No. _____

In the Supreme Court of the United States

Ernest L. Francway, Jr.,

Petitioner,

v.

Robert Wilkie, Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress has established a veterans-benefits system that is uniquely pro-claimant. In veterans-benefit cases, every statutory and regulatory presumption favors the veteran over the Department of Veterans Affairs. Despite this, the Federal Circuit has created a "presumption of competency" that allows the VA and its reviewing courts to presume that VA medical examiners are competent unless the veteran articulates a specific reason to believe otherwise. The questions presented are:

1. Whether the court of appeals erred in holding that the VA enjoys a presumption that its medical examiner is competent in every veterans-benefit case.

2. Whether the court of appeals erred in expanding the presumption of competency so that the VA and reviewing courts presume, not only that VA medical examiners are competent, but also that they are specialists in the relevant area of medicine.

STATEMENT OF RELATED CASES

Pursuant to Supreme Court Rule 14.1(b)(iii), counsel for Petitioner states that it is not aware of any proceedings directly related to the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ernest L. Francway, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a–12a), a portion of which is joined by the en banc court, has not yet been published in the Federal Reporter but is available at 2019 WL 5151736. The initial panel opinion (Pet. App. 13a–24a) is reported at 930 F.3d 1377. The opinions of the Court of Appeals for Veterans Claims ("CAVC") (Pet. App. 27a–52a) are unreported but are available at 2018 WL 718564 and 2018 WL 2065565. The opinion of the Board of Veterans' Appeals (Pet. App. 53a–70a) is unreported but is available at 2016 WL 7101251.

JURISDICTION

The en banc court of appeals sua sponte issued a revised version of the court's initial panel opinion and entered judgment on October 15, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at Pet. App. 71a–90a.

INTRODUCTION

This case is the latest in a line of recent Federal Circuit decisions applying the so-called "presumption of competency" to deny veterans disability benefits for injuries sustained in the line of duty. The presumption of competency is a judge-made rule that the Federal Circuit constructed ten years ago in *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009). In effect, the presumption operates as an exception to the VA's statutory duty to assist veterans in developing their claims: it absolves the VA of any obligation to affirmatively establish a VA medical examiner's qualifications unless the veteran can supply a specific reason for thinking the examiner is not competent.

Providing such a specific reason, however, is nearly impossible without access to information about the examiner's qualifications—and yet the VA is not obligated to provide such information unless and until the veteran can overcome the presumption. The presumption thus denies veterans the very information they need to overcome it. This perverse requirement stands as a glaring anomaly in the uniquely pro-claimant veterans-benefits scheme created by Congress, as it alone—unlike every other rule in the statutory regime—gives the benefit of the doubt to the VA, rather than to the veteran.

The court of appeals—perhaps in recognition that the doctrine is indefensible—took the extraordinary step of sua sponte granting rehearing en banc in this case and issuing a revised opinion joined in part by

the full court. But the revised opinion, while professing to address the problems created by the presumption of competency, in fact merely sidesteps them. In a one-paragraph footnote, the full court "overruled" certain (undefined) aspects of the doctrine and rebranded it as "simply … a 'requirement.'" Pet. App. 6a n.1. But the core of the presumption (or, to use the Federal Circuit's euphemism, "requirement")—the veteran's obligation to articulate a *specific reason* to believe the examiner is incompetent before the VA will address the issue—apparently remains intact. *See* Pet. App. 7a–8a. And, as this case illustrates, it continues to impede veterans in their pursuit of just adjudication of their benefits claims.

Whatever one calls this doctrine, it is deeply misguided, and this Court should grant certiorari and set it aside. *First*, the presumption "enjoys no apparent provenance in the relevant statutes," *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from denial of certiorari), and those statutes nowhere give the Federal Circuit the authority to create judge-made rules of decision for use in VA-benefits proceedings. The court of appeals thus lacked the authority to create the presumption in the first place.

Second, the presumption is logically unsound. It is rooted in the presumption of regularity, but there is nothing remotely "regular" about the VA's processes for selecting medical examiners. Moreover, the presumption is inconsistent with the evidentiary maxim that, when the evidence to prove a fact is

peculiarly within the control of one party, that party should bear the burden of proof. The VA is clearly better equipped to assess the qualifications of its own medical examiners (whom the VA hires and trains) than are veteran claimants—many of whom are proceeding *pro se* and are handicapped by serious physical and mental disabilities.

Third, the presumption of competency is irreconcilable with the governing statutory framework. Veterans-benefits statutes—"imbued with special beneficence from a grateful sovereign," *Barrett v. Nicholson*, 466 F.3d 1039, 1044 (Fed. Cir. 2006)—are, by design, non-adversarial, pro-claimant, and paternalistic. Congress has mandated that the VA assist veterans in developing their claims and give them the benefit of the doubt in determining whether they qualify for disability benefits, and courts resolve all ambiguities in veterans statutes in favor of the veteran. The judicially created presumption of competency, however, inhibits claimants in their pursuit of benefits, contrary to the duty to assist; it gives the benefit of the doubt to the VA rather than the veteran, contrary to the benefit-of-the-doubt rule; and it disfavors veterans, contrary to the pro-veteran canon of construction.

Even if the *Rizzo* presumption is retained, however, certiorari is still warranted. The Federal Circuit has dramatically expanded the doctrine from a presumption that VA medical examiners are generally qualified health-care providers into a presumption that VA medical examiners are

specialists in any area of medicine. In this case, the Board of Veterans' Appeals issued a remand order requiring that petitioner Francway be examined by an "appropriate medical specialist" to determine the etiology of his lower-back condition. The courts below relied on the presumption of competency to presume that the doctor who eventually examined Francway—an internist—was a specialist in treating lower-back disorders. This arbitrary expansion of the doctrine finds no support in the veterans-benefits statute, in logic, or in common sense. And it is flatly inconsistent with the VA's duty to assist veterans in developing their claims and to ensure substantial compliance with its own remand orders.

The legitimacy and scope of the presumption of competency are recurring and important issues. The Federal Circuit has addressed the presumption in at least six cases since 2009, and the agency has applied the presumption to deny veterans disability benefits in untold more. The court of appeals is clearly aware that the presumption of competency is a problem. In addition to the court's extraordinary sua sponte grant of en banc review in this case, the Federal Circuit in 2016 came within two votes of reconsidering the presumption in its entirety en banc. The denial of en banc review drew strong dissents, which harshly criticized the court's decision to "leave[] in place a judicially created evidentiary presumption that in application denies due process to veterans seeking disability benefits." *Mathis v. McDonald*, 834 F.3d 1347, 1353 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing en

banc). Given the Federal Circuit's exclusive jurisdiction over veterans cases, further percolation of these issues in the lower courts is impossible.

This Court, too, has recognized the troubling nature of the presumption. Although the Court denied certiorari in *Mathis*, Justice Gorsuch dissented from the denial, and Justice Sotomayor wrote separately to suggest that the Court should grant review in a case in which the VA "denied a veteran benefits after declining to provide the examiner's credentials" in response to a request from the veteran. *Mathis*, 137 S. Ct. at 1995 (Sotomayor, J., statement respecting denial of certiorari). Here, the *Board itself* put the examiner's credentials at issue by requiring that Francway be examined by a "specialist," and the CAVC and the Federal Circuit then relied on the presumption to excuse the agency's failure to present any evidence that Francway's examiner was, in fact, so qualified. This case thus presents an ideal vehicle for the Court to address the propriety of the presumption.

STATEMENT

Petitioner Ernest Francway, Jr., served honorably in the U.S. Navy from August 1968 to May 1970, including a tour of duty in Vietnam spanning from June 1969 to November 1969. While in the service, Francway sustained various back injuries—injuries that have resulted in a lifetime of chronic back pain. This case arises from Francway's sixteen-year effort to obtain disability compensation for those injuries from the VA.

A. Statutory Framework

1. The VA-benefits adjudicatory system

Title 38 U.S.C. § 1110 entitles veterans to disability compensation for injuries suffered in the line of duty. Veterans who believe they are entitled to compensation may file a claim with the VA. The VA then determines whether the disability in question is service-connected and, if so, awards the veteran benefits. If the VA denies the claim, the veteran may appeal to the Board of Veterans' Appeals ("Board"), then to the CAVC, and then finally to the Federal Circuit and this Court. *See* 38 U.S.C. §§ 7105, 7266, 7292; *Henderson v. Shinseki*, 562 U.S. 428, 440–41 (2011).

The VA-benefits adjudicatory system is unique in American jurisprudence. As this Court has recognized, "[t]he contrast between ordinary civil litigation … and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." *Henderson*, 562 U.S. at 440. The scheme is "strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). To that end, "proceedings before the VA are informal and nonadversarial." *Henderson*, 562 U.S. at 440.

Two specific aspects of this "informal and nonadversarial" system are particularly relevant here. *First*, "[t]he VA is charged with the responsibility of assisting veterans in developing

evidence that supports their claims." *Id.*; *see* 38 U.S.C. § 5103A(a). This is known as the "duty to assist." Thus, the VA's interest is not in "winning," but rather in ensuring that veterans receive the benefits to which they are entitled under the law. *Barrett*, 466 F.3d at 1044. The duty to assist includes the duty to "provid[e] a medical examination or obtain[] a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *see Wood v. Peake*, 520 F.3d 1345, 1347–48 (Fed. Cir. 2008). A veteran, moreover, is entitled to have his or her claim adjudicated based on "competent medical evidence." 38 C.F.R. § 3.159. "Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." *Id.* § 3.159(a)(1).

Second, "in evaluating th[e] evidence, the VA must give the veteran the benefit of any doubt." *Henderson*, 562 U.S. at 440; *see* 38 U.S.C. § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."); H.R. Rep. No. 100-963, at 13 (1988). This is commonly referred to as the "benefit-of-the-doubt rule." It results in a uniquely low "'equality of the evidence' standard (as opposed to the more common 'preponderance of the evidence' standard applied in most civil contexts)." *Skoczen v. Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009). Thus, with respect to

any given issue in a VA-benefits proceeding, if the evidence is in equipoise, the tie goes to the veteran.

2. The presumption of competency

Under the presumption of competency, the VA and the Federal Circuit presume, as a matter of law, that the VA "has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013). The veteran may rebut this presumption only by "set[ting] forth the specific reasons why the litigant concludes that the [examiner] is not qualified to give an opinion." *Mathis v. McDonald*, 643 F. App'x 968, 971 (Fed. Cir. 2016); *accord Parks*, 716 F.3d at 585. Thus, the presumption of competency effectively puts the burden on the veteran to show that a VA medical examiner is *not* qualified, rather than putting the burden on the VA to show that the examiner *is* qualified.

The Federal Circuit first articulated the presumption of competency a decade ago in *Rizzo*. *Rizzo* "adopt[ed] the reasoning" of a 2007 CAVC decision, *Cox v. Nicholson*, 20 Vet. App. 563 (2007), which had asserted—without any substantive analysis—that "the Board is entitled to assume the competence of a VA examiner." *Rizzo*, 580 F.3d at 1290-91 (quoting *Cox*, 20 Vet. App. at 569). As the conceptual basis for this new presumption, the *Rizzo* court relied on the presumption of regularity, which "provides that, in the absence of clear evidence to the contrary, the court will presume that public officers

have properly discharged their official duties." *Id.* at 1292 (citation omitted).

The Federal Circuit has developed the presumption of competency in a line of cases, the most recent of which were the decision below and the 2016 *Mathis* case. "[T]he presumption as applied" in the earlier cases "was a presumption that a doctor with expertise in a certain topic was qualified to opine on that topic." *Mathis*, 643 F. App'x at 984 (Reyna, J., concurring). By the time *Mathis* was decided, however, the presumption had gradually come to mean that any VA healthcare provider is presumed competent to opine on any particular condition. *See id.* at 971–72; *id.* at 984 (Reyna, J., concurring).

While the *Mathis* panel followed the presumption of competency as a matter of Circuit precedent, it expressed serious reservations about the doctrine's continuing viability. The panel noted that the presumption of regularity typically applies only to "ministerial, routine, and non-discretionary" actions. *Id.* at 973–74. But "[n]owhere in the *Rizzo* line of cases … did either the Veterans Court or [the Federal Circuit] perform an analysis to verify that the procedures attending the selection and assignment of VA examiners are, in fact, regular, reliable, and consistent." *Id.* at 974; *see also id.* at 975 (Reyna, J., concurring) ("[I]t was unprecedented to apply the presumption of regularity to a process such as determining whether a nurse is qualified to provide an opinion on a particular issue.").

Following the Federal Circuit's denial of en banc review (by a 7-5 vote), *see* 834 F.3d 1347, Mr. Mathis sought certiorari in this Court. The Court denied the petition, with Justice Gorsuch dissenting from the denial of certiorari and Justice Sotomayor issuing a statement respecting the denial. *See* 137 S. Ct. 1994.

The panel in the current appeal attempted to downplay the negative effects of the presumption, stating that it was a "narrow[]" rule that merely requires that "the veteran raise[] the competency issue." Pet. App. 6a–7a. And the en banc Court—apparently recognizing that the panel's characterization of the presumption is irreconcilable with the Federal Circuit's cases—inserted a footnote into the opinion admonishing future courts to call the presumption "simply … a 'requirement'" and stating that *Rizzo* and *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), were overruled "to the extent [they were] inconsistent" with the panel's opinion. Pet. App. 6a. The substantive import of this footnote—if any—is far from clear, particularly given the analysis elsewhere in the panel opinion. The panel expressly reaffirmed *Parks*'s holding that, in order to put the examiner's competency at issue, the veteran must "provide information" that sets forth a *specific* reason why the examiner is incompetent. *See* Pet. App. 8a. And that is not all. The panel also dramatically expanded the scope of the presumption, holding that VA medical examiners are presumed to be not only *competent*, but also *specialists*. *See* Pet. App. 12a. In short, while the nomenclature may have

changed, the presumption remains, broader than ever before.

In the years since the presumption of competency was invented, it has made its way not only into CAVC and Federal Circuit decisions, but also into the VA's internal procedures regarding examiner qualifications. The VA Manual instructs regional offices who receive questions about or requests for information regarding examiner competency to themselves rely on the presumption of competency in evaluating the request. VA Manual M21-1 § III.iv.3.D.2.o. In other words, instead of providing the veteran with information about the examiner's qualifications upon request and then assessing the merits of any "specific challenges" to the examiner's competency, the agency relies upon the presumption to deny veterans the very information they need to mount a specific challenge. Judge Stoll sharply criticized this practice in her dissent from denial of rehearing in *Mathis*, stating that "[t]he agency itself should not rely on the presumption that it followed its rules when evaluating the very application of those very rules." 834 F.3d at 1360.

B. Factual Background

1. While serving on an aircraft carrier in 1969, Francway was hit by a gust of wind while carrying a set of wheel chocks. He then dropped the chocks, fell on top of them, and felt a "stabbing pain in [his] back." C.A.J.A. 1909 (Francway testimony to VA); *see also* C.A.J.A. 95–97, 657. Francway was placed

on bedrest for a week and assigned to light duty for three months.

