No. 21-234

In the Supreme Court of the United States

KEVIN R. GEORGE, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the 1977 denial of petitioner's claim for disability benefits connected to his military service is "subject to revision on the grounds of clear and unmistakable error," 38 U.S.C. 7111(a), where a regulation in effect at the time of the denial was later determined by the agency (in 2003) and the court of appeals (in 2004) to have reflected an impermissible interpretation of the governing statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 991 F.3d 1227. The opinion of the Court of Appeals for Veterans Claims (Veterans Court) (Pet. App. 25a-65a) is reported at 30 Vet. App. 364. The decision of the Board of Veterans' Appeals (Pet. App. 66a-80a) is unreported. A prior decision of the Board (Pet. App. 81a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as

that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on August 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In December 1975, petitioner, a former servicemember, filed a claim for disability benefits with the Department of Veterans Affairs (VA). The Board of Veterans' Appeals (Board) denied that claim in 1977. Pet. App. 81a-87a. The Board later denied petitioner's 2014 request to revise its 1977 decision. *Id.* at 66a-80a. The Veterans Court affirmed. *Id.* at 25a-65a. The court of appeals affirmed. *Id.* at 1a-24a.

1. Petitioner served in the Marine Corps from June 1975 to September 1975, when he was medically discharged following a diagnosis of schizophrenia, which had not been identified on his medical entrance examination. Pet. App. 6a. Congress has directed that, with limitations not relevant here, "the United States will pay [compensation] to any veteran" who is "disabled" as a result of (1) "personal injury suffered or disease contracted in line of duty," or (2) "aggravation of a preexisting injury suffered or disease contracted in line of duty." 38 U.S.C. 1110. Such disabilities entitling the veteran to benefits are called "service connected" because they are "causally related to an injury sustained in the service." *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 307 (1985); see 38 U.S.C. 101(16).

Following his medical discharge, petitioner filed a disability-benefits claim with the VA, asserting that his schizophrenia was service-connected because it was contracted in or aggravated by his military service. See Pet. App. 6a-7a. A regional VA office denied the claim

"on the ground that the disability existed prior to his entry onto active duty and it was not aggravated by military service." *Id.* at 81a.

In 1977, the Board denied petitioner's appeal, which raised only the issue of aggravation. See Pet. App. 82a. The Board observed that a psychiatric evaluation had opined that petitioner's schizophrenia "existed prior to service," that a medical board had "confirmed" that opinion, and that a "subsequent physical evaluation board" had agreed. *Id.* at 83a. The Board further observed that, although the medical board had determined that petitioner's schizophrenia had been "aggravated by his active duty," the subsequent physical evaluation board had concluded that petitioner's schizophrenia "had not been aggravated by his military service." *Ibid.*; see *id.* at 6a.

The Board then explained that "[a] preexisting injury or disease will be considered to have been aggravated by active wartime service, where there is an increase in disability during such war service, unless there is clear and unmistakable evidence that the increase in disability is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record." Pet. App. 85a. The Board concluded that petitioner's "preexisting schizophrenia was not aggravated by his military service" and that "[e]ntitlement to service connection for schizophrenia has not been established." *Id.* at 86a. The Board did not specify whether that conclusion was based on a determination that petitioner's schizophrenia had not worsened during his period of service, or on a determination that any such worsening reflected the natural progress of the schizophrenia rather than any

effect caused by military service. At the time, the Board's decision was not subject to judicial review. See *Henderson* v. *Shinseki*, 562 U.S. 428, 432 & n.1 (2011).

2. a. In December 2014, petitioner asked the Board to revise its 1977 decision. See C.A. App. 62-68. Since 1997, Congress has provided that a "decision by the Board is subject to revision on the grounds of clear and unmistakable error." 38 U.S.C. 7111(a). "If evidence establishes the error, the prior decision shall be reversed or revised." *Ibid.* A veteran may ask the Board to revise its decision for clear and unmistakable error "at any time after that decision is made." 38 U.S.C. 7111(d); see 38 U.S.C. 5109A (similar provisions applicable to a "decision by the Secretary").

