No. _____

# In The
# Supreme Court of the United States

SOLENA Y. HAMPTON,

*Petitioner,*

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI


KENNETH M. CARPENTER
*Counsel of Record*
CARPENTER CHARTERED
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251
kmcarpenter@mindspring.com

FALEN M. LAPONZINA
ADVOCATE NONPROFIT ORGANIZATION
1629 K Street, NW
Washington, DC 20006
(202) 600-7819
advocate@veteranlawyers.org

*Counsel for Petitioner*



COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTIONS PRESENTED

The questions presented are twofold: When the VA fails to adjudicate the disposition of a claim for benefits, may a reviewing Court find that the VA meant to implicitly deny the claim, without running afoul of the *Chenery* Doctrine and further engaging in impermissible first-hand fact finding? And does the Federal Circuit's use of the implicit denial rule undermine and contradict the VA's statutory duty to provide a written statement of the reasons or bases for its findings and conclusions, that are adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in a higher Court?

In 38 U.S.C. § 7292(a) Congress authorized the United States Court of Appeals for the Federal Circuit (Federal Circuit) to review decisions from the United States Court of Appeals for Veterans Claims (Veterans Court), on a rule of law or of any statute or regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Congress specifically limited that review to exclude (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case in 38 U.S.C. § 7292(d)(1).

This Court complemented the exclusions in 38 U.S.C. § 7292(d)(1) with the *Chenery* Doctrine, which is a fundamental rule of administrative law that a reviewing court, "in dealing with a determination or

**QUESTIONS PRESENTED** – Continued

judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947). In other words, a reviewing Court may not engage in first-hand fact finding.

However, the Federal Circuit established the implicit denial rule, which runs afoul of 38 U.S.C. § 7292 and the *Chenery* Doctrine. This rule was created to facilitate the determination of whether a claim remained pending and unadjudicated or had been, by operation of law, deemed denied. *See Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006). Prior to *Deshotel*, there was no rule of law for determining whether a claim had been "deemed denied" by the Department of Veterans Affairs (VA). In the case at bar, the Federal Circuit used the rule to extrapolate that the VA implicitly denied the Veteran's claim for total disability individual unemployability (TDIU), when the VA failed to address the claim in its decision. However, the Federal Circuit's finding that the VA implicitly denied the TDIU claim, resulted in the Court breaching its jurisdictional confines, with a post hoc prediction of the VA's intentions when it failed to adjudicate the claim.

**QUESTIONS PRESENTED** – Continued

The VA's determination, regarding entitlement to benefits is, in every sense, a finding of fact. *See* 38 U.S.C. § 7261(a)(4). Thus, the Federal Circuit's finding that the VA implicitly denied the claim is a manufactured factual determination, regarding the disposition of the TDIU claim, where the Secretary made no factual finding in the first instance. This is a consequence strictly prohibited by 38 U.S.C. § 7292 and the *Chenery* Doctrine.

The implicit denial rule further contradicts the VA's Congressionally mandated statutory obligation to provide an adequate statement of reasons or bases for its findings and conclusions, on all material issues of fact and law. This requirement was imposed by Congress in the Veterans Judicial Review Act (VJRA), and codified at 38 U.S.C. § 7104(d)(1). As articulated in the legislative history, Congress' dual purpose for the requirement was to enable a claimant's understanding of how the Board dealt with arguments, and to assist a reviewing court with evaluating the adjudicative action. In *SEC v. Chenery*, the Supreme Court held that "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." 332 U.S. 194 (1947). Fulfillment of the reasons or bases mandate

**QUESTIONS PRESENTED** – Continued

requires the Board to set forth a precise basis for its decision. *See* 38 U.S.C. § 7104(d)(1). Implicit denial renders compliance with § 7104(d)(1) impossible because there is no statement by the VA that the claim is being denied, much less the reasons therefore. Instead, the Federal Circuit is content to have the Veteran deduce that the claim was denied, and cares not that the VA has provided no explanation for the Court's invented implicit denial of the claim.

## RELATED PROCEEDINGS

*Solena Y. Hampton v. Denis McDonough, Secretary of Veterans Affairs,* No. 2022-1359 (Fed. Cir. Judgment entered June 5, 2023).

*Solena Y. Hampton v. Denis McDonough, Secretary of Veterans Affairs,* No. 2022-1359 (Fed. Cir. petition for rehearing en banc denied August 21, 2023).

*Solena Y. Hampton v. Denis McDonough, Secretary of Veterans Affairs,* No. 20-4075 (Vet. App. Judgment entered October 26, 2021).

*In the Appeal of Solena Y. Hampton*, No. 05-11-100 (Decision entered February 25, 2020).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## INTRODUCTION

In *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006), the Federal Circuit held that where the veteran files more than one claim with the RO at the same time, and the RO's decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run.

Three years later *Adams v. Shinseki*, 568 F.3d 956 (Fed. Cir. 2009), expanded the deemed denied rule of law to an implicit denial rule of law. In *Adams*, the Federal Circuit reviewed a decision of the Veterans Court which concluded that a 1951 decision regarding Mr. Adams's formal claim for rheumatic heart condition had implicitly denied Mr. Adams's informal claim for service connection for endocarditis. *Adams*, 568 F.3d at 960. The panel in *Adams* concluded that in applying the implicit denial rule, the Veterans Court properly looked first to the language of the Veterans Administration's 1951 and 1952 decisions to determine whether they provided sufficient information for a reasonable claimant to know that he would not be awarded benefits for his asserted disability. *Adams*, 568 F.3d 963. As a result, this rule has been running rampant and unchecked, being applied by the VA, Veteran's Court, and the Federal Circuit, in thousands of cases, for the last 17 years.

