No. 19-604

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

BRIEF OF MILITARY-VETERANS ADVOCACY INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Golz v. Shinseki,
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Kirkman v. Peake,
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Massie v. Shinseki,
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Mathis v. McDonald,
643 F. App'x 968 (Fed. Cir. 2016).....9

Mathis v. McDonald,
834 F.3d 1347 (Fed. Cir. 2016).....6, 7, 9, 10, 11

Mathis v. Shulkin,
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38 U.S.C. § 7292 6

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38 C.F.R. § 2.1090 (1938) 24

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38 C.F.R. § 2.1093 (1938) 24

38 C.F.R. § 2.1094 (1938) 24

38 C.F.R. § 2.1095 (1938) 24

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38 C.F.R. § 3.3 (1949) 16

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38 C.F.R. § 20.801(b) 5

38 C.F.R. § 20.802(a) 5

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ACCRED. COUNC. FOR GRAD. MED. EDUC., https://tinyurl.com/wy65cff (last visited Dec. 3, 2019).....8

Br. of Law School Veterans Clinics and Attorneys as *Amici Curiae* in Support of the Petition for a Writ of Certiorari, *Mathis v. McDonald*, (No. 16-677), 2016 U.S. S. Ct. Briefs LEXIS 4782 (Dec. 22, 2016) 10

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Chase Cobb, *For Him Who Shall Have Borne the Battle: How the Presumption of Competence Undermines Veterans' Disability Law*, 25 Wash. & Lee J. Civ. Rts. & Soc. Just. 577 (2019).....5, 9

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Paul Dickson and Thomas B. Allen, "Marching on History", *Smithsonian Magazine* (February 2003), https://tinyurl.com/ulfodmp.....13

Steven Reis and Matthew Tenner, *Effects of Representation by Attorneys in Cases before VA: The "New Paternalism",* 1 Veterans L. Rev. 2 (2009) 12

Terence McArdle, "The veterans were desperate; Gen. MacArthur ordered U.S. troops to attack them", *Washington Post* (July 28, 2017, 8:00 AM), https://tinyurl.com/qpqubwx 13

U.S. Dep't of Justice, *Rep. of the Atty. Gen's. Comm. on Admin. Proc.* (1941).....3, 14

U.S. Dep't of Veterans Affairs, *Adjudication Procedure Manual M21-1* (2019) 6, 10

U.S. Dep't of Veterans Affairs, *VA History in Brief* (undated) 13

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U.S. Veterans Administration, Bureau of Pensions, *Laws of the United States Governing the Granting of Army and Navy Pensions* (1931) 15

INTEREST OF *AMICUS CURIAE*[1]

Military-Veterans Advocacy Inc. (MVA) is a non-profit organization that litigates and advocates on behalf of service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains service members and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand service members' and veterans' rights and benefits.

The Federal Circuit's decision in *Francway v. Wilkie*, 940 F.3d 1304, 1309 (Fed. Cir. 2019)—which broadens the presumption of competence created in *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009)—erodes veterans' rights to the benefits their dutiful service has earned them. In a veterans' benefits system that is uniquely pro-claimant, the presumption of competence insulates critical Department of Veterans Affairs (VA) decisions from scrutiny by claimants or courts. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) ("The process is designed to function throughout with a high degree of … solicitude for the claimant.").

The presumption allows the Board of Veterans' Appeals (Board) to assume the competence of a VA

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

medical examiner without any evidentiary foundation. *Rizzo*, 580 F.3d at 1291. Rather than require the VA to establish the reliability of its experts, the presumption forces veterans to undermine their reliability. *Id.* In the decision below, the Federal Circuit extended the presumption's reach; now VA medical examiners are not just presumed competent but are presumed to be specialists in virtually any medical field. *Francway*, 940 F.3d at 1309. When disabled veterans without legal training or representation[2] run into this unfair presumption—and the VA's reluctance to provide examiner credentials when requested—their ability to receive their hard-earned benefits is compromised. MVA thus has a strong interest in this Court reviewing and reversing the *Francway* decision.

SUMMARY OF ARGUMENT

The presumption of competence is an anti-claimant concept in an otherwise uniquely pro-claimant system of veterans' benefits adjudication. *Walters*, 473 U.S. at 311. Lacking any statutory or regulatory basis, *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from the denial of certiorari), it was born from a presumption of regularity applicable to mailing documents. *See Hilkert v. West*, 12 Vet. App. 145, 151 (1999) (citing *Hill v. Brown*, 9 Vet. App. 246, 249 (1996) (presumption of regularity applies to

[2] U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals, *Annual Report, Fiscal Year (FY) 2018* at 31 (17.98% of claimants whose cases were disposed of during FY2018 were represented by attorneys).

mailing of notices) and *Ashley v. Derwinski*, 2 Vet. App. 307, 309 (1992) (same)).

