APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

DAVID FORSYTHE,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1610

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-4449, Judge Grant Jaquith.

Decided: March 24, 2023

FALEN M. LAPONZINA, ADVOCATE Nonprofit Organization, Washington, DC, argued for claimant-appellant.

RETA EMMA BEZAK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-

appellee. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY; JULIE HONAN, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before CHEN, MAYER, and HUGHES, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HUGHES.

Dissenting opinion filed by *Circuit Judge* MAYER.

HUGHES, *Circuit Judge*.

David Forsythe appeals a decision from the United States Court of Appeals for Veterans Claims holding that the pre-decision evidentiary notice he received from the Department of Veterans Affairs was legally sufficient. Because we find that the agency did not have to wait until he submitted a claim to provide an evidentiary notice, and that, regardless, the timing of the notice was not prejudicial, we affirm.

I

Mr. Forsythe served in the United States Navy from July 1987 to July 1990. In February 1988, he suffered a contusion to his left shoulder after falling. X-rays taken at the time of injury showed no dislocation or any other injury, and he was prescribed Motrin. By March 1988, his shoulder condition had resolved. Mr. Forsythe's separation examination report in 1990 showed no residual shoulder conditions, and Mr. Forsythe reported that he had no issues with his left shoulder at a 1993 examination.

Nearly 30 years later, in March 2019, Mr. Forsythe visited a private physician for left shoulder pain and dysfunction. Mr. Forsythe reported that he injured his shoulder during his military service by lifting a 60-pound generator onto a helicopter, and based on that statement, the private physician concluded that his shoulder injury was more likely than not related to his service. There is nothing in the record showing that Mr. Forsythe received medical care for a shoulder injury resulting from lifting the generator while he was in the Navy. Soon after, Mr. Forsythe applied for disability benefits for a left shoulder condition by submitting a claim on VA Form 21-526EZ. Before submitting his claim, he signed to certify that he had "received the notice attached to this application titled, Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits.'" Appx54 (emphasis removed). As part of his application package, Mr. Forsythe included the 2019 medical report and opinion from the private physician, as well as a statement in support of his claim identifying the evidence he was submitting.

After submitting his claim, Mr. Forsythe underwent a VA medical examination. The agency examiner determined that Mr. Forsythe's shoulder condition was less likely than not related to his service because (1) his X-rays at the time of injury were normal, (2) Mr. Forsythe reported that his injuries were resolved at a follow-up visit, and (3) there was no indication of any chronic or recurring shoulder issues in 1990 or 1993 service examinations. After considering both the VA examination and the

private medical examination, the agency denied Mr. Forsythe's claim, and he appealed to the Board of Veterans' Appeals. The Board denied service connection for left shoulder pain and dysfunction, finding no nexus between Mr. Forsythe's current shoulder condition and his service. In particular, the Board found the VA examination report and service records to be more probative than the private medical report.

Mr. Forsythe appealed to the Veterans Court. Along with challenging the denial of service connection, Mr. Forsythe argued that he received inadequate notice about what evidence was needed to substantiate his claim in violation of 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1). But the Veterans Court rejected that argument, noting that "the law 'requir[es] only generic notice,' not an individualized explanation of the specific evidence required for each case." Appx10 (alteration in original) (quoting *Wilson v. Mansfield*, 506 F.3d 1055, 1059-60 (Fed. Cir. 2007)). The Veterans Court provided links to both the March 2018 and September 2019 versions of VA Form 21-526EZ, and added that the "form notice explained what a veteran needed to do to submit a claim" and "described the information and evidence the veteran needed to submit based on the claim processing chosen by the veteran." Appx10, n.3. The Veterans Court found that the content of the notice satisfied the agency's statutory duty to assist under § 5103(a). Accordingly, the Veterans Court found that there was no error by the Board.

Mr. Forsythe filed a motion for reconsideration or, in the alternative, a panel decision. Along with

challenging the adequacy of the content of the notice, Mr. Forsythe argued that the agency erred by providing notice on the claim form itself, rather than waiting until after he had submitted his claim to provide a more individualized notice of the evidence required to substantiate his claim. On January 12, 2022, a three-judge panel ordered that the single-judge decision remain the decision of the court. This appeal followed.

II

Our review of decisions from the Veterans Court is limited by statute. "[A]ny party to the case may obtain a review of [a Veterans Court] decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation … or any interpretation thereof … that was relied on by the Court in making the decision." 38 U.S.C. § 7292(a). Except to the extent that an appeal presents a constitutional issue, we lack jurisdiction to review any "challenge to a factual determination" or any "challenge to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2). We review statutory and regulatory interpretations of the Veterans Court de novo. *Gazelle v. Shulkin*, 868 F.3d 1006, 1009 (Fed. Cir. 2017).

III

Mr. Forsythe's arguments require us to interpret 38 U.S.C. § 5103(a), the statute that directs the agency to provide evidentiary notice, as well as the corresponding enacting regulation, 38 C.F.R. § 3.159(b)(1). We first review the statute and

regulation to determine whether the agency was required to wait until after Mr. Forsythe submitted his claim to provide notice, and then whether, if such a timing requirement existed, providing that notice on the claim form constitutes prejudicial error.

A

Starting with the statutory text, the current version of 38 U.S.C. § 5103(a) does not require the agency to wait to provide notice until after it receives a veteran's application. Before it was amended in 2012, § 5103(a) read as follows:

> **Upon receipt of a complete or substantially complete application**, [the VA] shall notify the claimant … of any information, and any medical or lay evidence, not previously provided to [the VA] that is necessary to substantiate the claim.

38 U.S.C. § 5103(a)(1) (2006) (emphasis added). When this section was amended, Congress struck the bolded language. The statute now reads:

> [The VA] shall provide to the claimant … by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to [the VA] that is necessary to substantiate the claim.

38 U.S.C. § 5103(a)(1). This amendment explicitly removed the requirement that the agency provide

notice *after* receiving a complete or substantially complete application from the claimant.

It is also telling that Congress removed this temporal requirement following testimony from the agency about the inefficiencies of providing notice after a claim was filed. A House Committee Report discussing the proposed language explains that the amendment "would remove the requirement that the [notice] be sent only after receipt of a claim, thereby allowing VA to put notice on new claim forms," and would encourage veterans "to take additional time to find, procure, and submit private medical evidence before submitting their claim." H.R. Rep. No. 112-241, at 9 (2011). The report also emphasizes that "it is imperative that when VA moves the [notice] *onto the application form itself*, it continues to keep in place a system that acknowledges receipt of all submitted claims." *Id.* (emphasis added). This legislative history shows that Congress explicitly envisioned that the agency would put the notice on the claim application form, and by consequence, claimants would receive and review this notice *before* submitting their claim.

