No. 24-____

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL WRIGHT,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Paul Wright
Petitioner pro se
115 Hugh Smith Road
Marietta, South Carolina 29661
(864) 275-7955
Paul.Wright@1979.usna.com

January 23, 2024

QUESTION PRESENTED

The Veterans Judicial Review Act of 1988 affords judicial review of the Article I veteran-benefit administrative process, pursuant to 38 U.S.C. § 7261 in the Court of Appeals for Veterans Claims as an Article I tribunal, and pursuant to 38 U.S.C. § 7292(d) in the Court of Appeals for the Federal Circuit as the Article III court of first instance; those provisions derive operative language from 5 U.S.C. § 706 of the Administrative Procedures Act. The Veterans Judicial Review Act of 1988 also affords appellate review of decisions issued within that Article I process, pursuant to 38 U.S.C. § 7252(a) in the Court of Appeals for Veterans Claims, and pursuant to 38 U.S.C. § 7292(e) in the Court of Appeals for the Federal Circuit.

The Court of Appeals for the Federal Circuit refused to review specified jurisdictional defects in the Article I veteran-benefit administrative process, reasoning that 38 U.S.C. § 7292(a) limits its jurisdiction to reviewing decisions of the Court of Appeals for Veterans Claims.

In relation to those circumstances, the question presented is:

Whether an aggrieved veteran's right to judicial review of the Article I veteran-benefit administrative process, pursuant to the first sentence of 38 U.S.C. § 7292(d)(1) in the Court of Appeals for the Federal Circuit as the Article III court of first instance, is independent of review of decisions issued within that Article I process.

LIST OF PARTIES
AND RULE 29.6 STATEMENT

Petitioner Paul Wright was Claimant-Appellant in No. 2023-1360, where Respondent Denis McDonough, Secretary of Veterans Affairs, was Respondent-Appellee. No publicly held corporations are involved in this proceeding.

RELATED CASES

Wright v. McDonough, United Sates Court of Appeals for the Federal Circuit, No. 23-1360

Wright v. McDonough, United States Court of Appeals for Veterans Claims, No. 20-8732

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

U.S. Navy veteran Paul Wright respectfully requests the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit, dated December 8, 2023.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Federal Circuit in Case 2023-1360, dated December 8, 2023, is Appendix A.

The unpublished decision of the United States Court of Appeals for Veterans Claims in Case 20-8732, dated December 22, 2022, is Appendix B.

The unpublished decision of the United States Court of Appeals for Veterans Claims in Case 20-8732, dated July 30, 2021, is Appendix C.

STATEMENT OF JURISDICTION

The Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1). This petition is timely filed within ninety (90) days after the judgment to be reviewed.

STATUTORY PROVISIONS INVOLVED

The full text of section 7261 of Title 38 is Appendix D.

The full text of section 7252 of Title 38 is Appendix E.

The full text of section 7292 of Title 38 is Appendix F.

STATEMENT OF THE CASE

Mr. Wright served honorably in the U.S. Navy on active duty from April 1974 to July 1984, and has disabilities resulting from that service. The Secretary withholds a substantial portion of Mr. Wright's benefits, for alleged adjudication.

In an action before the Court of Appeals for Veterans Claims (Veterans Court), Mr. Wright presented adjudicatory acts for 38 U.S.C. § 7261 judicial review,[1] and an error by the Board of Veterans' Appeals (Board) for § 7252(a) appellate review. The Veterans Court set aside the Board error and remanded, but refused to review the process defects: "However, the Court reviews final *Board* decisions, not decisions rendered by a regional office (RO)." Appx C at 3 (emphasis in original). When the Board refused to address jurisdiction on remand, the Veterans Court again refused to hear the jurisdictional challenge but instead construed and denied the petition as allegedly seeking recall of mandate. Appx B.

On appeal to the Court of Appeals for the Federal Circuit (Federal Circuit), the Federal Circuit refused to hear the § 7292(d) jurisdictional challenge: "this court's jurisdiction over appeals from the Veterans Court extends only to decisions of that court, *see* 38 U.S.C. § 7292(a) . . . ." Appx A at 7. This petition ensued.

The statutory basis for jurisdiction in the Federal Circuit, as the Article III court of first instance, is the first sentence of 38 U.S.C. § 7292(d)(1).

