No. 19-604

In the Supreme Court of the United States

ERNEST L. FRANCWAY, JR., PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any objection from the veteran involved, the Department of Veterans Affairs (VA) must affirmatively establish that a VA staff physician was qualified to render a medical opinion concerning a veteran's disability claim before the VA may rely on the medical opinion in its administrative adjudication of that claim.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals for Veterans Claims:

Francway v. *Shulkin*, No. 16-3738 (Feb. 6, 2018)

United States Court of Appeals (Fed. Cir.):

Francway v. *Wilkie*, No. 18-2136 (Oct. 15, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 940 F.3d 1304. The panel decision of the court of appeals (Pet. App. 13a-24a) is reported at 930 F.3d 1377. The decision and order of the Court of Appeals for Veterans Claims (Pet. App. 27a-52a) are unreported but are available at 2018 WL 718564 and 2018 WL 2065565. The decision of the Board of Veterans' Appeals (Pet. App. 53a-70a) is unreported but is available at 2016 WL 7101251.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2019. The petition for a writ of certiorari was filed on November 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served in the United States Navy from August 1968 to May 1970. Pet. App. 3a. He contends that, while he was serving on an aircraft carrier in 1969, a gust of wind caused him to fall and injure his back. *Ibid.* In 2003, petitioner filed a claim for veterans' disability benefits related to his back injury. *Ibid.*

This case implicates the statutory duty of the Department of Veterans Affairs (VA) to provide reasonable assistance, which can include the provision of a medical examination or medical opinion, to a veteran who seeks evidence to substantiate his claim for benefits. See 38 U.S.C. 5103A(a)(1) and (d)(1). The question presented is whether the VA must provide affirmative evidence of the competence of the VA physician who gives such a medical opinion in the veteran's case, even if the veteran has not disputed the physician's qualifications, before the VA may consider that opinion in its adjudication of the benefits claim.

a. Congress has authorized awards of disability benefits to veterans whose disabilities "result[ed] from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty." 38 U.S.C. 1110 (wartime service), 1131 (non-wartime service); see 38 U.S.C. 1113(b). With limited exceptions that are not implicated here, a veteran must carry the "evidentiary burden" of proving his or her entitlement to such benefits. *Cromer* v. *Nicholson*, 455 F.3d 1346, 1350 (Fed. Cir. 2006), cert. denied, 550 U.S. 936 (2007); see 38 U.S.C. 5107(a) (The "claimant has the responsibility to present and support

a claim for benefits.").[1] "[T]o establish a right to compensation for a present disability, a veteran must show: '(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service'—the so-called 'nexus' requirement." *Holton* v. *Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (citation omitted).[2]

Two VA components—the Veterans Benefits Administration (VBA) and the Board of Veterans' Appeals (Board)—adjudicate veterans' benefit claims. The VBA, acting through VA regional offices, develops an administrative record and makes an initial decision on such a claim. See 38 C.F.R. 3.100. If a claim is denied, the veteran may file a notice of disagreement, which initiates a review within the VBA during which the agency may collect additional evidence and hold an evidentiary hearing before it either grants benefits or provides a written statement of the case explaining its adverse decision. 38 C.F.R. 19.26(a) and (d), 19.29; see 38 C.F.R. 3.2600(a) and (c), 20.201.

If the veteran is still dissatisfied, he may appeal to the Board, which may receive additional evidence from the veteran before rendering a "[f]inal decision[]" for

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[1] A veteran's burden of proof is less stringent than the traditional burden of proof in civil litigation. In a close case, where "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter," the VA must "give the benefit of the doubt to the claimant." 38 U.S.C. 5107(b).

[2] In certain contexts, the VA will presume that a disability was caused by military service if the disability sufficiently manifests so as to be compensable within one year after the veteran's separation from service. 38 U.S.C. 1112(a)(1); 38 C.F.R. 3.307, 3.309(a).

the agency. 38 U.S.C. 7104(a); 38 C.F.R. 20.200-20.202; see 38 C.F.R. 20.800. Such agency proceedings are non-adversarial and are not "limited by legal rules of evidence." 38 C.F.R. 20.700(c); see 38 C.F.R. 3.103(a) and (d). Instead, the VA must "consider all information and lay and medical evidence of record in a case before [it]." 38 U.S.C. 5107(b).[3]

