No. 23-7140

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

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

1. Statement

Petitioner Paul Wright (Wright) successfully challenged the Secretary's denial of a claim for veteran benefits, before the Board of Veterans' Appeals (Board). He then successfully challenged the Board's sua sponte denial on other grounds, in the Court of Appeals for Veterans Claims (Veterans Court). As those decisions on the merits confirm, the May 27, 2015 application fully supports the claim.

As a matter of process, however, the Board and the Veterans Court thereafter refused to hear Wright's challenge to the Secretary's continued assertion of jurisdiction pursuant to 38 U.S.C. § 511(a), and unlawful withholding of benefits. The pending petition seeks review of the ensuing refusal of the Court of Appeals for the Federal Circuit (Federal Circuit) to exercise its original jurisdiction, granted in § 7292(d)(1), to decide the challenge the Board and Veterans Court had refused to hear. The Federal Circuit assumed that § 7292(a) restricts its jurisdiction to reviewing merits decisions of the Veterans Court.

Wright presents this supplemental brief pursuant to Rule 15.8, to address intervening matter in *Rudisill v. McDonough*, 601 U.S. ___ (2024); and *Bufkin v. McDonough*, 23-713 (cert. granted 4/29/2024). The government waived opposition in the instant case, on May 6, 2024.

Rudisill

In *Rudisill*, (Kavanaugh, J., concurring), (Thomas, J., dissenting), members of this Court expressed concern over the canon that laws governing veteran benefits are to be construed in favor of veterans. The "thumb on the scale" applies in Congress, not in court. Congress placed its own "thumb on the scale" in Title 38, very heavily in favor of veterans, in granting benefits and enacting the Veterans Judicial Review Act of 1988 (VJRA) and related statutes. Courts should construe and apply the applicable Title 38 provisions liberally to achieve the remedial purpose; this applies to all remedial statutes, not just those favoring veterans.

As 38 U.S.C. § 6301(a)(1) shows, veteran benefits serve the overarching purpose of remediating the social and economic burdens of military service, so veterans "may achieve a rapid social and economic readjustment to civilian life and obtain a higher standard of living for themselves and their dependents."

The VJRA derived provisions from the Administrative Procedures Act (APA), to afford judicial review to correct defects in the administration of veteran benefits. As shown in the pending petition, §§ 7292(d)(1) and 7261(a) promote that remedial purpose by granting the Federal Circuit and the Veterans Court, respectively, original jurisdiction to review the Article I process for administering veteran benefits, using the same core operative phrase 5 U.S.C. § 706 of the APA uses to grant the district courts original jurisdiction to review other Article I processes: "shall decide all relevant questions of law."

Bufkin

In *Bufkin*, the government's brief in opposition argues novel theories in conflict with Title 38, legislative history and this Court's decisions. The following examples are relevant to the instant case.

The government's brief in *Bufkin* depends largely on the assumption that VJRA review is a monolithic appellate proceeding. But §§ 7292(d) and 7261 afford judicial review of the Article I process (akin to APA review of other Article I processes) while, separately, §§ 7292(e) and 7252 afford appellate review of decisions issued within that process (akin to appeals pursuant to Chapter 83 of Title 28).

In reviewing the Article I process pursuant to §§ 7292(d) and 7261, the courts below have original jurisdiction to hold unlawful and set aside improper administrative action, and to order proper administrative action. In reviewing decisions pursuant to §§ 7292(e) and 7252, the courts below have appellate jurisdiction to affirm, modify or reverse, on the merits.

The government compounds its mistaken assumption that VJRA review is a monolithic appellate proceeding, with the further assumption that review of the Article I process it thus tethered to review of decisions issued within that process. The Federal Circuit made the same assumption in disclaiming jurisdiction to review the Article I process, specifically because Wright "intends to present a freestanding challenge, untethered to any specific decision of the Veterans Court." Appx A, 7. The Federal Circuit simply assumed that the freestanding challenge would be outside the scope of § 7292(a), without offering any rationale.