---

[1] In 38 C.F.R. § 3.102 the Secretary interpreted the § 5107(b) evidentiary standard to explain, in pertinent part, that adjudicators may not entertain "[m]ere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts." Material evidentiary conflict is thus the sine qua non of jurisdiction to adjudicate a question of fact under § 511(a); § 7261(b)(1) mandates judicial review of the Secretary's compliance with that evidentiary standard. The adjudicatory acts Mr. Wright presented for judicial review confirm the absence of evidentiary conflict, and thus the want of adjudicatory jurisdiction ab initio.

REASONS FOR GRANTING THE PETITION

The decision of the Federal Circuit is incorrect, and conflicts with the rationale in *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___ (2016); *Henderson v. Shinseki*, 562 U.S. 428 (2011); and *Leedom v. Kyne*, 358 U.S. 184 (1958). The national importance of the question presented is reflected in the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

In *Hawkes*, the Administrative Procedures Act (APA) afforded judicial review of asserted administrative jurisdiction. The rationale included that aggrieved parties need not endure consequences that flow from assertions of administrative jurisdiction, "while waiting for the [administrative process] to 'drop the hammer' in order for them to have their day in court." *Hawkes*, slip op. at 9. An aggrieved party's right to judicial review of an Article I process is thus independent of review of decisions issued within that Article I process. *See also Leedom* at 188:

> **This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers . . . .**

While *Hawkes* applied the APA, the rationale applies under the Veterans Judicial Review Act of 1988 (VJRA) as well. The core operative phrase "shall decide all relevant questions of law" – shared by §§ 7261(a)(1) and 7292(d)(1) in the VJRA, and derived from 5 U.S.C. § 706 in the APA – is an independent grant of "the same authority," *i.e.* the same jurisdiction to review the administrative process at issue. *See* S. Rep. No. 100-418, at 60 (1988):

[T]he other major scope of review provisions contained in proposed section 4026(a)(1) through (a)(3) are derived specifically from section 706 of the APA. Thus, it is the Committee's intention that the court shall have the same authority as it would in cases arising under the APA to review and act upon questions other than matters of material fact made in reaching a decision on an individual claim for VA benefits . . . .

Henderson held that the deadline in § 7266(a) does not limit jurisdiction; the rationale contrasted the second sentence of § 7292(a), where Congress gave a "clear indication" of intent by adopting a deadline from Title 28 that limits jurisdiction. The first sentence of § 7292(a) includes no such "clear indication," and is not "cast in mandatory language" as a limit would be. Accordingly, under the *Henderson* rationale, the first sentence of § 7292(a) does not limit the jurisdiction granted in § 7292(d). *See also Leedom* at 190: "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."

Consequences that flow when the Secretary acts in excess of delegated powers, rather than delivering benefits as claimed, are noted in *Martin v. O'Rourke*, 891 F.3d 1338, 1350 - 52 (Fed. Cir. 2018) (Moore, J, concurring):

In short, even when veterans win on appeal, they have lost years of their lives living in constant uncertainty, possibly in need of daily necessities such as food and shelter, deprived of the very funds to which they are later found to have been entitled.

. . . .

It takes on average six and a half years for a veteran to challenge a VBA determination and get a decision on remand. God help this nation if it took that long for these brave men and women to answer the call to serve and protect. We owe them more.

In *Henderson*, at 432, it was noted that the Veterans Court grants veterans relief in appeals of Board decisions at the "remarkable" rate of 79 percent. In *George v. McDonough*, 596 U.S. __ slip op. at 7-8 (2022) (GORSUCH, J., dissenting), it was noted that the average delay in resolving a claim was seven years and that the Veterans Court affirmed the Board at a rate of only about ten percent. The delay of seven years in *George* is worse than six and a half years as earlier noted in *Martin*; the delay in the instant case approaches nine years as of this petition. The 90 percent error rate in *George* is worse than 79 percent as earlier noted in *Henderson*; the instant case is in that remarkable category as well.

Under the *Hawkes* rationale, aggrieved veterans need not endure those and other consequences of process defects, while awaiting eventual reversals of decisions that are inordinately erroneous and dilatory as a result of such process defects. Instead, as *Hawkes* confirms, the core operative phrase shared in §§ 7261(a)(1) and 7292(d)(1) – "shall decide all relevant questions of law" – grants aggrieved veterans the right to attack defects in the Article I process, as consequences flow therefrom.