This case presents important questions regarding the validity and legality of the judicially created implicit denial rule, being used by the VA and reviewing

Courts in Veteran's law cases. The Federal Circuit, which does not possess the jurisdiction to make factual findings in the first instance, is consistently affirming decisions of the Veterans Court which permit the VA and the Board to use the implicit denial rule as a means to infer agency actions not actually taken. The implicit denial rule allows reviewing Courts to make factual determinations never made by the VA in the first instance, overstepping 38 U.S.C. § 7292. The effect of the rule further disregards the *Chenery* Doctrine, which stands for the proposition that a reviewing Court may only evaluate the agency's stated rationales, not supply their own. *See SEC v. Chenery Corp.*, 332 U.S. at 196.

The use of the implicit denial rule further runs afoul of the VA's statutory mandate to state reasons or bases for its findings and conclusions on all material issues of fact and law. *See* 38 U.S.C. § 7104(d)(1). Congress requires that every Board decision must include a written statement of the reasons or bases for its findings and conclusions. The Board's statement must be adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996)

(table). Instead of supplying the statement required by § 7104(d)(1), the implicit denial rule gives the Board carte blanche to make adverse inferences about decisions made below, that failed to actually adjudicate the disposition of a claim.

When the Board fails to provide this explanation, neither the claimant nor the Court can ascertain whether a fair and thorough analysis occurred, frustrating judicial review. Absent this Court's intervention, claimants seeking VA benefits are being deprived of the decisions mandated by Congress when the Board uses the implicit denial rule as a substitute for reviewing the actual evidence of record. Since its inception in *Deshotel*, the implicit denial rule has resulted in the consistent deprivation of benefits to deserving VA claimants.

Ms. Hampton served honorably on active duty in the U.S. Navy from June 1985 to November 1989. She filed her initial claim for migraine headaches in April 1997. In a VA examination in July 1997, she reported that she started having migraines in 1985 or 1986 and that they had continued ever since. In an October 1997 decision, the VA issued a decision which granted her service connected compensation for her resulting disability from migraine headaches with an evaluation of 10 percent effective May 1, 1997. Later that month, she submitted new and material evidence in the form of a statement in support of claim in which she asserted that her rating of 10 percent was not an adequate rate of compensation for her disability. In August 1998, she had another VA examination in which the

examiner wrote: "Migraine headaches with intermittent hemisensory defect associated with headache episodes and her headaches occurred about twice a week. In September 1998, VA increased her initial disability rating from 10 percent to 30 percent effective May 1997.

Within one year of this decision, VA received new and material evidence in the form of a completed VA Form 21-8940 in February 1999 seeking increased compensation based upon her inability to work due to her service connected disability. This is referred to as TDIU. The evidence indicated that her service connected migraines affected her full-time employment beginning in January 1997 and rendered her too disabled to work in August 1998. As such, Ms. Hampton was availed of 38 C.F.R. § 3.156(b), which speaks to when a claim is pending based on VA's receipt of new and material evidence during the period in which an appeal may be initiated by a claimant. The plain language in § 3.156(b), since 1961, explicitly imposes upon VA adjudicators, the express obligation to assess whether evidence received by VA in the specified period is both new and material and relates to an initial claim made and decided by VA.

In March 1999, VA denied her a TDIU rating. In May 1999, within one year of VA's September 1998 rating decision and VA's March 1999 decision to deny her a TDIU rating, she submitted further new and material evidence in the form of a statement using a VA Form 21-4138 (Statement in Support of Claim) requesting increased compensation for her migraine disability

after reporting that her headaches had increased in frequency and intensity. Once again, Ms. Hampton was availed of the benefit of 38 C.F.R. § 3.156(b). In a June 1999 VA examination report, which was also within one year of VA's September 1998 rating and VA's March 1999 decision, she reported having headaches daily lasting from 2-24 hours. In June 1999, VA issued a rating decision which denied and increased schedular rating more than 30 percent but did not address entitlement to a TDIU rating based on VA's receipt of the June 1999 VA examination report or Ms. Hampton's May 1999 statement in support of claim. Ms. Hampton timely filed an appeal of the rating assigned to her service connected disability. A November 2000 Board decision denied Ms. Hampton a schedular rating more than 30 percent for her service connected disability but failed to address entitlement to TDIU.

In September 2003, Ms. Hampton submitted a claim for an increased evaluation for her service connected migraine disability. In this claim she asserted an increase in the severity and frequency of her headaches. She also filed a second VA Form 21-8940 seeking TDIU. In April 2004, VA denied her entitlement to a schedular rating greater than 30 percent for her migraine disability and denied a TDIU rating. Again, Ms. Hampton timely filed an appeal. In June 2007, the Board issued a partially favorable decision granting an increased schedular rating of 50 percent but denied a TDIU rating. Ms. Hampton appealed to the Veterans Court, where the parties filed a joint motion for remand, which vacated and remanded those parts of the

June 2007 decision that denied her a schedular rating more than 50 percent and denied her a TDIU rating.

In June 2010, the Board remanded Ms. Hampton's claim to the VA and upon return to the Board, a TDIU rating was granted. In May 2015, the VA issued a rating decision that granted TDIU, with an effective date of September 2003. Ms. Hampton timely appealed the assigned effective date for the TDIU. On February 5, 2020, the Board denied Ms. Hampton an earlier effective date for the TDIU rating. Ms. Hampton appealed to the Veterans Court, where the Board decision was affirmed on the basis that the Board's November 2000 decision, which did not address the issue of her entitlement to a TDIU rating, had been implicitly denied. Ms. Hampton appealed to the Federal Circuit, which affirmed the Veterans Court's use of the implicit denial rule.

The Federal Circuit's reliance upon the implicit denial rule surpasses its jurisdictional limits, resulting in impermissible first-instance fact finding, fails to apply the long standing *Chenery* Doctrine, and results in the Board failing to discharge its obligation to provide the Veteran (and in turn reviewing Courts) with an adequate statement of reasons or bases for its findings and conclusions. Ms. Hampton's petition presents two questions of law that are of profound importance to all claimants seeking benefits through the VA.

