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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-2225

PETER VAN DERMARK,
Claimant-Appellant,
v.

DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-2795, Judge Coral Wong Pietsch, Judge Joseph L. Toth, Judge William S. Greenberg.

Decided: January 23, 2023

OPINION

Before DYK, TARANTO, and STARK, *Circuit Judges*.

TARANTO, *Circuit Judge*.

Peter Van Dermark is a veteran with a service-connected disability recognized by the Department of Veterans Affairs (VA). While abroad, he received medical treatment from a non-VA source for conditions not derived from that disability. By assumption here, the treatment was emergency treatment. Mr. Van Dermark filed claims with VA asking it to pay for his treatment, under 38 U.S.C. § 1728 (enacted in 1973) and

§ 1725 (enacted in 1999), either by paying those who treated him or by paying him (reimbursing him) for what he had paid or owed them. VA's Office of Community Care denied both claims, the Board of Veterans' Appeals maintained the denials, and the Court of Appeals for Veterans Claims (Veterans Court) affirmed the Board's decision. *Van Dermark v. McDonough*, 34 Vet. App. 204, 206 (2021).

The basis of the denial was 38 U.S.C. § 1724, which, as relevant here, took its current form in 1958, based on a 1940 statute containing the key phrase now in dispute. Specifically, the Veterans Court, like VA, relied on § 1724(a), which prohibits VA from "furnish[ing] hospital … care or medical services" abroad, except in limited circumstances concededly not present here. On Mr. Van Dermark's appeal, we agree with the Veterans Court that the "furnishing" phrase encompasses the payment for a veteran's hospital care or medical expenses abroad at issue here, making the § 1724(a) prohibition applicable, and that §§ 1728 and 1725 do not override that prohibition. We therefore affirm.

I

We decide the issue before us based on facts accepted by the parties for purposes of this appeal. Mr. Van Dermark served in the United States Navy from June 1963 until his honorable discharge in May 1976. VA has found Mr. Van Dermark to be totally and permanently disabled due to service-connected injuries. As relevant here, Mr. Van Dermark received treatment in Thailand (where he lived) at non-VA facilities, from physicians and others not affiliated with VA, on two occasions—first in 2016, again in 2018—both times for cardiac conditions not related to his service-connected disability. For each of the two instances of treatment

abroad, Mr. Van Dermark filed a claim with VA under 38 U.S.C §§ 1728 and 1725 seeking VA payment—to him or his medical creditors—for the surgical or other heart-related treatment he received abroad.

Section 1728(a) says that the Secretary "shall … reimburse veterans eligible for hospital care or medical services under this chapter for the customary and usual charges of emergency treatment … for which such veterans have made payment, from sources other than the Department, where such emergency treatment was rendered to such veterans in need thereof" in specified circumstances. 38 U.S.C. § 1728(a).[1] One such circumstance is where the treatment is for "[a]ny disability of a veteran if the veteran has a total disability permanent in nature from a service-connected disability." *Id.* § 1728(a)(3). Section 1728 allows the Secretary, "in lieu of reimbursing such veteran," to "make payment of the reasonable value of emergency treatment directly—(1) to the hospital or other health facility furnishing the emergency treatment; or (2) to the person or organization making such expenditure on behalf of such veteran." *Id.* § 1728(b). The section borrows the meaning of "emergency treatment" from § 1725(f)(1). *Id.* § 1728(c). Section 1728 makes no reference to treatment abroad.

Section 1725(a) says that, subject to certain conditions and limitations, the Secretary "shall reimburse a veteran described in subsection (b) for the reasonable value of emergency treatment furnished the veteran in

[1] Enacted in 1973 as 38 U.S.C. § 628 using "may," the provision was recodified as 38 U.S.C. § 1728 in 1991 (as part of the general recodification of chapter 17, changing "6xy" provisions to "17xy" provisions) and has used "shall" since 2008. *See* Pub. L. No. 93-82, § 106(a), 87 Stat. 183 (1973); Pub. L. No. 102-83, § 5(a), 105 Stat. 406 (1991) (recodification); Pub. L. No. 110-387, § 402(b)(1), 122 Stat. 4123 (2008) (replacing "may" with "shall").

a non-Department facility," while authorizing the same direct-payment alternative to reimbursement as does § 1728. *Id.* § 1725(a)(1), (2).[2] Section 1725(b) describes the eligible veteran as one "who is an active Department health-care participant who is personally liable for emergency treatment furnished the veteran in a non-Department facility." *Id.* § 1725(b)(1). The subsection identifies who is "an active Department health-care participant" in terms of enrollment in the VA health-care system under 38 U.S.C. § 1705(a) and recent receipt of care under chapter 17. *Id.* § 1725(b)(2). It further identifies being "personally liable" in terms that, among other things, exclude a veteran who has "entitlement to care or services under a health-plan contract" or eligibility "for reimbursement for medical care or services under section 1728." *Id.* § 1725(b)(3).[3] Section 1725(c) adds that the veteran's liability for the costs of the treatment is extinguished if the Secretary makes payment under the section on behalf of the veteran "to a provider of emergency treatment" unless the payment is "rejected and refunded by the provider within 30 days of receipt," and it makes specified contractual arrangements or their absence immaterial to the applicability of that extinguishment provision. *Id.* § 1725(c)(3). Like § 1728, § 1725 makes no reference to treatment abroad.

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[2] Enacted in 1999 using "may," the provision has used "shall" since 2008. *See* Pub. L. No. 106-117, title I, § 111(a), 113 Stat. 1553 (1999) (enacting 38 U.S.C. § 1725); Pub. L. No. 110-387, title IV, § 402(a), 122 Stat. 4123 (2008) (changing "may" to "shall").

[3] The term "health-plan contract" covers various insurance and other arrangements, an "insurance program" specified in 42 U.S.C. § 1395c (Medicare Part A) or § 1395j (Medicare Part B), a state plan under 42 U.S.C. § 1396 *et seq.* (Medicaid), or a specified "worker's compensation law or plan." 38 U.S.C. § 1725(f)(2).

Mr. Van Dermark contended that he was entitled to the claimed payment because the treatment he received in 2016 and 2018 in Thailand constituted "emergency treatment" under §§ 1728 and 1725. He claimed eligibility for payment under § 1728 because of his total-disability rating and under § 1725 because he was an active VA healthcare participant with recent enough receipt of VA care. VA's Office of Community Care and the Board denied both claims, applying § 1724(a)'s prohibition on VA's "furnish[ing] hospital care and medical services" "outside any State" where, as is undisputed here, the exceptions stated in § 1724 do not apply (because the treated conditions are not related to a service-connected disability and this matter does not involve the Philippines).

The Veterans Court affirmed the Board's decision. *Van Dermark*, 34 Vet. App. at 206. For purposes of its decision, the Veterans Court assumed arguendo that the treatment was "emergency treatment" under §§ 1728 and 1725. *Id.* at 209-10. And the Veterans Court concluded that, as Mr. Van Dermark did not dispute, the phrase "medical services" of § 1724(a) covers "emergency treatment" of §§ 1728 and 1725 and hence, by assumption for purposes of the appeal, the treatment Mr. Van Dermark received in 2016 and 2018. *Id.* at 210.

On the key point in dispute, the court ruled that "furnish[ing] … medical services" in § 1724 included VA's paying for treatment rendered by the direct hands-on providers independent of VA, including when the payment takes the form of "reimburse[ment]" paid directly to the veteran for the veteran's debt for the treatment. *Id.* at 210-15. The Veterans Court reasoned that "furnish" *can* be understood to include "provide for" something indirectly, *id.* at 210-11 (quoting *Web-*

ster's New International Dictionary 1021 (2d ed. 1934)), and that § 1724 uses the broad sense, which includes paying for what others directly provide, as supported by the specific statutory context and its history and implementation: Notably, § 1724(b)'s specific authorization *to* "furnish hospital care and medical services" in certain circumstances has long been understood and applied to cover such payments, *id.* at 211-14. Having concluded that the prohibition of § 1724(a) applied to bar the requested payments for services abroad, the Veterans Court also concluded that §§ 1728 and 1725 did not override that prohibition because there was no basis for reading them to apply abroad. *Id.* at 214-15. Judge Greenberg dissented. *Id.* at 215-16.

Mr. Van Dermark timely appealed the Veterans Court's decision. Because Mr. Van Dermark raises an issue of law—statutory interpretation—we have jurisdiction under 38 U.S.C. § 7292. *Carter v. McDonough*, 46 F.4th 1356, 1359 (Fed. Cir. 2022). We review the Veterans Court's statutory interpretation de novo. *Gurley v. McDonough*, 23 F.4th 1353, 1356 (Fed. Cir. 2022).

II

The question before us is the scope of the phrase "furnish hospital … care or medical services" in § 1724(a). Section 1724 is the 1991 recodification of what had been 38 U.S.C. § 624, Pub. L. No. 102-83, § 5(a), 105 Stat. 406 (1991), with the only change since 1991 being the 2000 addition of subsection (e), Pub. L. No. 106-377, § 1(a)(1) [title V, § 501(c)], 114 Stat. 1441, 1441A-58 (2000). Congress enacted § 624 in 1958 in a form containing the language and structure centrally at issue here, Pub. L. No. 85-857, 72 Stat. 1105, 1144

(1958), having adopted a similar version as part of a re-codification the year before.[4]

Section 1724 reads in full:

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[4] The 1958 enactment, 38 U.S.C. § 624, read:

> § 624. Hospital care and medical services abroad
>
> (a) Except as provided in subsections (b) and (c), the Administrator shall not furnish hospital or domiciliary care or medical services outside the continental limits of the United States, or a Territory, Commonwealth, or possession of the United States.
>
> (b) The Administrator may furnish necessary hospital care and medical services for any service-connected disability—
>
> (1) if incurred during a period of war, to any veteran who is a citizen of the United States temporarily sojourning or residing abroad except in the Republic of the Philippines; or
>
> (2) whenever incurred, to any otherwise eligible veteran in the Republic of the Philippines.
>
> (c) Within the limits of those facilities of the Veterans Memorial Hospital at Manila, Republic of the Philippines, for which the Administrator may contract, he may furnish necessary hospital care to a veteran of any war for any non-service-connected disability if such veteran is unable to defray the expenses of necessary hospital care. The Administrator may enter into contracts to carry out this section.

Pub. L No. 85-857, 72 Stat. 1144 (1958). This was part of a broad recodification of Title 38. *Id.* at 1105-1274.

A 1957 codification, Pub. L. No. 85-56, 71 Stat. 83-175 (1957), included 38 U.S.C. § 524, 71 Stat. 113, which read:

> Sec. 524. The Administrator shall not furnish hospital or domiciliary care or medical services outside the continental limits of the United States, or a Territory, Commonwealth, or possession of the United States, except that he may furnish necessary hospital care and medical services for service-connected disabilities incurred during a period of war to veterans who are citizens of the United States temporarily sojourning or residing abroad.

(a) Except as provided in subsections (b) and (c), the Secretary shall not furnish hospital or domiciliary care or medical services outside any State.

(b)(1) The Secretary may furnish hospital care and medical services outside a State to a veteran who is otherwise eligible to receive hospital care and medical services if the Secretary determines that such care and services are needed for the treatment of a service-connected disability of the veteran or as part of a rehabilitation program under chapter 31 of this title.

(2) Care and services for a service-connected disability of a veteran who is not a citizen of the United States may be furnished under this subsection only—

(A) if the veteran is in the Republic of the Philippines or in Canada; or

(B) if the Secretary determines, as a matter of discretion and pursuant to regulations which the Secretary shall prescribe, that it is appropriate and feasible to furnish such care and services.