CONCLUSION

The Court should decide the question presented.

Very respectfully submitted, January 23, 2024

Paul Wright,
Petitioner pro se
115 Hugh Smith Road
Marietta, South Carolina 29661
(864) 275-7955
Paul.Wright@1979.usna.com

United States Court of Appeals for the Federal Circuit

PAUL WRIGHT,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2023-1360

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-8732, Judge Michael P. Allen.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

DISMISSED

FOR THE COURT

December 8, 2023
Date

Jarrett B. Perlow
Clerk of Court

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

PAUL WRIGHT,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2023-1360

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-8732, Judge Michael P. Allen.

Decided: December 8, 2023

PAUL WRIGHT, Marietta, SC, pro se.

JANA MOSES, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by BRIAN M. BOYNTON, WILLIAM JAMES GRIMALDI, PATRICIA M. MCCARTHY.

Before PROST, TARANTO, and HUGHES, *Circuit Judges*.

PER CURIAM.

Paul Wright appeals from a decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") denying his motion to recall the mandate and judgment of an earlier Veterans Court decision. For the reasons below, we dismiss.

BACKGROUND

In 2015, Mr. Wright first sought service-connected benefits for melanoma. Following a series of adverse decisions and corresponding appeals from Mr. Wright, the Board of Veterans' Appeals ("Board") made a determination of no service connection on February 7, 2020. S.A. 36.[1]

Mr. Wright timely appealed that 2020 Board decision to the Veterans Court. The Secretary of Veterans Affairs ("Secretary") responded by "conced[ing] that the Board did not provide an adequate statement of its reasons or bases for denying [Mr. Wright's] claim" and contending that the Veterans Court should remand. S.A. 36. Mr. Wright argued that the Veterans Court should reverse and award service connection instead of remanding to the Board. S.A. 38. The Veterans Court set aside the Board decision and remanded for further consideration of Mr. Wright's claim. S.A. 36–40 ("*Single-Judge Remand Decision*"). Specifically, the Veterans Court concluded that a remand was appropriate because the Board failed to consider Mr. Wright's argument that his service exposure to ionizing radiation put him at a higher risk for developing melanoma from his service exposure to UV radiation. The Veterans Court determined that because "[t]he Board did not address appellant's arguments . . . , it never weighed the evidence" and that a remand was required for the

[1] S.A. refers to the appendix submitted with the government's informal response brief.

Board to make necessary factfindings in the first instance. S.A. 38.

Mr. Wright filed a timely motion for reconsideration or, in the alternative, a panel decision. S.A. 20–35. On September 7, 2021, the Veterans Court granted the request for a panel decision, denied reconsideration, and adopted the single-judge decision as the decision of the panel. S.A. 18–19 ("*Panel Remand Decision*"). Judgment was entered on September 29, 2021, and the mandate issued on November 30, 2021. S.A. 16–17.

Almost a year after the mandate issued, on November 22, 2022, Mr. Wright filed a "petition to vacate remand, and for statutory relief under 38 U.S.C. § 7261(a)," which the Veterans Court construed as a motion to recall the mandate and judgment.[2] *See* S.A. 8–15; S.A. 5. On December 22, 2022, the Veterans Court denied the motion, concluding that Mr. Wright had "not demonstrated good cause or alleged unusual circumstances to recall [the] mandate" and that its "single-judge decision and the panel's order affirming the single-judge decision were both within [its] normal practice and supported by caselaw." S.A. 5–6 ("*Recall Decision*").

Mr. Wright filed an appeal on December 28, 2022. ECF No. 1-2 at 1. As it pertains to the *Recall Decision*, Mr. Wright's appeal was timely filed. However, to the extent Mr. Wright is challenging the *Panel Remand Decision*,

---

[2] Initially, the Veterans Court had docketed Mr. Wright's filing as a separate mandamus petition. However, after Mr. Wright explained that his filing was intended for the same docket number as the *Panel Remand Decision*, the filing was construed as a motion to recall the mandate and judgment. S.A. 5–6. Mr. Wright does not argue that the Veterans Court should have treated his filing as a mandamus petition.

that appeal is out of time. Our jurisdiction is analyzed under 38 U.S.C. § 7292.

