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

REPLY BRIEF FOR PETITIONER

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
James Anglin Flynn
Anne W. Savin
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

Abigail Colella
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Kenneth M. Carpenter
John Niles
CARPENTER, CHARTERED
1525 SW Topeka Blvd.,
Suite D
Topeka, KS 66601

John F. Cameron
250 Commerce Street
Montgomery, AL 36124

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION... 1

I. The Federal Circuit's Condition-Or-Symptom Restriction Has No Basis In Law... 2

A. Mr. Sellers's 1996 filing was legally sufficient to serve as the effective date for his psychiatric disability benefits. 2

B. VA's authority to prescribe a form cannot justify the condition-or-symptom restriction. 4

C. The burden-setting statute cannot justify the condition-or-symptom restriction. 5

D. VA's purported practice cannot bind Mr. Sellers. 7

II. The Veterans Court's Rule Squares With The Statute And Existing Practice. 9

III. The Government Does Not Dispute The Importance Of This Recurring Question Or That This Case Is An Ideal Vehicle........... 11

CONCLUSION.. 13

TABLE OF AUTHORITIES

Page(s)

Cases

Bailey v. Wilkie,
33 Vet. App. 188 (2021) 9

Brokowski v. Shinseki,
23 Vet. App. 79 (2009) 9

Houghton v. Payne,
194 U.S. 88 (1904)...8

King v. St. Vincent's Hosp.,
502 U.S. 215 (1991)..7

Saunders v. Wilkie,
886 F.3d 1356 (Fed. Cir. 2018).............................3

Skoczen v. Shinseki,
564 F.3d 1319 (Fed. Cir. 2009)......................4, 6, 7

Util. Air Regul. Grp. v. EPA,
573 U.S. 302 (2014)..5

Statutes

38 U.S.C. § 501 5

38 U.S.C. § 501(a)...5

38 U.S.C. § 501(a)(2) 4

38 U.S.C. § 5101(a)(1)(A) 4

38 U.S.C. § 5103A(c)(1)(A) 7

38 U.S.C. § 5107 .... 5, 6, 7

38 U.S.C. § 5107(a) 5, 6, 7

38 U.S.C. § 5110 .... 3, 4, 5, 6

38 U.S.C. § 5110(a)(1) 2

Regulations

38 C.F.R. § 3.156(a) 10

38 C.F.R. § 3.156(c) 10

38 C.F.R. § 3.310 9

Standard Claims and Appeals Forms,
79 Fed. Reg. 57,660 (Sept. 25, 2014) 5

INTRODUCTION

VA agrees with Mr. Sellers on the central interpretive issue in his petition: A "claim" in the context of veterans-benefits law is a statement of entitlement to a particular type of benefit (like disability compensation) and not for a particular disabling condition (like arthritis or PTSD).

VA agrees that Mr. Sellers submitted just such a claim for disability benefits in 1996. VA agrees that the claim was on the correct form and accepted by the agency as complete. And VA agrees that the evidence in the very records it reviewed when it adjudicated Mr. Sellers's claim clearly showed that Mr. Sellers was suffering from disabling psychiatric conditions caused by his military service.

That should be the end of this case. The statute says Mr. Sellers's benefits for psychiatric disability—finally granted decades after the fact—should be effective as of the date Mr. Sellers initiated his claim.

But the Federal Circuit held—and VA argues—that Mr. Sellers's psychiatric disability was not within the scope of his 1996 claim, and that he is entitled only to an effective date of 2009—the date he first specified a psychiatric condition or symptomatology on a claim form. VA agrees the Federal Circuit's test is found nowhere in the governing statutes. *See* Opp. 12; Pet. 20-24. Instead, VA tries to justify it based on language in other statutes that do not govern the scope of a claim (or effective dates), as well as its recounting of a supposed unwritten agency practice that conflicts with all available evidence of VA's

actual practices. The Federal Circuit's decision is not supported by the statute, and VA lacks the authority to rewrite the law to deny Mr. Sellers the benefits to which he is statutorily entitled.

The Federal Circuit's test permits—indeed, encourages—VA to ignore obvious evidence of a disability merely because it is not specified on a veteran's form. That test defies both the plain text of the specific statutory provisions at issue and the non-adversarial, pro-claimant character of the system Congress established for veterans benefits. It ensures a particular injustice when it comes to veterans, like Mr. Sellers, whose psychiatric symptoms often include an inability to recognize the very fact of the condition itself. This Court should grant the petition.

I. The Federal Circuit's Condition-Or-Symptom Restriction Has No Basis In Law.

A. Mr. Sellers's 1996 filing was legally sufficient to serve as the effective date for his psychiatric disability benefits.

