No. 20-1148

IN THE

Supreme Court of the United States

ROBERT M. SELLERS,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

Respondent.

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

BRIEF FOR NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

National Veterans Legal Services Program ("NVLSP") is one of the nation's leading organizations advocating for veterans' rights. Founded in 1981, NVLSP is an independent, nonprofit veterans service organization recognized by the United States Department of Veterans Affairs ("VA") and dedicated to ensuring that the government honors its commitment to veterans. NVLSP has extensive experience representing veterans before the VA and is intimately familiar with the VA claims process and the challenges veterans often face raising their claims with precision. Among other activities, NVLSP represents veterans; prepares, presents, and prosecutes veterans' benefits before the VA; pursues veterans' rights legislation; and advocates before this and other courts. Since its inception, NVLSP has secured more than $5.2 billion in VA benefits for veterans and their families.

The issues presented in this petition for a writ of certiorari lie at the core of NVLSP's experience and expertise. In addition, NVLSP has a strong interest in the pro-claimant policy adopted by Congress and in defending decisions that implement this policy and opposing decisions that undermine it.[2]

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties filed blanket consents to the filing of *amicus* briefs.

[2] Pursuant to Rule 37.2(a), *amicus* affirms that both parties received timely notice of its intent to file this amicus brief, and both parties consented to the filing of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Court of Appeals for the Federal Circuit ("Federal Circuit") rejected the Veterans Court's "reasonably identifiable" test and held that a claim is limited in scope to medical conditions identified on a veteran's application form for disability compensation. Pet. App. 18a-19a. Under the Federal Circuit's test, the VA may deny benefits for any condition not identified on a veteran's application form even if the veteran's medical records make clear that the veteran has been diagnosed with the condition. Pet. App. 16a-17a.

The Federal Circuit's decision is inconsistent with Congress's intent to create a disability compensation system for veterans that is flexible and pro-claimant. Under the governing statutes and regulations, the VA must construe claims liberally and assist veterans in fully developing their claims, including by assisting the veterans in obtaining medical records. *See* 38 U.S.C. §§ 5103A, 5107; 38 C.F.R. §§ 3.102, 3.103(a). Yet under the Federal Circuit's decision, the VA is free, for instance, to disregard clear evidence in the record that a veteran, who articulated a general intent to apply for disability compensation benefits, qualifies for benefits for a specific disability simply because the veteran did not specifically identify that disability in his claim.

Endorsing the Federal Circuit's decision would undermine Congress's pro-claimant designs for the veterans' disability system. At a practical level, the veterans' claims process already presents difficulties for

veterans seeking benefits to which they are entitled. Many veterans initiate the claims process without the aid of a lawyer and without ready access to important information about how VA regional offices evaluate claims.

In contrast, the Veterans Court's "reasonably identifiable" test would help ensure that the veterans' benefits process is implemented in a manner that is consistent with Congress's intent for the system to be flexible and pro-claimant. The Veterans Court held that when a veteran's claim indicates a general intent to seek benefits and the veteran's medical records in the VA's possession reflect a reasonably identifiable in-service medical diagnosis, the VA "may not ignore" the reasonably identifiable diagnoses. Pet. App. 30a. This rule is consistent with congressional intent to create a benefits system where the VA must construe claims liberally and also develop claims to their optimum fully and sympathetically. *See* 38 U.S.C. § 5107; 38 C.F.R. § 3.103(a).

ARGUMENT

I. Congress Intended the Veterans Disability Compensation System to be Pro-Claimant.

"'The solicitude of Congress for veterans is of long standing.' And that solicitude is plainly reflected in ... laws that 'place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of [Veterans Administration (VA)] decisions.'" *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (quoting *United States v. Oregon*, 366 U.S. 643, 647 (1961)).

Congress created the VA in 1930 to administer the congressional program for veterans' benefits. Thereafter, in 1988, Congress passed the Veterans' Judicial Review Act and the Veterans' Benefits Improvement Act. Pub. L. No. 100–687, 102 Stat. 4105. This legislation created the Court of Veterans Appeals (later renamed the Court of Appeals for Veterans Claims), which for the first time allowed veterans to obtain judicial review of the VA's benefits decisions. The accompanying report of the House Committee on Veterans' Affairs stated that "Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits," which "is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty." H.R. Rep. No. 100-963, at 13, reprinted in 1988 U.S.C.C.A.N. 5782, 5795. The committee explained: "I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Id.* "Even then," the report continued, "*VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.* In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof." *Id.* (emphasis added).