When it enacted Sections 5109A and 7111 in 1997, Congress did not define the phrase "clear and unmistakable error." But "since at least 1928 the VA and its predecessors have provided for the revision of decisions which were the product of 'clear and unmistakable error.'" *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc) (citing United States Veterans' Bureau Regulation No. 187, § 7155 (1928)); see 38 C.F.R. 3.105(a) (1963 Cum. Supp.) ("Previous determinations * * * will be accepted as correct in the absence of clear and unmistakable error."). The Federal Circuit has stated that 38 U.S.C. 5109A and 7111 were intended "to codify and adopt the [clear-and-unmistakable-error] doctrine as it had developed under 38 C.F.R. § 3.105" and as set forth in *Russell*, *supra*, and other Veterans Court cases. *Cook* v. *Principi*, 318 F.3d 1334, 1344 (2002) (en banc), cert. denied, 539 U.S. 926 (2003); see H.R. Rep. No. 52, 105th Cong., 1st Sess. 1-2 (1997) (citing *Russell* and explaining that Sections 5109A and 7111 were intended "to codify existing regulations which make decisions * * *

subject to revision on the grounds of clear and unmistakable error"); S. Rep. No. 157, 105th Cong., 1st Sess. 3 (1997) (similar, citing *Russell*).

In *Russell*, the Veterans Court stated that "a 'clear and unmistakable error' under [38 C.F.R.] 3.105(a) must be the sort of error which, had it not been made, would have manifestly changed the outcome at the time it was made." 3 Vet. App. at 313. The court explained that "[e]rrors that would not have changed the outcome are harmless; by definition, such errors do not give rise to the need for revising the previous decision." *Ibid.* The court further explained that a clear and unmistakable error must be "undebatable," such that "reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Id.* at 313-314. It stated that a clear-and-unmistakable-error determination "must be based on * * * the law that existed at the time of the prior" decision. *Id.* at 314. Those principles from *Russell* continue to be codified in VA regulations, see 38 C.F.R. 3.105(a)(1)(i), (iii), and (iv), and 20.1403(a)-(e), and the Federal Circuit adopted them in its en banc decision in *Cook*, *supra*, see 318 F.3d at 1342-1347.

In his 2014 request for revision, petitioner asserted that the Board's 1977 decision had rested on a "clear and unmistakable error" because the Board had "fail[ed] to correctly apply the provisions of 38 U.S.C. [1111]." C.A. App. 65. Section 1111, which is entitled "Presumption of sound condition," provides as relevant here that "every veteran shall be taken to have been in sound condition" at the time of enrollment unless "clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service."

38 U.S.C. 1111. Petitioner asserted that "the evidence in this case does not clearly and unmistakably indicate that [petitioner's] schizophrenia was not aggravated by service." C.A. App. 67.

b. The Board denied the request for revision. Pet. App. 66a-80a. As relevant here, its decision explained that in 1977, under the then-applicable regulation implementing Section 1111's statutory predecessor, the Board "was not required to find clear and unmistakable evidence that [petitioner's] disability was not aggravated by service." *Id.* at 70a-71a (citing 38 C.F.R. 3.304(b) (1977)). That regulation provided as relevant here that a "veteran will be considered to have been in sound condition when examined, accepted and enrolled for service" unless "clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto." 38 C.F.R. 3.304(b) (1977); see 26 Fed. Reg. 1561, 1580 (Feb. 24, 1961) (same).

Unlike Section 1111, however, the regulation did not expressly require clear and unmistakable evidence to rebut the presumption that the injury or disease was aggravated by service. Compare 38 U.S.C. 1111 (presumption of soundness rebutted "where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment *and was not aggravated by such service*") (emphasis added), with 38 C.F.R. 3.304(b) (1977) (presumption of soundness rebutted "where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior" to acceptance and enrollment).

The Board acknowledged that in 2003, the VA's general counsel had concluded that, to the extent the regulation did not require clear and unmistakable evidence to rebut the presumption of aggravation, it reflected an

impermissible interpretation of Section 1111. Pet. App. 71a (citing VA Op. Gen. Counsel Prec. 3-2003 (July 16, 2003)). The Board also acknowledged that the Federal Circuit had reached the same conclusion the following year in *Wagner* v. *Principi*, 370 F.3d 1089 (2004). Pet. App. 71a. The Board explained, however, that "application of a subsequently-invalidated regulation * * * does not constitute 'obvious error' or provide a basis for reconsideration of the decision" under the clear-and-unmistakable-error standard. *Ibid.* (quoting 61 Fed. Reg. 10,063, 10,065 (Mar. 12, 1996)). The Board also observed that "the Federal Circuit [had] specifically held that the presumption of soundness interpretation articulated in *Wagner* * * * does not have retroactive application." *Ibid.* Accordingly, the Board concluded that "the failure of the Board [in 1977] to find that [petitioner's] condition was not clearly and unmistakably aggravated by service as part of its presumption of soundness analysis cannot be considered to be" clear and unmistakable error. *Ibid.*

