No. 19-

IN THE

Supreme Court of the United States

EDDIE N. DELA CRUZ,

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

SETH A. WATKINS
Counsel of Record
WATKINS LAW & ADVOCACY, PLLC
1455 Pennsylvania Avenue, NW,
Suite 400
Washington, DC 20004
(202) 355-9421
watkins@wlapllc.com

LOUIS S. MASTRIANI
ADDUCI, MASTRIANI
& SCHAUMBERG LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
Of Counsel

Counsel for Petitioner

Date: December 19, 2019

291966

QUESTION PRESENTED

Over the last decade since Congress passed remedial legislation creating Filipino Veterans Equity Compensation ("FVEC"), an astronomical *fifty-six percent (56%)* of all claimants have been denied that one-time benefit by the Department of Veterans Affairs ("VA"). This notorious failure to effectuate Section 1002, American Recovery and Reinvestment Act of 2009 ("ARRA"), has been the subject of an inter-agency task force convened by the White House, two hearings before the House of Representatives, and now a Federal Circuit opinion.

Below, the parties disputed the plain language in Section 1002 establishing "eligible persons" to receive the FVEC benefit. The Federal Circuit held that the VA could by-pass express eligibility criteria in the statute in favor of a "service" determination by the United States Army that would be "conclusive and binding on the VA" irrespective of the benefit's remedial nature and "regardless of whatever other evidence documenting service the claimant provides to the VA." According to the court of appeals, the VA need not make any independent assessment of FVEC eligibility.

The question presented is:

Whether the Federal Circuit has erred in its narrow construction of ARRA Section 1002—a remedial veteran's statute providing a benefit for Filipinos who were "call[ed] and order[ed] into the service of the armed forces of the United States" during WWII—by not following the pro-veteran canon requiring that the Act be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Eddie N. Dela Cruz. Respondent is Robert Wilkie, Secretary of Veterans Affairs. No party is a corporation.

STATEMENT OF RELATED CASES

Pursuant to SCR 14.1(b)(iii), all proceedings in the lower courts directly related to this case are

- Eddie N. Dela Cruz v. Robert Wilkie, No. 2018-2101 (Fed. Cir.) (judgment dated July 26, 2019);
- Eddie N. Dela Cruz v. David J. Shulkin, M.D., No. 17-1020 (CAVC) (judgment dated May 25, 2018); and
- Eddie N. DelaCruz v. Robert A. McDonald, No. 13-1157 (CAVC) (remand and mandate, without judgment, on October 24, 2014).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

Petitioner Eddie N. Dela Cruz ("Dela Cruz") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this action on July 26, 2019.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit, dated July 26, 2019, is set forth in the Appendix ("App.") at 1a-21a. A panel Order of the Court of Appeals for Veterans Claims on rehearing, dated May 3, 2018, is set forth at 22a-23a. The Memorandum Decision of the Court of Appeals for Veterans Claims dated March 16, 2018 is set forth at 24a-32a. The underlying decision of the Board of Veterans' Appeals dated February 7, 2017 is set forth at 33a-42a. The Order of the Court of Appeals for the Federal Circuit denying rehearing, dated September 20, 2019, is set forth at 43a-44a.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2019. A petition for rehearing was denied on September 20, 2019. App. at 43a-44a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1002 of ARRA, Pub. L. No. 111–5, 123 Stat. 115, 200-02 (2009), is set forth in the Appendix at 45a-51a.

STATEMENT OF THE CASE

This case raises a question of broad and general importance to veterans: when must the pro-veteran canon of statutory construction be applied to veterans' benefits statutes? The answer to this question affects all of the 20 million veterans whose benefit claims are subject to administrative "adjudication" by the VA, with its annual budget exceeding $200 billion.[1]

This Court gave life to the pro-veteran canon during World War II. *Boone v. Lightner*, 319 U.S. 561, 575 (1943). That time in history precisely intersects the service of the Filipino benefit claimants impacted by this case. The Philippines was a territory of the United States during the war, and Filipinos who were deemed to be "on active service in the Philippine Army"[2] were "call[ed] and order[ed] into the service of the armed forces of the United States" by President Franklin D. Roosevelt. Military

1. Department of Veterans Affairs Agency Financial Report 2019 (Nov. 19, 2019), at 179 ("For FY 2019, VA [] operat[ed] under a $201.1 billion budget . . . serving an estimated 19.6 million Veterans."), available at https://www.va.gov/finance/docs/afr/2019VAafrFullWeb.pdf.

2. On October 28, 1944, Philippine President Osmeña issued Executive Order No. 21 designating "[a]ll persons . . . who are actively serving in recognized military forces in the Philippines . . . to be on active service in the Philippine Army." *See* Executive Order No. 21 by the President of the Philippines (Oct. 28, 1944), *available at* https://www.officialgazette.gov.ph/downloads/1944/10oct/19441028-EO-0021-OSMENA.pdf. A "recognized military force" was defined as "a force under a commander who has been appointed, designated or recognized by the Commander-in-Chief Southwest Pacific Area [("SWPA")]." *Id.*

Order of July 26, 1941, 6 Fed. Reg. 3825 (Aug. 1, 1941). For those who survived the Japanese invasion and the accompanying atrocities, their victory in some aspects was bittersweet.

The Rescission Acts of 1946

Filipinos who served in WWII experienced a notorious "bait and switch." First, they were told by the VA that they were in "active service" for the purposes of veterans' benefits. *Filipino American Veterans and Dependents Ass'n v. United States*, 391 F. Supp. 1314, 1317-18 (N.D. Cal. 1974), *citing* Hearings Before the Subcommittee of the Senate Committee on Appropriations, 79th Congress, 2d Session, "Attachment" to Agreed Statement herein, pp. 56-57. But then Congress passed the First Supplemental Surplus Appropriation Rescission Act, 1946, Pub. L. No. 79-301, 60 Stat. 6, 14 (1946) which appropriated $200,000,000 to the Army of the Philippines but stripped Filipino guerrillas of U.S. veteran's benefits. Philippine Scouts were similarly disenfranchised by the Second Supplemental Surplus Appropriation Rescission Act, 1946, Pub. L. No. 79-391, 60 Stat. 221, 223 (1946). Now codified at 38 U.S.C. § 107(a) & (b), the Rescission Acts substantially reduced the available benefits, and amounts paid, to such Filipinos.

The Reconstructed Rosters of Guerrillas Who Served

Among the Filipinos who fought against the Japanese were "guerrillas," who together formed a large, shadow army that played an important role in the Philippines during the war. U.S. Army Recognition Program of Philippine Guerrillas, Headquarters, Philippines

Command, United States Army (ca. 1949) ("1949 Army Report").[3] Unfortunately, original guerrilla rosters, which had been submitted to the U.S. Army, were "destroyed" or "lost in storage." *Id.* at 108-09, 162. And so the Army undertook a program to "reconstruct" the rosters to newly "award . . . official guerrilla recognition" to those deemed to have "contributed materially to the defeat of the common foe." *Id.* at Foreword, 161.

Recognition of guerrillas "was constantly hindered [] [] by chaotic conditions incident to a total war . . . Under the most favorable reception the granting of guerrilla recognition to deserving Filipinos would have been extremely difficult to accomplish and hold the degree of error and injustice to an absolute nuance." *Id.* at 214. Claims for guerrilla recognition also were complicated by "chaotic personnel problems experienced by an army undergoing the process of rapid demobilization" *Id.* at Foreword.

Injustices accompanied the Army's recognition program. For example, "when it was determined that the unit was worthy of recognition, the unit commander was directed to 'screen' his unit down in numbers . . . The reasoning behind screening was that the unit would . . . be incorporated into the Philippine Army as a standard unit (as differentiated from a non-standard or guerrilla unit)." *Id.* at 108. And the degree of arbitrariness of the recognition process is readily apparent from another decision that "excepting [registered] nurses, no women should be recognized." *Id.* at 106.

---

3. The 1949 Army Report is available at https://catalog.archives.gov/id/6921767.

That a guerrilla might only have been recognized on a reconstructed roster by "chance" is further amplified by testimony from an American hero of WWII:

> . . . Lieutenant Colonel Edwin P. Ramsey, [] commanded over 40,000 guerrilla troops in the northern Philippines during World War II. . . . Ramsey stated that his command stopped keeping accurate rosters or lists when some of the rosters fell into enemy hands, and many of those named were executed. Colonel Ramsey testified that he participated in the reconstruction of the lists after the war, but that nearly half of the Filipinos who served under his command, including some who served on his staff, were shortly thereafter "derecognized" by the Army for political reasons and their records eliminated.

Almero v. INS, 18 F.3d 757, 759 (9th Cir. 1994).

The incompleteness of the *reconstructed* rosters is clear.

The FVEC Benefit

In 2009, over half a century after their war time service, the stars momentarily came into alignment for Filipinos who served during WWII. Deep within a 407-page supplemental appropriations bill, an allocation of "$198,000,000, to remain available until expended" was authorized for one-time remedial payments to each "eligible person" who served in the Philippines during WWII, in exchange for "a complete release of any claim

against the United States by reason of any service" on which eligibility was based. *See* App. at 49a-51a, ARRA § 1002(h) & (l). Eligible persons who are not U.S. citizens receive a one-time payment of $9,000 while those who are U.S. citizens receive $15,000. *Id.* at 48a, ARRA §§ 1002(e) & (f). FVEC claims had to be submitted to the VA within one-year of enactment of the Act providing the benefit. *Id.* at 47a, ARRA § 1002(c)(1).

ARRA § 1002(d) specifically defines "eligible persons" for receiving the equity compensation:

> (d) ELIGIBLE PERSONS.—An eligible person is any person who—
>
> (1) served—
>
> (A) before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States; or

> (B) in the Philippine Scouts under section 14 of the Armed Forces Voluntary Recruitment Act of 1945 (59 Stat. 538); and
>
> (2) was discharged or released from service described in paragraph (1) under conditions other than dishonorable.

App. at 47a-48a.

In creating the FVEC benefit, Congress finally recognized, in ARRA § 1002(g)(1), the "human suffering" associated with not only Filipinos' service and sacrifice during WWII but also the indignity many faced in having to live for the vast majority of their lives bearing the disrespect of having their service rendered largely invisible either by the failures of the recognition program or by the Rescission Acts of 1946. App. 48a-49a.