Francway's treatment records from 1995 to the present reflect repeated complaints of lower back pain, which he traces to the 1969 injury on the flight deck. In the years following Francway's discharge from the service, he had to take off work "sometimes a couple [of] times a month" because of his back pain. C.A.J.A. 1912. He did not report his back problems to his employer because he was afraid of losing his job. *Id.* This account of chronic back pain was corroborated by Francway's longtime friend, Glen Pettry, who has known him since the 1970s.

2. In April 2003, Francway filed a claim for entitlement to service connection for the back injury he sustained in 1969, as well as for a stomach condition and post-traumatic stress disorder. The VA regional office denied his claims the following month. Francway appealed, and the Board eventually remanded the case to the regional office, finding that the VA had provided him with insufficient assistance.

In May 2006, an orthopedist, Dr. Paul Steurer, examined Francway. Dr. Steurer diagnosed Francway with a "[l]umbosacral strain" and wrote, "[i]t is not likely his current back symptoms are related to a simple strain back in 1969, but rather a natural [*sic*] occurring phenomenon." C.A.J.A. 1705.

Two years later, the Board granted Francway entitlement to service connection for a hernia, but it

again denied entitlement to service connection for his lower-back condition.[1] Francway timely appealed that decision to the CAVC.

3. In December 2010, while his appeal was pending, Francway and the government agreed that remand to the agency was "warranted … because the Board did not provide an adequate statement of reasons or bases for its determinations." C.A.J.A. 1242. Accordingly, the parties filed a joint motion to remand. The motion stated that it was "unclear how [Dr. Steurer] reached [the] medical conclusion" that Francway's back injury was not related to his military service, "when the medical history … reflect[ed] 1) low back strain in service, 2) that 'over the years' [Francway] has had 'persistent back pain,' and 3) that [Francway] now has 'a chronic back pain problem.'" C.A.J.A. 1243–44. This "medical history, on its face, implie[d] a medical link to service based on a continuation of symptomatology." C.A.J.A. 1244. "[T]he examiner's rationale[s] for both medical opinions appear to be somewhat vague," the motion continued, because it was "unclear what it means for a lumbosacral strain to be a 'natural occurring phenomenon.'" *Id.* (citations omitted). The Board again remanded the case to the VA.

In December 2011, Dr. Steurer reviewed Francway's file but failed to examine him, as the remand order required. Dr. Steurer's written opinion

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[1] The Board had granted Francway service connection for his post-traumatic stress disorder in a separate decision.

was two sentences long and stated only that Francway's "spinal stenosis is less likely than not related to service but natural age progression." C.A.J.A. 1139. Dr. Amy Schecter, a general internist, later provided a second medical opinion recommending denying benefits. Like Dr. Steurer, Dr. Schecter did not examine Francway, as the remand order required.

A subsequent internal VA memo, dated April 2012, noted that neither physician's opinion complied with the Board's remand order because neither physician examined Francway and because neither physician provided a "complete rationale." C.A.J.A. 1104–05. The memo explained that this was "contrary to the [Board's] instructions and w[ould] cause another remand for not following the remand directives." C.A.J.A. 1105.

The VA then produced yet another opinion, this time from Patrick Hopperton, a physician assistant. Mr. Hopperton concluded (in an opinion strikingly similar to the opinion from Dr. Steurer, which the parties had already agreed was insufficient) that Francway's back injury was more likely "related to natural age progression with consideration [*sic*] wear and tear throughout his life." C.A.J.A. 1097–98.

Francway again appealed to the Board. In connection with his appeal, Francway submitted a "buddy statement" from his longtime friend, Mr. Pettry, that Francway has had debilitating back pain for decades. Francway requested "that the Board remand this matter for the provision of a

medical examination conducted by a *board certified orthopedist* along with all necessary tests, to include the provision of x-rays and MRI imaging." C.A.J.A. 1052 (emphasis added).

4. In March 2013, the Board granted Francway's request, again remanding his case to the VA (the "2013 Remand Order"). The Board ordered as follows:

> The Veteran['s] claims file should be reviewed by an *appropriate medical specialist* for an opinion as to whether there is at least a 50 percent probability or greater … that he has a low back disorder as a result of active service…. *The examiner should reconcile any opinion provided with the statements from the Veteran and G.P. as to reported episodes of back pain since active service*."

C.A.J.A. 1046 (first emphasis added).

In September 2014, orthopedist Dr. Steurer examined Francway and submitted another opinion. But, as the VA noted in a March 2015 internal e-mail, Dr. Steurer's opinion yet again did not comply with the Board's remand order because Dr. Steurer did not reconcile his opinion with Mr. Pettry's statement. Accordingly, the e-mail stated, Dr. Steurer should "provide an addition[al] medical opinion/discussion" that specifically addressed Mr. Pettry's statement. C.A.J.A. 440.

Dr. Steurer, however, did not do so. Instead, Dr. Schechter, the internist, reviewed Francway's file and the buddy statement and reiterated her conclusion that Francway's condition was not service-connected. C.A.J.A. 435–36. A decision review officer then denied Francway's claim.

C. Procedural History

1. Francway appealed to the Board, arguing that neither Dr. Steurer's nor Dr. Schechter's opinion complied with the terms of the 2013 Remand Order. The Board rejected his arguments. *E.g.*, Pet. App. 65a–66a.

2. Francway next appealed to the CAVC, renewing his argument that the examinations and opinions of Dr. Steurer and Dr. Schechter did not comply with the terms of the 2013 Remand Order. Francway noted that the 2013 Remand Order required that the VA obtain "a medical opinion by an 'appropriate medical specialist' to specifically 'reconcile any opinion provided with the statements from the Veteran and G.P. as to reported episodes of back pain since active service.'" C.A.J.A. 38–39. The only opinion discussing Mr. Pettry's statement, however, was from Dr. Schechter—who was not an orthopedic specialist. C.A.J.A. 39. Francway argued that the Board clearly "desired an appropriate medical specialist and not simply any doctor when it directed an opinion by an appropriate medical specialist." *Id.*

The CAVC affirmed the Board's decision. As relevant here, the CAVC relied on the presumption of competency to reject Francway's argument that the Board had erred in failing to ensure that "the March 2015 examiner was an appropriate medical specialist." Pet. App. 43a. The court noted that the "VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Id.* (quoting *Parks*, 716 F.3d at 585). "Thus," the court reasoned, "the Board was not required to provide a statement of reasons or bases establishing the medical examiner's competence before relying on her opinion." *Id.* (citing *Rizzo*, 580 F.3d at 1291–92). The court also stated that Francway had "fail[ed] to demonstrate prejudicial error because he fail[ed] to explain why an internal medicine specialist may not qualify as 'an appropriate medical specialist.'" *Id.* 44a.

3. Francway then appealed to the Federal Circuit, arguing that the court should overrule the presumption of competency or—at a minimum—decline to extend it to a case like this one in which a remand order specifically calls for a "specialist."[2] As Francway explained, even if all VA medical examiners may be presumed *competent*, it does not follow that they may all be presumed to be *specialists* in every area of medicine.

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[2] Francway petitioned for initial hearing en banc prior to filing his opening brief, but the petition was denied.

The Federal Circuit rejected Francway's arguments. The court of appeals refused to overturn *Rizzo* and its other presumption-of-competency cases because, it said, the presumption was in fact simply a "narrow[]" rule that required only that "the veteran raise[] the competency issue." Pet. App. 6a–7a. The panel later acknowledged, however, that the veteran must do more than raise the issue; he must make a "specific[] … challenge" to the competency of the examiner. *Id.* 8a. In other words, as other Federal Circuit decisions have repeatedly held, the veteran must provide "specific reasons why the litigant concludes that the expert is not qualified to give an opinion." *Mathis*, 643 F. App'x at 971 (quoting *Bastien*, 599 F.3d at 1307).

Relying on the presumption of competency, the Federal Circuit affirmed the denial of Francway's claim for benefits because it found "no legal error" with the CAVC's determination that Francway "had not raised the competency issue with sufficient clarity to the Board," Pet. App. 11a—that is, had not articulated a sufficiently "specific" challenge to the internist's qualifications. The court also "s[aw] no reason to distinguish between how the presumption applies to 'general' medical examiners as compared to 'specialists.'" *Id.* 12a. "The presumption," the court stated, "is that the VA has properly chosen an examiner who is qualified to provide competent medical evidence in a particular case absent a challenge by the veteran." *Id.*

Nearly three months after the court issued its judgment, the court of appeals sua sponte granted

rehearing en banc. The en banc court left the panel opinion essentially intact but inserted the following footnote:

> The en banc court … has determined that to the extent that the decision here is inconsistent with *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009), and *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), those cases are overruled. We note that in the future, the requirement that the veteran raise the issue of the competency of the medical examiner is best referred to simply as a "requirement" and not a "presumption of competency."

Pet. App. 6a n.1. Notably, the en banc court left in place the panel's conclusions that (i) the veteran must raise a "specific[] … challenge" to the examiner's competency to overcome the presumption and (ii) the presumption applies equally to specialists and regular medical examiners. *See* Pet. App. 8a, 12a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO DISAVOW THE FEDERAL CIRCUIT'S JUDGE-MADE PRESUMPTION OF COMPETENCY.

A. The presumption of competency is illegitimate.

The most fundamental problem with the presumption of competency is that the VA and the Federal Circuit lacked the authority to create it in the first place.

1. Under 38 U.S.C. § 7292, the Federal Circuit's jurisdiction in veterans-benefits cases is limited to interpreting the Constitution, congressional statutes, and agency regulations. *Id.* § 7292(c), (d). But the *Rizzo* court did not purport to rely on a statute or a regulation in adopting the presumption; instead, the Federal Circuit simply created it out of whole cloth. *See Mathis*, 137 S. Ct. at 1995 (Gorsuch, J., dissenting from denial of certiorari) ("[W]here does this presumption come from? It enjoys no apparent provenance in the relevant statutes. There Congress imposed on the VA an affirmative duty to assist—not impair—veterans seeking evidence for their disability claims."). The task of fashioning such presumptions belongs to Congress, not the federal courts.

Indeed, Congress knows how to create presumptions for application in veterans-benefits

adjudicatory proceedings. It has already done so, in numerous places throughout Title 38 of the U.S. Code. *See, e.g.*, 38 U.S.C. § 1111 (establishing presumption that wartime veterans were "in sound condition when examined, accepted, and enrolled for service"); *id.* § 1132 (establishing presumption that peacetime veterans were in sound condition when enrolled for service); *see also id.* § 1112; *id.* § 1116; *id.* § 1133; *id.* § 1153. Notably, all these statutory presumptions favor *the claimant over the VA*. Not a single one favors *the VA over the claimant*, as the presumption of competency does. The presumption of competency is thus not only untethered to any applicable statute or regulation; it is inconsistent with the entire statutory regime applicable to veterans benefits. *See Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994) (rules applicable in VA-benefits proceedings "should be structured so that if any error occurs, it will occur in the veteran's favor").

This Court's decision in *O'Melveney & Myers v. F.D.I.C.*, 512 U.S. 79 (1994), is instructive and demonstrates why the court-created presumption of competency is illegitimate. There, the FDIC had argued that a federal statute governing FDIC receiver actions, FIRREA, authorized federal courts to create a specific right of the FDIC receiver as a matter of "federal common law"—a right that the receiver would not have had under the otherwise applicable state law. This Court held that this argument was "demolished" by the fact that various provisions of the FIRREA *did* "specifically create special federal rules of decision regarding claims by,

and defenses against, the FDIC as receiver"—and yet no provision established the specific right for which the FDIC was advocating. *Id.* at 86. Relying on the maxim "*[i]nclusio unius, exclusio alterius*," the Court found it "hard to avoid the conclusion" that the statute required the FDIC "to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." *Id.* at 86–87. "To create additional 'federal common-law' exceptions," the Court stated, "is not to 'supplement' this scheme, but to alter it." *Id.* at 87.

A similar conclusion is appropriate here. Congress knew how to create presumptions for application in veterans-benefits adjudications, and it did so in several instances in the detailed statutory framework of Title 38. This leads inescapably to the inference that Congress did not intend courts to create *other* presumptions as a matter of federal common law—particularly ones like the *Rizzo* presumption that (unlike every presumption explicitly set forth in the statute) disfavor the veteran.

2. The Federal Circuit's creation of the presumption of competency was *ultra vires* for an additional reason. The presumption of competency is an application of the presumption of regularity, and the application of *that* presumption depends on the factual predicate that the process to which the presumption applies is routine and reliable. *See Latif v. Obama*, 666 F.3d 746, 771 (D.C. Cir. 2011) (Tatel, J., dissenting). But both the Federal Circuit and the

CAVC lack jurisdiction to make factual determinations in veterans-benefits cases, *see* 38 U.S.C. § 7292(d)(2); *id.* § 7261(c)—meaning neither court possessed the power to establish that factual predicate. *See Mathis*, 643 F. App'x at 982 (Reyna, J., concurring).

Indeed, the Federal Circuit's continued adherence to the presumption of competency creates an intra-circuit split on this issue. In *Kyhn v. Shinseki*, 716 F.3d 572 (Fed. Cir. 2013), the court held that the CAVC erred by applying the presumption of regularity to the VA's procedures for providing notice of examinations because application of the presumption depended on the predicate factual finding that those procedures were "regular"—a factual finding that the CAVC lacked jurisdiction to make. *Id.* at 577–78. In the presumption-of-competency cases, however, the Federal Circuit has sanctioned just this sort of judicial fact-finding. This Court's intervention is necessary to resolve this contradiction in the lower court's caselaw.

B. The presumption of competency is conceptually unsound.

The presumption is not only illegitimate; it is also illogical, for two reasons. *First*, application of the presumption of regularity is inappropriate in this context because the VA's process for selecting medical examiners is neither routine nor reliable. *Second*, the presumption is inconsistent with the bedrock principle that the burden of proof with

respect to a given fact should fall on the party best situated to adduce evidence of that fact.

1. The presumption of regularity historically has been applied only to non-discretionary and "ministerial" agency actions; it does not shield substantive agency action "from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *see also* 2 McCormick on Evidence § 343 (7th ed.) ("[o]fficial actions by public officers" are subject to the presumption of regularity because of the high probability that they were carried out correctly). The "process by which medical examiners are selected to provide expert opinions on medical issues" is "far from a routine, ministerial procedure." *Mathis*, 834 F.3d at 1355 (Reyna, J., dissenting from denial of rehearing en banc). Indeed, the VA has near-total discretion regarding its choice of a medical examiner in any given case. *See* VA Manual M21-1 § III.iv.3.A.6.d ("The choice of examiners is up to the VA medical facility conducting the examination, unless the BVA remand specifies that the examination must be conducted by a Board-certified specialist in …, or specialist who is Board qualified.") (emphasis omitted). This is not the sort of the procedure for which the presumption of regularity is appropriate.

Moreover, as the Federal Circuit recognized in *Mathis*, a "presumption should be predicated on evidence that gives us confidence that a particular procedure is carried out properly and yields reliable results in the ordinary course." 643 F. App'x at 973.

But there is no evidentiary support for the proposition that the VA selection process for medical examiners meets this requirement. And significant evidence suggests that it does not.