DISCUSSION

Our review of Veterans Court decisions is limited. We lack jurisdiction to "review (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" unless presented with a constitutional issue. 38 U.S.C. § 7292(d)(2). However, we have "jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . , and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." *Id.* § 7292(c). Our review of the Veterans Court's decision on a motion for recall is subject to these same jurisdictional constraints. *See Moreno v. Shinseki*, 527 F. App'x 962, 964–65 (Fed. Cir. 2013) (nonprecedential) (dismissing for lack of jurisdiction).

First, it is unclear to what extent this appeal centers around an untimely challenge to the merits of the *Panel Remand Decision*. For example, Mr. Wright's notice of appeal stated that it was seeking review of a December 22, 2022 decision, which is the date of the *Recall Decision*. ECF No. 1-2 at 1. However, the *Single-Judge Remand Decision*, dated July 30, 2021, and adopted by the panel on September 7, 2021, was attached to the notice of appeal. *Id.* at 5–10. In response to the government's motion to dismiss, ECF No. 6, Mr. Wright contended that "[t]he July 2021 remand order is not on appeal" and that "[t]he decision on appeal is the December 2022 order." ECF No. 8 at 1–2. Still, Mr. Wright's arguments appear primarily focused on challenging the merits of the *Panel Remand Decision*. Further, in his reply, Mr. Wright stated that he "did not invoke 38 U.S.C. § 7292(e) appellate review of that [remand] (or any other decision)" and seems to contend that he does not seek review of the December 2022 order either. Appellant's Informal Reply Br. 1.

To the extent Mr. Wright's appeal does seek review of the *Panel Remand Decision*, we dismiss for lack of jurisdiction. *See* 38 U.S.C. § 7292(a) ("[R]eview shall be obtained by filing a notice of appeal with the [Veterans Court] within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts."); 28 U.S.C. § 2107(b) (providing a 60-day time limit to appeal when one of the parties is the United States); *Fedora v. MSPB*, 848 F.3d 1013, 1016 (Fed. Cir. 2017) ("[A]ppeal periods to Article III courts are jurisdictional."). Judgment was entered on the *Panel Remand Decision* on September 29, 2021, S.A. 17, and Mr. Wright did not file the present notice of appeal until December 28, 2022, ECF No. 1-2. Thus, any appeal of that decision is dismissed as untimely.

Turning to the Veterans Court's *Recall Decision*, Mr. Wright's notice of appeal was timely filed as it relates to that decision. However, dismissal is appropriate here too because Mr. Wright's challenge does not raise legal issues within our jurisdiction.

One of Mr. Wright's primary arguments seems to be that the Secretary lacked jurisdiction to deny him benefits under 38 U.S.C. § 511(a). First, to the extent this contention challenges the merits of the Veterans Court's *Panel Remand Decision*, it is untimely, as discussed above. To the extent the argument relates to the *Recall Decision*, it is underdeveloped and outside our jurisdiction. The *Recall Decision* does not mention § 511(a), nor does Mr. Wright argue that the decision necessarily implicates an interpretation of § 511(a). In fact, aside from contending that it affords him benefits, Mr. Wright has not presented—here or in his petition for recall at the Veterans Court—any proposed interpretation of § 511(a) that bears on this case. Thus, to the extent § 511(a) was implicated by the *Recall Decision* at all, Mr. Wright's arguments challenge only the application of settled law to the facts of this case.

Next, Mr. Wright argues that under 38 U.S.C. § 7252(a) the Veterans Court lacked jurisdiction to remand to the Board. Section 7252(a) provides:

> The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

Mr. Wright also made this argument to the Veterans Court in his "petition to vacate remand, and for statutory relief under 38 U.S.C. § 7261(a)," S.A. 13–14, but the court concluded that the "single-judge decision and the panel's order affirming the single-judge decision were both within [its] normal practice and supported by caselaw," S.A. 6. The crux of Mr. Wright's argument seems to be that the Veterans Court was not permitted to remand here at least in part because the Secretary argued that a remand was the appropriate remedy. We understand this argument to present a challenge to the application of law to the facts of this case. Instead of presenting a legal argument about § 7252(a) or any Veterans Court interpretation of it, Mr. Wright's arguments invite us to look to the particular circumstances here and find that remand was inappropriate.[3]