Despite the change in statutory language and its associated legislative history, Mr. Forsythe argues that the agency violated § 5103(a) by providing him with an evidentiary notice on the claim form, rather than waiting until after he submitted his claim to provide such notice. In doing so, Mr. Forsythe relies on the repealed language of the statute, as well as the legislative and regulatory history, from *before* the 2012 amendment was enacted. Appellant's Br. 11-15. Mr. Forsythe does not provide any reason for this court to consider the pre-amendment version of the

statute, nor can he. Mr. Forsythe filed his claim in 2019, several years after the new statute went into effect. We therefore find that the agency was not required by statute to wait until Mr. Forsythe had submitted his application to provide him with the evidentiary notice.

B

Mr. Forsythe also argues that the enacting regulation requires the agency to wait until after a claim is submitted to provide an evidentiary notice. Section 3.159(b)(1) reads as follows:

> **[W]hen VA receives a complete or substantially complete initial or supplemental claim**, VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim ….

38 C.F.R. § 3.159(b)(1) (emphasis added). Although the bolded temporal language is still present in the current version of the regulation, this language stems from the pre-2012 version of § 5103(a), Duty to Assist, 66 Fed. Reg. 45,620, 45,630 (Aug. 29, 2001) (Final Rule), and has not been substantively amended since the statute was amended.

As discussed above, Congress amended § 5103(a) to repeal the temporal requirement after hearing testimony from the agency about the delays under the old claims system. And the regulatory history following the amendment shows that the agency intended for the regulations to reflect the amended

statute. For example, in a 2013 notice of proposed rulemaking about the new claim forms, the agency explained that "[t]o the extent there is any inconsistency between VA's current notice and assistance rules and the current statute as amended by Public Law 112-154, the statute clearly governs." Standard Claims and Appeals Forms, 78 Fed. Reg. 65,490, 65,495 (Oct. 31, 2013). The agency then said that it was "examining whether 38 C.F.R. [§] 3.159 should be amended to account for the new statute, but [it] believes the statute is clear authority for the changes affecting how VA provides notice [as proposed] here." *Id.* Thus, it is unlikely that the agency intended to independently re-impose the very temporal limit that Congress repealed. Instead, the regulatory history shows that this provision is outdated.[1]

IV

Even if the regulation imposes an independent temporal requirement on the agency to provide notice after a claimant submits an application, its failure to send the notice after receipt of a claim is harmless error. The content of the notice Mr. Forsythe received was sufficient as a matter of law, and furthermore,

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[1] We do not need to decide whether the regulation imposes an independent temporal requirement because, as discussed in the next section, there could be no prejudicial error from sending the notice too early. That being said, it has now been over ten years since Congress amended § 5103(a) and since the agency expressed a potential need to amend the regulation. To avoid further confusion, we urge the Secretary to amend this regulation to reflect the statute.

Mr. Forsythe does not explain why his claim application was impacted by *when* he received the notice. Thus, any error resulting from Mr. Forsythe receiving the notice "too early" cannot be prejudicial.

First, Mr. Forsythe argues that, by providing the notice directly on the claim form, the agency was unable to "review … the application and accompanying evidence to determine what is missing, [and issue] a notice tailored to the Veteran's claim …." Appellant's Br. 14. In other words, Mr. Forsythe seeks an individualized notice tailored to his claim. But we squarely rejected that requirement in *Wilson*. There, we held that neither § 5103(a) nor § 3.159(b) required the agency to provide an evidentiary notice tailored to each individual claim because the statute requires "only generic notice." *Wilson*, 506 F.3d at 1059-60. Mr. Forsythe received such a notice and certified that he received that notice. Mr. Forsythe asks us to ignore *Wilson* because it was decided before Congress amended § 5103(a), but we have reiterated this holding after the amendment, as well. *See, e.g.*, *Russell v. McDonald*, 586 F. App'x 589, 590-91 (Fed. Cir. 2014) (nonprecedential). Accordingly, because the agency did not have to provide Mr. Forsythe with an individually tailored evidentiary notice, the notice that Mr. Forsythe received was legally sufficient.

Second, Mr. Forsythe does not explain why his application was hindered by receiving the evidentiary notice *too early*. For example, Mr. Forsythe explains that "[h]e would have submitted private records," Appellant's Reply Br. 12, but Mr. Forsythe *did* submit records from a private medical examination despite receiving the notice before submitting his claim. Mr.

Forsythe also claims that he "would have gathered and submitted additional evidence to substantiate his claim that he previously was unaware the VA would accept." Appellant's Reply Br. 12. But he does not explain specifically why receiving the notice early prevented him from collecting and submitting the evidence he had. If Mr. Forsythe wanted to submit more evidence in support of his claim, the timing of when he received the notice could not have, for example, prevented him from filing a supplemental claim and asking the agency to gather evidence from other private providers through Form 21-4142. *See Supplemental Claims*, U.S. Dep't of Veterans Affs., https://www.va.gov/decision-reviews/supplemental-claim (last visited Mar. 14, 2023). Thus, we see no circumstance in which there could have been prejudicial error resulting from Mr. Forsythe receiving the notice too early.

Because the notice Mr. Forsythe received was legally sufficient, and because receiving the notice early could not have had any bearing on how Mr. Forsythe handled his claim, we conclude that any error resulting from receiving the notice as part of the claim application form was harmless.

V

We have considered the rest of Mr. Forsythe's arguments and find them unpersuasive. As a result, we affirm the Veterans Court's decision finding that the agency satisfied its pre-decision notice requirement.

AFFIRMED

COSTS

No costs.

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

DAVID FORSYTHE,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1610

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-4449, Judge Grant Jaquith.

MAYER, *Circuit Judge*, dissenting.

If the Department of Veterans Affairs ("VA") is to fulfill its duty to serve veterans injured in the line of duty, see 38 U.S.C. § 1110, it must, at a minimum, provide clear and timely notice regarding how to file and substantiate a claim for service-connected disability benefits. On this front, implementation of 38 C.F.R. § 3.159(b)(1), the VA's regulation related to its responsibility to notify a veteran of the evidence necessary to develop a claim, falls far short of the mark. That regulation, in relevant part, provides:

> *[W]hen VA receives a complete or substantially complete initial or supplemental claim*, VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the "notice"). In the notice, VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant.