The White House Task Force in 2012-13

Because "many Filipino veterans . . . believe[d] their [FVEC] claims were improperly denied," an Interagency Working Group—including Army, the National Archives and Records Administration ("NARA"), and VA—was convened by the White House from 2012-13.[4] Release of

4. *See* https://obamawhitehouse.archives.gov/blog/2012/10/17/honoring-filipino-world-war-ii-veterans-their-service (Oct. 17, 2012); https://obamawhitehouse.archives.gov/blog/2013/07/09/recognizing-extraordinary-contribution-filipino-veterans (July 9, 2013); https://sites.ed.gov/aapi/filipino-world-war-ii-veterans/.

the 1949 Army Report was one of its accomplishments aimed at "increased transparency."[5] But the process for making service determinations for claimants was not materially changed.

Hearings in the House of Representatives in 2014

Concerns about the improper denial of FVEC claims in part focused on claimants for whom a so-called "Form 23 Affidavit" was located in Army's records, but whose names were not listed on the reconstructed rosters. The significance of the Form 23 Affidavits with respect to FVEC eligibility indeed was the subject of *two* Congressional hearings in 2014. During a first hearing before the Subcommittee on Oversight and Investigations of the Committee on Armed Services, House of Representatives, Congressman Heck, the chairman of the subcommittee stated:[6]

> I understand the record keeping, and I understand everything that was tried to be done back in 1942 to 1948 with the reconstructing rosters. But it would seem that if somebody comes in with an AGO 23, that has got a

5. https://obamawhitehouse.archives.gov/blog/2013/07/09/recognizing-extraordinary-contribution-filipino-veterans (July 9, 2013).

6. *See* Filipino Veterans Equity Compensation Fund: Examining the Department of Defense and Interagency Process for Verifying Eligibility, Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Armed Services, House of Representatives (June 24, 2014), at 10, 14-15 *available at* https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg89507/pdf/CHRG-113hhrg89507.pdf.

> stamp on it, you know, stamped by the U.S. Government certifying they have served, that it should be the document that qualifies the individual for service. . . .

During a second hearing in the House of Representatives before the Subcommittee on Disability Assistance and Memorial Affairs of the Committee on Veterans' Affairs, Representative Heck addressed the same issue with VA's Brad Flohr, Senior Advisor for Compensation Service at the Veterans Benefits Administration:[7]

> **[Congressman] HECK.** Okay. You know, I would ask then just hypothetically, do you think it would be unreasonable to believe that in 1948, in postwar Philippines, after a country has been ravaged by combat for 4 years, that there could possibly be somebody who had qualified service who didn't make it on the list [of guerrillas created by the U.S. Army]? Unreasonable to think that that couldn't happen?
>
> **Mr. FLOHR.** Not to me, no.
>
> **[Congressman] HECK.** . . . [D]o you think it would be unreasonable . . . to accept an AGO-23 as proof of service to be able to pay

7. *See* Filipino Veterans Equity Compensation Fund: Inquiry into the Adequacy of Process in Verifying Eligibility, Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs of the Committee on Veterans' Affairs, House of Representatives (Nov. 20, 2014), at 11-12, available at https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg96136/pdf/CHRG-113hhrg96136.pdf.

> a claim? Because many of those Filipino vets that are being denied have an AGO-23, the Philippine form that has been certified, that was developed—I mean, this one is stamped 1948. I don't think we are going to find many 90 to 100-year old Filipino veterans trying to come in with forged documents. Do you believe that . . . taking the AGO-23 as proof of service would be unreasonable? Mr. Flohr?
>
> **Mr. FLOHR.** I wouldn't say it would be unreasonable. . . .

Despite these hearings, the process for making service determinations—specifically, requiring a claimant's name to be found on a *reconstructed* roster—was not subsequently changed by VA or the agencies to which it delegated authority for service determinations, Army and NARA.

Dela Cruz Was Denied Eligibility for the FVEC Benefit

The Federal Circuit summarized the VA's rationale for denying Dela Cruz the FVEC benefit:

> . . . To show that he served in the Filipino guerrillas, Dela Cruz submitted an affidavit describing his service (the "Form 23 affidavit"), which he executed at the end of World War II in front of a U.S. Army captain. . . .
>
> The Department of Veterans Affairs Regional Office ("RO") denied Dela Cruz's claim for payment because it determined that he did not

> establish his service. It concluded that none of the affidavits and supporting documentation Dela Cruz submitted qualified as documents of the service department. *See* 38 C.F.R. § 3.203(a). The RO therefore requested the service department, the Army, to verify Dela Cruz's service. *See id.* § 3.203(c). The Army, in turn, certified "that Mr. Dela Cruz did not have service as a member of the Philippine Commonwealth Army, including the recognized guerillas," as "he was not listed in the Reconstructed Guerilla Roster." Although the Army did have Dela Cruz's Form 23 affidavit—the affidavit Dela Cruz executed in front of an Army captain in which he described his service in the Filipino guerillas—in its own files, the Army indicated that it was unable to verify the accuracy of Dela Cruz's statements of service and, in any event, was "not able to accept affidavits to verify service." After multiple appeals and remands, the BVA and Veterans Court affirmed the denial of payment. The Veterans Court reasoned that the Army was "not able to verify that Mr. Dela Cruz had service" and that the service department's determination as to service is "conclusive and binding" on the VA.

Id. at 8a-9a (internal J.A. citations omitted). In sum, although Army had an affidavit describing Dela Cruz's guerrilla service that was executed at the end of the war, Dela Cruz still was denied the FVEC benefit because his name was not listed on Army's reconstructed roster.

The Federal Circuit Opinion

At the Federal Circuit, both Dela Cruz and the VA characterized ARRA § 1002 as remedial legislation. *Id.* at 10a-11a. But the Court concluded:

> We agree with the government that the remedial purpose and language of § 1002 do not foreclose the VA from requiring service department verification similar to that required under 38 C.F.R. § 3.203(c). . . . The remedial purpose of ARRA § 1002 cannot overcome its plain language, which allows the VA to prescribe what information and evidence is required to apply for payment from the compensation fund.
>
> . . . To be sure, the Form 23 itself was prepared by the Army in 1945 before it was executed by Dela Cruz. In addition, the Form 23 affidavit as executed by Dela Cruz has indicia of reliability because it was executed under penalty of military courts-martial through the then-governing Articles of War. Nevertheless, in establishing service, the Army treats the reconstructed roster—not Form 23—as the "definitive source," instead using Form 23 primarily as a check for consistency against the roster. The Army was unable to locate Dela Cruz's name on the reconstructed roster, and thus under its approach was unable to verify the accuracy of his Form 23 affidavit. The VA's decision to treat the roster as the "document issued by the service department," 38 C.F.R. § 3.203(a)(1), was not arbitrary and capricious.

Id. at 11a-12a (internal citations omitted). The Federal Circuit rejected Dela Cruz's argument "that the VA should have made its own determination as to Dela Cruz's service and thus his eligibility for payment." *Id.* at 9a.

Rather than instructing the VA to accept Dela Cruz's Form 23 affidavit as evidence of his service sufficient for receiving the FVEC benefit, the Court remanded to the Court of Appeals for Veterans Claims to "hold the case in abeyance" while Dela Cruz could apply for correction of Army's records with the Army Board for Correction of Military Records ("ABCMR").[8] *Id.* at 15a-17a.

---

8. During oral argument at the Federal Circuit, both Dela Cruz and the government implored the panel not to send Dela Cruz (and other Filipino WWII veterans) to ABCMR for potential correction of service records (e.g., the reconstructed roster) from WWII. As the government stated, "the Army is not involved in this appeal" and "the issue before this Court is reviewing the Veteran's Court's decision." *Dela Cruz, v. Wilkie*, No. 2018-2101 (Fed. Cir.), Oral Arg. at 32:09–32:30, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2018-2101.mp3. Yet the Panel "conclude[d] that Dela Cruz's proper recourse is to challenge the Army's determination based on the reconstructed roster before the [Army] Corrections Board." App. at 17a. According to the Panel, "the Veterans Court has exclusive jurisdiction . . . to review relevant decisions from the [Army] Corrections Board." *Id.* at 15a. It does not.

When an applicant is dissatisfied with a decision of ABCMR, federal district courts have jurisdiction over the dispute pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702, 704. Should Dela Cruz not be satisfied with a decision of ABCMR, he has *no path* to the U.S. Court of Appeals for Veterans Claims to resolve the matter. He would need to file suit in federal district court, such as in the U.S. District Court for the District of Columbia, then appeal to the regional circuit court, and then this Court. CAVC would not intersect the ABCMR decision until it was final.

REASONS FOR GRANTING THE PETITION

The Federal Circuit failed not only to properly account for the "remedial" nature of ARRA § 1002 but also the pro-veteran canon of statutory construction. Had it done so, the rigid evidentiary standards applied by the government in measuring "eligible persons" under § 1002(d)—i.e., requiring a claimant's name to be listed on a *reconstructed* roster—would be relaxed. It needs scarcely to be emphasized that *fifty-six percent (56%)* of all claimants have been denied the FVEC benefit. *Id.* at 4a n.1. There could be no clearer indicia of problems with the evidentiary standard than this shockingly high denial rate.

Nowhere in ARRA § 1002 is there any requirement that the VA give "conclusive weight," *id.* at 13a, to a service determination by the *United States* Army and NARA concerning a guerrilla's active service in the *Philippine* Army. *See* n.2, *supra*. When the best evidence of a Filipino's service is a Form 23 affidavit, that document should be given weight by VA in administering the FVEC benefit. VA has perpetuated an unduly narrow, misinterpretation of the statute, and the Federal Circuit has failed to correct that very consequential error.

Since WWII, this Court has held that statutes impacting veterans are "always to be liberally construed" in their favor. *Boone v. Lightner*, 319 U.S. 561, 575 (1943). This is not an outdated concept. Indeed, in reversing the Federal Circuit in 2011, this Court confirmed that "[w]e have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (citations omitted).