The inaugural Chief Judge of the Veterans Court likewise assumed, without rationale, that § 7252(a) limits that court to "reviewing final Board decisions." Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits*, 46 Me. L. Rev. 5, 8 (1994). Section 7252(a) imposes no "final" limit; and "exclusive jurisdiction" does not limit the Veterans Court's jurisdiction but instead withholds jurisdiction from other tribunals, *see, e.g.*, 28 U.S.C. § 1251. Yet that entrenched assumption still survives to deprive veterans of intended review of the Article I process: "However, the Court reviews final *Board* decisions, not [the Article I process]." Appx C, 3 (emphasis in original). The Federal Circuit decision to be reviewed, Appx A, is not materially different.

As shown in the pending petition, *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___ (2016); and *Leedom v. Kyne*, 358 U.S. 184 (1958) discredit the assumptions the government makes (along with the courts below). Review of an Article I process is independent of review of decisions issued within that process.

Beyond *Hawkes Co.* and *Leedom*, the monolithic / tethered assumptions discredit themselves, when taken to the logical conclusion in the instant case. While § 7292(e) nominally grants appellate jurisdiction to review the Veterans Court's erroneous decision not to review the Article I process, that error is harmless, within the meaning of § 7261(b)(2), because § 7292(d)(1) imposes upon the Federal Circuit the duty to issue de novo decisions on the same relevant questions of law the Veterans Court decided not to decide.

The Federal Circuit's unstated rationale appears to be that a descriptive phrase in the first sentence in § 7292(a) – "a review of the [Veterans Court] decision with respect to the validity of a decision on a rule of law" – is a restrictive phrase that bars a freestanding challenge pursuant to § 7292(d)(1). But review "with respect to" a decision is broader than review "of" a decision. The freestanding challenge invokes the Federal Circuit's original jurisdiction to issue de novo decisions on the same relevant questions of law the Veterans Court decided not to decide; this falls squarely within "with respect to" the decision specified in the notice of appeal (without which decision there would be no relevant questions of law left for the Federal Circuit to decide). At any rate, as shown in the pending petition, "with respect to" does not limit the jurisdiction granted in § 7292(d)(1), under the test applied in *Henderson v. Shinseki*, 562 U.S. 428 (2011).

The government's argument in *Bufkin* differs only slightly, in suggesting that "necessary to its decision" limits § 7261 review to § 7252 appeals because the "decision" is whether to affirm, modify or reverse a de novo Board decision. But that "decision" plainly is whether to issue the relief specified in § 7261 itself. Otherwise, the references to the actions of the Secretary would be meaningless.

The government's key assumption in *Bufkin* – that judicial review of the Article I process is tethered to appellate review of decisions issued within that process – fails under the scrutiny of *Hawkes Co.*, *Henderson* and the harmless error rule.

If §§ 7292(d) and 7261 process review were tethered to §§ 7292(e) and 7252 merits review as the government suggests, the Veterans Court's failure to comply with its § 7261 mandate – as in the instant case – would insulate the Article I process from review, and thereby render §§ 7292(d) and 7261 all but meaningless.

Another example is that the government distorts the § 5107(b) evidentiary standard as only narrowly applicable where the positive and negative evidence are exactly balanced – on which basis adjudicators believe they are otherwise free to doubt positive evidence. Section 5107(b) does use "benefit of the doubt" to require a finding in favor of the veteran at that single point on the continuum of conflicting evidence. But § 5107(b) is in derogation of common law only in that narrow respect, and thus ratifies common law as to the remainder of the continuum.

Accordingly, as applied to the entire continuum of conflicting evidence, § 5107(b) requires a finding in favor of the veteran on a material fact unless the greater weight of evidence tends to disprove the fact. Adjudicators' subjective doubt is never permitted.[1]

In a related example from the brief in opposition in *Bufkin*, the government refers to "rules for determining when the veteran has a service connected disability," pursuant to which "the VA requires [certain documents] to establish a service connection."

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1 The Secretary interprets the § 5107(b) evidentiary standard in 38 C.F.R. § 3.102, which provides in relevant 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."

The stated rule excludes all other veteran-favorable evidence, and thus has no legitimate place in the intended veteran-friendly, non-adversarial and paternalistic Article I process. Section 5107(b) instead requires adjudicators to consider the "entire record," without ignoring evidence veterans provide.

At most, a proper rule might allow exclusion of veteran-favorable evidence after presentation, objection, arguments from both sides, and an impartial judge's ruling. But legislative history makes it clear not only that Title 38 eschews those kinds of technicalities altogether, but why Congress made that choice.[2] The stated rule thus presents a particularly compelling example of the need to review the Secretary's application of § 5107(b), as §7261(b)(1) commands for reasons explained in amicus briefing in *Bufkin*.