(c) Within the limits of those facilities of the Veterans Memorial Medical Center at Manila, Republic of the Philippines, for which the Secretary may contract, the Secretary may furnish necessary hospital care to a veteran for any non-service-connected disability if such veteran is unable to defray the expenses of necessary hospital care. The Secretary may enter into contracts to carry out this section.

(d) The Secretary may furnish nursing home care, on the same terms and conditions set forth in

> section 1720(a) of this title, to any veteran who has been furnished hospital care in the Philippines pursuant to this section, but who requires a protracted period of nursing home care.
>
> (e) Within the limits of an outpatient clinic in the Republic of the Philippines that is under the direct jurisdiction of the Secretary, the Secretary may furnish a veteran who has a service-connected disability with such medical services as the Secretary determines to be needed.

38 U.S.C. § 1724. "State" means "each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico." *Id.* § 101. We use "abroad" to mean "outside any State."

The two subsections of central significance here are (a) and (b). Subsection (a) prohibits VA from furnishing hospital care and medical services abroad, subject only to the "[e]xcept[ions]" stated in subsections (b) and (c). Subsection (b) then defines an exception that allows VA to furnish hospital care and medical services only for service-connected disabilities.[5] The other three subsections—inapplicable here, and on which Mr. Van Dermark has not relied for his argument—all concern the distinctive situation presented by the Republic of the Philippines, reflecting its unique relationship to

[5] The subsection refers also to "a rehabilitation program under chapter 31," 38 U.S.C. §§ 3100-3122, which applies to "veterans with service-connected disabilities," 38 U.S.C. § 3100; *see* 38 U.S.C. ch. 31 heading.

the United States, especially during World War II. *See*, *e.g.*, S. Rep. No. 85-1469, at 1-12 (1958).[6]

We conclude that the "furnish" phrase at issue covers what Mr. Van Dermark claims here—VA payment for a veteran's treatment (*i.e.*, hospital care or medical services), whether payment is made to the treated veteran or to those to whom the veteran owes a debt for the treatment. It is undisputed that, if we so conclude, the § 1724(a) prohibition applies where, as in this case, the treatment was rendered abroad and is not for a service-connected disability. We also conclude that §§ 1728 and 1725 do not override the § 1724(a) prohibition.

A

Our analysis of the phrase at issue from § 1724(a) ("furnish hospital … care or medical services") reflects the fact that what is substantively the same phrase appears in § 1724(b) ("furnish hospital care and medical services"). The phrase in subsection (a) is a prohibitory, "shall not" phrase, and so uses "or," whereas the phrase in subsection (b) is an authorizing, "may" phrase, and so uses "and." But Mr. Van Dermark agrees that the two phrases have the same meaning with respect to the disputed issue of coverage of VA's payment for treatment provided by others, Oral Arg. at 1:43-50, and we see no basis for a contrary conclusion. *See also* Oral Arg. at 19:45-20:20 (Secretary urging same meaning).

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[6] VA has explained that it "has had a presence in the Philippines since 1922" and its "Manila Regional Office and Outpatient Clinic is the only VA office located outside [the] United States or its territories," with the Clinic offering various medical services. *Fact Sheet*, Department of Veterans Affairs (Sept. 2020), https://www.benefits.va.gov/ROMANILA/docs/VAManilaFactSheet.pdf.

This premise is important for at least two reasons. First, the phrase appears in the 1940 predecessor to current § 1724(b) (and in the 1958- and 1957-enacted statutes quoted above)—that is, in the phrase authorizing VA to furnish treatment abroad for service-connected conditions.[7] Accordingly, we look to 1940 (or to 1933-1940) as the pertinent time of initial congressional adoption, a fact of significance in statutory interpretation, and we focus on the scope of Congress's authorization of treatment abroad.

Second, a narrowing of the "furnish" phrase would simultaneously narrow the § 1724(a) prohibition and the § 1724(b) authorization. With respect to what benefits

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[7] In 1933, Congress granted VA authority to "furnish … medical and hospital treatment" in existing VA facilities to certain veterans. Title I § 6, Pub. L. No. 73-2, 48 Stat. 8 (1933). That authority was implemented in two 1933 executive orders (available at 38 U.S.C. Ch. 12A (1934)) that by regulation authorized VA to "furnish … hospital care, including medical treatment" in VA facilities to certain veterans, but declared that "[n]o person shall be entitled to receive domiciliary, medical, or hospital care, including treatment, who resides outside of the continental limits of the United States or its territories or possessions," Exec. Order No. 6094 §§ I, IV; *see* Exec. Order No. 6232 §§ I, IV (same). In 1940, Congress "amended" § IV of the regulation "to read as follows," authorizing care abroad:

> No person shall be entitled to receive domiciliary, medical, or hospital care, including treatment, who resides outside of the continental limits of the United States or its Territories or possessions: *Provided*, That in the discretion of the Administrator of Veterans' Affairs necessary hospital care, including medical treatment, may be furnished to veterans who are citizens of the United States and who are temporarily sojourning or residing abroad, for disabilities due to war service in the armed forces of the United States.

Pub. L. No. 76-866, § 4, 54 Stat. 1195 (1940).

veterans, the two effects are opposites—the first would relax a limit on possible benefits to veterans, and the second would constrain the provision of benefits to veterans. In fact, VA has long been paying for veteran-obtained care abroad under § 1724(b), and Mr. Van Dermark agrees that his interpretation would require curtailment of VA's practice, Oral Arg. at 1:00-2:10. In the circumstances before us, where each of the argued-for interpretations would benefit some veterans at the expense of others, and we lack information to compare magnitudes, we see no role for the pro-veteran interpretive canon. *See Burden v. Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013).

1

We start with consideration of the statutory provision's "ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (cleaned up). The language permits a meaning that includes the meaning adopted by the Veterans Court. The prominent comprehensive contemporaneous dictionary, *Webster's Second*, released in 1934, gives definitions of "furnish" that include "to provide" and (listed first among the non-obsolete meanings) "to provide for." *Webster's New International Dictionary of the English Language* 1021 (2d ed. 1937). Each definition on its face—as well as "provide what is necessary for," listed next to "provide for" in the same definition, *id.*—is sufficiently broad to include, where context makes it appropriate, both directly delivering treatment and more indirectly enabling receipt of treatment by paying (in advance or after the fact) for the treatment, whether payment is made to the treater or to the recipient. And nothing on the face of § 1724 precludes the broader meaning, under which Congress barred VA from both the delivery and payment roles

for treatment abroad, subject to specific exceptions for service-connected problems and the special situation presented by the Philippines.

Thus, the expression at issue here is one that can be used differently in different settings—for example, to refer just to the actions of the direct treaters (or their principals) or, more broadly, to various forms of indirect provision, including by funding. Context always matters, *Artis v. District of Columbia*, 138 S. Ct. 594, 603-04 (2018); *Johnson v. United States*, 559 U.S. 133, 139 (2010), and "the specific context in which that language is used" is especially important, *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 892-93 (2018). Still more specifically, courts give effect to clear differences in context to identify which of the available meanings is the right one for a particular setting, even if the differences are among parts of a single overall statute. *See Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853, 1863 (2019) (requiring different meanings "when a statutory term is used throughout a statute and takes on 'distinct characters' in distinct statutory provisions" (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014))); *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831). That approach applies *a fortiori* within a chapter of a title of the U.S. Code when the differences are among provisions enacted at different times.

Here, for the reasons now set forth, we conclude that the "specific" context supports the broader meaning within § 1724.

2

Mr. Van Dermark effectively agrees that the narrow direct-provision meaning is not appropriate for § 1724. In particular, he accepts that § 1724(b)'s use of

"furnish … medical services"—and hence, too, § 1724(a)'s use of the same phrase—reaches beyond VA's own delivery of care, through its own facilities, employees, or agents making VA the principal responsible for the treatment (the "provider" in modern parlance). *E.g.*, Reply Br. at 8-9; *Van Dermark*, 34 Vet. App. at 211. And he does not dispute the Veterans Court's explanation of the evident reason: Congress was seeking to enable veterans abroad to get treatment for service-connected disabilities, and VA had virtually no presence abroad. *Van Dermark*, 34 Vet. App. at 212-13 (discussing both 1940 legislative history and VA non-presence abroad); *see* U.S. Br. at 23-24; Annual Report of the Administrator of Veterans' Affairs for the Fiscal Year Ended June 30, 1941, at 11, 52-53 (1942). Mr. Van Dermark adds, moreover, that there are "good reasons" for a congressional policy against a VA expansion of its presence abroad that would put it "in the business of providing care abroad through its own facilities or through other advance arrangements with private providers" abroad, *e.g.*, that "giving the Secretary's medical infrastructure a global reach might entail unwanted complexities, including the need to reconcile such infrastructure with the healthcare laws of other nations." Opening Br. at 29-30.

These acknowledgements confirm the inappropriateness of the narrow reading of the phrase at issue in § 1724. They also indicate why the broader reading allows § 1724(b) to be more effective in furthering the evident congressional purpose of enabling veterans to receive care abroad for service-connected conditions. "A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored," and "evident purpose always includes effectiveness." Antonin Scalia & Bryan A. Garner, *Reading*

Law: The Interpretation of Legal Texts § 4, at 63 (2012); *see also Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1323 (Fed. Cir. 2021). Congress allowed the Secretary to make judgments about how to implement the authorization, considering all relevant factors, including benefits to veterans, administrative costs, and others. The broad reading of the scope of authorization thus permits the grant of authority to be more effective in achieving the plain congressional purposes.

Later expressions of congressional understanding lend further support to the broader reading of the "furnish" phrase in § 1724, which encompasses paying for treatment delivered by others for whom VA was not the principal. When Congress enacted 38 U.S.C. § 624 in 1958, it considered the proper scope of the special provisions for the Philippines. In that context, the Senate Committee recognized, based on the submissions of VA and the Bureau of the Budget, that "American veterans residing in other countries, such as France, England, or Germany, are not given medical care *at VA expense* for non-service-connected disabilities." S. Rep. No. 85-1469, at 5 (1958) (emphasis added). The phrase suggests coverage, by the statutory phrase at issue, of the payment function here in dispute.

Congressional action in 1987 is even more supportive of the broader reading of the phrase in dispute. Before 1988, subsection (b)—of what was then 38 U.S.C. § 624—permitted VA to furnish care abroad only if the veteran receiving care was "a citizen of the United States" or "in the Republic of the Philippines." 38 U.S.C. § 624(b) (1982). In 1988, Congress amended the subsection to cover U.S. veterans who were Canadian citizens living in Canada. *See* Title I § 105, Pub. L. No. 100-322, 102 Stat. 487 (1988) (providing that VA may

furnish care to non-citizens "only … if the veteran is in the Republic of the Philippines or Canada" or otherwise "as a matter of discretion"). The pertinent House Committee described the effect of the House bill, which included language substantially similar to that of the final enactment. *Compare* H.R. Res. 2616, 100th Cong. (1987), *and* H.R. Rep. No. 100-191, at 54, *with* Title I § 105, Pub. L. No. 100-322, 102 Stat. 487 (1988). It explained that such Canadian citizens would be able to receive medical care "for their service-connected conditions *on a reimbursable basis* by the VA," H.R. Rep. No. 100-191, at 11 (emphasis added), demonstrating that Congress understood § 1724(b)'s grant of authority to furnish care abroad to permit reimbursement. That language is used in § 1728 (already enacted by 1987), and in § 1725 (yet to be enacted), to refer to payment to the veteran, not to payments to the direct provider "in lieu of reimbursing [the] veteran." 38 U.S.C. § 1728(b); *see* 38 U.S.C. § 1725(a)(2).