The presumption appears even more incongruous when contrasted with the VA's historic duties as a "benefactor agency." U.S. Dep't of Justice, *Rep. of the Atty. Gen's. Comm. on Admin. Proc.* at 129 (1941). The VA has a duty to assist claimants by developing relevant facts to support all but the most implausible claims (38 U.S.C. § 5103A, 38 C.F.R. §§ 3.103(a), 3.159(c)), to notify them of necessary evidence before denying their claims (38 U.S.C. § 5103, 38 C.F.R. § 3.159(b)), to give them the benefit of the doubt when the evidence for and against their claims is in approximate balance (38 U.S.C. § 5107, 38 C.F.R. § 3.102), and to recognize numerous evidentiary presumptions favoring veterans that may be overcome only by clear and convincing evidence. *See* 38 U.S.C. §§ 1111 (presumption of soundness), 1112-1118 (presumptions of service-connectedness), 38 C.F.R. §§ 3.307-3.309, 3.318 (same). Moreover, only claimants—not the VA—may challenge an adverse decision by the Board. 38 U.S.C. § 7266(a); *see also Williams v. Principi*, 15 Vet. App. 189, 198 (2001).

A presumption that places complicated evidentiary burdens on veterans simply has no place in an adjudicatory framework that has historically and substantially advantaged veterans.

ARGUMENT

I. The Presumption Of Competence Undermines The Pro-Veteran System For Benefits Adjudication.

A. Congress designed the VA system to favor veterans when awarding benefits.

Congress has provided a comprehensive array of benefits to compensate veterans (or their surviving spouses or dependents) who suffer disability or death as a result of military service. *Walters*, 473 U.S. at 309-11; *see also* 38 U.S.C. § 1110 *et seq*. The system for awarding benefits favors the veteran at every turn and gives them every opportunity to develop their claims. *See* 38 C.F.R. § 3.1 *et seq*.

To initiate a claim for benefits, a veteran first files a claim with a VA regional office (RO). 38 C.F.R. § 3.155. If the RO decides additional information is required to complete the application, it must notify the claimant (and the claimant's representative, if applicable) of the information needed. *Id.*; *see* 38 C.F.R. § 3.159(b). The RO may not render an adverse decision before providing this notice. 38 C.F.R. § 3.159(b)(1).

The RO personnel—responsible for actuating the VA's duty to assist—may request a VA medical examination when the evidence accompanying a claim is inadequate to decide whether the disability is service-connected or how much compensation should be paid. 38 C.F.R. §§ 3.159(c)(4), 3.326. The medical examiner's role in resolving such questions is critical, and

his credentials affect the probative weight given to the examination. Chase Cobb, *For Him Who Shall Have Borne the Battle: How the Presumption of Competence Undermines Veterans' Disability Law*, 25 Wash. & Lee J. Civ. Rts. & Soc. Just. 577, 584 (2019).

Before a decision on his claim, the veteran is entitled to a hearing where no VA official appears in opposition. 38 C.F.R. § 3.103(d); *Walters*, 473 U.S. at 309-10. When all evidence is assembled, the RO must determine whether the evidence supports the claim or is in approximate equipoise—in which case the claimant prevails—or whether the preponderance of the evidence is against the claimant—in which case the claim is denied. *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001). The RO's decision must "grant[] every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a).

The claimant initiates appellate review of an adverse RO decision by filing with the Board a notice of disagreement. 38 U.S.C. § 7105. The Board may remand for a VA medical examination when necessary to correct the VA's failure to assist a veteran. 38 C.F.R. § 20.802(a). Here again, a VA medical examiner's credentials and the probative weight to assign his examination are implicated. The Board must provide the claimant a written statement of its decision, including findings of fact, conclusions of law, and the bases for both. 38 C.F.R. § 20.801(b).

If the claimant is unsatisfied by the Board's decision, he may appeal to the Court of Appeals for Veterans Claims (Veterans Court) (38 U.S.C. § 7266) and

subsequently to the U.S. Court of Appeals for the Federal Circuit. 38 U.S.C. § 7292. However, federal law limits the Federal Circuit's review to challenges to the validity or interpretation of a statute or regulation; it may not review a challenge to a factual determination or the application of a law or regulation to the facts of a case. 38 U.S.C. § 7292(d).