The ultimate question in this case is the effective date for the benefits that VA finally granted Mr. Sellers for his psychiatric disability. The statute provides the answer: The effective date must be no "earlier than the date of receipt of application" for Mr. Sellers's "claim." 38 U.S.C. § 5110(a)(1).[1]

---

[1] VA does not argue that there is a material difference between the statutes in force in 1996 and the current versions. *See* Pet. 12 n.2. Except where otherwise noted, this reply (like VA's brief) refers to the current versions.

The petition demonstrated, and VA nowhere disputes, that a "claim" is a statement of entitlement to a particular *type* of benefit. Pet. 15-18; *see* Opp. 11-12. And Mr. Sellers submitted just such a statement, filing the appropriate VA form to initiate a claim for disability compensation in 1996. He filled out every box of that form and specifically indicated that he was requesting benefits derived from "[service connection] for disabilities occurring during active duty service." Pet. App. 116a.

That is all Mr. Sellers needed to do to plant a flag in the ground, establishing 1996 as the effective date for awards for "disabilities occurring during [his] active service." The fact that Mr. Sellers did not fully recount all symptoms of his disability on his application form, or specify all diseases or conditions that might be causing his functional impairment, does not limit the scope of his claim. *See Saunders v. Wilkie*, 886 F.3d 1356, 1362 (Fed. Cir. 2018) ("'disability' refers to a functional impairment," not "underlying cause[s] of the impairment"). The Federal Circuit's condition-or-symptom restriction is absent from § 5110's effective-date inquiry—and VA does not argue otherwise.

In an attempt to justify the restriction, VA instead relies on statutes other than § 5110, along with claims about policy and practice. None supports VA's or the Federal Circuit's restriction on the scope of Mr. Sellers's 1996 claim.

B. VA's authority to prescribe a form cannot justify the condition-or-symptom restriction.

VA first points to two statutes concerning the agency's authority to prescribe forms for use by veterans.

VA cites its authority to "prescribe all rules and regulations which are necessary or appropriate … including … the forms of application by claimants." 38 U.S.C. § 501(a)(2). VA exercised this authority to issue VA Form 21-526 for disability compensation.

VA then notes that veterans must "file[]" "a specific claim in the form prescribed by the Secretary" for benefits to be paid. *Id.* § 5101(a)(1)(A). Mr. Sellers did just that, filing VA Form 21-526. Pet. App. 98a-119a. VA received and processed Mr. Sellers's form in March 1996. Pet. App. 98a, 101a. It did not reject Mr. Sellers's form as incomplete—so VA's arguments about the completeness of veterans' forms are misplaced. *See* Opp. 3, 12; *see also Skoczen v. Shinseki*, 564 F.3d 1319, 1328 (Fed. Cir. 2009) (noting VA's "duty to notify claimants of incomplete applications").

VA instead appears to argue that it can bootstrap its form-prescription authority into a license to impose new substantive legal requirements on veterans. Here, for example, it suggests that by including a box asking about conditions or symptoms on its form, it can rewrite § 5110, setting the effective date as the date Mr. Sellers first listed his psychiatric symptomatology on a form, rather than—as § 5110 requires—the date he first filed a claim for

compensation encompassing the disability caused by those symptoms, whether or not expressly listed on the form.

VA lacks the authority to rewrite the statute in this way.[2] The statutory grant of rulemaking authority, 38 U.S.C. § 501, permits VA to craft application forms and to set the procedure for VA adjudications. But all such regulations must be "consistent with" the governing statutes, *id.* § 501(a), reflecting the "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate," *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014). In short: VA can require veterans to use a specific form to make clear what benefits they are requesting, but it cannot use that form to restrict what constitutes a "claim" under the statute. Pet. 20.

C. The burden-setting statute cannot justify the condition-or-symptom restriction.

VA next relies on 38 U.S.C. § 5107, which establishes the burdens and standard of proof to be used in VA adjudications. Specifically, VA relies on § 5107(a), which requires that "veterans 'present *and support*' their claims." Opp. 12 (emphasis in Opp.) (quoting 38 U.S.C. § 5107).

[2] VA's 2014 rulemaking did not even purport to alter the effective-date inquiry of § 5110, although VA now claims it had that effect. *See* Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660 (Sept. 25, 2014).

But here, too, there is no dispute that Mr. Sellers fulfilled his responsibility under § 5107(a).[3] He "present[ed]" a claim for disability benefits to VA, which accepted the claim as complete and adjudicated it. *See* Pet. 21. And his claim to service-connection for the psychiatric disabilities resulting from his military career was "support[ed]" with more than adequate evidence: his service medical records. VA does not dispute that those records, which VA reviewed when adjudicating Mr. Sellers's 1996 claim, supported a finding of service connection at the time.