3. The Veterans Court affirmed in a divided decision. Pet. App. 25a-65a. Citing *Russell*, *supra*, the court explained (as relevant here) that, to establish a clear and unmistakable error, "a claimant must show that * * * an error occurred based on * * * the law that existed at the time the decision was made." Pet. App. 33a. The court further explained that "[t]he error must also have 'manifestly changed the outcome' of the decision." *Ibid.* (citation omitted).

The Veterans Court observed that "[i]n 1977, the Board was required to apply the law as it existed at that time, including [38 C.F.R.] 3.304(b)." Pet. App. 43a. The court explained that in 1977, that regulation required "clear and unmistakable evidence" only as to

whether "a disability preexisted service," not as to whether it was aggravated by service, in order to rebut the presumption of soundness. *Ibid.* Accordingly, the court concluded that the Board's 1977 decision did not constitute clear and unmistakable error. *Ibid.*

Independently, and in the alternative, the Veterans Court held that even if the law in 1977 required clear and unmistakable evidence as to aggravation, it would not support a claim of clear and unmistakable error in petitioner's case because petitioner had not "demonstrate[d] that these errors * * * would have manifestly changed the outcome of the 1977 Board's decision." Pet. App. 51a. The court explained that "[t]he 2016 Board noted * * * that there was conflicting evidence of *both* preexistence and aggravation, yet Mr. George does not allege that this evidence was, as a matter of law, insufficient to establish either preexistence or no aggravation of schizophrenia." *Ibid.* The court observed that petitioner "d[id] not in any of his pleadings include analyses or arguments as to specific evidence in 1977" to demonstrate that the outcome would have been different. *Id.* at 51a-52a. The court accordingly "decline[d] to find facts to assist a represented appellant in addressing arguments he has * * * chosen not to raise." *Id.* at 52a.

4. The court of appeals affirmed. Pet. App. 1a-24a. As relevant here, the court emphasized that a clear and unmistakable error "is a 'very specific and rare type of error,' and must be based on 'the record and the *law that existed at the time of the prior adjudication* in question,' such that ' * * * the statutory or regulatory provisions *extant at the time* were incorrectly applied.'" *Id.* at 13a-14a (citations omitted). The court reiterated that a clear and unmistakable error "must also be an

'undebatable' error that would have 'manifestly changed the outcome at the time it was made.'" *Id.* at 14a (citation omitted).

The court of appeals concluded that because the Board in 1977 had correctly applied the regulations as they existed at the time, petitioner's claim of clear and unmistakable error was foreclosed by the court's prior decisions in *Jordan* v. *Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005), and *Disabled American Veterans* v. *Gober*, 234 F.3d 682 (Fed. Cir. 2000), cert. denied, 532 U.S. 973 (2001). The court explained that in *Disabled American Veterans*, it had upheld the validity of 38 C.F.R. 20.1403(e), "which expressly states that [clear and unmistakable error] 'does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a *change in the interpretation* of the statute or regulation.'" Pet. App. 15a (citation omitted). The court of appeals also quoted the *Jordan* court's statement that "'the accuracy of the regulation as an interpretation of the governing legal standard does not negate the fact that § 3.304(b) did provide the first commentary on section 1111, and was therefore the initial interpretation of that statute,' which subsequently changed with the issuance of the 2003 [VA general counsel] opinion." *Id.* at 17a (brackets and citation omitted).

The court of appeals rejected petitioner's argument that its decision in *Patrick* v. *Nicholson*, 242 Fed. Appx. 695 (Fed. Cir. 2007), compelled a different result. See Pet. App. 18a-19a. The court explained that it was "not bound by" *Patrick*, which was "a nonprecedential decision that issued after [*Disabled American Veterans*] and *Jordan*." *Id.* at 19a. The court also observed that it had "expressly denied a motion to reissue" that

decision "as precedential." *Ibid.* (citing C.A. Doc. 26, *Patrick* v. *Shinseki*, No. 06-7254 (Fed. Cir. Aug. 21, 2007)).

