) determination*.

The determination procedure consists of

- analyzing the discharge characterization, if any, provided by the service branch for the period of service, and other related facts and circumstances
- assessing whether the former service member's conduct for the period of service matches criteria defined by statute and/or regulation, and
- completing and releasing an approved administrative decision.

**Note:** In cases where a prior, binding COD determination was made with respect to a period of service, the definition of *COD determination* includes a decision on whether

- evidence submitted and/or obtained after a prior final COD determination was new and relevant
- new and relevant evidence of record is sufficient to change a prior final COD determination, or
- a clear and unmistakable error (CUE) was made in the prior COD determination.

**References:** For more information on

- administrative decisions, see M21-1, Part X, Subpart v, 1.C, and
  - procedures for analyzing whether there was prior finality and making decisions when there was a prior final COD determination, see M21-1, Part X, Subpart iv, 1.A.1.q and r.
- 

**c. Development** The development activity is generally responsible for making COD

**and Rating Activity Involvement in COD Determinations**

determinations.

**Important:** This block’s reference to the development activity is not intended to imply that a specific adjudicative office or division is required to make all COD determinations. This block does not prohibit assignment of COD development, or preparation of COD determinations, to other activities, staffs, offices, or centers that have capacity and the appropriate staff qualifications, including those outlined in M21-1, Part X, Subpart v, 1.C.2.h.

In cases where insanity under the provisions of [38 CFR 3.354](#) is claimed or raised by the record, the rating activity is responsible for making that determination for use in the COD determination.

**References:** For more information on

- rating activity responsibility for insanity determinations, see
  - M21-1, Part V, Subpart i, 1.A.1.b, and
  - M21-1, Part X, Subpart iv, 2.A.1.d, and
- authorization activity jurisdiction over severance cases based on CUE in a COD determination, see M21-1, Part X, Subpart iv, 1.F.1.a.

**d. Fact Patterns When a COD Determination Is Required**

A COD determination is required when a

- claim is filed for Veterans Benefit Administration (VBA) benefits, such as compensation or pension and there is a discharge, or discharge circumstances, listed in M21-1, Part X, Subpart iv, 1.A.1.e
- COD determination is requested by the former service member under [38 U.S.C. 5303B](#)
- claim for benefits is filed with another VA administration (such as Veterans Health Administration (VHA)), and VBA receives an appropriate VA form request for a COD determination, or
- former service member requests, or there are otherwise grounds for consideration of a revision of a final COD determination based on
  - new and relevant evidence, or
  - CUE.

**Exceptions:**

- If a claim is filed based on a period of service, and a prior COD determination found the discharge for that period of service to have been under conditions other than dishonorable, another COD determination is not required.
- VBA is not required to always issue a COD determination when requested by another VA administration. VBA will issue a COD determination only if a COD determination for the period of service is not of record.

**Notes:**

- If a prior COD determination found the conditions of the discharge from a period of service to constitute a bar to benefits, and the claimant files a

subsequent claim based on that period of service, VA must make a written determination of whether new and relevant evidence has been submitted, or (depending on the claimant's contention) whether CUE exists in the prior COD determination. See *Harris v. McDonough*, 33 Vet. App. 269 (2021).

- VA may also make a COD determination on its own initiative based on discovery of CUE or legal changes.
- *Public Law 115-141* created [38 U.S.C. 5303B](#), which permits a former service member to request a COD determination without filing a claim. There is no prescribed form for a former service member to request the determination.
- In some cases, particularly with older administrative decisions, a COD determination may appear in the record, but the electronic claims folder (eFolder) may not show advance notice of the COD determination and/or notice that the COD determination was issued.
  - The presumption of administrative regularity dictates that VA followed due process procedures that existed at that time; however, if there was clear evidence of irregularity and due process was not satisfied, corrective action will be required.
  - With respect to decision notice, when VBA makes determinations for another entity, that entity typically provided decision notice. Presume that notice was sent – unless there is a clear showing to the contrary.
- Upon receipt of a request, regional offices also make COD determinations for other entities, such as
  - the U.S. Department of Labor
  - the U.S. Railroad Retirement Board, and
  - State agencies.

**References:** For more information on

- finality and revisions of administrative decisions, see
  - M21-1, Part X, Subpart iv, 1.A.1.q and r
  - M21-1, Part X, Subpart v, 1.C.1.c
  - *Harris v. McDonough*, 33 Vet.App. 269 (2021)
- assertions and discovery of CUE, see M21-1, Part X, Subpart ii, 5.A.1.a
- requirements for a valid claim asserting CUE, see M21-1, Part X, Subpart ii, 5.A.2.a
- handling reversal of prior determinations of COD based on CUE to sever service connection (SC), see M21-1, Part X, Subpart iv, 1.F
- COD determinations requested by VHA, see M21-1, Part XIII, Subpart i, 3.B, and
- handling requests for COD determinations from other Federal and State agencies, see M21-1, Part XIII, Subpart ii, 3.C.

**e. Discharges That Generally Require a COD Determination**

In certain fact patterns, as listed in M21-1, Part X, Subpart iv, 1.A.1.d, the following service department discharge characterizations require a COD determination:

- other than honorable (OTH)

- bad conduct discharge (BCD)
- dismissal (of an officer), and
- dishonorable.

The following uncharacterized separation will also require a COD determination:

- void enlistment or induction, or
- dropped from the rolls.

**Notes:**

- A service discharge that shows resignation of an officer for the good of the service is considered a bar to benefits under [38 CFR 3.12\(c\)](#) and also requires a COD determination.
- In older records, what is now called an OTH discharge was called an “undesirable” discharge.
- Officers only receive dismissals. They do not receive OTH, BCD, or dishonorable discharges.

**Reference:** For more information on assessing COD and related matters when there is an uncharacterized discharge or separation, see M21-1, Part X, Subpart iv, 1.B.3.

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**f. Discharges That Generally Do Not Require a COD Determination**

Normally, if the service branch characterizes service as “honorable” or “general – under honorable conditions” (general-UHC), or issues an entry level separation, VA accepts that there was a discharge or release under conditions other than dishonorable, and a COD determination is *not* required.