Contrary to VA's argument, nothing in § 5107(a) supports the Federal Circuit's condition-or-symptom restriction. That provision sets out the respective obligations of the claimant and VA throughout the process of developing and adjudicating a claim; it imposes no requirements on veterans with respect to the "low hurdle" of claim initiation—a stage at which paid representation is legally prohibited. *Skoczen*, 564 F.3d at 1329; *see* Military-Veterans Advocacy Amicus Br. 11-13, 15-16 (discussing restrictions on legal representation). The fact that a claim must ultimately be "supported," in other words, does not change the fact that § 5110 defines "claim" as a request for a particular type of benefit writ large, not a request to be compensated for a specific condition. *See* Pet. 15-17.

---

[3] The version of § 5107 in effect at the time of Mr. Sellers's 1996 claim did not include the "present and support" language on which VA now relies. But it similarly governed the obligations of a veteran once adjudication had commenced, not at the time the claim was filed. *See* Pet. App. 85a.

Indeed, the Federal Circuit has recognized that the "present and support" requirement operates in the context of VA's duty to assist, under which VA bears the "primary responsibility of obtaining the evidence it reasonably can to substantiate a veteran's claim for benefits." *Skoczen*, 564 F.3d at 1328. The fact that § 5107(a) requires evidence to "support service-connection," in other words, does not change the fact that the evidence may either be "submitted by the claimant or VA—as determined by [other statutory provisions]." *Id.* at 1326. Those provisions make clear that VA, not the veteran, is responsible for "obtaining … [t]he claimant's service medical records," which is the only kind of evidence implicated here. 38 U.S.C. § 5103A(c)(1)(A); *see also* Nat'l Veterans Legal Services Program Amicus Br. 8 (veterans do not possess their own service medical records).

Finally, even if § 5107 somehow injected ambiguity into the statutory scheme, VA's reading would be inappropriate in light of the pro-veterans canon: statutes providing "benefits to members of the Armed Services" must be interpreted "in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *see also* Nat'l Organization of Veterans' Advocates Amicus Br. 19-21.

D. VA's purported practice cannot bind Mr. Sellers.

VA's purported prior practice, meanwhile, gets it nowhere. VA cites only its 2014 rulemaking notice to establish this supposed "longstanding" practice. Opp. 4, 10, 18. In fact, VA's internal manuals have long contemplated that its adjudicators would

adjudicate conditions established by the record evidence but not listed on a veteran's claim application. Pet. 24-25. Assuming, as VA contends, its adjudicators were not required to investigate every such condition, Opp. 16-17, they certainly were encouraged to do so. The manuals show that VA's practice was never to limit a claim only to the veteran's listed conditions. *See* Nat'l Law School Veterans Clinic Consortium Amicus Br. 25-27; Nat'l Veterans Legal Services Program Amicus Br. 15.

The record here is illustrative: VA encountered evidence of a toe fracture in the medical records and properly granted service connection, even though Mr. Sellers had not listed that condition on his form. Pet. 25. VA tries to avoid this problem by conflating one of the listed conditions ("Right Leg numbness," Pet. App. 104a) with the toe fracture. Opp. 14-15. But the record from 1996 shows that VA correctly adjudicated these as unrelated issues: The leg numbness was an ongoing symptom arising from parachuting injuries. C.A. Appx133. The fracture was a distinct stubbed-toe injury, sustained years later, that was not listed on Mr. Sellers's claim application. C.A. Appx134; *see also* R.B.A. 855. If the longstanding practice were as VA says, the toe injury would have been deemed outside the scope of Mr. Sellers's claim. *See* Pet. 25-26.

Even if VA could show that it had a consistent practice, "[a] custom of the department, however, long continued by successive officers, must yield to the positive language of the statute." *Houghton v. Payne*, 194 U.S. 88, 100 (1904).

II. The Veterans Court's Rule Squares With The Statute And Existing Practice.

VA warns of the burdensome "unguided safari" through the record its adjudicators would need to undertake but for the Federal Circuit's condition-or-symptom restriction. Opp. 18 (quoting *Brokowski v. Shinseki*, 23 Vet. App. 79, 89 (2009)). In doing so, VA ignores the standard articulated by the Veterans Court, which limits the scope of a disability claim to conditions that are "reasonably identifiable" from the record evidence. Pet. App. 30a. It also ignores that VA itself is tasked with making that reasonably-identifiable determination in each case, taking into account the size and nature of the record. Pet. App. 32a.

This standard does not meaningfully increase VA's administrative burden. As discussed above, VA already has an obligation to obtain veterans' service records, and it already must review the full record for any conditions eligible for secondary service connection that are "reasonably raised by the record"—even if not listed on a veteran's claim form. *Bailey v. Wilkie*, 33 Vet. App. 188, 197 (2021); *see* 38 C.F.R. § 3.310 ("secondary" conditions are those caused or aggravated by a service-connected condition). Under undisputed law, therefore, an adequate review of the record in 1996 would have identified the psychiatric symptoms. The only additional burden is insubstantial: "VA may not ignore in-service diagnoses of specific disabilities," as it did in the case of Mr. Sellers's extensively documented psychiatric condition. Pet. App. 30a.