The government distorts another distinctive veteran-favorable feature of Title 38, by baldly asserting that the Secretary's "duty to assist" does not arise until the veteran meets the § 5107(a) burden. The duty to assist instead arises when the Secretary discerns that an application is not "complete," within the meaning of § 5102(b), to meet the § 5107(a) burden to "present and support a claim." As § 5103A(a) states, the duty is to obtain evidence "necessary to substantiate the claimant's claim"; it is not necessary to substantiate a claim even further, where the application already meets the § 5107(a) burden.

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[2] "In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof." H.R. Rep. No. 963, 100th Cong., 2d Sess. 13 (1988).

In practice, the incorrect assumption that judicial / process review is tethered to appellate / merits review thwarts the inquiry the VJRA affords to ensure that veteran benefits are lawfully administered. As a result, the government's distortion of § 5107(b) unlawfully persists to require veterans to corroborate unrefuted evidence to overcome subjective doubts, while the distortion of §§ 5103 and 5103A unlawfully persists to impose a burden atop the § 5107(a) burden. As those examples show, the government's novel theories in *Bufkin* are in material conflict with Title 38, as to issues in common with the instant case.

The following section outlines the Article I process and the VJRA, free of the government's mistaken assumptions and distortions; the section thereafter puts that outline into context by summarizing the proceedings below.

Article I Process and VJRA

Congress granted disability benefits in §§ 1110 and 1131, and delegated Article I power to provide those benefits. Sections 7292(d)(1) and 7261(a) grant original jurisdiction to review that Article I process. Separately, §§ 7292(e) and 7252(a) grant appellate jurisdiction to review decisions issued within that process.

Sections 7292(d)(1) and 7261(a) thus codify the fundamental right of veterans to petition for redress of grievances arising out of the Article I process, which process includes the Secretary's non-discretionary ministerial duties as follows:

1. to review an application for benefits, pursuant to § 5102(b), to determine whether the application is complete to meet the veteran's § 5107(a) burden to present and support the claim;

2. to provide notice of any incompleteness, pursuant to § 5102(b), and to assist, pursuant to §§ 5103 and 5103A, in making the application complete;
3. to provide the benefits as claimed in the complete application, pursuant to the core operative phrase "the United States will pay," as stated in §§ 1110 and 1131; or, alternatively, to provide § 5104 notice specifying the ways in which the application fails to meet the § 5107(a) burden.

If that non-discretionary ministerial "pre-trial phase" produces a § 5104 notice specifying a genuine question as to whether the application meets the § 5107(a) burden, § 511(a) authorizes the Secretary to decide that question. If the Secretary's decision is adverse, § 7104 entitles the veteran to a de novo decision by the Board.

If the Board's de novo decision is adverse, § 7252(a) grants the Veterans Court appellate jurisdiction to affirm, modify, or reverse. When the Veterans Court issues a decision, § 7292(e) grants the Federal Circuit Article III appellate jurisdiction to affirm, modify, or reverse.

Proceedings Below

The Secretary took delivery of Wright's application, and later accepted the application as complete under § 5102(b). The Secretary has not issued § 5104 notice specifying a genuine question[3] to be decided under § 511(a).

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3 The material facts are limited to the elements of a disability claim: (1) Veteran status; (2) existence of a disability; (3) a connection between the veteran's service and the disability; (4) degree of disability; and (5) effective date of disability. *Collaro v. West*, 136 F.3d 1304 (Fed. Cir. 1998). The Secretary calls element (3) "service connection" and divides that element into "nexus" and "in-service injury."

A regional office instead purported to deny nexus based on the bald assertion that ultraviolet radiation does not cause melanoma. That denial failed to specify nexus evidence reviewed or to specify alleged material evidentiary conflict therein.

Wright responded by pointing to the unrefuted nexus evidence of record, prior Board findings of the identical nexus, and applicable authority.

A different regional office subsequently conceded nexus – but went further in purporting to deny in-service injury based on the bald assertion that there was no in-service injury. That denial likewise failed to specify in-service injury evidence reviewed or to specify alleged material evidentiary conflict therein.