Not only did the Federal Circuit sidestep longstanding precedent concerning the interpretation of veteran's statutes, the Court failed to meaningfully implement that precedent. Indeed, the Court's avoidance of the pro-veteran canon in this case continues its resistance to confronting that canon.[9] Resolution of the issue of whether a veteran's statute must be interpreted in favor of its beneficiary—regardless of whether its plain meaning is apparent or its meaning must be determined in view of ambiguity—remains vitally important to the proper interpretation of veteran's statutes and the proper handling of claims for veteran's benefits.

Both Dela Cruz—now 95 years old, having applied for the FVEC benefit a decade ago—and the government agree that ARRA § 1002 is remedial. The Federal Circuit did not disagree, but concluded that "[t]he remedial purpose of ARRA § 1002 cannot overcome its plain language, which allows the VA to prescribe what information and evidence is required to apply for payment from the compensation fund." App. at 11a. Yet ARRA § 1002(d) sets forth an explicit definition of an "eligible person" in view of that person's service "in the organized military forces of the Government of the Commonwealth of the Philippines" or in the Philippine Scouts during WWII. The Federal Circuit ignored that definition, instead relying on a different provision, *see* ARRA § 1002(c)(1), stating that "[t]he *application for the claim* shall contain

9. *See, e.g., Procopio v. Wilkie*, 913 F.3d 1371, 1380 (Fed. Cir. 2019) (en banc) ("The parties and amici have differing views on the role the pro-veteran canon should play . . . Given our conclusion that the intent of Congress is clear from the text of § 1116—and that clear intent favors veterans—we have no reason to reach this issue." (internal citations omitted)).

such information and evidence as the Secretary may require." App. at 11a. Nowhere in the application itself did the VA require the applicant to provide evidence *of Philippine Army service* to the satisfaction of the United States Army pursuant to delegated authority under VA's regulation at 38 C.F.R. § 3.203. And nowhere can such an eligibility standard be found in the definition of an "eligible person" in ARRA § 1002(d).

Confronted with an explicit definition of an "eligible person" to receive an FVEC payment, the Federal Circuit concluded that VA has unfettered authority to interpret that definition irrespective of any detriment to the beneficiaries for whom the statute was written:

> Had Congress sought to create an exception in ARRA § 1002 to the VA's longstanding regulatory requirement for proving service or to limit the VA's authority to prescribe such regulations, it could have expressly done so—but it did not.

App. at 12a. That conclusion is completely at odds with this Court's command—again in an opinion issued as WWII came to a close—"to construe the separate provisions of [a statute] as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). The Federal Circuit completely ignored that edict of statutory construction.

Requiring those who served in the Philippine Army during WWII to satisfy the U.S. Army's standards

for authenticating service contradicts "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). Here, the Federal Circuit decision conferred a free pass on the United States government for having intentionally denied Filipino WWII veterans access to the ABCMR for about the last seventy-five (75) years. App. at 13a ("according to a 1951 Corrections Board memorandum, the Corrections Board will not even consider applications for correction submitted by individuals seeking to establish their service in the Philippine military.")

Yet the Federal Circuit validated VA's approach to authenticating Philippine Army service during WWII by delegating authority to the United States Army pursuant to 38 C.F.R. § 3.203 which in turn treats the inclusion of an individual's name on a *reconstructed* roster (created after the war was over) as the *sine qua non* of a service and hence eligibility determination.

The Federal Circuit's failure to interpret ARRA § 1002 in favor of Dela Cruz—and those others whose service records emanate from their service in *the Philippine Army* during WWII—in effect amounts to a complete abrogation of *Boone*, *Fishgold*, and *King*.

I. THE FEDERAL CIRCUIT HAS DEPARTED FROM THIS COURT'S PRECEDENTS CONSTRUING VETERAN'S STATUTES

Boone and its lineage mandate that veteran's laws are to be liberally construed in beneficiaries' favor. In 1943, in the midst of WWII, this Court held in *Boone v. Lightner*

that "[t]he Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. at 575; *see also Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948), citing *Boone*, 319 U.S. at 575 ("the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call"). This Court has not taken *Boone* to heart.

Since the Federal Circuit was created, *Boone* has only rarely been cited and, even then, in dissenting opinions. *See Kisor v. Shulkin*, 880 F.3d 1378, 1381 (Fed. Cir. 2018) (O'Malley, dissenting) ("The veteran-friendly canon of construction, which originates in this Court's World War II—era expression of solicitude towards those who 'drop their own affairs to take up the burdens of the nation,' carries comparable weight. Indeed, it is difficult to overstate the importance of the veteran-friendly approach to veterans' benefits statutes and their accompanying regulations." (internal citations omitted)); *Cronin v. United States*, 765 F.3d 1331, 1343 (Fed. Cir. 2014) (Linn, dissenting-in-part) (noting "the Supreme Court's repeated direction for the need to construe the act liberally in favor of the serviceman"); *Henderson v. Shinseki*, 589 F.3d 1201, 1233 (Fed. Cir. 2009) (en banc) (Mayer, dissenting), rev'd, *Henderson v. Shinseki*, 562 U.S. 428 (2011).

Yet successive opinions from this Court following *Boone* solidified and expanded its reach. In 1946, the Court stated in *Fishgold v. Sullivan Drydock & Repair Corp.* that a veteran "who was called to the colors was not to be penalized." 328 U.S. 275, 284 (1946). The Court made two important pronouncements: First, citing *Boone*, the Court mandated that "this legislation is to be liberally

construed for the benefit of those who left private life to serve their country in its hour of great need." *Id.* at 285. Second, the Court mandated that "[o]ur problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Id.* That opinion still finds force today. *See Henderson*, 562 U.S. at 441; *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (citing *Fishgold* for the holding that the Vietnam Era Veterans' Readjustment Assistance Act of 1974 "is to be liberally construed for the benefit of the returning veteran"); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977), quoting *Fishgold*, 238 U.S. at 285.

The presumption in favor of veterans was expanded in *King v. St. Vincent's Hosp.* In that case, this Court held that it "would ultimately read the [statutory] provision in [the veteran's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." 502 U.S. 215, 220 n.9 (1991). *Henderson* reaffirmed its reach in 2011. 562 U.S. at 441 (citing *King* for holding that veteran's law is "construed in the beneficiaries' favor" and applying the canon when the Court could "not find any clear indication" that a law was meant to be interpreted otherwise).

As for circumstances when a statute is ambiguous (not argued by the parties), this Court directly addressed that circumstance in *Brown v. Gardner*, which cited *King* for "the rule that interpretive doubt is to be resolved in the veteran's favor." 513 U.S. 115, 118 (1994), *abrogated in part by statute*, Pub. L. No. 104-204, § 422(a), 110 Stat. 2874, 2926-27 (1996).

"It is of course true that courts are to construe remedial statutes liberally to effectuate their purposes." *Smith v. Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994) (citations omitted); *see also Cloer v. Sec'y of HHS*, 675 F.3d 1358, 1362 (Fed. Cir. 2012) (en banc) (citation omitted) ("Remedial legislation . . . should be construed in a manner that effectuates its underlying spirit and purpose."); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes").

II. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Given the combination of (i) a veteran's benefit statute (ARRA § 1002) with (ii) the remedial nature of that statute and (iii) application of the pro-veteran canon, mandated by this Court, that such a statute must construed in favor of its beneficiaries, the Federal Circuit impermissibly allowed VA to deviate from the express eligibility standard set in § 1002(d) of the statute through VA's more restrictive regulation, 38 C.F.R. § 3.203. VA's astonishing 56% denial rate for the FVEC benefit makes this case a particularly good vehicle for establishing when the pro-veteran canon of statutory construction must be applied: either *always* to veteran's statutes, or alternatively only sometimes.

The Federal Circuit erred in holding that "VA can properly rely on the [U.S.] Army's certification as to [a Filipino's WWII] service" in the Philippine Army. App. at 17a. It is not sufficient to pay lip service to the pro-veteran's canon and this Court's decree that that veteran's laws are to be liberally construed in beneficiaries' favor.

The Federal Circuit must observe and give life to that commitment made to those who served a grateful nation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SETH A. WATKINS
Counsel of Record
WATKINS LAW & ADVOCACY, PLLC
1455 Pennsylvania Avenue, NW,
Suite 400
Washington, DC 20004
(202) 355-9421
watkins@wlapllc.com

LOUIS S. MASTRIANI
ADDUCI, MASTRIANI
& SCHAUMBERG LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
Of Counsel

Counsel for Petitioner

Date: December 19, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED JULY 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2018-2101

EDDIE N. DELA CRUZ,

Claimant-Appellant,

v.

ROBERT WILKIE, SECRETARY
OF VETERANS AFFAIRS,

Respondent-Appellee.

July 26, 2019, Decided

Appeal from the United States Court of Appeals
for Veterans Claims in No. 17-1020,
Judge Coral Wong Pietsch.

Before DYK, REYNA, and WALLACH, *Circuit Judges.*

DYK, *Circuit Judge.*

Eddie Dela Cruz appeals from the decision of the Court of Appeals for Veterans Claims ("Veterans Court") affirming the denial of his claim for a one-time payment

from the Filipino Veterans Equity Compensation Fund ("compensation fund"). The Department of Veterans Affairs ("VA") denied his claim because the Army certified that Mr. Dela Cruz did not have service as a member of the Philippine Commonwealth Army, including recognized guerillas, as "he was not listed in the Reconstructed Guerilla Roster" ("reconstructed roster"). J.A. 5.

We hold that the VA can generally rely on the service department's determination in deciding eligibility for payment from the compensation fund. But, in this context, the VA cannot rely on the service department's determination that the veteran is not on the reconstructed roster without giving the veteran a meaningful opportunity to challenge his service record. Dela Cruz's proper avenue for relief is to seek a correction of his service record from the Army Board for Correction of Military Records ("Corrections Board"). The government has represented that the Corrections Board will consider such an application. We affirm-in-part and remand to the Veterans Court to hold the case in abeyance pending consideration by the Corrections Board.

BACKGROUND

I

On July 26, 1941, President Franklin D. Roosevelt issued an Executive Order to "order into the service of the armed forces of the United States . . . all of the organized military forces of the Government of the Commonwealth of the Philippines." Military Order: Organized Military

Forces of the Government of the Commonwealth of the Philippines Called Into Service of the Armed Forces of the United States, 6 Fed. Reg. 3,825, 3,825 (July 26, 1941). At the time, the Philippines was a territory of the United States. As a result of the Executive Order, a variety of Filipino military organizations—the regular Philippine Scouts, the new Philippine Scouts, the Guerrilla Services, and more than 100,000 members of the Philippine Commonwealth Army—served the United States during World War II. *See* ARRA § 1002(a)(3).