The VA must also "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim." 38 U.S.C. 5103A(a)(1); see 38 C.F.R. 3.159(c). In the disability-compensation context, that assistance "include[s] providing a medical examination or obtaining 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 38 C.F.R. 3.159(c)(4). A medical examination or opinion is necessary if "the evidence of record" both "contains competent evidence that the claimant has a current disability" and "indicates that the disability * * * may be associated with the claimant's active military, naval, or air service," but "does not contain sufficient medical evidence for the Secretary [of Veterans Affairs (Secretary)] to make a decision on the claim." 38 U.S.C. 5103A(d)(2); see 38 C.F.R. 3.159(c)(4).

As relevant here, VA regulations define "competent medical evidence" as "evidence provided by a person

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[3] On February 19, 2019, revised versions of various VA regulations took effect, amending the VA appeals system. See 84 Fed. Reg. 2449 (Feb. 7, 2019); 84 Fed. Reg. 138 (Jan. 18, 2019). Those amendments do not apply to this case, and all citations in this brief refer to the regulations that were previously in effect. Various statutory changes that were made effective February 19, 2019, likewise do not apply to this case. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105; 84 Fed. Reg. at 2449.

who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 C.F.R. 3.159(a)(1). The VA's *Adjudication Procedures Manual* M21-1 (*VA Manual*), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual, which provides guidance for the VBA's adjudication of veterans' benefits claims, addresses the process of obtaining medical examinations. Cf. 38 C.F.R. 19.5 (2017) (stating that the Board is not bound by VA manuals). The *VA Manual* states that VA medical facilities are "responsible for ensuring that examiners are adequately qualified." § III.iv.3.D(2)(b).

b. In April 2003, petitioner filed a claim for veterans' disability benefits, asserting that he had injured his back during a 1969 fall while on an aircraft carrier. Pet. App. 3a. Between 2003 and 2015, petitioner was examined and had his medical records separately reviewed by an orthopedist, an internist, and a physician's assistant working on behalf of the VA. *Ibid.*; *id.* at 29a-34a. Those examiners observed that petitioner's service treatment records did not reflect an in-service back injury, and that petitioner's medical records indicated that petitioner had first complained of back pain roughly three decades after his discharge from service. *Id.* at 32a-33a. The VA orthopedist, internist, and physician's assistant each concluded that petitioner's current back disability was unlikely to be connected to his 1969 injury. *Id.* at 3a.

In 2013, after "multiple appeals to and from the Board and remands back to the VA regional office," petitioner proffered a "buddy statement" from a longtime friend attesting to petitioner's history of back disability

after his 1969 injury. Pet. App. 3a. The Board again remanded petitioner's claim to the VBA, with instructions that petitioner's "claims file should be reviewed by an *appropriate medical specialist*" and that the "examiner should reconcile any opinion provided" with the "buddy statement." *Id.* at 3a-4a (citation omitted).

In 2014, petitioner was examined by the same orthopedist, who again concluded that petitioner's current back symptoms were likely not related to his 1969 injury. Pet. App. 4a. The orthopedist did not, however, address the "buddy statement." *Ibid.* The VA internist then also reviewed petitioner's file and "buddy statement," and the internist remained unable to connect petitioner's back symptoms to his in-service injury "without resorting to speculation." *Id.* at 34a (citation omitted). The internist found the "buddy statement" "insufficient to establish the existence of an initial in-service condition that would cause the symptoms and findings occu[r]ring after the service." *Id.* at 35a (citation omitted; brackets in original). The VBA denied entitlement to benefits for petitioner's back disability, and the matter was returned to the Board. See *id.* at 4a.

c. The Board concluded that "the preponderance of the evidence is against [petitioner's] claim for service connection for a low back disorder," finding "no competent evidence of a medical nexus between the current low back disability and an incident of service." Pet. App. 66a, 70a. The Board considered petitioner's own statements and his "buddy statement," but ultimately found them 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 * * * for many

years after service." *Id.* at 67a. Before the Board, petitioner did not challenge the competency of the VA doctors who had provided medical opinions in his case, nor did he seek information from the VA about the doctors' qualifications. See *id.* at 4a, 11a.