B. Despite this solicitous system, veterans routinely fall victim to the presumption of competence.

Contrary to the "high degree of … solicitude" throughout the veterans' benefits system, *Walters*, 473 U.S. at 311, the presumption of competence allows the VA to reject a veteran's claim based on the opinion of a medical expert without demonstrating the expert's proficiency. *Rizzo*, 580 F.3d at 1291. The VA refuses to afford private physicians testifying on behalf of veterans a comparable presumption of competence, compounding the unfairness. *Mathis v. McDonald*, 834 F.3d 1347, 1355 (Fed. Cir. 2016) (Reyna, J., dissenting from denial of rehearing en banc) (noting the VA does not believe every private physician "is qualified to testify about every issue, and that some issues require special knowledge"). In short, if the VA chooses a physician, the physician is presumptively a specialist in the field of the veteran's disability;[3] if the veteran chooses the physician, he

[3] There are exceptions not relevant here, including for mental health and traumatic brain injury (TBI). U.S. Dep't of Veterans Affairs, *Adjudication Procedure Manual M21-1*, Part III, Ch. 3, Sec. D(2)(h)-(k) (2019). Even with this precaution, the VA admitted in 2016 more than 24,000 veterans received TBI exams

must prove his physician's competence. Moreover, without all physicians' curricula vitae, neither the RO nor the Board can assign appropriate probative weight to conflicting medical opinions.

This damaging presumption arises not from any rule governing expert testimony, but from a presumption that the VA properly mails documents to veterans. *Rizzo*, 580 F. 3d at 1291 (adopting the reasoning of *Cox v. Nicholson*, 20 Vet. App. 563, 569 (2007) (relying on *Hilkert v. West*, 12 Vet. App. 145, 151 (1999))). In *Hilkert*, the court held the VA could "implicitly accept[]" its examiner's competence because "[t]here is simply nothing in the record that would cast doubt on Dr. Mather's competency." *Id.* The *Hilkert* court cited *Hill v. Brown*, 9 Vet. App. 246 (1996), and *Ashley v. Derwinski*, 2 Vet. App. 307 (1992), for the principle that a "presumption of regularity attaches to actions of public officials" like medical exams. *Id.*

However, *Hill* and *Ashley* involved only the "routine, non-discretionary, and ministerial" act of mailing notices of Board decisions. *Mathis*, 834 F.3d at 1355 (Reyna, J., dissenting); *see Hill*, 9 Vet. App. at 252-53 (applying "presumption of regularity in mailing" to conclude appeal was untimely); *Ashley*, 2 Vet. App. at 311 (finding claimant overcame presumption of regularity in mailing). This is an absurd source for a rule governing the competence of medical experts. Moreover, the Federal Circuit extended the presumption of regularity from the non-discretionary act of

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by unqualified examiners. *Mathis*, 834 F.3d at 1356 n. 5 (Reyna, J., dissenting).

mailing to the discretionary act of evaluating an illness or injury without explanation.

Not content with *Rizzo*'s narrow presumption, *Francway* dramatically expanded it, concluding "no reason [exists] to distinguish between how the presumption applies to 'general' medical examiners as compared to 'specialists.'" 940 F.3d at 1309. The court thus sanctioned the VA's reliance on the presumption of competence to allow an internist to conduct the specialist orthopedic examination mandated by the Board. *Id.* at 1306 (noting Board remanded for examination "by an appropriate medical specialist" who "should reconcile any opinion provided with the statements from [Francway and his 'buddy statement'] as to reported episodes of back pain since active service.") (alteration in original). The VA used the presumption to ignore the Board's mandate and presume a specialist in internal medicine to be a specialist in the unrelated field of orthopedics.[4] *Id.*

This presumption—that any VA health-care provider is a competent specialist qualified to render an expert opinion—wreaks havoc with veterans' claims throughout the adjudication process. Many disabled veterans pursue their claims *pro se* or with the assistance of non-lawyer representatives from veterans' service organizations; they are unprepared to argue

[4] The Accreditation Council for Graduate Medical Education—which sets professional educational standards for physicians in the United States—does not include orthopedics on its lengthy list of internal medicine subspecialties. ACCRED. COUNC. FOR GRAD. MED. EDUC., https://tinyurl.com/wy65cff (last visited Dec. 3, 2019).

nuances of evidentiary law, overcome procedural objections, or preserve issues for appeal. Cobb, *supra*, at 582. They simply do not know what to ask for or how to phrase the requisite "specific" objection. *Mathis v. McDonald*, 643 F. App'x 968, 971 (Fed. Cir. 2016) (veterans must "set forth the specific reasons" the examiner is unqualified) (citation omitted); *Mathis*, 137 S. Ct. at 1995 (Gorsuch, J., dissenting) (criticizing requirement that veterans "first supply a specific reason for thinking the examiner incompetent" before receiving examiner's credentials).