**Exceptions:**

- A COD determination is necessary, even with an honorable or general-UHC discharge, if the separation reason is listed as a bar to benefits under [38 U.S.C. 5303\(a\)](#).
- Development for the facts and circumstances surrounding discharge is required, even if the discharge was honorable or general-UHC, if the reason for separation code shown in the corporate record is
  - T38 (possible Title 38 bar to VA benefits)
  - 953 (clemency discharge)
  - BEO (by executive order), or
  - DRO (discharge review—prior discharge under conditions other than honorable).

**Examples:**

- If the character of service is general-UHC, and the separation reason is *drug use*, a COD determination is *not* necessary. The separation reason is not a bar to benefits under [38 U.S.C. 5303\(a\)](#).
- If the characterization of service is general-UHC but the separation reason is *a conscientious objector who refused to perform military duties, wear the*

*uniform, or otherwise comply with lawful orders of competent military authorities, a formal determination as to whether the separation reason poses a bar to benefits under [38 U.S.C. 5303\(a\)](#) is necessary.*

**Notes:**

- [38 CFR 3.14\(d\)](#) states that an honorable discharge is binding on VA with the exception of cases involving aliens. [38 CFR 3.12\(a\)](#) provides that a discharge “under honorable conditions” is binding as to character of discharge.
- A general-UHC discharge may be shown as “general”, “GEN,” “under honorable conditions,” “under honorable conditions (general),” or “UHC.”

**Reference:** For more information on handling cases involving conscientious objectors that were discharged under honorable conditions, see VAOPGCPREC 11-1993.

**g. Avoiding Pre-mature COD Determinations**

Do not make a COD determination prematurely.

Even if, in connection with a claim, the record shows a discharge listed in M21-1, Part X, Subpart iv, 1.A.1.e, do not make a COD determination if there is another period or periods of service establishing Veteran status and basic eligibility, and qualifying the claimant for the benefit sought. It is premature to determine basic eligibility based on a period of service if the benefit sought can be granted based on clear eligibility from a separate period of service.

**Note:** If there is any question regarding which period of multiple periods of service qualify a claimant for the benefits they are seeking, complete a COD determination for the period of (whichever is applicable) before referring the claim to the rating activity.

**h. Procedure for Making a COD Determination**

Follow the steps in the table below when a COD determination is needed **except in limited circumstances provided in M21-1, Part X, Subpart iv, 1.A.1.r.**

Step	Action
1	Conduct development, to the extent possible, for all evidence required to make a COD determination, including records detailing the facts and circumstances surrounding a former service member’s discharge as discussed in M21-1, Part X, Subpart iv, 1.A.1.i.
2	Provide advance notice that a COD determination will be issued, as described in M21-1, Part X, Subpart iv, 1.A.1.j.
3	Was there a contention or evidence that the conduct upon which the discharge was based occurred when the individual met the definition of <i>insanity</i> under <a href="#">38 CFR 3.354</a> ?

	<ul style="list-style-type: none"> <li>• If <i>no</i>, go to the next step.</li> <li>• If <i>yes</i>, before going to the next step,             <ul style="list-style-type: none"> <li>– refer the case to the rating activity for a determination of insanity under <a href="#">38 CFR 3.354</a>, and</li> <li>– wait for that determination to be completed.</li> </ul> </li> </ul> <p><b>References:</b> For more information on</p> <ul style="list-style-type: none"> <li>• when insanity is at issue, see M21-1, Part X, Subpart iv, 2.A.1.b, and</li> <li>• referring a case involving insanity for rating action, see M21-1, Part X, Subpart iv, 2.A.1.d.</li> </ul>
4	<p>Make a formal determination, using guidance on regulatory and/or statutory bars (as applicable) in M21-1, Part X, Subpart iv, 1.A.2 and 3, as well as the special topics in M21-1, Part X, Subpart iv, 1.B, as applicable, and document it using the template shown in M21-1, Part X, Subpart iv, 1.A.1.k.</p> <p><b>Important:</b></p> <ul style="list-style-type: none"> <li>• Make a determination using all the evidence in VA’s possession, including a claimant’s credible statements or testimony regarding reasons for the discharge, and resolve any reasonable doubt in favor of the claimant.</li> <li>• Include a finding on insanity.             <ul style="list-style-type: none"> <li>– If insanity was <i>not</i> an issue raised in Step 3, that must be stated.</li> <li>– If insanity <i>was</i> at issue, briefly discuss how, and incorporate the rating determination that the former service member was/was not insane when they committed the act(s) that resulted in the discharge.</li> </ul> </li> <li>• As applicable, the decision must discuss conditional discharges under <a href="#">38 CFR 3.13</a> and M21-1, Part X, Subpart iv, 1.B.2. Address any satisfactorily completed service, as well as unsatisfactory service, in the determination. Follow the guidance in M21-1, Part X, Subpart iv, 1.B.2.h.</li> <li>• When making an unfavorable determination, list favorable findings if applicable as provided in M21-1, Part X, Subpart iv, 1.A.1.l.</li> <li>• When completing a COD determination refer to the additional considerations in M21-1, Part X, Subpart iv, 1.A.1.m.</li> <li>• Consider the information in M21-1, Part X, Subpart iv, 1.B.4 and 5 before making a making a COD determination that involves a former service member with a Vietnam-Era, special upgraded discharge.</li> <li>• When the determination is that there is no statutory or regulatory bar to benefits and the discharge for the period of service is other than dishonorable, do not discuss <a href="#">38 CFR 3.360</a> or make any determination regarding applicability of the regulation. Basic eligibility to all VA benefits <i>including health care</i> is established.</li> </ul> <p><b>References:</b> For more information on</p> <ul style="list-style-type: none"> <li>• determinations of insanity, see             <ul style="list-style-type: none"> <li>– M21-1, Part X, Subpart iv, 2.A, and</li> <li>– <a href="#">38 CFR 3.354 (b)</a>, and</li> </ul> </li> <li>• whether to address basic eligibility to health care under <a href="#">38 CFR 3.360</a>, see M21-1, Part X, Subpart iv, 1.B.1.</li> </ul>
5	<p>Refer the determination for approval by the Veterans Service Center Manager</p>

	designee, or Pension Management Center Manager designee as specified in M21-1, Part X, Subpart v, 1.C.2.h.
6	Send the former service member a decision notice communicating the outcome of the administrative decision in accordance with M21-1, Part X, Subpart iv, 1.A.1.n.
7	Prepare a record-purpose award to clear any pending end product (EP) 290 established to control the COD determination.
8	Update the corporate record, as discussed in M21-1, Part X, Subpart iv, 1.A.1.o.