After the war ended, however, Congress passed legislation—the First Supplemental Surplus Appropriation Rescission Act of 1946, 38 U.S.C. § 107(a) and Second Surplus Appropriation Rescission Act of 1946, 38 U.S.C. § 107(b) (collectively, "the 1946 Rescissions Acts")—providing that service in these Filipino military organizations "shall *not* be deemed to have been active military, naval, or air service." *Id.* § 107(a), (b) (emphasis added). As a result, after the passage of this legislation, Filipino veterans were not eligible for the same benefits as the United States veterans they served with during World War II. Instead, the 1946 Rescissions Acts made them eligible only for certain benefits, often at reduced rates. *See* ARRA § 1002(a)(6)-(8) (describing these reduced benefits).

In 2009, Congress enacted Section 1002 of the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115, 200-02 (2009), which established a $198 million fund to provide one-time payments to Filipino veterans who were excluded from full

veterans benefits by the 1946 Rescissions Acts. *Compare* ARRA § 1002(d)(1)(A) (defining an "eligible person" for purposes of receiving the one-time payment) *with* 38 U.S.C. § 107. The one-time payment is $15,000 for U.S. citizens and $9,000 for non-citizens. ARRA § 1002(e). The statute required Filipino veterans to apply for this payment within one year of the statute's enactment. *Id.* § 1002(c)(1).

II

Although many Filipino veterans have received payments under this statute, many have not.[1] This is in part due to the VA's requirement that the relevant service department (such as the Army) verify the veteran's service. For many decades, the VA has required that all veterans applying for benefits establish their service in one of two ways: (1) the veteran can submit a "document issued by the service department," 38 C.F.R. § 3.203(a); or (2) the VA will request "verification of service from the service department," *id.* § 3.203(c). "[T]he VA has long treated the service department's decision on such matters as conclusive and binding on the VA," regardless of whatever other evidence documenting service the claimant provides to the VA. *Soria v. Brown*, 118 F.3d 747, 749 (Fed. Cir. 1997). In *Soria*, for example, the claimant applied for the reduced benefits discussed above based on his service in

1. As of January 1, 2019, the VA has granted 18,983 claims for payment from the compensation fund and denied 23,772 claims. *See* U.S. Dep't of Veterans Affairs, *WWII Filipino Veterans Equity Compensation (FVEC) Fund*, https://www.va.gov/centerforminorityveterans/fvec.asp (last visited July 24, 2019).

the Philippine Commonwealth Army, but the U.S. Army refused to certify his service. *Id.* at 748. The VA denied benefits based on the Army's determination. *Id.* This court affirmed, explaining that there was "no error" in treating the service department's determination as conclusive, and noting that the proper "recourse lies within the relevant service department, not the VA." *Id.* at 749.

III

As relevant here, for claims based on Philippine service in World War II, the appropriate "service department" is the U.S. Army. To verify the service of a Filipino guerrilla, the Army relies on the reconstructed roster and treats the roster as authoritative. *See Filipino Veterans Equity Compensation Fund: Examining the Department of Defense and Interagency Process for Verifying Eligibility: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Armed Servs.*, 113th Cong. 9 (2014) [herein-after *Oversight & Investigations Subcomm. Hearing*] (Statement of Scott Levins, Director, Nat'l Personnel Records Ctr., Nat'l Archives & Records Admin.) ("[T]he roster is the definitive source."). If an individual's name does not appear on the reconstructed roster, the Army will refuse to verify service.[2] Moreover, as explained above, the VA in turn treats the Army's determination of service as conclusive and binding. The result of this is that a Filipino veteran who does not appear on the reconstructed roster will not receive payment from the compensation fund.

2. The Army also requires a Form 23 affidavit, such as the one it had in its files for Dela Cruz, though the affidavit is not sufficient by itself. *See Oversight & Investigations Subcomm. Hearing* at 9.

The problem is that the reconstructed roster is not always accurate. This is the result of the methodology employed to create the reconstructed roster. According to a 1949 Army report, many of the original rosters for Filipino units were lost, destroyed, or tampered with. *See* Dela Cruz Op. Br. Addendum at 20-21. After the war ended, "hundreds of unit rosters were missing," some sets of rosters "were being tampered with," "a number of guerillas had been processed and paid but no records existed of their having been recognized," and "no one interested agency possessed a complete set of rosters." *Id.* at 20. Thus, the Army embarked on a reconstruction project to attempt to create one authentic roster of Filipino guerrillas who served during World War II.

To create the reconstructed roster, the Army first decided which guerrilla units to include in the roster, based on information received from the units themselves, military orders, combat histories of the U.S. units that fought alongside the Filipino units, and so on. Then, if the Army decided that a particular guerrilla unit merited inclusion in the roster, it requested a roster from the unit commander. If the roster appeared to be free of anomalies, it was then authenticated for inclusion in the reconstructed roster. Since completing the reconstructed roster in 1948, the Army has followed a policy prohibiting any changes or corrections to the roster. *See Oversight & Investigations Subcomm. Hearing* at 3-4 (Statement of Brigadier Gen. David K. MacEwen, The 59th Adjutant Gen. of the U.S. Army, Dep't of the Army); Dela Cruz Op. Br. Addendum at 1 (1974 Memorandum from Howard H. Callaway, Secretary of the Army).

Representatives of the VA and the Army have acknowledged the potential for inaccuracies in the reconstructed roster at Congressional hearings relating to payments to Filipino veterans from the compensation fund. At one hearing, a VA Senior Advisor for Compensation agreed that it would not be unreasonable to think that there are eligible individuals who "didn't make it on the list," given that the reconstructed roster was created "in postwar Philippines, after a country has been ravaged by combat for 4 years." *Filipino Veterans Equity Compensation Fund: Inquiry Into the Adequacy of Process in Verifying Eligibility: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 113th Cong. 12 (2014) (Statement of Brad Flohr, Senior Advisor for Compensation, Veterans Benefits Admin., Dep't of Veterans' Affairs). At the same hearing, Brigadier General MacEwen testified on behalf of the Army he did not "doubt that there are plenty of people that served honorably, patriotically" but that may have been excluded from the roster if it was determined at the time that their role did not "r[i]se to the level of qualifying service." *Id.* (Statement of Brigadier Gen. David K. MacEwen, The 59th Adjutant Gen. of the U.S. Army, Dep't of the Army). Moreover, at a hearing before the House Subcommittee on Oversight and Investigations to the Committee on Armed Services, Chairman Heck noted that "it certainly is possible that individuals who served honorably in a recognized guerrilla unit may have been omitted from the reconstructed roster," such as if the individual simply "missed the time when the rosters were reconstructed." *Oversight & Investigations Subcomm. Hearing* at 12

(statement of Rep. Joseph J. Heck, Chairman, Subcomm. on Oversight & Investigations).

IV

Contending that he served in the Filipino guerilla forces during World War II, Dela Cruz timely applied for payment from the compensation fund. To show that he served in the Filipino guerrillas, Dela Cruz submitted an affidavit describing his service (the "Form 23 affidavit"), which he executed at the end of World War II in front of a U.S. Army captain. He also provided a certification from the Armed Forces of the Philippines, which certified his service in a Filipino guerrilla unit. In addition, Dela Cruz submitted affidavits by his brother, his wife, his brother-in-law, and his neighbor (who stated that he served in the Filipino guerrillas together with Dela Cruz). Notably, as the Board of Veterans' Appeals ("BVA") recognized, Dela Cruz has been deemed eligible to receive healthcare from the VA, which requires veteran status, based on an affidavit from the Philippine Army.

The Department of Veterans Affairs Regional Office ("RO") denied Dela Cruz's claim for payment because it determined that he did not establish his service. It concluded that none of the affidavits and supporting documentation Dela Cruz submitted qualified as documents of the service department. *See* 38 C.F.R. § 3.203(a). The RO therefore requested the service department, the Army, to verify Dela Cruz's service. *See id.* § 3.203(c). The Army, in turn, certified "that Mr. Dela Cruz did not have service as a member of the Philippine

Commonwealth Army, including the recognized guerillas," as "he was not listed in the Reconstructed Guerilla Roster." J.A. 5. Although the Army did have Dela Cruz's Form 23 affidavit—the affidavit Dela Cruz executed in front of an Army captain in which he described his service in the Filipino guerillas—in its own files, the Army indicated that it was unable to verify the accuracy of Dela Cruz's statements of service and, in any event, was "not able to accept affidavits to verify service." J.A. 131. After multiple appeals and remands, the BVA and Veterans Court affirmed the denial of payment. The Veterans Court reasoned that the Army was "not able to verify that Mr. Dela Cruz had service" and that the service department's determination as to service is "conclusive and binding" on the VA. J.A. 8.

Dela Cruz appeals. We have jurisdiction under 38 U.S.C. § 7292(c). We review legal determinations of the Veterans Court de novo. *Goodman v. Shulkin*, 870 F.3d 1383, 1385 (Fed. Cir. 2017).

DISCUSSION

I

At its core, Dela Cruz's argument is that the VA should have made its own determination as to Dela Cruz's service and thus his eligibility for payment. We rejected a similar argument in *Soria*. 118 F.3d at 749. As noted earlier, before the compensation fund was established, Filipino veterans were only eligible for reduced benefits. In *Soria*, a Filipino veteran applied for these reduced benefits, but the VA

denied his claim because the Army "refused to certify Mr. Soria's service." *Id.* at 748. We explained that under 38 C.F.R. § 3.203, an applicant for veterans' benefits must prove service "with either official documentation issued by a United States service department or verification of the claimed service by such a department." *Id.* We noted that "the VA has long treated the service department's decision on such matters as conclusive and binding on the VA" and held that there was "no error in that treatment." *Id.* at 749. We further explained that if the service department's refusal to verify service is in error, the proper "recourse lies within the relevant service department, not the VA." *Id.; see also Go v. Shinseki*, 517 F. App'x 941, 942 (Fed. Cir. 2013) (holding that under *Soria*, the VA may apply 38 C.F.R. § 3.203(c) to claims for payment from the compensation fund, and that the applicant's "avenue for relief" is to "file a request to 'correct' his military service record" with the service department).