Id. (emphasis added).

By its plain terms, section 3.159(b)(1) says that *after* the VA receives a veteran's claim for benefits, it will send notice of any information or medical or lay evidence that is necessary to substantiate that claim. It is undisputed, however, that the VA did not send such notice after receipt of David Forsythe's claim, but only attached the notice to VA Form 21-526EZ, the standard form used by veterans to file disability claims. In other words, although its own regulation requires the VA to send the notice after the receipt of a veteran's claim, the agency only provided it at the start of the claims process.

On appeal, the government does not dispute that the VA's practice of only providing notice prior to the receipt of a claim is inconsistent with the plain language of section 3.159(b)(1). It attempts to brush aside the VA's non-compliance with its own regulation, however, by asserting that: (1) if there is an inconsistency between a statute and a regulation an agency has issued pursuant to that statute, the

statute controls; and (2) since section 3.159(b)(1)'s requirement that the VA send notice after the receipt of a claim is inconsistent with 38 U.S.C. § 5103(a)(1), that statute controls. *See* Appellee's Br. 15-17. The fundamental flaw in this argument is that nothing in the language of the current version of section 5103(a)(1) is inconsistent with sending notice after the receipt of a veteran's claim. That statute, in relevant part, states:

> [T]he Secretary shall provide to the claimant and the claimant's representative, if any, by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with [38 U.S.C. § 5103A] and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a)(1).

While section 5103(a)(1) spells out, in general terms, what the VA needs to include in the notice it provides to veterans, it does not specify when that notice should be provided. Accordingly, the government's argument that the VA need not comply with the timing requirement of section 3.159(b)(1)

because it is inconsistent with section 5103(a)(1) falls flat.

The government notes that section 5103(a)(1) previously began with the phrase "[u]pon receipt of a complete or substantially complete application," 38 U.S.C. § 5103(a)(1) (2008), but that Congress eliminated that phrase when it amended the statute in 2012. *See* Appellee's Br. 9-10. The government further notes that certain statements contained in the legislative history of the 2012 amendment support the view that it was intended to eliminate the requirement that the VA send notice after the receipt of a claim. *Id*. at 10 (citing H.R. Rep. No. 112-241, at 9 (2011)). Thus, in the government's view, Forsythe, the veteran here, is not entitled to rely on the plain language of section 3.159(b)(1) regarding the timing of the VA's notice because the legislative history of the 2012 amendment to section 5103(a)(1) indicates that Congress intended to eliminate the requirement of post-claim notice.

The short answer to this argument is that this intent did not explicitly make it into the law, and a veteran should not be forced to compare and contrast different iterations of a statute and conduct a thorough study of its legislative history in order to divine the interpretation of an implementing regulation. Rather, he should be entitled to assume that the VA means what it says when it states, in section 3.159(b)(1), that notice regarding what further evidence is necessary to substantiate a claim will be sent after receipt of the claim. *See, e.g.*, *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (explaining that "[t]he VA disability compensation

system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him").

Importantly, moreover, even assuming that Congress intended that the 2012 amendment would eliminate the requirement that the VA send notice after receipt of a claim, the government points to nothing in the relevant legislative history suggesting that Congress intended to prohibit the agency from doing so. Accordingly, even viewing section 5103(a)(1) through the prism of the legislative history cited by the government, the statute is not inconsistent with a choice by the VA to implement a policy to provide notice even in the post-claim period.

Finally, apart from the timing issue, there are significant questions as to whether the VA's standard notice, from a substantive perspective, is sufficient to apprise veterans of the evidence necessary to bring a successful claim for disability benefits. In *Wilson v. Mansfield*, we held that while section 5103(a)(1) does not "require[] specific notice of the missing evidence with respect to a particular claim," the notice provided by the VA must nonetheless "identify the information and evidence necessary to substantiate *the particular type of claim* being asserted by the veteran." 506 F.3d 1055, 1059 (Fed. Cir. 2007) (emphasis added). However, the notice attached to VA Form 21-526EZ covers claims for *twelve* different types of VA benefits, most of which have distinct evidentiary requirements, making it difficult for a veteran to ascertain precisely what kind of evidence must be submitted. *See Mayfield v. Nicholson*, 444

F.3d 1328, 1333 (Fed. Cir. 2006) (explaining that section 5103(a)(1) requires the VA to issue notice "in a form that enables the claimant to understand the process" for obtaining disability benefits). Furthermore, while the VA's notice refers to "lay evidence," it does not necessarily convey, in plain terms, that a claim for disability benefits can, in certain circumstances, be supported by statements from those with whom a veteran served as well as statements from a veteran's relatives and friends. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1333, 1337 (Fed. Cir. 2006) (noting that the veteran had "submitted several affidavits from lay witnesses, including his relatives, acquaintances, and a sergeant who led the unit to which [the veteran] was assigned in 1973," and explaining that if "the lay evidence presented by a veteran is credible and ultimately competent, the lack of contemporaneous medical evidence should not be an absolute bar to the veteran's ability to prove his claim of entitlement to disability benefits based on that competent lay evidence").

Forsythe contends, moreover, that the standard notice issued by the VA is "prohibitively dense," noting that it was composed using a very small, nine-point font and contains seven pages of single-spaced lines. Appellant's Reply Br. 7. He further asserts that many deserving veterans are deterred from filing claims because the standard notice is "complicated, overwhelming, confusing, [and] visually difficult to read" and fails to clearly explain the different requirements for the various types of available VA benefits. *Id*. at 8.

I would remand this case for the VA to apply its regulation.

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 20-4449

DAVID FORSYTHE, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before JAQUITH, *Judge*.

MEMORANDUM DECISION

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

JAQUITH, *Judge*: U.S. Navy veteran David Forsythe appeals a May 13, 2020, Board of Veterans' Appeals (Board) decision that denied service connection for a left shoulder disability.[1] Record (R.) at 3-7. Because the veteran fails to demonstrate clear error in the Board's decision, we affirm.

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[1] The Court does not have jurisdiction over the claims related to service connection for bilateral hearing loss, right hip, left knee, and lumbar spine disabilities, R. at 7-13, because the Board remanded those matters. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997).