The implicit denial rule is not consistent with this nonadversarial, ex parte, pro-claimant system. Congress created a paternalistic veterans' benefits system

to care for those who served their country in uniform. *See Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009); *see also Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (pointing out Congress' recognition of the "strongly and uniquely pro-claimant system of awarding benefits to veterans." In this uniquely pro-claimant system, protecting the interests of the Veteran is paramount. *See Hayre v. West*, 188 F.3d 1327, 1333 (Fed. Cir. 2000). The implicit denial rule is antithetical to the VA adjudicatory system. A determination that a claim was implicitly denied is an inherently adversarial determination because, as here, it allowed the Board to infer an adverse decision was made when in fact no decision was made, which is required by VA regulations. When the Board is permitted to determine that a claim was implicitly denied, in so doing the Board has resolved an obvious doubt against the claimant and in favor of the Secretary. Such a rule of law is contrary to the structural premise of Congress that the VA adjudicatory system requires that doubt shall be resolved in favor of the claimant. *See* 38 U.S.C. § 5107(b).

Consequently, the Federal Circuit's decision cannot be squared with this Court's precedent, relevant law, and Congressional intent. The Federal Circuit's creation and use of the implicit denial rule squarely rejects *Chenery*, its jurisdictional limits, and federal statutes. The implicit denial rule is not consistent with well-established law and must be set aside. Given the importance of the questions presented here, for

claimants whose benefits are wrongly withheld, this Court should grant certiorari.

## OPINIONS AND ORDERS BELOW

The decision of the Federal Circuit is reported at 68 F.4th 1376 (2023) and reproduced at Pet. App. 1a-12a. The decision of the Court of Appeals for Veterans Claims is reported at 2021 WL 4952747 and reproduced at Pet. App. 13a-20a. The February 25, 2020 decision of the Board of Veterans' Appeals is unreported and reproduced at 21a-40a.

## JURISDICTION

The Federal Circuit denied Ms. Hampton's petition for panel rehearing on May 15, 2023. Pet. App. 41a. This Court has jurisdiction under 28 U.S.C. § 1254(1) with respect to the Federal Circuit opinion dated June 5, 2023.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of 38 C.F.R. § 3.156(b). Relevant portions of 38 U.S.C. § 7292(a), 38 U.S.C. § 7292(d)(1), and 38 U.S.C. § 7104(d)(1).

> New and material evidence received prior to the expiration of the appeal period, or prior

> to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of § 20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

38 C.F.R. § 3.156(b).

> After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

38 U.S.C. § 7292(a).

> The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful

> and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be—
>
> (A)
> arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B)
> contrary to constitutional right, power, privilege, or immunity;
>
> (C)
> in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
>
> (D)
> without observance of procedure required by law.

38 U.S.C. § 7292(d)(1).

> Each decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.

38 U.S.C. § 7104(d)(1).

## STATEMENT OF THE CASE

**The implicit denial rule results in Appellate Courts impermissibly engaging in first-instance fact finding and the rule allows VA to evade its statutory duty to provide an adequate statement of reasons or bases for its determinations, which in turn impedes judicial review.**

Since Congress first established it in 1930, VA has administered the federal program that provides benefits to veterans. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Under this program, veterans or their dependents can submit a claim for "any benefit under the laws administered by the Secretary." 38 U.S.C. § 5100; *see id.* § 101(13)-(15). These benefits include medical assistance, education benefits, pensions, and, most notably, compensation for veterans with disabilities linked to their military service—that is, "service-connected" disabilities. *Walters*, 473 U.S. at 309; *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011).

VA's process for administering those benefits is specifically "designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson*, 562 U.S. at 431 (quoting *Walters*, 473 U.S. at 311). Once a claim is filed, the process is "*ex parte* and nonadversarial." *Id.* VA is required to "assist veterans" in substantiating their claims and "must give veterans the 'benefit of the doubt' whenever . . . evidence on a material issue is roughly equal." *Id.* at 431-32. Based upon the Secretary's regulatory

statement of policy, as set out in 38 C.F.R. § 3.103(a), it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law. Thus, when a Veteran makes a claim for benefits, the VA has a statutory duty to assist the Veteran with the development of his claim, review submitted evidence and arguments, adjudicate the issue of entitlement to the benefit sought, and provide notice to the Veteran regarding the same. *See* 38 U.S.C. § 5103; § 5103A; and 38 C.F.R. § 3.159.

If the VA fails to adjudicate a claim, it remains pending. While Congress has not provided a definition for the phrase "pending claim," the Secretary defines a pending claim as an application, formal or informal, which has not been finally adjudicated. *See* 38 C.F.R. § 3.160(c); *see also* 27 Fed. Reg. 11887, Dec. 1, 1962, as amended at 31 Fed. Reg. 12056, Sept. 15, 1966; 55 Fed. Reg. 20148, May 15, 1990; 58 Fed. Reg. 32443, June 10, 1993. Indeed, "Where such review of all documents and oral testimony reasonably reveals that the claimant is seeking a particular benefit, the Board is required to adjudicate the issue of the claimant's entitlement to such a benefit or, if appropriate, to remand the issue to the [VARO] for development and adjudication of the issue; however, the Board may not simply ignore an issue so raised." *Suttman v. Brown*, 5 Vet.App. 127, 132 (1993).

Here, Ms. Hampton submitted new and material evidence, within one year of the September 1998 decision, that increased her initial migraine rating from 10

percent to 30 percent. More specifically, in February 1999 Ms. Hampton filed a VA Form 21-8940, seeking increased compensation based upon her inability to work due to her service connected disability, otherwise known as TDIU. The evidence indicated that her service connected migraines affected her full-time employment beginning in January 1997 and rendered her too disabled to work in August 1998. By submitting this new and material evidence, Ms. Hampton was availed of 38 C.F.R. § 3.156(b), which speaks to when a claim is pending based on VA's receipt of new and material evidence during the period in which an appeal may be initiated by a claimant. The plain language of 38 C.F.R. § 3.156(b) imposes upon VA adjudicators, the express obligation to assess whether evidence received by VA in the specified period is both new and material and relates to an initial claim made and decided by the VA.