Dela Cruz contends that *Soria* is distinguishable because it did not involve benefits under ARRA § 1002. According to Dela Cruz, § 1002 is remedial legislation that must be construed broadly to effectuate its purpose. Further, he argues that limiting payment only to those Filipino veterans whose service is verified by the applicable service department under 38 C.F.R. § 3.203(c) would be inconsistent with the statute because the statute's definition of "eligible person" does not include a requirement of service department verification.[3] The

3. In relevant part, ARRA § 1002(d)(1)(A) defines an "eligible person" as "any person" who served

government agrees that ARRA § 1002 is remedial legislation, but responds that even so, requiring service department verification is consistent with the statute.

We agree with the government that the remedial purpose and language of § 1002 do not foreclose the VA from requiring service department verification similar to that required under 38 C.F.R. § 3.203(c). The statute expressly provides that an application for payment "shall contain such information and evidence as the Secretary may require," ARRA § 1002(c)(1), and 38 C.F.R. § 3.203 simply specifies the information required to establish service for all veterans seeking benefits. The remedial purpose of ARRA § 1002 cannot overcome its plain language, which allows the VA to prescribe what information and evidence is required to apply for payment from the compensation fund. Moreover, the language in § 1002 is similar to the general statutory grant of authority

---

> before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States.

This definition is identical to the provision in the 1946 Rescissions Acts defining who is deemed *not* to have qualifying service and therefore cannot obtain the full range of veterans' benefits. *See* 38 U.S.C. § 107(a).

to the VA to prescribe "regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits" administered by the VA. 38 U.S.C. § 501(a)(1). Had Congress sought to create an exception in ARRA § 1002 to the VA's longstanding regulatory requirement for proving service or to limit the VA's authority to prescribe such regulations, it could have expressly done so—but it did not.

Dela Cruz also argues that even if the VA is permitted to require service department verification in the context of ARRA § 1002, it misapplied that requirement by not accepting Dela Cruz's Form 23 affidavit as a "document issued by the service department." 38 C.F.R. § 3.203(a)(1). To be sure, the Form 23 itself was prepared by the Army in 1945 before it was executed by Dela Cruz. In addition, the Form 23 affidavit as executed by Dela Cruz has indicia of reliability because it was executed under penalty of military courts-martial through the then-governing Articles of War. Nevertheless, in establishing service, the Army treats the reconstructed roster—not Form 23—as the "definitive source," *see Oversight & Investigations Subcomm. Hearing* at 9, instead using Form 23 primarily as a check for consistency against the roster, *see id.* The Army was unable to locate Dela Cruz's name on the reconstructed roster, and thus under its approach was unable to verify the accuracy of his Form 23 affidavit. J.A. 131. The VA's decision to treat the roster as the "document issued by the service department," 38 C.F.R. § 3.203(a)(1), was not arbitrary and capricious. The Board therefore did not err in not accepting Dela Cruz's Form 23 affidavit alone as establishing service.

For the first time, Dela Cruz argues on appeal that requiring service department verification to receive payment from the compensation fund violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment. Under the circumstances, we decline to consider this argument which was not raised at any point in the proceedings below. *See Forshey v. Principi*, 284 F.3d 1335, 1355-58 (Fed. Cir. 2002) (en banc), *superseded in part by statute on other grounds.*

II

Dela Cruz alternatively argues that the VA cannot give conclusive weight to an Army determination that relies solely on the reconstructed roster without giving the veteran a meaningful opportunity to challenge his service record. However, the VA maintains that the proper remedy for this lies with Corrections Board, not the VA, because only the Corrections Board has the "legal authority to amend or correct an official military record." Gov't Br. at 36. Thus, contends the VA, "a dispute concerning determinations as to whether a claimant served in the military is properly directed" to the Corrections Board. *Id.* at 37. The applicable statute, 10 U.S.C. § 1552(a)(1), provides that the Corrections Board, acting on behalf of the Secretary of the Army, "may correct any military record" of the Army when "necessary to correct an error or remove an injustice." Dela Cruz contends that pursuing such relief would be futile, because, according to a 1951 Corrections Board memorandum, the Corrections Board will not even consider applications for correction submitted by individuals seeking to establish their service in the Philippine military.

After oral argument, we directed the VA to file a response "stating the position of the United States regarding the availability of a remedy from the Army Board for the Corrections of Military Records to correct the Reconstructed Guerilla Roster." *Dela Cruz v. United States*, No. 18-2101 (Fed. Cir. May 7, 2019), ECF No. 55. The VA's response, which is attached as an Addendum to this opinion, stated that the VA had

> consulted with counsel for the Department of the Army and counsel for the Army Review Boards Agency (ARBA), the agency that oversees and administers the [Corrections Board]. Counsel for the ARBA has represented that the board will consider applications filed by purported Filipino Guerillas claiming military service during World War II on behalf of the United States Army, including individuals who are not currently listed on the Reconstructed Guerilla Roster.

Gov't Resp. to Order at 1-2. The VA's response further noted that the Corrections Board will only consider such an application for correction "after the applicant exhausts all other available administrative remedies, including requesting verification of military service from the National Personnel Records Center (NPRC) and the Army Human Resources Command (AHRC)." *Id.* at 2. However, the VA acknowledges that here, Dela Cruz has already exhausted these remedies, as "[t]he NPRC and AHRC have already provided responses unfavorable to Mr. Dela Cruz." *Id.* at 3. Thus, "potential relief is available" to Dela

Cruz from the Corrections Board. *Id.; see Soria*, 118 F.3d at 749 ("[I]f the United States service department refuses to verify the applicant's claimed service, the applicant's only recourse lies within the relevant service department, not the VA.").

Under the circumstances, Dela Cruz should promptly file a request with the Corrections Board to have his service recognized by the Army based on his Form 23 affidavit and other available evidence, such as Philippine military documents and affidavits by contemporary witnesses. We expect the Corrections Board will process the request with appropriate dispatch. If the Corrections Board provides relief, we assume that the VA will promptly approve Dela Cruz's claim for payment from the compensation fund.

The question remains whether to affirm the denial of Dela Cruz's claim or to remand to the Veterans Court. We conclude that remand is appropriate because the Veterans Court has exclusive jurisdiction to review a decision by the Corrections Board if the Board denies relief to Dela Cruz. A similar issue has arisen in the context of claims for monetary relief under the Tucker Act, over which the Claims Court (or its predecessor, the Court of Claims) has exclusive jurisdiction. In such cases, the Court of Claims had authority to review relevant decisions by a military corrections board. *See Grieg v. United States*, 640 F.2d 1261, 1265-67 (Ct. Cl. 1981); *Sanders v. United States*, 594 F.2d 804, 812-13 (Ct. Cl. 1979) (en banc), *superseded by statute on other grounds*; *see also Richey v. United States*, 322 F.3d 1317, 1323 (Fed. Cir. 2003). The Supreme

Court recognized the appropriateness of such review by the Court of Claims. *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) ("Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." (citing *Grieg* and *Sanders*)). That authority now rests with the Claims Court. *See Richey*, 322 F.3d at 1323. And if a claimant files suit in the Claims Court in the first instance, rather than first going to the Corrections Board, "that court will require resort to a Corrections Board while the matter remains pending in that court." *Id.*

Here, the situation is similar. Compensation under ARRA § 1002 is determined only by the Secretary for Veterans Affairs. An appeal to the Veterans Court is the exclusive review mechanism for decisions of the Secretary in the administration of VA benefits. *See* 38 U.S.C. §§ 511, 7104, 7252; *In re Russell*, 155 F.3d 1012, 1012-13 (8th Cir. 1998) (per curiam); *Beamon v. Brown*, 125 F.3d 965, 967-71 (6th Cir. 1997); *Larrabee v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992); *Vincent v. United States*, 731 F. App'x 954, 957 (Fed. Cir. 2018) (explaining that "the Court of Federal Claims lacks jurisdiction to hear a claim for benefits under Section 1110 or comparable Title 38 provisions" because such a claim "must proceed through the statutorily prescribed route of review . . . a route that runs through the Court of Appeals for Veterans Claims"). Since the Veterans Court has exclusive jurisdiction to review the right to compensation under ARRA § 1002 and to review relevant decisions from the Corrections Board, we remand to the Veterans Court to hold the case in abeyance pending proceedings at the Corrections

Board—a procedure identical to that followed by the Claims Court in cases arising under the Tucker Act. *See Richey*, 322 F.3d at 1323.

CONCLUSION

We conclude that the VA can properly rely on the Army's certification as to service, but it cannot rely simply on the Army's determination that the veteran's name does not appear on the reconstructed roster without giving the veteran a meaningful opportunity to challenge his service record. Based on the government's representation that the Corrections Board will consider requests for correction by individuals who are not listed on the reconstructed roster, we conclude that Dela Cruz's proper recourse is to challenge the Army's determination based on the reconstructed roster before the Corrections Board. We trust that the Corrections Board will act promptly on requests by Filipino veterans such as Dela Cruz, particularly given the long procedural history of such claims and the fact that most World War II veterans are now over 90 years old. The case is remanded to the Veterans Court to hold the case in abeyance pending consideration by the Corrections Board. The mandate shall issue forthwith.

AFFIRMED-IN-PART AND REMANDED

COSTS

No costs.

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2018-2101

EDDIE N. DELA CRUZ,

Claimant-Appellant,

v.

ROBERT WILKIE, SECRETARY
OF VETERANS AFFAIRS,

Respondent-Appellee.

RESPONDENT-APPELLEE'S RESPONSE TO THE COURT'S MAY 7, 2019 ORDER

Respondent-appellee, Robert Wilkie, Secretary of Veterans Affairs, respectfully submits this response to the Court's May 7, 2019 order (ECF No. 55), directing the Secretary to address the availability of a remedy from the Army Board for Correction of Military Records (ABCMR or board) to correct the Reconstructed Guerilla Roster for applicants who challenge their exclusion from the roster, which, in part, determines eligibility for payment from the Filipino Veterans Equity Compensation Fund.