Mr. Van Dermark advances a kind of middle position. He contends that VA must have some kind of contract with the treating persons or entities in order for its role in enabling veterans to receive services to constitute "furnishing" the services. Opening Br. at 28, 31-34; Reply Br. at 5, 9. This contention, even aside from some uncertainty about what Mr. Van Dermark suggests must be in the contract, is unpersuasive.

The suggestion runs counter to the indications of congressional contemplation, quoted above, that the furnishing phrase covers VA bearing the "expense" and covers "reimbursement"—the latter term focusing on the VA-veteran relationship, not a VA-treater relationship. More fundamentally, Mr. Van Dermark has supplied no persuasive reason that a contractual obligation, on VA's part or on direct service deliverers' part, is a

necessary aspect of "furnishing" (*e.g.*, "providing for") in its available, broad sense, which encompasses indirect provision through paying to help enable receipt of the service. That sense might even encompass such paying without any obligation preexisting the service, but it readily encompasses what is invoked here—an alleged obligation to pay that preexisted the service—and that meaning is independent of the particular legal basis for the obligation, whether the obligation is contractual or, instead, as Mr. Van Dermark asserts here, statutory or regulatory.

When Congress wished to focus on contracts as one means of implementing the "furnishing" phrase, it did so by including *additional* language, over and above the "furnishing" phrase itself. In § 1724, for example, subsection (c) ends with a sentence saying: "The Secretary may enter into contracts to carry out this section." 38 U.S.C. § 1724(c). The separate mention of contracts confirms that the "furnishing" phrase itself does not require contracts. And the "may" language makes clear that all it does is declare that contracts are one way to implement the section, not that they are the only way.

Sections 1703 and 1703A provide an instance in which Congress used additional language to refer to contracts when VA is furnishing care by paying for care directly delivered by others. Section 1703, in its current form, states that the Secretary "shall, subject to the availability of appropriations, furnish hospital care, medical services, and extended care services to a covered veteran through [specified] health care providers," 38 U.S.C. § 1703(d)(1), which include "[a]ny health care provider that is participating in the Medicare program," *id.* § 1703(c)(1), in certain enumerated circumstances, including where "the covered veteran and the

covered veteran's referring clinician agree that furnishing care and services through a non-Department entity or provider would be in the best medical interest of the covered veteran based upon criteria developed by the Secretary," *id.* § 1703(d)(1)(E); *see also id.* § 1703(a), (e). This language clearly uses the "furnishing" phrase in the broad sense now at issue. *See id.* § 1703(i) (addressing "payment rates for care and services," referring to Medicare rates (capitalization removed)).

The provision then uses additional language to address the matter of VA-treater contracts for this indirect provision of care, seemingly (we need not here say definitively) to require such contracts. *See id.* § 1703(h) (requiring the Secretary to "enter into consolidated, competitively bid contracts to establish networks of health care providers specified in … subsection (c) for purposes of providing sufficient access to hospital care, medical services, or extended care services"); *id.* § 1703A(a)(1)(A), (B) (stating that, in specified circumstances, the Secretary "may furnish such care or service … through an agreement under this section," giving the agreement the name, "Veterans Care Agreement"). If there is such a requirement, it is established by language over and above the "furnishing" phrase. Such provisions confirm that Mr. Van Dermark's contract view is not to be read into the phrase itself.

3

VA's actions over time reflect the broad reading of the "furnish" phrase at issue. In 1968, VA promulgated a regulation, under the heading "Payment or reimbursement of the expenses of unauthorized hospital care and other medical expenses," approving VA reimbursement to certain veterans for certain emergency medical treatment, related to service-connected disabil-

ities, received from non-VA facilities for which those veterans did not get authorization from VA in advance of treatment. 33 Fed. Reg. 19,011 (Dec. 20, 1968) (38 C.F.R. § 17.80 (1968)). At the time, VA's only statutory authority for the regulation was its authority to "furnish" care. 38 U.S.C §§ 610-612, 624 (1958). The reimbursement regulation rests on an understanding that furnishing care includes paying for emergency care received from non-VA facilities without prior VA involvement. That action preceded Congress's enactment of 38 U.S.C. § 1728 (then 38 U.S.C. § 628) in 1973, which expanded VA's approach and created a clearer statutory foundation. *Compare* Pub. L. No. 93-82, § 106, 87 Stat. 179 (1973), *with* 33 Fed. Reg. 19,011. *See also* S. Rep. No. 92-776, at 29 (1972); S. Rep. No. 93-54, at 25 (1973) (similar).

In fact, the parties do not dispute two key facts about VA's longstanding practice relevant here. First, aside from the treatment for service-connected disabilities where subsection (b) applies, and the situations covered by the Philippines-specific subsections, VA has not paid for treatment abroad, even in the five decades or so after enactment of § 1728 (then 38 U.S.C. § 628) in 1973. *See*, *e.g.*, S. Rep. No. 85-1469, at 5 (quoted above: "American veterans residing in other countries, such as France, England, or Germany, are not given medical care at VA expense for non-service-connected disabilities."). Second, VA *has* long paid for treatment abroad where subsection (b) applies (or where the Philippines subsections apply). Current 38 C.F.R. § 17.35(a) and (c)—with predecessors dating back as far as 1959, *see* 24 Fed. Reg. 8,327 (Oct. 14, 1959) (38 C.F.R. § 17.36); *see also* 33 Fed. Reg. 19,011 (1968 regulations 38 C.F.R. §§ 17.80, 17.84)—make clear that, under the Foreign Medical Program, eligible veterans can submit claims

for payment for reimbursement for treatment received abroad, if properly tied to a service-connected disability, even if not authorized by VA in advance. When VA adopted the current provision in 2018, it said that it was doing so to "clarify" and "reflect current VA practice and statutory authority." 83 Fed. Reg. 29,447 (June 25, 2018); *see* 83 Fed. Reg. 4,452 (Jan. 31, 2018) (proposed rule).[8]

Mr. Van Dermark's position, which he acknowledges would require alteration of VA practice, Oral Arg. at 1:00-2:10, would represent a break with VA's long practice both of *not* paying for non-service-connected-disability emergency treatment abroad and of *paying* (without contracts) for service-connected-disability

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[8] *See Van Dermark*, 34 Vet. App. at 213-14; VA Health Administration Center, *Foreign Medical Program Fact Sheet 01-17* (Nov. 2001), https://web.archive.org/web/20020922203959/http://www.va.gov/hac/factsheet/fspages/01-17fmpprovidersheet.pdf ("The Foreign Medical Program (FMP) … provides reimbursement for VA adjudicated service-connected conditions … . Claims are reviewed to determine whether the medical care provided is related to the service-connected condition."); VA Health Administration Center, *Foreign Medical Program Fact Sheet 01-5* (Nov. 2001), https://web.archive.org/web/20020922204000/http://www.va.gov/hac/factsheet/fspages/01-05fmp.pdf ("The FMP is a program for veterans who live or travel overseas. Under the FMP, Veterans Affairs will pay 100% of the charges for any health care the veteran needs that is associated with a service connected disability."); VA Health Administration Center, *Foreign Medical Program* (Aug. 2001) (explaining that FMP is for "US veterans with VA-rated service-connection conditions who are residing or traveling abroad (Canada and Philippines excluded)," under which "VA assumes payment responsibility for certain necessary medical services associated with the treatment of those service-connected conditions"); VA, *Federal Benefits for Veterans and Dependents* (Jan. 1981) ("The Veterans Memorial Hospital in Manila is the only overseas hospital where VA-paid care is available to veterans with nonservice-connected disabilities.").

treatment abroad. That consequence provides additional reason to reject Mr. Van Dermark's interpretation. *See National Labor Relations Board v. Noel Canning*, 573 U.S. 513, 525 (2014) ("The longstanding practice of the government can inform our determination of what the law is." (cleaned up)).

4

Mr. Van Dermark points to other provisions within chapter 17 of Title 38 of the U.S. Code for support for his view, either because they use "furnish medical services" or a similar phrase to refer only to the direct treatment providers to whom a patient owes payment for the treatment or because they refer to VA contracts with the treaters (or their principals). Such provisions do not alter the conclusion about the meaning in § 1724. The essence of the context-dependency principle most recently stated in *Return Mail*, as quoted above, is that a term with one meaning in one provision can take on a different meaning in a different provision that contains surrounding words that require the different meaning. That principle differentiates the "furnish" provisions on which Mr. Van Dermark relies from § 1724. And the "contract" provisions to which he points depend not on a narrow meaning of the "furnish" phrase but on additional language for their contract prescriptions.

Sections 1725 and 1728 contain surrounding words that establish they use "furnish," with "treatment" as the object, to refer to the direct provision (and only the direct provision) of emergency treatment. Section 1728 permits VA to, "in lieu of reimbursing [an eligible] veteran," directly pay "the hospital or other health facility furnishing the emergency treatment." 38 U.S.C. § 1725(b)(1). And § 1725 speaks expressly of "reimburse[ment]" for the reasonable value of the emergency

"treatment furnished," *id* § 1725(a)(1); *see id.* § 1725(b). The same is true of 38 U.S.C. § 1720J(a), which directs the Secretary, in a three-item list, to "furnish emergent suicide care to an eligible individual at a medical facility of the Department," to "pay for emergent suicide care provided to an eligible individual at a non-Department facility," and to "reimburse an eligible individual" for such non-VA-facility care. The "furnish" phrase there, because of the surrounding words, refers to direct provision.

Other provisions cited by Mr. Van Dermark are akin to §§ 1703 and 1703A, discussed above, which authorize the Secretary to furnish services through third-party providers and which use *additional* language to authorize or perhaps require contracts to do so. *See* 38 U.S.C. § 1712A(e)(1) (granting the Secretary "the same authority to enter into contracts or agreements with private facilities" when "furnishing counseling and related mental health services under subsections (a) and (b)"); *id.* at § 1720I(c)(1)-(2) (granting the Secretary the authority "to enter into contracts or agreements" pursuant to § 1703 "or any other provision of law" when "furnishing mental or behavioral health care services" to certain individuals); *id.* at § 1720C(a), (b)(1) (granting the Secretary authority to "furnish medical, rehabilitative, and health-related services in noninstitutional settings" or eligible veterans "in need of[] nursing home care" "solely through contracts with appropriate public and private agencies"); *id.* at § 1788(c) (granting the Secretary authority to "furnish to [a] live donor" certain "care and services … at a non-Department facility pursuant to an agreement entered into by the Secretary under [Title 38]"). None of the provisions cited by Mr. Van Dermark imply that, in § 1724, the "furnish" phrase is less broad than we have concluded.

B

Having concluded that § 1724(a) prohibits the requested VA payment for treatment abroad, we also conclude that the prohibition is not overridden by the later-enacted §§ 1728 or 1725. Mr. Van Dermark contends that, even if the "furnish" phrase in § 1724(a)'s prohibition includes "reimbursement," §§ 1725 and 1728 conflict with the prohibition and that the proper resolution of the conflict is that §§ 1725 and 1728 govern. We reject that contention at the threshold, finding no conflict needing to be resolved.

The threshold task is to determine if the provisions can be harmonized.