As a general matter, "the Board remands almost half (47% in 2015) of disability compensation appeals back to the regional offices." *Mathis*, 834 F.3d at 1356 (Reyna, J., dissenting from denial of rehearing en banc). That means the VA gets disability determinations wrong in the first instance approximately *half the time*. "[T]he reality," one commentator has explained, is that the "VA has consistently demonstrated difficulty fulfilling its fundamental obligation to provide veterans with adequate medical examinations and opinions in the first instance." Stacey-Rae Simcox, *The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships*, 68 S.C. L. Rev. 223, 230 (2016). This "reality" is particularly evident in claims concerning diseases of the spine; a recent study found that the VA incorrectly processed over 50% of such claims decided in the first half of 2018. VA Office of Inspector General, *Accuracy of Claims Decisions Involving Conditions of the Spine*, at i (Sept. 5, 2019).

Indeed, this case provides an illustrative example of the VA's difficulty in properly adjudicating veterans disability claims. The VA has—by its own admission—repeatedly failed to provide Francway with an adequate medical examination over the

sixteen-year course of these proceedings. *See supra* Statement of the Case; C.A.J.A. 439–40, 1104–05.

There is no evidence that the VA fares any better in the specific context of selecting medical examiners. For example, with respect to one common type of claim—traumatic brain injuries—the VA has admitted that over 24,000 veterans have received examinations from unqualified examiners. *See Mathis*, 834 F.3d at 1356 n.5 (Reyna, J., dissenting from denial of rehearing en banc). This is particularly noteworthy given that VA guidelines *explicitly require* that veterans with traumatic brain injuries be examined by certain types of specialist physicians. *See* VA Manual M21-1 § III.iv.3.D.2.b. If the VA cannot reliably select competent examiners in the traumatic-brain-injury context—notwithstanding the explicit requirements for those examiners' qualifications—there is no reason to assume the agency does any better in the typical case where there is essentially no selection protocol and where examiners need not specifically state their credentials in their reports.

2. This Court has long recognized that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." *Boone v. Lightner*, 319 U.S. 561, 570 (1943) (citation omitted); 2 McCormick on Evidence § 343. The Federal Circuit recognizes this principle as well. *See Barrett*, 466 F.3d at 1042.

On this logic, the presumption of competency gets things exactly backwards. The VA plainly has superior access to information regarding the qualifications of its own examiners. On the other hand, veterans seeking disability compensation—many of whom suffer "from very significant psychiatric and physical disabilities," *Dixon v. Shinseki*, 741 F.3d 1367, 1376 (Fed. Cir. 2014)—are ill equipped to gather the evidence necessary to overcome the presumption.

C. The presumption of competency is inconsistent with the pro-claimant nature of the VA adjudicatory system.

The presumption of competency stands as a glaring anomaly in the system of veterans-benefits adjudication. "Congress' intent in crafting the veterans benefits system [was] to award entitlements to a special class of citizens, those who risked harm to serve and defend their country," and consequently, the "entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett*, 466 F.3d at 1044 (quotation marks and citation omitted). By design, the system favors the veteran at every turn. *See Henderson*, 562 U.S. at 440–41. As noted above, the VA has a duty to assist claimants in developing their claims, *see* 38 U.S.C. § 5103A(a), and to give the veteran "the benefit of any reasonable doubt" "regarding any issue material to the determination of a matter," 38 U.S.C. § 5107(b). To a similar end, statutes benefitting veterans must "be liberally construed to protect

those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575.

The presumption of competency is inconsistent with all three of these features of the veterans-benefits system. Specifically, the presumption *impairs* veterans in their efforts to obtain disability compensation:

> [C]onsider how the presumption works in practice. The VA usually refuses to supply information that might allow a veteran to challenge the presumption without an order from the Board of Veterans' Appeals. And that Board often won't issue an order unless the veteran can first supply a specific reason for thinking the examiner incompetent…. [H]ow is it that an administrative agency may manufacture for itself or win from the courts a regime that … does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve?

Mathis, 137 S. Ct. at 1995 (Gorsuch, J., dissenting from denial of certiorari); *see also Mathis*, 834 F.3d at 1358–59 (Reyna, J., dissenting from denial of rehearing en banc). The unfairness of the system is impossible to overstate: the VA itself employs the presumption in order to deny veterans access to the very information they need to rebut it. *See Mathis*,

834 F.3d at 1360 (Stoll, J., dissenting from denial of rehearing en banc).

The presumption also conflicts with the benefit-of-the-doubt rule. In direct contravention of the mandate of § 5107(b), the presumption requires that doubts about VA examiners' qualifications are resolved against veterans and in favor of the VA—at least unless the veteran is able to supply a "specific reason" to think the examiner is incompetent.

Finally, the presumption violates the pro-veteran canon of statutory construction, since it *disfavors* veterans seeking disability compensation. If the Federal Circuit wishes to create presumptions for application in VA-benefits proceedings, it must ensure that those presumptions benefit the veteran, not the VA. Given the pro-veteran canon, the presumption of competency simply cannot be reconciled with the statutory duty to assist and the regulatory duty to base benefits decisions on competent medical evidence.

D. The Federal Circuit's defense of the presumption was misguided.

The court below attempted to downplay the negative effects of the presumption of competency, contending that it is "far narrower than Francway asserts and is not inconsistent with the statutory scheme." Pet. App. 6a. According to the panel, the presumption requires only that "the veteran raise[] the competency issue." *Id.* 7a. But, to adequately "raise[] the competency issue," the veteran is

required to "provide information" that sets forth a "specific[] … challenge" to the examiner's qualifications. *Id.* 8a (quoting *Parks*, 716 F.3d at 585); *accord Mathis*, 643 F. App'x at 971; *Bastien*, 599 F.3d at 1307. The en banc court's footnote—which, as noted above, rebranded the presumption as "simply a 'requirement'" and purported to overrule prior Federal Circuit cases to some unspecified extent—apparently does not affect this aspect of the doctrine, because the panel's decision specifically reaffirms it. *See* Pet. App. 6a n.1. And, as noted above, the VA will not provide information necessary to present a "specific challenge" unless the veteran can first overcome the presumption.

This practice flies in the face of the duty to assist, which obligates the VA to ensure that the veteran is provided with all information necessary for a fair decision on her claim. *See Dixon*, 741 F.3d at 1373. Instead of placing the burden on the VA to show that its examiners are competent (a burden the VA could easily satisfy), the presumption places the burden on the veteran to show that a given examiner is incompetent. That makes no sense. "[P]roving a negative is a challenge in any context," *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J. concurring)—and especially in this one, given that many veterans are proceeding pro se, suffer from serious physical and mental handicaps, and have no way to obtain information about an examiner's qualifications, *see Dixon*, 741 F.3d at 1376.

The absurdity of the VA's current practice is also illuminated through consideration of how VA

medical examiners function in VA-benefits proceedings. "VA medical examiners are nothing more or less than expert witnesses[] who provide opinions on medical matters." *Mathis*, 834 F.3d at 1358 (Reyna, J., dissenting from denial of rehearing en banc) (quotation marks and citation omitted). Accordingly, when the VA proffers their testimony, it should be obligated to establish their qualifications, just as is the case with expert witnesses in federal court. *See generally Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Notably, the VA in fact follows this practice when it comes to *private examiners* submitting opinions on behalf of *veterans*: it requires such examiners to submit evidence concerning their qualifications, reasoning that the agency is "unable to assess their experience or qualifications to render an opinion when they do not include information regarding their specialty or a CV." *Mathis*, 643 F. App'x at 979 (Reyna, J., concurring) (quotation marks omitted) (collecting cases). The same logic should apply with at least the same force to the VA's own examiners. Thus, even if the panel's characterization of the presumption as a "narrow" rule that requires only that the veteran "raise the issue" were correct, the rule would still make no sense, as it allows the VA to credit the testimony of an expert witness without *any* information as to his or her qualifications. *See id.* at 978–79 ("That an examiner is qualified to provide a report should be a 'threshold consideration' before her report is considered by the Board.") (quoting *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008)).

II. EVEN IF THIS COURT LEAVES THE PRESUMPTION OF COMPETENCY IN PLACE, REVIEW IS WARRANTED TO CORRECT THE FEDERAL CIRCUIT'S ERRONEOUS EXPANSION OF THE PRESUMPTION.

Even if the presumption of competency is retained, this Court should still reject the expansion of the doctrine wrought by the Federal Circuit here. Until the decision below, the *Rizzo* presumption meant only that, when the VA undertakes to provide a medical examination, the individual who is chosen to perform the examination is presumed to be a *competent medical examiner*—that is, presumed to be "qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1).

In this case, however, the CAVC applied the presumption to hold that, when the VA specifically orders that an examination be conducted by a "specialist," the individual chosen to perform the examination is *presumed to be a competent specialist*. Pet. App. 43a–44a. The claim in this case is for a back injury, so the area of specialty in question is orthopedic medicine. The CAVC rejected Francway's argument that Dr. Schechter was not qualified as an orthopedic specialist—notwithstanding the fact that there is no evidence whatsoever that she was so qualified—because Francway had not "explain[ed] why an internal medicine specialist may not qualify as 'an appropriate medical specialist.'" *Id.* The Federal Circuit then endorsed this dramatic

expansion of the presumption, stating that it "s[aw] no reason to distinguish between how the presumption applies to 'general' medical examiners as compared to 'specialists.'" Pet. App. 12a.

The Federal Circuit's holding lacks any basis in the relevant statutes or regulations, in this Court's case law, or in common sense. Even if the VA may properly presume that any given individual chosen by a VA medical facility is a competent healthcare provider, it does not follow that the VA may presume that the individual is a "specialist" qualified to render an expert opinion in any given area (for example, orthopedic medicine). *See, e.g.*, *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001) ("[M]erely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue."). Indeed, the CAVC itself has acknowledged that "a medical professional is not competent to opine as to matters outside the scope of his or her expertise." *Leshore v. Brown*, 8 Vet. App. 406, 409 (1995). "Specialist doctors exist because the body of medical knowledge is larger than any individual doctor can learn, and it continues to grow as new research is conducted. No doctor can ready every journal in every specialty." *Mathis*, 643 F. App'x at 984 (Reyna, J., concurring).

The VA manual itself recognizes that a competent medical examiner is not necessarily a "specialist," defining a "specialist" as "a clinician who specializes in a particular field" and distinguishing specialists from ordinary VA medical examiners. VA

Manual M21-1 § III.iv.3.A.1.h. This accords with the plain meaning of the term, as evidenced by dictionaries defining a "specialist" as, for example, "a person who devotes himself or herself to one subject or to one particular branch of a subject or pursuit," or "a medical practitioner who devotes attention to a particular class of diseases, patients, etc."[3] Under the Federal Circuit's reasoning, however, the word "specialist" has no meaning at all.

Moreover, the Federal Circuit's transformation of the presumption of *competency* into a presumption of *specialization* is flatly inconsistent with the VA's duty to assist claimants in obtaining the evidence necessary to develop their claims, *see Wood*, 520 F.3d at 1348. It is also inconsistent with the VA's duty to ensure substantial compliance with remand orders, *see Chest v. Peake*, 283 F. App'x 814, 816–17 (Fed. Cir. 2008). Where, as here, the Board determines that a medical opinion from a "specialist" is necessary, the VA is obligated to ensure that the chosen examiner is, in fact, a specialist in the relevant area of medicine. The VA may not rely on a court-created "presumption" to satisfy that affirmative duty.

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[3] https://www.dictionary.com/browse/specialist?s=ts; *see also* https://www.merriam-webster.com/dictionary/specialist (defining "specialist" as "one who specializes in a particular occupation, practice, or field of study," such as "a specialist in disorders of the immune system."

Thus, contrary to what the CAVC thought, it was not Francway's burden "to explain why an internal medicine specialist may not qualify as 'an appropriate medical specialist'" for his back claim. Pet. App. 44a. The CAVC (and the Federal Circuit) got the inquiry exactly backwards: the burden should have been on the VA to establish that the internist Dr. Schechter was an "appropriate medical specialist," not on Francway to show the contrary.

It is particularly important that the VA ensure that a specialist is provided when one is specifically required because, in general, the VA has a strong preference for selecting general practitioners over specialists to perform most disability evaluations. The VA Manual instructs regional offices to "[r]equest a specialist examination *only if it is considered essential for rating purposes*." VA Manual M21-1 § III.iv.3.A.6.c (emphasis added). Given this default rule in favor of generalists, it is necessary to impose upon the VA an affirmative duty to establish that, when a specialist is requested, a specialist is procured.

III. THE QUESTIONS PRESENTED ARE IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE THROUGH WHICH TO RESOLVE THEM.

The questions presented in this case are vitally important to thousands of veterans seeking disability benefits for injuries sustained in the line of

duty.[4] Their importance is clear from the extraordinary sua sponte grant of en banc review below, and from the lengthy opinions accompanying the denial of en banc hearing in the *Mathis* case. As many Federal Circuit judges recognized in that case, the presumption of competency leads to an "absurd" outcome. *Mathis*, 643 F. App'x at 986 (Reyna, J., concurring). It "makes the choice of examiners and their qualifications effectively unreviewable, and bars consideration of an examiner's qualifications in weighing the persuasive value of her testimony." *Id.* The presumption thus insulates the VA's decisions from scrutiny and inevitably leads to the improper denial of veterans' claims.

This case, moreover, presents an ideal vehicle in which to address these issues. The CAVC and the court of appeals relied exclusively on the presumption of competency in denying Francway's claim, *see* Pet. App. 5a–11a, 43a–44a, and the presumption's scope and legitimacy was exhaustively briefed in the court below. Indeed, this is a particularly appropriate case in which to consider the propriety of the presumption because competence is undisputedly at issue here: the *Board*

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[4] *See, e.g.*, Br. Amicus Curiae Disabled American Veterans in Support of Pet'r at 15, *Mathis v. Shulkin*, No. 16-677 (U.S. Dec. 22, 2016) ("With no safeguards on the competence of medical examiners, veterans are left to suffer the consequences of being denied benefits to which they are entitled, and the already labyrinthine veterans benefits system is made even more opaque and difficult to navigate.").

itself found that a specialist was necessary to fairly evaluate Francway's claim, and yet it relied on the presumption to excuse the VA's failure to ensure that a specialist was in fact procured.

Justice Sotomayor, in a statement respecting the denial of certiorari in the *Mathis* case, acknowledged that the presumption of competency implicates "important questions about how the Government carries out its obligations to our veterans," but suggested that the Court should grant review in a case in which "the VA denied a veteran benefits after declining to provide the medical examiner's credentials." 137 S. Ct. at 1994–95. The situation here presents an even more compelling case for certiorari than Justice Sotomayor's hypothetical: as explained above, the Board itself put competency at issue by ordering review by a specialist. This petition thus presents an opportunity for the Court to address the presumption in a case in which it is unquestionably relevant.

It is unlikely, moreover, that a better candidate for certiorari will arise. Most veterans proceed pro se before the VA in the first instance. Accordingly, they are unlikely to have the requisite familiarity with these issues to understand their purported obligation to raise a "specific challenge" to the examiner's competency. And, precisely because the presumption of competency is the sole exception to the VA's duty to assist, a veteran who has been consistently aided by the VA in the development of her claim will never think that the onus is on her to challenge the examiner's competence or to ask for

the examiner's qualifications in the first instance. The veteran is particularly likely to be confused about her obligations given (i) the Federal Circuit's opaque en banc footnote—which does not specify which aspects of the presumption remain good law and which do not—and (ii) the VA's continued reliance on the presumption to refuse to provide veterans with the information they need to mount challenges to examiner competency, *see* VA Manual M21-1 § III.iv.3.D.2.o.