Petitioner relied in part on this Court's statement in *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298 (1994), that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Id.* at 312-313. Invoking that principle, petitioner contended that "a new judicial pronouncement retroactively applies to *final* decisions, even those subject to a collateral attack, such as a request to revise a final Board" decision. Pet. App. 20a. The court of appeals rejected that argument, explaining that "new judicial pronouncements are to be given 'full retroactive effect in all cases *still open on direct review*' but not in final cases already closed." *Ibid.* (quoting *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86, 97 (1993)).

Finally, the court of appeals explained that its decision comports with the meaning of "clear and unmistakable error" in 38 U.S.C. 5109A and 7111, given that Congress had enacted those provisions in 1997 to "'codify'" both the then-existing regulation, 38 C.F.R. 3.105 (1997), and "the Veterans Court's 'long standing interpretation of [clear and unmistakable error].'" Pet. App. 22a (citations omitted). The court of appeals observed that in 1997, Section 3.105's "preamble provided that revision of a final [benefits] decision based on [clear and unmistakable error] was available '*except* where' the alleged error was based on 'a change in law or [VA] issue, or a *change in interpretation of law* or a [VA] issue.'" *Id.* at 23a (citation omitted). The court concluded that, "by codif[y]ing this regulation, Congress did not intend

for [clear and unmistakable error] to go so far as to attack a final VA decision's correct application of a then-existing regulation that is subsequently changed or invalidated, whether by the agency or the judiciary." *Id.* at 23a-24a.

ARGUMENT

Petitioner contends that the Board's 1977 disability-benefits decision in his case constitutes "clear and unmistakable error" because the Federal Circuit later held that a regulation in existence at the time of the decision reflected an impermissible interpretation of the governing statute. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Moreover, this case would be a poor vehicle in which to address the question presented because, under the clear-and-unmistakable-error standard, a claimant must show that "the result would have been manifestly different but for the error." 38 C.F.R. 3.105(a)(1)(i); 38 C.F.R. 20.1403(a) (same). Petitioner cannot make that showing and did not attempt to do so in the courts below. Further review is not warranted.

1. a. Petitioner contends that the 1977 benefits decision in his case involved "clear and unmistakable error" because a then-applicable regulation was later determined to be inconsistent with the governing statute. Petitioner agrees (Pet. 16-17) that, when Congress enacted 38 U.S.C. 5109A and 7111 in 1997, it intended to codify the longstanding VA practice and regulations, including 38 C.F.R. 3.105 (1997), that permitted revision of benefits decisions based on clear and unmistakable error. Petitioner likewise does not dispute that, under that longstanding practice—and under the regulations that implement Sections 5109A and 7111 today—a claim

of clear and unmistakable error must be based on the law in effect at the time of the decision. See 38 C.F.R. 3.105(a)(1), (i), (iii), and (iv), and 20.1403(b)(1) and (e). As the Veterans Court explained in *Russell* v. *Principi*, 3 Vet. App. 310 (1992) (en banc)—a decision that the House and Senate Reports specifically endorsed when Congress enacted Sections 5109A and 7111, see H.R. Rep. No. 52, 105th Cong., 1st Sess. 1-2 (1997); S. Rep. No. 157, 105th Cong., 1st Sess. 3 (1997)—"changes in the law subsequent to the original adjudication * * * do not provide a basis for revising a finally decided case." *Russell*, 3 Vet. App. at 313.

When the Board issued its 1977 decision denying petitioner's claim for benefits, the applicable regulation, Section 3.304(b), did not require clear and unmistakable evidence rebutting a presumption of aggravation. See 38 C.F.R. 3.304(b) (1977). That regulation was plainly "law" at the time. See 38 U.S.C. 4004(c) (1976) ("The Board shall be bound in its decisions by the regulations of the Veterans' Administration."). Petitioner does not dispute that the Board in 1977 correctly applied that regulation, as it was written, when it denied petitioner's claim for benefits.