In light of Congress's intended "uniquely pro-claimant" system, the Federal Circuit has previously consistently held that the VA should not limit the

scope of a pro se veteran's claim to what is recited within the four corners of her application, but rather must "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits," including "by determining all potential claims raised by the evidence." *Harris v. Shinseki*, 704 F.3d 946, 949 (Fed. Cir. 2013) (citing *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)).

II. The VA's Pleading Requirement for Requesting Benefits, as Interpreted by the Federal Circuit, Is Inconsistent with Congressional Intent for a Compensation System that Is Flexible and Pro-Claimant.

A. The VA's Benefit System Is Often Difficult for Veterans to Navigate.

The Federal Circuit's ruling threatens to compound existing difficulties veterans often face in initiating a claim for benefits. Although Congress intended the claims system to be flexible and pro-claimant, even the earliest stages of the claims process are difficult for veterans to navigate. For example, many veterans whose disabilities limit their capacities to appreciate and describe their ailments must nonetheless do so without ready access to information about how the VA will evaluate their claims, without access to their medical records, and without legal representation. Requiring veterans at this early stage, or any stage, to identify the sickness, disease, or injury for which benefits are sought only exacerbates these difficulties and further strays from Congress's pro-veteran aims.

To initiate the benefits process, a veteran must first submit a request for benefits, or a claim. 38 U.S.C. § 5101(a); *see also* 38 C.F.R. § 3.1(p) (defining "claim"). Despite Congress's pro-claimant policy, the VA has, in recent years, introduced mandatory pleading requirements even at an early stage.

For starters, a claim must now (i) be filed on the form prescribed by the Secretary (VA Form 21-526 for disability claims), (ii) include the name of the claimant, (iii) provide sufficient information to allow the VA to verify the claimed service, (iv) be signed by the claimant or a person legally authorized to sign for the claimant, and (v) identify the benefit sought. *See* 38 C.F.R. §§ 3.155(a), 3.160.[3] Current VA regulations, adopted in 2014, expand upon the requirement to "identify the benefit sought" by stating that a "complete claim" must also include "[a] description of any symptom(s) or medical condition(s) on which the benefit is based." 38 C.F.R. § 3.160(a)(4). Although a seemingly benign request, the condition-or-symptom requirement presents a barrier for veterans, many of whom face difficulties articulating the specific symptoms and disabling conditions from which they suffer and identifying which of these symptoms and disabling conditions are related to the period of their military service.

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[3] If a claimant submits an application lacking this information, the VA is required to inform the claimant what evidence or information is needed to make the claim complete. 38 U.S.C. § 5102(b). An incomplete application is an "informal claim," and the claimant has one year from the time of VA notice to make the claim complete. *See* C.F.R. § 21.31.

For one, some veterans do not know about, let alone have access to, the Adjudications Procedures Manual M21-1 (the "Manual"). That documentation is critical as regional VA officers rely on it to evaluate and rate claims, and the Board of Veterans' Appeals often refers to it in explaining its decisions.[4] *See Gray v. Sec'y of Veterans Affs.*, 875 F.3d 1102, 1105 (Fed. Cir. 2017) (noting that the Manual, which is "used to convey guidance to VA adjudicators," is "not binding on anyone other than the [Veterans Benefits Administration] employees"), *vacated on other grounds by Gray v. Sec'y of Veterans Affs.*, 774 F. App'x 678 (Fed. Cir. 2019); *see also Overton v. Wilkie*, 30 Vet. App. 257, 264 (2018) ("The Board is required to discuss any relevant provisions contained in the M21-1 as part of its duty to provide adequate reasons or bases . . . ."). Without access to the Manual, claimants lack critical awareness of, among other things, the roles and responsibilities thrust upon a claimant, including, for example, first identifying disabilities, conditions, and symptoms that may underlie a successful claim. *See* Manual, M21-1 § III.iii (detailing the claims process, including the process of developing a claim); *cf., e.g.*, *Robinson v. Shinseki*, 557 F.3d 1355, 1361 (Fed. Cir. 2009) (holding that "*where the claimant has raised an issue of service connection*, the evidence in the record must be reviewed to determine the scope of that claim"

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[4] Although the Manual is now published in the Federal Register and online, not all veterans have ready access to the internet or know how to use the internet to access materials relevant to their benefits claims. *Cf.* FCC, Report on Promoting Broadband Internet Access Services for Veterans, Pursuant to the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018 at 12 (May 2019) ("In total, 2.2 million veteran households lack either fixed or mobile broadband connections at home.").