More fundamentally, requiring the veteran to ask for the examiner's credentials on pain of losing the ability to challenge the examiner's competency is precisely the sort of harm that the duty to assist is supposed to prevent. That duty mandates that the burden is on the VA to ensure that the veteran's rights are vindicated. This Court should not deny certiorari based on Francway's failure to fulfill procedural obligations that never should have been imposed upon him in the first place.

In short, this case is an excellent vehicle for review, and this Court's intervention is needed now. In *Mathis*, the Federal Circuit refused, by a vote of 7-5, to reconsider the presumption. And the en banc court's footnote in the decision below demonstrates that the court is now content to let the core of the presumption live on in perpetuity, albeit with the less-threatening title "requirement." Given the Federal Circuit's exclusive jurisdiction over appeals from the CAVC, *see* 38 U.S.C. § 7292(c), further percolation of this issue in the judicial branch will not change the status quo. And the VA itself has

shown no signs of amending its practices; it has steadfastly defended the validity of the presumption since it was established. Accordingly, the only recourse for veterans like Francway is review in this Court.

CONCLUSION

This Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ERNEST L. FRANCWAY, JR.,
Claimant-Appellant

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2018-2136

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-3738, Judge Michael P. Allen, Judge Amanda L. Meredith, Judge Joseph L. Toth.

Decided: October 15, 2019

WILLIAM H. MILLIKEN, Sterne Kessler Goldstein & Fox, PLLC, Washington, DC, argued for claimant-appellant. Also represented by MICHAEL E. JOFFRE.

WILLIAM JAMES GRIMALDI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by JOSEPH H. HUNT, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; LARA EILHARDT, SAMANTHA ANN SYVERSON, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before PROST, *Chief Judge,* LOURIE and DYK, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* DYK, in which PROST, *Chief Judge* and LOURIE, *Circuit Judge*, join.

Footnote 1 of the opinion is joined by PROST, *Chief Judge,* NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

DYK, *Circuit Judge.*

Ernest L. Francway appeals from the Court of Appeals for Veterans Claims' ("Veterans Court's") decision affirming the Board of Veterans' Appeals' ("Board's") denial of Francway's claim for disability compensation. We affirm.

BACKGROUND

Francway served on active duty in the United States Navy from August 1968 to May 1970. While serving on an aircraft carrier in 1969, Francway contends that he was "hit by a gust of wind while carrying a set of wheel chocks" and "[t]he resulting fall caused him to injure his back." Francway Br. at 4. He contends he "was placed on bedrest for a week and assigned to light duty for three months following the incident." *Id.* Francway claims that this injury is connected to a current lower back disability, noting that after his accident he was treated for back problems while in service.

In April 2003, Francway filed a claim with the Department of Veterans Affairs ("VA") for service connection for his back disability. Between 2003 and 2011, Francway was examined multiple times by an orthopedist and had his medical records separately reviewed by the orthopedist and an internist. They concluded, along with a physician's assistant that examined Francway, that Francway's current back disability was not likely connected to his injury in 1969.

After multiple appeals to and from the Board and remands back to the VA regional office ("RO"), in 2013, Francway sought to open his claim based on new and material evidence from his longtime friend, in a so-called "buddy statement," attesting to Francway's history of lower back disability after his injury in 1969. The Board again remanded the case to the RO based on the allegations in the "buddy

statement," with instructions that Francway's "claims file should be reviewed by an appropriate medical specialist for an opinion as to whether there is at least a 50 percent probability or greater . . . that he has a low back disorder as a result of active service." J.A. 1046 (emphasis added). The Board also instructed that "[t]he examiner should reconcile any opinion provided with the statements from [Francway and his "buddy statement"] as to reported episodes of back pain since active service." *Id.* (emphasis omitted).

In 2014, Francway was examined by the same orthopedist who had examined him previously. The orthopedist concluded that Francway's current back symptoms were unlikely to be related to his injury in 1969, but the orthopedist did not address the "buddy statement." Subsequently, the internist who had previously provided the VA a medical opinion on Francway's disability reviewed Francway's file and the "buddy statement," and concluded that it would be speculative to say his current back symptoms were related to his earlier injury. The RO again denied Francway's entitlement to benefits for his back disability.

The Board concluded that there was insufficient evidence of a nexus between Francway's injury in 1969 and his current back disability and that the VA had complied with the earlier remand orders. Francway then appealed to the Veterans Court, arguing for the first time that the internist who had reviewed the "buddy statement" was not an "appropriate medical specialist" within the meaning

of the remand order. The Veterans Court held that Francway had not preserved that claim because Francway did not challenge the examiner's qualifications before the Board.

Francway appealed to this court. We have jurisdiction pursuant to 38 U.S.C. § 7292(c). A request for initial hearing en banc was denied. *Francway v. Wilkie*, No. 18-2136 (Nov. 28, 2018), ECF No. 30. We review questions of law de novo, but, absent a constitutional issue, we "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

DISCUSSION

I

Since 2009, we have held that the Board and Veterans Court properly apply a presumption of competency in reviewing the opinions of VA medical examiners. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009).

Francway first contends that the presumption of competency is inconsistent with the VA's duty to assist veterans, *see* 38 U.S.C. § 5103A (requiring the VA to assist veterans with benefit claims), and the benefit-of-the-doubt rule, *id.* § 5107(b) (requiring the VA to give the benefit of the doubt to the veteran when the evidence is in approximate equipoise), and that there is no statutory basis for the presumption. We construe Francway's continued argument as to the illegitimacy of the presumption as a request for

the panel to ask for an en banc hearing under Federal Circuit Rule 35 to overturn *Rizzo* and subsequent cases.[1] We decline to do so. We see no reason for en banc review since the "presumption of competency" is far narrower than Francway asserts and is not inconsistent with the statutory scheme.

"The purpose of the [VA] is to administer the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans." 38 U.S.C. § 301(b). In line with this mandate, the VA processes claims for service-connected disability benefits sought by veterans, *see, e.g.*, *id.* §§ 1110, 1131, and, to perform this duty, the VA relies on medical examiners who provide medical examinations and medical opinions based on review of the evidence in the record, *id.* § 5103A(d); 38 C.F.R. § 3.159(c)(4). Both the statute and implementing regulations require that these medical examinations and opinions be based on competent medical evidence, defined, in relevant part, as "evidence provided by a person who is qualified through education, training, or experience to offer

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[1] The en banc court formed of PROST, *Chief Judge,* NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*, has determined that to the extent that the decision here is inconsistent with *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009), and *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), those cases are overruled. We note that in the future, the requirement that the veteran raise the issue of the competency of the medical examiner is best referred to simply as a "requirement" and not a "presumption of competency."

medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1).

The presumption of competency originated in our decision in *Rizzo*. As we said in *Rizzo*, "[a]bsent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion." 580 F.3d at 1291. Although it is referred to as the presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this presumption is rebutted when the veteran raises the competency issue.

The limited nature of the presumption has been consistently recognized in our caselaw. Beginning with *Rizzo*, we have held that "where . . . the veteran does not challenge a VA medical expert's competence or qualifications before the Board," the "VA need not affirmatively establish that expert's competency." *Id.* at 1291 (emphasis added); *id.* ("Absent some challenge . . . ." (emphasis added)); *id.* ("Absent some challenge . . . .") (emphasis added)). Similarly, in *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011), we held that "when a veteran suspects a fault with the medical examiner's qualifications, it is incumbent upon the veteran to raise the issue before the Board." *Id.* at 1365–66 (emphasis added). "[T]he VA and Board are not required to affirmatively establish competency of a medical examiner unless

the issue is raised by the veteran." *Id.* at 1366 (emphasis added). Our holding in *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013), is consistent with this understanding. Although we noted that "[i]f an objection is raised it may be necessary for the veteran to provide information to overcome the presumption," *id.* at 585 (emphasis added), the statement was referring to the specificity of the challenge rather than requiring the veteran to submit evidence that is within the control of the VA.

Francway contends that *Rizzo* held that the veteran bears the burden of persuasion, or at least production, of showing that the examiner was incompetent. The only support for that contention is a quote in *Rizzo* from the Veterans Court's decision in *Cox v. Nicholson*, 20 Vet. App. 563 (2007): "[T]he appellant bears the burden of persuasion on appeals to th[e Veterans] Court to show that such reliance was in error." *Rizzo*, 580 F.3d at 1290–91 (quoting *Cox*, 20 Vet. App. at 569). First, the Veterans Court's language in *Cox* that Francway cites concerned the veteran's burden on appeal to show prejudicial error with the Board's decision and did not concern which party bears the initial burden of demonstrating the examiner's competence or lack thereof. Second, although the presumption of competency is based on *Rizzo* and subsequent cases from our court, those cases did not place the burden of persuasion or evidentiary production on the veteran, as discussed above.

The presumption of competency requires nothing more than is required for veteran claimants in other

contexts—simply a requirement that the veteran raise the issue. The Supreme Court has implicitly recognized that the veteran bears such a burden of raising an issue in *Shinseki v. Sanders*, 556 U.S. 396 (2009). There, the Supreme Court noted the burden placed on the claimant in ordinary litigation to raise an issue and establish prejudicial error. *Id.* at 410. When the Court held that the veteran bears the burden of showing prejudicial error, it necessarily assumed that the veteran bears the burden of raising the claim of error in the first instance. *See id.*; s*ee also, e.g.*, *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009) ("[A] veteran is obligated to raise an issue in a notice of disagreement if he wishes to preserve his right to assert that issue on appeal . . . ."). There is nothing in the statute or its interpretation that relieves the veteran from the obligation to raise an issue in the first instance in the general run of cases.[2]

Here, once the veteran raises a challenge to the competency of the medical examiner, the presumption has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner's qualifications. The Board must

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[2] We do not address the applicability of the presumption of competency in cases where the veteran did not challenge the examiner's competence, but the record independently demonstrates an irregularity in the process of selecting the examiner. *See* VA Br. at 36 (citing *Wise v. Shinseki*, 26 Vet. App. 517 (2014)) (conceding that the presumption would not apply in such a situation).

then make factual findings regarding the qualifications and provide reasons and bases for concluding whether or not the medical examiner was competent to provide the opinion. 38 U.S.C. § 7104(d).

Since the veteran is obligated to raise the issue in the first instance, the veteran must have the ability to secure from the VA the information necessary to raise the competency challenge. Once the request is made for information as to the competency of the examiner, the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner. This is mandated by the VA's duty to assist. *See* 38 U.S.C. § 5103A; *Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013) (collecting cases).

The VA agrees with this interpretation of the presumption of competency and the VA's duties. At oral argument, the VA agreed that "[the presumption] is not an evidentiary burden, it's kind of a burden to request [the examiner's qualifications]." Oral Arg. at 25:34–38. The VA also recognized its burden to "substantively respond" to the veteran's challenge "[o]nce the veteran [sufficiently] raises the issue" and that after a challenge is raised "the VA can't come in [to the Board] and say we're entitled to the presumption that this person is competent and you have to assume he is competent." Oral Arg. at 32:29–42. Then, as the VA notes, the Board has to "make a decision as to whether the medical officer was

actually competent and provide reasons and bases explaining that decision." Oral Arg. 28:50–29:02.

II

Francway alternatively contends that his brief to the Board sufficiently raised the issue of the medical examiner's competency because it broadly argued that the medical examinations and opinions were inadequate. But "whether an examiner is competent and whether he has rendered an adequate exam are two separate inquiries." *Mathis v. McDonald*, 834 F.3d 1347, 1351 (Fed. Cir. 2016) (Hughes, J., concurring in denial of rehearing en banc). The Veterans Court found that Francway had not raised the competency issue with sufficient clarity to the Board. Based on the proper understanding of the presumption of competency described above, we find no legal error with the Veterans Court's decision, and we lack jurisdiction to determine whether the Veterans Court's decision is correct as a factual matter.

III

Francway separately contends that this case is distinguishable because the issue of the examiner's competency arose in the context of a remand order from the Board requiring an "appropriate medical specialist." In such a situation, Francway argues that the Board cannot presume the competency of the selected examiner in a specialty because the presumption is one of general medical competence not one regarding an examiner's expertise in various specialties.

We see no reason to distinguish between how the presumption applies to "general" medical examiners as compared to "specialists." The presumption is that the VA has properly chosen an examiner who is qualified to provide competent medical evidence in a particular case absent a challenge by the veteran. *Parks*, 716 F.3d at 585; 38 C.F.R. § 3.159(c)(4). Here, as noted above, Francway did not raise the issue of the medical examiner's competence before the Board so the presumption applies. Thus, we see no legal error in the Veterans Court's decision affirming the Board's denial of Francway's claim to compensation for his back injury.

CONCLUSION

Because Francway did not challenge the medical examiner's qualifications before the Board, which is all that the presumption of competency requires, we do not find legal error with the Veterans Court's decision.

AFFIRMED

COSTS

No costs.

APPENDIX B

United States Court of Appeals
for the Federal Circuit

ERNEST L. FRANCWAY, JR.,
Claimant-Appellant

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2018-2136

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-3738, Judge Michael P. Allen, Judge Amanda L. Meredith, Judge Joseph L. Toth.

Decided: July 23, 2019

WILLIAM H. MILLIKEN, Sterne Kessler Goldstein & Fox, PLLC, Washington, DC, argued for claimant-appellant. Also represented by MICHAEL E. JOFFRE.

WILLIAM JAMES GRIMALDI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by JOSEPH H. HUNT, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; LARA EILHARDT, SAMANTHA ANN SYVERSON, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before PROST, *Chief Judge,* LOURIE and DYK, *Circuit Judges.*

DYK, *Circuit Judge.*

Ernest L. Francway appeals from the Court of Appeals for Veterans Claims' ("Veterans Court's") decision affirming the Board of Veterans' Appeals' ("Board's") denial of Francway's claim for disability compensation. We affirm.

BACKGROUND

Francway served on active duty in the United States Navy from August 1968 to May 1970. While serving on an aircraft carrier in 1969, Francway contends that he was "hit by a gust of wind while carrying a set of wheel chocks" and "[t]he resulting fall caused him to injure his back." Francway Br. at 4. He contends he "was placed on bedrest for a week and assigned to light duty for three months following the incident." *Id.* Francway claims that this injury is connected to a current lower back disability, noting

that after his accident he was treated for back problems while in service.

In April 2003, Francway filed a claim with the Department of Veterans Affairs ("VA") for service connection for his back disability. Between 2003 and 2011, Francway was examined multiple times by an orthopedist and had his medical records separately reviewed by the orthopedist and an internist. They concluded, along with a physician's assistant that examined Francway, that Francway's current back disability was not likely connected to his injury in 1969.

After multiple appeals to and from the Board and remands back to the VA regional office ("RO"), in 2013, Francway sought to open his claim based on new and material evidence from his longtime friend, in a so-called "buddy statement," attesting to Francway's history of lower back disability after his injury in 1969. The Board again remanded the case to the RO based on the allegations in the "buddy statement," with instructions that Francway's "claims file should be reviewed by an appropriate medical specialist for an opinion as to whether there is at least a 50 percent probability or greater . . . that he has a low back disorder as a result of active service." J.A. 1046 (emphasis added). The Board also instructed that "[t]he examiner should reconcile any opinion provided with the statements from [Francway and his "buddy statement"] as to reported episodes of back pain since active service." *Id.* (emphasis omitted).