***Important:***

- The procedure in this table applies for COD determinations when a claim for benefits has been filed, as well as to free-standing requests by former service members for COD determinations without a claim, which are permitted pursuant to [38 U.S.C. 5303B](#).
- When a claim has been filed and, applying the guidance in this section, a COD determination is necessary, do not send [38 U.S.C. 5103](#) notice (if applicable) or development letters, or initiate development for an examination or for records (beyond those required relating to facts and circumstances of discharge) unless/until the COD determination concludes that there is basic eligibility to the benefit claimed.

***References:*** For more information on the procedures applicable to handling COD determinations

- requested by VHA, see M21-1, Part XIII, Subpart i, 3.B, and
- involving finality, see M21-1, Part X, Subpart iv, 1.A.1.q and r.

**i. Developing for Facts and Circumstances Surrounding Discharge**

Collect, to the extent possible, all evidence required to make a COD determination, including records detailing the facts and circumstances surrounding a former service member's discharge.

Occasionally service departments provide only limited records to VA and some types of facts and circumstances evidence may be unobtainable.

***References:*** For more information on

- the duty to assist with obtaining Federal records, see M21-1, Part III, Subpart i, 2.C.1
- concluding that Federal records do not exist or that further efforts would be futile, see M21-1, Part III, Subpart i, 2.C.1.d
- procedures for requesting records from a Federal entity, see M21-1, Part III, Subpart ii, 1.A.1
- development procedures for service department records, see M21-1, Part III, Subpart ii, 2, and
- guidance on substantially complete service treatment records (STRs), see M21-1, Part III, Subpart ii, 2.A.1.f.

**j. Providing**

When a COD determination is required, provide advance notice containing

**Advance Notice That a COD Determination Will Be Issued** the elements described in the table below.

**Important:** Do *not* solicit a completed application for benefits (such as *VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits*) from the former service member when preparing the advance notice described in this block.

Element	Purpose and Description
Reason for the Decision	Explains the reason why a COD determination is necessary.
Criteria Used to Make the Decision	<ul style="list-style-type: none"> <li>• Explains the criteria VA will use to make the decision.</li> <li>• Explains and cites the applicable VA regulations.</li> </ul>
Right of Representation	<ul style="list-style-type: none"> <li>• Discusses the right to be represented, without charge, by an accredited representative of a recognized Veterans service organization.</li> <li>• Explains the rights to:                             <ul style="list-style-type: none"> <li>– employ an attorney to assist in prosecuting the claim, and</li> <li>– have the attorney appear at a personal hearing if requested.</li> </ul> </li> </ul> <p><b>Reference:</b> For information on powers of attorney, see M21-1, Part I, Subpart i, 2.</p>
Request Placed to Service Department	Explains that VA has asked the service department for STRs and all available active duty personnel records.
Right to Submit Evidence	Explains the right to submit any evidence, contention, or argument bearing on the issue.
Right to a Hearing	<p>Explains the right to request a personal hearing before a decision is made.</p> <p><b>Note:</b> Discuss that VA will furnish the hearing room, provide hearing officials, and prepare a transcript of the proceedings, but will not pay any other expense connected with the hearing.</p>

60-Day Time Limit	<p>Explains that if a reply is not received within 60 days, VA will</p> <ul style="list-style-type: none"> <li>• assume             <ul style="list-style-type: none"> <li>– there is no additional evidence to submit, and</li> <li>– additional time for presentation of the case is not desired, and</li> </ul> </li> <li>• make a decision based on the evidence available.</li> </ul> <p><b>Reference:</b> For more information on granting additional time for presentation of a case, see M21-1, Part X, Subpart ii, 3.B.1.d.</p>
Effect of the Decision	<p>Fully explains that an unfavorable decision might preclude entitlement to</p> <ul style="list-style-type: none"> <li>• any benefits claimed, and</li> <li>• other gratuitous VA benefits.</li> </ul>

- References:** For more information on
- the need for advanced notice in COD determinations, see
    - M21-1, Part VI, Subpart i, 1.B.1.a, and
    - M21-1, Part I, Subpart i, 1.B.1.b
  - preparing advance notice in
    - Modern Award Processing - Development (MAP-D), see the [MAP-D User's Guide](#), and
    - the Veterans Benefits Management System (VBMS), see the *VBMS Core User Guide*, and
  - EP control of requests for COD determinations from VHA, see M21-1, Part XIII, Subpart i, 3.B.

**k. COD Determination Template**

Use of the template below is mandatory to document COD determinations.

The template contains *all* possible paragraphs and language that will potentially need to be included in the decision depending on the facts of the particular case. If the decision is being addressed to a person other than the former service member, modify the language as necessary, to include replacing references to “you” and “your” with the name of the former service member and third-person personal pronouns.

<b>DEPARTMENT OF VETERANS AFFAIRS</b>	
[Designation of VA Office]	[File Number]
[Location of VA Office]	[Former Service Member’s Name]
<b>ADMINISTRATIVE DECISION</b>	

**ISSUE:** Character of discharge for the period of service [add service dates for the period(s) at issue].

**EVIDENCE:** [Use bullets to list all documents and information reviewed in making the decision. Identify the evidence using the standards in M21-1, Part V, Subpart iv, 1.A.4.] For example:

- *VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits*, received September 6, 2015.
- Response to advanced notice that VA will be making a COD determination, received November 9, 2015.
- STRs received on November 25, 2015, for the period March 2002 to November 2004.
- Service personnel records received on November 25, 2015, for the period March 2002 to November 2004.

**PERTINENT LAWS AND REGULATIONS:** [List laws and regulations applicable to the decided issue(s).]

[Copy and paste applicable text from the relevant law(s) and/or regulation(s) that are required to determine the issue.]

[Include in all decisions.] According to 38 CFR 3.12(a), if the former service member did not die in service, then pension, compensation, or Dependency and Indemnity Compensation (DIC) is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable (38 U.S.C. 101(2)).

[Copy and paste the text of only the applicable paragraph(s)/subparagraphs from 38 CFR

- 3.12(c)(x) if/when the discharge potentially poses a statutory bar to benefits
- 3.12(d)(x) if/when the discharge potentially poses a regulatory bar to benefits, and/or
- 3.13(c) for conditional discharges.]