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). The intention must be "'clear and manifest.'" *Morton*, *supra*, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988).

Epic Systems v. Lewis, 138 S. Ct. 1612, 1624 (2018) (alterations in original) (citations in original, but parallel citations omitted); *see* Scalia & Garner, *Reading Law* § 27, at 180 ("[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.").

Here, harmonization is straightforward. Section 1724 requires VA to furnish care abroad in limited circumstances and bars VA from furnishing care abroad in all other circumstances. Section 1728 requires that VA reimburse certain veterans for emergency treatment they receive at non-VA facilities, under VA's power to furnish care, but there is no mention of treatment abroad. The same is true of section 1725. The simple textual harmonization of the three provisions is that §§ 1728 and 1725 do not apply to treatment abroad when such treatment is outside the limited authorization of § 1724 to furnish such treatment.

There is, accordingly, no conflict of provisions that must be resolved by reference to an identification of greater specificity or on any other basis. And there is no occasion to test §§ 1728 and 1725 against the presumption against extraterritoriality.

III

For the foregoing reasons, we affirm the Veterans Court's decision, concluding that 38 U.S.C. § 1724(a) bars VA from reimbursing Mr. Van Dermark for the treatment he received abroad.

The parties shall bear their own costs.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2795

PETER VAN DERMARK,
Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

On Appeal from the Board of Veterans' Appeals
(Argued October 20, 2020 Decided June 1, 2021)

Before PIETSCH, GREENBERG, and TOTH, *Judges.*

TOTH, *Judge*, filed the opinion of the Court. GREENBERG, *Judge*, filed a dissenting opinion.

TOTH, *Judge*: Veteran Peter Van Dermark appeals a Board decision denying reimbursement for cardiac treatments at Bangkok Hospital in May 2016 and May 2018. He asserts that these were emergency treatments and that two statutes, 38 U.S.C. §§ 1725 and 1728, require VA to reimburse him for any money he personally expended for this care. The Board disagreed, concluding that these statutes were not applicable outside the United States. Instead, it found that 38 U.S.C. § 1724 and relevant VA regulations governed and barred VA from furnishing—that is, paying for—cardiac treatment outside the United States because such a condition was not connected to service. Because

we agree that section 1724 generally bars the Secretary from paying for emergency treatment abroad of a non-service-connected condition, the Court affirms the Board decision.

I. BACKGROUND

A. Law

This case concerns the interaction of three statutes within chapter 17 of title 38 of the U.S. Code: sections 1724, 1725, and 1728. We start with an overview of each.

1.

The first is 38 U.S.C. § 1724, entitled "Hospital care, medical services and nursing home care abroad." It is the only statutory provision that expressly addresses VA's healthcare obligations outside the United States. At present, it instructs that "the Secretary shall not furnish hospital or domiciliary care or medical services outside any State."[1] 38 U.S.C. § 1724(a).

Subsections (b) and (c) of the statute create explicit exceptions to this prohibition. Under (b)(1), VA "may furnish" medical services and hospital care abroad to a U.S. citizen veteran "who is otherwise eligible to receive" them when necessary for treatment of a service-connected disability or as part of a rehabilitation program. Under (b)(2), the Secretary has discretion to furnish non-citizen veterans in the Philippines or Canada care and services for service-connected disabilities if he determines the care to be appropriate and feasible. Subsection (c) allows the Secretary, "[w]ithin the limits

[1] "The term 'State' means each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico." 38 U.S.C. § 101(20).

of those facilities of the Veterans Memorial Medical Center at Manila, Republic of the Philippines, for which the Secretary may contract," to "furnish necessary hospital care to a veteran for any non-service-connected disability if such veteran is unable to defray the expenses of necessary hospital care."

Finally, the statute allows the Secretary, "[w]ithin the limits of an outpatient clinic in the Republic of the Philippines that is under the direct jurisdiction of the Secretary," to "furnish a veteran who has a service-connected disability with such medical services as the Secretary determines to be needed." 38 U.S.C. § 1724(e).

VA implemented this statute by establishing the Foreign Medical Program (FMP) to "furnish hospital care and outpatient services to any veteran outside of the United States, without regard to the veteran's citizenship" if such care and services are "necessary for treatment of a service-connected disability, or any disability associated with and held to be aggravating a service-connected disability," or are "furnished to a veteran participating in a rehabilitation program under … chapter 31." 38 C.F.R. § 17.35(a)(1)-(2) (2020). Subsection (b) addresses the special circumstances regarding treatment in the Philippines. "Claims for payment or reimbursement for services not previously authorized by VA under this section are governed by §§ 17.123-17.127 and 17.129-17.132." 38 U.S.C. § 17.35(c).

2.

Next to be enacted, in 1973, was section 1728, which instructs the Secretary to "reimburse veterans eligible for hospital care or medical services … for the customary and usual charges of emergency treatment

(including travel and incidental expenses under [certain terms and conditions])" when such emergency treatment was rendered outside the VA system for any of the following: (1) an "adjudicated" service-connected disability; (2) a non-service-connected disability "associated with and held to be aggravating a service-connected disability"; (3) any disability, if a veteran has a permanent total disability; or (4) any illness, injury, or dental condition of a veteran in a rehabilitation program where the care or treatment is necessary to facilitate entrance into or continuation of that program. 38 U.S.C. § 1728(a).

The implementing regulation, 38 C.F.R. § 17.120, reiterates these criteria without much elaboration except for (a)(3), with respect to which it provides: "For any disability of a veteran who has a total disability permanent in nature resulting from a service-connected disability (does not apply outside of the States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico)." 38 C.F.R. § 17.120(a)(3) (2020). Prior to its recodification in 1996, this regulation was located at 38 C.F.R. § 1780. *See* 61 Fed. Reg. 21,965, 21,968 (May 13, 1996). The parenthetical language was added in 1986 "to more accurately define the eligibility requirements for claims filed for VA payment of unauthorized medical services." 51 Fed. Reg. 8672, 8672 (Mar. 13, 1986).

Originally, section 1728 did not define "emergency treatment," *see* Pub. L. No. 93-82, Title I, § 106(a), 87 Stat. 179, 183 (Aug. 2, 1973), but Congress eventually assigned it the same meaning as it bore in the later-enacted section 1725. 38 U.S.C. § 1728(c). We turn to that final section now.

3.

Section 1725 was enacted in 1999 and addresses, in depth, the issue of VA's reimbursement for emergency treatments. It defines "emergency treatment" as "medical care or services furnished, in the judgment of the Secretary—"

> (A) when Department or other Federal facilities are not feasibly available and an attempt to use them beforehand would not be reasonable;
>
> (B) when such care or services are rendered in a medical emergency of such nature that a prudent layperson reasonably expects that delay in seeking immediate medical attention would be hazardous to life or health; and
>
> (C) until—
>
> (i) such time as the veteran can be transferred safely to a Department facility or other Federal facility and such facility is capable of accepting such transfer; or
>
> (ii) such time as a Department facility or other Federal facility accepts such transfer if—
>
> (I) at the time the veteran could have been transferred safely to a Department facility or other Federal facility, no Department facility or other Federal facility agreed to accept such transfer; and
>
> (II) the non-Department facility in which such medical care or services was furnished made and documented reasonable attempts to transfer the veteran to a Department facility or other Federal facility.

38 U.S.C. 1725(f)(1).

When emergency treatment is at issue, the provision states that the Secretary "shall reimburse a veteran … for the reasonable value of emergency treatment furnished the veteran in a non-Department facility" if the veteran is "an active [VA] health-care participant" and is "personally liable" for the emergency treatment. § 1725(a)(1), (b)(1). An active health-care participant is a veteran who is "enrolled in the health care system established under section 1705(a) of title 38 or received VA healthcare under chapter 17 within the 24-month period preceding the emergency treatment.[2] § 1725(b)(2).

B. Facts

Veteran Paul Van Dermark resides in Thailand. He served in the Navy from June 1963 until May 1967. Following service, he applied for disability compensation and was granted service connection for a right wrist and thumb disability, right shoulder capsulitis, bronchitis, and hemorrhoids. His combined schedular evaluation eventually reached 90% and he was assigned a total disability rating based on individual unemployability. He is not service connected for any heart-related condition.

In May 2016, Mr. Van Dermark started experiencing cardiac symptoms and underwent preliminary testing, which revealed an abdominal aortic aneurism. He contacted VA's FMP on May 5 to request reimbursement for medical bills he had already incurred and to inquire about his entitlement to reimbursement for a

[2] Under section 1705(a), the Secretary is directed to "establish and operate a system of annual patient enrollment" following a specific prioritization list; the first category includes veterans with service-connected disabilities rated 50% or greater, and the second category is made up of veterans with service-connected disabilities rated 30% or 40%. 38 U.S.C. § 1705(a)(1)-(2).

planned surgery. On May 14, he was informed that the FMP could not reimburse him because his treatments were not related to a service-connected disability. Mr. Van Dermark went ahead with his planned surgery and was hospitalized at Bangkok Hospital from May 22 to 26, 2016. The following month, VA personnel from the FMP formally denied his claim for reimbursement because the treatment he received was not related to a service-connected disability. When he disagreed, VA issued a Statement of the Case in October 2016 citing 38 U.S.C. § 1724 and its implementing regulation, 38 C.F.R. § 17.35, as the reasons for denial. He appealed to the Board, asserting that he was entitled to reimbursement under 38 U.S.C. § 1728(a)(3).

Meanwhile, Mr. Van Dermark had renewed cardiac problems in 2018 and sought VA treatment. He flew to Guam on May 4, 2018, for testing and observation at the United States Naval Hospital. He was then transferred to Tripler Army Medical Center in Hawaii on May 9 and underwent a coronary catheterization two days later. He was scheduled for a coronary artery bypass graft surgery on May 23 to replace his aortic valve. But he grew dissatisfied with the nursing staff and the outpatient accommodations that VA had arranged and decided to return to Thailand.

Upon returning, Mr. Van Dermark received medical care at the Bangkok Hospital on May 27, 2018. He again sought reimbursement from VA but was denied. He appealed this denial as well.

The Board issued a decision on April 17, 2019, denying reimbursement for expenses from both May 2016 and May 2018. First, the Board found that section 1724 was the controlling statute. This section "governs hospital care, medical services and nursing home care

abroad," and the term "emergency medical treatment" as used in sections 1725 and 1728, the Board concluded, is encompassed by "medical services." R. at 12 (internal quotation marks omitted). The Board reasoned that the emergency treatment reimbursement provisions in sections 1725 and 1728 are constrained by section 1724's general prohibition against VA providing medical care abroad. Under section 1724, Mr. Van Dermark's May 2016 and May 2018 cardiac treatments at Bangkok Hospital could not be reimbursed by VA because they did not relate to a service-connected condition or a non-service-connected condition associated with or aggravated by a service-connected condition; nor was Mr. Van Dermark participating in a chapter 31 rehab program.[3] The Board did not determine whether any care received at the Bangkok Hospital constituted emergency treatment. This appeal followed.