I. BACKGROUND

Mr. Forsythe served honorably in the Navy from July 1987 to July 1990. R. at 16. In February 1988, he fell and suffered a contusion to his left shoulder. R. at 252. X-rays at that time were negative for dislocation, and he was prescribed Motrin. *Id*. A follow-up examination in March 1988 noted that the shoulder condition had resolved. R. at 253; *see also* R. at 76. Later, his 1990 separation examination report reflected no shoulder conditions. R. at 195-96.

After active duty, Mr. Forsythe served in the Navy Reserve. R. at 172. At a service examination conducted in March 1993, the veteran reported no issues with his left shoulder, checking "no" as his response to the question "have you ever had or have you now … [a] painful or 'trick' shoulder or elbow." R. at 193. The 1993 examiner's clinical evaluation was that the veteran's upper extremities were normal. R. at 191.

In March 2019, Mr. Forsythe underwent a private consultation, and the physician diagnosed him with left shoulder pain and dysfunction. R. at 298. The physician relied on the veteran's statement—that he injured his shoulder lifting a 60-pound generator onto a helicopter during active duty service—to conclude that it was more likely than not that the appellant's left shoulder condition was causally related to his military service. *Id.* The physician provided no further rationale. *Id.* Mr. Forsythe applied for VA benefits soon afterward. R. at 287-93.

On August 14, 2019, the appellant underwent a VA examination. R. at 55-76. The examiner determined that the appellant's shoulder condition was less likely than not related to service because x-rays were normal at the time of his in-service injury, the injury was found to be resolved and the veteran asymptomatic at a follow-up 10 days later, there was no indication of any shoulder issues in reports of medical history and service examinations in 1990 and 1993, and no findings of any chronic or recurrent left shoulder pain or condition. R. at 55-56. VA denied his claim, and he appealed to the Board. R. at 40, 22.

In the decision now on review, the Board denied service connection for the appellant's left shoulder pain and dysfunction, finding no nexus between the appellant's current shoulder condition and his service.[2] R. at 3-5. The Board noted that it found the August 2019 VA examination and service records more probative than the March 2019 consultation. *Id.* It also found the appellant competent to provide lay statements regarding a current diagnosis and ongoing symptoms. *Id.* But the Board chose to afford more probative weight to the August 2019 examination—which relied on medical evidence from 1990 and 1993 rather than the appellant's current lay statements—and determined that a preponderance of

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[2] Establishing service connection generally requires medical or, where competent, lay evidence of (1) a current disability, (2) in-service incurrence or aggravation of a disease or injury, and (3) a link, or nexus, between the claimed in-service disease or injury and the current disability. *Harvey v. Shulkin*, 30 Vet.App. 10, 15 (2018).

the evidence was against a finding of service connection. *Id.*

II. ANALYSIS

Mr. Forsythe argues that the August 2019 VA examination was inadequate because it failed to consider that he also injured his shoulder lifting a generator onto a helicopter during service. Appellant's Brief (Br.) at 19-24. He further argues that the Board inappropriately discounted the March 2019 private consultation in favor of the inadequate August 2019 VA examination. *Id*. The appellant separately alleges that VA failed to provide sufficient notice prior to its decision of what evidence was needed to establish service connection, and it was incumbent upon the Board to ensure that VA had satisfied this aspect of its duty to assist. *Id*. at 6-9. And he contends that the Board erred by declining to afford him the benefit of the doubt in the adjudication of his claim. *Id.* at 24-7.

The Secretary argues that the Board considered all relevant evidence and weighed it appropriately, and that the August 2019 examination was adequate, as the examiner properly relied on affirmative evidence to reach his conclusion. Secretary's Br. at 8-21. He contends that the appellant's duty to assist argument is without merit because VA provided him adequate notice via the application he submitted in March 2019. *Id*. at 6-8. And the Secretary argues that the benefit of the doubt doctrine was not applicable in this instance. *Id*. at 21-23.

As the veteran highlights, the Board expressly noted that he had "reported ongoing left shoulder pain since service." R. at 5. That is a favorable finding that is not challenged and will not be disturbed. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007), *aff'd in part, denied in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009). However, the only descriptions of the veteran's left shoulder pain that are before the Court are found in his service medical records, the report of his March 2019 private consultation, and the report of his August 2019 VA compensation and pension examination.

A. Adequacy of the August 2019 Examination

A medical examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 102, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). The examination must "sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). "It is the factually accurate, fully articulated, sound reasoning for the conclusion … that contributes probative value to the medical opinion." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008). "[W]here the Board favors one medical opinion over another, the Court will review the Board's decision to determine whether [expert witness] criteria have been met or properly applied." *Id.* at 302.

When this Court reviews a Board determination of a medical opinion's adequacy, it is reviewing a finding of fact by the Board and does so under the "clearly erroneous" standard. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (citing *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990)). A finding of fact is "clearly erroneous" when the Court, after reviewing all the evidence, "'is left with the definite and firm conviction that a mistake has been committed.'" *Gilbert*, 1 Vet.App. at 52 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

There are shortcomings in the reports of both the private consultation and the VA examination. In finding that the private medical opinion was "of no probative value," the Board noted that the doctor "did not provide a rationale for his opinion," did not address the 1990 separation examination and the March 1993 service examination reports that the veteran's left shoulder was normal, and did not address the veteran's denial of left shoulder symptoms. R. at 6. In concluding that "[i]t is more likely than not that the [veteran's left shoulder pain and dysfunction] is directly and causally related to the veteran's military service," the private doctor cited the veteran's description of having been "seen by military medical personnel for this condition and treated" and having "injured his left shoulder during active-duty military service while lifting a generator (60 lbs) onto the top of a helicopter." R. at 297-98. The private doctor also recounted the veteran's description of "having painful limits and aggravation" with some activities of daily living—including lifting a child, carrying groceries, sleeping, and working in the yard—and activities he could not perform due to

pain, such as climbing stairs and lifting things overhead. *Id.* And the private doctor described the results of his examination of the veteran's left shoulder, which showed significant functional loss. *Id.* at 298. What is not explained is the private doctor's basis or rationale for connecting the veteran's left shoulder pain and dysfunction to his injury and treatment in service 3 decades earlier.