In 2014, Francway was examined by the same orthopedist who had examined him previously. The orthopedist concluded that Francway's current back symptoms were unlikely to be related to his injury in 1969, but the orthopedist did not address the "buddy statement." Subsequently, the internist who had previously provided the VA a medical opinion on Francway's disability reviewed Francway's file and the "buddy statement," and concluded that it would be speculative to say his current back symptoms were related to his earlier injury. The RO again denied Francway's entitlement to benefits for his back disability.

The Board concluded that there was insufficient evidence of a nexus between Francway's injury in 1969 and his current back disability and that the VA had complied with the earlier remand orders. Francway then appealed to the Veterans Court, arguing for the first time that the internist who had reviewed the "buddy statement" was not an "appropriate medical specialist" within the meaning of the remand order. The Veterans Court held that Francway had not preserved that claim because Francway did not challenge the examiner's qualifications before the Board.

Francway appealed to this court. We have jurisdiction pursuant to 38 U.S.C. § 7292(c). A request for initial hearing en banc was denied. *Francway v. Wilkie*, No. 18-2136 (Nov. 28, 2018), ECF No. 30. We review questions of law de novo, but, absent a constitutional issue, we "may not review (A) a challenge to a factual determination, or

(B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

DISCUSSION

I

Since 2009, we have held that the Board and Veterans Court properly apply a presumption of competency in re-viewing the opinions of VA medical examiners. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009).

Francway first contends that the presumption of competency is inconsistent with the VA's duty to assist veterans, *see* 38 U.S.C. § 5103A (requiring the VA to assist veterans with benefit claims), and the benefit-of-the-doubt rule, *id.* § 5107(b) (requiring the VA to give the benefit of the doubt to the veteran when the evidence is in approximate equipoise), and that there is no statutory basis for the presumption. We construe Francway's continued argument as to the illegitimacy of the presumption as a request for the panel to ask for an en banc hearing under Federal Circuit Rule 35 to overturn *Rizzo* and subsequent cases.[1] We decline to do so. We see no reason for en banc review since the "presumption of

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[1] "Although only the court en banc may overrule a binding precedent, a party may argue, in its brief and oral argument, to overrule a binding precedent without petitioning for hearing en banc. The panel will decide whether to ask the regular active judges to consider hearing the case en banc." Fed. Cir. R. 35(a)(1) (emphasis added).

competency" is far narrower than Francway asserts and is not inconsistent with the statutory scheme.

"The purpose of the [VA] is to administer the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans." 38 U.S.C. § 301(b). In line with this mandate, the VA processes claims for service-connected disability benefits sought by veterans, *see, e.g.*, *id.* §§ 1110, 1131, and, to perform this duty, the VA relies on medical examiners who provide medical examinations and medical opinions based on review of the evidence in the record, *id.* § 5103A(d); 38 C.F.R. § 3.159(c)(4). Both the statute and implementing regulations require that these medical examinations and opinions be based on competent medical evidence, defined, in relevant part, as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1).

The presumption of competency originated in our decision in *Rizzo*. As we said in *Rizzo*, "[a]bsent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion." 580 F.3d at 1291. Although it is referred to as the presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this

presumption is rebutted when the veteran raises the competency issue.

The limited nature of the presumption has been consistently recognized in our caselaw. Beginning with *Rizzo*, we have held that "where . . . the veteran does not challenge a VA medical expert's competence or qualifications before the Board," the "VA need not affirmatively establish that expert's competency." *Id.* at 1291 (emphasis added); *id.* ("Absent some challenge . . . ." (emphasis added)); *id.* ("Absent some challenge . . . .") (emphasis added)). Similarly, in *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011), we held that "when a veteran suspects a fault with the medical examiner's qualifications, it is incumbent upon the veteran to raise the issue before the Board." *Id.* at 1365–66 (emphasis added). "[T]he VA and Board are not required to affirmatively establish competency of a medical examiner unless the issue is raised by the veteran." *Id.* at 1366 (emphasis added). Our holding in *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013), is consistent with this understanding. Although we noted that "[i]f an objection is raised it may be necessary for the veteran to provide information to overcome the presumption," *id.* at 585 (emphasis added), the statement was referring to the specificity of the challenge rather than requiring the veteran to submit evidence that is within the control of the VA.

Francway contends that *Rizzo* held that the veteran bears the burden of persuasion, or at least production, of showing that the examiner was incompetent. The only support for that contention is

a quote in *Rizzo* from the Veterans Court's decision in *Cox v. Nicholson*, 20 Vet. App. 563 (2007): "[T]he appellant bears the burden of persuasion on appeals to th[e Veterans] Court to show that such reliance was in error." *Rizzo*, 580 F.3d at 1290–91 (quoting *Cox*, 20 Vet. App. at 569). First, the Veterans Court's language in *Cox* that Francway cites concerned the veteran's burden on appeal to show prejudicial error with the Board's decision and did not concern which party bears the initial burden of demonstrating the examiner's competence or lack thereof. Second, although the presumption of competency is based on *Rizzo* and subsequent cases from our court, those cases did not place the burden of persuasion or evidentiary production on the veteran, as discussed above.

The presumption of competency requires nothing more than is required for veteran claimants in other contexts—simply a requirement that the veteran raise the issue. The Supreme Court has implicitly recognized that the veteran bears such a burden of raising an issue in *Shinseki v. Sanders*, 556 U.S. 396 (2009). There, the Supreme Court noted the burden placed on the claimant in ordinary litigation to raise an issue and establish prejudicial error. *Id.* at 410. When the Court held that the veteran bears the burden of showing prejudicial error, it necessarily assumed that the veteran bears the burden of raising the claim of error in the first instance. *See id.*; s*ee also, e.g.*, *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009) ("[A] veteran is obligated to raise an issue in a notice of disagreement if he wishes to preserve his right to assert that issue on

appeal . . . ."). There is nothing in the statute or its interpretation that relieves the veteran from the obligation to raise an issue in the first instance in the general run of cases.[2]

Here, once the veteran raises a challenge to the competency of the medical examiner, the presumption has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner's qualifications. The Board must then make factual findings regarding the qualifications and provide reasons and bases for concluding whether or not the medical examiner was competent to provide the opinion. 38 U.S.C. § 7104(d).

Since the veteran is obligated to raise the issue in the first instance, the veteran must have the ability to secure from the VA the information necessary to raise the competency challenge. Once the request is made for information as to the competency of the examiner, the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner. This is mandated by the VA's duty to

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[2] We do not address the applicability of the presumption of competency in cases where the veteran did not challenge the examiner's competence, but the record independently demonstrates an irregularity in the process of selecting the examiner. *See* VA Br. at 36 (citing *Wise v. Shinseki*, 26 Vet. App. 517 (2014)) (conceding that the presumption would not apply in such a situation).

assist. *See* 38 U.S.C. § 5103A; *Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013) (collecting cases).

The VA agrees with this interpretation of the presumption of competency and the VA's duties. At oral argument, the VA agreed that "[the presumption] is not an evidentiary burden, it's kind of a burden to request [the examiner's qualifications]." Oral Arg. at 25:34–38. The VA also recognized its burden to "substantively respond" to the veteran's challenge "[o]nce the veteran [sufficiently] raises the issue" and that after a challenge is raised "the VA can't come in [to the Board] and say we're entitled to the presumption that this person is competent and you have to assume he is competent." Oral Arg. at 32:29–42. Then, as the VA notes, the Board has to "make a decision as to whether the medical officer was actually competent and provide reasons and bases explaining that decision." Oral Arg. 28:50–29:02.

II

Francway alternatively contends that his brief to the Board sufficiently raised the issue of the medical examiner's competency because it broadly argued that the medical examinations and opinions were inadequate. But "whether an examiner is competent and whether he has rendered an adequate exam are two separate inquiries." *Mathis v. McDonald*, 834 F.3d 1347, 1351 (Fed. Cir. 2016) (Hughes, J., concurring in denial of rehearing en banc). The Veterans Court found that Francway had not raised the competency issue with sufficient clarity to the

Board. Based on the proper understanding of the presumption of competency described above, we find no legal error with the Veterans Court's decision, and we lack jurisdiction to determine whether the Veterans Court's decision is correct as a factual matter.

III

Francway separately contends that this case is distinguishable because the issue of the examiner's competency arose in the context of a remand order from the Board requiring an "appropriate medical specialist." In such a situation, Francway argues that the Board cannot presume the competency of the selected examiner in a specialty because the presumption is one of general medical competence not one regarding an examiner's expertise in various specialties.

We see no reason to distinguish between how the presumption applies to "general" medical examiners as compared to "specialists." The presumption is that the VA has properly chosen an examiner who is qualified to provide competent medical evidence in a particular case absent a challenge by the veteran. *Parks*, 716 F.3d at 585; 38 C.F.R. § 3.159(c)(4). Here, as noted above, Francway did not raise the issue of the medical examiner's competence before the Board so the presumption applies. Thus, we see no legal error in the Veterans Court's decision affirming the Board's denial of Francway's claim to compensation for his back injury.

CONCLUSION

Because Francway did not challenge the medical examiner's qualifications before the Board, which is all that the presumption of competency requires, we do not find legal error with the Veterans Court's decision.

AFFIRMED

COSTS

No costs.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ERNEST L. FRANCWAY, JR.,
Claimant-Appellant

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2018-2136

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-3738, Judge Michael P. Allen, Judge Amanda L. Meredith, Judge Joseph L. Toth.

SUA SPONTE REHEARING EN BANC

Before PROST, *Chief Judge,* NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

This case was argued before a panel of three judges on June 6, 2019. A sua sponte request for a poll on whether to consider this case en banc was made. A poll was conducted, and the judges who are in regular active service voted for sua sponte en banc consideration.

Accordingly,

IT IS ORDERED THAT:

1. Rehearing en banc is granted for the limited purpose of deleting footnote 1 and accompanying text from the previous precedential opinion and replacing it with a new en banc footnote 1.
2. The previous precedential opinion, dated July 23, 2019, is hereby withdrawn and replaced with the modified precedential opinion attached to this order.

FOR THE COURT

October 15, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX D

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3738

ERNEST L. FRANCWAY, JR., APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

MEREDITH, *Judge*: The appellant, Ernest L. Francway, Jr., through counsel appeals an October 13, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for a low back disability. Record (R.) at 1-16. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*,

1 Vet. App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's October 13, 2016, decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from August 1968 to May 1970. R. at 213. Service treatment records show that the appellant received medical treatment during service, including for back pain. In November 1969, the appellant was seen for a painful, swollen wrist, following a motorcycle accident. R. at 91. On December 9, 1969, the appellant was seen for low back pain on the right side; he was given medication for pain relief, instructed to treat his back with warm soaks, and asked to return to sick call later that morning. *Id.* Later that day, the appellant returned with the same complaint of low back pain, and examination revealed limited range of motion without pain, no deformity, negative test for fracture, and some pain on rotation. *Id.* On December 10, 1969, the appellant was seen again for low back pain, and he reported that symptoms first began on November 19 when he was involved in a motor vehicle accident and that the "present episode" began on December 8. R. at 92. Examination revealed symptoms at L5-S1 without radiation and on the right sacroiliac joint, and the appellant was placed on light duty. *Id.*

A March 1978 report of medical examination for the U.S. Naval Reserve revealed a normal back. R. at 94-95. In a contemporaneous report of medical

history, the appellant reported that he was in good condition and denied currently having or having had any recurrent back pain, but he disclosed currently having or having had "[s]wollen or painful joints" and a "'[t]rick' or locked knee." R. at 96-97. He also reported that he had been hospitalized after a motorcycle accident in 1976 for surgical removal of cartilage from his left knee and a bone fragment from his right shoulder. R. at 97.

A March 1995 non-VA medical record reflects the appellant's complaint of back pain which started after he lifted weights. R. at 2078.

An October 2002 VA treatment record reflects the appellant's complaint of arthritis in his shoulders and hands and his denial of any other physical complaints. R. at 1989-90. The record also noted the 1976 motor vehicle accident that resulted in a left ankle sprain and surgical repair of a right shoulder injury as well as a left knee injury. R. at 1989.

In April 2003, the appellant filed multiple claims for VA benefits, including entitlement to disability compensation for a "back injury on [his] left side dated 5/69. . . . [sustained o]n the U.S.S. Oriskany." R. at 1995. In May 2003, a VA regional office (RO), among other things, denied entitlement to disability compensation for a back condition. R. at 1927-29. In June 2003, the appellant filed a request "to reopen" his prior claims, including for a back condition. R. at 1921. In January 2004, the RO "confirmed [the] previous decision" denying the appellant's claim. R.

at 1883. The appellant timely perfected his appeal of the denial. R. at 1855-57 (Mar. 2004 Substantive Appeal), 1863-81 (Feb. 2004 Statement of the Case), 1882 (Feb. 2004 Notice of Disagreement).

In October 2005, the appellant testified at a hearing before the Board, during which he stated that he had injured his back on a flight deck when a gust of wind knocked him over and he fell onto the wheel chocks that he was carrying. R. at 1821. He explained that he fell onto the chocks and injured his abdomen, after which he was carried on a stretcher to sickbay where he stayed for a couple of weeks. *Id*. The appellant stated that he was diagnosed in service with a muscle strain and that he was also assigned to light duty for 3 months. R. at 1821-22. The appellant denied receiving any treatment for his back after service until he got a muscle cramp in 2004, which was treated with muscle relaxants. R. at 1822. Before 2004, the appellant stated that he would treat his back pain by taking over-the-counter medication and sick leave. R. at 1823-24. In January 2006, the Board remanded the claim for further development. R. at 1800-05.

In May 2006, the appellant underwent a VA examination, during which the appellant reported that he had strained his back in 1969, which "took about three months to go away," after which he experienced intermittent back pain that "got worse" in 2004, when he was told that he may have arthritis. R. at 1617. The examiner, an orthopedist, diagnosed the appellant with lumbosacral strain,

concluding that it is not likely that his current back symptoms are related to "a simple strain back in 1969, but rather a natural[ly] occurring phenomenon." *Id.* Contemporaneous diagnostic testing revealed "[m]inimal arthritis" of the lumbosacral spine. R. at 1618. In July 2007, the appellant underwent another VA examination with the same examiner, who diagnosed the appellant with lumbosacral strain with minimal arthritis and reiterated his opinion that this condition was not related to service. R. at 1582. In August 2007, the appellant sought medical treatment and disclosed that he had been rear-ended in a motor vehicle accident, after which he began to experience a stiff neck and headache. R. at 1351.

In May 2009, the Board denied the appellant's claim of entitlement to disability compensation for a low back disorder. R. at 1428-44. In September 2009, the appellant appealed the Board's decision to the Court. R. at 1113. In December 2010, the parties filed a joint motion for partial remand (JMPR), in which they agreed that "it did not appear that [the May 2006 and July 2007 VA] medical opinions provided an adequate rationale for a fully-informed decision by the Board" and that it was "unclear whether the Board properly considered the adequacy of . . . [these] examination reports." R. at 1155, 1158. Later that month, the Court granted the parties' motion. R. at 1115. In May 2011, the Board remanded the claim for further development. R. at 1073-79.