[It may be necessary to include applicable portions of other regulations such as 38 CFR 3.13, 38 CFR 3.14, 38 CFR 3.105(c), or 38 CFR 3.354 depending on the facts; however, do not copy and paste the regulations into decisions when they are not applicable.]

[Include the following only in decisions where the service was dishonorable for VA purposes, and therefore there was no basic eligibility to VA benefits requiring Veteran status, but further consideration was given to basic eligibility to health care only for former service members under [38 CFR 3.360](#)] As stated in 38 CFR 3.360(a) and (b), the health care and related benefits authorized by Chapter 17 of Title 38 U.S.C. shall be provided to certain former service members with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty. With certain exceptions such benefits shall be furnished for any disability incurred or aggravated during period of service terminated by a discharge under other than honorable conditions. Specifically, they may not be

furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in 38 CFR 3.12(c) applies.

**DECISION:** [Clearly and briefly state the decision here, but not the reasons for it.]

For example:

Your discharge from [name of branch of service] for the period of service from [EOD date to RAD date] is [other than dishonorable/dishonorable for VA purposes]. You [have/do not have] basic eligibility to VA benefits.

[Only include a second decision with respect to a period of service when the individual filed a claim, and the first decision above finds no basic eligibility.] You [meet/do not meet] the basic eligibility criteria in 38 CFR 3.360 for health care benefits under Chapter 17, Title 38 U.S.C.

**REASONS AND BASES:** [This section must be prepared in accordance with the guidelines found in M21-1, Part X, Subpart v, 1.C.2.e, and included on all administrative decisions, including favorable ones.]

[Always address that insanity was considered. Include the following statement.] Insanity [is/is not] an issue. [Provide a brief explanation of the contention or facts putting insanity at issue.]

[When insanity is at issue, discuss the determination made. Select one of the following statements as applicable]:

- Based on the facts showing [summarize the facts bearing on the 38 CFR 3.354(a) standard] we have determined that you met the VA definition of insanity at the time of the conduct resulting in your discharge and its characterization, we find that you were not at fault, and you are not precluded from VA benefits.
- Based on the facts showing [summarize the facts bearing on the 38 CFR 3.354(a) standard] we have determined that you did not meet the VA definition of insanity at the time of the conduct resulting in your discharge and its characterization.

[When the type of court-martial is relevant to the regulatory finding – for example, see the criteria in 38 CFR 3.12(c)(1) and 38 CFR 3.12(d)(1) – include one of the following]

- Your [list service branch discharge characterization] discharge was part of a sentence of a general court-martial.
- Your [list service branch discharge characterization] discharge was part of a sentence of a [summary of special] court-martial.
- You accepted an [OTH or BCD] to escape trial by a general court-martial.

[Always sum up the decision.] For example:

Based on the evidence listed and discussed above, we conclude that the conduct for which you were discharged from service, and upon which your service characterization was based, [is/is not] a bar to benefits under 38 CFR 3.12(x)(x) [When finding a bar, fill in the 38 CFR 3.12 paragraph. When finding that a bar is not met, simply refer to 38 CFR 3.12]. Therefore, the discharge for the period of service [dates of service] was [other than dishonorable/dishonorable] for VA purposes and basic eligibility to all VA

benefits [is/is not] established.

**[When the decision is that there is a bar under 38 CFR 3.12 to VA benefits requiring Veteran status, and the individual filed a claim for benefits for a disability, address basic eligibility to health care for a former service member under 38 CFR 3.360.**

***Note:* There should be no decision, and no reasons and bases on this secondary determination where basic eligibility to all benefits is established.]**

**FAVORABLE FINDINGS:** [When this heading is applicable, list any favorable findings that are made. See M21-1, Part X, Subpart iv, 1.A.1.I, for more information on when the heading is required.]

**I. Favorable Findings in a COD Determination**

The *Favorable Findings* part of the decision is not required when

- the decision and all findings (conclusions as to a fact or application of law to facts) are favorable, or
- in unfavorable determinations, there are no favorable findings.

***Note:*** Address full favorability of an outcome and findings as specified in M21-1, Part X, Subpart v, 1.C.2.e.

When a COD determination is not fully favorable (a bar to benefits is found, the discharge was dishonorable for VA purpose, and there is either no eligibility to any VA benefits, or there is only basic eligibility to health care), but favorable findings are made, list those findings under *Favorable Findings*.

- When a determination is made that an OTH discharge was dishonorable for VA purposes due to a regulatory bar, but eligibility to health care was established under [38 CFR 3.360](#), the fact that no provision of [38 CFR 3.12\(c\)](#) applies is a favorable finding.
- When multiple [38 CFR 3.12](#) bars were considered, and one was proven, the bases for concluding the other bar(s) could not be established are favorable findings. ***Example:*** The primary bar was for spying. There was also a citation for homosexual behavior in the record, but the conduct was consensual, between members of the same rank, and the service members engaged in the behavior only during sleeping hours. There would be a favorable finding that homosexual acts did not involve aggravating circumstances or affect performance of duty.

**m. Additional Considerations for Completing the COD Determination**

Apply the guidance below when completing the COD determination template.

- The issue in the determination should always be *Character of discharge* because the determination required by law is whether there is, or is not, a discharge or release under conditions other than dishonorable. Do not limit the stated issue to *Statutory bar* or *Regulatory bar* or list the two as co-issues.
- When a COD determination is made in response to a claim, and the

discharge was dishonorable for VA purposes such that there is no eligibility to VA benefits, make a second decision to address whether there is basic eligibility for health care under [38 CFR 3.360](#). The SC contentions are deemed to be for compensation and/or treatment purposes.

- The reasons for the decision must include discussion of the evidence received from the service department, and from the former service member, as it relates to the circumstances of the conduct that formed the basis for the discharge and its characterization. The decision must adequately discuss whether the facts meet the criteria for any bar(s) to benefits raised by the evidence of record (multiple bars may require discussion), and in doing so, should address facts bearing on any mitigating or equitable considerations within the regulatory criteria.
- When making a determination that a period of obligated service within a longer period of continuous service involving a conditional discharge was satisfactorily completed (and therefore that there is considered to have been a discharge or release from this period of service under [38 U.S.C. 101\(18\)](#) and [38 CFR. 3.13](#)) follow the guidance in M21-1, Part X, Subpart iv, 1.A.1.h (Step 4) and M21-1, Part X, Subpart iv, 1.B.2.h.