The precise nature of the required objection to an examiner's credentials eludes even the judges who routinely consider the issue. *Mathis*, 834 F.3d at 1357 (Reyna, J., dissenting) ("*Presumably*, a specific objection entails pointing to a specific aspect of an examiner's qualifications.") (emphasis added). This opaqueness is due in large part to the fact that veterans struggle to effectively preserve the issue for judicial review in the first instance. *Mathis*, 834 F.3d at 1351 (Hughes, J., concurring in denial of rehearing en banc) (noting the veterans in *Rizzo, Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), and *Mathis* all failed adequately to object). The objection must include more than a request for credentials, *Bastien*, 599 F.3d at 1306, or a challenge to the VA's failure to introduce evidence of competence, *Mathis*, 834 F.3d at 1350, but beyond that the contours of the required objection remain vague. And if the objection is not raised first to the VA, it cannot be raised on review. *Massie v. Shinseki*, 25 Vet. App. 123, 127 (2011).

Even where a claimant specifically requests an examiner's curriculum vitae to rebut an unfavorable

opinion, the VA may refuse to provide it. Br. of Law School Veterans Clinics and Attorneys as *Amici Curiae* in Support of the Petition for a Writ of Certiorari at 10-11, *Mathis v. McDonald*, (No. 16-677), 2016 U.S. S. Ct. Briefs LEXIS 4782 (Dec. 22, 2016) (noting VA ignored five requests for credentials of occupational medicine specialist who examined client for genitourinary condition). The VA's Adjudication Procedures Manual states that, while claims personnel should "duly consider" claimants' concerns about an examiner's competence, "[t]he mere fact that such a communication [questioning the examiner's competence or requesting his credentials] is received does *not* mean that … there is a further duty to assist to obtain records." U.S. Dep't of Veterans Affairs, *Adjudication Procedure Manual M21-1*, Part III, Ch. 3, Sec. D(2)(o) (2019) (emphasis original). But without his examiner's credentials, the veteran lacks "the information necessary to mount a challenge to the medical examiner's qualifications." *Mathis*, 834 F.3d at 1349 (Dyk, J., concurring in denial of rehearing en banc); *see also id.* at 1357 (Reyna, J., dissenting) (requiring "a specific objection to an examiner's competence before she can learn the examiner's qualifications" renders the veteran "hapless, caught in a classic … catch-22 ….")

Although the presumption applies only on judicial review, *Francway*, 940 F.3d at 1306, the manual extends it to the VA itself. U.S. Dep't of Veterans Affairs, *Adjudication Procedure Manual M21-1*, Part III, Ch. 3, Sec. D(2)(o) (2019) ("If the … communication is … that the examiner was not qualified … then … [n]ote: There is a presumption that a selected medical examiner is competent."). Because the agency itself "rel[ies] on the presumption that it followed its

rules when evaluating the application of those very rules," the presumption of competence disadvantages claimants from the outset of the process. *Mathis*, 834 F.3d at 1360 (Stoll, J., dissenting from denial of rehearing en banc).

This problem persists before the Board. *Nohr v. McDonald*, 27 Vet. App. 124, 128 (2014) (reversing Board after it denied claimant's request for examiner's curriculum vitae). With fewer than one in five claimants represented by counsel before the Board, *see* n. 2, *supra*, p. 2, veterans often do not understand the need to preserve technical evidentiary issues for judicial review. *Mathis*, 137 S. Ct. at 1995 (Sotomayor, J., concurring in denial of certiorari) (noting the frequent problem that veterans "d[o] not ask the VA to provide the examiner's credentials"). Thus, what might seem to a lawyer like a benign "requirement"[5] to make a record for appeal substantially disadvantages the majority of veterans appearing before the VA *pro se* or with the assistance of non-lawyer representatives.

[5] In footnote 1 of its decision below, the court purported to turn the presumption into a "requirement." *Francway*, 940 F.3d at 1307 n.1. Because the court preserved the veteran's burden to raise a "specific[] … challenge" to his examiner's competence and expanded the presumption to encompass specialists as well as generalists, *id.* at 1307, this terminology change does not mitigate the disadvantage borne by the veteran.