II. ANALYSIS

Mr. Van Dermark doesn't dispute the Board's analysis under section 1724. Instead, he argues that section 1724 is inapplicable to his claim for reimbursement. He begins by observing that both "furnish" and "reimburse" appear in sections 1725 and 1728 and reasons that these distinct terms must be presumed to bear distinct meanings. Relying on the common definitions of the words, he contends that "furnish" in the context of 1725 and 1728 requires the direct provision of healthcare, while "reimburse" signifies payment for

[3] But the Board did remand the issue of entitlement to reimbursement for March 2017 treatment at the Bangkok Hospital for a head injury that Mr. Van Dermark asserted was precipitated by his right wrist disability, which *is* service connected. Because remands are not final Board decisions, the Court has no jurisdiction over that matter. *See Sharp v. Shulkin*, 29 Vet.App. 26, 28 n.1 (2017).

healthcare provided by another party. And invoking the consistent meaning canon, Mr. Van Dermark asserts that "furnish" in section 1724(a) should be understood to have the same meaning it does in sections 1725 and 1728. Thus, he reasons that section 1724 does not affect his claim for reimbursement because VA was not asked to "furnish" him care but to "reimburse" him for care. With section 1724's bar cleared, Mr. Van Dermark believes that he is entitled to reimbursement for purportedly emergency treatment at the Bangkok Hospital in 2016 and 2018 under either section 1728(a)(3) because of his TDIU rating or section 1725(b) as an active VA healthcare participant personally liable for the non-VA treatment he received.

In response, the Secretary argues that, when read as a whole, the statutory scheme embedded within chapter 17 demonstrates a congressional intent only to provide or pay for medical care outside of the United States through the FMP established by section 1724.

Before reaching the legal issues, however, the Court must address a factual argument interposed by the Secretary. He contends that the medical care Mr. Van Dermark received from the Bangkok Hospital did not constitute emergency treatment as the phrase is defined in section 1725(f) and urges the Court to affirm on those grounds without going further. But whether specific hospital care constitutes emergency treatment is a factual question, and the Board did not make any findings on this issue in its decision. Outside certain circumstances not present here, the Court cannot decide factual questions in the first instance. *See Kyhn v. Shinseki*, 716 F.3d 572, 575 & n.4 (Fed. Cir. 2013). Therefore, the following analysis will presume solely for argument's sake that the care at issue in this case was emergency treatment.

This appeal turns on statutory interpretation. Statutory interpretation is a legal question, and the Court reviews the Board's determinations on legal questions de novo. *Casey v. Wilkie*, 31 Vet.App. 260, 265 (2019). "In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Id.* (quoting *Artis v. District of Columbia*, 138 S. Ct. 594, 603 (2018)). But context "inform[s] any statutory provision's plain meaning." *Id.* Put otherwise: "The meaning of the phrase turns on its context." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 413 (2012).

The first relevant term to tackle is "emergency treatment," the meaning of which is easy to ascertain because Congress defined it as "medical care or services furnished" in specific circumstances. 38 U.S.C. § 1725(f)(1). Section 1724(a)'s prohibition covers "hospital or domiciliary care or medical services outside any State." The Board concluded that "emergency treatment" as used in sections 1725 and 1728 "is encompassed by the term 'medical services' in 38 U.S.C. § 1724 and this statute applies to both emergency and non-emergency treatment abroad." R. at 12. Mr. Van Dermark doesn't challenge this conclusion in his opening brief.

In his reply brief, the veteran asserts that "hospital and domiciliary care" as used in section 1724(a) "differs from 'emergency treatment'" as used in sections 1725 and 1728. Reply Br. at 10. But this cursory statement isn't enough to preserve a challenge on appeal to the Board's conclusion. First, it doesn't address the term "medical services," which is what the Board examined. Second, despite the citations in the reply brief, the veteran's opening brief doesn't touch upon the issue at all, and the Court deems challenges not raised in an open-

ing brief forfeited. *Fears v. Wilkie*, 31 Vet.App. 308, 319 n.100 (2019). Finally, even in the reply brief, Mr. Van Dermark never offers any argument to support an assertion that "emergency treatment" isn't covered by section 1724. Therefore, we treat this issue as conceded on appeal.

The other two terms at issue here are "reimburse" and "furnish." Because neither is specifically defined by Congress, the Court looks to their ordinary meaning at the time of enactment. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). The word "reimburse" in sections 1725 and 1728 meant (and still means) "to pay back (an equivalent for something taken, lost, or expended)." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1914 (3d ed. 1966); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1986 (10th ed. 1998). There is no real dispute between the parties over the scope of this term.

The same cannot be said of "furnish." The term's appearance in section 1724 has its origin in 1940 legislation. *See* Act of Oct. 17, 1940, ch. 893, § 4, 54 Stat. 1193, 1195. Back then "furnish" was primarily understood to mean "[t]o provide for; to provide what is necessary for"; it also was defined as "[t]o provide; supply; give; afford," specifically, "[t]o supply (a person or thing *with* something)." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1021 (2d ed. 1934); *accord* THE POCKET OXFORD DICTIONARY 334 (7th ed. 1943). Thus, "furnish" has a potentially broad scope. It can mean to directly provide something or to indirectly provide *for* it.

This is where context comes in. To ascertain the meaning of "furnish" in section 1724(a), Mr. Van Dermark looks to sections 1725 and 1728. *See* Appellant's Br. at 19. In the context of those provisions, he main-

tains, the word "furnish" must be understood to describe "only" the situation where VA is "directly" providing medical care, whereas "reimburse"—which is used alongside it—means to repay for medical care furnished by another. *Id.* at 16-17. Focusing narrowly on sections 1725 and 1728, there is something to this. The distinction is clear when Congress, for example, instructed the Secretary to "*reimburse* a veteran … for the reasonable value of emergency treatment *furnished* the veteran in a non-Department facility." 38 U.S.C. § 1725(a) (emphasis added). Or when it permitted the Secretary, "in lieu of *reimbursing* [a] veteran," to "make payment of the reasonable value of emergency treatment directly—to the hospital or other health facility *furnishing* the emergency treatment." 38 U.S.C. § 1728(b)(1) (emphasis added). In these passages, the word "furnish" appears to exclude the concept of reimbursement.

But the fact that "furnish" may bear this narrow meaning in sections 1725 and 1728 does not support giving it the same meaning elsewhere in chapter 17. For instance, under the Veterans Community Care Program, the Secretary is instructed in certain circumstances to "furnish hospital care, medical services, and extended care services to a covered veteran through health care providers" like a "Federally-qualified health center" or the "Indian Health Service." 38 U.S.C. § 1703(c), (d)(1). Likewise, when hospital care or a medical service is not "feasibly available" in a VA facility, the Secretary is authorized to "furnish such care or service to such covered individual through an agreement under this section with an eligible entity or provider to provide" them. 38 U.S.C. § 1703A(a)(1)(A). Other examples abound. *See, e.g.*, 38 U.S.C. §§ 1712A(e)(1), 1720C(b)(1), 1720I(c)(1), 1788(c). In

these provisions, it's clear that Congress is using "furnish" to mean, not the direct provision of healthcare by VA, but the assumption of the cost of healthcare provided by non-VA entities.

Mr. Van Dermark admitted as much at oral argument. Departing somewhat from his initial briefing position, he conceded that "furnish" as used in chapter 17 can mean the provision of healthcare directly by VA or the provision of healthcare by VA via a contract with a third party. But he still maintained that "furnish" cannot mean after-the-fact reimbursement of healthcare provided by a third party. Oral Argument at 10:47-12:56.

But Congress "need not, and frequently does not, use the same term to mean precisely the same thing in two different statutes, even when the statutes are enacted at about the same time." *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Res. Sys.*, 468 U.S. 137, 174-75 (1984) (O'Connor, J., dissenting). And as noted above, the relevant portions of chapter 17 were not enacted at the same time but over the course of 50 years. The consistent-usage canon—which Mr. Van Dermark implicitly invokes when he consults the way "furnish" is used in VA's other healthcare statutes—"readily yields to context, especially when a statutory term is used throughout a statute and takes on distinct characters in distinct statutory provisions." *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1863 (2019) (quotation marks omitted); *see also id.* at 1865 ("The consistent-usage canon breaks down where Congress uses the same word in a statute in multiple conflicting ways.").

Because Congress has not defined "furnish" and has used it to mean distinct things throughout chapter

17, section 1724(a) itself provides the most important contextual clues to the scope of "furnish" in that provision. Several considerations persuade us that subsection (a) uses the term "furnish" in its broader sense of "provide for." Thus, the general ban on VA's furnishing medical services abroad also bars reimbursement for medical services, save for the exceptions specified in later subsections of 1724.

First, when the verb "furnish" was added to section 1724's precursor in 1940, the existing law—a VA regulation—stated: "No person shall be entitled to receive domiciliary, medical, or hospital care, including treatment, who resides outside of the continental limits of the United States or its Territories or possessions." § 4, 54 Stat. at 1195. To this, Congress tacked on the following: "*Provided*, That in the discretion of the Administrator of Veterans' Affairs necessary hospital care, including medical treatment, *may be furnished* to veterans who are citizens of the United States and who are temporarily sojourning or residing abroad, for disabilities due to war service in the armed forces of the United States." *Id.* (emphasis added).

A Senate report on the amendment indicated that the exception in 1940 was created because VA thought the existing law worked "a hardship on certain veterans suffering with service-connected disabilities … and others who, from necessity rather than choice, are temporarily residing abroad in the promotion for American interests." S. REP. NO. 76-2198, at 5-6 (1940). Importantly for present purposes, the report stated that the existing law barring entitlement to medical or hospital care abroad was "in consonance" with another VA regulation that "limit[ed] the right to treatment primarily to that which can be afforded in Government facilities." *Id.* at 5. With the amendment, Congress de-

cided to "permit the hospitalization of such veterans who have had war service and who are American citizens, when necessary for the relief of service-connected disabilities." *Id.* at 6. In other words, although there were no VA (i.e., "Government") facilities abroad to treat service-connected disabilities, VA could allow non-VA facilities in other countries to furnish such treatment by picking up the tab. As Congress continued to recognize almost two decades later, "American veterans residing in other countries, such as France, England, or Germany, are not given medical care *at VA expense* for non-service-connected disabilities." S. REP. NO. 85-1469, at 5 (1958) (emphasis added).

That "furnish" bore this broad meaning of indirect provision by VA is supported by the VA Administrator's first report to Congress after the amendment discussed above took effect.[4] The Administrator noted that the

> prohibition against the rendering of medical treatment for beneficiaries in foreign countries … was repealed by a law authorizing such treatment for applicants suffering from service connected conditions who could establish the fact that they have American citizenship. By agreement, the Department of State undertook

[4] We take judicial notice of the statements and other facts put forth in the VA report because this is "extra-record evidence … from sources whose accuracy cannot reasonably be questioned." *Euzebio v. McDonough*, 989 F.3d 1305, 1323 (Fed. Cir. 2021) (quotation marks omitted); *see Dodd v. TVA*, 770 F.2d 1038, 1039 n.1 (Fed. Cir. 1985) (taking judicial notice of facts contained in the Tennessee Valley Authority's annual report to Congress); *see also Terrebonne v. Blackburn*, 646 F.2d 997, 1000 n.4 (5th Cir. June 1981) (en banc) ("Absent some reason for mistrust, courts have not hesitated to take judicial notice of agency records and reports.").

> to establish that required status before *arranging*, as heretofore, *the treatment of such citizens living in foreign countries* (other than Canada, where direct arrangements are made through a reciprocal agreement with the Department of Pensions and National Health, Ottawa).