**Reference:** For more information on addressing basic eligibility to health care and related processing required after the administrative decision, see M21-1, Part X, Subpart iv, 1.B.1.

**n. Providing Decision Notice of the COD Determination**

After making an administrative decision, generate a decision notice that meets the requirements expressed in M21-1, Part VI, Subpart i, 1.B. Attach a copy of the administrative decision to the decision notice.

Use the table below to determine what additional information/elements to include in a decision notice of an *unfavorable* administrative decision regarding COD.

If the unfavorable COD decision ...	Then the decision notice must ...
precludes eligibility to all VA benefits	address the <ul style="list-style-type: none"> <li>• decision’s effect on entitlement to VA benefits, and</li> <li>• procedure for asking the applicable service branch to review it.</li> </ul>
<ul style="list-style-type: none"> <li>• precludes eligibility to all benefits other than medical treatment under <a href="#">38 U.S.C. Chapter 17</a>, and</li> <li>• was made in connection with the claim for benefits</li> </ul>	<ul style="list-style-type: none"> <li>• address the                             <ul style="list-style-type: none"> <li>– decision’s effect on entitlement to VA benefits, and</li> <li>– procedure for asking the applicable service branch to review it, and</li> </ul> </li> <li>• inform the claimant that                             <ul style="list-style-type: none"> <li>– contentions listed on the claim form are being further processed, and</li> <li>– a decision will be made on whether</li> </ul> </li> </ul>

	<p>the claimed conditions are service connected (SC) for health care purposes.</p> <p><b>Important:</b> Do not invite the claimant to file another <i>VA Form 21-526EZ</i>.</p>
<ul style="list-style-type: none"> <li>• precludes eligibility to all benefits other than medical treatment under <a href="#">38 U.S.C. Chapter 17</a>, and</li> <li>• was not made in connection with a claim for benefits (such as requests for a COD determination pursuant to <a href="#">38 U.S.C. 5303B</a>)</li> </ul>	<ul style="list-style-type: none"> <li>• address the             <ul style="list-style-type: none"> <li>– decision’s effect on entitlement to VA benefits, and</li> <li>– procedure for asking the applicable service branch to review it</li> </ul> </li> <li>• enclose <i>VA Form 21-526EZ</i>, and</li> <li>• invite the former service member to claim entitlement to SC for treatment purposes for any specific conditions believed to be related to service.</li> </ul>

**Notes:**

- For all determinations that are not fully favorable, it is critical that the former service member receives information on applicable options for seeking further review of the decision as provided in M21-1, Part VI, Subpart i, 1.B.1.b.
- When providing notice to a VA or non-VA entity, complete the applicable form provided. If a non-VA entity does not furnish a form for reply, send notification via a locally generated letter.

**o. Updating the Corporate Record After Making a Decision**

By signing off on an administrative decision regarding the character of discharge, the signing official authorizes corresponding updates to the corporate record.

The authorization activity is responsible for updating the corporate record.

Unless current entries are accurate, the authorization activity must update the corporate record to reflect the

- period(s) of service
- eligibility to receive health care for service-connected (SC) disabilities where Veteran status is not established
- type(s) of discharge, and
- separation reason(s).

The table below lists the update to make for various outcomes on the COD determination in Share.

<p><b>If the administrative decision indicates ...</b></p>	<p><b>Then identify the column containing service data for the period at issue and enter ...</b></p>
------------------------------------------------------------	------------------------------------------------------------------------------------------------------

<ul style="list-style-type: none"> <li>• the character of the entire period of service at issue bars the former service member from receiving <i>any</i> benefits per <a href="#">38 CFR 3.12(c)</a>, or</li> <li>• the character of             <ul style="list-style-type: none"> <li>– the entire period of service at issue bars the former service member from receiving benefits other than health care per <a href="#">38 CFR 3.12(d)</a> and <a href="#">38 CFR 3.360</a>, and</li> <li>– the service discharge was BCD</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <i>12C</i> in the CHAR SVC (<b>character of service</b>) field, and</li> <li>• <i>ADM</i> (<b>administrative decision</b>) in the SEP REAS (<b>separation reason</b>) field.</li> </ul> <p><i>Note:</i> Entering <i>12C</i> informs VHA that the individual is not eligible for health care.</p>
<ul style="list-style-type: none"> <li>• the character of the entire period of service at issue bars the former service member from receiving benefits other than health care per <a href="#">38 CFR 3.12(d)</a> and <a href="#">38 CFR 3.360</a>, and</li> <li>• the service discharge was OTH</li> </ul>	<ul style="list-style-type: none"> <li>• <i>12D</i> in the CHAR SVC field, and</li> <li>• <i>ADM</i> in the SEP REAS field.</li> </ul> <p><i>Note:</i> Entering <i>12D</i> informs VHA that the individual is eligible for health care.</p>
<p>the entire period of service at issue was <i>other than dishonorable</i> for VA purposes</p>	<ul style="list-style-type: none"> <li>• <i>HVA</i> (<b>honorable for VA purposes</b>) in the CHAR SVC field, and</li> <li>• <i>ADM</i> in the SEP REAS field.</li> </ul> <p><i>Note:</i> <i>HVA</i> is used to reflect the <a href="#">38 U.S.C. 101(2)</a>, <a href="#">38 U.S.C. 101(18)</a>, and <a href="#">38 CFR 3.12</a> wording <i>other than dishonorable</i>.</p>
<p>the individual</p> <ul style="list-style-type: none"> <li>• was discharged under circumstances involving a bar specified in <a href="#">38 CFR 3.12(c)</a>, but</li> <li>• attained Veteran status from an earlier service based on <a href="#">38 CFR 3.13</a></li> </ul>	<ul style="list-style-type: none"> <li>• the date the most recent service obligation was completed, and the individual was deemed unconditionally discharged from that service in the RAD (<b>released from active duty</b>) field</li> <li>• <i>HVA</i> in the CHAR SVC field</li> <li>• the beginning and ending dates of the remainder of the period of service in the EOD (<b>entry on duty</b>) and RAD fields, respectively, of the <i>next</i> column of service data</li> <li>• <i>12C</i> in the CHAR SVC field of the next column of service data, and</li> <li>• <i>ADM</i> in the SEP REAS field of <b>both</b> columns of service data.</li> </ul>