II. The Presumption Of Competence Is Contrary To The History Of Veterans' Benefits Administration.

Since the First Session of the First Congress in 1789 guaranteed Revolutionary War pensions, veterans' benefits have been part of American law. Act of September 29, 1789, ch. 24, § 1, 1 Stat. 95 (assuring federal payment of state pensions granted to veterans wounded and disabled "during the late war"). Veterans' benefits laws have since sought, albeit with mixed success, to ease veterans' paths to benefits.

During the Civil War, the federal government instituted the first federal grant of benefits since the Revolutionary War for illness, injury, or death incurred in the line of duty. Act of July 14, 1862, ch. 166, § 1, 37 Stat. 566. It authorized the Commissioner of Pensions to "furnish such claimants, free of all expense or charge to them, all such printed instructions and forms as may be necessary in establishing and obtaining" the claimed benefits, *id.* at § 9, and required him to reimburse successful claimants for the out-of-pocket costs of their medical examinations. *Id.* at § 8. Reflecting the paternalism that still characterizes the system today, the law also capped the fees that agents and attorneys could charge claimants to "prevent the numerous frauds committed by pension agents upon applicants for pensions." Steven Reis and Matthew Tenner, *Effects of Representation by Attorneys in Cases before VA: The "New Paternalism"*, 1 Veterans L. Rev. 2, 6 (2009) (quoting CONG. GLOBE, 37th Cong., 2d Sess. 2099, 2101 (1862) (statement of Mr. Harrison)) (internal quotations omitted). After each successive conflict between the Civil War and

World War I, Congress passed legislation that "provided for him who has borne the battle." *Walters*, 473 U.S. at 309 (quoting President Abraham Lincoln's second inaugural address).

The privations wrought on veterans successively by World War I and the Great Depression resulted in a sustained improvement in their treatment by the federal government and American society and triggered the modern era of veterans' benefits. Congress created the VA in 1930 and tasked it to administer veterans' benefits. *Id.* In 1932, World War I veterans left destitute by the Great Depression marched on Washington, D.C., to demand payment of deferred "bonuses" promised them in the World War Adjusted Compensation Act of 1924, 68 Stat. 121. Terence McArdle, "The veterans were desperate; Gen. MacArthur ordered U.S. troops to attack them", *Washington Post* (July 28, 2017, 8:00 AM), https://tinyurl.com/qpqubwx. The U.S. Army's subsequent route of the Bonus Marchers from their encampment along the Anacostia River (resulting in two veterans' deaths) profoundly affected how the country viewed its military veterans.[6] *Id.*; *see also* U.S. Dep't of Veterans Affairs, *VA History in Brief* at 10-11 (undated).

Congress reacted by repealing conflict-by-conflict legislation and introducing a unitary process for

[6] When the Bonus Marchers returned to Washington in March 1933, just months into President Franklin Roosevelt's first term, the president exemplified this new attitude by sending the First Lady to meet them, prompting one veteran to quip "Hoover sent the Army; Roosevelt sent his wife." Paul Dickson and Thomas B. Allen, "Marching on History", *Smithsonian Magazine* (February 2003), https://tinyurl.com/ulfodmp

awarding veterans' benefits. Economy Act of 1933, 48 Stat. 8, sec. 1(a) ("[T]he following classes of persons may be paid a pension: (a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty …."). The Attorney General's Committee on Administrative Procedure captured the new spirit in veterans' benefits when it concluded that "[t]he nature of the work of the Veterans' Administration as a benefactor agency justifies considerable leniency" toward the adjudication of veterans' benefits.[7] U.S. Dep't of Justice, *Rep. of the Atty. Gen's. Comm. on Admin. Proc.* at 129 (1941).

To effectuate this increasing public concern for veterans, Congress and the VA established a pro-claimant system of granting benefits. Evidencing the historically paternalistic view of veterans, they codified numerous presumptions to facilitate the award of benefits. They imposed duties to assist veterans to perfect their claims and to grant them the benefit of the doubt in close cases. Even after courts construed these duties liberally in veterans' favor, Congress intervened to further minimize obstacles to receiving benefits. Against this history of modern veterans' benefits, the presumption of competence stands starkly out of place.