In December 2011, the same examiner who provided the May 2006 and July 2007 VA medical opinions, upon review of the claims file, diagnosed the appellant with spinal stenosis and opined that it was "less likely than not related to service but natural age progression." R. at 1051. In January 2012, a different examiner, a VA internist, reviewed the record and interviewed, but did not examine, the appellant. R. at 1026, 1029. She noted that neither the appellant's narrative of his in-service back injury nor his complaint of recurrent back pain after that injury was reflected in his service treatment records. R. at 1028. She also observed that the appellant had made "various orthopedic complaints (knee, shoulder) [in October 2002] but expressed no complaint of back pain" until 2005, when he claimed to have a history of chronic back pain, which she further observed was not noted in his VA treatment records or claims file. R. at 1028-29. Upon review of the record and interview of the appellant, the examiner diagnosed him with degenerative disk disease (DDD), opining that spinal stenosis and DDD are less likely than not related to "an acute back strain that occurred more than 30 years prior to his next back complaint and even further from the time of a diagnosis of spinal stenosis." R. at 1029.

In April 2012, the appellant underwent a VA examination by a physician's assistant. R. at 997-1010. The examiner noted the appellant's history of motor vehicle accidents, both prior to service in 1964 and after service in 1976, as well his denial of any back pain after those accidents. R. at 997. The

appellant reported that he had low back pain in 1995 secondary to bending over to pick up a 10-pound weight. *Id*. He further stated that he has had chronic and constant low back pain since injuring his back in service but, as observed by the examiner, he did not report having received any medical treatment from the time of his discharge from service until 1995; he stated that his back pain was not formally addressed until 2004 when he received VA treatment for his back. R. at 998. The examiner opined:

> There are no medical records of evidence from 1970-2004 to establish a nexus therefore it would be less likely than not that the [appellant's] spinal stenosis is related to the injury he describes . . . . It would be more likely than not [that] his spinal stenosis is related to natural age progression with consideration [of] wear and tear throughout his life.

R. at 1009-10.

In January 2013, the appellant submitted a statement dated November 2012 from a person, G.P., whom he had known since the 1970s. R. at 960-61. G.P. stated that the appellant had told him he had injured his back in service, that he had "seen [the appellant] in some really bad pain," that the appellant had treated his back pain with over-the-counter medicine, and that the appellant has had back pain since G.P. has known him. R. at 960. In March 2013, the Board remanded the claim for further development, to include a directive that the

appellant's claims file "should be reviewed by an appropriate medical specialist for an opinion," who, among other things, "should reconcile any opinion provided with the statements from the [appellant] and G.P. as to reported episodes of back pain since active service." R. at 958.

In September 2014, the appellant underwent another VA medical examination with the same examiner who provided the May 2006, July 2007, and December 2011 VA medical opinions. R. at 376-84. The examiner diagnosed the appellant with lumbosacral strain and spinal stenosis, concluding that "it is less likely that his current [spinal] stenosis is related to one eve[n]t over 40 years ago but rather natural age progression." R. at 377, 383-84.

In March 2015, a VA addendum opinion was provided by the same examiner who wrote the January 2012 VA opinion. R. at 347-48. After reviewing the appellant's claims file, VA treatment records, and the lay statement of G.P., the examiner opined:

> While it is possible that the [appellant] injured or developed disease in his spine after his military service, it's not possible to relate post-service conditions to the self-limited back strain documented in service without resorting to speculation. It is a rare service member or civilian who does not, at one time or another, experience a self-limited musculoskeletal back strain. However, one

> such event does not qualify as a chronic condition or cause spinal stenosis or any other disease. [G.P.'s] [] statement confirming back pain during the 1970s and thereafter is insufficient to establish the existence of an initial in-service condition that would cause the symptoms and findings occu[r]ring after the service.

R. at 347-48.

On October 13, 2016, the Board denied the appellant's claim for disability compensation for a low back disability. R. at 1-16. This appeal followed.

II. ANALYSIS

The appellant argues, essentially, that the Board erred in (1) relying upon medical opinions that are inadequate and failed to substantially comply with the Board's prior remand directives, and (2) failing to provide adequate reasons or bases in support of its finding that lay statements by the appellant and G.P. carried less probative value than other evidence of record. Appellant's Brief (Br.) at 11-19; Reply Br. at 5-11. The Secretary contends that the Board properly relied upon adequate medical opinions, which substantially complied with prior remands, and that it provided sufficient reasons or bases in assigning less probative value to the lay statements of the appellant and G.P. Secretary's Br. at 8-24.

A. Duty To Assist

"[O]nce the Secretary undertakes the effort to provide an examination [or opinion] when developing a service connection claim, . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007), "describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet. App. 97, 105 (2012) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id.* at 105-06.

Additionally, a remand by the Board or this Court "confers on the [appellant] . . . , as a matter of law, the right to compliance with the remand orders," and the Board errs when it fails to ensure compliance with the terms of such a remand. *Stegall v. West*, 11 Vet. App. 268, 271 (1998). Although the Secretary is required to comply with remand orders, it is substantial compliance, not strict compliance, that is required. *See Dyment v. West*, 13 Vet. App. 141, 146-47 (1999) (holding that there was no *Stegall*

violation when the examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order"), *aff'd sub nom. Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002); *Evans v. West*, 12 Vet. App. 22, 31 (1998) (holding that remand was not warranted because the Secretary substantially complied with the Board's remand order).

The Board's determination of whether there was substantial compliance with a remand and "[w]hether a medical [examination] or opinion is adequate [are] finding[s] of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet. App. 97, 104 (2008) (per curiam); *see Gill v. Shinseki*, 26 Vet. App. 386, 391-92 (2013) (reviewing the Board's finding of substantial compliance for clear error), *aff'd per curiam sub nom. Gill v. McDonald*, 589 F. App'x 535 (Fed. Cir. 2015). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet. App. at 56-57.

The Board found that VA had satisfied its duty to assist. The Board concluded that the VA opinions it relied upon were adequate in all respects:

> The April 2012 examiner provided a complete rationale based upon a review of the claims file and a physical examination. The March 2015 examiner conducted an additional review of the claims file, including lay statements and medical records, and provided a detailed medical opinion based on the history and findings. The VA examiners provided detailed rationales and cited supporting data for their conclusions.

R. at 4-5. In addition, the Board determined that "the development ordered in the May 2011 and March 2013 remands has been completed, and no further action is necessary to comply with the remand directives" under *Stegall*, 11 Vet. App. at 271. R. at 3.

Ultimately, the Board denied the appellant's claim based, in part, on the opinions of the "April 2012 and March 2015 VA examiners [who] opined that the [appellant's] current low back disability is not likely related to service." R. at 11. The Board observed again that the opinions were supported by review of the appellant's claims file, specifically finding that their medical opinions were "competent and highly probative, and based on adequate rationales." *Id.* The Board further observed: "The

April 2012 examiner found that it was unlikely that spinal stenosis is related to the [appellant's] described in-service injuries. The March 2015 examiner concluded that back strain in service does not qualify as a chronic condition and would not cause spinal stenosis." *Id.* Based upon the foregoing, the Board concluded that there was "no competent evidence of a medical nexus between the current low back disability and an incident of service." *Id.*

The appellant has submitted various arguments in support of his position that the April 2012 VA examination report and the March 2015 VA addendum opinion are each separately inadequate and that they failed to substantially comply with the Board's March 2013 remand. However, as shown above, the Board relied on these opinions collectively, not individually, to determine that VA had satisfied its duty to assist and to find "no competent evidence of a medical nexus between the current low back disability and an incident in service." R. at 11; *see* R. at 4-5.

The appellant first argues that the April 2012 VA examination report and the March 2015 VA addendum opinion are not supported by adequate rationales. With respect to the April 2012 VA examination, the appellant asserts that the opinion was not supported by an adequate rationale in compliance with "the terms of the prior remand in which the parties agreed that future medical examinations or opinions must *provide more clarity . . . and a more robust rationale* than a simple statement that a nexus is unlikely because a

particular diagnosed back condition is a naturally occurring phenomenon." Appellant's Br. at 13 (emphasis added); Reply Br. at 2. With respect to the March 2015 VA addendum, the appellant argues that the opinion "is nonsensical and unresponsive to the medical questions presented," Appellant's Br. at 14-15, and that "the . . . examiner's rationale did not make any sense," Reply Br. at 3. In particular, the appellant appears to take issue with the March 2015 examiner's rationale that (1) the appellant's in-service back strain does not qualify as a chronic condition or cause spinal stenosis or any other disease and (2) G.P.'s statements concerning the appellant's back pain are "insufficient to establish the existence" of a condition that would cause any current low back disability. Reply Br. at 3; *see* Appellant's Br. at 14-15.

The appellant's arguments that the VA medical opinions in question lacked sufficient rationale are not persuasive. Although the Board did not provide an extensive explanation for its finding that the examiners provided detailed rationales, the appellant provides no specific analysis in support of his general contention that the April 2012 examiner did not provide a robust rationale that complied with the terms of the JMPR. Appellant's Br. at 13. Without more, his argument amounts to a disagreement with the Board's assessment of the evidence, which is insufficient to demonstrate that the Board's findings were clearly erroneous. *See D'Aries*, 22 Vet. App. at 104. Similarly, with respect to the March 2015 VA opinion, it is clear from the Board's decision that the Board understood the basis

for the examiner's negative nexus opinion—the appellant's in-service "self-limited back strain . . . . does not qualify as a chronic condition or cause spinal stenosis or any other disease" and G.P.'s "statement confirming back pain in the 1970[s] and thereafter is insufficient to establish the existence of an initial in-service condition that would cause the symptoms and findings occurring after service." R. at 10. The Board found that the examiner supported her conclusion with a "detailed rationale" and "data," R. at 5, and the Court finds that the appellant's arguments to the contrary amount to no more than a disagreement with the opinion as well as the Board's reliance upon it to find no evidence of a nexus between the appellant's current low back disability and an in-service incident. *See D'Aries*, 22 Vet. App. at 104.

The appellant next argues that the April 2012 examiner failed to consistently diagnose the appellant with lumbar strain or DDD and provide a nexus opinion for those disabilities, Appellant's Br. at 13; Reply Br. at 2, 7. However, the appellant fails to cite any legal authority supporting the argument that VA examiners must provide consistent diagnoses. Moreover, the Court is not convinced that any error in this regard is prejudicial in light of the Court's determination that the Board did not err in relying on the March 2015 opinion that it is "not possible to relate post-service conditions to the self-limited back strain documented in service without resorting to speculation. . . . [because] one such event does not qualify as a chronic condition or cause spinal stenosis or any other disease," R. at 347-48.

Additionally, the appellant maintains that the April 2012 examiner could not have substantially complied with the March 2013 remand directive that the examiner address a January 2013 statement by G.P., because the examination predated G.P.'s statement. Appellant's Br. at 14. As a result, he contends that the opinion was "not based on all pertinent evidence" and lacks all probative value. Reply Br. at 3, 7-8. However, the Board's March 2013 remand was directed at obtaining a new opinion to address the appellant's and G.P.'s statements regarding episodes of back pain since service, *see* R. at 958, which the Board in the decision on appeal found was accomplished by the March 2015 VA addendum opinion. R. at 3; *see* R. at 5 (noting that the March 2015 examiner reviewed "lay statements"), 10 (noting that the examiner addressed the January 2013 statement). Moreover, the appellant fails to provide legal support for his contention that the April 2012 opinion would lack all probative value on this basis alone, especially considering that, as the Board noted, the appellant had directly reported to the examiner that he experienced chronic and constant low back pain since discharge. *See* R. at 998; *see also Monzingo*, 26 Vet. App. at 107 (noting, "even if a medical opinion is inadequate to decide a claim," it may be entitled to some probative weight "based upon the amount of information and analysis it contains").

Finally, the appellant asserts that the Board failed to ensure substantial compliance with the March 2013 remand directive that an opinion "should be [obtained] by an appropriate medical

specialist" because the March 2015 examiner, a VA internist, is "not an appropriate medical specialist to provide an opinion on a back disorder like an orthopedic surgeon." Appellant's Br. at 14; Reply Br. at 6. Although the Board found substantial compliance with the March 2011 and March 2013 remands, R. at 3 (citing *Stegall*, 11 Vet. App. at 271), it did not specifically address whether the March 2015 examiner was an appropriate medical specialist.

Initially, the Court notes that "VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case," *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) (citing *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011)), and the appellant does not argue, nor does the record reflect, that he raised this issue below. Additionally, the appellant does not assert that the record itself reasonably raises some irregularity 10 in VA's selection process. *Cf. Wise v. Shinseki*, 26 Vet. App. 517, 525-27 (2014) (holding that the presumption of competence does not attach where the face of the examination report reveals some irregularity in the selection of the examiner). Thus, the Board was not required to provide a statement of reasons or bases establishing the medical examiner's competence before relying on her opinion. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1291-92 (Fed. Cir. 2009) (holding that the Board is not required to affirmatively establish the competence of a medical examiner, unless the veteran raises the issue); *see also Parks*, 716 F.3d at 585-86 (holding that the appellant waived his right

to rebut the presumption that a nurse practitioner selected by VA was competent because the appellant never challenged the examiner's competence before the Board).

However, even assuming the appellant is not precluded from raising this issue for the first time on appeal, the appellant fails to demonstrate prejudicial error because he fails to explain why an internal medicine specialist may not qualify as "an appropriate medical specialist," given the Board's broad and nonspecific request for an "appropriate medical specialist," and thus fails to explain how or why the March 2015 opinion does not substantially comply with the Board's request. *See Dyment*, 13 Vet. App. at 146-47; *see also D'Aries*, 22 Vet. App. at 104-05 (noting that *Stegall* requires substantial "not strict compliance," and affirming the Board's determination that obtaining an expert opinion from a neurologist substantially complied with VA's request for an opinion by an "'internal medicine specialist'").

For the reasons stated above, the Court is not persuaded by the appellant's arguments on appeal.[3]

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[3] The Court declines to address the appellant's additional arguments—raised for the first time in his reply brief—challenging the adequacy of the March 2015 examiner's opinion. *See* Reply Br. at 8. The Court has consistently discouraged parties from raising new arguments after the initial briefing. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[I]mproper or late presentation of an issue or argument . . . ordinarily should not be considered."), *aff'g sub nom. Carbino v. Gober*, 10 Vet. App. 507, 511 (1997) (declining to

Berger v. Brown, 10 Vet. App. 166, 169 (1997) (the appellant "always bears the burden of persuasion"); *see Hilkert v. West*, 12 Vet. App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). The Court finds that the appellant's arguments are undeveloped or lacking support in legal authority and therefore do not satisfy his burden of persuasion on appeal to show Board error. *See Coker v. Nicholson*, 19 Vet. App. 439, 442 (2006) (per curiam) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x. 371 (Fed. Cir. 2008) (per curiam order); *see also Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped); U.S. VET. APP. R. 28(a)(5).

Additionally, the appellant has failed to meet his burden of demonstrating that the Board committed prejudicial error. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he suffered prejudice as a result of VA error); *see also Coker*, 19 Vet. App. at 442.