(emphasis added)). The natural result is that some claimants are put in the untenable position of describing their symptoms or disabling conditions without knowing that they must provide such information or understanding how much detail they must provide or how that information will be used by the VA to develop and evaluate the claim.

Moreover, most veterans do not possess a copy of their medical records (which are in the VA's possession), either *before* or until *after filing* a claim.[5] Under VA regulations, it is the submission of a "claim for benefits" that triggers the VA's duty to obtain and review a veteran's service records and to assist in developing a claim and maximizing a veteran's benefits. 38 C.F.R. § 3.159(b); *see also* 38 U.S.C. § 5107. But without having medical records prior to submission of a

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[5] Veterans may request copies of their administrative records, including health records, but the process for doing so is far from straightforward. *See Veterans' Service Records*, Nat'l Archives, https://www.archives.gov/veterans/military-service-records/medical-records.html (listing the various locations of service records depending of a veteran's branch, status, and dates of service and describing the services' various recordkeeping practices through the years). Moreover, National Archives instructs that "[v]eterans who plan to file a claim for medical benefits with the Department of Veterans Affairs (VA) do not need to request a copy of their military health record," because "[a]fter a claim is filed, the VA will obtain the original health record." *Id.* But what the National Archives does not point out is that when the VA obtains a veteran's service and post-service medical records, it does not automatically provide the veteran with a copy of these records. The burden is on the veteran to make a formal request for a copy of these medical records and wait for 6 to 12 months to receive a copy of these records.

claim, a veteran is likely limited in her ability to describe the symptoms and disabling conditions for which she may be entitled to benefits.

Indeed, even after the VA obtains a veteran's in-service and post-service medical records, the VA's practice and policy is not to provide these critical records to the veteran unless the veteran or representative makes a written request for these records. Moreover, even veterans who obtain a copy of their medical records are not necessarily well positioned to navigate those records and identify the specific symptoms and conditions that are likely to qualify for service-connected disability compensation. For example, the veteran in *Shea v. Wilkie*, 926 F.3d 1362 (Fed. Cir. 2019), obtained medical records revealing that she suffered from physical disabilities, including pelvic fractures, as well as psychiatric conditions, including anxiety, depression, and impaired memory. *Id.* at 1364–65. Ms. Shea's initial claim for disability benefits specifically listed four physical disabilities and referenced medical records containing her psychiatric diagnoses. *See id.* 1369. But only after Ms. Shea submitted a letter asking the VA to reconsider the disability rating for her physical conditions—in which she explained that, among other symptoms, "I also don't remember a lot of things I do, even the same day," and "[m]y job had to print out special instructions for me to close out the computer step by step because I am unable to remember day to day"—did the VA conclude that Ms. Shea had also intended to claim that her psychiatric conditions were service connected. *Id.* Although the Federal Circuit later vacated and remanded the Veterans Court's decision because Ms. Shea's references

to "specific medical records" that "contain[ed] reasonably ascertainable diagnosis of disability" had adequately raised an informal claim for benefits related to those psychiatric conditions, not all veterans are similarly situated to Ms. Shea. Many are not well positioned to take the steps necessary to obtain medical records possessed by the VA, to identify and attach specific medical records, or to evaluate which records might "contain reasonably ascertainable diagnos[es]" to put the VA on notice of particular service-connected symptoms or conditions that may be related to the period of military service.

This difficulty is exacerbated by the fact that veterans generally do not have medical expertise and therefore are often unaware whether their symptoms and diagnosed conditions have a medical nexus to an event, injury or disease that occurred while they were in service. For example, the VA rules provide that a veteran is entitled to disability compensation for a medical condition that did not directly result from military service, but instead is a secondary condition, which is a new disability linked to a service-connected disability from which a veteran already suffers. *See* 38 C.F.R. § 3.310. For example, it is common knowledge in the medical profession that injuries to one joint may lead to a disability in a different joint. *Cf.* Jessica D. Rivera, et al., *Posttraumatic Osteoarthritis Caused by Battlefield Injuries: The Primary Source of Disabilities in Warriors*, J. Am. Acad. Orthop. Surg., 20 Suppl. 1, 64–69 (2012) (describing joint degeneration issues facing young wounded warriors). Under VA regulations, a "secondary condition shall be considered a part of the original condition" when it "is proximately due to or the result of a service-connected