Undersigned counsel has consulted with counsel for the Department of the Army and counsel for the Army Review Boards Agency (ARBA), the agency that oversees

and administers the ABCMR. Counsel for the ARBA has represented that the board will consider applications filed by purported Filipino Guerillas claiming military service during World War II on behalf of the United States Army, including individuals who are not currently listed on the Reconstructed Guerilla Roster.

Pursuant to 10 U.S.C. § 1552(a)(1), the Secretary of the Army, acting through the ABCMR, "may correct any military record of the [Army] when the Secretary considers it necessary to correct an error or remove an injustice." Accordingly, relevant to the Court's directive, an individual attempting to establish eligible Philippine military service, as defined in the American Recovery and Reinvestment Act of 2009, may file an application and supporting documents with the ABCMR for consideration. The ABCMR will consider applications for correction only after the applicant exhausts all other available administrative remedies, including requesting verification of military service from the National Personnel Records Center (NPRC) and the Army Human Resources Command (AHRC).

The ABCMR review process is the highest level of administrative appeal and provides the final decision on behalf of the Army. If the ABCMR denies the requested relief, the applicant may file an application for reconsideration or seek judicial review. Army Reg. No. 15-185, § 2-15 (rule governing requests for reconsideration); *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) ("Board [for Correction of Military Records] decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence.").

At this stage, the ABCMR is the only remedy available to Mr. Dela Cruz to change the status of his military service. The NPRC and AHRC have already provided responses unfavorable to Mr. Dela Cruz when the Department of Veterans Affairs (VA) requested service verification from those agencies. Appellee Br. 3-4, ECF No. 38. As we stated in our response brief in this appeal, VA takes no position on whether Mr. Dela Cruz would be successful in pursuing relief at the ABCMR, but potential relief is available. *Id.* at 36-37. Regardless of the potential outcome at the ABCMR, this Court is not the proper forum to resolve Mr. Dela Cruz's dispute concerning recognition of his military service. *See Soria v. Brown,* 118 F.3d 747, 749 (Fed. Cir. 1997) ("[I]f the United States service department refuses to verify the applicant's claimed service, the applicant's only recourse lies within the relevant service department, not the VA."); *Go v. Shinseki,* 517 Fed. Appx 941, 942 (Fed. Cir. 2013) (concluding that claimant's "recourse is under 10 U.S.C. § 1552, not with this Court").

Respectfully submitted,

OF COUNSEL:
BRIAN D. GRIFFIN
Deputy Chief Counsel

BRANDON A. JONAS
Attorney
Benefits Law Group
Department of Veterans Affairs
810 Vermont Ave., NW
Washington, DC 20420

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/ L. Misha Preheim
L. MISHA PREHEIM
Assistant Director

/s/ Jana Moses
JANA MOSES
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, NW
Washington, DC 20530
Tel: (202) 616-2279

May 23, 2019

Attorneys for Respondent-Appellee

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, DATED MAY 3, 2018

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 17-1020

EDDIE N. DELA CRUZ,

Appellant,

v.

ROBERT L. WILKIE, M.D., SECRETARY OF VETERANS AFFAIRS,

Appellee.

Before DAVIS, *Chief Judge*,
and PIETSCH and ALLEN, *Judges.*

ORDER

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

In a March 16, 2018, memorandum decision, the Court affirmed the February 7, 2017, decision of the Board of Veterans' Appeals that denied entitlement to a one-time payment from the Filipino Veterans Equity Compensation Fund. On April 6, 2018, the appellant filed a timely motion

for reconsideration or, in the alternative, a panel decision pursuant to Rule 35 of the Court's Rules of Practice and Procedure. The motion for decision by a panel 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 precendential 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).

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is futher

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

ORDERED, by the panel, that the single-judge decision remains the decision of the Court.

DATED: May 3, 2018 PER CURIAM.

APPENDIX C — MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, DATED MARCH 16, 2018

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 17-1020

EDDIE N. DELA CRUZ,

Appellant,

v.

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

Appellee.

March 16, 2018, Decided

Before PIETSCH, *Judge.*

MEMORANDUM DECISION

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

PIETSCH, *Judge*: Eddie Dela Cruz appeals pro se a February 7, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to a one-time payment

from the Filipino Veterans Equity Compensation Fund (FVECF). 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 as the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the February 7, 2017, Board decision.

I. FACTS

Mr. Dela Cruz sought VA compensation benefits in June 2001, citing service in the "Philippines Army Guerillas" from 1943 to 1946. Record (R.) at 1031. In his application, he stated that he was part of a recognized guerilla group and later assigned to "D" company, "122 BN, LGAF (F-23)." R. at 1034.

In July 2001, a VA regional office (RO) requested Mr. Dela Cruz's service records from the National Archives and Records Administration (NARA), which responded that Mr. Dela Cruz was not a member of the Philippine Commonwealth Army, including the recognized guerillas in the service of the U.S. Armed Forces. The RO also requested verification of Mr. Dela Cruz's service from the National Personnel Records Center (NPRC). The NPRC also responded that he did not have service as a member of the Philippine Commonwealth Army, including the recognized guerillas in the service of the U.S. Armed Forces. The RO denied Mr. Dela Cruz's claim for benefits based on his lack of eligible service.

Appendix C

Mr. Dela Cruz submitted a letter in November 2006 describing his experience in the recognized guerillas in the service of the U.S. Armed Forces and his later work in Guam. In December 2006, the RO again requested information regarding Mr. Dela Cruz's service, noting that he was not listed in the Reconstructed Guerilla Roster maintained at the Manila, Philippines, RO. The RO subsequently denied his claim based on his failure to submit new and material evidence of qualifying service.

In February 2007, Mr. Dela Cruz submitted an affidavit from Domingo T. Mercado, a former neighbor who stated that he served in the Philippine guerilla service with Mr. Dela Cruz. Mr. Mercado stated that Mr. Dela Cruz served in and was discharged from the guerilla forces that fought for the U.S. Armed Forces during World War II.

In April 2009, Mr. Dela Cruz sought a one-time payment from the FVECF. In October 2009, the RO again requested information to verify Mr. Dela Cruz's service. At that time, the RO provided an additional name under which Mr. Dela Cruz may have served. In response to that request, the NPRC again stated that Mr. Dela Cruz did not have service as a member of the Philippine Commonwealth Army, including recognized guerillas in the service of the U.S. Armed Forces. The RO denied Mr. Dela Cruz entitlement to a one-time payment from the FVECF, finding that he did not meet service requirements. After he appealed that decision, the Board remanded the matter for additional development.

Appendix C

In August 2010, Mr. Dela Cruz submitted another affidavit from Mr. Mercado stating that Mr. Dela Cruz was an enlisted guerilla solder from 1942 to 1946. The RO sent NPRC a new request for verification of service, accompanied by Mr. Mercado's affidavit. The NPRC again responded that Mr. Dela Cruz did not have any verifiable service as a member of the Philippine Commonwealth army or recognized guerrilla service.

In December 2014, Mr. Dela Cruz submitted lay statements from his wife, brother, brother-in-law, and Mr. Mercado. Each statement indicated that he had served as a member of the Philippine guerilla service in support of the U.S. Armed Forces.

The RO requested a verification of Mr. Dela Cruz's service from the Army Human Resources Command (AHRC). In October 2015, the AHRC responded, stating that it was unable to change the previous negative service determination. In May 2016, the RO again attempted to verify Mr. Dela Cruz's service. The NPRC responded that his service could not be verified and, thus, there was no change to the prior negative certification.

On February 7, 2017, the Board issued the decision on appeal. In that decision, the Board denied entitlement to a one-time payment from the FVECF. The Board based its decision on certifications from both the AHRC and the NPRC that Mr. Dela Cruz did not have service as a member of the Philippine Commonwealth Army, including the recognized guerillas in the service of the U.S. Armed Forces. The Board noted the affidavits and lay statements

of record, but found that these documents were not official documents of a U.S. service department and were not sufficient to demonstrate proof of service. Based on the lack of qualifying service, the Board found that he was not eligible to receive the one-time payment.

On appeal, Mr. Dela Cruz argues that the Board erred by failing to adequately consider lay evidence, including testimony and affidavits, as well as a Philippine veterans association certificate, his birth certificate, and army cards that he believes demonstrate that he had qualifying service. He states that he missed the registration period for his service and that VA has failed to obtain records regarding his treatment for malaria. He also cites to various provisions concerning reasonable doubt, competency of lay evidence, duty to assist by obtaining records, and service records as evidence of service.

In response, the Secretary argues that the Court should affirm the Board's decision because the Board properly found that Mr. Dela Cruz did not have qualifying service and, thus, was not eligible for a payment under FVECF as a matter of law. The Secretary notes that the Board considered the lay evidence and affidavits, but found that these documents were not sufficient to establish qualifying service.

II. ANALYSIS

A. Matters on Appeal

Initially, the Court notes that, in his brief, Mr. Dela Cruz states that, in addition to the denial of a one-time

payment from FVECF, he is appealing "[l]egal entitlement to all privileges, benefits and pensions entitled to [him] as a U[.]S[.] combat veteran." Appellant's Informal Brief at 4. However, the only issue before the Board in the decision currently on appeal is entitlement to a one-time payment under the FVECF. The Court lacks jurisdiction to consider any issues that were not before the Board. *See* 38 U.S.C. § 7252(a).

The Court also notes that, after briefing was completed in this appeal, Mr. Dela Cruz submitted several photographs purporting to show him at one or more meetings. However, these photographs were not before the Board at the time it issued its decision, and the Court may not consider them. *See Timberlake v. Gober*, 14 Vet. App. 122, 133 (2000) (The Court is "precluded by statute from including in the record on appeal and generally from considering any material that was not contained in the 'record of proceedings before the Secretary and the Board.'" (quoting 38 U.S.C. § 7252(b))); *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990).

B. Filipino Veterans Equity Compensation Fund

Pursuant to the American Recovery and Reinvestment Act of 2009, Pub.L. No. 111-5, § 1002, 123 Stat. 115, Congress established the FVECF and authorized VA to make one-time payments from the fund to eligible persons who submitted a claim within the one-year period beginning on the date of enactment. Section 1002(d) of the Act defines "eligible person" as any person who served before July 1, 1946, in the organized military

forces of the Government of the Commonwealth of the Philippines, including the recognized guerrilla forces, or in the Philippine Scouts organized under section 14 of the Armed Forces Voluntary Recruitment Act of 1945, 79 Cong. Ch. 393, 59 Stat. 538, 543.