Petitioner's claim of error here relies on the new interpretation of Section 3.304(b) and the statute it implements, 38 U.S.C. 1111, as set forth in the VA general counsel's 2003 precedential decision, VA Op. Gen. Counsel Prec. 3-2003, and the Federal Circuit's 2004 decision in *Wagner* v. *Principi*, 370 F.3d 1089. But that "change[] in the law subsequent to the original adjudication" of petitioner's benefits claim "do[es] not provide a basis for revising [his] finally decided case." *Russell*, 3 Vet. App. at 313. As the court of appeals correctly explained (Pet. App. 15a-16a), that the regulation was

subsequently determined by the agency and the court to reflect an impermissible interpretation of the statute, and that the regulation eventually was amended in 2005, see 70 Fed. Reg. 23,027, 23,029 (May 4, 2005), are immaterial to the question whether the Board's faithful application of the then-binding regulation in 1977 constituted a clear and unmistakable error.

b. Petitioner's contrary argument is premised on his observation (see Pet. 16) that a "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision," *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). From that principle, petitioner concludes that the Federal Circuit's 2004 decision in *Wagner* should not be viewed as "a *change* in the interpretation of the statute or regulation," 38 C.F.R. 20.1403(e) (emphasis added), and the 1977 regulation should not be viewed as part of "the *law* that existed when [the Board's] decision was made," 38 C.F.R. 20.1403(b)(1) (emphasis added). That argument lacks merit.

As a threshold matter, a judicial construction of a statute can be both a statement about what the statute has always meant and a change in the interpretation of the statute. Consider, for instance, this Court's decisions in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), and *Monroe* v. *Pape*, 365 U.S. 167 (1961). The Court in *Monell* concluded that 42 U.S.C. 1983 permits suits against municipalities, overruling *Monroe*'s contrary holding. See *Monell*, 436 U.S. at 695-701. As an authoritative judicial pronouncement, *Monell*'s holding is deemed to reflect the actual meaning of Section 1983 since its enactment in 1871. But *Monroe*'s holding was likewise so regarded when that decision was issued. Although *Monell* did not change

the *actual* meaning of Section 1983, it surely changed the prevailing "interpretation" of that provision. The same analysis applies here.

In any event, the relevant question is not whether a judicial decision construing a statute can represent a "change in interpretation" as a general matter, but instead whether such a decision effects a "change in the interpretation of the [VA benefits] statute" within the meaning of 38 C.F.R. 3.105(a)(1)(iv) and 20.1403(e). The Court in *Rivers* and other decisions has explained that, because an authoritative judicial interpretation of a statute clarifies what the statute has always meant, that interpretation should be applied in any subsequent case "still open on direct review." *Harper* v *Virginia Department of Taxation*, 509 U.S. 86, 97 (1993); see *Rivers*, 511 U.S. at 312-313 & n.12, cf. *Henderson* v. *United States*, 568 U.S. 266, 271 (2013); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

That general principle, however, does not address whether and under what conditions a litigant may collaterally challenge or reopen an otherwise final decision. The answer to that question depends on the specific context and generally may be determined by Congress. Cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226-227 (1995). For instance, although a new constitutional rule announced by this Court would apply to all criminal cases still open on direct review, see *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), Congress has specified more stringent requirements for a federal prisoner to seek postconviction relief based on such a new rule, see 28 U.S.C. 2255(f)(3) and (h)(2). Congress is under no obligation to allow claimants to seek reopening or revision of final VA benefits decisions at all, and when it chose to authorize such requests, it had broad

latitude to specify the conditions that a claimant must satisfy.

Here, Congress chose to codify the longstanding VA practice of allowing final benefits decisions to be revised on the ground of clear and unmistakable error—"a very specific and rare kind of error" that excludes "the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." 38 C.F.R. 20.1403(a) and (e); see 38 C.F.R. 3.105(a)(1)(iv). That standard precludes a finding of clear and unmistakable error when "the prior board decision represents a correct application of the statute or regulation *as it was interpreted* at the time of the decision." *Disabled American Veterans* v. *Gober*, 234 F.3d 682, 697 (Fed. Cir. 2000) (emphasis added), cert. denied, 532 U.S. 973 (2001). Contrary to petitioner's position, nothing requires the old interpretation *itself* to have been correct. Instead, all that is needed to defeat a claim of clear and unmistakable error is a showing that the agency's decision was consistent with the prevailing interpretation of the relevant statute or rule at the time the decision was made. That is a familiar legal concept. Cf., *e.g.*, *United States* v. *Leon*, 468 U.S. 897, 920-921 (1984) (holding that suppression of evidence is unwarranted if an officer acts in "objective good faith" reliance on a warrant, even if the warrant is later found to have been defective).