There is a hole in the August 2019 VA examination report, too—one that casts some doubt on the Board's pronouncement that "[t]he August 2019 VA examiner's opinion was based upon thorough analysis of the Veteran's entire history," R. at 6, and fuels the veteran's argument that Board relied on an examination that failed to factor in the veteran's favorable evidence. The August 2019 examiner conducted an in-person examination and found that the veteran has left shoulder pain and stiffness that increases with overhead activities, limits his range of motion, and causes functional loss. R. at 57-76. There is no evidence that the veteran provided the August 2019 examiner with any information regarding the onset and history of his left shoulder condition. The VA doctor described that history only by reference to the veteran's service records, reflecting his fall on his shoulder in February 1988 and his recovery within 2 weeks, the clinical evaluations of his shoulders as normal in his 1990 separation examination and his March 1993 service examination, and his denial of any painful shoulder condition at the time of his 1990 and 1993 examinations. R. at 57, 67, 75-76. The VA examination report does not mention either the March 2019 private consultation report or the veteran's description of his injury reflected in that

report—lifting a 60-pound generator onto the top of a helicopter. However, the VA examiner indicated that he had reviewed the veteran's e-folder in the VA's Veterans Benefits Management System (VBMS) and his patient record in VA's Computerized Patient Record System (CPRS). R. at 55-56, 66-67, 75. In the rationale for his medical opinion, the examiner referred to "(the) complaints"—plural—regarding the veteran's left shoulder condition. R. at 75. And the record shows that VA acknowledged receipt and intake of the veteran's claim and the attachments to it, including the March 2019 private consultation report, on March 22, 2019. R. at 285-99.

"[T]here is no requirement that a medical examiner comment on every favorable piece of evidence in a claims file." *Monzingo*, 26 Vet.App. at 105. Examiners have no reasons or bases requirement. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). "Rather, examination reports are adequate when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Id*. The August 2019 VA examination report meets that adequacy standard.

Though the appellant argues otherwise, the VA examiner explained his rationale for why the appellant's current shoulder condition was less likely than not caused by an in-service injury: X-rays were negative when the veteran was injured in 1988, and the condition resolved soon afterward; subsequent clinical examinations in 1990 and 1993 revealed no shoulder issues and the veteran complained of none, indicating in 1993 that he had not had any painful

shoulder condition; and the medical providers in 1990 and 1993 had not found any chronic or recurrent left shoulder pain or condition. R. at 75-76. That rationale is problematic for the veteran's argument because, even if the in-service injury he described as occurring when he lifted a generator was separate from the February 1988 injury reflected in his service treatment records, he hasn't shown how that would change the factual finding that he had no shoulder issues in 1990 and 1993, the bases of the adverse medical opinion relied on by the Board. The appellant points to *Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007) and *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2007), Appellant's Br. at 21, but this isn't a case where the VA examiner impermissibly ignored the veteran's assertion of an in-service injury based upon the absence of a contemporaneous medical report. The August 2019 VA examiner premised his opinion on the veteran having injured his left shoulder in service and pointed to the later medical examinations and the veteran's denial of left shoulder problems as the basis for finding that the veteran's in-service complaints were not likely to have caused his current shoulder conditions. Therefore, the Court cannot say that the VA examiner's failure to mention appellant's March 2019 lay statement resulted in an inadequate examination, nor can it say that the Board—which did note appellant's March 2019 statement and favorable medical opinion—lacked sufficient medical evidence to render a fully informed decision in this matter.

B. The Board's Statement of Reasons and Bases

In every case, the Board has a general obligation to support its determination "with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court." *Smiddy v. Wilkie*, 32 Vet.App. 350, 356 (2020). As part of its statement of reasons or bases, the Board must analyze the credibility and probative value of evidence, account for the evidence it finds to be persuasive or unpersuasive, and provide the reasons for rejecting any material evidence favorable to the claimant. *Caluza v. Brown,* 7 Vet. App. 498, 506 (1995); 38 U.S.C. § 7104(d)(1). When assessing the credibility and probative weight of evidence, the Board may consider factors such as facial plausibility, bias, self-interest, and consistency with other evidence of record. *Buchanan*, 451 F.3d at 1337. The Board's assessment of the credibility and weight to be given to evidence is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991).

The appellant disagrees with the Board's decision to assign no probative value to the March 2019 consultation. Appellant's Br. at 12. But the Board is free to choose one opinion over another, provided that it offers valid reasons and bases for doing so, and those reasons are apparent here. *Nieves-Rodriguez*, 22 Vet.App. at 300. As the Board noted, the private doctor did not provide a rationale for his service connection opinion. R. at 6. In other words, it was a bare conclusion, without "fully articulated, sound reasoning" supporting it. *See Nieves-Rodriguez*, 22 Vet.App. at 304. "[A] medical examination report

must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." *Id*. at 301. Unlike the VA examiner, the private doctor did not review the appellant's medical history, specifically the unfavorable evidence that the appellant's 1990 separation examination and 1993 treatment records revealed no issues with the appellant's left shoulder. R. at 297-98. Although private examiners are not required to review a claimant's medical history, information contained in a claimant's file may be, and in this case was, significant in creating a well-reasoned medical opinion. *See Nieves-Rodriguez*, 22 Vet.App. at 303-304. Accordingly, the Board did not err in assigning diminished probative value to the private examiner's opinion.

The appellant's argument that Board did not assess the credibility of his statements or explain that assessment is misplaced. The Board's application of *Buchanan* was not "a mockery." Appellant's Br. at 16. In *Buchanan*, the Federal Circuit held that the Board cannot determine that lay statements lack credibility simply because they are not corroborated by contemporaneous medical records. *Buchanan*, 451 F.3d at 1336. But that is not what the Board did in this case. The Board expressly considered the appellant's lay evidence, found him competent to report the current diagnosis of his left shoulder disability and his symptoms since service, and accepted that he injured his left shoulder in service and "has reported ongoing left shoulder pain" since then. R. at 5-7. The Board then chose to afford this lay evidence less probative value because it was contradicted by affirmative medical evidence within

the record, including service medical examinations in 1990 and 1993, the August 2019 VA examination, and the veteran's denial in 1993 that he had or had ever had a painful shoulder. See R. at 5-7, 193. As factfinder, the Board "is obligated to, and fully justified in, determining whether lay evidence is credible," including weighing conflicting statements by the veteran, and it may discount lay evidence when that is appropriate. *Buchanan*, 451 F.3d at 1336-37. There is no clear error in the Board's evidentiary determination here. Appellant's arguments to the contrary amount to a challenge to how the Board weighed the evidence. *See Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010) ("The Board, not the Court, is responsible for assessing the credibility and weight to be given to evidence, and the Court may overturn the Board's assessments only if they are clearly erroneous." (quoting *Owens v. Brown*, 7 Vet.App. 429, 433 (1995))).