The Veterans Court's sensible standard also resolves VA's concerns that veterans will be permitted to "effectively reopen" old claims. Opp. 19. Under VA's regulations, to reopen a claim requires submission and review of new evidence not previously part of the record. 38 C.F.R. § 3.156(a), (c). The Veterans Court's standard does nothing like this. Instead, it accounts for conditions already so well-established by the evidentiary record that VA knew or should have known about them based on its original review. If there was some reasonable basis for overlooking a well-documented condition in the record the first time around, VA is entitled to make that factual finding, subject only to deferential clear-error review.

VA's failure to grapple with the Veterans Court's standard is evident in its inapt reformulation of the Question Presented. The question is not whether VA "must" always grant "the effective date of an earlier-filed claim" for a "different" condition. Opp. (I). The question is whether a condition was within the scope of that earlier-filed claim all along, because it was reasonably identifiable in the pre-existing record. In other words, to the extent there is a safari, it is one "fully guided" by the record and by VA's own determinations. Pet. App. 33a.

Lastly, VA is wrong when it says the petition advanced a test "different from" the Veterans Court's. Opp. 13. As the Veterans Court explained, "VA may not ignore in-service diagnoses of specific disabilities, *even those* coupled with a general statement of intent to seek benefits." Pet. App. 30a (emphasis added). In Mr. Sellers's case, that statement was one factor to be weighed alongside others (to be developed by VA on

remand), including the size of the record and the clarity of the diagnosis. Pet. App. 31a-32a.

III. The Government Does Not Dispute The Importance Of This Recurring Question Or That This Case Is An Ideal Vehicle.

The Federal Circuit's condition-or-symptom restriction may affect any of the tens of millions of veterans, dependents, and survivors entitled to VA benefits. Pet. 30-31. The harshest consequences will fall on unrepresented claimants and those unable to acknowledge or articulate their disability. Given the Federal Circuit's exclusive jurisdiction, only this Court can prevent these dire effects.

VA does not deny the breadth and severity of these consequences. On the contrary, VA acknowledges that latent or invisible conditions—especially mental illnesses—may render veterans unable to acknowledge their disabilities and impede their ability to obtain disability compensation benefits. Opp. 18-19. It also concedes that a veteran's inability to understand or acknowledge her service-connected condition "close[s] off benefits" under the condition-or-symptom restriction until the veteran recognizes the relevant condition is "disabling and service-related." Opp. 19. VA does not dispute that veterans often fail to identify such sensitive conditions on their claim forms. Despite these impediments, VA defends the Federal Circuit's approach that relieves the agency of any obligation to compensate veterans for ongoing, service-connected disabilities that are well-documented in available service medical records—simply

because the veteran did not or could not identify the disabling condition or a symptom on a form. Opp. 19.

Despite conceding in part the importance of the Question Presented, VA attempts to minimize the prospective effect of resolving "purported ambiguity in VA's pre-2015 rules." Opp. 20. But VA's 2014 rule change did not salvage its imposition of substantive restrictions untethered to statute. *See* Pet. 23-24. The Court's resolution of the Question Presented will have a significant impact on veterans going forward. If the Court concludes the condition-or-symptom restriction is incompatible with the statutory text, that holding would undermine VA's 2014 rule. All veterans going forward would be assured that VA—consistent with the agency's duty to assist—will include within a veteran's claim any condition reasonably identifiable in available service medical records. And even if VA can show that its 2014 rule is a reasonable reading of the statute, the Question Presented will still affect millions of veterans who filed claims before that rule's enactment and who may ultimately rely on those claims in proving effective dates for newly granted disability benefits. *See* Pet. 32.

In addition to agreeing that the Question Presented will profoundly affect a large number of disabled veterans, VA does not deny that this case is an ideal vehicle for resolving it. VA does not dispute that, at the time of his 1996 claim, Petitioner's service medical records reflected years of serious, recurring, service-connected psychiatric symptoms culminating in an involuntary, three-week hospitalization less than a year before his 1996 retirement. VA acknowledges Petitioner's service-connected psychiatric disability.

Opp. 5. Moreover, the Veterans Court remanded for the Board to apply its "reasonably identifiable" test to Petitioner's claim in the first instance. At issue is simply the legal, almost certainly outcome-dispositive question of whether the scope of Petitioner's 1996 claim included his "reasonably identifiable" psychiatric diagnoses in the records VA then possessed.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
James Anglin Flynn
Anne W. Savin
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

Abigail Colella
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Kenneth M. Carpenter
John Niles
CARPENTER, CHARTERED
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601

John F. Cameron
250 Commerce Street
Montgomery, AL 36124

May 17, 2021