Wright responded by demanding the Board's de novo decision.

The Board's de novo decision replaced the denial of in-service injury (the sole material fact in dispute) with the Board's finding that the evidence on in-service injury is competent and "not contested"; that finding fully resolved the claim in favor of Wright and further confirmed that § 511(a) jurisdiction is wanting ab initio. But the Board denied the claim by sua sponte re-adjudicating and denying nexus.

When the Board failed to consider requests for reconsideration, Wright appealed to the Veterans Court.

The case-initiating pleading in the Veterans Court states on the first page: "This action invokes merits review under 38 U.S.C. § 7252 as to the Board's denial of the melanoma claim, and process review under 38 U.S.C. § 7261 as to the manner in which the Secretary and the Board administered the claim."

The sole error presented for appellate review, as stated on page 4, was: "In summary as to merits review, the Board failed to give binding effect to the Secretary's and the Board's findings of nexus between melanoma and ultraviolet radiation, as 38 U.S.C. § 5104A required."

The government did not dispute the error. Appx C agreed with the government's concession, set aside the error, and remanded the matter to the Board at the government's request. Appx C separately refused to afford § 7261(a) review, and instead directed the Board to address the challenged §§ 511(a) and 5107(b) defects in the Article I process.[4]

The Board did not comply with the remand order, however, and instead remanded to the Secretary under the pretext of "claim development" – the Secretary's jargon for alleged "assistance" pursuant to §§ 5103 and 5103A. But neither the Board nor the Secretary issued the requisite notices specifying evidence allegedly needed to meet the § 5107(a) burden.

After the Board failed to respond to a request for reconsideration, Wright's November 2022 petition attacked the remand to the Board as void ab initio for want of jurisdiction, in the Veterans Court pursuant to its inherent duty and authority as the court of rendition; that petition further invoked § 7261(a) judicial review to attack the Secretary's continued unlawful assertion of § 511(a) jurisdiction.

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4 Appx C also refers to further fact-finding regarding an alternative nexus. There is no genuine question as to that alternative nexus because the treatise evidence is unrefuted. At any rate, any alleged question as to that alternative nexus is moot due to the Secretary's finding of nexus between ultraviolet radiation and melanoma.

Appx B refused to hear the November 2022 petition. Appx A, the Federal Circuit decision to be reviewed, likewise refused to afford § 7292(d)(1) review, on the grounds that § 7292(a) limits its jurisdiction to reviewing Appx B.

The pending petition ensued.

En Banc

In *Bufkin*, the government argued that the Court should deny the petition because the en banc Federal Circuit did not deliver the decision to be reviewed. The instant case is similar in that regard.

The VJRA is still in its infancy, and the Federal Circuit is unique among the circuits in hearing VJRA cases. Issues of first impression thus abound under the VJRA – yet do not percolate through the other circuits to generate multiple perspectives. The en banc Federal Circuit would have been in no better position than the panel to decide the issue of first impression. There is no reason to believe that the national importance of the question presented would offset those immutable limitations.

A single paragraph on Page 7 of Appx A succinctly stated the issue and the panel's decision. The panel plainly understood the issue, and presumably would have sua sponte proposed en banc decision if appropriate. An appellant (particularly a pro se veteran) has no reason to presume a more enlightened view as to the propriety of en banc review as a matter of process.

On the other hand, the lack of rationale to support the panel's conclusory assumption – which is flatly contrary to statutory text and this Court's decisions – offers ample reason to challenge the panels' decision on the merits.

Under those circumstances, a reasonable veteran, whether pro se or represented, would see a request for en banc decision as futile and dilatory.

2. Conclusion

The compelling distinction between judicial / process review on one hand and appellate / merits review on the other hand – the distinction the government glossed over in *Bufkin* – is as plain as the difference between this Court hearing cases as a court of original jurisdiction pursuant to 28 U.S.C. § 1251 on one hand, and on the other hand reviewing decisions of tribunals below as an appellate court pursuant to the other sections of Chapter 81 of Title 28.

The government's brief in opposition in *Bufkin* militates strongly in favor of granting the pending petition in the instant case, by evincing fundamental conflict between the Secretary and Title 38 as to the lawful administration of veteran benefits.

Very respectfully submitted, May 14, 2024

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