C. The Duty to Assist and Notify

Mr. Forsythe additionally alleges that he received inadequate notice from VA regarding what evidence was required to substantiate his claim, as required by 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1). Appellant's Br. at 6-9. Thus, he argues here, the Board failed to ensure that VA met its statutorily defined duty to assist. Specifically, he points to two letters received prior to the Board decision denying his claim, both Veterans Claims Assistance Act (VCAA) letters. *Id.* One letter signaled that VA had received his claim, while the other requested banking information. *Id.* at 8-9. The appellant asserts that neither satisfied VA's notice requirements. *Id.*

However, before VA first decides a claim, the law "require[es] only generic notice," not an individualized explanation of the specific evidence required for each case. *Wilson v. Mansfield*, 506 F.3d 1055, 1059-60 (Fed. Cir. 2007). And the appellant's arguments fail to consider that, in March 2019, he certified that he had received such notice. R. at 291 ("I certify that I have received the notice attached to this application titled, **Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits.**") (emphasis in original).[3] This notice to the appellant satisfies VA's pre-decision notice requirements, and accordingly there was no error by the Board here.

D. The Benefit of the Doubt Doctrine

Finally, in cases where there is an approximate balance of positive and negative evidence, the Secretary is required to give the benefit of the doubt

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[3] The 2018 form notice explained what a veteran needed to do to submit a claim, described the information and evidence the veteran needed to submit based on the claim processing chosen by the veteran, described how VA would help the veteran obtain evidence for his or her claim, provided a guide to what the evidence must show to support the claim, and described the ways to submit information and evidence by mail, fax, and/or online. *See* VA Form 21-526EZ, Mar. 2018, https://www.kennedy.senate.gov/public/_cache/files/c/c/cc818efa-ba52-4764-b585-3e897d28da77/B949DC2ECD88996678792B62C8A259B8.vba-21-526ez-are.pdf. The current VA Form 21-526EZ, dated September 2019, is available at https://www.vba.va.gov/pubs/forms/vba-21-526ez-are.pdf.

to the claimant. 38 U.S.C. § 5107. Here, the Board determined that the evidence preponderated against the veteran's claim, R. at 7, and the veteran has not demonstrated clear error in that determination. Therefore, the benefit of the doubt provision was not applicable, and the Board did not err. *See Ferguson v. Principi*, 273 F.3d 1072, 1076 (Fed. Cir. 2001).

III. CONCLUSION

Accordingly, the May 13, 2020, Board decision denying entitlement to service connection for a left shoulder disability is AFFIRMED.

DATED: August 31, 2021

Copies to:

Falen Marie LaPonzina, Esq.

VA General Counsel (027)

APPENDIX C

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [REDACTED]
DAVID FORSYTHE Docket No. 191007-37520

DATE: May 13, 2020

ORDER

Entitlement to service connection for a left shoulder disability is denied.

REMANDED

Entitlement to service connection for a bilateral hearing loss disability is remanded.

Entitlement to service connection for a right hip disability is remanded.

Entitlement to service connection for a lumbar spine disability is remanded.

Entitlement to service connection for a left knee disability is remanded.

FINDING OF FACT

A left shoulder disability diagnosed as a left shoulder strain was not manifest during service and is not otherwise related to service.

CONCLUSION OF LAW

A left shoulder disability was not incurred in or aggravated by service. 38 U.S.C. § 1131 (2012); 38 C.F.R. § 3.303 (2019).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served on active duty from July 1987 to July 1990.

On August 23, 2017, the President signed into law the Veterans Appeals Improvement and Modernization Act, also known as the Appeals Modernization Act (AMA). Pub. L. No. 115-55, 131 Stat. 1105 (2017) (to be codified as amended in scattered sections of 38 U.S.C.). This law creates a new framework for Veterans dissatisfied with VA's decision on their claim to seek review on or after February 19, 2019. As this case is an appeal of an August 2019 rating decision, this decision has been written consistent with the new AMA framework.

In October 2019, the Veteran submitted a VA Form 10182 (Decision Review Request: Board Appeal) electing direct review by the Board of the same evidence the local regional office (RO) considered when denying the claims. However, regarding his bilateral hearing loss, right hip, lumbar spine, and left knee disabilities claims, when as here, there are pre-decisional, duty-to-assist, errors it is permissible for the Board to have them corrected before deciding the claims on appeal.

Service connection for a left shoulder disability

Veterans are entitled to compensation from VA if they develop a disability "resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty." 38 U.S.C. § 1110 (wartime service), 1131 (peacetime service). To establish a right to compensation for a present disability, a veteran must show: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service"—the so-called "nexus" requirement. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed.Cir. 2004).

After the evidence is assembled, it is the Board's responsibility to evaluate the entire record. *See* 38 U.S.C. § 7104(a) (2012). When there is an approximate balance of evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each issue shall be given to the claimant. *See* 38 U.S.C. § 5107 (2012); 38 C.F.R. §§ 3.102, 4.3 (2019).

In *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990), the United States Court of Appeals for Veterans Claims (Court) stated that "a veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail." To deny a claim on its merits, the preponderance of the evidence must be against the claim. *See Alemany v. Brown*, 9 Vet. App. 518, 519 (1996), citing *Gilbert*, 1 Vet. App. at 54.

The Veteran contends that he has a left shoulder disability that is related to service, specifically from treatment to his shoulder in service due to an injury. *See*, *e.g.*, a private treatment record dated March 2019 record from R.A., D.C. The Veteran reported an injury to his left shoulder in service during the March 2019 evaluation by R.A., D.C. from lifting a generator. Additionally, his service treatment records dated February 1988 and March 1988 document injury to his left shoulder from a fall and assessment of left shoulder contusion. The remainder of his service treatment records are absent complaints of or treatment for a left shoulder disability.

The Board further notes that the Veteran has reported ongoing left shoulder pain since service and during an August 2019 VA examination, he was assessed with a left shoulder strain.

The Board has carefully evaluated the evidence and, for reasons stated immediately below, finds that a preponderance of the competent and probative evidence of record is against a finding that the Veteran's current left shoulder strain is related to his service.

