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Veterans Secure Landmark Victory in *Witkowski v. Collins*: Faster Access to Extraschedular TDIU

By Bradley W. Hennings¹ and Robert Chisholm²

11.0—Veterans' claims.

In October 2025, the U.S. Court of Appeals for Veterans Claims (Court) issued a sweeping, en banc decision in *Witkowski v. Collins*.³ This ruling—argued by Chisholm Chisholm & Kilpatrick (CCK Law) attorney April Donahower—overturns more than twenty years of precedent and removes a major source of procedural delay for veterans seeking Total Disability based on Individual Unemployability⁴ (TDIU) on an extraschedular basis.

The Court explicitly overruled *Bowling v. Principi* (2001), ending the long-standing requirement that the Board of Veterans' Appeals (Board)

¹ BA 1997 George Washington University, MS 2001 Stevens Institute of Technology, JD 2006 Rutgers University School of Law. Mr. Hennings joined Chisholm Chisholm & Kilpatrick as an attorney in January 2018 and currently serves as a Partner in the firm. His practice focuses on the U.S. Department of Veterans Affairs (VA) and the U.S. Court of Appeals for Veterans Claims. Immediately prior to joining CCK Law, Mr. Hennings served as a Veterans Law Judge at the U.S. Department of Veterans Affairs, Board of Veterans' Appeals (BVA). Mr. Hennings' full biography may be found at cck-law.com/lawyers/bradley-w-hennings. To learn more about CCK Law, the largest and most respected veterans law firm in the U.S., visit cck-law.com.

² BA 1984 Boston College, JD 1988 Boston University School of Law. Mr. Chisholm is a Founding Partner of Chisholm Chisholm & Kilpatrick, the largest veterans law firm in the U.S. His law practice focuses on representing disabled veterans in the United States Court of Appeals for Veterans Claims and before the Department of Veterans Affairs. As a veterans lawyer, Mr. Chisholm has been representing disabled veterans since 1990. During his extensive career, he has successfully represented veterans before the Board of Veterans Appeals, Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Federal Circuit. Mr. Chisholm is a founding member of the United States Court of Appeals for Veterans Claims Bar Association and served as President of that organization for the year 2002-2003. Mr. Chisholm served as the President of the National Organization of Veterans' Advocates from 1999 to 2004. In 2016, the United States Court of Appeals for Veterans Claims (CAVC) awarded Mr. Chisholm the Hart T. Mankin Distinguished Service Award in recognition of his 25 years of outstanding service to the Court. Mr. Chisholm has served as appellant's lead counsel in over 7,500 cases before the CAVC. His full biography may be found at cck-law.com/lawyers/robert-v-chisholm. To learn more about CCK Law, the largest and most respected veterans law firm in the U.S., visit cck-law.com.

³ <https://law.justia.com/cases/federal/appellate-courts/cavc/24-0640/24-0640-2025-10-21.html>

⁴ <https://www.va.gov/disability/eligibility/special-claims/unemployability/>

must first send extraschedular TDIU cases to the Director of Compensation before deciding them. For countless veterans, this change means faster decisions, fewer procedural dead ends, and a fairer path to benefits.

This case is also an example of CCK Law's philosophy of systemic advocacy: each client's case is prepared meticulously and every argument is developed as though the case may one day be presented before a court. If a case exposes a recurring regulatory problem that harms tens of thousands of veterans, CCK aims to be ready to fix that problem not only for an individual veteran, but for all veterans who rely on this system.

Below is a breakdown of what happened in *Witkowski*, what the Court held, and why the decision matters.

Background: What Went Wrong Under *Bowling v. Principi*

For more than two decades, *Bowling* required the Board to follow a rigid two-step process for extraschedular TDIU:

1. If a veteran did not meet schedular TDIU criteria but evidence showed unemployability due to service-connected disabilities, the Board had to **refer** the case to the Director of Compensation for an initial opinion.
2. Only after the Director issued a decision could the veteran return to the Board for appellate review.

In practice, this mandatory detour caused years of delay. The Director usually denied these referrals, and the process duplicated adjudication that the Board could otherwise have completed in a fraction of the time. Veterans routinely waited several additional years after referral before the Board could make a final decision. Under AMA procedures,

referral also forced many veterans to file a new notice of disagreement, sending the case back to the end of the appellate line.

This system trapped veterans like Mr. Witkowski, a Vietnam-era Navy veteran seeking the earliest possible effective date for TDIU based on hearing loss. Although evidence showed unemployability from the date of his claim, the Board believed that *Bowling* prevented it from granting TDIU before June 2021 without a referral. Because Mr. Witkowski explicitly waived referral and asked for a decision based purely on the evidence, the Board denied the earlier period outright, allowing the issue to be appealed to the Court of Appeals for Veterans Claims.