2. A veteran, but not the VA, may seek judicial review of a Board decision. 38 U.S.C. 7252(a). That agency-record-based review is "limited [in] scope" under standards for reviewing agency action, 38 U.S.C. 7252(b), that authorize the Court of Appeals for Veterans Claims (Veterans Court) to set aside a Board decision if it is, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if the Board's factual findings are clearly erroneous. 38 U.S.C. 7261(a)(3)(A) and (4).

Petitioner sought review in the Veterans Court, which affirmed the Board's ruling. Pet. App. 27a-49a. As relevant here, petitioner argued for the first time that the VA internist who had opined on his case was not an "appropriate medical specialist," as the Board's earlier order had required. *Id.* at 43a. The Veterans Court explained that, because petitioner had not raised this issue before the Board, the Board "was not required to provide a statement of reasons or bases establishing the medical examiner's competence before relying on her opinion." *Ibid.* In the alternative, the Veterans Court found that petitioner had failed to demonstrate prejudicial error on this point, because petitioner had not explained why an internist could not be an "appropriate medical specialist." *Id.* at 44a.

3. The Federal Circuit has exclusive but limited jurisdiction over appeals from the Veterans Court. 38 U.S.C. 7292(a), (c) and (d). The court of appeals may

decide "relevant questions of law" and review "any regulation or any interpretation thereof" under standards for judicial review of agency action. 38 U.S.C. 7292(d)(1). The Federal Circuit "may not review" any "challenge to a factual determination" or a "challenge to a law or regulation as applied to the facts of a particular case," "[e]xcept to the extent" that the appeal "presents a constitutional issue," 38 U.S.C. 7292(d)(2).

a. Petitioner appealed to the Federal Circuit, and a panel of that court affirmed. Pet. App. 13a-24a.

Petitioner challenged as illegitimate the "presumption of competency" that applies to VA medical examiners. Pet. App. 17a. The court of appeals rejected that argument. The court explained that the "presumption of competency" had originated in the Federal Circuit's statement that, "'[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.'" *Id.* at 18a (quoting *Rizzo* v. *Shinseki*, 580 F.3d 1288, 1290-1291 (Fed. Cir. 2009)) (brackets in original). The court of appeals clarified that, "[a]though 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." *Ibid.* Rather, the presumption is "rebutted" when a veteran raises the competency issue before the Board. *Id.* at 19a.

The court of appeals rejected a reading of *Rizzo* under which "the veteran bears the burden of persuasion, or at least production, of showing that the examiner was incompetent." Pet. App. 19a. Rather, the court explained, "[t]he presumption of competency requires

nothing more than is required for veteran claimants in other contexts—simply a requirement that the veteran raise the issue." *Id.* at 20a. The court further explained that, "once the veteran raises a challenge to the competency of the medical examiner, the presumption [of competency] 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." *Id.* at 21a. At that point, the court stated, the Board must "make factual findings regarding the qualifications and provide reasons and bases for concluding whether or not the medical examiner was competent." *Ibid.*

The court of appeals emphasized that, because a veteran must raise the competency issue in the first instance, "the veteran must have the ability to secure from the VA the information necessary to raise the competency challenge." Pet. App. 21a. "Once the request is made for information as to the competency of the examiner," the court stated, "the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner." *Ibid.* The court of appeals explained that the provision of this information is mandated by the VA's statutory duty to assist veterans. *Id.* at 21a-22a (citing 38 U.S.C. 5103A).

The court of appeals also rejected petitioner's alternative contention that he had sufficiently raised the issue of his medical examiner's competency before the Board by arguing that the medical opinions in his case were inadequate. Pet. App. 22a. The court explained that the competency of a medical examiner and the adequacy of an examination are two separate issues. *Ibid.* (citing *Mathis* v. *McDonald*, 834 F.3d 1347, 1351 (Fed.

Cir. 2016) (per curiam) (Hughes, J., concurring in the denial of the petition for rehearing en banc)).

Petitioner also argued that the Board cannot presume that a selected examiner is competent in a particular specialty because the presumption "is one of general medical competence not one regarding an examiner's expertise in various specialties." Pet. App. 23a. The court of appeals rejected that contention. The court found no reason to distinguish between the two forms of competence because "[t]he 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." *Ibid.*

b. Acting *sua sponte*, the Federal Circuit subsequently ordered en banc rehearing of petitioner's case for the purpose of modifying one footnote in the panel opinion. Pet. App. 26a. The modified footnote, joined by every active member of the court, states:

> [T]o 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."