In March 1999, the VA denied her a TDIU rating. In May 1999, within one year of VA's September 1998 rating decision and VA's March 1999 decision to deny her TDIU, she submitted further new and material evidence in the form of a statement using a VA Form 21-4138 (Statement in Support of Claim) requesting increased compensation for her migraine disability after reporting that her headaches had increased in frequency and intensity. Once again, Ms. Hampton was availed of the benefits of 38 C.F.R. § 3.156(b). In a June 1999 VA examination report, which was also within one year of VA's September 1998 rating and VA's March 1999 decision, she reported having headaches

daily lasting from 2-24 hours. In June 1999, VA issued a rating decision which denied and increased schedular rating more than 30 percent but did not address entitlement to a TDIU rating based on VA's receipt of the June 1999 VA examination report or Ms. Hampton's May 1999 statement in support of claim. Ms. Hampton timely filed an appeal of the rating assigned to her service connected disability. A November 2000 Board decision denied Ms. Hampton a schedular rating more than 30 percent for her service connected disability but failed to address entitlement to TDIU. The November 2000 Board's failure to issue a decision that adjudicated, or even addressed the TDIU claim, is the crux of the instant appeal.

After various appeals, resulting in a protracted procedural history that is spelled out in the Introduction, *supra*, the Board awarded Ms. Hampton a TDIU rating, which was effectuated by a May 2015 rating decision granting TDIU, with an effective date of September 2003. Ms. Hampton timely appealed the assigned effective date, asserting that she was entitled to TDIU as of February 1999 when she filed a VA Form 21-8940, seeking increased compensation based upon her inability to work due to her service connected migraines or TDIU. A February 5, 2020 Board decision ultimately denied Ms. Hampton an earlier effective date for VA's award of a TDIU rating. Ms. Hampton appealed to the Veterans Court, which affirmed on the basis that the Board's November 2000 decision, which did not address the issue of her entitlement to TDIU, had been implicitly denied. Ms. Hampton appealed to the Federal

Circuit which affirmed the Veterans Court's decision—citing to and condoning the application of the judicially created implicit denial rule.

In its decision, the Federal Circuit indicated that the Board found that its November 2000 decision denying Ms. Hampton's claim for increased compensation for migraines was an implicit denial of the 1999 TDIU claim. The Federal Circuit acknowledged that Ms. Hampton, before the Veterans Court, had argued that the Board erred by (1) not discussing whether her May 1999 statement and May 1999 exam constituted new and material evidence under 38 C.F.R. § 3.156(b), and (2) finding that its November 2000 decision was an implicit denial of her 1999 TDIU claim. Further, the Federal Circuit noted that the Veterans Court rejected both arguments and affirmed the Board's decision. Ultimately, the Federal Circuit agreed with the Veterans Court that the VA's implicit denial of TDIU satisfied the requirements of § 3.156(b).

To be sure, the November 2000 Board decision, did not address or adjudicate the issue of entitlement to TDIU, which was duly before it, as a result of Ms. Hampton's VA Form 21-8940 submission, in February 1999, seeking TDIU. Thus, the 1999 TDIU claim is lawfully still pending appeal. *See* 38 C.F.R. § 3.160(c). The pending claims doctrine provides that a claim remains pending in the adjudication process—even for years—if VA fails to act on it. *Norris v. West*, 12 Vet.App. 413, 422 (1999). Raising a pending claim theory in connection with a challenge to the effective-date decision is procedurally proper. *Ingram v. Nicholson*, 21 Vet.App.

232, 249, 255 (2007) (Federal Circuit cases have not overruled the pending claim doctrine articulated in *Norris*); *McGrath v. Gober*, 14 Vet.App. 28, 35 (2000) (a claim that has not been finally adjudicated remains pending for purposes of determining the effective date for that disability). The Federal Circuit's use of the implicit denial rule is a shifty maneuver to sidestep the statutory pending claims doctrine and avoid application of established caselaw, that actually predates the creation of the implicit denial rule in *Deshotel*.

Furthermore, the implicit denial rule inevitably results in a reviewing Court making a factual finding, not previously made by the administrative agency below. Here, the November 2000 Board decision made no factual findings or determinations regarding Ms. Hampton's claim for TDIU. There is nothing in the decision that even scratches the surface of entitlement to TDIU. As such, neither the Veteran's Court, nor the Federal Circuit, possess the jurisdiction to make a factual finding regarding the disposition of the TDIU claim, in the Board's place. The Federal Circuit decision to uphold the implicit denial of the TDIU claim is essentially a psychic attempt to read the VA's mind. Moreover, the VA's failure to make a factual determination regarding the disposition of the claim, and reasons therefore, leaves the reviewing Court with nothing to actually review. The Federal Circuit ameliorating for the Board's failure by applying the implicit denial rule, results in unfettered impunity for the Board's failure to comply with the reasons or bases requirement. *See* 38 U.S.C. § 7104(d)(1). Indeed, the

Federal Circuit's recurrent use of implicit denial has resulted in reviewing Courts issuing a finding of fact that a claim was denied, when that finding of fact was never made by the VA in the first instance. Consequently, the implicit denial rule exceeds the limits of 38 U.S.C. § 7292(d)(1) and disregards the *Chenery* Doctrine, which stands for the proposition that an agency's action may only be upheld on the basis articulated by the agency itself and a reviewing Court is tasked with the evaluation of the agency's stated rationales, not supplying their own. *See SEC*, 332 U.S. at 196. Under the implicit denial rule, the Board evades its statutory obligation to articulate a basis for its action by inferring a denial which was never made. As a result, the reviewing courts necessarily are making a finding of fact in the first instance since the Board made no finding of fact. As a result, the Federal Circuit issuing an implicit denial finding is the epitome of supplying its own rationale.