<p>the individual</p> <ul style="list-style-type: none"> <li>• was discharged under circumstances involving a bar specified in <a href="#">38 CFR 3.12(d)</a>, but</li> <li>• attained Veteran status from an earlier service based on a conditional discharge analysis under <a href="#">38 CFR 3.13</a></li> </ul>	<ul style="list-style-type: none"> <li>• the date the most recent service obligation was completed, and the individual was deemed unconditionally discharged from that service in the RAD field</li> <li>• <i>HVA</i> in the CHAR SVC field</li> <li>• the beginning and ending dates of the remainder of the period of service in the EOD and RAD fields, respectively, of the <i>next</i> column of service data</li> <li>• <i>I2D</i> in the CHAR SVC field of the next column of service data, and</li> <li>• <i>ADM</i> in the SEP REAS field of <i>both</i> columns of service data.</li> </ul>
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**Notes:**

- When multiple bars to benefits in one period of service are supported by the facts, and at least one is a [38 CFR 3.12\(c\)](#) bar, use *I2C*.
- When there are multiple bars to benefits applicable for the period of service and they are all [38 CFR 3.12\(d\)](#) bars, use *I2D* unless the service department discharge was BCD. In those instances, use *I2C*.
- A record-purpose award must also be generated and authorized to clear the EP associated with the administrative decision.

**References:** For more information on

- the effect of a COD determination on eligibility to receive health care, see M21-1, Part X, Subpart iv, 1.B.1, and
- updating the corporate record using Share, see the [Share User Guide](#).

**p. Claim Processing After a Determination That Service Was Other Than Dishonorable**

When a COD determination issued in connection with a claim for benefits concludes that there is no bar to benefits, and the discharge from active service is other than dishonorable, after completing all steps of the procedure in M21-1, Part X, Subpart iv, 1.A.1.h, the development activity will

- send [38 U.S.C. 5103](#) notice if required
- accomplish any and all normal development necessary to ready the case for rating disposition, and
- refer the case for preparation of a rating decision.

Rating, promulgation, authorization, and notice will proceed in normal fashion.

**Reference:** For more information on the duty to notify under [38 U.S.C. 5103](#), see M21-1, Part III, Subpart i, 2.B.

**q. Reviewing**

When a former service member files a claim for benefits, claims processors

**for Prior Final  
COD  
Determinations**

must review the file for any prior final COD determination made in accordance with the same criteria and based on the same facts – regardless of whether the filing specifically alludes to a prior COD determination or attaches evidence.

Refer to the table below for guidance on the actions to take based on existence of a prior COD determination.

If ...	Then ...
<p>there is no previous COD determination of record</p>	<p>is a COD determination necessary to assess basic eligibility for the current claim?</p> <ul style="list-style-type: none"> <li>• If <i>yes</i>, follow the procedure for making a COD determination in M21-1, Part X, Subpart iv, 1.A.1.h.</li> <li>• If <i>no</i>, then no action is needed under this section. The claim can be developed and decided under applicable M21-1 policies and procedures.</li> </ul>
<p>a prior COD determination found all service to be other than dishonorable for VA purposes</p>	<p>no action is needed under this section. The claim can be developed and decided under applicable M21-1 policies and procedures.</p>
<ul style="list-style-type: none"> <li>• a prior COD determination found a period of service to be dishonorable for VA purposes, and</li> <li>• the current claim is                             <ul style="list-style-type: none"> <li>– for a benefit requiring Veteran status, and</li> <li>– based on the service previously found dishonorable for VA purposes</li> </ul> </li> </ul>	<p>follow the guidance in M21-1, Part X, Subpart iv, 1.A.1.r to determine whether there is a basis for changing the prior determination.</p>
<ul style="list-style-type: none"> <li>• a prior COD determination found a period of service to be dishonorable for VA purposes, but</li> <li>• the prior COD determination is not binding on the current claim</li> </ul> <p><b>Examples:</b></p> <ul style="list-style-type: none"> <li>• The current claim is for SC</li> </ul>	<p>is a COD determination necessary to assess basic eligibility for the current claim?</p> <ul style="list-style-type: none"> <li>• If <i>yes</i>, follow the procedure for making a COD determination in M21-1, Part X, Subpart iv, 1.A.1.h.</li> <li>• If <i>no</i>, then no action is needed under this section.</li> </ul>

<p>compensation but is based on a separate, earlier period of service not addressed in the prior COD determination.</p> <ul style="list-style-type: none"> <li>• The current claim is based on the service covered by the prior COD determination but the prior decision established basic eligibility for treatment under <a href="#">38 U.S.C. Chapter 17</a> pursuant to <a href="#">38 CFR 3.360</a>, and the current claim is expressly for SC for treatment purposes only.</li> </ul>	<p><b>Explanation:</b></p> <ul style="list-style-type: none"> <li>• In the first example, basic eligibility to benefits has not been determined for the earlier service period. If the circumstances do not require a COD determination for the earlier service (for example if there is an honorable discharge for the service at issue) then the new claim can be developed and decided under applicable M21-1 policies and procedures.</li> <li>• In the second example, a prior COD determination found the service dishonorable for VA purposes. Therefore, the former service member has no basic eligibility to benefits, such as SC compensation, that would require Veteran status. However, it also found that the former service member had basic eligibility to treatment, and that is what the current claim unambiguously is for. The claim for SC for treatment purposes can be developed and decided under applicable M21-1 policies and procedures.</li> </ul> <p><b>Important:</b> If there is any ambiguity in the claim and the claimant may be seeking readjudication of the issue of COD – considering the form used for the filing, the wording used in the claim, and any evidence attached to, or identified in, the claim – a decision under M21-1, Part X, Subpart iv, 1.A.1.r may be necessary. When a claimed issue is not clearly identified, ask the claimant and authorized representative (if any) to clarify the claim.</p>
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**Reference:** For more information on

- administrative decision finality, see
  - [38 CFR 3.104\(b\)](#), and
  - M21-1, Part X, Subpart v, 1.C.1.c, and
- clarifying issues and claims, see M21-1, Part III, Subpart i, 2.D.1.c.