Id. at 6a.

ARGUMENT

Petitioner contends (Pet. 21-36) that, before the VA may rely on a doctor's medical opinion in adjudicating a veteran's claim for disability benefits, the VA must prove the physician's competence to give that opinion, regardless of whether the veteran raises the issue. That

argument is inconsistent with the statutory and regulatory provisions that govern the VA's administrative adjudication of such claims, and with well-established legal principles governing agency adjudicative procedures. Many of petitioner's current attacks on the decision below are premised on a broad understanding of the "presumption of competence" that the en banc Federal Circuit has now rejected. And even if the question presented warranted further review, this case would be a poor vehicle for the Court to consider it. The petition for a writ of certiorari should be denied.

1. The Federal Circuit correctly held that the VA need not affirmatively prove an examiner's competence to render a medical opinion concerning a veteran's disability claim unless the veteran raises the issue. Pet. App. 9a-10a.

a. "[A]dministrative agencies * * * have never been restricted by the rigid rules of evidence" that apply in court proceedings. *FTC* v. *Cement Inst.*, 333 U.S. 683, 705-706 (1948). Consistent with that understanding, Congress has directed the VA to "consider all information and lay and medical evidence of record in a case before [it]" when adjudicating veterans' benefits claims. 38 U.S.C. 5107(b). Congress has also authorized the VA to promulgate "regulations with respect to the nature and extent of proof and evidence * * * to establish the right to [such] benefits." 38 U.S.C. 501(a)(1). The VA's regulations state that proceedings before the Board are not "limited by legal rules of evidence" and instead will incorporate "reasonable bounds of relevancy and materiality." 38 C.F.R. 20.700(c).

Those statutory and regulatory provisions make clear that the VA may consider the medical opinion of

one of its own physicians without demonstrating affirmatively that the physician is qualified to provide that opinion. Section 5107(b) requires the agency to "consider[] all evidence that may bear upon a claim." *Rizzo* v. *Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009). Petitioner does not address Section 5107(b) or the VA's regulations authorizing the agency to consider all relevant and material information submitted in its own proceedings.

Petitioner's focus (Pet. 32) on requirements for the admission of expert testimony under Federal Rule of Evidence 702 is misplaced. Those rules govern the type of information that a court and jury may consider; they do not restrict the authority of administrative agencies to consider all evidence they deem relevant to their inquiries. See, *e.g.,* 38 C.F.R. 20.700(c). And by inviting the courts to devise judge-made evidentiary rules for the VA's administrative proceedings, petitioner disregards "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Perez* v. *Mortgage Bankers Ass'n,* 135 S. Ct. 1199, 1207 (2015) (quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.,* 435 U.S. 519, 544 (1978) (*Vermont Yankee*)). Reviewing courts "are not free to impose upon agencies specific procedural requirements that have no basis in the [Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*]," or an agency's governing statute. *Pension Benefit Guar. Corp.* v. *The LTV Corp.,* 496 U.S. 633, 654-655 (1990); see *Vermont Yankee,* 435 U.S. at 549 (explaining that a reviewing court lacks authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").

Adoption of petitioner's approach would also jeopardize veterans' ability to secure benefits. The provisions that require the VA to consider "all" relevant and material information benefit veterans by allowing consideration of an extremely wide range of information relevant to veterans' claims. If the VA were required to disregard all medical opinions offered by physicians who had not been proved qualified, veterans would face a new obstacle in satisfying their burden of proof, because any such rule would logically apply to medical opinions that support a claim as well as to those that cast doubt upon it.

b. The agency's adjudicative practice of considering medical opinions of VA physicians in the absence of any objection by the veteran is neither arbitrary nor capricious. The VA medical facilities that provide medical examinations and opinions regarding veterans' disability claims are "responsible for ensuring that examiners are adequately qualified." *VA Manual* § III.iv.3.D(2)(b); cf. American Med. Ass'n, *Code of Medical Ethics* Opinion 9.7.1(h) (2016), https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/code-of-medical-ethics-chapter-9.pdf (advising that physicians who testify as expert witnesses should "[t]estify only in areas in which they have appropriate training and recent, substantive experience and knowledge"). When no objection or question is raised about a particular physician's competence to offer a particular medical opinion, the VA can reasonably rely on that opinion in evaluating a disability claim.