As earlier noted, the implicit denial rule further runs afoul of the VA's statutory mandate to state adequate reasons or bases for its findings and conclusions. *See* 38 U.S.C. § 7104(d)(1). "The legal requirements with regard to the Board's statement are that the Board (1) address the material issues raised by the appellant or reasonably raised by the evidence, (2) explain its rejection of materially favorable evidence, (3) discuss potentially applicable laws, and (4) otherwise provide an explanation for its decision that is understandable and facilitative of judicial review." *Johnson v. Shinseki*, 26 Vet.App. 237, 264 (2013) (Kasold, C.J., dissenting)

(reversed on other grounds by *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014)). When the November 2000 Board failed to provide an explanation as to why the TDIU claim was denied, neither the claimant nor the Court could ascertain whether a fair and thorough analysis occurred, impeding judicial review. This is especially so given that Ms. Hampton capitalized on 38 C.F.R. § 3.156(b), by submitting new and material evidence for her TDIU claim. In *Bond v. Shinseki*, 659 F.3d 1362, 1367 (Fed. Cir. 2011) the Federal Circuit interpreted the language in § 3.156(b) to mean that VA adjudicators must assess any evidence submitted during the relevant period and make a determination as to whether it constitutes new and material evidence relating to the old claim. The submission of new and relevant evidence, in connection with the claim for a TDIU rating, inevitably requires review by the VA, and any decision stemming therefrom, is subject to the requirements of 38 U.S.C. § 7104(d)(1).

**The unlawful effect of the implicit denial rule is first instance fact finding, which exceeds the Federal Circuit's jurisdiction, and whether or not a claim has been denied is a determination reserved solely for an administrative agency.**

The Federal Circuit in *Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000) noted:

" . . . the general rule that appellate tribunals are not appropriate *fora* for initial fact finding."

Thus, the Supreme Court has held that when a court of appeals reviews a district court decision, it may remand if it believes the district court failed to make findings of fact essential to the decision; it may set aside findings of fact it determines to be clearly erroneous; or it may reverse incorrect judgments of law based on proper factual findings; "[b]ut it should not simply [make] factual findings on its own." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 89 L. Ed. 2d 739 (1986); *see also First Interstate Bank v. United States*, 61 F.3d 876, 882 (Fed. Cir. 1995).

Here, the November 2000 Board failed to articulate whether or not the TDIU claim was denied, nor did it provide any basis for a denial. The Federal Circuit applied the implicit denial rule, boldly articulating the Board's determination for them, in light of the Board's omission, however a reviewing court may not make up for the Board's deficiencies. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. *See Securities and Exchange Comm'n v. Chenery Corp*., 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S.Ct. 1575 (1947) (noting that a court reviewing an administrative agency decision must judge the decision's propriety solely on the grounds the agency invoked: "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."). Consequently, the Federal Circuit is only permitted to

evaluate the agency's stated rationales, not supply their own, which is what the implicit denial rule has the effect of doing.

When the Federal Circuit found that the November 2000 Board decision implicitly denied Ms. Hampton's claim for TDIU, it surpassed the jurisdictional confines of 38 U.S.C. § 7292. Whether or not a claim has been denied is a factual finding reserved for the administrative agency. Much like any service connection claim submitted by a Veteran, a Board determination on an increased rating, to include a rating of TDIU, is a finding of fact, reviewed under the "clearly erroneous" standard. *Fenderson v. West*, 12 Vet.App. 119 (1999); *see Dalton v. Nicholson*, 21 Vet.App. 23, 32 (2007) (TDIU is a claim for increased rating).

In *Kyhn v. Shinseki*, the Federal Circuit admonished the Veteran's Court for making factual findings, where none were made below. 716 F.3d 572 (2013). "By making an independent finding of fact absent an underlying factual finding by the Board, the Veterans Court both exceeds its jurisdiction to 'review' the Board's decision under 38 U.S.C. § 7252 and impermissibly engages in first-instance fact finding barred by § 7261. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013)." *Kyhn*, 716 F.3d at 575. Consequently, the Federal Circuit is well aware of its jurisdictional limitations, in that it may not make independent findings of fact, rendering its repeated application of the implicit denial rule not only unlawful, but contradictory.

The Federal Circuit's use of implicit denial ignores the holding that a "judicial judgment cannot be made to do service for an administrative judgment." *SEC*, 318 U.S. at 88. Nor can an appellate court intrude upon the domain which Congress has exclusively entrusted to an administrative agency. *Id*. The Federal Circuit echoed these sentiments in *Mickeviciute v. INS* stating " . . . honoring an agency's authority is not measured by whether we reverse or affirm the agency's decision. Rather, we safeguard agency decision making by ensuring that the agency itself makes the decisions entrusted to its authority based on grounds articulated by that entity. Because an agency has a duty not only to reach an outcome, but to explain that outcome, we intrude on the agency's authority not only by reaching a certain result on the merits as the Ninth Circuit did in *Ventura*, but also by supporting a result reached by the agency with reasoning not explicitly relied on by the agency." 327 F.3d 1159, 1165 (10th Cir. 2003). This is pitch perfect reasoning as to why the implicit denial rule cannot stand. Here, the VA failed to adjudicate Ms. Hampton's 1999 TDIU claim, a decision Congress entrusted VA to make, which obligates VA to explain and reach an outcome. The Federal Circuit's finding that the claim was implicitly denied intrudes on the agency's authority by reaching a result on the merits, to deny the claim, where the agency did no such thing.

The Federal Circuit has made an impermissible inference regarding what it believed the Board intended to do, namely deny the TDIU claim, where the Board was otherwise silent on the same. This is

guesswork at best and impermissible fact finding, that exceeds the Federal Circuit's jurisdiction, at worst. The Federal Circuit's repeated application of the implicit denial rule amounts to the conjuring of first-instance factual determinations, regarding the disposition of a claim, where mum is the Board's word. This Court should not accept the Federal Circuit's judicially created implicit denial rule, which is *post hoc* reasoning, in place of a silent Board decision.