ANNUAL REPORT OF THE ADMINISTRATOR OF VETERANS AFFAIRS FOR THE FISCAL YEAR ENDED ON JUNE 30, 1941, at 14 (1942) (emphasis added) ("1941 ANNUAL REPORT"). The report goes on to say that the only application received during that fiscal year (from a veteran residing in Cuba) was rejected "because the conditions for which he requested treatment had no relation to [his] former military service." *Id.* The subject is concluded with the statement that political "conditions obtaining in Europe at the present time make practically impossible the furnishing of medical treatment to citizens of the United States who are residing in countries now occupied by German military forces." *Id.* at 14-15. These passages reveal, as a matter of historical fact, that VA would "furnish" medical treatment to veterans abroad by arranging for its provision through non-VA entities.

Indeed, no other understanding seems possible since, at the time, VA did not have under its control or propose development of a single facility outside the United States. *See* 1941 ANNUAL REPORT at 107-109. And, although VA reported that more than $2 million in pension and compensation benefits were paid to veterans in "United States possessions and foreign countries," *id.* at 91, the portion of the Administrator's report detailing the total number of veterans remaining under VA hospital treatment at the end of fiscal year 1941 lists hospital locations only in the continental

United States and its then-"possessions": Alaska, the Canal Zone, Hawaii, the Philippine Islands, and Puerto Rico, *id.* at 44-47. This silence is telling, especially when VA was able to report the specific amounts of pension and compensation received by the precise numbers of veterans or their dependents living in foreign countries. *Id.* at 98-101.

So, the historical evidence shows that, at the time that Congress permitted medical treatment for service-connected disabilities to be "furnished" to veterans abroad, VA had no healthcare infrastructure abroad to provide such treatment directly but would provide it as appropriate by paying for it. Thus, when Congress in 1940 affirmed the general bar on the furnishing of VA medical treatment to veterans outside the United States but permitted such treatment to be furnished for service-connected disabilities, it was using the word "furnish" in the indirect sense of the Agency arranging or paying for treatment provided by non-VA entities.

And, indeed, that is how the FMP is administered today. Per VA's policy manual: "FMP may provide *reimbursement* for all foreign-provided, medically necessary services associated with the treatment of adjudicated service-connected disabilities or any disability associated with and held to be aggravating a service-connected condition, as well as care for Veterans participating in a rehabilitation program." FOREIGN MEDICAL PROGRAM POLICY MANUAL § 1.01.III.B. Generally, claims for "payment or reimbursement for expenses of medical care or services" must be filed within two years following the date the care or service was rendered or the date of discharge from inpatient hospitalization. *Id.* § 3.01.I.A. Or, as the Agency's brochure explaining the FMP's mechanics to veterans advises more simply: "You may pay the provider and then file a claim by

submitting the bill, medical documentation and proof of payment to the FMP office. Or your provider, if willing, may submit the bill and medical documentation to FMP for payment."[5]

With the proper contextual meaning of "furnish" in section 1724(a) established, we can put it together with the other definitions noted above to understand the scope of the congressional limitation on VA medical treatment abroad. When Congress directed in section 1724(a) that "the Secretary shall not furnish hospital or domiciliary care or medical services outside any State," it meant that the Secretary may not provide for or arrange veterans' "hospital or domiciliary care or medical services" abroad. Since emergency treatment is a type of medical service, section 1724 necessarily orders the Secretary not to "provide for" emergency treatment abroad. Reimbursing for the cost of emergency treatment, either by paying a veteran back or directly paying a non-VA provider, is a way of providing for that treatment and, in fact, is generally the only way VA may arrange for treatment in other countries. Thus, "reimburse" falls within the meaning of "furnish" as used in section 1724(a). Under a plain reading of the relevant terms, section 1724 barred VA from paying for Mr. Van Dermark's emergency cardiac treatment at Bangkok Hospital because he was not service connected for any cardiac condition. (Nor was any such treatment needed in connection with his participation in a chapter 31 rehab program.)

Nothing in section 1725 or 1728 persuades us that they meant to alter VA's healthcare obligations outside the United States. Those provisions make no reference

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[5] https://www.va.gov/COMMUNITYCARE/docs/pubfiles/brochures/FMP_brochure.pdf.

to medical services abroad—and recall that emergency treatment is defined as a type of medical care or service. 38 U.S.C. § 1725(f)(1). "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). Rather, when Congress wished to add exceptions to, or otherwise alter the scope of, the general bar on VA's furnishing of medical services abroad, it did so in section 1724 itself, not elsewhere. We will not presume that sections 1725 and 1728 were meant to apply in foreign countries like Thailand. *See id.* at 261 ("Rather than guess anew in each case, we apply the presumption [against territoriality] in all cases, preserving a stable background against which Congress can legislate with predictable effects.").

Relatedly, given the carefully delineated circumstances in section 1724 in which VA is obliged to provide for veterans' medical care in foreign countries, we think Congress would have made it clear if it intended to dramatically expand those circumstances to include "[a]ny disability" if a veteran has TDIU, 38 U.S.C. § 1728(a)(3), or is "an active Department health-care participant," 38 U.S.C. § 1725(b)(1). *See Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782, 790 (Fed. Cir. 2016). But no intention on Congress's part to do so is apparent.

Likewise, the fact that courts generally presume that Congress intends a specific statute to govern over more general ones supports our conclusion. *See Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir. 2010). Section 1724, as noted above, is the only one in chapter 17 that addresses the instances in which VA may provide for the medical care veterans receive abroad. Sections 1725 and 1728 make no reference to their territorial scope. Where Congress addresses VA's extraterritori-

al healthcare responsibilities in one statute but says nothing about it in others, we think it proper to conclude that the former takes precedence. Moreover, "Congress is presumed to legislate against the backdrop of existing law." *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 848 (Fed. Cir. 2008). At the time section 1728 was enacted in 1973 and section 1725 in 1999, section 1724(a)'s general prohibition against the furnishing of medical services for non-service-connected disabilities abroad had existed for several decades.

After considering the foregoing, the Court concludes that sections 1725 and 1728 permit reimbursement for veterans who receive emergency treatment from domestic, non-VA healthcare providers. In contrast, section 1724 covers when veterans abroad who receive medical care or services—including emergency treatment—may receive reimbursement. As relevant here, because Mr. Van Dermark was not seeking medical care in connection with a service-connected condition or as part of a rehab program, the Board properly determined that his May 2016 and May 2018 treatments at Bangkok Hospital for cardiac issues—even if qualifying as emergency treatment—could not, under section 1724, be reimbursed by VA.

III. CONCLUSION

Accordingly, the Court AFFIRMS the April 17, 2019, Board decision.

GREENBERG, *Judge*, dissenting: The line between a plain language analysis and interpreting ambiguity in a statute has never been more blurred. What the majority calls historical context to support a plain language finding could very easily be described as reviewing legislative history to uncover the meaning of an ambiguous term. With the utmost respect for my esteemed colleagues, I have no alternative but to dissent.

It is well established that Congress created a scheme where veterans are a highly regarded class of citizens. *See Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (stating that longstanding Congressional "solicitude [for veterans] is plainly reflected in the [Veterans Judicial Review Act of 1988], as well as in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions" (internal quotes omitted)). This principle has been considered and enforced since the earliest days of the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n. (1792).

As Justice Alito recognized, "We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21 n. 9 (1991)); *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (noting "the rule that interpretive doubt is to be resolved in the veteran's favor" cited in *King*). Not to be viewed merely as an afterthought,

> the pro-veteran canon is a traditional tool of construction. It requires that we discern the purpose of a veterans' benefit provision in the context of the veterans' benefit scheme as a

> whole and ensure that the construction effectuates, rather than frustrates, that remedial purpose: that benefits that by law belong to the veteran go to the veteran.

Kisor v. McDonough, 995 F.3d 1316, 1327 (Fed. Cir. 2021) (Reyna, J., dissenting).

The Court should be interpreting statutes in a way that helps veterans, otherwise we diminish and minimize the purpose and role of the entire statutory scheme created by Congress specifically to favor veterans; in fact, the pro-veteran canon requires us to interpret statutes in this context. Today's decision sets a dangerous precedent for interpretation of future veterans benefits statutes. For the foregoing reasons, I dissent.

APPENDIX C

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS

[REDACTED]
Docket No. 16-61 239
Advanced on the Docket

IN THE APPEAL OF **PETER VAN DERMARK**
Represented by **Luke D. Miller, Attorney**

Date: April 17, 2019

ORDER

Payment or reimbursement for the cost of non-VA medical care the Veteran received at Bangkok Hospital from May 22, 2016 through May 26, 2016 is denied.

Payment or reimbursement for the cost of non-VA medical care the Veteran received at Bangkok Hospital on May 27, 2018 is denied.

REMANDED

The issue of whether payment or reimbursement is warranted for non-VA medical care the Veteran received at Bangkok Hospital on March 20, 2017 is remanded.

FINDINGS OF FACT

1. The Veteran received treatment at Bangkok Hospital in Thailand from May 22, 2016 through May 26, 2016 for an abdominal aorta aneurysm.

2. The Veteran received treatment at Bangkok Hospital in Thailand on May 27, 2018 for cardiac care services.

3. The Veteran is not service-connected for abdominal aorta aneurysm or any other cardiac condition, nor is his abdominal aorta aneurysm or any other cardiac condition associated with or aggravated by any service-connected disability.

4. The Veteran has not been a participant in a rehabilitation program under 38 U.S.C. Chapter 31.

CONCLUSIONS OF LAW

1. The criteria for payment or reimbursement for the cost of non-VA medical care the Veteran received at Bangkok Hospital from May 22, 2016 through May 26, 2016 are not met. 38 U.S.C. §§ 1703, 1724; 1725, 1728, 5107; 38 C.F.R. §§ 17.35, 17.52, 17.53, 17.54, 17.120, 17.121, 17.1002.

2. The criteria for payment or reimbursement for the cost of non-VA medical care the Veteran received at Bangkok Hospital on May 27, 2018 are not met. 38 U.S.C. §§ 1703, 1724; 1725, 1728, 5107; 38 C.F.R. §§ 17.35, 17.52, 17.53, 17.54, 17.120, 17.121, 17.1002.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the Navy from June 1963 to May 1976. This case comes before the Board of Veterans' Appeals (Board) on appeal from June 2016, May 2017, and August 2018 denial of benefits decisions.

The Veteran's claims for payment or reimbursement for the cost of non-VA medical care the Veteran re-

ceived at Bangkok Hospital from May 22, 2016 through May 26, 2016 and May 27, 2018 were denied because the Veteran did not meet the criteria under 38 U.S.C. § 1724 and 38 C.F.R. § 17.35 as his abdominal aorta aneurysm and cardiac condition were not service-connected conditions and were not associated with or held to be aggravated by a service-connected condition. *See* August 2016 decision; October 2016 statement of the case; August 2018 decision; October 2018 statement of the case.

The Veteran contends that he is entitled to reimbursement for his emergency surgery for an abdominal aorta aneurysm for which he was treated at Bangkok Hospital from May 22, 2016 through May 26, 2016. The Veteran states that 38 U.S.C. § 1724 and 38 C.F.R. § 17.35 are not applicable to his claim as his treatment was for an emergency condition. The Veteran submitted a letter from his wife and a June 2016 letter from treating physician in Thailand confirming that surgery was required and that he was unable to fly to the United States due to the risk of rupture during the 30-hour flight. He asserts that since his abdominal aorta aneurysm surgery was an emergency surgery, the applicable regulations are 38 U.S.C. §§ 1725 and 1728. In this regard, the Veteran contends that since he has been granted a total rating based on individual unemployability due to a service connected disability (TDIU), he is entitled to reimbursement for treatment of any condition pursuant to 38 U.S.C. § 1728. *See* May through August 2016 e-mails from Veteran; October 2016 VA Form 9; April 2018 report of general information; January and February 2019 statements from the Veteran's representative. He further asserts that, if 38 U.S.C. § 1728 does not apply to his claim, then he should be granted payment under 38 U.S.C. § 1725 as he meets all

requirements of 38 U.S.C. § 1725, including receiving medical treatment in the 24 months preceding his claim. *See* July 2017 statement; August 2017 correspondence; February 2019 statement from the Veteran's representative.