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[7] During World War II, Congress sought to prevent renewed civil unrest by granting returning veterans generous benefits through the Servicemen's Readjustment Act of 1944 (also known as the G.I. Bill). 78 Stat. 284. The act established hospitals and provided mortgage and tuition assistance to veterans. *Id.*

A. The history of the duty to assist shows the pro-claimant evolution of veterans' benefits.

Foremost among the duties imposed upon the VA is the duty to help veterans gather all available evidence to perfect their claim. That includes not only military records, service medical records, VA medical records, and records from other federal agencies likes the Social Security Administration (SSA), but also records not in the custody of the VA or the federal government. 38 C.F.R. § 3.159(c). In short, the VA must make all "reasonable efforts" to obtain "procurable" information. 38 C.F.R. §§ 3.102, 3.159(c).

As early as 1938,[8] the VA assigned responsibility for "the development of claims in conformity with established Veterans' Administration policy" to its authorization units. 38 C.F.R. § 2.1004 (1938). The duty to assist in developing relevant facts was triggered, then as now, by the filing of an application for benefits. 38 C.F.R. § 2.1075 (1938).

The explicit obligation to assist veterans applying for benefits persisted into the next edition of the Code

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[8] The Federal Register Act of 1935, 74 Stat. 500, ch. 417, authorized publication of the Federal Register and, as amended in 1937, 75 Stat. 304, ch. 369, the Code of Federal Regulations to improve public access to government regulations, which agencies previously published individually. *See, e.g.*, U.S. Veterans Administration, Bureau of Pensions, *Laws of the United States Governing the Granting of Army and Navy Pensions* (1931) (including "Rules of Practice of the Veterans' Administration in Pension and Bounty Land Appeals").

of Federal Regulation. The VA's adjudication divisions bore responsibility "for the preparation … of claims for disability or pension," 38 C.F.R. § 3.3 (1949), while the authorization units remained tasked with "the development of claims in conformity with established Veterans' Administration policy." 38 C.F.R. § 3.4 (1949).

This framework persisted relatively unchanged until the early 1970s, when the veteran population expanded with the Vietnam War. In 1972, the VA revised its regulations to incorporate a stronger statement of the duty to assist a veteran in "developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in the law." 38 C.F.R. § 3.103 (1973). The VA proposed this new rule "to assemble various Veterans' Administration directives relating to due process and appellate rights … so that the principles contained therein may be more readily available to interested members of the public." 37 Fed. Reg. 10,745 (May 27, 1972). No written objections were received to the proposed rule, and it became effective on July 18, 1972. 37 Fed. Reg. 14,780 (July 18, 1972).

Sixteen years later, Congress revalidated and reinforced the regulatory duty to assist by incorporating it into the Veterans' Judicial Review Act (VJRA). H.R. 5288, 100th Cong. § 103(a) (1988) (now codified at 38 U.S.C. § 5103A ("The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit ….")). The VJRA restrained the VA's discretion and mitigated the enormous discrepancies in how similarly situated veterans were treated across the

VA. Charles G. Mills, *Is the Veterans' Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?*, 17 Touro L. Rev. 695, 697 (2001). The act also established judicial review of VA benefits determinations—previously denied to veterans—by creating the Court of Veterans Appeals (now known as the Court of Appeals for Veterans Claims) and authorizing appeals to the Court of Appeals for the Federal Circuit. VJRA, H.R. 5288, 100th Cong. § 301(a) (1988).

Early in this new era of judicial review, the Federal Circuit acknowledged Congress's intent "to assist veterans in establishing facts sufficient to support well-grounded claims and to give them every benefit that can be supported in law." *Collaro v. West*, 136 F.3d 1304, 1309 (Fed. Cir. 1998). In deference to Congress, the courts of appeal created a "unique, and uniquely low" standard for triggering the VA's duty to assist. *Hensley v. West*, 212 F.3d 1255, 1261 (Fed. Cir. 2000). They recognized that the duty arose when a veteran made "a plausible claim, one which is meritorious on its own or capable of substantiation." *Murphy v. Derwinski*, 1 Vet. App. 78, 81-82 (1990) ("The Secretary, then, is obligated … to assist 'such a claimant in developing the facts pertinent to the claim.' Within the non-adversarial process of VA claims adjudication, the word 'pertinent' takes on an even stronger meaning; the Secretary's duty applies to all relevant facts, not just those for or against the claim.").

Unsatisfied with the courts' already-deferential standard, Congress intervened to further lower the "uniquely low" standard for triggering the VA's duty to assist. Mills, *supra*, at 714. The Veterans Claims

Assistance Act (VCAA), H.R. 4864, 106th Cong. (2000), "entirely eliminated the requirement that there be a well grounded claim," excluding from the duty to assist only "those claims where no reasonable possibility exists of substantiating the claim." Mills, *supra*, at 724. Virtually every veteran is now entitled to the VA's assistance with a claim.