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review argument first raised in appellant's reply brief); *Untalan v. Nicholson*, 20 Vet. App. 467, 471 (2006); *Fugere v. Derwinski*, 1 Vet. App. 103, 105 (1990).

B. Evidentiary Findings

It is the Board's duty, as factfinder, to determine the credibility and weight to be given to the evidence. *Washington v. Nicholson*, 19 Vet. App. 362, 367-68 (2005); *Owens v. Brown*, 7 Vet. App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). This duty includes assessing the probative value of medical evidence. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302 (2008) ("Part of the Board's consideration of how much weight to assign [a medical opinion] is the foundation upon which the medical opinion is based."). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday*, 7 Vet. App. at 527; *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet. App. at 56-57.

In its decision, the Board found the following:

> [T]he [appellant's] statements made in connection with a claim for VA compensation benefits [are] to be of lesser probative value than his more contemporaneous history, including medical records showing that he sought treatment for other complaints but did not report back pain and the absence of complaints or treatment for many years after service. The lay statement of G.P. regarding the [appellant's] complaints of back pain

> symptoms since the 1970's is likewise considered less probative than the contemporaneous medical records which indicate that the [appellant] denied recurrent back pain.

R. at 11-12.

The appellant argues that the Board provided insufficient reasons or bases for finding that the lay statements of the appellant and G.P. were outweighed by other evidence. Appellant's Br. at 17-18; Reply Br. at 9-10. Specifically, the appellant maintains that the Board "considered and rejected favorable evidence" from the appellant and G.P. and relied upon the "absence of medical 12 evidence of treatment or complaints of a back disorder since service . . . .[, although n]one of these factors relate in any way to the observations in the certified statement made by [G.P.]." Appellant's Br. at 17. The appellant also contends that "the Board did not cite to any other contemporaneous medical record in which [the appellant] denied recurrent back pain." Reply Br. at 9-10.

The Court is not persuaded by the appellant's arguments on appeal. *Berger*, 10 Vet. App. at 169; *see Hilkert*, 12 Vet. App. at 151. As shown above, the Board, in assigning the lay statements lesser probative value concerning continuity of symptomatology, did not "reject" the contested lay statements. Rather, the Board's analysis reflects that it deemed the appellant's statements less probative because the "more contemporaneous history, *including* medical records" did not reflect

continuous complaints, reports, or treatment for back pain for many years after service. R. at 11 (emphasis added). *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (noting it was not ruling out that the Board may "weigh the absence of contemporaneous medical evidence against the lay evidence of record"). Additionally, the Board ascribed lesser probative value to G.P.'s statements concerning the appellant's back symptoms because contemporaneous medical records, i.e., the 1978 examination, showed that the appellant denied recurrent back pain after discharge from service. *See id*. The appellant cites no legal authority requiring the Board to cite to additional contemporaneous medical evidence, other than the March 1978 report of medical history and report of medical examination, in order to find G.P.'s statements of lower probative value. The Court finds that the reasons or bases provided by the Board are sufficient and clearly explain its findings. *See Allday*, 7 Vet. App. at 527; *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet. App. at 56-57. Moreover, as maintained by the Secretary, the appellant's arguments amount to mere disagreement with how the Board weighed the evidence. Secretary's Br. at 23.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's October 13, 2016, decision is AFFIRMED.

DATED: February 6, 2018

Copies to:

Sean A. Ravin, Esq.

VA General Counsel (027)

APPENDIX E

Designated for electronic publication only
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-3738

ERNEST L. FRANCWAY, JR. APPELLANT,

V.

ROBERT L. WILKIE,
ACTING SECRETARY OF
VETERANS AFFAIRS, APPELLEE.

Before ALLEN, MEREDITH, and TOTH, *Judges*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On February 6, 2018, the Court issued a memorandum decision that affirmed the October 13, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for a low back disability. On February 27, 2018, the appellant filed a motion for panel decision pursuant to Rule 35 of the Court's Rules of Practice and Procedure. The motion for a panel decision will be granted.

Based on review of the pleadings and the record of proceedings, it is the decision of the panel that the appellant fails to demonstrate that 1) the single-judge memorandum decision overlooked or misunderstood a fact or point of law prejudicial to the outcome of the appeal, 2) there is any conflict with precedential decisions of the Court, or 3) the appeal otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge decision in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED that the motion for panel decision is granted. It is further

ORDERED that the single-judge memorandum decision remains the decision of the Court.

DATED: May 3, 2018 PER CURIAM.

Copies to:

Sean A. Ravin, Esq.

VA General Counsel (027)

APPENDIX F

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20420

IN THE APPEAL OF
ERNEST L. FRANCWAY, JR.

DOCKET NO. 04-09 153	)))	DATE **October 13, 2016** **TDV**

On appeal from the
Department of Veterans Affairs Regional Office in
Cleveland, Ohio

THE ISSUE

Entitlement to service connection for a low back disability.

REPRESENTATION

Veteran represented by: Sean A. Ravin, Attorney

WITNESS AT HEARING ON APPEAL

Veteran

ATTORNEY FOR THE BOARD

Catherine Cykowski, Counsel

INTRODUCTION

The Veteran had active service from August 1968 to May 1970.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from May 2003 rating decision of the Department of Veterans (VA) Regional Office (RO) in Cleveland, Ohio.

In October 2005, the Veteran testified at a videoconference hearing before the undersigned Veterans Law Judge. A transcript of the hearing is of record.

In a May 2009 decision, the Board denied service connection for lumbosacral strain. The Veteran appealed the Board's decision to the United States Court of Appeals for Veterans' Claims. In December 2010, the Court granted a Joint Motion for Partial Remand and remanded the case to the Board for action consistent with the Joint Motion.

The case was previously remanded in May 2011 and March 2013. In May 2011, the Board remanded the case to obtain a VA examination. A VA examination was obtained in April 2012. The claim was remanded in March 2013 to obtain an addendum medical opinion. A medical opinion was obtained in March 2015. The Board finds that the development ordered in the May 2011 and March 2013 remands has been

completed, and no further action is necessary to comply with the remand directives. *Stegall v. West,* 11 Vet. App. 268, 271 (1998).

FINDING OF FACT

A chronic low back disorder to include arthritis of the lumbar spine did not manifest during service or within one year of separation from service, and a current low back disability is not causally related to any disease, injury or event in active service.

CONCLUSION OF LAW

The criteria for service connection for a low back disability have not been met. 38 U.S.C.A. §§ 1110, 1112, 1113, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2015).

REASONS AND BASES FOR FINDING AND CONCLUSION

Duties to Notify and Assist

As provided for by the Veterans Claims Assistance Act (VCAA), VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2015). A VCAA letter was sent to the Veteran in July 2003 and in July 2006.

VA also has a duty to assist the Veteran in the development of the claim. This duty includes assisting the Veteran in the procurement of service medical records and pertinent treatment records and providing an examination when necessary. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159. The record indicates that the RO obtained all information relevant to the Veteran's claim. The service treatment records have been obtained, as well as post-service VA and private treatment records. The RO requested medical records from the Social Security Administration. A negative response was received in June 2011. In October 2011, the RO issued a formal finding of unavailability for records from the Social Security Administration. No additional effort is warranted to try and obtain Social Security records, as it appears that any such additional efforts would be futile. 38 C.F.R. § 3.159(c)(2).

The Veteran had a VA examination in April 2012, and an addendum opinion was obtained in March 2015. When VA undertakes to provide a VA examination or obtain a VA opinion, it must ensure that the opinion is adequate. *Barr v. Nicholson,* 21 Vet. App. 303, 312 (2007). The April 2012 examiner provided a complete rationale based upon a review of the claims file and a physical examination. The March 2015 examiner conducted an additional review of the claims file, including lay statements and medical records, and provided a detailed medical opinion based on the history and findings. The VA examiners provided detailed rationales and cited

supporting data for their conclusions. Accordingly, the Board finds that VA's duty to assist with respect to obtaining a VA examination or opinion has been met. 38 C.F.R. § 3.159(c)(4).

Furthermore, as noted, the Veteran was afforded a Board hearing in October 2005. The Veterans Law Judge and the Veteran's representative outlined the issues on appeal, and the Veteran and representative engaged in a colloquy as to substantiation of the claims, including identifying relevant types of evidence. Overall, the hearing was legally sufficient and the duty to assist has been met. 38 U.S.C.A. § 5103A (West 2014); *Bryant v. Shinseki,* 23 Vet. App. 488 (2010).

The Board finds that all necessary development has been accomplished, and therefore appellate review may proceed without prejudice to the Veteran. No further notice or assistance to the Veteran is required to fulfill VA's duty to assist the Veteran in the development of the claim. *Smith v. Gober,* 14 Vet. App. 227 (2000), *aff'd* 281 F.3d 1384 (Fed. Cir. 2002); *Dela Cruz v. Principi,* 15 Vet. App. 143 (2001); *see also Quartuccio v. Principi,* 16 Vet. App. 183 (2002).

Service Connection Criteria

Service connection will be granted if it is shown that the veteran suffers from disability resulting from an injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active

military, naval, or air service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). Service connection may also be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d). As a general matter, service connection for a disability requires evidence of: (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. *Shedden v. Principi,* 381 F.3d 1163 (Fed. Cir. 2004); *see also Hickson v. West,* 12 Vet. App. 247, 253 (1999), *citing Caluza v. Brown,* 7 Vet. App. 498, 506 (1995), *aff'd,* 78 F.3d 604 (Fed. Cir. 1996).

The Veteran has been diagnosed with degenerative changes of the lumbar spine. Arthritis is a chronic disease listed under 38 C.F.R. § 3.309(a); therefore, the theory of continuity of symptomatology under 38 C.F.R. § 3.303(b) applies to the claim for service connection for a low back disability. *Walker v. Shinseki,* 708 F.3d 1331 (Fed. Cir. 2013).

Where the evidence shows a "chronic disease" in service or "continuity of symptoms" after service, the disease shall be presumed to have been incurred in service. For the showing of "chronic" disease in service, there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time. With chronic disease as such in service, subsequent manifestations of the same

chronic disease, at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. If a condition noted during service is not shown to be chronic, then generally a showing of "continuity of symptoms" after service is required for service connection. 38 C.F.R. § 3.303(b).

Additionally, where a veteran served 90 days or more of active service, and certain chronic diseases, such as arthritis, became manifest to a degree of 10 percent or more within one year after the date of separation from such service, such disease shall be presumed to have been incurred in or aggravated by service, even though there is no evidence of such disease during the period of service. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137 (West 2014); 38 C.F.R. §§ 3.307, 3.309(a). While the disease need not be diagnosed within a presumptive period, it must be shown, by acceptable medical or lay evidence, that there were characteristic manifestations of the disease to the required degree during that time. *Id.*

Competency of evidence differs from weight and credibility. The former is a legal concept determining whether testimony may be heard and considered by the trier of fact, while credibility is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted. *Rucker v. Brown,* 10 Vet. App. 67, 74 (1997); *Layno v. Brown,* 6 Vet. App. 465, 469 (1994); *see also Cartright v. Derwinski,* 2 Vet. App. 24, 25 (1991) ("although interest may affect the credibility

of testimony, it does not affect competency to testify").

In determining whether service connection is warranted for a disability, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim must be denied. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102, *Gilbert v. Derwinski,* 1 Vet. App. 49 (1990).

The Veteran asserts that his current low back disability is related to incidents in service including motor vehicle accidents and other incidents. In his service connection claim, the Veteran noted a left sided stomach and back injury during service. At the Board hearing, the Veteran testified that he was on the flight deck carrying wheel chocks when he was hit by a gust of wind. The Veteran testified that he had pain in his back and dropped the chocks. He testified that he was treated for a muscle strain and was given pain pills and put on light duty for three months.

Service treatment records reflect complaints of abdominal pain and back pain. The Veteran was seen in April 1969 with a complaint of a pulled muscle in the right side. He was put on light duty for 24 hours. An entry the following day noted that the Veteran was working on the flight deck lifting the pulley when he got sharp pain in the left lower

abdomen. The Veteran complained of vomiting dark red-black blood. He was admitted to the ward and was discharged after four days.

Service treatment records show that the Veteran complained of right side low back pain in December 1969. Examination showed no deformity, and a test for fracture was negative. There was some pain on rotation. The Veteran was instructed to return the following day. An entry the next day noted low back pain, with first symptoms in November 1969. The record indicates that the Veteran was placed on light duty. Service treatment records do not include other complaints or findings regarding the low back.

There is no evidence that arthritis of the lumbar spine manifested to a compensable degree within one year of separation from service in May 1970. Therefore, service connection for arthritis may not be presumed. 38 C.F.R. §§ 3.307, 3.309.

A reserve enlistment examination dated in March 1978 reflects that the Veteran denied recurrent back pain.

Initial post-service treatment of back pain is shown in private treatment records dated in March 1995. Those records reflect that the Veteran reported flank and back pain. The record noted that the Veteran was lifting weights before the pain started.

A VA treatment record dated in October 2002 reflects that the Veteran complained of arthritis of his shoulders and his hands. He denied other

physical complaints. Such histories reported by the Veteran for treatment purposes are of significant probative value particularly when compared with more recent assertions and histories given for VA disability compensation purposes. *See Rucker v. Brown,* 10 Vet. App. 67, 73 (1997).

VA treatment records dated in May 2004 show that the Veteran reported back pain for years. The Veteran reported that he initially injured his back on the flight deck in 1969. A physician assessed acute on chronic muscular pain, low back. VA treatment records dated in January 2005 and July 2005 reflect assessments of acute on chronic low back pain, ongoing since 1969. An August 2009 VA spine care consultation reflects that the Veteran reported back pain traveling down his legs. The record noted that the Veteran related the onset of the pain to an incident in service.

The Veteran had a VA examination in May 2006. The Veteran reported a strain injury of his back in 1969. He reported intermittent episodes of back pain over the years. The examiner diagnosed back strain. The examiner opined that it is not likely that his current back symptoms are related to a simple strain in 1969, but rather a natural phenomenon.

At a July 2007 VA examination, the examiner noted that the Veteran had a strain in service and had persistent back pain over the years. The examiner noted that he now had minimal arthritis by x-ray. The examiner noted that he had a chronic back pain problem. The examiner stated that the opinion was

not changed from May 2006. The examiner noted that the Veteran's back pain is not likely related but is a naturally occurring phenomenon.

In the December 2010 Joint Motion, the parties found that the May 2006 and July 2007 opinions were inadequate because the examinations did not provide adequate rationales to allow for a fully informed decision by the Board. The May 2006 and July 2007 medical opinions are therefore not probative regarding the issue of a medical nexus to service.

Upon VA examination in April 2012, the Veteran reported that he injured his back in 1969 while walking across a flight deck carrying wheel chocks. He reported that he was hit by wind, causing him to fall. He recalled immediate pain to his low back and his abdomen at the time of the fall. He reported that he was taken off the flight deck by stretcher and remained on bedrest for a week. He reported that he was on light duty for 90 days after that. The Veteran reported that he was later diagnosed with a hernia to the left side of the abdomen. He reported chronic and constant low back pain since his discharge from service in 1970.