Finally, although Mr. Wright's response to the government's motion to dismiss stated that "[t]he decision on

---

[3] Mr. Wright also contends that the § 511(a) and § 7252(a) issues presented are "inherently constitutional." Appellant's Informal Br. 12. Because mere characterization of an issue as constitutional is insufficient to confer jurisdiction, this argument does not alter our analysis. *See Flores v. Nicholson*, 476 F.3d 1379, 1382 (Fed. Cir. 2007).

appeal is the December 2022 order," ECF No. 8 at 1–2, in other places his briefing seems to suggest that he intends to present a freestanding challenge, untethered to any specific decision of the Veterans Court, *see* Appellant's Informal Reply Br. 1–3, 3 n.1. Because this court's jurisdiction over appeals from the Veterans Court extends only to decisions of that court, *see* 38 U.S.C. § 7292(a), we also dismiss Mr. Wright's appeal to the extent it presents a general challenge to the proceedings below.

CONCLUSION

We have considered Mr. Wright's remaining arguments in his briefing and his memorandum in lieu of oral argument, ECF No. 30, and find them unpersuasive. Because this appeal raises no issues within our limited jurisdiction, we dismiss.[4]

DISMISSED

COSTS

No costs.

[4] Mr. Wright has also filed a motion for sanctions. ECF No. 29. We have also considered that motion and deny it.

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-8732

PAUL WRIGHT, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On December 24, 2020, self-represented appellant Paul Wright appealed a February 7, 2020, Board of Veteran' Appeals decision that denied entitlement to service connection for melanoma. On July 30, 2021, the Court set aside and remanded the Board's decision for readjudication. In August 2021, appellant filed a timely motion for reconsideration or, in the alternative, a panel decision. On September 7, 2021, we denied reconsideration, granted panel consideration, and a panel affirmed the July 30, 2021, decision remanding the Board's February 2020 decision. Judgment entered on September 29, 2021, and mandate issued on November 30, 2021.

On November 22, 2022, nearly a year after mandate issued, appellant filed what he called a "petition to vacate remand, and for statutory relief under 38 U.S.C. § 7261(a)" and he identified 20-8732 as the docket number in which he was making that filing. In that filing, appellant expressed his disagreement with the Court's July 2021 decision remanding the February 2020 Board decision and argued that the Court erred when it granted the Secretary's request for remand. Appellant requested that the Court "vacate its extrajurisdictional remand to the Board, to hold unlawful and set aside extrajurisdictional proceedings below, and to order the Secretary to deliver benefits."[1] However, due to an administrative oversight, the Court docketed this filing as a new petition for extraordinary relief under a new docket number, 22-6879.

On December 19, 2022, appellant submitted a response to a show cause order in docket number 22-6879. In it, he explained how he never intended to file a new petition for extraordinary relief and that his November 22, 2022, submission was intended for docket number 20-8732. To remedy this error, the Court will order appellant's appeal under docket number 20-8732 be reopened. Next, the Court will direct the Clerk of the Court to file appellant's November 22, 2022,

[1] Appellant's November 22, 2022, Submission to the Court at 1.

submission under docket number 20-8732 as a construed motion to recall mandate and judgment. Finally, the Court will direct the Clerk of the Court to close the petition docket number 22-6879, because it was opened in error.

The Court will now address appellant's November 22, 2022, construed motion to recall mandate and judgment in docket number 20-8732. Recall of mandate is not ordinarily allowed. However, a court has the power to set aside any judgment and to recall mandate, where necessary to protect the integrity of its own processes."[2] Although the exercise of the power to recall mandate is within the discretion of the Court, recalling mandate is an extraordinary remedy, "such discretion may be exercised only for good cause or to prevent injustice, and only when 'unusual circumstances exist sufficient to justify modification or recall of a prior judgment.'"[3] We conclude that appellant has not demonstrated good cause or alleged unusual circumstances to recall mandate.[4] Our single-judge decision and the panel's order affirming the single-judge decision were both within our normal practice and supported by caselaw. Because there is nothing unusual or exceptional about the facts of this matter or the Court's remand decision, we will deny appellant's motion to recall mandate and judgment.[5]

Upon consideration of the foregoing, it is

ORDERED that the appeal in docket number 20-8732 is reopened. It is further

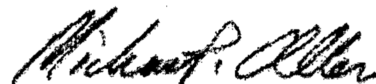
ORDERED that in docket number 20-8732, the Clerk of the Court will file appellant's November 22, 2022, submission to the Court as a motion to recall mandate and judgment. It is further

ORDERED that in docket number 20-8732, appellant's November 2022 motion to recall mandate and judgment is DENIED. And it is further

ORDERED that the Clerk of Court close docket number 22-6879 because it was opened in error.