**The Federal Circuit's determination that the VA implicitly denied Ms. Hampton's TDIU claim unlawfully absolved the Board of its statutory obligation to comply with 38 U.S.C. § 7104(d)(1).**

Since 1961, 38 C.F.R. § 3.156(b) has provided that when new and material evidence has been received during specific described periods following a decision by VA on a claim for benefits, that evidence will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period. However, 38 C.F.R. § 3.156(b) grants no authority to make implicit findings. On the contrary, the Federal Circuit in *Bond v. Shinseki*, 659 F.3d 1362, 1367 (Fed. Cir. 2011) interpreted the Secretary's language to mean that VA adjudicators, to include the Board are required to treat new and material evidence as if it was filed in connection with the pending claim, and that the VA must assess any evidence submitted during the relevant period and make a determination as to whether it constitutes new and material evidence

relating to the old claim. The decision in *Bond* described the issue as being whether the VA must make a determination as to whether evidence submitted during the appeal period constitutes new and material evidence for the purposes of § 3.156(b). *Id*.

Five years later in *Beraud v. McDonald*, 766 F.3d 1402 (Fed. Cir. 2014), the Federal Circuit again addressed the meaning of the language used by the Secretary in § 3.156(b). *Beraud* reinforced *Bond*'s holding that when VA received evidence, pursuant to § 3.156(b), the necessary assessment was whether subsequently submitted materials constituted new and material evidence relating to an earlier claim. Stating that it was the interpretation of the Federal Circuit, made clear in *Bond*, the VA's obligations under § 3.156(b) are not optional. *Beraud*, 766 F.3d 1406. Thus, in *Beraud*, the Federal Circuit reaffirmed that, under § 3.156(b), the VA must provide a determination that is directly responsive to the new submission and that, until it does so, the claim at issue remains open. *Beraud*, 766 F.3d at 1407.

The implicit denial rule allows the VA to evade the non-optional obligations of § 3.156(b), to consider new and material evidence, which imposes an obligation on the VA to provide a determination that is directly responsive to the new submission and that, until it does so, the claim at issue remains open. *Beraud*, 766 F.3d at 1407. The judicially created rule of law may not provide an opportunity for VA to circumvent or ignore its own regulations. The Courts have repeatedly cautioned the Board that it is not free to ignore the

VA's duly promulgated regulations, and has noted that where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. *See Fugere v. Derwinski*, 1 Vet.App. 103, 108 (1990) (quoting *Morton v. Ruiz*, 415 U.S. 199, 235, 39 L. Ed. 2d 270, 94 S.Ct. 1055 (1974)). Pursuant to the Accardi Doctrine, a governmental agency may not act contrary to its own regulations. *See Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Accordingly, unless and until the VA makes a determination about whether evidence received is new and material, pursuant to § 3.156(b), the earlier claim remains open and pending. Since the VA must comply with its own regulation, which requires an express determination be made, implicit denial is non sequitur.

This ties into the Secretary's statutory obligation, pursuant to 38 U.S.C. § 7104(d)(1), to provide a statement of reasons or bases that explains the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discusses all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), and discusses all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991). In every decision, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. *See* 38 U.S.C.

§ 7104(d)(1); *see also Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

This requirement was originally imposed by Congress in the VJRA, and codified at 38 U.S.C. § 7104(d)(1). As articulated in the legislative history, Congress' dual purpose for the requirement was to enable a claimant's understanding of how the Board dealt with arguments, and to assist a reviewing court with evaluating the adjudicative action. The legislative history makes it clear that this requirement "would not be met by such terms as 'service connection not found' or other such conclusory statements." 135 Cong.Rec. S16466 (daily ed. Nov. 21, 1989) (Explanatory Statement on the Compromise Agreement on H.R. 901 as Amended, the "Veterans Benefits Amendments of 1989"). Where "the intent of Congress is clear, that is the end of the matter," because courts and agencies alike "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). As such, the *Gilbert* Court carried out Congress' intent stating that a "bare, conclusory statement by the Board [is] inadequate," and reiterated that the "decisions must contain clear analysis and

succinct but complete explanations." *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

The reasons or bases requirement is extraordinarily important in Veterans law because of the unique nature of the VA system, specifically the lack of cross examination. The Board is both judge and jury in a Veteran's appeal; both administering the law and assessing the strength of the factual contentions. The Board's statutory obligation under 38 U.S.C. § 7104(d)(1) to state "the reasons or bases for [its] findings and conclusions" serves a function similar to that of cross-examination in adversarial litigation. *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994). To fairly adjudicate a claim in this non-adversarial system, the Board must subject the evidence to the scrutiny that a claimant is powerless to apply. The agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Insurance Company, et al.*, 463 U.S. 29, 43 (1983).

When the November 2000 Board failed to provide an explanation as to why Ms. Hampton's TDIU claim was denied, neither the claimant nor the Court could ascertain whether a fair and thorough analysis occurred. This is especially so given that Ms. Hampton capitalized on 38 C.F.R. § 3.156(b), by submitting new and material evidence for her TDIU claim, prior to the expiration of the appeal period, so that it would be considered as filed in connection with the migraine claim which was pending at the beginning of the appeal

period. In *Bond v. Shinseki*, 659 F.3d 1362, 1367 (Fed. Cir. 2011) the Federal Circuit interpreted the language in § 3.156(b) to mean that VA adjudicators must assess any evidence submitted during the relevant period and make a determination as to whether it constitutes new and material evidence relating to the old claim. The submission of new and relevant evidence, in connection with the claim for a TDIU rating, inevitably requires review by the VA, and any decision stemming therefrom, is also subject to the requirements of 38 U.S.C. § 7104(d)(1).

