No. 21-465

In the Supreme Court of the United States

JAMES L. KISOR, 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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether certain records relating to petitioner's prior military service were "relevant official service department records" for purposes of 38 C.F.R. 3.156(c)(1), so that petitioner should have received reconsideration and an earlier effective date for his veteran's benefits.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals for Veterans Claims:

Kisor v. *McDonald*, No. 14-2811 (Jan. 28, 2016)

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

Kisor v. *Shulkin*, No. 16-1929 (Sept. 7, 2017)

Kisor v. *Shulkin*, No. 16-1929 (Jan. 31, 2018) (order denying petition for panel rehearing and rehearing en banc)

Kisor v. *McDonough*, No. 16-1929 (Apr. 30, 2021) (order denying petition for rehearing en banc)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 21-465

JAMES L. KISOR, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 995 F.3d 1316. The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. 43a-105a) is reported at 995 F.3d 1347. A prior opinion of the court of appeals is reported at 869 F.3d 1360. The opinion of the Court of Appeals for Veterans Claims is not reported in the Veteran Appeals Reporter but is available at 2016 WL 337517.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2021. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for

rehearing. The effect of this Court's order was to extend the deadline for filing a petition for a writ of certiorari in this case to September 27, 2021. The petition was filed on September 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) administers a program to provide monetary benefits to veterans who become disabled as a result of their military service. See 38 U.S.C. 301(b); 38 U.S.C. 1110, 1131 (2006); *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). Claims for benefits are received and processed by a VA regional office, which renders an initial decision. See *Henderson*, 562 U.S. at 431. A veteran who is dissatisfied with the regional office's decision may seek de novo review by the Board of Veterans' Appeals (Board), a component of the VA. See *ibid.*; see also 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court that has exclusive jurisdiction to review decisions of the Board. 38 U.S.C. 7252, 7266. Any party may in turn appeal the Veterans Court's decision to the Federal Circuit, 38 U.S.C. 7292(a), which has jurisdiction to "decide all relevant questions of law, including interpreting constitutional and statutory provisions," 38 U.S.C. 7292(d)(1).

2. Generally speaking, a veteran is entitled to monthly monetary benefits if he or she is disabled because of injury or disease incurred "in the line of duty" during military service. 38 U.S.C. 1110 (2006) and 38 U.S.C. 1114, 1131, 1134. With certain exceptions, these payments generally run from an effective date

tied to the VA's receipt of the veteran's claim for benefits. 38 U.S.C. 5110(a) (2006); see 38 U.S.C. 5110(b)-(n).

As relevant here, VA regulations authorize the agency either to "reopen" or to "reconsider" final claims decisions in light of additional evidence. 38 C.F.R. 3.156. A claimant may "reopen a finally adjudicated claim by submitting new and material evidence." 38 C.F.R. 3.156(a).[1] Evidence is new if it has "not previously [been] submitted to agency decisionmakers"; it is material if, when considered alone or with other evidence, it "relates to an unestablished fact necessary to substantiate the claim." *Ibid.* If a closed claim is later reopened and is ultimately granted based on new and material evidence, the effective date of the award is the "[d]ate of receipt of [the] new claim or [the] date entitlement arose, whichever is later." 38 C.F.R. 3.400(q)(2).

Alternatively, the VA will "reconsider" a claim if it receives "relevant official service department records that existed," but that "had not been associated with the claims file," when the agency previously decided a claim. 38 C.F.R. 3.156(c)(1). Such records include "[s]ervice records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name." 38 C.F.R. 3.156(c)(1)(i). When the VA awards benefits after reconsidering a claim, the effective date of the award is

---

[1] A revised version of 38 C.F.R. 3.156(a) took effect in February 2019. See 84 Fed. Reg. 2449 (Feb. 7, 2019); 84 Fed. Reg. 138, 169 (Jan. 18, 2019). Unless otherwise noted, all citations in this brief refer to the version of the regulations that was in effect in 2018. Various statutory changes effective February 19, 2019, do not apply to this case. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105; 84 Fed. Reg. at 2449.

"the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. 3.156(c)(3). The reconsideration provision thus serves as an "exception to the general effective date rule," allowing the effective date of an award to "relate back to the original claim or date entitlement arose even though the decision" has previously become final. 70 Fed. Reg. 35,388 (June 20, 2005).

3. This case arises from administrative proceedings on petitioner's claim for veteran's benefits for posttraumatic stress disorder (PTSD). To establish that disability, a claimant must show (1) "medical evidence diagnosing the condition"; (2) an "in-service stressor," such as experience in combat; and (3) "a link, established by medical evidence, between current symptoms and [the] in-service stressor." 38 C.F.R. 3.304(f).

a. Petitioner served in the Marine Corps from 1962 to 1966 and fought in the Vietnam War. Pet. App. 5a. In 1982, he filed a claim for disability benefits for PTSD. *Ibid.* The evaluating psychiatrist noted that petitioner had been involved in a "major ambush which resulted in 13 deaths" in his company during "Operation Harvest Moon." *Ibid.* (citation omitted). After considering these and other facts, the psychiatrist diagnosed him with "a personality disorder as opposed to PTSD." *Ibid.* (citation omitted). In 1983, the VA regional office reviewed the evidence, concluded that petitioner's claim of PTSD was "not shown by evidence of record," and denied his claim for benefits. C.A. App. 23 (capitalization altered); see 38 C.F.R. 4.127 (1983) ("[P]ersonality disorders will not be considered as disabilities."); see also Pet. App. 5a-6a. Petitioner filed a notice of disagreement, but the denial became final after he failed to perfect an appeal. Pet. App. 6a.

b. In 2006, petitioner moved to reopen his claim. Pet. App. 6a. While the motion was pending, petitioner submitted a 2007 psychiatric evaluation that diagnosed him with PTSD, and a VA examiner confirmed that diagnosis. *Ibid.* Petitioner also submitted Department of Defense records regarding his military service, medals, and combat history. *Ibid.* The VA regional office reviewed petitioner's submissions, along with the evidence submitted with his original claim, and granted his claim for benefits at a 50% disability rating effective June 5, 2006—the date the agency had received petitioner's motion to reopen. *Id.* at 6a-7a. After petitioner noted his disagreement with both the disability rating and the effective date, the regional office increased his disability rating, but did not change the effective date. *Id.* at 7a.

c. Petitioner appealed to the Board, which held that he was not entitled to an earlier effective date. Pet. App. 7a. The Board observed that petitioner's original claim had been denied in 1983 "because he did not have a diagnosis of PTSD" at that time. C.A. App. 81. It explained that June 5, 2006—the date the VA had received petitioner's motion to reopen—was the "earliest effective date" allowable for his award of benefits. *Id.* at 84.

Although petitioner had not raised the issue, the Board noted that, as an alternative to seeking to reopen his prior claim, petitioner instead might have sought reconsideration of his claim under 38 C.F.R. 3.156(c) based on service records submitted in connection with his 2006 request "documenting petitioner's participation in Operation Harvest Moon." Pet. App. 8a; see *id.* at 7a-8a. But the Board determined that the additional service records at issue were not "relevant" to the original denial of his claim in 1983 and therefore did not

warrant reconsideration. C.A. App. 90; see Pet. App. 8a.

The first document was a page of personnel records, which petitioner had submitted in 2006, noting that he had "participat[ed] in Operation Harvest Moon" in 1965. C.A. App. 89 (capitalization altered); see *id.* at 16. The second document, located by a VA official in 2007, was an extract from the "daily log" of petitioner's battalion. *Id.* at 89; see Pet. App. 6a. As noted above, however, the psychiatrist who had evaluated petitioner with respect to his original claim was aware of petitioner's participation in Operation Harvest Moon; petitioner's claim had been denied not based on any question regarding that participation, but "because there was no diagnosis of PTSD." Pet. App. 8a.

d. The Veterans Court affirmed for the same reasons. 2016 WL 337517.

4. The court of appeals also affirmed. 869 F.3d 1360. Petitioner contended that the Board had erred by interpreting the term "relevant official service department records" in 38 C.F.R. 3.156(c)(1) to mean "records that countered the basis of the prior denial." 869 F.3d at 1366 (citation omitted). He argued that prior service records are "relevant" within the meaning of the regulation as long as they are probative of "any fact that is of consequence to the determination of the action." *Ibid.* (citation and emphasis omitted). The records at issue here, he contended, were relevant to other criteria for establishing a compensable disability. See *ibid.* The court determined that the regulation was ambiguous, but it deferred to the agency's reasonable construction of the rule under *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997). 869 F.3d at 1367-1369; see Pet. App. 4a.

5. This Court granted certiorari to decide "whether [it] should overrule" *Seminole Rock* and *Auer*. 139 S. Ct. 2400, 2408. The Court declined to overrule those decisions while "reinforc[ing] [the] limits" of the doctrine it had recognized in those cases. *Ibid.* In particular, the Court explained that "the possibility of deference can arise only if a regulation is genuinely ambiguous * * * even after a court has resorted to all the standard tools of interpretation." *Id.* at 2414. The Court further explained that deference is not warranted where "a court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, fair, or considered judgment." *Ibid.* (brackets, citation, and internal quotation marks omitted).

Applying those limits, this Court vacated the court of appeals' judgment and remanded the case for further proceedings. The Court explained that the court of appeals had been too quick to "declar[e] the regulation ambiguous." 139 S. Ct. at 2423. Although the government had argued that the regulation unambiguously supported the court of appeals' judgment—and that reliance on *Seminole Rock* deference therefore was unnecessary, see U.S. Br. 47-52, *Kisor* v. *Wilkie*, *supra* (No. 18-15)—this Court declined to reach that question, 139 S. Ct. at 2424. Instead, the Court instructed that on remand, the court of appeals should "seriously think through" the government's position, and any contrary arguments asserted by petitioner, "[b]efore even considering deference." *Ibid.* The Court instructed the court of appeals to "make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." *Ibid.*

6. a. On remand, both the government and petitioner argued that the regulation was not genuinely ambiguous. Pet. App. 9a. Applying the framework laid out by this Court, the court of appeals agreed that "in the context of § 3.156(c)(1), the term 'relevant' has only 'one reasonable meaning,' the meaning the Board attributed to it." *Id.* at 4a. That is, "in order to be 'relevant'" for purposes of reconsideration under Section 3.156(c), a record must "speak to a matter in issue" in the original claim proceeding. *Ibid.*

The court of appeals explained that this construction made the most sense within the regulatory context. Unlike the provision for reopening, which makes benefits effective "no earlier than the date of the request for reopening," Pet. App. 11a, "the effective date for an award under § 3.156(c) is retroactive to the 'date entitlement arose or the date VA received the previously decided claim,'" *id.* at 13a (quoting 38 C.F.R. 3.156(c)(3)). That more generous effective date is available "only if the award is 'based all or in part on' the newly identified records." *Ibid.* But if particular records are duplicative of those the VA considered in reaching its prior decision, or if the records speak "to an undisputed fact," then the claimant "could not obtain an award 'based all or in part on'" such records. *Ibid.* The court of appeals accordingly concluded that relevant records must speak, "directly or indirectly, to the basis for the VA's prior decision." *Ibid.*

The court of appeals further explained that this understanding was consistent with the regulation's purpose of placing "a veteran in the position he would have been [in] had the VA considered the relevant service department record before the disposition of his earlier claim." Pet. App. 13a (quoting *Blubaugh* v. *McDonald*,

773 F.3d 1310, 1313 (Fed. Cir. 2014)). The court also noted that its interpretation of the regulation was consistent with its prior holding that, "in the context of veteran's benefits," relevant evidence "is evidence that 'must tend to prove or disprove a material fact.'" *Ibid.* (quoting *AZ* v. *Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013)).

Applying the regulation to the facts of this case, the court of appeals agreed with the Board and the Veterans Court that the records submitted in 2006 and 2007 "were not 'relevant' because they did not pertain to the basis of the 1983 denial, the lack of a diagnosis of PTSD." Pet. App. 15a. Instead, the records simply addressed "a matter that was not in dispute: the presence of an in-service stressor." *Id.* at 16a; see *id.* at 10a. The court declined petitioner's invitation to "resort to the 'pro-veteran canon' of construction," explaining that it had already determined the regulation's meaning "through the use of ordinary textual analysis tools," and that there was "no remaining interpretive doubt." *Id.* at 17a (citation omitted).

Judge Reyna dissented. He would have held that under Section 3.156(c), "relevant . . . records" are those that "address a necessary and unestablished element of the claim as a whole," even if they do not "address facts expressly 'in dispute.'" Pet. App. 28a. Judge Reyna would have found that test for relevance satisfied here. In his view, "regardless of whether the presence of [petitioner's] in-service stressor was 'disputed' by the VA, it was not *established* at the time of the VA's first decision." *Id.* at 34a-35a. In addition, because Judge Reyna found that the majority's interpretation was not "unambiguously correct," he would have relied on the pro-veteran canon of construction. *Id.* at 38a.

b. The court of appeals denied petitioner's request for rehearing en banc. Pet. App. 43a-45a. Five judges joined one or both of two opinions concurring in the denial of rehearing. See *id.* at 44a. Those opinions—by then-Chief Judge Prost and Judge Hughes—set forth the concurring judges' views on the pro-veteran canon of construction, and they explained that the clarity of the regulation rendered the canon irrelevant to the proper disposition of this case. See *id.* at 46a-67a (Prost, C.J., concurring in the denial of the petition for rehearing en banc); *id.* at 68a-72a (Hughes, J., concurring in the denial of rehearing en banc). Judge Dyk also concurred in the denial of rehearing en banc. He concluded that the decision did not warrant en banc review because "[s]ervice department records relevant to a claim for benefits will continue to provide grounds for reconsideration (and an earlier effective date) if they relate to a disputed claim element," and that the pro-veteran canon "simply is not relevant to the disposition of this case." *Id.* at 73a, 76a (Dyk, J., concurring in the denial of rehearing en banc).

Judge O'Malley and Judge Reyna each dissented from the denial of rehearing en banc, joined by each other and by Judges Newman and Moore. Pet. App. 44a; see *id.* at 78a-104a.

DISCUSSION

Petitioner contends (Pet. 14-21) that, under 38 C.F.R. 3.156(c), his award of benefits should be made retroactive to 1982, the date the VA received his initial claim. The court of appeals correctly rejected that reading of Section 3.156(c), and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. As explained above (see pp. 3-4, *supra*), the VA's regulations distinguish between *reopening* a prior claim for benefits on the basis of "new and material evidence" not previously submitted to agency decisionmakers, 38 C.F.R. 3.156(a), and *reconsidering* a claim on the basis of "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. 3.156(c)(1). When a claim is *reopened* and then granted, the veteran is generally entitled to benefits from the date the VA received the *claim to reopen* or the date entitlement arose, whichever is later. 38 C.F.R. 3.400(q)(2). By contrast, when a claim is *reconsidered* and then granted "based all or in part" on previously overlooked records, the veteran is generally entitled to benefits from the date the VA received the *previously decided claim* or the date entitlement arose, whichever is later. 38 C.F.R. 3.156(c)(3).

In practice, Section 3.156(c) mandates an earlier effective date for a benefits award when "the veteran's claim was originally denied due to error or inattention on the part of the government," as where the VA fails to consider pertinent service department records that existed at the time of the original denial. *Sears* v. *Principi*, 349 F.3d 1326, 1331 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004). Section 3.156(c) thus serves to "ensure[] that a veteran is not denied benefits due to an administrative error," by placing the "veteran in the position he would have been [in] had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh* v. *McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014).

Here, the court of appeals correctly determined (as had the VA) that, while petitioner's 2007 PTSD diagnosis was new and material evidence that warranted *reopening*, the additional service department records were not "relevant," 38 C.F.R. 3.156(c)(1), to the agency's 1983 denial of petitioner's claim for benefits, and thus *reconsideration* and retroactive benefits were not appropriate. The additional service department records detailed petitioner's service in Vietnam and his combat participation in Operation Harvest Moon. Pet. App. 6a. At the time of the original 1983 decision, however, it was undisputed that petitioner had participated in Operation Harvest Moon during the Vietnam War. *Id.* at 14a, 16a. Indeed, the psychiatrist who examined petitioner with respect to the original claim had documented that fact. See *id.* at 14a.

Petitioner's original claim was denied because, notwithstanding such participation, "he had no diagnosis of PTSD" in 1983, and such a diagnosis was a prerequisite to an award of benefits. Pet. App. 14a; see C.A. App. 23. The additional service department records submitted in 2006 and 2007 do not show that petitioner had such a diagnosis as of 1983. Instead, they simply further confirm what no one had previously disputed—that petitioner had participated in Operation Harvest Moon. The additional service department records thus were irrelevant to the dispositive defect in petitioner's 1983 claim. Indeed, petitioner does not seriously dispute that the VA would have denied the benefits for the same reason in 1983 even if it had considered the additional records.

Petitioner suggests that, because PTSD is a "'differential diagnosis,'" the requirements of an in-service stressor and a PTSD diagnosis "cannot so neatly be

separated." Pet. 20 (citation omitted). But as discussed above, the records before the VA in 1983 already provided evidence of the same in-service stressor. Petitioner "has not made any showing that the service records at issue were relevant, even indirectly, to undermining the basis for the [VA's] 1983 rejection of his claim that he was suffering from PTSD, a rejection that did not question [petitioner's] experiences in the service." Pet. App. 10a. And while petitioner briefly suggests (Pet. 20-21) that the existence of an in-service stressor *was* disputed in 1983, that assertion is unpreserved and inconsistent with petitioner's prior arguments to, and the understandings of, both this Court and the court of appeals. See 139 S. Ct. at 2409, 2423; 869 F.3d at 1358; Pet. App. 10a; Pet. Reply Br. 19, *Kisor* v. *Wilkie*, *supra* (No. 18-15); Pet. C.A. Br. 6-7. In any event, even if it had been timely raised, petitioner's assertion that his participation in combat was disputed would amount, at most, to a request for fact-bound error correction that would not warrant this Court's review. Cf. Pet. App. 76a (Dyk, J., concurring in the denial of rehearing en banc) (stating that disagreement between the majority and dissent on this issue was "hardly a ground for en banc review").

In determining that petitioner was not entitled to reconsideration, the court of appeals correctly interpreted Section 3.156(c)(1). As this Court had instructed, see 139 S. Ct. at 2424, the court of appeals considered the text, structure, history, and purpose of the regulation and determined that it does not have "more than one reasonable meaning." *Ibid.*; see Pet. App. 4a. Rather, "to be 'relevant' for purposes of reconsideration, additional records must speak to the basis for the VA's prior decision." Pet. App. 13a.

The text of the regulation favors the court of appeals' interpretation. The ordinary meaning of "relevant" is "[h]aving a bearing on or connection with the matter at hand." *The American Heritage Dictionary of the English Language* 1483 (5th ed. 2016) (*American Heritage*); see 13 *The Oxford English Dictionary* 561 (2d ed. 1989). In legal usage, the term likewise ordinarily means "tending to prove or disprove a matter in issue." *Black's Law Dictionary* 1481 (10th ed. 2014) (*Black's*); cf. Fed. R. Evid. 401. And as the court explained (Pet. App. 13a), that same meaning applies in the context of veterans' benefits, where evidence is "relevant" if it "tend[s] to prove or disprove a material fact." *AZ* v. *Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013).

Under Section 3.156(c)(1), the "matter at hand" *American Heritage* 1483, to which the additional records must be "relevant," 38 C.F.R. 3.156(c)(1), is whether to reconsider the VA's prior decision denying the veteran's claim. The reason for the prior denial is thus the "matter in issue," *Black's* 1481, or the "material fact," *AZ*, 731 F.3d at 1311. That is the most natural reading of the first sentence of the regulation, which contemplates that the VA will "reconsider the claim" only if the agency "receives or associates with the claims file relevant" additional records. 38 C.F.R. 3.156(c)(1).[2]

---

[2] That commonsense understanding of what it means for service department records to be "relevant" in this context is consistent with the use of that term elsewhere in the veterans' benefits scheme. For example, the VA has a duty to make reasonable efforts to obtain "relevant private records" identified in a veteran's claim. 38 U.S.C. 5103A(b)(1). A record does not qualify as relevant unless it has "a reasonable possibility of helping to substantiate the veteran's claim." *Golz* v. *Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010).

The role of 38 C.F.R. 3.156(c)(1) within the overall regulatory scheme reinforces that reading. As explained above, the hallmark of reconsideration (as distinct from reopening) of a prior claim is that the VA concludes that its prior decision was incorrect *ab initio*—*i.e.*, that the VA might have reached a different result at the time of its prior decision if it had considered the additional records. Cf. 38 C.F.R. 3.156(c)(2) (providing that the VA will not reconsider a claim on the basis of "records that VA could not have obtained when it decided the claim"). To be "relevant" for purposes of reconsideration, the additional records therefore must speak to the basis for the VA's prior decision. Records that are duplicative of information previously before the VA, or that simply provide further confirmation of a fact that the agency had already recognized to be true at the time of its original benefits decision, cannot lead the VA to reconsider the merits of its earlier denial. Those records therefore are not "relevant official service department records" that can trigger an earlier effective date. 38 C.F.R. 3.156(c)(1).

That reading is confirmed by an adjacent provision. Section 3.156(c)(3) states that "[a]n award" in a case the VA reconsiders is retroactive only if the award is "made *based all or in part on* the records identified by paragraph (c)(1)," the provision requiring that additional records be "relevant." 38 C.F.R. 3.156(c)(3) (emphasis added); see 38 C.F.R. 3.156(c)(1). Read together, the two paragraphs demonstrate that Section 3.156(c)(3) "only applies when VA receives official service department records that were unavailable at the time that VA previously decided a claim for benefits and those records lead VA to award a benefit that was not granted in

the previous decision." *Blubaugh*, 773 F.3d at 1314 (citation, emphasis, and internal quotation marks omitted). Where, as here, service department records are duplicative of evidence already submitted as part of the initial claim, any retroactive award of benefits generally would not be "based all or in part on" those service department records.

In contrast, if a claim is denied because there is "no evidence of an in-service injury," the veteran can move for reconsideration based on "service department records that show an in-service injury." 70 Fed. Reg. at 35,389. Those records (accompanied by a medical opinion linking the injury to the veteran's disability), will trigger the earlier effective date under Section 3.156(c)(3). *Ibid.* In that case, the service department records are relevant because they tend to prove an as-yet unestablished element of a claim for benefits.

b. Petitioner's contrary arguments lack merit.

i. Petitioner contends (Pet. 15-17) that any document that should have been included in the claims file initially is "relevant" for purposes of Section 3.156(c)(1). That argument rests on the premise that the "relevant" matter for purposes of reconsideration is the claim as a whole, rather than the basis for the agency's prior decision. On petitioner's view, the VA would be required to reconsider its prior decision on a claim whenever a veteran submits previously unexamined service department records that support any element of that claim, even if the additional records could not have altered the VA's prior decision because they are duplicative or do not cast doubt on the stated ground for the VA's original denial of benefits.

If the VA had considered the service records at issue here in 1983 but had denied petitioner's claim based on

the absence of a PTSD diagnosis, petitioner would not now be entitled to a 1982 effective date under either of the competing views of Section 3.156(c)(1). Petitioner acknowledges (Pet. 12) that the purpose of Section 3.156(c) is to ensure that a veteran in his position receives the same stream of benefits he would have received if the agency had considered all relevant service department records at the outset. Petitioner does not explain how that regulatory purpose would be served by awarding him benefits retroactive to 1982, since such an award would place him in a *better* position than he would have occupied if the VA had considered the service department records in the course of its initial benefits decision.[3]

ii. Petitioner previously objected that the VA's interpretation of Section 3.156(c) was incorrect because it would make "'relevant' * * * mean the same thing as the defined term 'material'" in Section 3.156(a). Pet. Br. 58, *Kisor* v. *Wilkie*, *supra* (No. 18-15). Petitioner now argues (Pet. 17), however, that the VA's interpretation is incorrect because it gives those terms *different* meanings. Like his prior argument, petitioner's new contention fails.

---

[3] Petitioner suggests (Pet. 15) that the VA previously adopted his understanding of the regulation. That suggestion rests on an out-of-context quotation from the VA's response to a comment regarding 38 C.F.R. 3.156(c)(2). Section 3.156(c)(2) states that the provisions of subsection (c)(1) do not apply when the claimant initially failed to provide sufficient information for the VA to identify and obtain the records. In context, the VA was simply recognizing that, when a claimant has provided enough information for the VA to obtain service medical records, other records that should have been received at the same time may fall within the scope of Section 3.156(c)(1). See 71 Fed. Reg. 52,456 (Sept. 6, 2006).

For purposes of *reopening* a claim, the regulation defines "material" evidence as "existing evidence that * * * relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. 3.156(a). Unlike the "relevant official service department records" that can trigger reconsideration under 38 C.F.R. 3.156(c)(1), evidence may be "material" under Section 3.156(a) without suggesting that the VA's prior decision on the claim was incorrect when it was made. That was so in this case, where petitioner's submission of a 2007 PTSD diagnosis was "material" to his benefits claim even though it did not cast doubt on the VA's 1983 denial of benefits, which was premised on the absence at that time of any such diagnosis. Section 3.156(a) is thus broader than Section 3.156(c)(1) in two ways: The claimant can submit any kind of evidence (not merely service department records), and he can submit evidence that may warrant a different decision now without questioning any previous decision. That is why the effective date for a reopened claim, as opposed to a reconsidered one, does not relate back to the filing of the original claim.

Petitioner suggests (Pet. 17-18) that the regulatory history supports his argument that "material" and "relevant" must have the same meaning. That is incorrect. Until 2005, Section 3.156(a) allowed the VA to reopen a denied claim when it received "new and material evidence," including "records which presumably have been misplaced and have now been located." 38 C.F.R. 3.156(a) and (c) (2004). If the claim was reopened and granted based on new and material evidence "[o]ther than service department records," and that evidence was received after the final disallowance of the claim, the effective date was the "[d]ate of receipt of new claim or date entitlement arose, whichever is later." 38 C.F.R.

3.400(q)(1)(ii) (2004) (emphasis omitted). But if the claim was reopened and granted based on service department records, the effective date would "agree with evaluation (since it is considered these records were lost or mislaid) [sic] or [be the] date of receipt of claim on which prior evaluation was made, whichever is later." 38 C.F.R. 3.400(q)(2) (2004).

As petitioner observes (Pet. 17), the VA concluded that these regulations had caused unnecessary confusion. 70 Fed. Reg. at 35,388. The VA therefore amended subsection (c) to make clear that the "VA does not limit its reconsideration to 'misplaced' service department records." *Ibid.* The VA also removed "'new and material'" from subsection (c) to "eliminate possible confusion regarding the effective date" where relief is granted based on service department records that were unavailable at the time of the prior decision. *Ibid.* Those amendments did not disturb the usual rule that an earlier effective date applies where "the veteran's claim was originally denied due to error or inattention on the part of the government," while a later effective date applies when the claim is initially denied but "subsequently granted based on new and material evidence." *Sears*, 349 F.3d at 1331.

Petitioner is also wrong in suggesting (Pet. 18) that, because the VA has declined to define "material" evidence as "existing evidence that relates specifically to the reason why the claim was last denied," 66 Fed. Reg. 45,629 (Aug. 29, 2001), the same must be true of "relevant" evidence for purposes of Section 3.156(c)(1). That argument ignores the fact that reconsideration generally is based on error or inattention by the VA, while reopening is not. In any event, in the "material" evidence context, the VA has explained that evidence is

material if it "relates to an unestablished fact necessary to substantiate the claim." *Ibid.*; see 38 C.F.R. 3.156(a). Applying that same requirement to "relevant" evidence under Section 3.156(c)(1) would not entitle petitioner to an earlier effective date, since the record in 1983 already contained evidence of an in-service stressor without the additional service department records. See, *e.g.*, 139 S. Ct. at 2409.

2. Petitioner asserts (Pet. 21) that, if this Court grants certiorari to "construe Section 3.156(c), the Court may also confirm the appropriate role of the veteran's canon in the process of textual interpretation." But petitioner does not argue that review is independently warranted to address the pro-veteran canon. *Ibid.* As the court of appeals explained (Pet. App. 17a), the canon is inapplicable here because the regulation is not ambiguous. Even a liberal construction of a provision for veterans' benefits cannot "distort the language of [those] provisions." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); see *id.* at 286 (declining to "read into" the statute a policy favorable to veterans when the text and interplay of the statutory sections would not bear that interpretation).

For similar reasons, this case would not present an appropriate vehicle for considering the role of the pro-veteran canon. While petitioner points out (Pet. 26) that the opinions concurring in and dissenting from the denial of rehearing en banc suggested different approaches to that interpretive principle, and to its interaction with *Seminole Rock* deference, each of those opinions would have required at least some level of ambiguity before resorting to the pro-veteran canon. Compare Pet. App. 66a (Prost, C.J., concurring in the denial of the petition for rehearing en banc), with *id.* at

69a (Hughes, J., concurring in the denial of rehearing en banc), and *id.* at 99a (O'Malley, J., dissenting from the denial of the petition for rehearing en banc). Because the regulation at issue here is unambiguous, any disagreement about the proper scope of the pro-veteran canon—or its interaction with *Seminole Rock* deference, which the government did not seek and the court of appeals did not apply on remand—is not implicated in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

NOVEMBER 2021