disease or injury." *Id.* But, even veterans who know their current diagnoses when filing their claims may not expressly identify an existing secondary condition as part of their claim due to their lack of knowledge about its medical nexus to a primary condition to which the VA has already accorded service-connected status. Indeed, unless a veteran submits a written request for a copy of the medical records the VA obtains after the claim is filed, she would be unlikely to know whether those records contain a medical opinion indicating that a secondary condition undiscussed by the veteran-claimant is related to the primary condition expressly identified on the veteran's claims form. A veteran who submits a later claim specifically describing those new secondary symptoms and conditions would receive a later effective date and would forfeit benefits to which she may have been entitled during that earlier period. *See Ellington v. Peake*, 541 F.3d 1364, 1372 (Fed. Cir. 2008) (holding that the effective date for a secondary service condition arises no earlier than the date for which a veteran applied for service connection for that condition).

Further compounding veterans' difficulties navigating the claim initiation process is that most claimants do so without the assistance of a lawyer. *See* James D. Ridgeway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Vet. L. Rev. 113, 132 (2009) ("[A]ttorneys are infrequently involved in veterans benefits claims."). Congress and the VA have in fact historically discouraged lawyer participation, especially at the early stages of the claims process, by barring or limiting attorney com-

pensation. *See, e.g.*, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (upholding a statute limiting to $10 the fee that may be paid an attorney or agent who represents a veteran seeking benefits from the VA for service-connected death or disability). Presently, an attorney or claims agent generally may not charge a claimant a fee until after a VA regional office has issued a decision on the claim, a notice of disagreement has been filed, and the attorney or agent has filed a power of attorney and fee agreement with the VA. *See* 38 C.F.R. § 14.636(c) (permitting attorneys representing veterans before the VA to charge for services rendered before a final Board decision only if the Notice of Decision in a veteran's case was filed on or after June 20, 2007); *see also Cameron v. Shinseki*, 26 Vet. App. 109, 113 (2012) (explaining that, under prior regulations, attorneys were prohibited from charging fees for services provided before a final Board decision). Discouraging or barring attorney participation likely comes at the expense of veterans, who are likely unfamiliar with the procedural requirements associated with filing claims for service-related benefits.

Although some veterans receive assistance of non-attorney veteran services organizations, courts have recognized that this aid "is not the equivalent of legal representation." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009); *see also id.* ("Although aides from veterans' service organizations provide invaluable assistance to claimants seeking to find their way through the labyrinthine corridors of the veterans' adjudicatory system, they are not generally trained or licensed in the practice of law." (quotation marks omitted)).

And while some veterans secure pro bono legal representation, pro bono lawyers are not universally available to veterans for assistance. *Cf*. Dep't of Veterans Affairs, Board of Veterans' Appeals, Annual Report Fiscal Year 2020 at 36 (in 2020, fewer than 25% of veterans' appeals, for which attorneys may receive compensation, were handled by attorneys while more than 9% of veterans proceeded with no representation). Thus, veterans are frequently left to navigate the confusing claims initiation process without the aid of a lawyer.

B. In Deciding Claims for Disability Compensation, the VA Has a History of Addressing Whether the Veteran is Entitled to Compensation for All Diagnosed Conditions, Regardless of Whether the Veteran Expressly Sought Benefits for the Diagnosed Condition

In recognition of the pro-claimant process that Congress intended and the fact that veterans generally lack medical knowledge and access to attorney representation, when a veteran filed a claim for disability compensation, the VA traditionally addressed entitlement to benefits for all diagnosed conditions regardless of whether the veteran expressly sought compensation for all diagnosed conditions.

For example, for years after the Vietnam War, veterans suffering from diseases they believed were caused by Agent Orange exposure struggled to receive disability compensation from the VA, despite Congressional intent that such compensation be provided to veterans. *See In re Agent Orange Prod. Liab. Litig.*,

818 F.2d 194 (2d Cir. 1987). In 1984, Congress passed the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, Pub.L. No. 98-542, 98 Stat. 2725 (1984) ("Dioxin Act") which authorize[d] the Administrator of the VA [ ] to conduct rulemaking to determine which diseases w[ould] be deemed service connected for all diseases claimed to be caused by Agent Orange exposure." *Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404, 1407–08 (N.D. Cal. 1989). The VA regulation implementing the Dioxin Act, however, expressly identified only a single disease, chloracne, that "is sufficient to establish service-connection for resulting disability." 38 C.F.R. § 3.311a(c) (1988).