VA regulations provide that certain types of documents may be used to establish qualifying service. 38 C.F.R. § 3.203(a) (2017). To establish entitlement to benefits, VA may accept documents submitted by a claimant as evidence of qualifying service, without verification from the appropriate service department, if the documents were issued by a U.S. service department, contain the needed information, and in VA's opinion are genuine and contain accurate information. *Id.* If, however, the evidence of service submitted does not meet the requirements of § 3.203(a), VA must request verification of service from the appropriate U.S. service department. 38 C.F.R. § 3.203(c); *see Capellan v. Peake*, 539 F.3d 1373, 1380 (Fed. Cir. 2008) (noting that § 3.203(c) requires verification from the service department whenever a claimant lacks the kind of official evidence specified in § 3.203(a)). Once the service department determines whether an individual had qualifying service, its determination is "conclusive and binding" on VA. *Soria v. Brown*, 118 F.3d 747, 749 (Fed. Cir. 1997); *Duro v. Derwinski*, 2 Vet.App. 530, 532 (1992). This rule applies in the context of FVECF claims. *See Tagupa v. McDonald*, 27 Vet.App. 95, 100 (2014).

Mr. Dela Cruz argues that the Board erred by failing to accept the documents that he submitted as proof of his service, referring to an affidavit for Philippine Army

personnel, affidavits from himself and Mr. Mercado, written statements, testimony before the Board, a certificate from the Philippine Scouts and World War II Association, his birth certificate, and army cards from the American Legion and Philippine Army. Contrary to his argument, the Board considered this evidence and found that it was not sufficient to establish qualifying service. Specifically, the Board stated that the only evidence in support of Mr. Dela Cruz's claim was from individuals known to him and the Philippine government. Although Mr. Dela Cruz asks the Court to accept these documents because they are true, as found by the Board, none of the submitted documents or testimonies meets the requirements of § 3.203(a). With respect to his argument regarding records for his treatment for malaria, it is not clear how those records would establish qualifying service pursuant to § 3.203(a).

Instead, the Board noted that, pursuant to § 3.203(c), VA sought verification of Mr. Dela Cruz's service from the relevant service department. Despite multiple requests, the NPRC and AHRC were not able to verify that Mr. Dela Cruz had service as a member of the Philippine Commonwealth Army, including recognized guerillas in the service of the U.S. Armed Forces. Based on this evidence, the Board found that he did not have qualifying service for FVECF purposes and denied his claim. Although Mr. Dela Cruz cites to various VA regulations, he does not explain and the Court does not discern how those regulations would alter the Board's determination regarding his service. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden

of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Reviewing the Board decision as a whole, the Court does not find any error with the Board's denial of a one-time payment under the FVECF.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the February 7, 2017, Board decision is AFFIRMED.

DATED: March 16, 2018

APPENDIX D — DECISION OF THE BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS, DATED FEBRUARY 7, 2017

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF

EDDIE N. DELACRUZ

DOCKET NO. 10-14 480

DATE FEB 07 2017

On appeal from the Department of Veterans Affairs Regional Office in Manila, the Republic of the Philippines

THE ISSUE

Legal entitlement to the one-time payment from the Filipino Veterans Equity Compensation Fund.

INTRODUCTION

The Appellant alleges that he had World War II service as a recognized guerilla in the service of the U.S. Armed Forces for the Far East from October 1942 to February 1946. The Appellant's status as a veteran is the issue on appeal. This matter is before the Board of Veterans' Appeals (Board) on appeal from a December

2009 decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Manila, the Republic of the Philippines. This matter was last before the Board in December 2014, whereupon it was remanded for further development. Following the issuance of a June 2016 statement of the case in which the RO continued to deny the Appellant his status as a Veteran, the case was returned to the Board for its adjudication.

In February 2013, the Appellant testified at a hearing at the RO before the undersigned via videoconference. A transcript of the hearing is of record.

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2016). 38 U.S.C.A. § 7107(a)(2) (West 2014).

FINDING OF FACT

The U.S. Army Human Resources Command has indicated that the appellant had no service as a member of the United States Armed Forces.

CONCLUSION OF LAW

The appellant does not have recognized active military service for the purposes of obtaining the one time payment from the Philippine Veterans Equity Compensation Fund. 38 U.S.C.A. § 5101(a) (West 2014); American Recovery and Reinvestment Act, Section 1002, Pub. L. No. 111-5 (Enacted February 17, 2009); 38 C.F.R. § 3.203 (2016).

Appendix D

REASONS AND BASES FOR FINDING AND CONCLUSION

Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA) imposes obligations on VA in terms of its duties to notify and assist claimants in developing claims. When VA receives a complete or substantially complete application for benefits, it is required to notify the claimant of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159 (b); *Quartuccio v. Principi,* 16 Vet. App. 183 (2003). In *Pelegrini v. Principi,* 18 Vet. App. 112 (2004), the United States Court of Appeals for Veterans Claims (Court) held that VA must (1) inform the claimant of any information and evidence not of record that is necessary to substantiate the claim; (2) inform the claimant about the information and evidence that VA will seek to provide; and (3) inform the claimant about the information and evidence the claimant is expected to provide.

VA's duties to assist and notify have been considered in this case. However, as it is the law, and not the facts, that is dispositive of the appeal, the duties to notify and assist imposed by the VCAA are not for application in this case. *See Mason v. Principi,* 16 Vet. App. 129, 132 (2002). The enactment of the VCAA does not affect matters on appeal from the Board on questions limited to statutory interpretation. *See Dela Cruz v. Principi,* 15 Vet. App. 143, 149 (2001). Because qualifying service and how it may be established are outlined in statute and

regulation, and because service department certification of service is binding on VA, the Board's review is limited to interpreting the pertinent law and regulations.

In this case, the law is dispositive, and basic entitlement to the one time payment from the Philippine Veterans Equity Compensation Fund for nonservice-connected pension benefits is precluded based upon the appellant's lack of qualifying service; accordingly, legal entitlement to the one time payment from the Philippine Veterans Equity Compensation Fund must be denied. *Sabonis v. Brown,* 6 Vet. App. 426 (1994).

Pertinent Law and Regulations

Under the American Recovery and Reinvestment Act, the new one time benefit is provided for certain Philippine Veterans to be paid from the "Filipino Veterans Equity Compensation Fund." American Recovery and Reinvestment Act Section 1002, Pub. L. 111-5 (Enacted February 17, 2009). Payment for eligible persons will be either in the amount of $9,000 for non-United States citizens, or $ 15,000 for United States citizens.

For eligible persons to accept payment from the Filipino Equity Compensation Fund, such payment "shall constitute a complete release of any claim against the United States for reason of [such] service ... " However, nothing in this Act "prohibits a person from receiving any benefit (including health care, survivor, or burial benefits), which the Veteran would have been eligible to receive based on laws in effect as of the day before the date of the enactment of this Act."

Appendix D

Section 1002(d) provides that an eligible person is any person who (1) served- (A) before January 1, 1946 in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders who were appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States; or (B) in the Philippine Scouts under Section 14 of the Armed Forces Voluntary Recruitment Act of 1945 (59 Stat. 538); and (2) was discharged or released from service described in paragraph (1) under conditions other than dishonorable. Section 1002(j)(2) of the law also provides that VA will administer its provisions in a manner consistent with VA law including the definitions of 38 U.S.C.A. § 101 except to the extent otherwise provided in the statute.

Analysis

The record reflects that the RO requested verification of the appellant's service from the National Personnel Records Center (NPRC) on multiple occasions. In November 2001, April 2002, July 2002, December 2006, and November 2009, the National Personnel Records Center, a component of the appropriate United States service department, reported that the appellant had no service as a member of the Philippine Commonwealth Army, including the recognized guerrillas, in the service of the United States Armed Forces under the names:

Eddie Nerpio Dela Cruz and Leonido Nerpio Dela Cruz. Another request for verification was made to the NPRC in August 2011 with additional evidence regarding the military unit the appellant alleges he served in during World War II. In a September 2011 correspondence, the NPRC replied that even with this additional information it was still not able to locate any records to substantiate the appellant's claims of recognized service.

Distinct from its attempts to verify the appellant's service with the NPRC, in July 2010 the RO requested records from the Guam Benefits Office, VA Guam Community Based Outpatient Clinic, Guam Vet Center, and the VA Health Eligibility Center. In response to the RO's requests, the Director of the Health Eligibility Center submitted a letter in November 2010 stating that the appellant is assigned to the priority group 5 for VA healthcare purposes. The letter further noted that a request had been forwarded to the Enrollment Coordinator of the VA Medical Center in Honolulu, Hawaii.

A December 2010 letter from the Enrollment Coordinator states that an application for enrollment was received in January 2007 and that the appellant has been actively enrolled with the Guam Community Based Outpatient Clinic. The letter further stated that the documentation requested, documents used to verify eligibility for healthcare, was not available for disclosure at the time as, effective July 2008, all records had been secured off site for electronic scanning. The letter provided dates of service of November 1943 to February 1946 with an honorable discharge.

Nonetheless, of record are the medical treatment records from the Guam VA Community Based Outpatient Clinic containing a September 2006 application for healthcare benefits, a VA Form 10-10EZ, a certificate of naturalization from the United States, and an affidavit for Philippine Army Personnel. It appears these were the documents used to determine the appellant's healthcare eligibility.

In support of his claim, the appellant submitted an affidavit from D.M., a fellow servicemember, wherein he states that the two served in the guerillas in 1942 and were discharged in 1946. The affidavit further states that they served in the same company "H" Co 2nd Bn 121st Inf USAFIPNL. He finally stated that the appellant had not processed his papers as one of the World War II veterans.

The appellant has further submitted several statements from his family members regarding his service. In an affidavit, his brother J.N.D.C. states that the appellant joined the Philippine Guerillas in 1942. More recently, in statement dated in December 2014 statement, both an A.C.C. and a B.M.C.D.C, the appellant's brother-in-law and spouse. respectively, asserted that they met the appellant in 1954 while he was living in Guam and that he had consistently maintained that he served with the American military in World War II prior to moving to Guam in 1947.