**r. Making Decisions Involving a**

Refer to the table below for guidance on making determinations when

- a prior COD determination found a discharge or release from service was

**Prior Final  
COD  
Determination**

- dishonorable for VA purposes, and
- the current claim is
  - for a benefit requiring Veteran status, and
  - based on the service previously found dishonorable for VA purposes such that the prior COD determination is binding on the current claim.

If ...	Then ...
<p>a change in the prior COD determination is justified because of</p> <ul style="list-style-type: none"> <li>• new and relevant evidence</li> <li>• CUE, or</li> <li>• a change in law that provides a new basis for entitlement</li> </ul>	<ul style="list-style-type: none"> <li>• make another COD determination as provided in M21-1, Part X, Subpart iv, 1.A.1.k, and</li> <li>• provide decision notice as provided in M21-1, Part X, Subpart iv, 1.A.1.n.</li> </ul>
<p>a change in the prior COD determination is not justified</p>	<ul style="list-style-type: none"> <li>• complete a <i>VA Form 21-0961, Rating Decision/Administrative Decision/Formal Finding/Statement of the Case (SOC)/ Supplemental Statement of the Case (SSOC) (Electronic Signatures)</i>, documenting the determination in the REMARKS section of the form, and</li> <li>• generate a decision notice that meets the requirements in M21-1, Part VI, Subpart i, 1.B, including explanation of the reasons and bases for the decision, and a statement of applicable review options the claimant may use to seek further review of the decision</li> </ul> <p><b>Notes:</b></p> <ul style="list-style-type: none"> <li>• If late flowing evidence is received, or the claimant submits new and relevant evidence, list the evidence, and state that it was considered but did not change the prior COD determination (make sure to specify the date of the prior determination). The explanation must explain why evidence was not new and relevant and/or why new and relevant evidence did not change the prior decision.</li> <li>• If a CUE was asserted but not found, briefly explain the determination that no CUE was found.</li> <li>• In cases where no change in a prior</li> </ul>

	final COD determination is warranted but the prior COD determination did not address former service member basic eligibility for treatment under <a href="#">38 U.S.C. Chapter 17</a> pursuant to <a href="#">38 CFR 3.360</a> , prepare a new COD determination addressing only that issue.
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**References:** For more information on

- supplemental claims, see M21-1, Part II, Subpart iii, 2.B.1
  - revision based on new evidence, see M21-1, Part X, Subpart ii, 2.A
  - revision due to CUE, see M21-1, Part X, Subpart ii, 5.A, and
  - the right to a decision and decision notice on determinations regarding new and relevant evidence, see *Harris v. McDonough*, 33 Vet.App. 269 (2021).
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## Section A. Character of Discharge (COD) and Bars to Benefits

### Overview

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**In This Section** This section contains the following topics:

Topic	Topic Name
1	General Information About Determinations of the Character of a Former Service Member's Discharge
2	Statutory Bars to Benefits
3	Regulatory Bars to Benefits

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Outdated as of 11-04-2021

# 1. General Information About Determinations of the Character of a Former Service Member's Discharge

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**Introduction** This topic contains general information about the relevance of the character of a former service member's discharge, including

- thresholds for benefit eligibility
  - when the Department of Defense's (DoD) characterization of service is binding on the Department of Veterans Affairs (VA)
  - when a COD determination is necessary
  - when a COD determination is not necessary
  - overview of the COD determination process
  - requirement for advance notice
  - responsibility for collecting evidence, including records containing facts and circumstances surrounding discharge
  - responsibility for making COD determinations
  - notifying claimants after making a decision
  - notifying VA and non-VA entities of a decision
  - updating the corporate record after making a decision, and
  - COD determination template.
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**Change Date** February 19, 2019

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**a. Thresholds for Benefit Eligibility** A former service member's character of discharge (COD) must be under other-than-dishonorable conditions to establish eligibility for Department of Veterans Affairs (VA) benefits based on that individual's military service.

A dishonorable discharge – or a discharge under conditions for which a statutory bar to benefits exists – for a given period of service renders a claimant ineligible for all VA benefits for any claim based on that period of service.

**Exception:** A dishonorable discharge or statutory bar is *not* binding on VA if it is determined that the individual was insane when committing the acts that resulted in the discharge.

**Note:** A discharge under other-than-honorable (OTH) conditions

- is *not* the same as a dishonorable discharge, and
- does *not* necessarily render a claimant ineligible for VA benefits.

**References:** For more information on

- statutory bars to benefits, see M21-1, Part X, Subpart iv, 1.A.2

- regulatory bars to benefits, see M21-1, Part X, Subpart iv, 1.A.3
- eligibility for health care, see M21-1, Part X, Subpart iv, 1.B.1
- how VA determines Veteran status, see
  - [38 CFR 3.1\(d\)](#), or
  - [38 U.S.C. 101\(2\)](#)
- how a former service member's COD affects his/her (or his/her survivors') eligibility for VA benefits, see
  - [38 CFR 3.12](#), and
  - [38 CFR 3.13](#), and
- determinations of insanity, see
  - M21-1, Part X, Subpart iv, 2.A, and
  - [38 CFR 3.354 \(b\)](#).

**b. When DoD's Characterization of Service Is Binding on VA**

An individual is entitled to full rights and benefits of programs administered by VA unless there is a bar to benefits under [38 U.S.C. 5303\(a\)](#). Normally, the Department of Defense's (DoD's) characterization of service is binding on VA if the discharge is

- honorable
- under honorable conditions (UHC), or
- general.

**Note:** Any character of service listed above is binding on VA, irrespective of the separation reason, unless the separation reason is one listed as a bar to benefits under [38 U.S.C. 5303\(a\)](#).

**Examples:**

- If the separation reason is *drug use*, but the character of service is UHC, DoD's characterization of service is still binding on VA; a COD determination is **not** necessary under these circumstances.
- If the characterization of service is UHC but the separation reason is *a conscientious objector who refused to perform military duties, wear the uniform, or otherwise comply with lawful orders of competent military authorities*, a formal determination as to whether the separation reason poses a bar to benefits under [38 U.S.C. 5303\(a\)](#) **is** necessary.

**Exception:** Records added to the Beneficiary Identification Records Locator Subsystem (BIRLS) from the Veterans Assistance Discharge System after October 16, 1975, include the reason for separation. Development for the facts and circumstances surrounding discharge is required, even if there is indication that COD was honorable or general, if the reason code shown in the corporate record is

- T38 (possible Title 38 bar to VA benefits)
- 953 (clemency discharge)

- BEO (by executive order), or
- DRO (discharge review—prior discharge under conditions other than honorable).