The Board's failure to make a determination or provide a statement of reasons or bases, regarding Ms. Hampton's claim for a TDIU rating, impedes judicial review. In *SEC v. Chenery*, the Supreme Court held that "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." 332 U.S. 194 (1947). Fulfillment of the reasons or bases mandate requires the Board to set forth a precise basis for its decision. The Federal Circuit's implementation of the implicit denial rule is exactly the type of error the *Chenery* Doctrine explicitly forbids—a reviewing Court guessing that the Board meant to deny the claim and taking the liberty of making that determination for the Board, in its stead.

It is not possible for a reviewing Court to discern whether the Board correctly understood the facts and properly applied the law if the Board fails to explain itself, with clear and plausible reasons for its stated findings and conclusions. Without an adequate statement of reasons or bases, it is not possible for a reviewing Court to ensure that no substantive error was made, that there was a reasonable basis for the decision, based in both in law and fact, or whether a sufficient explanation was given, with reasons that support the conclusions. "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?" *American Eagle Fire Ins. Co. v. Jordan*, 67 F. Supp. 76, 80 (D.D.C. 1946).

The Court fleshed out the implications of this requirement in *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). As the Court stated in *Gilbert*, "Judicial review tests a Board decision by the basis upon which it purports to rest. This is impossible if the Board does not reveal its reasoning. If the veteran is to be able to understand the reason for the denial of his claim, and if our review is to be an informed one, strict adherence by the Board to the requirements of 38 U.S.C. § 4004(d)(1) is required." *Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1990). The November 2000 Board made no decision on the TDIU claim, much less revealed its reasoning for the same, leaving the Veteran's Court and the Federal Circuit with nothing to review.

Be that as it may, both Courts took it upon themselves to become a proxy for the Board, by post hoc rationalizing that the Board's failure to adjudicate the claim was an implicit denial of TDIU.

The Supreme Court held that where the "failure to explain administrative action . . . frustrate[d] effective judicial review, the remedy was . . . to obtain from the agency . . . such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973). Thus, "[t]he proper course in a case with an inadequate record is to vacate the agency's decision and to remand the matter to the agency for further proceedings." *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 347 (D.C. Cir. 1989); *see Camp*, 411 U.S. at 143, 93 S.Ct. at 1244; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). If the implicit denial rule is upheld as lawful, the VA can issue decision after decision, skipping over the adjudication of certain claims and failing to explain administrative action—which unquestionably impedes judicial review. As it stands, the VA is essentially vindicated from scrutiny of how it reaches decisions. This is a slippery slope.

In sum, the implicit denial rule renders compliance with 38 C.F.R. § 3.156(b) and 38 U.S.C. § 7104(d)(1) impossible because there is no statement by the VA considering the new and material evidence submitted, nor is there an explanation for the reasons underlying a decision on the claim. Instead, the Federal Circuit's imposition of implicit denial is predicated on speculation, and claimants are expected to infer that the claim

was denied, with no indication or explanation for the denial. The Board, moreover, must do more than "implicitly" apply the terms of the Act; it must articulate the reasons for its decisions in a manner that enables a reviewing court to discern the basis for its actions. *Int'l Longshoremen's Ass'n, AFL-CIO v. Nat'l Mediation Bd.*, 870 F.2d 733, 736 (D.C. Cir. 1989).

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Is Incorrect.

#### A. The Federal Circuit's use of the Implicit Denial Rule exceeds its jurisdiction.

In light of 38 U.S.C. § 7292 and the *Chenery* Doctrine, the Federal Circuit is not permitted to make factual determinations in the first instance. By finding that the VA implicitly denied the Veteran's claim for TDIU, when the VA failed to address the claim in its decision, the Federal Circuit generated a never before made finding of fact, a task which is explicitly reserved for the VA. Indeed, the VA's determination, regarding entitlement to benefits, is a finding of fact reserved for the agency. Consequently, the Federal Circuit manufactured a first-instance factual determination, regarding the disposition of the TDIU claim, where the VA made no factual finding itself. Thus, the Federal Circuit's application of the implicit denial rule breaches its jurisdictional margins, with conjecture as to the VA's intentions when it failed to adjudicate the

claim in the first place. The Federal Circuit therefore inserted its own reasoning, in place of the VA's requisite reasoning. These are consequences strictly prohibited by 38 U.S.C. § 7292 and the *Chenery* Doctrine.

### B. The Implicit Denial Rule unlawfully excuses the VA from complying with Congressionally mandated statutes and its own regulation.

Fulfillment of the reasons or bases mandate requires the Board to set forth a precise basis for its decision. Employing the implicit denial rule means contradicting the VA's statutory obligation to provide an adequate statement of reasons or bases for its findings and conclusions. Implicit denial renders compliance with 38 U.S.C. § 7104(d)(1) impossible because it allows the VA to evade making a determination on a claim and stating the reasons for its determination, by later invoking the rule. The implicit denial rule and reasons or bases requirement are mutually exclusive.

If the VA is allowed to forgo making an explicit determination regarding the disposition of a claim and excused from providing reasons or bases as to how it reached its decision, judicial review is frustrated because the reviewing Court has nothing to review. Consequently, the implicit denial rule renders compliance with 38 U.S.C. § 7104(d)(1) impossible because there is no decision on the claim provided, nor an explanation for the reasons underlying the VA's determination. This judicially created rule has furnished the VA with

an armored vehicle to escape its statutory obligations. The rule runs contrary to and undermines the Congressionally mandated reasons or bases requirement, and should be held unlawful.

## II. The Question Presented Is Important And Recurring.

The Federal Circuit's creation and use of the implicit denial rule of law has resulted in the Federal Circuit definitively rejecting: 1) its jurisdictional restraints, pursuant to 38 U.S.C. § 7292; 2) the *Chenery* Doctrine; 3) 38 C.F.R. § 3.156(b), which requires VA to make a determination as to whether evidence is new and material; and 4) 38 U.S.C. § 7104(d)(1), which imposes a reasons or bases requirement on the VA. In *Morgan v. Principi*, 327 F.3d 1357, 1361 (2003), the Federal Circuit noted that it was axiomatic that under federal law there are three sources of substantive legal principles: Congress, acting through statute; an administrative agency with rulemaking power; or a judicial body. Here, the implicit denial rule is invalidating and overriding law created by various branches of government, to include federal statutes, federal agency regulations, and judicially established caselaw. All of which, predate the inception of the implicit denial rule in *Deshotel*. However, the judicial power vested in the appellate court by Article III does not include the power to veto or otherwise override federal statutes. U.S. Const. art. III, § 2. A judicial or agency rule that conflicts with a statute is invalid to the extent that it so conflicts.