At the February 2013 videoconference hearing the appellant testified that he served in the Philippine Guerillas and that he, unfortunately, had not filed the

paperwork needed to be recognized as a World War II veteran. He further testified that he believed that he should be recognized as a veteran since he had been deemed eligible to receive healthcare from the VA.

Pursuant to the Board's December 2014 remand, the Board requested that the U.S. Army Human Resources Command (AHRC) undertake a new review of the available evidence and make a determination as to whether the appellant's service could be verified. In an October 2015 correspondence, the ARHC indicated that the claims file contains an AGO Form 23 which shows that the Veteran was assigned to D Company, 122nd Battalion Luzon Guerrilla Army forces (LGAF). A review of military archives did not show any documentation of a 122nd Battalion, LGAF, but the AHRC did find a listing for a 122nd Squadron, LGAF; however, reviewing the unit roster for the squadron did not show that the appellant's name was listed. Accordingly, the AHRC stated that it could not accept the affidavits to verify the appellant's service.

In addition to requesting that the AHRC attempt to verify the appellant's service, the RO once again contacted the NPRC and asked that it attempt to verify the appellant's service. According to the NPRC. it reviewed the roster for the appellant's unit provided on VA Form 21-3101 and the index files for Guerrilla service and could not verify the appellant's service.

The Board has carefully reviewed the appellant's evidentiary submissions. However, the Board finds that

these documents fail to satisfy the requirements of 38 C.F.R. § 3.303 as essential proof of service. as they are not official documents of the appropriate United States service department, but rather documents from the Philippine Government and individuals known to the appellant. As such, those documents may not be accepted by the Board as verification of service for the purpose of determining eligibility for VA benefits, including the one time payment from the Filipino Veterans Equity Compensation Fund.

The AHRC has submitted documentation of its own thorough review of the available evidence demonstrating that there is not sufficient support that the appellant actually served in the 122nd Squadron as he has asserted. The Board is not free to ignore the certification of the AHRC. This certification is binding on VA such that VA has no authority to change or amend the finding. *Duro v. Derwinski,* 2 Vet. App. 530, 532 (1992). The proper course for the appellant is to pursue his disagreement with his Service Department. *See Sarmiento v. Brown.* 7 Vet. App. 80, 85 (1994). VA is bound to follow the certifications by the Service Departments with jurisdiction of United States military records.

In addition, the NPRC has certified that the appellant had no service as a member of the Philippine Commonwealth Anny, including the recognized guerrillas in the service of the United States Armed Forces. Recognition of service by the Philippine Government is not sufficient for benefits administered by VA. Again, the Board is not entitled to ignore the certification of the NPRC.

Appendix D

Regarding the appellant's eligibility for VA healthcare, the Board finds that this does not prove his status as a veteran. The record reflects that his eligibility for healthcare was not based on a finding of veteran status by the NPRC, but rather, was based on the affidavit from the Philippine Army, the appellant's citizenship, and his financial status. While these documents may be sufficient to prove entitlement to VA healthcare, they are not sufficient to establish eligibility to a one time payment from the Filipino Veterans Equity Compensation Fund.

Based upon the record in this case, the appellant had no service as a member of the Philippine Commonwealth Army, including the recognized guerrillas, in the service of the United States Armed Forces. The appellant may not, therefore, be considered a veteran for the purpose of establishing entitlement to the one-time payment from the Filipino Veterans Equity Compensation Fund. Accordingly, the claim is denied as a matter of law. *Sabonis v. Brown.* 6 Vet. App. 426 (1994)

ORDER

Legal entitlement to the onetime payment from the Filipina Veterans Equity Compensation Fund is denied.

/s/_____
A.C. MACKENZIE
Veterans Law Judge, Board of Veterans' Appeals

APPENDIX E — ORDER DENYING REHEARING BY THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED SEPTEMBER 20, 2019

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

EDDIE N. DELA CRUZ,

Claimant-Appellant

v.

ROBERT WILKIE, SECRETARY
OF VETERANS AFFAIRS,

Respondent-Appellee

2018-2101

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-1020, Judge Coral Wong Pietsch.

ON MOTION

Before Dyk, Reyna, and Wallach, *Circuit Judges.*
Per Curiam.

Appendix E

ORDER

Appellant Eddie N. Dela Cruz filed a motion to recall the mandate.

It Is Ordered That:

The motion to recall the mandate is denied because the court has concluded that the combined petition for rehearing and rehearing *en banc* lacks merit. Dela Cruz's remedy is before the Army Board for Correction of Military Records, a remedy which he should promptly exercise if he wishes to secure the claimed compensation.

Accordingly, Dela Cruz's petition is denied as moot.

For the Court

September 20, 2019
Date

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

APPENDIX F — AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 § 1002

PUBLIC LAW 111–5—FEB. 17, 2009

ADMINISTRATIVE PROVISION

SEC. 1002. PAYMENTS TO ELIGIBLE PERSONS WHO SERVED IN THE UNITED STATES ARMED FORCES IN THE FAR EAST DURING WORLD WAR II. (a) FINDINGS.—Congress makes the following findings:

(1) The Philippine islands became a United States possession in 1898 when they were ceded from Spain following the Spanish-American War.

(2) During World War II, Filipinos served in a variety of units, some of which came under the direct control of the United States Armed Forces.

(3) The regular Philippine Scouts, the new Philippine Scouts, the Guerrilla Services, and more than 100,000 members of the Philippine Commonwealth Army were called into the service of the United States Armed Forces of the Far East on July 26, 1941, by an executive order of President Franklin D. Roosevelt.

(4) Even after hostilities had ceased, wartime service of the new Philippine Scouts continued as a matter of law until the end of 1946, and the force gradually disbanded and was disestablished in 1950.

(5) Filipino veterans who were granted benefits prior to the enactment of the so-called Rescissions Acts

of 1946 (Public Laws 79–301 and 79–391) currently receive full benefits under laws administered by the Secretary of Veterans Affairs, but under section 107 of title 38, United States Code, the service of certain other Filipino veterans is deemed not to be active service for purposes of such laws.

(6) These other Filipino veterans only receive certain benefits under title 38, United States Code, and, depending on where they legally reside, are paid such benefit amounts at reduced rates.

(7) The benefits such veterans receive include service-connected compensation benefits paid under chapter 11 of title 38, United States Code, dependency indemnity compensation survivor benefits paid under chapter 13 of title 38, United States Code, and burial benefits under chapters 23 and 24 of title 38, United States Code, and such benefits are paid to beneficiaries at the rate of $0.50 per dollar authorized, unless they lawfully reside in the United States.

(8) Dependents' educational assistance under chapter 35 of title 38, United States Code, is also payable for the dependents of such veterans at the rate of $0.50 per dollar authorized, regardless of the veterans' residency.

(b) Compensation Fund.—

(1) In General.—There is in the general fund of the Treasury a fund to be known as the "Filipino Veterans

Equity Compensation Fund" (in this section referred to as the "compensation fund").

(2) AVAILABILITY OF FUNDS.—Subject to the availability of appropriations for such purpose, amounts in the fund shall be available to the Secretary of Veterans Affairs without fiscal year limitation to make payments to eligible persons in accordance with this section.

(c) PAYMENTS.—

(1) IN GENERAL.—The Secretary may make a payment from the compensation fund to an eligible person who, during the one-year period beginning on the date of the enactment of this Act, submits to the Secretary a claim for benefits under this section. The application for the claim shall contain such information and evidence as the Secretary may require.

(2) PAYMENT TO SURVIVING SPOUSE.—If an eligible person who has filed a claim for benefits under this section dies before payment is made under this section, the payment under this section shall be made instead to the surviving spouse, if any, of the eligible person.

(d) ELIGIBLE PERSONS.—An eligible person is any person who—

(1) served—

(A) before July 1, 1946, in the organized military forces of the Government of the Commonwealth of

the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States; or

(B) in the Philippine Scouts under section 14 of the Armed Forces Voluntary Recruitment Act of 1945 (59 Stat. 538); and

(2) was discharged or released from service described in paragraph (1) under conditions other than dishonorable.

(e) PAYMENT AMOUNTS.—Each payment under this section shall be—

(1) in the case of an eligible person who is not a citizen of the United States, in the amount of $9,000; and

(2) in the case of an eligible person who is a citizen of the United States, in the amount of $15,000.

(f) LIMITATION.—The Secretary may not make more than one payment under this section for each eligible person described in subsection (d).

(g) CLARIFICATION OF TREATMENT OF PAYMENTS UNDER CERTAIN LAWS.—Amounts paid to a person under this section—

(1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering; and

(2) shall not be included in income or resources for purposes of determining—

(A) eligibility of an individual to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code, or the amount of such benefits;

(B) eligibility of an individual to receive benefits under title VIII of the Social Security Act, or the amount of such benefits; or

(C) eligibility of an individual for, or the amount of benefits under, any other Federal or federally assisted program.

(h) RELEASE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the acceptance by an eligible person or surviving spouse, as applicable, of a payment under this section shall be final, and shall constitute a complete release of any claim against the United States by reason of any service described in subsection (d).

(2) PAYMENT OF PRIOR ELIGIBILITY STATUS.—Nothing in this section shall prohibit a person from receiving any benefit (including health care, survivor, or burial benefits) which the person would have been eligible to

receive based on laws in effect as of the day before the date of the enactment of this Act.

(i) RECOGNITION OF SERVICE.—The service of a person as described in subsection (d) is hereby recognized as active military service in the Armed Forces for purposes of, and to the extent provided in, this section.

(j) ADMINISTRATION.—

(1) The Secretary shall promptly issue application forms and instructions to ensure the prompt and efficient administration of the provisions of this section.

(2) The Secretary shall administer the provisions of this section in a manner consistent with applicable provisions of title 38, United States Code, and other provisions of law, and shall apply the definitions in section 101 of such title in the administration of such provisions, except to the extent otherwise provided in this section.

(k) REPORTS.—The Secretary shall include, in documents submitted to Congress by the Secretary in support of the President's budget for each fiscal year, detailed information on the operation of the compensation fund, including the number of applicants, the number of eligible persons receiving benefits, the amounts paid out of the compensation fund, and the administration of the compensation fund for the most recent fiscal year for which such data is available.

(l) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated to the compensation fund $198,000,000, to remain available until expended, to make payments under this section.