**References:** For more information about

- COD determinations, see M21-1, Part X, Subpart iv, 1.A.1.1, and
- handling cases involving conscientious objectors that were discharged under honorable conditions, see VAOPGCPREC 11-1993.

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**c. When a COD Determination Is Necessary**

A COD determination is required if a service member received

- an undesirable discharge
- an OTH discharge, or
- a bad conduct discharge (BCD).

**Important:** Before making a COD determination, review

- the instructions for determining Veteran status in M21-1, Part III, Subpart ii, 6.A.1, and
- the definition of *Veteran* in [38 CFR 3.1\(d\)](#).

**Reference:** For more information about preparing COD determinations, see M21-1, Part X, Subpart iv, 1.A.1.1.

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**d. When a COD Determination Is Not Necessary**

It is *not* necessary to make a COD determination

- before a claimant applies for VA benefits and places the matter at issue, or
- if there is a separate period of honorable service that qualifies the claimant for the benefits he/she is seeking.

**Note:** If there is any question regarding which period of multiple periods of service qualify a claimant for the benefits he/she is seeking, complete a COD determination (whichever is applicable) before referring the claim to the rating activity.

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**e. Overview of the COD Determination Process**

Follow the steps in the table below when a COD determination is needed.

**Important:**

- Strictly observe the due process provisions listed in [38 CFR 3.103](#) and M21-1, Part X, Subpart ii, 3.
- The process outlined below is *not* intended for use in connection with Veterans Health Administration (VHA)-initiated eligibility determination requests involving COD. Procedures for handling determinations of that type are instead found in M21-1, Part XIII, Subpart i, 3.B.

Step	Action		
1	<p>If the discharge at issue is not specifically honorable, UHC, or general, or if there is evidence that the discharge was upgraded, send a request to the service department for all available records, including service treatment records (STRs), personnel records and records of proceedings pertaining to the discharge.</p> <p><b>Reference:</b> For more information on Discharge Review Boards (DRBs), see <a href="#">38 CFR 3.12(f)-(h)</a>.</p>		
2	<p>Make a formal determination and document it using the template shown in M21-1, Part X, Subpart iv, 1.A.1.l.</p> <p><b>Important:</b></p> <ul style="list-style-type: none"> <li>• Occasionally service departments provide only limited records to VA. Make a determination using all the evidence in VA’s possession and resolve any reasonable doubt in favor of the claimant.</li> <li>• In any COD determination, there <b>must</b> be, minimally, a finding that the former service member was not insane when he/she committed the act or acts that resulted in DoD’s characterization of his/her service.</li> <li>• If a former service member had more than one period of consecutive service, include information covering the periods of satisfactory as well as unsatisfactory service in the determination.</li> <li>• Consider the information in M21-1, Part X, Subpart iv, 1.B.3 and 4 before making a making a COD determination that involves a former service member with a Vietnam-Era, special upgraded discharge.</li> </ul> <p><b>Reference:</b> For more information on determinations of insanity, see</p> <ul style="list-style-type: none"> <li>• M21-1, Part X, Subpart iv, 2.A, and</li> <li>• <a href="#">38 CFR 3.354(b)</a>.</li> </ul>		
3	<p>Refer the determination to the Veterans Service Center Manager or designee for approval, per the instructions in M21-1, Part X, Subpart v, 1.C.1.b.</p>		
4	<ul style="list-style-type: none"> <li>• Send the former service member a decision notice communicating the outcome of the administrative decision in accordance with M21-1, Part X, Subpart iv, 1.A.1.l.</li> <li>• prepare a record-purpose award to clear any pending end product (EP) 290 established to control the COD determination</li> <li>• update the corporate record accordingly, as discussed in M21-1, Part X, Subpart iv, 1.A.1.k, and</li> <li>• refer to the table below to determine how to further process the administrative decision.</li> </ul> <table border="1" data-bbox="375 1724 1422 1831"> <tr> <td data-bbox="375 1724 824 1831"><b>If the conclusion reached in the administrative decision is that ...</b></td> <td data-bbox="824 1724 1422 1831"><b>Then ...</b></td> </tr> </table>	<b>If the conclusion reached in the administrative decision is that ...</b>	<b>Then ...</b>
<b>If the conclusion reached in the administrative decision is that ...</b>	<b>Then ...</b>		

	<p>the former service member's service is honorable for VA purposes</p>	<ul style="list-style-type: none"> <li>• accomplish any and all normal development necessary to ready the case for rating disposition</li> <li>• refer the case for preparation of a rating decision addressing service connection (SC) for specific conditions, and</li> <li>• proceed to the next step.</li> </ul>
	<p>the former service member's service</p> <ul style="list-style-type: none"> <li>• is dishonorable for VA purposes, but</li> <li>• does not adversely affect his/her eligibility for health care benefits under <a href="#">38 U.S.C. Chapter 17</a></li> </ul>	<ul style="list-style-type: none"> <li>• accomplish any and all development (to include requesting any medical opinions warranted) necessary to ready the case for rating disposition</li> <li>• refer the case for preparation of a rating decision addressing SC for treatment purposes for specified conditions, and</li> <li>• proceed to the next step.</li> </ul>
	<ul style="list-style-type: none"> <li>• a statutory bar to VA benefits exists based on an offense specified in <a href="#">38 CFR 3.12(c)</a>, or</li> <li>• the former service member is eligible for neither disability compensation nor health care benefits under <a href="#">38 U.S.C. Chapter 17</a></li> </ul>	<ul style="list-style-type: none"> <li>• take no further action, and</li> <li>• disregard the remaining step in this table.</li> </ul>
5	Process the rating decision rendered in response to Step 4, and prepare a corresponding decision notice for the claimant.	

**f. Requirement for Advance Notice** In any situation that requires a COD determination, including dishonorable discharges, provide the claimant with advance notice containing the elements described in the table below.

**Important:** Do *not* solicit a completed application for benefits (such as *VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits*) from the former service member when preparing the advance notice described in this block.

Element	Purpose and Description
Reason for the Decision	<p>Explains the reason why a COD determination is necessary.</p> <p><b>Note:</b> Basic eligibility for VA benefits is contingent upon a discharge under conditions other than dishonorable.</p>