Although petitioner now contends that the internist who opined on his back issues was insufficiently specialized, he did not make that argument to the Board. See

Pet. App. 43a. The Board therefore considered the numerous opinions offered by VA examiners in petitioner's case, including those of an orthopedist and an internist, and weighed those opinions along with the other evidence that petitioner had presented to support his claim. *Id.* at 61a-70a. That approach was neither arbitrary nor capricious.

c. If petitioner or advocacy organizations wish to alter the VA's administrative adjudicatory process, the proper course is to petition the agency for rulemaking and to seek APA review if the VA's response is deemed insufficient. See 38 U.S.C. 502. That approach would appropriately reflect the Secretary's broad rulemaking authority to specify the "nature and extent of proof and evidence" required to establish benefits claims, 38 U.S.C. 501(a)(1), and "the methods of making investigations and medical examinations," 38 U.S.C. 501(a)(3). It would also permit a proper development of factual contentions in the rulemaking record to support any policy arguments, and it would avoid the limitations on the Federal Circuit's authority to review relevant factual determinations in appeals from individual benefits decisions, 38 U.S.C. 7292(d)(2).

2. Many of petitioner's present contentions are premised on a view of the "presumption of competency" that the en banc opinion below specifically rejected.

a. Petitioner emphasizes (Pet. 5-6) that the "presumption of competency" has been questioned by members of the Federal Circuit and this Court. The Federal Circuit's opinion in this case, however, addressed many of those concerns. While prior opinions—such as *Rizzo* —had suggested that the veteran may bear the burden of persuasion with respect to examiner competency, the

opinion below stated the opposite rule: "[O]nce 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." Pet. App. 8a-9a. And while prior opinions had questioned whether a veteran could easily obtain information on examiner qualifications, the decision below establishes that they can: "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." *Id.* at 10a (citing 38 U.S.C. 5103A).

In a footnote added by the en banc court of appeals, the court stated that prior Federal Circuit decisions were overruled to the extent they supported a broader understanding of the "presumption of competency." Pet. App. 6a. The en banc court explained that the "presumption" properly understood is simply a "requirement" that veterans must raise the issue of examiner competency if they want the VA to resolve it. *Ibid.* All active members of the en banc court joined that footnote, further indicating that the concerns raised about the "presumption of competency" in prior Federal Circuit opinions have now been resolved. See *Mathis* v. *McDonald*, 834 F.3d 1347, 1353-1360 (Fed. Cir. 2016) (per curiam) (Reyna, J., dissenting from denial of rehearing en banc, joined by Newman, J., and Wallach, J.).

The decision below also addressed many of the concerns raised by Justice Sotomayor's and Justice Gorsuch's opinions regarding the denial of certiorari in

Mathis v. *Shulkin*, 137 S. Ct. 1994 (2017). Those opinions expressed concern that the VA might refuse to provide veterans with information concerning an examiner's qualifications, leaving veterans unable to challenge examiner competency. *Id.* at 1994-1995. Under the decision below, however, the VA is *required* to provide such information upon request as an aspect of its duty to assist, see 38 U.S.C. 5103A. Pet. App. 10a. The decision below thus reflects the "continue[d] * * * dialogue" about examiner competency between the "Federal Circuit and the VA" that Justice Sotomayor hoped would occur after this Court denied certiorari in *Mathis*. 137 S. Ct. at 1995.

b. Petitioner contends (Pet. 21-23) that the "presumption of competency is illegitimate" because "Congress knows how to create presumptions for application in veterans-benefits adjudicatory proceedings," and it did not create this presumption. That argument fails because the pleading "requirement" articulated in the decision below is not an evidentiary presumption. Instead, it "requires nothing more than is required for veteran claimants in other contexts—simply a requirement that the veteran raise the issue." Pet. App. 20a. That requirement differs in kind from the true statutory presumptions that petitioner identifies. See, *e.g.*, 38 U.S.C. 1111 (establishing presumption that wartime veterans were healthy upon enlistment).

c. Petitioner contends (Pet. 23-27) that the "presumption of competency" is illegitimate because it relies on "an application of the presumption of regularity" that is both factually incorrect and beyond the Federal Circuit's jurisdictional authority. That argument likewise is refuted by the plain terms of the decision below, which treats the "presumption" as simply a rule that the

agency need not affirmatively address the examiner's competency unless the veteran contests it.