DATED: December 22, 2022

BY THE COURT:



MICHAEL P. ALLEN
Judge

---

[2] *Serra v. Nicholson*, 19 Vet.App. 268, 271 (2005) (citing *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir.1996)).

[3] *McNaron v. Brown*, 10 Vet.App. 61, 63 (1997) (quoting *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988)), *aff'd sub nom. McNaron v. Gober*, 121 F.3d 728 (Fed. Cir. 1997) (per curiam); *see Smith v. Shinseki*, 26 Vet.App. 406, 410 (2014) (per curiam order) (noting that "recall of mandate required the parties to show both good cause and unusual circumstances").

[4] *McNaron*, 10 Vet.App. at 63 (mandate and judgment will not be recalled except in unusual circumstances such as the discovery that a judgment was obtained by fraud, the correction of clerical mistakes and judicial oversights, or a party's death prior to the issuance of mandate).

[5] *Id.* at 62.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-8732

PAUL WRIGHT, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

ALLEN, *Judge*: Self-represented appellant Paul Wright served the Nation honorably in the United States Navy. In this appeal, which is timely and over which the Court has jurisdiction,[1] he contests a February 7, 2020, Board of Veterans' Appeals decision that denied entitlement to service connection for melanoma.[2] The Secretary concedes that the Board did not provide an adequate statement of its reasons or bases for denying appellant's claim. He urges the Court to remand this matter.[3] We agree with the Secretary both that the Board erred and that remand is the appropriate remedy.

I. ANALYSIS

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed

[1] *See* 38 U.S.C. §§ 7266(a), 7252(a).

[2] Record (R.) at 154-73. The Board reopened appellant's claims seeking service connection for sleep apnea, GERD with Barrett's disease and a heart condition and then remanded those matters for adjudication. The decisions to reopen these claims are favorable to appellant and we may not disturb them. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). We also lack jurisdiction to address these remanded claims on the merits. *See Breeden v. Principi*, 17 Vet.App. 475, 477-78 (2004) (per curiam order).

[3] *See* Secretary's Brief (Br.) at 9-10.

in-service disease or injury and the present disability.[4] The Court reviews the Board's findings regarding service connection for clear error.[5] The Board must provide "a written statement of reasons or bases for its findings and conclusions on all material issues of fact or law."[6] To comply with its requirement to provide an adequate statement of reasons or bases, "the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant."[7] Moreover, the Board must address evidence favorable to appellant, which includes competent medical and lay evidence.[8] If the Board fails to do so, remand is appropriate.[9]

Appellant has consistently claimed that his melanoma was due to exposure to the sun and ionizing radiation while he was in service.[10] The Board stated that "[w]hile the [v]eteran is competent to report having been exposed to sunlight, and the Board does not doubt that he believes his melanoma is due to radiation exposure, he is not competent to provide an opinion on this medical issue."[11] The Secretary asserts that this analysis is insufficient. Specifically, the Secretary notes that the Board

> does not address [a]ppellant's claim that exposure to ionizing radiation place[s] those exposed to UV radiation at a higher risk, and his claim that he was exposed to intense, prolonged exposure to sun while serving as a member of the [v]arsity [s]ailing [t]eam at the U[.]S[.] Naval Academy, and that he regularly received sunburns especially to the tops and sides of [his] feet.[12]

We agree with the Secretary that the Board's analysis is deficient. The Board must address arguments, including theories of entitlement, that a claimant raises or that are reasonably apparent

[4] *See Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2021).

[5] 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

[6] 38 U.S.C. § 7104(d)(1). *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

[7] *Kahana v. Shinseki*, 24 Vet.App. 428, 433 (2011) (citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)); *Gilbert*, 1 Vet.App. at 56-57.

[8] *Kahana*, 24 Vet.App. at 433.