Petitioner's contrary view would effectively convert a clear and unmistakable error from "a very specific and rare kind of error," 38 C.F.R. 20.1403(a); see 38 C.F.R. 3.105(a)(1)(i) (same), into a garden-variety error of the sort regularly encountered in administrative law, cf. 5 U.S.C. 706(2)(A). That would be contrary to Congress's

intent in codifying clear-and-unmistakable-error review as reflected in longstanding VA practice and regulations, and would "not give adequate weight to the finality of judgments." *Jordan* v. *Nicholson*, 401 F.3d 1296, 1299 (Fed. Cir. 2005) (discussing clear-and-unmistakable-error review); cf. *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 758 (1995) ("New legal principles, even when applied retroactively, do not apply to cases already closed."). Petitioner asserts (Pet. 25) that "'finality' principles * * * have no application" here because the "entire purpose of the [clear-and-unmistakable-error] statutes is to create an exception to finality." But while Congress has authorized reexamination of final VA benefits decisions under specified circumstances, its continuing concern for values of finality is manifested by its adoption of a substantive standard far more demanding than the one that applies on a direct appeal.

Petitioner's view also is undermined by the preamble in 38 C.F.R. 3.105, which provides (today as in 1997) that review of decisions for clear and unmistakable error is not available when, *inter alia*, there is "a change in law or a [VA] issue, or a change in interpretation of law or a [VA] issue." 38 C.F.R. 3.105; accord 38 C.F.R. 3.105 (1997). That text, which Congress sought to codify when it enacted Sections 5109A and 7111, refers separately to a "change in law" and a "change in interpretation of law." Whether or not a new judicial construction of a statute effects a "change in law" within the meaning of that preamble, it effects a "change in interpretation of law." Petitioner suggests that a "change in interpretation of law" occurs only when "the VA adopts a new regulation (or reinterprets a regulation) by choosing among several 'permissible constructions.'" Pet. 21 (brackets and citation omitted). But a change from an

impermissible or incorrect interpretation to a permissible or correct one is still a *change*.

Although petitioner emphasizes the Federal Circuit's 2004 decision in *Wagner*, the VA general counsel already had determined a year earlier that the 1977 regulation reflected an impermissible interpretation of the statute. See VA Op. Gen. Counsel Prec. 3-2003. Precedential opinions issued by the VA general counsel are binding on the agency. See 38 U.S.C. 7104(c) ("The Board shall be bound in its decisions by * * * the precedent opinions of the chief legal officer."). Accordingly, the Board would have ceased applying the 1977 regulation when the 2003 general counsel opinion was issued. Cf. *Wagner*, 370 F.3d at 1092. Yet petitioner does not assert that the *agency*'s actions, standing alone, would have provided the basis for a claim of clear and unmistakable error. Cf. Pet. 16 (limiting his argument to circumstances "when a court definitively interprets one of VA's governing statutes"); Pet. 22-23 (similar). Petitioner identifies no sound basis for treating a new interpretation adopted through internal agency processes as a "change in interpretation of law," while declining to accord the same treatment to a new judicial construction.

c. Petitioner's other arguments are unavailing.

Petitioner relies in part (Pet. 17-18) on a reference in the legislative history of Sections 5109A and 7111 to the Social Security claims system. Petitioner reads that legislative history to suggest that reopening of final decisions in the two categories of cases should be governed by the same standard. Pet. 17. Relying on *Munsinger* v. *Schweiker*, 709 F.2d 1212 (8th Cir. 1983), petitioner further argues that reopening of Social Security determinations is available in circumstances like those

presented here, where the statutory interpretation on which the agency's benefits decision was based is found to be incorrect. Pet. 18. That argument is unsound.

As with VA benefits determinations, a request to reopen a Social Security claim "is precluded" if the request is premised on "a change of legal interpretation * * * upon which the initial determination was based." *Fox* v. *Bowen*, 835 F.2d 1159, 1163-1164 (6th Cir. 1987). The Eighth Circuit in *Munsinger* likewise explained that "reopening to revise a determination" of Social Security benefits is not appropriate unless "the result reached [was] legally erroneous *at the time it was reached*." 709 F.2d at 1216 (emphasis added); see *ibid.* ("A case may not be reopened 'if the only reason for reopening is a *change* of legal interpretation or administrative ruling upon which the determination or decision was made.'") (citation omitted). In *Munsinger*, the court found that the original decision was legally erroneous at the time it was reached because the ALJ had misapplied the governing statute as it was then written. See *id.* at 1217. Here, by contrast, the 1977 Board *correctly* applied the 1977 regulation as it was then written, see 38 C.F.R. 3.304(b) (1977).