The examiner diagnosed spinal stenosis. The examiner noted that records did not describe any treatment until 1995, when the Veteran developed pain in the area of his hernia radiating to his back. The Veteran reported that his pain was constant and chronic in nature. The examiner noted that there are

no medical records from 1970 to 2004 to establish a nexus. The examiner opined that it is therefore less likely than not that the Veteran's spinal stenosis is related to the injury described. The examiner opined that it would be more likely that his spinal stenosis is related to natural age progression with consideration of wear and tear throughout his life.

In January 2013, the Veteran submitted a lay statement from G.P. G.P. stated that he has known the Veteran since the 1970's. G.P. stated that the Veteran has had back problems since he has known him. G.P. indicated that he working as a mechanic at a gas station when the Veteran came and said that he could not work on his car because of his back. G.P. noted that the Veteran stated that he hurt his back in the service. G.P. noted that he has witnessed the Veteran's back pain over the years when the Veteran visited his home.

In March 2013, the Board remanded the claim for an addendum medical opinion to address the lay evidence from the Veteran and G.P. as to the reported episodes of back pain since service.

In March 2015, a physician reviewed the claims file and provided an addendum opinion. The examiner noted that there were two references to back pain in the service treatment records in December 1969. The examiner noted that the Veteran reported one episode of back pain, which was treated as muscle strain. The episode began in November 1969 and reached its peak in December. The examiner stated, in other words, the Veteran had an acute to subacute

episode of back pain in service, lasting approximately two to three weeks. The examiner noted that such an event is extremely common in the general population. The examiner opined that the evidence in the service treatment records is consistent with the normal clinical picture of low back pain and strain, which typically resolves within a few weeks. The examiner noted that the Veteran was examined twice in a short period of time, and the diagnosis was confirmed. The examiner stated that, based on this evidence, there was no reason to suspect a severe injury or chronic condition, and there was no evidence of spinal stenosis. The examiner opined that, while it is possible that the Veteran injured or developed disease in his spine after military service, it is not possible to relate post-service conditions to the self-limited back strain documented in service without resorting to speculation. The examiner opined that it is a rare service member or civilian who does not at one time or another experience a self-limited musculoskeletal back strain. The examiner opined, however, that one such event does not qualify as a chronic condition or cause spinal stenosis or any other disease. The examiner opined that a buddy statement confirming back pain in the 1970's and thereafter is insufficient to establish the existence of an initial in-service condition that would cause the symptoms and findings occurring after service.

The April 2012 and March 2015 VA examiners opined that the Veteran's current low back disability is not likely related to service. The examiners

provided a detailed rationale for the opinion based on a review of Veteran's claims file, including service treatment records, post-service medical records and lay statements. The April 2012 examiner found that it was unlikely that spinal stenosis is related to the Veteran's described in-service injuries. The March 2015 examiner concluded that back strain in service does not qualify as a chronic condition and would not cause spinal stenosis. The discussion of the underlying rationale is where most of the probative value of an opinion is derived. *See Nieves-Rodriguez v. Peake,* 22 Vet. App. 295, 304 (2008). The probative value of an opinion is dependent, in part, upon the extent to which it reflects "clinical data or other rationale to support [the] opinion." *Bloom v. West,* 12 Vet. App. 185, 187 (1999). The Board finds that the April 2012 and March 2015 medical opinions are competent and highly probative, and based on adequate rationales. There is no competent evidence of a medical nexus between the current low back disability and an incident of service.

The post-service medical evidence does not reflect complaints or treatment related to a low back disability until 1995. *See Maxson v. Gober,* 230 F.3d 1330, 1333 (Fed. Cir. 2000) (lengthy period of absence of medical complaints for condition can be considered as a factor in resolving claim); *see also Mense v. Derwinski,* 1 Vet. App. 354, 356 (1991) (affirming Board's denial of service connection where veteran failed to account for lengthy time period between service and initial symptoms of disability).

The Board has weighed the lay evidence provided by G.P. and the Veteran as to continuity of his low back symptomatology. The Board finds the Veteran's statements made in connection with a claim for VA compensation benefits to be of lesser probative value than his more contemporaneous history, including medical records showing that he sought treatment for other complaints but did not report back pain and the absence of complaints or treatment for many years after service. The lay statement of G.P. regarding the Veteran's complaints of back pain symptoms since the 1970's is likewise considered less probative than the contemporaneous medical records which indicate that the Veteran denied recurrent back pain.

A Veteran is competent to report symptoms that he experiences at any time because this requires only personal knowledge as it comes to him through his senses. *Layno,* 6 Vet. App. at 470; *Barr v. Nicholson,* 21 Vet. App. 303, 309 (2007) (when a condition may be diagnosed by its unique and readily identifiable features, the presence of the disorder is not a determination "medical in nature" and is capable of lay observation). The Veteran is competent to report experiencing back pain. However, the Board must determine whether the Veteran is credible.

The absence of contemporaneous medical evidence is a factor in determining credibility of lay evidence, but lay evidence does not lack credibility merely because it is unaccompanied by contemporaneous medical evidence. *See Buchanan v. Nicholson,* 451 F.3d 1331, 1337 (Fed. Cir. 2006) (lack of

contemporaneous medical records does not serve as an "absolute bar" to the service connection claim); *Barr v. Nicholson,* 21 Vet. App. 303 (2007) ("Board may not reject as not credible any uncorroborated statements merely because the contemporaneous medical evidence is silent as to complaints or treatment for the relevant condition or symptoms"). But in *Buchanan* and other precedent cases, the United States Court of Appeals for the Federal Circuit (Federal Circuit Court) also has recognized the Board's "authority to discount the weight and probity of evidence in light of its own inherent characteristics and its relationship to other items of evidence*." See, e.g., Madden v. Gober,* 125 F.3d 1477, 1481 (Fed. Cir. 1997). Moreover, for non-combat Veterans providing non-medical related lay testimony regarding an event during service and what has occurred during the years since, *Buchanan* is distinguishable; any lack of documentation in service records and/or records since service must be weighed against the Veteran's statements. *See Bardwell v. Shinseki,* 24 Vet. App. 36 (2010).

In determining whether statements submitted by a Veteran are credible, the Board may consider internal consistency, facial plausibility, consistency with other evidence, and statements made during treatment. *Caluza v. Brown,* 7 Vet. App. 498 (1995). *See also Macarubbo v. Gober,* 10 Vet. App. 388 (1997).

In statements as part of the current VA disability compensation claim, the Veteran has asserted that his symptoms of low back pain began during service

and continued since then. However, the March 1978 reserves enlistment examination reflects that he denied recurrent back pain. The Veteran also did not report back pain when he was first seen at the VA in October 2002, despite complaining of several other orthopedic conditions. The Board finds that the Veteran's reported history of continued low back symptoms since active service is inconsistent with the other lay and medical evidence of record. These inconsistencies in the record weigh against the Veteran's credibility as to the assertion of continuity of symptomatology since service. *See Madden, supra.*

The post-service medical evidence does not reflect complaints or treatment related to a low back disability for many years following active service. *See Maxson and Mensa, both supra.* The Board has weighed the lay evidence as to continuity of low back symptomatology and finds his statements made in connection with a claim for VA compensation benefits to be of lesser probative value than his previous more contemporaneous history, and the absence of complaints or treatment for years after service.

The Veteran himself has asserted that his current low back disability is related to events in service. While the Veteran believes that his current low back disability, was incurred in or is etiologically related to his active service, he is not competent to provide a nexus in this case. The issues are medically complex and require specialized knowledge and experience. *Jandreau v. Nicholson,* 492 F.3d 1372 (Fed. Cir. 2007).

Based on a review of the above evidence, the Board finds that service connection for a low back condition is not warranted. The evidence of record does not show that arthritis of the lumbar spine manifested within the one year presumptive period after service separation. The record does not contain competent evidence of a nexus to service, and the lay evidence of continuity of low back symptoms since service is not considered persuasive. Accordingly, the Board finds that the preponderance of the evidence is against the Veteran's claim for service connection for a low back disorder. Consequently, the benefit-of-the-doubt rule does not apply, and entitlement to service connection for a low back condition is denied. *See* 38 U.S.C.A. § 5107 (b); 38 C.F.R. §§ 3.102; 4.3; *Gilbert,* 1 Vet. App. at 55.

ORDER

Service connection for a low back disability is denied.

S. L. Kennedy

Veterans Law Judge, Board of Veterans' Appeals

APPENDIX G

Title 38 U.S.C. 5103A provides as follows:

(a) Duty To Assist.—

(1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.

(2) The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.

(3) The Secretary may defer providing assistance under this section pending the submission by the claimant of essential information missing from the claimant's application.

(b) Assistance in Obtaining Private Records.—

(1) As part of the assistance provided under subsection (a), the Secretary shall make reasonable efforts to obtain relevant private records that the claimant adequately identifies to the Secretary.

(2)

(A) Whenever the Secretary, after making such reasonable efforts, is unable to obtain all of the relevant records sought, the Secretary shall notify the claimant that the Secretary is

unable to obtain records with respect to the claim. Such a notification shall—

(i)identify the records the Secretary is unable to obtain;

(ii)briefly explain the efforts that the Secretary made to obtain such records; and

(iii)explain that the Secretary will decide the claim based on the evidence of record but that this section does not prohibit the submission of records at a later date if such submission is otherwise allowed.

(B) The Secretary shall make not less than two requests to a custodian of a private record in order for an effort to obtain relevant private records to be treated as reasonable under this section, unless it is made evident by the first request that a second request would be futile in obtaining such records.

(3)

(A) This section shall not apply if the evidence of record allows for the Secretary to award the maximum benefit in accordance with this title based on the evidence of record.

(B) For purposes of this paragraph, the term "maximum benefit" means the highest evaluation assignable in accordance with the evidence of record, as long as such evidence is adequate for rating purposes and sufficient to

grant the earliest possible effective date in accordance with section 5110 of this title.

(4) Under regulations prescribed by the Secretary, the Secretary—

(A) shall encourage claimants to submit relevant private medical records of the claimant to the Secretary if such submission does not burden the claimant; and

(B) in obtaining relevant private records under paragraph (1), may require the claimant to authorize the Secretary to obtain such records if such authorization is required to comply with Federal, State, or local law.

(c) Obtaining Records for Compensation Claims.—

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under this section shall include obtaining the following records if relevant to the claim:

(A) The claimant's service medical records and, if the claimant has furnished the Secretary information sufficient to locate such records, other relevant records pertaining to the claimant's active military, naval, or air service that are held or maintained by a governmental entity.

(B) Records of relevant medical treatment or examination of the claimant at Department health-care facilities or at the expense of the Department, if the claimant furnishes information sufficient to locate those records.

(C) Any other relevant records held by any Federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain.

(2) Whenever the Secretary attempts to obtain records from a Federal department or agency under this subsection, the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.

(d) Medical Examinations for Compensation Claims.—

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.

(2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking

into consideration all information and lay or medical evidence (including statements of the claimant)—

(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and

(B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but

(C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

(e) Applicability of Duty to Assist.—

(1) The Secretary's duty to assist under this section shall apply only to a claim, or supplemental claim, for a benefit under a law administered by the Secretary until the time that a claimant is provided notice of the agency of original jurisdiction's decision with respect to such claim, or supplemental claim, under section 5104 of this title.

(2) The Secretary's duty to assist under this section shall not apply to higher-level review by the agency of original jurisdiction, pursuant to section 5104B of this title, or to review on appeal by the Board of Veterans' Appeals.

(f) Correction of Duty to Assist Errors.—

(1) If, during review of the agency of original jurisdiction decision under section 5104B of this title, the higher-level adjudicator identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision being reviewed, unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record, the higher-level adjudicator shall return the claim for correction of such error and readjudication.

(2)

(A) If the Board of Veterans' Appeals, during review on appeal of an agency of original jurisdiction decision, identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision on appeal, unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record, the Board shall remand the claim to the agency of original jurisdiction for correction of such error and readjudication.

(B) Remand for correction of such error may include directing the agency of original

jurisdiction to obtain an advisory medical opinion under section 5109 of this title.

(3)Nothing in this subsection shall be construed to imply that the Secretary, during the consideration of a claim, does not have a duty to correct an error described in paragraph (1) or (2) that was erroneously not identified during higher-level review or during review on appeal with respect to the claim.

(g)Regulations.—

The Secretary shall prescribe regulations to carry out this section.

(h)Rule With Respect to Disallowed Claims.—

Nothing in this section shall be construed to require the Secretary to readjudicate a claim that has been disallowed except when new and relevant evidence is presented or secured, as described in section 5108 of this title.

(i)Other Assistance Not Precluded.—

Nothing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) to a claimant in substantiating a claim as the Secretary considers appropriate.

Title 38 U.S.C. 5107 provides as follows:

(a) Claimant Responsibility.—

Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) Benefit of the Doubt.—

The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

Title 38 CFR 3.159 provides as follows:

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing:

(i) The claimant's name;

(ii) His or her relationship to the veteran, if applicable;

(iii) Sufficient service information for VA to verify the claimed service, if applicable;

(iv) The benefit sought and any medical condition(s) on which it is based;

(v) The claimant's signature; and

(vi) In claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income;

(vii) In supplemental claims, identification or inclusion of potentially new evidence (see § 3.2501);

(viii) For higher-level reviews, identification of the date of the decision for which review is sought.

(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence.

(1) Except as provided in paragraph (3) of this section, when VA receives a complete or

substantially complete initial or supplemental claim, VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the "notice") In the notice, VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice. If the claimant has not responded to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice in accordance with the requirements of paragraph (b)(4) of this section, VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information.

(Authority: 38 U.S.C. 5102(b), 5103A(3))

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a supplemental claim under § 3.2501 within one year of the date VA issues notice of a prior decision;

(ii) Upon receipt of a request for higher-level review under § 3.2601;

(iii) Upon receipt of a Notice of Disagreement under § 20.202 of this chapter; or

(iv) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(4) After VA has issued a notice of decision, submission of information and evidence substantiating a claim must be accomplished through the proper filing of a review option in accordance with § 3.2500 on a form prescribed by the Secretary. New and relevant evidence may be submitted in connection with either the filing of a supplemental claim under § 3.2501 or the filing of a Notice of Disagreement with the Board under 38 CFR 20.202, on forms prescribed by the Secretary, and election of a Board docket that permits the filing of new evidence (see 38 CFR 20.302 and 20.303).

(c) VA's duty to assist claimants in obtaining evidence. VA has a duty to assist claimants in obtaining evidence to substantiate all substantially complete initial and supplemental claims, and when a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error on the part of the agency of original jurisdiction, until the time VA issues notice of a decision on a claim or returned claim. VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. VA will not pay any fees charged by a custodian to provide records requested. When a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error, the agency of original jurisdiction has a duty to correct any other duty to assist errors not identified by the higher-level adjudicator or the Board.

(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the

records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical

records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form

acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions.

(i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if

the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in § 3.309, § 3.313, § 3.316, and § 3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) For requests to reopen a finally adjudicated claim received prior to the effective date provided in § 19.2(a) of this chapter, this paragraph (c)(4) applies only if

new and material evidence is presented or secured as prescribed in § 3.156.

(iv) This paragraph (c)(4) applies to a supplemental claim only if new and relevant evidence under § 3.2501 is presented or secured.

(Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for an initial or supplemental claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records.

(1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))

(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations.