3/3/23

No. 22-845

In the Supreme Court of the United States

ROBERT G. THORNTON,
Petitioner,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the veterans-benefits system, Congress has provided that an otherwise-final agency decision is subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation 38 U.S.C. § 7104(a). The Board of Veterans' Appeals (Board) applies a rebuttable presumption when reviewing veterans' disability claims.

The Supreme Court in *Mathis v. Shulkin*, 137 S.Ct. 1994 (2017): Statement of Justice Sotomayor respecting the denial of certiorari. This petition raises important questions about how the Government carries out its obligations to our veterans. The Board of Veterans' Appeals (Board) applies a rebuttable presumption when reviewing veterans' disability claims: Justice Gorsuch, dissenting from denial of certiorari. The VA appears to apply the same presumption in its own administrative proceedings, but where does this presumption come from? It enjoys no apparent provenance in the relevant statutes. There Congress imposed on the VA an affirmative duty to assist—not impair—veterans seeking evidence for their disability claims. See 38 U.S.C. § 5103A(a)(i). And consider how the presumption works in practice. But how is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve? The question presented are:

1. Whether, the appellant has demonstrated that [the]presumption of regularity operates to violate his

right to due process, of which a judge-made presumption of regularity allows for the Government to affirm the Board's decision, despite their findings to the contrary?

2. Whether, the veteran in his timely filing of the 2018 VA Form 9 rebutting the June 2015 untimely decision was denied his procedural due process under 38 U.S.C. § 7104(a) and 38 U.S.C. § 5103A, The VA's statutory "duty to assist" must extend this liberal reading to include issues raised in all documents or oral testimony submitted prior to the BVA decision.

3. When the Veterans Court applies FRE 201 [adjudicated facts] in one class and denies a FRE 201 in another class [similarly situated] a violation of rule of law?

4. Whether, In the Federal Circuit, a request for Judicial Notice of Adjudicated Facts is a mandatory requirement under FRE 201?

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DIRECT PROCEEDINGS

United States Court of Appeals for the Federal Circuit
No. 2022-1618
Robert Thornton, *Claimant-Appellant*, v.
Denis McDonough, Secretary of Veterans Affairs,
Respondent-Appellee
Date of Final Opinion: October 17, 2022
Date of Rehearing Denial: December 6, 2022

United States Court of Appeals for Veterans Claims
No. 19-7749
Robert Thornton, *Appellant*, v. Denis McDonough,
Secretary of Veterans Affairs, *Appellee*
Date of Final Order: December 21, 2021

RELATED PROCEEDINGS

United States Court of Appeals for the Federal Circuit
No. 2016-2264
Robert Thornton, *Claimant-Appellant*, v.
Denis McDonough, Secretary of Veterans Affairs,
Respondent-Appellee
Date of Final Opinion: November 8, 2016

United States Court of Appeals for the Federal Circuit
No. 2015-7107
Robert Thornton, *Claimant-Appellant*, v.
Denis McDonough, Secretary of Veterans Affairs,
Respondent-Appellee
Date of Final Opinion: December 15, 2015

United States Court of Appeals for Veterans Claims
No. 15-2059
Robert Thornton, *Petitioner*, v. Denis McDonough, Secretary of Veterans Affairs, *Respondent*
Date of Final Order: July 30, 2015

United States Court of Appeals for the Federal Circuit
No. 2014-7136
Robert Thornton, *Claimant-Appellant*, v. Denis McDonough, Secretary of Veterans Affairs, *Respondent-Appellee*
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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit dated October 17, 2022, is included at App.1a. The Memorandum Decision of the United States Court of Appeals for Veterans Claims dated December 21, 2021 is included at App.6a. These Opinions were not designated for Publications.

JURISDICTION

The Order of the United States Court of Appeals for the Federal Circuit denying a Petition for Rehearing dated December 6, 2022 is included at App.43a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

REGULATION INVOLVED

38 C.F.R. § 19.34
Determination that Notice of Disagreement or Substantive Appeal was not timely filed protested by claimant or representative.

> Whether a Notice of Disagreement or Substantive Appeal has been filed on time is an appealable issue. If the claimant or his or her representative protests an adverse determination made by the agency of original jurisdiction with respect to timely filing of the Notice of Disagreement or

Substantive Appeal, the claimant will be furnished a Statement of the Case. (Authority: 38 U.S.C. § 7105 (2016))

STATUTE INVOLVED

38 U.S.C. § 7104
Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

[. . .]

(c) The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.

(d) Each decision of the Board shall include—

(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record;

INTRODUCTION

The pervasive use of the presumption of regularity at the AOJ and the Board of Veterans Appeals, Court of Appeals for Veterans Claims and United States Court of Appeals for The Federal Circuit, in clear evidence to the contrary has denied Thornton a fair and impartial review of his disability claims citing; *Cushman v. Shinseki*, 576 F.3d 1290. *See*, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (finding that the state's inadvertent but prejudicial suppression of favorable evidence was a due process violation).

This case is about the presumption of regularity—how it may be triggered as well as rebutted. Courts often cite *United States v. Chemical Foundation, Inc.*, for the Supreme Court's statement of the presumption: "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." The presumption of regularity reflects Federal courts' deference to the other branches of Government and efficiency concerns. But it is not a carte blanche. After all, the presumption of regularity is rebuttable. *See Romero v. Wilkie*, No. 19-3687 (2020) . . . The judge-made presumption of regularity that presumes "that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations." *Crumlich v. Wilkie*, Docket no. 17-2630 (June 6, 2019).

In order to perfect an appeal of an adverse determination, governing statutory and regulatory provisions

require the submission, following an adverse rating action and adequate notice thereof, of a NOD and, following issuance of a statement or supplemental statement of the case, an adequate substantive or formal appeal. 38 U.S.C. § 7105(a) (West 1991); 38 C.F.R. §§ 20.200, 20.202 (2001) . . . A substantive appeal consists of a properly completed VA Form 9 or correspondence containing the necessary information. 38 C.F.R. § 20.202 (2001). Questions as to the adequacy of allegations of a substantive appeal will be made by the Board, which may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed. 38 U.S.C. § 7105(d)(3), (5) (West 1991); 38 C.F.R. §§ 20.202, 20.203 (2001).

§ 20.302 Rule 302 (b) Substantive Appeal—(1) General. Except in the case of simultaneously Contested claims, a Substantive Appeal must be filed within 60 days from the date that the agency of original jurisdiction mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later. (Authority: 38 U.S.C. § 7105(b)(1), (d)(3)) [57 FR 4109, Feb. 3, 1992; as amended at 66 FR 50318, Oct. 3, 2001; 68 FR 64806, Nov. 17, 2003; 73 FR 40748, July 16, 2008] . . . For the Board to ignore the statutory and regulatory requirements for perfecting an appeal would be to render both statute and regulation meaningless. The Board is bound by statute and regulation. 38 U.S.C. § 7104(a), (c) (West 1991 & Supp. 2001); 38 C.F.R. § 20.101(a) (2001). The Board is bound in fairness to all would-be appellants to give meaning to the statute and regulation.

ARGUMENT

This case in Mr. Thornton's Petition for Writ of Certiorari sets forth the pervasive use of the presumption of regularity at the AOJ and the Board of Veterans Appeals, Court of Appeals for Veterans Claims and United States Court of Appeals for The Federal Circuit, in face of prima facie evidence of clear evidence to the contrary on the record.

The Veteran's Court has applied the presumption of regularity to processes and procedures throughout the VA administrative process, including to the RO's mailing of an SOC. *See Crain v. Principi*, 17 Vet.App. 182, 186 (2003); *see also Redding v. West*, 13 Vet.App. 512, 515 (2000) (applying the presumption of regularity as to whether the RO received the veteran's power of attorney); *Baldwin v. West*, 13 Vet.App. 1, 5-6 (1999) (applying the presumption of regularity as to whether the RO examined and considered service medical records); *Schoolman v. West*, 12 Vet.App. 307, 310 (1999) (applying the presumption of regularity as to whether the RO sent the claimant an application form for dependency and indemnity compensation); *Mindenhall v. Brown*, 7 Vet.App. 271, 274 (1994) (applying the presumption of regularity to the RO's mailing of its decision to a veteran); *Davis*, 7 Vet.App. at 300 (applying the presumption of regularity to the Board's mailing of a copy of its decision to a veteran)

It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and the burden is on the plaintiff to

prove otherwise. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131, 142-143 (1926); *Brooks v. United States*, 213 Ct.Cl. 115, 121 (1977); *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 746, 572 F.2d 786, 805 (1978); and *Sanders v. United States*, 219 Ct.Cl. 285, 301-02, 594 F.2d 804, 813 (1979), and cases cited. The Board is presumed to provide a De Novo Review, but that presumption is a rebuttable one.

The judge-made presumption of regularity that presumes "that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations." *Crumlich v. Wilkie*, 31 Vet.App. 194, 203 (2019).

I. Board of Veterans Appeals Decision 07-18-19 (App.33a-42a)

The Board found and the petitioner notes:

1. In October 2007, the Veteran filed a claim for service connection for left ear hearing loss and tinnitus and an increase rating for right ear hearing loss.

2. In a September 2008 rating decision, the AOJ denied service connection for tinnitus and left ear hearing loss and an increased rating for right ear hearing loss . . . rating decision, the AOJ granted service connection for PTSD.

3. The Veteran filed a timely NOD disagreeing with the denial of service connection, increased rating for right ear hearing loss, and rating assigned for PTSD. R. at 5. (App.35a-37a).

4. An SOC was issued R. at 5 (App.35a-37a).

5. In August 2010, the Veteran filed a timely Substantive Appeal. R. at 5 (App.36a-37a).

6. In a December 2012 rating decision, the AOJ granted service connection for tinnitus and bilateral hearing loss and increased the Veteran's PTSD rating to 100 percent . . . the claim was granted in full. R. at 5 (App. 35a-38a).

7. Veteran filed a timely NOD disagreeing with the effective date of the awards. R. at 5 (App.36a-37a).

8. On June 4, 2014, the AOJ issued an SOC denying an effective date earlier than March 1, 2007 for the grant of service connection for PTSD, left ear hearing loss, tinnitus, and the assignment of a 40 percent evaluation for bilateral hearing loss. R. at 5 (App.26a-27a, 35a-38a).

9. The June 4, 2014 SOC was issued after the one-year appeal period following the date of notification of the December 2012 rating decision . . . Therefore, the date for timely filing of the Veteran's Substantive Appeal was August 4, 2014. On February 2, 2015, more than 60 days following the issuance of the SOC, VA received the Veteran's Substantive Appeal. R. at 5 (App.35a-38a).

10. In June 2015, the AOJ sent the Veteran a letter informing him that his Substantive Appeal was not a timely appeal as it was not filed within a year of the December 13, 2012 rating decision nor within 60 days of the June 4, 2014 SOC. R. at 5 (App. 35a-38a).

11. *The Veteran timely perfected an appeal of that determination*. R. at 6. (App.38a).

12. *After certification to the Board*, the Board has taken no action. R. 6. (App. 38a).

13. FINDING OF FACT: VA did not receive a Substantive Appeal within 60 days from the mailing of the SOC on June 4, 2012, or the one-year period from the mailing of the December 2012 rating decision that denied entitlement to service connection for tinnitus, left ear hearing loss, increased rating for right ear hearing loss, and the grant of service connection for PTSD. R. at 2. (App.33a).

II. Prima Facie Evidence of Clear Evidence to the Contrary to the Board on the Record and What the [BVA] Board Chose to Ignore.

1. In October 2007, the Veteran filed a claim for service connection for left ear hearing loss and tinnitus and an increase rating for right ear hearing loss. Veteran submitted attached with the claim a medical nexus opinion with supporting rationale. Oct 2007 the Veteran received VCCA Notice: We have received the following VA Form 21 4138 Statement in Support of Claim which we received on October 17 2007, Letter and evidence as supporting documentation for your claim, We are working on your claim and What Do We Still Need from You? See M21-1, Part III, Subpart iv Section B: d. Definition: New and Material Evidence, Examples of new and material evidence include

- written and sworn testimony of the claimant or witnesses to an event
- lay statements from a family member or friend, and
- a medical nexus opinion with supporting rationale.

RBA 2384-89, 2421-22, 2214-17, 2297-2305, 2702-06 (App.35a-38a).

2. April 14 2008 the Veteran received VCCA Notice: Please see the enclosed attachment "How You Can Help and How VA Can Help You" for more information about your claim, Important Information: A physical examination is needed to make a decision on your claim, send us any medical reports you have, VCAA NOTICE RESPONSE. In May 2008 veteran sent two (2) medical nexus opinion with supporting rationale. RBA 2289, 2060-87.

3. In a September 2008 rating decision: Evidence listed: Claim for benefits received May 13, 2008, Private treatment records, Bumrungrad International Hospital, dated June 26, 2007. Private treatment records, Dr. Jay Jones and Associates, from June 21, 2007 through June 26, 2007 and July 26, 2008, Buddy statement, Patrick O'Neill, dated received August 11, 2008, VA examination, Bumrungrad International Hospital, dated May 5, 2008. See M21-1, Part III, Subpart iv Section B: d. Definition: New and Material Evidence, Rating Decision (2) The evaluation of impaired hearing, right is continued as 0 percent disabling. (4) Service connection for dizziness was caused by some event or experience in service. Service connection is denied because dizziness is not considered an actually disabling condition, and there is no evidence the claimed condition exists. Service treatment records do not show any complaints of treatment for or diagnosis of dizziness in service. There is no evidence of dizziness or ongoing treatment from the time of your discharge to the present. There is no evidence of current treatment for dizziness, nor of a diagnosed illness which would cause dizziness. The evidence from Bumrungrad International Hospital submitted in connection with the current claim does not constitute new and material

evidence for impaired hearing, left, tinnitus. RBA 1971-78 (App.35a-36a).

4. The Veteran filed a timely NOD disagreeing with the denial of service connection for increased rating for right ear hearing loss, dizziness secondary to hearing loss R ear, rating and effective dates assigned for PTSD and for impaired hearing, left, tinnitus. Veteran disagreed the evidence from Bumrungrad International Hospital was not new and material evidence for impaired hearing, left ear and tinnitus. (App.8a, 35a-36a) RBA 1802-90, 1620-32.

See M21-1, Part III, Subpart iv Section B: d. Definition: a medical nexus opinion with supporting rationale. lay statements from a family member or friend.

5. An SOC was issued July 2010 De Novo Review, 38 C.F.R. § 3.2600(a) has a right to a review of that decision . . . [Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.] The DRO did not perform the requested 11-23-08 De Novo Review in the 07-19-10-SOC De Novo Review as require by Regulation 38 C.F.R. § 3.2600. The DRO-AOJ found and the petitioner notes: DRO-De Novo Review states evidence review; Private treatment records Dr. Jay Jones and Associates from June 2007 through February 2009. Which indicated additional evidence had been received with-in the one year time period of the issuance of the Sept. 2008 AOJ Decision and the VCAA Notice of 04-14-2008, within VCAA Notice time period to submit additional evidence. Dr. Jones submitted on 2-01-09

addendum to the 12-25-07 PTSD Report with additional expert medical opinions of the onset of PTSD and found the buddy statements in support of the petitioner's PTSD onset to be creditable. New evidence, 38 C.F.R. § 3.156(b) Authority: 38 U.S.C. § 501(a). RBA 1622-33, 1595, 1632. Evidence review: Private treatment records Bumrungrad International Hospital dated June 26 2007, Private treatment records Dr. Jay Jones and Associates from June 2007 through February 2009, Buddy statement, Patrick O'Neill dated received August 11 2008 also list VA examinations dated July 31 2008 and May 5 2008. The SOC DRO-Decision recited and deferred to the conclusions of the Sept. 12, 2008 decision and ignored the disagreements in the 2008 (NOD) Notice of Disagreement and New evidence, 38 C.F.R. § 3.156(b) Authority Veterans Service Center Manager; Your Rating Decision and this letter constitute our decision based on your claim. It represents all claims we understood to be specifically made, implied, or inferred in that claim. (App.7a-8a, 35a-36a) RBA 1971-78, 1476-97.

MR21-I MR, Part I, Chapter 5, Section C, states inter alia:

> b. VSCM's Responsibility for the Quality of the DRO's Decision; The VSCM is responsible for the quality of decisions in the VSC. This responsibility extends to ensuring that DROs properly apply all laws, regulations, and instructions to decisions rendered.

6. The (BVA) Board stated: In August 2010, the Veteran filed a timely Substantive Appeal. The appeal was never certified, thus remains pending un- adjudicated. Proper completion and filing of a Substantive Appeal are the last actions the appellant needs to take

to perfect an appeal 38 U.S.C. § 7105(a) (West 1991); 38 C.F.R. §§ 20.200, 20.202 (2001) (b)(1)(c)(1), (App. R. at 1408-09). (App.7a-8a, 36a-38a)

7. The Board found and the petitioner noted: In a December 2012 rating decision, the AOJ granted service connection for tinnitus and bilateral hearing loss and increased the Veteran's PTSD rating to 100 percent. The effective date for the grants was October 17, 2007. As the Veteran was awarded the highest possible rating for his PTSD and service connection was granted for tinnitus and bilateral hearing loss, the claim was granted in full. However, the DRO in 2012 rating decision stated: rating was based on "Statement received from veteran, accepted in lieu of Form 9, dated July 27, 2010, *which the petitioner did not submit and the Board did not find*. The submission "*claimant s substantive appeal in lieu of VA Form 9*" (RBA 1408-09) *was from the Disabled American Veterans (VSO) the veteran had terminated their representation on 07-28-10 and immediately notified the AOJ "no longer have DAV representing veteran "I was told they had filed a V-9 an appeal with BVA so to be sure I will send in my own*" (RBA 1376-79) and again on Aug. 3, 2010 "*You will be receiving my appeal to the BVA by Diplomatic Pouch*. The Aug. 1, 2010 Form 9 appealed whether new and material evidence was submitted for Bilateral H/L, effective dates for PTSD, Hearing Loss Rear [Diagnostic Code 6205, Meniere's disease (endolymphatic hydrops)] Usually, only affects one ear, secondary service connection to the 1970 grant for H/L R ear and dizziness claim. NOD 1971 remained pending un-adjudicated. (App.11a, 14a-15a, 35a-38a)

8. On Nov. 14, 2013 Appeals Election Letter. The issue(s) we accepted on appeal is/are: PTSD, Bilateral Hearing Loss, Tinnitus. The June 4, 2014 SOC [was issued after the one-year appeal period following the date of notification of the December 2012 rating decision . . . Therefore, the date for timely filing of the Veteran's Substantive Appeal was August 4, 2014]. The Board citing from the June 12, 2015 Notice of "untimely decision" disregards and suppresses the June 4, 2014 DRO-AOJ decision granting a March 1, 2007 effective date for all three disabilities and the issuance of the June 4, 2015 SOC denying earlier effective earlier than March 1, 2007. (App.6a, 9a, 13a, 23a-24a, 26a-, 36a-37a, 38a)

9. In June 2015, the AOJ sent the Veteran a letter informing him that his Substantive Appeal was not timely. The letter informed him that his Substantive Appeal was not a timely, along with his appellant rights. [Whether or not a claimant has timely filed a Notice of Disagreement is an appealable issue 38 C.F.R. § 19.34.] [CAVC-15-2059 (App.49a-57a, 35a-38a) The petitioner may now only obtain Board review of the RO's June 2014 decisions if he successfully challenges the RO's determination that he did not timely file his VA Form 9. As the RO wrote, he may initiate an appeal of that conclusion by submitting a Notice of Disagreement]. *The Veteran timely perfected an appeal of that determination* [38 C.F.R. § 19.34] (App.9a) . . . The petitioner appealed the untimely decision by filing of the Form 9 appeal of 2018 "the untimely decision" appeal was certified to the Board 2018. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding

and upon consideration of all evidence and material of record and applicable provisions of law and regulation 38 U.S.C. § 7104(a) shall be subject to one review on appeal to the Secretary. (App.9a-10a)

10. After certification to the Board, the Board has taken no action . . . (App.38a)

III. Aug. 5, 2022 Secretary's Response 19-7749

(Pg. 1-26) Appellee's Brief:

(P. 4) Appellant timely submitted his appeal to the Board. [R. at 1454]. (P. 5) a June 2014 Rating Decision, the RO awarded Appellant an earlier effective date of March 1, 2007, for the award of service connection . . . an SOC, also issued in June 2014, the RO denied Appellant's requests for the assignment of an effective date earlier than March 1, 2007. [R. at 993-1019]. (App.36a-37a)

(P. 6) June 12, 2015, the RO informed Appellant that it could not accept Appellant's February 2015 substantive appeal because it was untimely . . . Appellant timely appealed the RO's determination that his February 2015 substantive appeal was untimely. [R. at 200-11]. *The RO subsequently issued an SOC and Appellant perfected his appeal as to the timeliness of the February 2015 substantive appeal to the Board.* [R. at 139-62 (March 2018 Statement of the Case), 127 (May 2018 VA Form 9), 103 (August 2018 VA Form 8)] . . . On July 18, 2019, the Board issued its decision which determined that Appellant's February 2015 substantive appeal of the June 2014 SOC was not timely. [R. at 2-12]. (App.134a-158a, 36a-38a)

(P. 7) The Court determines whether a Board's decision on a factual issue is "clearly erroneous" in light of the record as a whole. *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007).

(P. 9) Appellant does, however, contest that the February 2, 2015, Substantive Appeal should have been deemed timely . . . The RO "may close the case for failure to respond after receipt of the [SOC]," but it is not required to do so. 38 U.S.C. § 7105(d)(3); see 38 C.F.R. § 19.32 (2014). (App. 134a-158a, 36a-38a)

(P. 11) Appellant argues that he submitted a timely August 2010 Substantive Appeal . . . Appellant is correct that in 2010 he submitted a timely Substantive Appeal. See [App. Br. at 20]; see also [R. at 1454 (July 2010 Correspondence)] . . . the 2010 Substantive Appeal only addressed the issues of the rating for PTSD, and service connection for tinnitus and left ear hearing loss. [R. at 1454 July 2010 Correspondence)] . . . the 2010 Substantive Appeal only addressed the issues of the rating for PTSD, and service connection for tinnitus and left ear hearing loss. [R. at 1454]. (App.36a-38a,)

(P. 12) as explained by the Board, the RO promptly notified Appellant, in a letter dated June 12, 2015, that his February 2015 Substantive Appeal was not timely. See [R. at 6-7]; see also [R. at 226-30]. *The Board also explained that Appellant timely appealed the RO determination that his Substantive Appeal was not timely*. [R. at 6] . . . Board explained that *after certification to the Board*, the Board did not take any action which would imply to Appellant that it treated his

February 2015 Substantive Appeal as timely. [R. at 6-7]. (App.36a-38a, 134a-158a)

(P. 18) As explained supra, after Appellant was notified by the RO that his February 2015 Substantive Appeal was untimely, Appellant appealed that decision to the Board. See [R. at 200-11 (December 2015 Notice of Disagreement)]. *The RO subsequently issued an SOC and Appellant perfected his appeal as to the timeliness of the February 2015 substantive appeal to the Board*, without requesting a hearing to give testimony. [R. at 139-62 (March 2018 Statement of the Case), 127 (May 2018 VA Form 9), 103 (August 2018 VA Form 8)]. (App.36a-38a, 134a-158a)

IV. The Veterans Court 19-7749 Findings

The Veterans Court in 19-7749 found and the petitioner notes:

App.7a The appellant . . . was service connected for a right ear hearing disability and received a non-compensable disability rating, effective August 1970, which the Board affirmed in 1972. See R. at 2688-89.

App.8a In a September 2008 rating decision, a VA regional office (RO) awarded disability compensation for PTSD . . . The RO denied a compensable disability rating for service-connected right ear hearing loss and denied disability compensation for left ear hearing loss and tinnitus. R. at 1971-78.

App.8a The appellant disagreed with the assigned ratings and effective dates for the disability compensation award for PTSD, the assigned rating for right ear hearing loss, and with the denials of disability compensation for left ear hearing loss and tinnitus.

See R. at 1781-890 (Oct. 2008 Notice of Disagreement (NOD)).

App.8a The appellant filed a timely Substantive Appeal regarding the RO's denial of a compensable rating for right ear hearing loss, a disability rating greater than 50% for PTSD, and disability compensation for left ear hearing loss and tinnitus. R. at 1454 (July 27, 2010, Substantive Appeal).

App.9a In response to the July 2010 Substantive Appeal, the RO issued a December 2012 decision that it "considered a full grant of benefits sought on appeal." R. at 1184

App.9a In November 2013, the appellant disagreed with the effective dates for these awards. R. at 1166-72 (Nov. 2013 NOD).

App.9a In response to the November 2013 NOD, on June 4, 2014, a decision review officer (DRO) assigned March 1, 2007, (the date of the appellant's informal claims) as the effective date for the disability compensation awards . . . June 4, 2014, the RO issued an SOC that denied effective dates earlier than March 1, 2007 . . .

App.10a In June 2015, the RO sent the appellant a letter explaining that his February 2, 2015, Substantive Appeal was untimely because the time to submit it had expired 60 days after the date of the June 2014 SOC — in August 2014 — and that the decision on his claims was therefore final. R. at 226;5

App.11a The *appellant disagreed with the RO's June 2015 decision regarding the timeliness of his Substantive Appeal*. R. at 200-12 (Dec. 2015 NOD) (App.105a, 121a) . . . *The appellant perfected his appeal*

in May 2018. See R. at 105-28 (VA Form 9 with supporting documents); see also R. at 103 (Aug. 2018 VA Form 8 reflecting that the Board received the Substantive Appeal on May 7, 2018), 139-50 (Mar. 2018 SOC).

App.12a In the July 2019 decision on appeal, the Board determined that the appellant's February 2, 2015, Substantive Appeal was untimely. R. at 5. The Board explained that "a claimant who fails to file a [S]ubstantive [A]ppeal in a timely manner[ ] . . . is statutorily barred from appealing the [RO's rating] decision." R. at 4. The Board summarized the relevant procedural history and the appellant's June 2015 assertion that his Substantive Appeal was timely. R. at 5, 8-9. The Board explained that the June 2014 SOC informed the appellant that, to file the Substantive Appeal, he had either 60 days from the date of the SOC or "'within the remainder, if any, of the [1]-year period from the date of the letter notifying you of the action that [he has] appealed'";

App.15a The Secretary counters that the Court should affirm the Board's decision. He argues that the Board's decision is supported by law and the record, the Board provided an adequate statement of reasons or bases for its decision, the appellant has not presented viable constitutional challenges, and the Court lacks jurisdiction over the remaining matters raised by the appellant. Secretary's Br. at 2, 7-19.

App.15a "A Substantive Appeal consists of a properly completed VA Form 9 . . . 38 C.F.R. § 20.202 (2015). By statute, a claimant "will be afforded a period of sixty days from the date the [SOC] is mailed to file the formal appeal." 38 U.S.C. § 7105(d)(3) (2015). VA promulgated 38 C.F.R. § 20.302, which

provides that a Substantive Appeal must be filed either within 60 days of the date on which VA mails the SOC or within 1 year of the date of mailing of the "notification of the determination being appealed," whichever is later. 38 C.F.R. § 20.302(b)(1) (2019).

App.16a Whether a Substantive Appeal is timely is a factual question that the Court reviews under the "clearly erroneous" standard of review.

App.17a The Board explained that the appellant had only 60 days from June 4, 2014, to submit his Substantive Appeal, because the "[1]-year appeal period following the date of notification of the December 2012 [RO] decision" had already expired when the RO issued the June 4, 2014, SOC. R. at 5, 9.

App.17a The Board explained that the appellant's February 2, 2015, Substantive appeal was untimely because the deadline to file it was August 4, 2014 (60 days after June 4, 2014). R. at 5, 9.

App.17a-18a ("[The a]ppellant did not need to request an extension of time within which to submit a Substantive Appeal, as the appeal was within [1] year of the decision in the [June 4, 2014, SOC to] deny an earlier effective date earlier than March 1, 2007.");

App.20a Board explained that, after the RO issued its December 2012 decision, the proper course of action was for the appellant to submit a timely NOD, which he did in November 2013.

App.21a Board's decision to reject the appellant's argument about the timely July 2010 Substantive Appeal is further supported by the procedural history in this case. As the Board summarized, the appellant's

timely July 2010 Substantive Appeal was an appeal of the September 2008 RO decision that denied service connection for left ear hearing loss and tinnitus. R. at 5.

22a On the other hand, the issue of the proper effective date for the PTSD award was in appellate status at the time of the July 2010 Substantive Appeal.

22a The appellant placed the issue of the *proper effective dates for the PTSD award into appellate status by virtue of his timely October 2008 NOD*.

App.23a-24a Consistent with the Board's decision, the timeliness of the July 2010 Substantive Appeal was no longer material after the RO issued the December 2012 decision. Board explained, the December 2012 RO decision triggered the requirement for a new NOD, which the appellant fulfilled in November 2013. R. at 5, 8-9. The timely NOD prompted the June 4, 2014, DRO decision and SOC, which together afforded the appellant with an effective date of March 1, 2007. And the SOC triggered the subsequent requirement for a timely Substantive Appeal.

App.24a As the Board found, the RO explained in the SOC that, if the appellant continued to disagree with the assigned effective date (for example, because he believed he was entitled to an effective date as early as the 1970s, see Appellant' Informal Br. at 4, 17, 29), his proper course of action was to file a timely Substantive Appeal. See R. at 5, 9; see also 38 C.F.R. § 20.302(b)(1).

App.24a Though the appellant argues that the Board decision on appeal "can only be described as fraudulent," Appellant's Informal Br. at 8, his fraud allegation is undeveloped . . .

App.25a-26a The appellant argues that, by finding his Substantive Appeal untimely, VA and the Board violated his constitutional right to due process because they disregarded evidence that would support an earlier effective date for his disability compensation claims and deprived him of "a fair and impartial review" of his claims for an earlier effective dates for bilateral hearing loss, tinnitus, and PTSD awards. However, this is not persuasive.

App.26a Given that the *only matter before the Board was the timeliness of the February 2015 Substantive Appeal* and that the Board determined that it was untimely, the merits of any effective-date claim were not before the Board.

App.26a For these reasons, the appellant has not demonstrated that his constitutional due process rights were violated by the either the VA's or the Board's purported failure to review evidence . . . *See, e.g., Cushman v. Shinseki*, 576 F.3d 1290, 1292, 1300 (Fed. Cir. 2009) (holding that a veteran showed in the context of an appeal of the merits of his claim that VA violated the veteran's due process rights when it relied on "an improperly altered document" in the veteran's medical record because the veteran demonstrated that, if VA had not relied on the improper alterations, there was "a reasonable probability of a different result" in the adjudication of his claim).

App.27a. Accordingly, even assuming that the appellant raised these contentions to the Board, see, e.g., R. at 127 (appellant's assertion on *May 2018 VA Form 9 that the RO "clearly issued a fraudulent decision . . . by concealing the June 4, 2014[,] DRO [d]ecision")*, the Board's failure to address these assertions was not prejudicial to the Board's Substan-

tive Appeal timeliness determination — the only matter before it. See 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error).

V. Veterans Court 19-7749: Prima Facie Evidence of Clear Evidence to the Contrary on the Record

(MD) Memorandum Decision (App.9a): In November 2013, the appellant disagreed with the effective dates for these awards. R. at 1166-72 (Nov. 2013 NOD). In response to the November 2013 NOD, on June 4, 2014, a decision review officer (DRO) assigned March 1, 2007, (the date of the appellant's informal claims) as the effective date for the disability compensation awards for PTSD, left ear hearing loss, and tinnitus; and the DRO increased disability ratings for bilateral hearing loss to 40%, effective March 1, 2007, and to 50%, effective May 17, 2010. R. at 1054-60. Also on June 4, 2014, the RO issued an SOC that denied effective dates earlier than March 1, 2007, for PTSD, left ear hearing loss, and tinnitus, and denied entitlement to a rating greater than 40% for bilateral hearing loss. R. at 993-1019. The letter attached to the SOC, also dated June 4, 2014, stated that if the appellant wished to submit a Substantive Appeal, he must do so "within 60 days from the date of this letter or within the remainder, if any, of the [1]-year period from the date of the letter notifying [him] of the action that [he has] appealed"; that if VA did not hear from him within this period, it would close the

appellant's case; (App.15a, 16a): Veterans Court cited the Secretary's brief (App.15a): The Secretary counters that the Court should affirm the Board's decision. He argues that the Board's decision is supported by law and the record, the Board provided an adequate statement of reasons or bases for its decision, the appellant has not presented viable constitutional challenges, and the Court lacks jurisdiction over the remaining matters raised by the appellant. Secretary's Br. at 2, 7-19 . . . (App.22a) "Therefore, as the Secretary argues, the timeliness of the July 2010 Substantive Appeal is immaterial, in part because the downstream issues of the proper effective dates for the bilateral hearing loss and tinnitus awards only became ripe in December 2012. See Secretary's Br. at 11 . . . The Veterans Court citing in the analysis of the (App.11a): As the Board explained, the July 2010 SOC and the timely July 2010 Substantive Appeal followed. As a result of the timely July 2010 Substantive Appeal, the RO issued the December 2012 decision and assigned the maximum disability rating (100%) for PTSD, effective October 17, 2007, the date of his formal claim. *However, the Board did not make that finding*. (App.35a-38a) The Board implicitly stated that the 2012 rating decision was a determination of the August 2010 Substantive Appeal, stated as follows; "In August 2010, the Veteran filed a timely Substantive Appeal. In a December 2012 rating decision, the AOJ granted service connection for tinnitus and bilateral hearing loss and increased the Veteran's PTSD rating to 100 percent. The effective date for the grants was October 17, 2007. As the Veteran was awarded the highest possible rating for his PTSD and service connection was granted for tinnitus and bilateral hearing loss, the claim was granted in full . . . R. at 5. The statute prohibits the

court from making factual findings in the first instance. *See Andre v. Principi*, 301 F.3d 1354, 1362 (Fed. Cir. 2002) (quoting 38 U.S.C. § 7261(c)). Furthermore, there has never been a review of the timely filed Aug. 2010 VA form 9 as required by Statue; 38 U.S.C. § 7104(a), shall be subject to one review on appeal to the Secretary . . . upon consideration of all evidence and material of record and applicable provisions of law and regulation . . . (App.11a, 129a-133a) The appellant disagreed with the RO's June 2015 decision regarding the timeliness of his Substantive Appeal. R. at 200-12 (Dec. 2015 NOD) [38 C.F.R. § 19.34] (App.12a). The appellant perfected his appeal in May 2018. See R. at 105-28 (VA Form 9 with supporting documents); see also R. at 103 (Aug. 2018 VA Form 8 reflecting that the Board received the Substantive Appeal on May 7, 2018), 139-50 (Mar. 2018 SOC). The Board's failure to address the timely 2018 substantive appeal was prejudicial to the Board's Substantive Appeal timeliness determination, as the Board stated: (App. 59a) In June 2015, the AOJ sent the Veteran a letter informing him that his Substantive Appeal was not a timely appeal as it was not filed within a year of the December 13, 2012 rating decision nor within 60 days of the June 4, 2014 SOC. *The Veteran timely perfected an appeal of that determination* . . . (App.27a) Accordingly, even assuming that the appellant raised these contentions to the Board, see, e.g., R. at 127 (appellant's assertion on May 2018 VA Form 9 that the RO "clearly issued a fraudulent decision . . . by concealing the June 4, 2014[,] DRO [d]ecision"), the Board's failure to address these assertions was not prejudicial to the Board's Substantive Appeal timeliness determination — the only matter before it. The Board's failure to address the May 2018 VA Form 9

filed in response to the June 2015 untimely decision was prejudicial to the Board's Substantive Appeal timeliness determination and a procedural due process violation. 38 U.S.C. § 7104(a) shall be subject to one review on appeal to the Secretary . . . upon consideration of all evidence and material of record and applicable provisions of law and regulation. *See, Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)

VI. The Federal Circuit 22-1618 Findings

The Federal Circuit 22-1618 found and the petitioner noted:

(App.2a) This case is Mr. Thornton's fourth appeal arising out of these claims.

(App.2a) December 2012, a Veterans Affairs regional office (RO) issued a decision that it "considered a full grant of benefits sought on appeal." SAppx. 2.1.

(App.2a) Letter accompanying this decision informed Mr. Thornton that he had "one year from the date of [the] letter to appeal the decision." *Id.* at 3.

(App.2a) In response to Mr. Thornton's November 2013 NOD, on June 4, 2014, the RO issued a decision increasing Mr. Thornton's benefits and granting an earlier effective date for the awards of benefits. On the same day, the RO also mailed a letter enclosing a statement of the case (SOC) and advising Mr. Thornton of his appellate rights and responsibilities:

(App.3a) In June 2015, the RO issued a decision finding Mr. Thornton's appeal untimely because it was received more than 60 days after the date of the June 2014 SOC, explaining that the June 2014 RO decision on Mr. Thornton's claims had be-come final.

Mr. Thornton appealed the June 2015 RO decision to the Board.

(App.3a, 4a) Further, the Veterans Court determined that his various claims that the Board and the VA had committed statutory and constitutional violations and fraud were subsidiary to, and thus rose and fell with, his challenge to the Board's finding of untimeliness. SAppx. 6–14. (App.4a) Because the Veterans Court affirmed the dismissal of Mr. Thornton's appeal based on the Board's factual finding that Mr. Thornton did not file his appeal before the filing deadline, we lack jurisdiction to review Mr. Thornton's appeal of the timeliness determination. § 7292(d)(2). Although Mr. Thornton also alleges constitutional violations on appeal, Appellant's Br. 26-28 (asserting that the Board and the Veterans Court violated his Due Process and Equal Protection rights when they denied his appeal as untimely), he provides no further detail or support for his claim other than the determination that the appeal was untimely.

VII. Appellant's Brief Requesting Judicial Notice FRE 201 to the Fed. Cir. 22-1618 [Excerpts] and Prima Facie Evidence of Clear Evidence to the Contrary on the Record

Fed. Cir. 22-1618 (App.2a) "This case is Mr. Thornton's fourth appeal arising out of these claims" . . . Mr. Thornton Appeal requested for the Fed. Cir. [22-1618] to take "Judicial notice in the Federal Rules of Evidence Rule 201." In which this court's acknowledgement is the (App.2a) "fourth appeal arising out of these claims", of which appellant requested this court's "Notice of Adjudicated Facts" in those opinions on those appeals (App.31a-32a, 75a-78a, 79a-84a, 84a-87a, 94a-

100a) [Motion for Judicial Notice of Adjudicated Facts and Opportunity to be Heard-FRE-201], (App.35a-36a, 39a-42a, 49a, 51a, 53a); "On June 4, 2014, a Veterans Affairs ("VA") Decision Review Officer ("DRO") *awarded* Mr. Thornton (1) a 100% disability rating for post-traumatic stress disorder *effective March 1, 2007*; (2) a 40% rating for bilateral hearing loss effective March 1, 2007 and a 50% rating effective May 17, 2010; and (3) a 10% rating for tinnitus effective March 1, 2007. In a Statement of the Case issued the same day, the DRO *denied* Mr. Thornton's request for entitlement to *effective dates prior to March 1, 2007* for all three conditions" . . .

a. Issues of Alleged Constitutional Violations to Federal Circuit [Suppression of Evidence]

(App.4a) Mr. Thornton also alleges constitutional violations . . . he provides *no further detail* or support for his claim other than the determination that the appeal was untimely. Appellant's Br. 26-28 . . . (App. 65a-67a, 86a-87a, 145a-148a, 126a) *further detail-suppressing—the alleged* constitutional violations; Appellant's Br. 15-16 (App.86a-87a) On June 4, 2014 the AOJ-DRO issued a new decision: June 4, 2014 DRO decision (R. at 986-992) granting earlier effective date of March 1, 2007 . . . Evidence cited Reviewed in granting EED: (2) Notices of Disagreement received 10-14-08 and 11-7-13 and VA rating decisions dated 9-12-08 and 12-11-12 (R. at 987). In a Statement of the Case issued the same day, the DRO denied Mr. Thornton's request for entitlement to effective dates prior to March 1, 2007 for all three conditions". Evidence cited Reviewed in denying earlier effective date earlier than March 1, 2007: (2) Notices of Disagreement received 10-14-08

and 11-7-13 and VA rating decisions dated 5-23-89, 9-12-08, 12-11-12 and 6-4-14 (R. at 995-96) . . .

b. Veteran Raised Issues of Irregularity to the Board

(App.153a-154a, 156a-158a) VA form 9 Rebuttal 2018 of *2015 untimely decision*, raised *issues of irregularity to Board*: [9]. Here is why I think that VA decided my Case Incorrectly: a *clearly erroneous decision*, not supported by the record. The adjudicator *clearly issued a fraudulent decision* under *"The presumption of regularity"* by concealing the June 4, 2014 DRO Decision. . . . (App.2a) In December 2012, a Veterans Affairs regional office (RO) issued a decision that it "considered a full grant of benefits sought on appeal." . . . MD-19-7749 of the Veterans Court, based on "The judge-made presumption of regularity". The full grant was in the December 2012 DRO decision to a July 2010 Substantive Appeal of *which the Veteran did not file* and the *Board did not find*, in that determination, the Board cite the Aug. 1, 2010 Substantive Appeal, which appealed all issues cited in the Oct 14, 2008 Notice of Disagreement. (App.7a-8a), In response to Mr. Thornton's November 2013 NOD, on June 4, 2014 the RO issued a decision increasing Mr. Thornton's benefits and granting an earlier effective date for the awards of benefits. On the same day, the RO also mailed a letter *enclosing a statement of the case (SOC)* and advising Mr. Thornton of his appellate rights and responsibilities: The Veterans Court found; (App.9a) "In response to the November 2013 NOD, on June 4, 2014, a decision review officer (DRO) assigned March 1, 2007, (the date of the appellant's informal claims) . . . R. at 1054-60. Also on June 4, 2014, the RO issued an SOC that

denied effective dates earlier than March 1, 2007 . . . R. at 993-1019. (App.23a) Board explained, the December 2012 RO decision triggered the requirement for a new NOD, which the appellant fulfilled in November 2013. R. at 5, 8-9. The timely NOD prompted the June 4, 2014, DRO decision and SOC, which together afforded the appellant with an effective date of March 1, 2007."

The general presumption of regularity "'that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations.'" *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993) (quoting *Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982)); *see Davis v. Brown*, 7 Vet.App. 298, 300 (1994); *Saylock v. Derwinski*, 3 Vet.App. 394, 395 (1992); *Ashley v. Derwinski*, 2 Vet.App. 62, 64-65 (1992) . . . The Veteran's Court has applied the presumption regularity to processes and procedures throughout the VA administrative process, including to the RO's mailing of an SOC. *See Crain v. Principi*, 17 Vet.App. 182, 186 (2003); *see also Redding v. West*, 13 Vet.App. 512, 515 (2000) (applying the presumption of regularity as to whether the RO received the veteran's power of attorney); *Baldwin v. West*, 13 Vet.App. 1, 5-6 (1999) (applying the presumption of regularity as to whether the RO examined and considered service medical records); *Schoolman v. West*, 12 Vet.App. 307, 310 (1999) (applying the presumption of regularity as to whether the RO sent the claimant an application form for dependency and indemnity compensation); *Mindenhall v. Brown*, 7 Vet.App. 271, 274 (1994) (applying the presumption of regularity to the RO's mailing of its decision to a veteran); *Davis*, 7 Vet. App. at 300

(applying the presumption of regularity to the Board's mailing of a copy of its decision to a veteran).

This veteran, based on the undisputed facts of this specific case that, even assuming a regular process, there is sufficient evidence to rebut it . . . This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else . . . Still more, we agree with *Kisor* that administrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse *See, Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) . . . *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803); *see also Wayman v. Southard*, 10 Wheat. 1, 46, 6 L.Ed. 253 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law"); THE FEDERALIST NO. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton) . . . Here, we promise, individuals may appeal to neutral magistrates to resolve their disputes about "what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Everyone, we say, is entitled to a judicial decision "without respect to persons," 28 U.S.C. § 453, and a "fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955).

VIII. Harm to Appellant's Substantial Rights

Veterans also have a right to one review on appeal, the 2018 VA form 9 rebutting the June 2015 AOJ untimely decision to the Secretary. 38 U.S.C. § 7104(a), an appellant must show how a claimed error in a Board decision harmed the outcome of her or his claim. *Sanders*, 556 U.S. at 410 ("[T]he party seeking reversal normally must explain why the erroneous ruling caused harm [,] . . . by marshaling the facts and evidence. . . . "). In *Sanders*, the Supreme Court

identified some case-specific factors a court may consider in assessing prejudice: "an estimation of the likelihood that the result would have been different" but for the error; an awareness of what body "has the authority to reach that result"; and the "error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings" *Sanders*, 556 U.S. at 411-12. (App.55a-58a, 75a-77a, 126a, 136a-137a, 143a-148a)

REASONS FOR GRANTING THE PETITION

1. This Court Should Now Provide That Guidance

The Court should grant review to provide the limits on presumption of regularity and protect veterans from an agency prone to do so, moreover, in a way that contravenes the intent of Congress and harms our Nation's veterans. Such abdication of the independent Judiciary's responsibility to say what the law is cannot be reconciled with the constitutional separation of powers, with basic principles of due process of law, or with the Administrative Procedure Act. This novel rule of presumption of regularity, conflicts not only with procedural law in general, but even more so with the proclaimant, ex parte, paternalistic character of the VA system:

2. Presumption of Regularity

A. The Board Found, Citing the AOJ

In June 2015, the AOJ sent the Veteran a letter informing him that his Substantive Appeal was not a timely appeal as it was not filed within a year of the

December 13, 2012 rating decision nor within 60 days of the June 4, 2014 SOC. *The Veteran timely perfected an appeal of that determination*. R. at 6

B. The Veterans Court Found, Citing the Board

In June 2015, the RO sent the appellant a letter explaining that his February 2, 2015, Substantive Appeal was untimely because the time to submit it had expired 60 days after the date of the June 2014 SOC — in August 2014 — and that the decision on his claims was therefore final. *The appellant disagreed with the RO's June 2015 decision regarding the timeliness of his Substantive Appeal*. R. at 200-12 (Dec. 2015 NOD). *The appellant perfected his appeal in May 2018. See R. at 105-28 (VA Form 9 with supporting documents*) see also R. at 103 (Aug. 2018 VA Form 8 reflecting that the Board received the Substantive Appeal on May 7, 2018), 139-50 (Mar. 2018 SOC).

C. The Federal Circuit Findings, Citing the Veterans' Court

The Federal Circuit found, citing the Veterans Court:

In June 2015, the RO issued a decision finding Mr. Thornton's appeal untimely because it was received more than 60 days after the date of the June 2014 SOC, explaining that the June 2014 RO decision on Mr. Thornton's claims had become final. *Mr. Thornton appealed the June 2015 RO decision to the Board*.

3. The Failure to Adjudicate by Board, Veterans Court and the Federal Circuit

Having acknowledged, Mr. Thornton appealed the untimely, June 2015 RO decision to the Board. The Board failed to adjudicate the timely perfected appeal, which violated the statutory and board's regulatory procedures [38 U.S.C. §§ 7104(a), 7105(a), 38 C.F.R. § 19.34] in that determination, the judge-made presumption of regularity allowed for the Gov. to affirm the Board's decision, despite their findings to the contrary in violation of the Veteran's Procedural Due Process, thus, invoking the Federal Circuit's Jurisdiction. *See, In re Edwards*, 582 F.3d 1351 (Fed. Cir. 2009) "[i]nvokes due process, this court reviews the factual determinations but only to the extent necessary to ensure compliance with due process."

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Robert G. Thornton

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March 3, 2023