The courts of appeal followed Congress's lead by applying the duty to assist broadly. The Veterans Court applied it to all five elements of a veteran's disability claim—the veteran's status, the existence of the disability, its service connection, its degree, and the effective date of the disability. *Canlas v. Nicholson*, 21 Vet. App. 312, 316 (2007). The Federal Circuit applied it to records collateral to the claimed disability, such a medical records pre-dating a period for which compensation is sought. *Moore v. Shinseki*, 555 F.3d 1369, 1372-73 (Fed. Cir. 2009) (remanding because Secretary abdicated duty to assist by refusing to obtain medical records of psychiatric care before alleged period of disability).

While not boundless in scope,[9] the duty to assist obligates the VA to obtain all reasonably available "relevant records that … would aid in substantiating a veteran's claims." *Bailey v. Shinseki*, 527 F. App'x

[9] The VA is not, for example, required to produce information already in the claimant's possession or unrelated to the benefits application. *See Golz v. Shinseki*, 590 F.3d 1317 (Fed. Cir. 2010) (where claimant alleged PTSD, duty to assist not breached where VA did not request SSA records related to back injury); *Walch v. Shinseki*, 563 F.3d 1374, 1377-78 (Fed. Cir. 2009) (VA not obligated to forward records in claimant's possession to his private physician).

937, 939 (Fed. Cir. 2013). It reflects a historic preference to provide veterans all reasonable assistance to perfect their benefits claims—a preference Congress and the courts have only strengthened over time.

The presumption of competence defies this pro-veteran arc by depriving claimants of probative information that could help substantiate their claims. In any case that depends on medical evidence provided by a VA examiner, the qualifications of that examiner—including his or her credentials in the relevant medical specialty—are unquestionably probative of the merits of the veteran's claim. A rule that allows the VA to withhold that information from the veteran cannot be squared with the duty to assist. The VA implicitly recognizes the probative value of an examiner's qualifications because it imposes on veterans the one-sided burden of proving their private physicians' competence. *See supra*, p. 6-7.

In this case, where the VA denied petitioner benefits based on a VA medical examiner's opinion without laying an evidentiary foundation for his expertise, it deprived petitioner of relevant information in violation of its duty to assist. Not only did the VA deny his claim, but after the Board remanded to the VA for a "specialist" examination, the VA merely assumed an internist was qualified to act as an orthopedic specialist—a groundless expansion of the presumption that a veteran not trained in the law lacked the foresight to challenge.

B. The benefit-of-the-doubt rule is another historic pro-claimant standard.

The veterans' benefits framework constructed over the last century also imposes on the VA a duty to grant veterans the benefit of the doubt in close cases. This rule recognizes that rigidity has no place in a system designed to reward those who often earned their benefits in the chaos of combat. Where the question is a close one, the veteran should receive his benefits.

The VA must give veterans the benefit of the doubt when the evidence supporting a claim is in relative equipoise with the evidence undermining it. 38 C.F.R. § 3.102 (2019). Under such circumstances, the VA must grant the veteran's benefits application. Only when the preponderance of the evidence weighs clearly against the claimant may the VA deny his claim. *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001).

This rule has an even older provenance than the VA's duty to assist claimants. When Congress reformed veterans' benefits after the 1932 Bonus March, some claimants were forced to reapply for their benefits. To reduce the impact of the reforms, in 1934 Congress imposed a benefit-of-the-doubt rule in the veterans' favor: "[I]n any review of the case of any veteran to whom compensation was being paid on March 19, 1933, for service-connected disability, reasonable doubts shall be resolved in favor of the veteran, the burden of proof being on the Government." 73 Stat. 524, Title III, sec. 28.

The benefit-of-the-doubt rule, first applied to veterans facing a loss of existing benefits, was expanded in the first Code of Federal Regulation to apply to all VA benefit applications. "Full credence shall be given to the evidence submitted in proper form in support of claims for disability compensation, unless there is sound basis for doubt as to the conditions set forth in the physician's or layman's statement, by reason of other conflicting evidence or otherwise." 38 C.F.R. § 2.1031(c) (1938); *see also* 38 C.F.R. § 3.31(c) (1949). The rule also applied to evaluating whether a claimant's disability was in the line of duty. 38 C.F.R. § 2.1075 (1938).