In the Veteran's claim for reimbursement for his treatment at Bangkok Hospital on May 27, 2018, the Veteran similarly argues that the AOJ failed in applying 38 U.S.C. § 1724 to his claim and that the AOJ should have granted his claim pursuant to 38 U.S.C. §§ 1725 and 1728 as his condition was emergent. *See* February 2019 statement from the Veteran's representative; November 2018 VA Form 9; October 2018 VA Form 9; August 2018 notice of disagreement. He further asserts that he was told by a VA staff member to go directly to the emergency room or hospital and he includes an April 2018 e-mail from a VA staff member, I.M., to support this assertion.

In general, if VA is to provide payment or reimbursement of medical expenses incurred in connection with a veteran's care at a non-VA hospital, the care must be authorized in advance. *See* 38 U.S.C. § 1703; 38 C.F.R. § 17.54. In regard to the Veteran's treatment at Bangkok Hospital from May 22, 2016 through May 26, 2016, the Board acknowledges that that the Veteran attempted to obtain authorization for his treatment. He sent an e-mail to the VA on May 5, 2016 in which he noted that a stent would be required and that flying back to the United States was out of the question. In regard to the May 2018 treatment, the Board also acknowledges that the Veteran was advised to go the nearest hospital or emergency room immediately since his cardiac symptoms were worsening. *See* May 2018 e-mail from I.M. at the VA. However, the advice was provided on May 1, 2018 and the Veteran's claim for re-

imbursement is for treatment on May 27, 2018. The Veteran did not receive authorization for his May 22, 2016 through May 26, 2016 or his May 27, 2018 treatments and his treatments would not have been authorized in advance as they were not for a service-connected condition or related to a service-connected condition.

Hospital care, medical services and nursing home care abroad is governed by 38 U.S.C. § 1724, which states, in pertinent part:

> (a) Except as provided in subsections (b) and (c), the Secretary shall not furnish hospital or domiciliary care or medical services outside any State." Subsections (b) and (c) are as follows:
>
> (b)(1) The Secretary may furnish hospital care and medical services outside a State to a veteran who is otherwise eligible to receive hospital care and medical services if the Secretary determines that such care and services are needed for the treatment of a service-connected disability of the veteran or as part of a rehabilitation program under chapter 31 of this title [38 U.S.C.S §§ 3100 et seq.].
>
> (2) Care and services for a service-connected disability of a veteran who is not a citizen of the United States may be furnished under this subsection only—
>
> (A) if the veteran is in the Republic of the Philippines or in Canada; or
>
> (B) if the Secretary determines, as a matter of discretion and pursuant to regulations which the Secretary shall prescribe, that it is appropriate and feasible to furnish such care and services.

> (c) Within the limits of those facilities of the Veterans Memorial Medical Center at Manila, Republic of the Philippines, for which the Secretary may contract, the Secretary may furnish necessary hospital care to a veteran for any non-service-connected disability if such veteran is unable to defray the expenses of necessary hospital care. The Secretary may enter into contracts to carry out this section.

38 C.F.R. § 17.35 states:

> § 17.35 Hospital care and outpatient services in foreign countries.
>
> (a) Under the VA Foreign Medical Program, VA may furnish hospital care and outpatient services to any veteran outside of the United States, without regard to the veteran's citizenship:
>
> (1) If necessary for treatment of a service-connected disability, or any disability associated with and held to be aggravating a service-connected disability;
>
> (2) If the care and services are furnished to a veteran participating in a rehabilitation program under 38 U.S.C. chapter 31 who requires care and services for the reasons enumerated in § 17.47(i)(2).
>
> (b) Under the Foreign Medical Program, the care and services authorized under paragraph (a) of this section are available in the Republic of the Philippines to a veteran who meets the requirements of paragraph (a) of this section. VA may also provide outpatient services to a veteran referenced in paragraph (a)(1) in the VA outpatient clinic in Manila for the treatment of such veteran's service-connected conditions within the limits of the clinic.

> Non-service connected conditions of a veteran who has a service-connected disability may be treated within the limits of the VA outpatient clinic in Manila.
>
> (c) Claims for payment or reimbursement for services not previously authorized by VA under this section are governed by §§ 17.123-17.127 and 17.129-17.132.

The Board finds that 38 U.S.C. § 1724 and its implementing regulation, 38 C.F.R. § 17.35, are the appropriate statute and regulation in this case. The Board acknowledges that VA is authorized to reimburse veterans for emergency medical treatment under 38 U.S.C. § 1725 and 38 U.S.C. § 1728; however, the Board finds these statutes are not applicable for services performed outside of the United States.

As noted above, 38 U.S.C. § 1724 governs "hospital care, medical services and nursing home care abroad" and specifically provides "Except as provided in subsections (b) and (c), the Secretary shall not furnish hospital or domiciliary care or medical services outside any State". 38 U.S.C. § 1724(a). Further, pursuant to 38 U.S.C. § 1725(f)(1), the term "emergency treatment" is defined as "medical care or services furnished, in the judgment of the Secretary…" Accordingly, by definition "emergency treatment" is encompassed by the term "medical services" in 38 U.S.C. § 1724 and this statute applies to both emergency and non-emergency treatment abroad.

Even more, the implementing regulation for 38 U.S.C. 1728, 38 C.F.R. § 17.120, specifically states that emergency treatment for any disability of a veteran who has a total disability permanent in nature resulting from a service-connected disability treatment does not apply

to services provided outside the States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. *See* 38 C.F.R. § 17.120(a)(3). Although the Veteran is in receipt of TDIU, as the Veteran resides in Thailand and is seeking authorization for treatment in Thailand, reimbursement may not be granted under the provisions of 38 C.F.R. § 17.120(a)(3).

Service connection is not in effect for the Veteran's abdominal aorta aneurysm and/or any other cardiac condition. The Veteran's treatment at Bangkok Hospital on May 22, 2016 through May 26, 2016 was for his abdominal aorta aneurysm. *See* May 2016 Bangkok Hospital treatment records. The Veteran's treatment on May 27, 2018 was related to his cardiac conditions, to include a coronary angiography, aortogram, and a vein graft angiogram. *See* May 2018 Bangkok Hospital treatment records. The Veteran does not contend, and the evidence does not show, that his May 22, 2016 through May 26, 2016 and/or his May 27, 2018 treatment at Bangkok Hospital is related to a service-connected disability. Further, the Veteran was not part of a rehabilitation program under 38 U.S.C. Chapter 31. Accordingly, as the requirements for medical treatment abroad have not been met, the Veteran's claim for payment or reimbursement for the cost of non-VA medical care the Veteran received at Bangkok Hospital from May 22, 2016 through May 26, 2016 and on May 27, 2018 must be denied. While the Board is sympathetic to the Veteran's contentions, it is bound by the law, and this decision is dictated by the relevant statutes and regulations.

REASONS FOR REMAND

The Veteran's March 20, 2017 treatment was for a head injury. He contends that his head injury occurred because he fell face forward due to his right hand failing to support him. *See* May 2018 VA Form 9; February 2018, April 2018, and May 2018 e-mails from the Veteran. Service connection is in effect for De Quervain's disease of the right wrist with radial sensory neuroma.

A March 20, 2017 private treatment record shows chronic wound on the forehead. The original document in the paper claims file does not show any additional information in the diagnosis section. However, the same medical record was submitted by the Veteran on September 24, 2018 and electronically associated with the claims file. On this version, it appears that the Veteran notated on the record that the wound was caused by his right wrist collapsing. *See* March 20, 2017 medical record from Bangkok Hospital. A VA medical opinion is warranted regarding whether the Veteran's head injury on March 20, 2017 was associated with or aggravated by his service-connected De Quervain's disease of the right wrist with radial sensory neuroma.

Any additional private treatment records regarding the Veteran's March 20, 2017 treatment at Bangkok Hospital must be obtained on remand. Additionally, the initial decision from the AOJ, which the Statement of the Case shows was issued on May 1, 2017, is not associated with the claims file, and must be obtained on remand.

The matter is REMANDED for the following action:

1. Associate with the claims file the initial decision from the AOJ, which the Statement of the Case shows was issued on May 1, 2017. If this cannot be obtained after reasonable efforts have been

made, issue a formal finding that such record does not exist or that further efforts to obtain such record would be futile, which should be documented in the claims file.

2. After obtaining any necessary authorization from the Veteran, obtain and associate with the claims file, any additional private treatment records related to the Veteran's private treatment at Bangkok Hospital on March 20, 2017. Any negative response should be in writing and associated with the claims file.

3. After any additional evidence has been associated with the claims file, request a VA medical opinion. The VA medical examiner must review the claims file and opine as to whether it is at least as likely as not that the Veteran's forehead wound for which he was treated at Bangkok Hospital on March 20, 2017 was caused or aggravated by his service-connected De Quervin's disease of the right wrist with radial sensory neuroma.

[Signature]
S. C. KREMBS
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD C. Samuelson, Counsel

APPENDIX D

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-2225

PETER VAN DERMARK,
Claimant-Appellant,
v.

DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-2795, Judge Coral Wong Pietsch, Judge Joseph L. Toth, Judge William S. Greenberg.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

O R D E R

Peter Van Dermark filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and

thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue May 1, 2023.

FOR THE COURT

April 24, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX E

RELEVANT STATUTORY PROVISIONS

38 U.S.C. § 1724

§ 1724. Hospital care, medical services, and nursing home care abroad

(a) Except as provided in subsections (b) and (c), the Secretary shall not furnish hospital or domiciliary care or medical services outside any State.

(b)(1) The Secretary may furnish hospital care and medical services outside a State to a veteran who is otherwise eligible to receive hospital care and medical services if the Secretary determines that such care and services are needed for the treatment of a service-connected disability of the veteran or as part of a rehabilitation program under chapter 31 of this title.

(2) Care and services for a service-connected disability of a veteran who is not a citizen of the United States may be furnished under this subsection only—

(A) if the veteran is in the Republic of the Philippines or in Canada; or

(B) if the Secretary determines, as a matter of discretion and pursuant to regulations which the Secretary shall prescribe, that it is appropriate and feasible to furnish such care and services.

(c) Within the limits of those facilities of the Veterans Memorial Medical Center at Manila, Republic of the Philippines, for which the Secretary may contract, the Secretary may furnish necessary hospital care to a veteran for any non-service-connected disability if such veteran is unable to defray the expenses of necessary

hospital care. The Secretary may enter into contracts to carry out this section.

(d) The Secretary may furnish nursing home care, on the same terms and conditions set forth in section 1720(a) of this title, to any veteran who has been furnished hospital care in the Philippines pursuant to this section, but who requires a protracted period of nursing home care.

(e) Within the limits of an outpatient clinic in the Republic of the Philippines that is under the direct jurisdiction of the Secretary, the Secretary may furnish a veteran who has a service-connected disability with such medical services as the Secretary determines to be needed.

38 U.S.C. § 1725
(eff. Feb. 1, 2010 to Dec. 28, 2022)

§ 1725. Reimbursement for emergency treatment

(a) GENERAL AUTHORITY.—(1) Subject to subsections (c) and (d), the Secretary shall reimburse a veteran described in subsection (b) for the reasonable value of emergency treatment furnished the veteran in a non-Department facility.