In 1987, NVLSP challenged former VA regulation 38 C.F.R. § 3.311a, on a number of grounds, including that "[t]he VA wrongfully required that the scientific evidence demonstrate a 'cause and effect' relationship between Agent Orange exposure and claimed diseases, instead of using the less demanding standard that there be a 'statistical association' between Agent orange exposure and claimed diseases." *Nehmer*, 712 F. Supp. at 1409. The district court agreed and invalidated the portion of the regulation that provided that chloracne be treated as the only condition associated with herbicide exposure and voided all VA decisions denying benefit claims under that portion of the regulation. *Id.* at 1423.

In 1991, NVLSP's attorneys negotiated a consent decree with the VA that requires the VA, in instances where emerging scientific evidence demonstrates the existence of a positive relationship between Agent Orange exposure and a new disease, to (a) identify all claims based on the newly recognized disease that

were previously denied and then (b) pay disability and death benefits to these claimants, retroactive to the initial date of claim. *See* Final Stipulation and Order at ¶¶6–7, *Nehmer v. U.S. Veterans' Admin.*, Civil Action No. CV-86-6160 (TEH) (N.D. Cal. May 17, 1991), Dkt. No. 141 ("*Nehmer* Consent Decree").

The *Nehmer* Consent Decree stated that the disability benefits would be retroactive to the date of the claim, "assuming the basis upon which compensation is granted after readjudication is the same basis upon which the original claim was filed," noting that "[t]he basis upon which the original claim was filed refers to the disease[s] or condition[s] which Chapter 46 of VA Manual M21-1, paragraph 46.02 required to be coded in the ratings decision contained in the claimant's claim file." *Nehmer Consent Decree* at ¶ 5 & n.1. At that time, paragraph 46.02 of the M21-1 Manual required agency officials to evaluate whether service-connected disability compensation or non-service-connected pension benefits were warranted for *all* of the disabilities noted in the veteran's VA claims file—not only those listed on the claimant's application form—with four minor exceptions. VA, *Adjudication Procedures* § 46.02(a) (Mar. 28, 1985), https://perma.cc/J6M6-RV5J.[6]

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[6] **46.02 DISPOSITION OF DISABILITIES NOTED OR CLAIMED**

a. [ ] Compensation Ratings. All disabilities claimed will be

Because the VA has historically reviewed a veteran's records to assist in developing the veteran's

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> given consideration as to service connection and [be coded as a disability rating on VA Form 21-6796.] (See par. 49.18 et seq.) [Any additional] disabilities [noted] will [be] coded, except:
>
> (1) Acute transitory conditions that leave no residuals.
> (2) Noncompensable residuals of venereal disease.
> (3) Disabilities noted only on the induction examination, or conditions recorded by history only.
> (4) Disabilities found by authorization to have not been incurred "in line of duty" (par. 14.03).
>
> **b.** **Pension Ratings.** Code all claimed or noted disabilities on VA Form 21-6796 and show the percent of disablement from each unless the disabilities have been held to be due to the claimant's own willful misconduct by Administrative Decision. (See par. 14.04 and app. A rating code 14.)

VA, *Adjudication Procedures*, Manual M21-1, ¶ 46.02 (Change 400, March 28, 1985) (emphasis added; brackets in original).

claim for disabilities, the Veterans Court's "reasonably identifiable" test does not impose a new administrative burden on the VA.

III. The Federal Circuit's Decision—Unlike the Veterans Court's "Reasonable Efforts" Standard—Is Inconsistent with Congressional Intent and the VA's Duty to Assist Veterans.

The Federal Circuit's holding that the VA need not consider claims for conditions reasonably identifiable in a veteran's in-service medical records is inconsistent with the VA's duty to assist veterans in developing their claims fully. As a result, the Federal Circuit's decision will further exacerbate the incongruence between congressional intent and the implementation of the disability compensation system for veterans. The Veterans Court's "reasonably identifiable" test, in contrast, implements the VA's statutory duty to assist and provides a workable mechanism for the VA to carry out that duty.