The VA reaffirmed its commitment to the benefit-of-the-doubt rule in the second edition of the Code. The 1949 regulations emphasized that doubts about the service-connection of a death or disability "will be resolved in favor of the veteran." 38 C.F.R. § 3.63(a) (1949); *see also* 38 C.F.R. § 3.31(d) (1949) ("The benefit of every reasonable doubt will be resolved in favor of such veterans [who "engaged in combat with the enemy in active service"].."). This straightforward regulation has remained substantively unchanged for decades and was revalidated by Congress in the VJRA. H.R. 5288, 100th Cong. § 103(a) (1988) (now codified at 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.")); VCAA, H.R. 4864, 106th Cong. § 4 (2000) (same).

A liberal regulation implements the benefit-of-the-doubt rule as enacted by the VJRA and VCAA. 38

C.F.R. § 3.102, as amended by 66 Fed. Reg. 45,630 (July 30, 2001). A decision-maker must consider all "procurable" information. 38 C.F.R. § 3.102. The rule applies to all issues arising in the benefit application process, including service connection and degree of disability. *Id.* Most importantly, the regulation expansively defines "reasonable doubt":

> It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility.... Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not [a] justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine.

Id. Where implicated, the VA commits reversible error if it fails affirmatively to address the rule. *Kirkman v. Peake*, No. 07-0774, 2008 U.S. App. Vet Claims LEXIS 1115, at *13 (Sept. 17, 2008).

Like the duty to assist, the benefit-of-the-doubt rule underscores the pro-claimant nature of the veterans' benefits system. Like the apocryphal rule of baseball, ties in benefits adjudication have long gone to the veteran. In contrast, the presumption of competence prevents veterans from taking a fair swing at the ball. It deprives them of obviously "procurable" information—these are examiners hired by the VA, after all—which in turn renders the appellate record bereft of necessary evidence. It alleviates the VA's

burden of establishing an examiner's expertise—even where specialized expertise is required—while the veteran continues to shoulder that burden for his private physician. The presumption of competence is a bizarre and unwarranted exception to the pro-veteran framework of benefits adjudication.

C. Other long-established presumptions buttress the pro-claimant nature of the veterans' benefits system.

Long-established evidentiary presumptions further illuminate the "solicitude for the claimant" inherent in the veterans' benefits system. *Walters*, 473 U.S. at 311. Not only do these presumptions shift the burden of proof to the government, they can only be overcome by "clear and unmistakable evidence" to the contrary. *See* 38 C.F.R. § 2.1079 (1938).

Service members have been presumed mentally and physically sound at the time of enlistment since at least the immediate post-World War I era. World War Veterans' Act of 1924 (WWVA), 43 Stat. 607, sec. 200; *see also* 38 C.F.R. § 2.1079(b) (1938). The same presumption applies to service members today. 38 U.S.C. §§ 1111, 1132 (2019).

Certain diseases and neuropsychiatric conditions have been presumptively service-connected for equally as long. WWVA, 43 Stat. 607, sec. 200 ("[A]n ex-service man who is shown to have or, if deceased, to have had … neuropsychiatric disease, an active tuberculous disease, paralysis agitans, encephalitis lethargica, or amoebic dysentery … shall be presumed to have acquired his disability in such service."); *see*

also 38 C.F.R. §§ 2.1089-2.1096 (1938). Over time, the conditions giving rise to presumptions of service connectedness have proliferated. Current regulations recognize presumptive service-connection for conditions and diseases arising from exposure to Agent Orange in Vietnam, atomic radiation during World War II, contaminated water at Camp Lejeune, North Carolina, and unknown contaminants during the First Gulf War. 38 C.F.R. §§ 3.309, 3.317 (2019).

Not only do these presumptions place evidentiary burdens on the VA, the VA's threshold for rebuttal has long been the clear-and-convincing-evidence standard. *See* WWVA, 43 Stat. 607, sec. 200 ("said presumption shall be rebuttable by clear and convincing evidence"); 38 C.F.R. § 2.1079 (1938) ("The presumption of soundness … is for application except in cases where the evidence clearly and unmistakably discloses" inception of a disability before enlistment); 38 U.S.C. § 1111 (2019) (presumption applies unless "clear and unmistakable evidence demonstrates that the injury or disease existed before" enlistment).

This pattern of shifting evidentiary burdens onto the VA, and the heightened standard required to overcome them, confirms that the veterans' benefits system has evolved toward ever-greater lenience toward claimants. By imposing on claimants the burden to undermine the reliability of VA medical experts—and depriving claimants of the information necessary to satisfy that burden—the presumption of competence defies decades of congressionally mandated solicitude toward veterans.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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