(2) In any case in which reimbursement is authorized under subsection (a)(1), the Secretary, in the Secretary's discretion, may, in lieu of reimbursing the veteran, make payment of the reasonable value of the furnished emergency treatment directly—

(A) to a hospital or other health care provider that furnished the treatment; or

(B) to the person or organization that paid for such treatment on behalf of the veteran.

(b) ELIGIBILITY.—(1) A veteran referred to in subsection (a)(1) is an individual who is an active Department health-care participant who is personally liable for emergency treatment furnished the veteran in a non-Department facility.

(2) A veteran is an active Department health-care participant if—

(A) the veteran is enrolled in the health care system established under section 1705(a) of this title; and

(B) the veteran received care under this chapter within the 24-month period preceding the furnishing of such emergency treatment.

(3) A veteran is personally liable for emergency treatment furnished the veteran in a non-Department facility if the veteran—

(A) is financially liable to the provider of emergency treatment for that treatment;

(B) has no entitlement to care or services under a health-plan contract (determined, in the case of a health-plan contract as defined in subsection (h)(2)(B) or (h)(2)(C), without regard to any requirement or limitation relating to eligibility for care or services from any department or agency of the United States);

(C) has no other contractual or legal recourse against a third party that would, in whole, extinguish such liability to the provider; and

(D) is not eligible for reimbursement for medical care or services under section 1728 of this title.

(c) LIMITATIONS ON REIMBURSEMENT.—(1) The Secretary, in accordance with regulations prescribed by the Secretary, shall—

(A) establish the maximum amount payable under subsection (a);

(B) delineate the circumstances under which such payments may be made, to include such requirements on requesting reimbursement as the Secretary shall establish; and

(C) provide that in no event may a payment under that subsection include any amount for which the veteran is not personally liable.

(2) Subject to paragraph (1), the Secretary may provide reimbursement under this section only after the veteran or the provider of emergency treatment has ex-

hausted without success all claims and remedies reasonably available to the veteran or provider against a third party for payment of such treatment.

(3) Payment by the Secretary under this section on behalf of a veteran to a provider of emergency treatment shall, unless rejected and refunded by the provider within 30 days of receipt, extinguish any liability on the part of the veteran for that treatment. Neither the absence of a contract or agreement between the Secretary and the provider nor any provision of a contract, agreement, or assignment to the contrary shall operate to modify, limit, or negate the requirement in the preceding sentence.

(4)(A) If the veteran has contractual or legal recourse against a third party that would only, in part, extinguish the veteran's liability to the provider of the emergency treatment, and payment for the treatment may be made both under subsection (a) and by the third party, the amount payable for such treatment under such subsection shall be the amount by which the costs for the emergency treatment exceed the amount payable or paid by the third party, except that the amount payable may not exceed the maximum amount payable established under paragraph (1)(A).

(B) In any case in which a third party is financially responsible for part of the veteran's emergency treatment expenses, the Secretary shall be the secondary payer.

(C) A payment in the amount payable under subparagraph (A) shall be considered payment in full and shall extinguish the veteran's liability to the provider.

(D) The Secretary may not reimburse a veteran under this section for any copayment or similar payment that

the veteran owes the third party or for which the veteran is responsible under a health-plan contract.

(d) INDEPENDENT RIGHT OF RECOVERY.—(1) In accordance with regulations prescribed by the Secretary, the United States shall have the independent right to recover any amount paid under this section when, and to the extent that, a third party subsequently makes a payment for the same emergency treatment.

(2) Any amount paid by the United States to the veteran (or the veteran's personal representative, successor, dependents, or survivors) or to any other person or organization paying for such treatment shall constitute a lien in favor of the United States against any recovery the payee subsequently receives from a third party for the same treatment.

(3) Any amount paid by the United States to the provider that furnished the veteran's emergency treatment shall constitute a lien against any subsequent amount the provider receives from a third party for the same emergency treatment for which the United States made payment.

(4) The veteran (or the veteran's personal representative, successor, dependents, or survivors) shall ensure that the Secretary is promptly notified of any payment received from any third party for emergency treatment furnished to the veteran. The veteran (or the veteran's personal representative, successor, dependents, or survivors) shall immediately forward all documents relating to such payment, cooperate with the Secretary in the investigation of such payment, and assist the Secretary in enforcing the United States right to recover any payment made under subsection (c)(3).

(e) WAIVER.—The Secretary, in the Secretary's discretion, may waive recovery of a payment made to a veteran under this section that is otherwise required by subsection (d)(1) when the Secretary determines that such waiver would be in the best interest of the United States, as defined by regulations prescribed by the Secretary.

(f) DEFINITIONS.—For purposes of this section:

(1) The term "emergency treatment" means medical care or services furnished, in the judgment of the Secretary—

(A) when Department or other Federal facilities are not feasibly available and an attempt to use them beforehand would not be reasonable;

(B) when such care or services are rendered in a medical emergency of such nature that a prudent layperson reasonably expects that delay in seeking immediate medical attention would be hazardous to life or health; and

(C) until—

(i) such time as the veteran can be transferred safely to a Department facility or other Federal facility and such facility is capable of accepting such transfer; or

(ii) such time as a Department facility or other Federal facility accepts such transfer if—

(I) at the time the veteran could have been transferred safely to a Department facility or other Federal facility, no Department facility or other Federal facility agreed to accept such transfer; and

(II) the non-Department facility in which such medical care or services was furnished made and documented reasonable attempts to transfer the veteran to a Department facility or other Federal facility.

(2) The term "health-plan contract" includes any of the following:

(A) An insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or similar arrangement under which health services for individuals are provided or the expenses of such services are paid.

(B) An insurance program described in section 1811 of the Social Security Act (42 U.S.C. 1395c) or established by section 1831 of that Act (42 U.S.C. 1395j).

(C) A State plan for medical assistance approved under title XIX of such Act (42 U.S.C. 1396 et seq.).

(D) A workers' compensation law or plan described in section 1729(a)(2)(A) of this title.

(3) The term "third party" means any of the following:

(A) A Federal entity.

(B) A State or political subdivision of a State.

(C) An employer or an employer's insurance carrier.

(D) An automobile accident reparations insurance carrier.

(E) A person or entity obligated to provide, or to pay the expenses of, health services under a health-plan contract.

Pub. L. No. 117-328, tit. I, § 142(a) & (c)(2), 136 Stat. 4459, 5423 (2022) (amending 38 U.S.C. § 1725)

SEC. 142. CLAIMS FOR PAYMENT FROM DEPARTMENT OF VETERANS AFFAIRS FOR EMERGENCY TREATMENT FURNISHED TO VETERANS.

(a) TREATMENT FOR NON-SERVICE-CONNECTED DISABILITIES.—

(1) IN GENERAL.—Section 1725 of title 38, United States Code, is amended—

(A) by redesignating subsection (f) as subsection (h); and

(B) by inserting after subsection (e) the following new subsections (f) and (g):

"(f) SUBMITTAL OF CLAIMS FOR DIRECT PAYMENT.—An individual or entity seeking payment under subsection (a)(2) for treatment provided to a veteran in lieu of reimbursement to the veteran shall submit a claim for such payment not later than 180 days after the latest date on which such treatment was provided.

"(g) HOLD HARMLESS.—No veteran described in subsection (b) may be held liable for payment for emergency treatment described in such subsection if—

"(1) a claim for direct payment was submitted by an individual or entity under subsection (f); and

"(2) such claim was submitted after the deadline established by such subsection due to—

"(A) an administrative error made by the individual or entity, such as submission of the claim to the wrong Federal agency, under the wrong

reimbursement authority (such as section 1728 of this title), or submission of the claim after the deadline; or

"(B) an administrative error made by the Department, such as misplacement of a paper claim or deletion of an electronic claim.".

* * *

(c) CONFORMING AMENDMENTS.—Such title is amended—

* * *

(2) in section 1725(b)(3)(B), by striking "subsection (f)(2)(B) or (f)(2)(C)" and inserting "subsection (h)(2)(B) or (h)(2)(C)";

* * *

38 U.S.C. § 1728
(eff. Oct. 10, 2008 to Dec. 28, 2022)

§ 1728. Reimbursement of certain medical expenses

(a) The Secretary shall, under such regulations as the Secretary prescribes, reimburse veterans eligible for hospital care or medical services under this chapter for the customary and usual charges of emergency treatment (including travel and incidental expenses under the terms and conditions set forth in section 111 of this title) for which such veterans have made payment, from sources other than the Department, where such emergency treatment was rendered to such veterans in need thereof for any of the following:

(1) An adjudicated service-connected disability.

(2) A non-service-connected disability associated with and held to be aggravating a service-connected disability.

(3) Any disability of a veteran if the veteran has a total disability permanent in nature from a service-connected disability.

(4) Any illness, injury, or dental condition of a veteran who—

(A) is a participant in a vocational rehabilitation program (as defined in section 3101(9) of this title); and

(B) is medically determined to have been in need of care or treatment to make possible the veteran's entrance into a course of training, or prevent interruption of a course of training, or hasten the return to a course of training which

was interrupted because of such illness, injury, or dental condition.

(b) In any case where reimbursement would be in order under subsection (a) of this section, the Secretary may, in lieu of reimbursing such veteran, make payment of the reasonable value of emergency treatment directly—

(1) to the hospital or other health facility furnishing the emergency treatment; or

(2) to the person or organization making such expenditure on behalf of such veteran.

(c) In this section, the term "emergency treatment" has the meaning given such term in section 1725(f)(1) of this title.

Pub. L. No. 117-328, tit. I, § 142(b) & (c)(3), 136 Stat. 4459, 5424 (2022) (amending 38 U.S.C. § 1728)

SEC. 142. CLAIMS FOR PAYMENT FROM DEPARTMENT OF VETERANS AFFAIRS FOR EMERGENCY TREATMENT FURNISHED TO VETERANS.

* * *

(b) TREATMENT FOR AND IN CONNECTION WITH SERVICE-CONNECTED DISABILITIES.—Section 1728 of such title is amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following new subsection (c):

"(c) No veteran described in subsection (a) may be held liable for payment for emergency treatment described in such subsection if—

"(1) a claim for direct payment was submitted by an individual or entity under subsection (b)(2); and

"(2) such claim was submitted after a deadline established by the Secretary for purposes of this section due to—

"(A) an administrative error made by the individual or entity, such as submission of the claim to the wrong Federal agency or submission of the claim after the deadline; or

"(B) an administrative error made by the Department, such as misplacement of a paper claim or deletion of an electronic claim.".

(c) CONFORMING AMENDMENTS.—Such title is amended—

* * *

(3) in section 1728(d), as redesignated by subsection (b)(4), by striking "section 1725(f)(1)" and inserting "section 1725(h)(1)";

* * *

Pub. L. No. 117-333, § 3(e)(3)(B)(i),
136 Stat. 6121, 6128 (2023)
(amending 38 U.S.C. § 1728)

SEC. 3. EXTENSION OF TIME LIMITATIONS FOR USE OF ENTITLEMENT.

* * *

(e) EMERGENCY SITUATION DEFINED.—

* * *

(3) VOCATIONAL REHABILITATION AND TRAINING.—

* * *

(B) CONFORMING AMENDMENTS.—Such title is amended—

(i) in section 1728(a)(4)(A), by striking "section 3101(9) of" and inserting "section 3101 of"; and

* * *