Congress specifically provided that the VA must assist claimants in substantiating a claim for benefits. The VA has a statutory duty to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a)(1). When a veteran makes a claim for disability compensation, the VA is required to obtain certain relevant records, including the claimant's service medical records. *Id.* § 5103A(c)(1)(A). If the claimant provides adequate information, the VA must also obtain other records of relevant medical treatment from health-care facilities

and any other relevant records from federal agencies. *Id.* § 5103A(c)(1)(B)–(C); *see also* 38 C.F.R. § 3.159(c)(3) (explaining the VA will make efforts to obtain relevant records from a government entity, VA healthcare facilities, non-VA facilities where the VA authorized treatment, and any federal agency). The duty to assist may even require the VA to provide a medical examination to a veteran if there is competent evidence that a veteran has a current disability or symptoms that may be associated with the veteran's service, yet the record does not contain sufficient evidence for the VA to make a decision. *Id.* § 5103A(d). Therefore, Congress expressly mandated that the VA must make reasonable efforts to obtain relevant medical records when reviewing a veteran's claim for disability compensation.

The VA also must assist veterans in developing their claims fully. The goal of the duty to assist is "to assist veterans in developing claims and receiving benefits for which they are eligible." H.R. Rep. No. 106-781, at 9. Congress made clear that once the VA obtains medical records, it must then review them. The VA has a statutory duty to "consider all information and lay and medical evidence" in the record in a case. 38 U.S.C. § 5107. The VA must assist a claimant in "developing facts pertinent to his claim" and grant "every benefit that can be supported in law" while protecting the government's interests. 38 C.F.R. § 3.103(a). Indeed, the VA is to "give the benefit of the doubt" to the claimant where evidence requires balancing. 38 U.S.C. § 5107; *see also* 38 C.F.R. § 3.102 ("[A] reasonable doubt . . . will be resolved in favor of the claimant."). In short, the benefits process is "designed to function throughout with a high degree

of informality and solicitude for the claimant." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985).

By requiring the VA to obtain evidence to support a disability compensation claim and to construe claims liberally, Congress expressed clear intent that the VA was to assist claimants in fully developing their disability claims. The Veterans Court's "reasonably identifiable" condition rule was the natural application of this duty to assist. Pet. App. 30a. The Federal Circuit's decision, in contrast, is at odds with the VA's duty to assist. Under the Federal Circuit's view, the VA, which would be required to assist a veteran in obtaining medical records and review those records, would be free to ignore medical conditions that are obvious on the face of those records. Pet. App. 20a-21a. Such a rule not only poses a serious obstacle to implementing the flexible, pro-claimant compensation system that Congress intended to create but flies in the face of clear Congressional intent that the VA assist veterans in developing their claims fully. *See* H.R. Rep. No. 100-963, at 13, reprinted in 1988 U.S.C.C.A.N. 5782, 5795. As discussed above, if the VA is not required to consider a claim for benefits for a veteran's disabling condition that is obvious on the face of the veteran's service records, that claim may be denied, and the veteran would not receive compensation for a service-connected disability. *See supra* Part II. The denial of benefits where a veteran has a disability that qualifies for compensation goes against congressional intent in creating a system that maximizes benefits for veterans.

Moreover, the Veterans Court's "reasonably identifiable" conditions rule is congruent with existing VA practices. The VA is required to review the entire record, including a veteran's medical records, with a sympathetic, pro-claimant perspective in adjudicating the veteran's claims. *See, e.g.,* 38 U.S.C. § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of *all evidence and material of record* and applicable provisions of law and regulation." (emphasis added)). Because the VA is required to obtain and consider relevant medical records, the Veterans Court's "reasonably identifiable" test is not likely to impose a significant burden to the VA process.

Relevantly, the Veterans Court's test does not require the VA to adjudicate *all* disabilities evidenced in the record. Instead, the VA must adjudicate diagnoses that are *reasonably identifiable* in the record. Whether a diagnosis is "reasonably identifiable" is a "factual determination" for the VA, which must "determine, based on the totality of the service medical record, both qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to the adjudicator." Pet. App. 31a. The "reasonably identifiable" rule thus only requires the VA to adjudicate diagnosed disabilities that are reasonably identifiable from the record that it is already required to review.

The agency's past practice confirms that the "reasonably identifiable" test is workable. In fact, the VA previously required Regional Offices to determine whether benefits are warranted for most conditions noted in the veteran's VA claims file, regardless of

whether the veteran's claim expressly discussed the condition, and the VA continues to do so today with respect to the claimants from the *Nehmer* litigation. *See supra* Part II.

Providing benefits where a veteran provides a general intent to seek benefits and a diagnosis is "reasonably identifiable" from a veteran's in-service records is entirely consistent the VA's duty to assist veterans. Such a rule would promote congressional intent in creating a paradigm that is not only flexible and pro-claimant, but also feasible to implement. The Federal Circuit's decision to the contrary will have grave consequences and will result in a disability compensation system that is even further from the system that Congress intended to create.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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