Petitioner's reliance (Pet. 18-19) on the pro-veteran canon of construction also is misplaced. Under that canon, "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) (citation omitted). But "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Here, petitioner acknowledges (Pet. 16-17) that Sections 5109A and 7111 codified the longstanding VA practice of

review for clear and unambiguous error, as reflected in VA regulations and Veterans Court case law. And as explained above, clear and unambiguous error has not historically been understood to encompass claims, like petitioner's, that are premised on the judicial invalidation of a regulation that was correctly applied at the time of the original decision.

2. This case would be a poor vehicle in which to address the question presented because petitioner would not be entitled to relief even if the question were resolved in his favor. To demonstrate a clear and unmistakable error, a claimant must show that "the result would have been manifestly different but for the error." 38 C.F.R. 20.1403(a); see 38 C.F.R. 3.105(a)(1)(i) (same). Indeed, the claimant must show that "reasonable minds could not differ" on the conclusion that the error was not harmless. *Ibid.* Petitioner cannot make that showing and did not attempt to do so in the courts below.

Petitioner's claim of error is that the Board applied a regulation, 38 U.S.C. 3.304(b) (1977), that did not expressly require clear and unmistakable evidence to rebut a presumption that his schizophrenia was aggravated by his service, even though such evidence is required by the statute, 38 U.S.C. 1111. The Board's 1977 decision stated that "[a] preexisting injury or disease will be considered to have been aggravated by active wartime service, *where there is an increase in disability during such war service*, unless there is clear and unmistakable evidence that the increase in disability is due to the natural progress of the condition." Pet. App. 85a (emphasis added). The decision further stated that "[a]ggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record." *Ibid.* The Board

concluded that petitioner's "preexisting schizophrenia was not aggravated by his military service" and that "[e]ntitlement to service connection for schizophrenia has not been established." *Id.* at 86a.

The 1977 Board thus recognized that, in determining whether "[a] preexisting injury or disease [was] aggravated by wartime service," the agency must consider two subsidiary questions: (1) whether the veteran's medical condition worsened during the relevant period (*i.e.*, whether there was "an increase in disability during such war service"); and (2) if so, whether that worsening was *caused* by the military service rather than by "the natural progress of the condition." Pet. App. 85a. The Board in 1977 recognized that, where the first prerequisite is satisfied, the veteran is entitled to benefits "unless there is clear and unmistakable evidence that the increase in disability is due to the natural progress of the condition" rather than to the military service. *Ibid.* The Board did not appear, however, to view the "clear and unmistakable evidence" requirement as applicable to the antecedent question whether the veteran's medical condition worsened during the relevant time period.

In denying petitioner's claim for benefits, the 1977 Board did not specify which of the two requirements described above it believed petitioner had failed to satisfy. It is therefore possible that the Board would have reached a different outcome if it had required clear and unmistakable evidence that petitioner's schizophrenia did not worsen during his period of service. But there is no basis to conclude that the Board *definitely* would have reached a different outcome, *i.e.*, that "reasonable minds could not differ" on a conclusion that "the result [in petitioner's case] would have been manifestly different" if the binding VA regulation at the time had re-

flected the interpretation of the statute that the current version of the rule reflects. 38 C.F.R. 20.1403(a); see 38 C.F.R. 3.105(a)(1)(i) (same).

Moreover, as the Board explained in its 2016 decision in this case, petitioner "has not claimed that any specific evidence was missing from the claims file at the time of the September 1977 decision, the inclusion of which would have resulted in a manifestly different outcome to which reasonable minds could not differ." Pet. App. 79a. Accordingly, petitioner's argument "is essentially a contention that the Board improperly weighed and evaluated the evidence in the claims file at the time of its September 1977 decision," which "is inadequate to rise to the level of [clear and unmistakable error]." *Ibid.* And as the Veterans Court held, petitioner did not assert in that court any "analyses or arguments" establishing that he was prejudiced by the flaw in the prior regulation. See *id.* at 52a.

Accordingly, petitioner's inability to establish that the Board's 1977 decision would have been different if the regulation in effect then had been consistent with the governing statute imposes an independent barrier to his effort to establish a "clear and unmistakable error" under 38 C.F.R. 20.1403(a). Veterans who cannot establish a clear and unmistakable error may still be able to reopen their claims on the basis of a new judicial pronouncement, at least in certain circumstances. 38 U.S.C. 5110(a)(3) and (g). Although benefits are not fully retroactive in such cases, see *ibid.*, petitioner and similarly situated veterans are not wholly without recourse.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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