This set the stage for the Court to address questions about jurisdiction, regulatory interpretation, and procedural fairness.

CCK Law’s Winning Arguments Before the *Witkowski* Court

1. “Only Congress Can Limit Board Jurisdiction”

CCK Law argued that *Bowling* was inconsistent with modern Supreme Court jurisprudence holding that **only Congress** may impose jurisdictional limits on an adjudicatory body like the Board of Veterans’ Appeals. Because Congress gave the Board jurisdiction over “all questions in a matter” under 38 U.S.C. § 7104(a), the Board must be able to decide TDIU, including extraschedular TDIU, when a veteran appeals that issue. Therefore, an agency-promulgated regulation like the one requiring referral of extraschedular TDIU, 38 C.F.R. § 4.16(b),⁵ cannot be jurisdictional.

The Court agreed with CCK Law’s argument. It held that *Bowling*’s interpretation of VA’s regulation improperly constrained Board

⁵ <https://www.law.cornell.edu/cfr/text/38/4.16>

jurisdiction in conflict with Supreme Court authority and was therefore effectively overruled.

2. “The Regulatory Text Never Applied to the Board”

CCK Law also argued that the referral requirement never applied to the Board of Veterans’ Appeals in the first place.

The regulation at issue, 38 C.F.R. § 4.16(b),⁶ states:

“**Rating boards** should submit to the Director ... all cases of veterans who are unemployable by reason of service-connected disabilities, but who fail to meet the percentage standards of § 4.16(a).”

CCK Law demonstrated that:

- Historically, “rating boards” were three-member panels located within regional offices.
- The Board of Veterans’ Appeals has always been a separate appellate tribunal.
- When VA intends to refer to the Board, VA uses the term “Board” explicitly in its regulations.

Therefore, § 4.16(b)’s reference to “rating boards” does not include the Board of Veterans’ Appeals, meaning the Board was never required to make these referrals.

The Court adopted this argument as well and held that *Bowling’s* reading of the regulation was incorrect. *Bowling* created a problem emblematic of delay, especially in AMA claims, where assertions of extraschedular TDIU referred to the Director by the Board would be forced to twice work their way up through VA’s long line of cases.

⁶ Id.

The Court's Holding: *Bowling* is Overruled

The en banc Court concluded:

- *Bowling v. Principi* was “egregiously wrong.”
- The decision conflicted with later Supreme Court authority distinguishing jurisdictional rules from claim-processing rules.
- The mandatory referral process cannot be imposed on the Board because § 4.16(b) neither mentions nor applies to the Board.
- The Board may now decide extraschedular TDIU **in the first instance**, without referral to the Director of Compensation.

The Court vacated the Board's denial of earlier-period TDIU for Mr. Witkowski and remanded the case for a new decision under the correct legal standard.

Why the *Witkowski* Decision Matters for Veterans

1. Faster Decisions and Elimination of Mandatory Referral Delays

Veterans seeking extraschedular TDIU will no longer face a procedural loop that delays adjudication for years. The Board can weigh evidence and issue its own decision directly.

2. Greater Consistency in TDIU Outcomes

Previously, two veterans with identical evidence could experience different procedural outcomes depending on whether referral was ordered. This decision restores uniformity and consistency across cases.

3. Stronger Access to Judicial Review

Under *Bowling*, veterans had to navigate a multi-step process that made meaningful review difficult. Now the Board must address

extraschedular TDIU directly, creating a clearer record for appeal and judicial oversight.

4. System-Level Impact Beyond a Single Case

This ruling affects not just Mr. Witkowski, but potentially hundreds of thousands of veterans who have raised or will raise extraschedular TDIU.

It also improves administrative efficiency for VA employees who struggled with the procedural complexity created by *Bowling*.

How CCK Law Got the *Witkowski* Issue Before the Court

This result was possible only because the case was deliberately developed with the potential for court review in mind, reflecting CCK Law's longstanding use of the courts to eliminate inconsistencies and clarify veteran disability benefits on behalf of the entire veteran community.

In the case of Witkowski, over the last ten years, CCK Law:

- Built the record from the start as if the case might eventually reach the Court.
- Preserved the jurisdictional and regulatory arguments long before the appeal.
- Successfully achieved a Board denial via Mr. Witkowski's refusal to accept a remand, which opened the door to present the question of the Board's jurisdiction over extraschedular TDIU squarely to the Court.

What *Witkowski* Means Going Forward

Veterans who previously saw their extraschedular TDIU cases stalled under *Bowling* should expect a more streamlined and just process. The Board can now:

- Grant extraschedular TDIU without referral,
- Deny it on the merits, or
- Remand for additional development only when development is truly needed.

The Director of Compensation may still play a role in some cases, but only when the Board determines that development is necessary, not because a regulation forces a particular procedural path.

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