Specifically, the Veteran was provided a VA examination in August 2019. The VA examiner noted the Veteran's in-service treatment for the left shoulder injury and pain. After examination of the Veteran and consideration of his medical history, the VA examiner diagnosed the Veteran with a left shoulder strain and concluded that it is less likely than not that the Veteran's left shoulder disability was incurred in or caused by service. The VA

examiner's rationale for his conclusion was based on his finding that he was unable to find any medical care for the chronic recurrent left shoulder pain or condition incurred in or caused by the in-service treatment. Moreover, he noted that X-rays from the February 1988 injury of the left shoulder were negative and that the contusion resolved after medication was given. Also, the Veteran's treatment in March 1988 revealed asymptomatic findings. Further, the examiner noted the Veteran's June 1990 separation examination as well as a March 1993 service examination which revealed normal left shoulder findings as well as the Veteran's denial of left shoulder problems on the March 1993 report of medical history.

The August 2019 VA examiner's opinion was based upon thorough analysis of the Veteran's entire history. *See Bloom v. West*, 12 Vet. App. 185, 187 (1999) [the probative value of a physician's statement is dependent, in part, upon the extent to which it reflects "clinical data or other rationale to support his opinion"]. Additionally, the VA examiner's opinion is consistent with the Veteran's documented medical history, which is absent any report of post-service left shoulder symptomatology for many years following separation from service. The examiner also noted the Veteran's in-service treatment for the left shoulder and further indicated that such injury did not cause the current left shoulder strain.

The Board acknowledges a private treatment report dated March 2019 from R.A., D.C. who noted the Veteran's in-service injury to the left shoulder and functional impairment thereafter. R.A., D.C. then

opined that the Veteran's current left shoulder pain and dysfunction is more likely than not related to the Veteran's service. However, the Board notes that R.A., D.C. did not provide a rationale for his opinion. Moreover, as discussed above, the Veteran's separation examination and March 1993 service examination revealed normal left shoulder findings and on the March 1993 report of medical history, the Veteran denied left shoulder symptoms. These findings were not addressed by R.A., D.C. Accordingly, the Board finds that the March 2019 private opinion from R.A., D.C. is of no probative value as to whether the Veteran has a current left shoulder disability that was incurred in or aggravated by service.

In relevant part, 38 U.S.C. § 1154(a) (2012) requires that VA give "due consideration" to "all pertinent medical and lay evidence" in evaluating a claim for disability or death benefits. *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009). "Lay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional." *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007); *see also Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) ("[T]he Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence").

To the extent the Veteran asserts that his current left shoulder disability is related to his service, he is competent to report that he has a current diagnosis (as that is documented in the record). He is also competent to report that he has had symptoms since service. However, his June 1990 separation examination and March 1993 service examination reveal normal left shoulder findings. Moreover, as discussed above, on his March 1993 report of medical history, he denied left shoulder symptoms. The Board also finds that the Veteran's statements do not outweigh the opinion of the VA examiner who provided a thorough examination of the Veteran, considered his medical history and thereafter indicated that the Veteran's current left shoulder disability is not related to service. Thus, these arguments do not outweigh the specific findings of the VA examiner who is a skilled neutral professional.

In short, the more credible and probative evidence establishes that the Veteran's current left shoulder disability was not manifest during service.

For the reasons and bases expressed above, the Board finds that the preponderance of the evidence is against the Veteran's claim of entitlement to service connection for a left shoulder disability. The benefit sought on appeal is accordingly denied.

REASONS FOR REMAND

Service connection for bilateral hearing loss, right hip, left knee, and lumbar spine disabilities

With respect to the Veteran's claim of service connection for a bilateral hearing loss disability, the Veteran contends that he has a bilateral hearing loss disability that is related to service, in particular noise exposure from being in proximity to aircraft and gunfire. *See*, *e.g.*, an August 2019 VA examination report.

The Veteran was provided a VA audiological examination in August 2019 in order to determine whether he had a bilateral hearing loss disability that is related to service. After examination of the Veteran and consideration of his medical history, the VA examiner determined that the Veteran has a bilateral hearing loss disability for VA evaluation purposes and concluded that it is less likely than not that the Veteran's bilateral hearing loss disability is caused by or a result of service. The examiner's rationale for her conclusion was based in part on her reliance on an Institute of Medicine report. The U.S. Court of Appeals for Veterans Claims (Court or CAVC) has stated that when an opinion relies on the 2005 Institute of Medicine (IOM) report entitled Noise and Military Service: Implications for Hearing Loss and Tinnitus, as is the case here, the Board must assess the underlying medical text evidence when it may affect the probative value and adequacy of the medical opinion. *McCray v. Wilkie*, 31 Vet. App. 243, 249 (2019). This IOM report states there was not sufficient evidence from longitudinal studies in laboratory animals or humans to determine whether permanent noise-induced hearing loss can develop much later in one's lifetime, long after the cessation of that noise exposure, and that definitive studies to address this issue have not been performed. *Id.*

Therefore, the VA examiner relied upon an inconclusive study to give an opinion regarding etiology. This causes the Board to give the opinion minimal probative value.

There is no other opinion of record that addresses the etiology of the Veteran's bilateral hearing loss disability. In light of the foregoing, the Board finds that an additional opinion should be obtained on remand that addresses the etiology of the Veteran's bilateral hearing loss disability.

With regard to the Veteran's claim of service connection for a right hip disability, the Veteran contends that he has a right hip disability that is related to service, in particular from performing his duties as an aviation electrician which involved climbing in and out of helicopters to service them as well as from standing and walking on the flight deck and having to keep his balance against waves. *See* the March 2019 private treatment record from R.A., D.C. The Board notes that the Veteran's service treatment records are absent complaints of or treatment for a right hip disability. However, the Veteran is competent to attest to injuring his right hip from the aforementioned incidents. *See Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). Therefore, the Veteran as a lay person is competent to report injuring his right hip. Further, he has reported current functional impairment of the right hip manifested by pain and interference in activities of daily living. *See* the March 2019 private treatment record from R.A., D.C.

The Board notes that although R.A., D.C. opined in the March 2019 private evaluation that the Veteran

has current right hip pain and dysfunction that is more likely than not directly and causally related to the Veteran's service, no rationale was thereafter provided. There is no other medical opinion of record as to the etiology of any current right hip disability. Thus, the Board finds that on remand, the Veteran should be provided a VA examination for such.

Additionally, the Veteran reported being seen in service for his right hip and also reported that he has received treatment for right hip osteoarthritis and that surgery has been recommended. The Board observes that there are no medical treatment records associated with the claims folder that pertain to the right hip other than the March 2019 record from R.A., D.C. As such, the Board finds that on remand, all outstanding treatment records should be obtained as to the Veteran's right hip.