[9] *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

[10] *See, è.g.*, R. at 1703 (July 2017 letter), 3520 (June 2015 claim).

[11] R. at 165.

[12] Secretary's Br. at 9 (internal quotation marks omitted).

from the record.[13] Here, appellant expressly argued that the Board failed to consider. Remand is required for the Board to address appellant's arguments.

Appellant also argues strenuously that we should reverse the Board's decision and award service connection for his melanoma.[14] However, that is not appropriate here. As the Federal Circuit has explained, "[t]he Court of Appeals for Veterans Claims, as part of its clear error review, must *review* the Board's weighing of the evidence; it may not weigh any evidence itself."[15] This does not mean that the Court can't reverse the Board's factual determinations. However, it may do so only "where the Board has performed the necessary fact-finding and explicitly weighed the evidence."[16] Stated another way, "reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision."[17] The Board did not address appellant's arguments and, because it did not do so, it never weighed the evidence. The Board must perform that function, which necessarily precedes this Court's review of the Board's findings.

Although what we have said thus far resolves this appeal, there are two additional arguments to address based on appellant's briefing. First, appellant requests that we review—and reverse—an October 2015 rating decision, a July 2017 rating decision, and a February 2019 Statement of the Case.[18] However, the Court reviews final *Board* decisions, not decisions rendered by a regional office (RO).[19] So, we lack jurisdiction to consider the matters appellant identifies. Moreover, as a practical matter there is no need to review these decisions. They are all part of the claims stream that led to the decision on appeal. And we have already explained why the Board erred when it rendered that decision.

Second, appellant argues that the Board erred when it did not afford him notice under 38 U.S.C. § 5104.[20] Appellant is incorrect. We begin with the legal context in which we view

---

[13] *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

[14] *See, e.g.*, Appellant's Br. at 14; Appellant's Reply Br. at 4-5.

[15] *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (emphasis in original) (citing *Andre v. Principi*, 301 F.3d 1354, 1362 (Fed. Cir. 2002)); *see* 38 U.S.C. § 7261(c) (prohibiting the Court from making factual determinations).

[16] *Deloach*, 704 F.3d at 1380.

[17] *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996); *see also Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (same).

[18] *See* Appellant's Br. at 14.

[19] *See* 38 U.S.C. § 7252(a).

[20] *See, e.g.*, Appellant's Reply Br. at 6-7.

appellant's appeal. Since February 19, 2019, there have been two types of adjudicatory systems for claims within VA. Those claims that are subject to the legacy appeals system, and those subject to the Veterans Appeals Improvement and Modernization Act of 2017 (AMA).[21] We have made clear that VA intended these systems to operate concurrently.[22] Therefore, in cases in which a VA agency of original jurisdiction such as an RO issued the initial decision that led to an administrative appeal before February 19, 2019, the legacy appeals system applies, while those initial decisions issued on or after that date are subject to the AMA process.[23] There is but one exception where a legacy appeal claimant can access the AMA process, and that is by opting in to the AMA system after a Statement of the Case is issued under the legacy system.[24] Here, appellant's appeal arose out of a July 2017 rating decision and he has never opted into the AMA.[25] That places his appeal under the legacy system. And the statute he cites concerning notice–section 5014—applies to AMA appeals. We have specifically held that the amended version of section 5104 to which appellant refers does not apply to a legacy appeal.[26]

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.[27] On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's post-remand notice.[28] The Board must consider any such additional evidence or argument submitted.[29] The Board must also proceed expeditiously.[30]

---

[21] *Mattox v. McDonough*, __ Vet.App. __, __, No. 19-5212, 2021 WL 1604717, at *5, *6 (Vet. App. Apr. 26, 2021).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] R. at 157.

[26] *See Mattox*, __ Vet.App. at __; 2021 WL 1604717, at *5-7.

[27] *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

[28] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

[29] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[30] 38 U.S.C. §§ 5109B, 7112.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the February 7, 2020, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: July 30, 2021

Copies to:

Paul Wright

VA General Counsel (027)

§7261. Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found 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; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

§7252. Jurisdiction; finality of decisions

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

(c) Decisions by the Court are subject to review as provided in section 7292 of this title.

§7292. Review by United States Court of Appeals for the Federal Circuit

(a) 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.

(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof

brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) 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.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (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.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.