Federal courts are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers. The Federal Circuit's creation and application of the implicit denial rule is firsthand fact finding, which is proscribed by 38 U.S.C. § 7292. Finding that a Veteran's claim for benefits has been denied is a factual determination, which pursuant to *Chenery*, is reserved solely for the administrative agency. The reasons or bases requirement effectively prevents the agency's silence from being reviewable and/or deemed an implicit denial, which would otherwise be at odds with the requirement at 38 U.S.C. § 7104(d)(1). The *Deshotel* Court failed to anticipate the consequences of the implicit denial rule it adopted. The rule's effect runs counter to congressional intent to facilitate judicial review of VA determinations in § 7104(d)(1). Nonetheless, the Federal Circuit has consistently applied the implicit denial rule, where Congressional intent should have prevailed. This is a reoccurring issue of grave importance to Congress, the judicial system, and Veterans.

## III. This Case Is An Ideal Vehicle To Clarify.

This case is the means by which this Court can strike down a rule of law which has been imprudently created by the Federal Circuit. It is difficult to imagine a more antithetical rule of law than the implicit denial rule. This rule permits the Federal Circuit to engage in first-instance fact finding and further allows the VA to dodge their statutory and regulatory obligations.

For decades, VA operated under what is now referred to as the "legacy system." In the "legacy system," the only available relief from a denial of VA benefits was an appeal. Baked into the "legacy system" was a claimant's right to submit and for VA to consider evidence received during the times specified in 38 C.F.R. § 3.156(b) (within the one year following notice of a VA decision or during the pendency of the appeal to the Board). In August 2017, Congress enacted the Veterans Appeals Improvement and Modernization Act of 2017 (AMA). The AMA is a sweeping piece of legislation that extensively overhauls the administrative appeals process concerning VA benefits decisions. Importantly, however, Congress did not eliminate the administrative appeals structure existing at the time Congress passed the AMA. Rather, Congress provided that certain administrative appeals would be processed under the legacy system while others would proceed under the new AMA system. As such, there are approximately 65,000 pending legacy system appeals according to VA. Claims in the legacy system are the oldest appeals in VA's system and comprise Veterans and their survivors, who have been waiting the longest for resolution of their appeals. *See also* https://www.veteransaidbenefit.org/what-are-legacy-claims-and-legacy-appeals.htm (last visited November 15, 2023).

As Ms. Hampton's appeal demonstrates, when the provisions of § 3.156(b) are applicable, a claim remains open until VA provides a determination that is directly responsive to new and material evidence received

within the periods specified has been made by the Secretary. *Beraud*, 766 F.3d 1407. The Federal Circuit does not possess the jurisdiction to deny a claim on the Board's behalf and the reasons or bases requirement prohibits a reviewing Court from affirming a decision, where no reasons or bases have been provided. The questions presented by this appeal are of the utmost importance, in light of millions of Veterans and other claimants whose claims have been deemed to have been denied without an actual denial having ever been made by VA. Indeed, this is a recurring issue, which if resolved in Ms. Hampton's favor, will impact hundreds of thousands of Veterans and their families.

As it stands, the Federal Circuit's implicit denial rule may be used as a reason to find that a claim was denied in *all* VA benefits decisions, whether originally issued by the regional office or the Board. The unfortunate reality is that since *Deshotel*, the VA has issued thousands of decisions that failed to adjudicate claims, which have been affirmed vis-a-vis the implicit denial rule. This judicially created rule of law is profoundly prejudicial to all VA claimants because it allows VA to deny a claim, without actually ever making a decision or notifying the claimant that it has been denied, as is the case for Ms. Hampton's TDIU claim. As Ms. Hampton's case demonstrates, the Federal Circuit's first-instance fact finding of the Board's implicit denial, coupled with the rule's effect of exonerating the VA from complying with 38 C.F.R. § 3.156(b) and 38 U.S.C. § 7104(d)(1), invalidates the rule. Such an invalidation of the implicit denial rule would mean that her TDIU

claim remains pending. This is the case for thousands of VA claimants who have been and will continue to be adversely affected by the implicit denial rule. This rule of law unfairly allows VA to deny claimants significant benefits without an actual decision or notice to the claimant. Section 3.156(b) is the quintessential VA regulation because it is remedial in nature having been promulgated by the Secretary to ensure that every benefit available under law is addressed by VA when VA receives new and material evidence. The adverse consequences to all VA claimants from the adoption of the implicit denial rule confirms that certiorari is warranted.

This case is an ideal vehicle to clarify that the Federal Circuit does not possess the authority or jurisdictions to make a factual determination, regarding whether a claim for disability benefits is granted or denied, on behalf of the VA—who has otherwise failed to do so, through the use of the implicit denial rule. This case is also an ideal vehicle to clarify that the judicially created implicit denial rule may not contradict, override, or otherwise invalidate a federal statute that requires the Board to provide an adequate statement of reasons or bases for its findings and conclusions, regarding a decision on a claim for disability benefits.

## CONCLUSION

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

Respectfully submitted,

KENNETH M. CARPENTER
*Counsel of Record*
CARPENTER CHARTERED
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251
kmcarpenter@mindspring.com

FALEN M. LAPONZINA
ADVOCATE NONPROFIT ORGANIZATION
1629 K Street, NW
Washington, DC 20006
(202) 600-7819
advocate@veteranlawyers.org

*Counsel for Petitioner*

November 16, 2023