In any event, this Court has long held that "[t]he presumption of regularity supports the official acts of public officers" and that, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); see, *e.g.*, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *USPS* v. *Gregory*, 534 U.S. 1, 10 (2001); *United States* v. *Armstrong*, 517 U.S. 456, 464-465 (1996); see also *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 723 (1990) (explaining that "anecdotal evidence will not overcome the presumption of regularity"). Consistent with that approach, the court of appeals specifically reserved judgment on "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." Pet. App. 9a n.2; see *Wise* v. *Shinseki*, 26 Vet. App. 517, 525 (2014) (concluding that the "presumption [of competency] does not attach when VA's process of selecting a medical professional appears irregular"). Thus, whether the Board should consider evidence of *irregularity* in the selection of a particular examiner, even in the absence of any objection from the veteran, remains an open question that is not implicated here.

d. Petitioner contends (Pet. 28-30) that the "presumption" conflicts with the VA's duty to assist pursuant to 38 U.S.C. 5103A(a), the benefit-of-the-doubt rule of 38 U.S.C. 5107(b), and the "pro-veteran canon of statutory construction." Pet. 30. To support those contentions, petitioner asserts (Pet. 29) that "the presumption

impairs veterans" because the "VA itself employs the presumption in order to deny veterans access to the very information they need to rebut it." Those arguments ignore the decision below, which *requires* the VA to honor a veteran's "request * * * for information as to the competency of the examiner" pursuant to the VA's statutory "duty to assist." Pet. App. 10a. Petitioner does not acknowledge this aspect of the court of appeals' decision.

e. Finally, petitioner contends (Pet. 33-36) that the court below "transform[ed]" the "presumption of *competency* into a presumption of *specialization*." Pet. 35. As the court of appeals explained, that is a distinction without a difference: "The presumption is that the VA has properly chosen an examiner who is qualified to provide competent medical advice in a particular case absent a challenge by the veteran." Pet. App. 12a; see *Parks* v. *Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) ("[O]ne part of the presumption of regularity is that the person selected by the VA is qualified by training, education, or experience in the particular field."), cert. denied, 572 U.S. 1134 (2014). A veteran who believes that his "particular case" requires qualifications different from those of the examining physician may raise that issue before the Board, and the VA then must establish that the physician was qualified to provide an opinion in that case. See *Parks*, 716 F.3d at 585 ("[C]ompetency requires some nexus between qualification and opinion."). There is "no reason to distinguish between how the presumption applies to 'general' medical examiners as compared to 'specialists,'" Pet. App. 12a, and the Federal Circuit has previously applied the "presumption of competency" to disputes over specialization. See, *e.g.*, *Mathis* v. *McDonald*, 643 Fed. Appx.

968, 970 (2016) (veteran argued that examining physician, "who specialized in family practice," was not "qualified to offer an expert opinion in the field of pulmonology"), cert. denied, 137 S. Ct. 1994 (2017).

3. For two related reasons, this case would be a poor vehicle to consider petitioner's contentions, even if the question presented otherwise warranted this Court's review.

First, petitioner did not attempt to challenge the competency of his medical examiner before the Board. See Pet. App. 43a ("the appellant does not argue, nor does the record reflect, that he raised this issue" before the Board). As a result, this case does not implicate any questions about how specific or substantiated a veteran's challenge must be in order to trigger the VA's obligation to demonstrate an examiner's competence. Petitioner suggests (Pet. 31) that the Federal Circuit's "rebranded * * * presumption" still requires the veteran to make a "specific challenge" to competence before the VA is obligated to respond or to provide the veteran with information. But that is far from clear under the Federal Circuit's decision, and petitioner has not tested his own hypothesis here.

Second, petitioner did not request from the VA any information about his examiner's credentials or competence. As a result, this case, like *Mathis*, "does not allow review of both the VA's practice and the Board's presumption." *Mathis*, 137 S. Ct. at 1995 (Sotomayor, J., respecting the denial of certiorari) ("Full review would require a petition arising from a case in which the VA denied a veteran benefits after declining to provide the medical examiner's credentials."). While petitioner asserts (Pet. 29) that the VA denies veterans access to

information about their examiners, that claimed practice is not actually implicated here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2020