With respect to the Veteran's claim of service connection for a lumbar spine disability, the Veteran contends that he has a lumbar spine disability that is related to service, in particular from performing his duties as an aviation electrician which involved climbing in and out of helicopters to service them. *Id.* The Board notes that the Veteran's service treatment records are absent complaints of or treatment for a lumbar spine disability. However, the Veteran is competent to attest to injuring his lumbar spine from working on helicopters. *Jandreau*, *supra*. Also, he has reported current functional impairment of the back manifested by pain and interference in activities of daily living. *See* the March 2019 private treatment record from R.A., D.C.

The Board notes that although R.A., D.C. opined in the March 2019 private evaluation that the Veteran has current low back pain and dysfunction that is more likely than not directly and causally related to the Veteran's service, no rationale was thereafter provided. There is no other medical opinion of record as to the etiology of any current lumbar spine disability. Thus, the Board finds that on remand, the Veteran should be provided a VA examination for such.

Additionally, the Veteran reported being seen in service for his back. The Board observes that there are no service treatment records associated with the claims folder that pertain to the back. As such, the Board finds that on remand, all outstanding service treatment records should be obtained as to the Veteran's lumbar spine.

With regard to the Veteran's claim of service connection for a left knee disability, the Veteran contends that he has a left knee disability that is related to service, in particular from physical training. *Id.* The Board notes that the Veteran's service treatment records are absent complaints of or treatment for a left knee disability. However, the Veteran is competent to attest to injuring his left knee from physical training. *Jandreau*, *supra*. Also, he has reported current functional impairment of the left knee manifested by pain and interference in activities of daily living. *See* the March 2019 private treatment record from R.A., D.C.

The Board notes that although R.A., D.C. opined in the March 2019 private evaluation that the Veteran

has current left knee pain and dysfunction that is more likely than not directly and causally related to the Veteran's service, no rationale was thereafter provided. There is no other medical opinion of record as to the etiology of any current left knee disability. Thus, the Board finds that on remand, the Veteran should be provided a VA examination for such.

Additionally, the Veteran reported being seen in service for his left knee. The Board observes that there are no service treatment records associated with the claims folder that pertain to the left knee. As such, the Board finds that on remand, all outstanding service treatment records should be obtained as to the Veteran's left knee.

The matters are REMANDED for the following action:

> 1. The Board makes no determination as to credibility at this stage.
>
> 2. Obtain any outstanding service treatment records pertaining to the Veteran's right hip, lumbar spine, and left knee. If these service treatment records are unavailable, notify the Veteran of such and of alternate sources of evidence that can supplement the available records. He must then be given an opportunity to respond.
>
> 3. Request the Veteran to provide authorization to obtain any outstanding, relevant treatment records, to include records pertaining to his right hip identified during

the March 2019 private evaluation by R.A., D.C. After securing the necessary authorization, these records should be requested. If any records are not available, the Veteran should be notified of such.

4. Thereafter, refer the Veteran's claims folder to an appropriate medical professional to determine the etiology of the Veteran's bilateral hearing loss disability. The claims file must be made available to the examiner for review.

If the examiner determines that an opinion cannot be rendered without examination of the Veteran, then an examination should be scheduled.

Based on the review of the Veteran's medical history, the examiner should respond to whether it is at least as likely as not (i.e., a probability of 50 percent or greater) that the Veteran's current bilateral hearing loss disability was incurred in or aggravated by his service, to include his exposure to noise from being near aircraft and gunfire.

In rendering the requested opinion, the VA examiner should consider the Veteran's report of a continuity of hearing loss since service. (Again, no credibility determination is made.)

A rationale should be provided.

5. Schedule the Veteran for a VA examination to determine the nature and etiology of his right hip disability. The claims folder must be made available to the examiner. The examiner should provide an opinion as to whether it is at least as likely as not (50 percent or greater probability) that the Veteran has a right hip disability that is related to his service, to include as due to performing his duties as an aviation election which involved climbing in and out of helicopters to service them and standing/walking on the flight deck and keeping balance against waves.

The examiner must provide a rationale for his or her opinion.

6. Schedule the Veteran for a VA examination to determine the nature and etiology of his lumbar spine disability. The claims folder must be made available to the examiner. The examiner should provide an opinion as to whether it is at least as likely as not (50 percent or greater probability) that the Veteran has a lumbar spine disability that is related to his service, to include as due to performing his duties as an aviation election which involved climbing in and out of helicopters to service them.

The examiner must provide a rationale for his or her opinion.

7. Schedule the Veteran for a VA examination to determine the nature and etiology of his left knee disability. The claims folder must be made available to the examiner. The examiner should provide an opinion as to whether it is at least as likely as not (50 percent or greater probability) that the Veteran has a left knee disability that is related to his service, to include as due to performing his physical training.

The examiner must provide a rationale for his or her opinion.

/s/ H. N. Schwartz
H. N. Schwartz
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board Arif Syed, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

APPENDIX D

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

DAVID FORSYTHE,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1610

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-4449, Judge Grant Jaquith.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, MAYER[1], LOURIE, DYK, PROST, REYNA, TARANTO, CHEN,

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[1] Circuit Judge Mayer participated only in the decision on the petition for panel rehearing.

HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

ORDER

David Forsythe filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by Denis McDonough.

Military-Veterans Advocacy Inc., Swords to Plowshares, National Organization of Veterans' Advocates, Inc. and Paralyzed Veterans of America requested leave to file briefs as amici curiae which the court granted.

The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue September 12, 2023.

FOR THE COURT

September 5, 2023	/s/ Jarrett B. Perlow
Date	Jarret B. Perlow
	Clerk of Court

APPENDIX E

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 20-4449

DAVID FORSYTHE, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: February 3, 2022 FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Suzanne E. Yang
Deputy Clerk

Copies to:
Falen Marie LaPonzina, Esq.
VA General Counsel (027)

APPENDIX F

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 5103

§ 5103. Notice to claimants of required information and evidence

(a) Required information and evidence.—

(1) Except as provided in paragraph (3), the Secretary shall provide to the claimant and the claimant's representative, if any, by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

(2)

(A) The Secretary shall prescribe in regulations requirements relating to the contents of notice to be provided under this subsection.

(B) The regulations required by this paragraph—

(i) shall specify different contents for notice based on whether the claim concerned is an original claim or a supplemental claim;

(ii) shall provide that the contents for such notice be appropriate to the type of benefits or services sought under the claim;

(iii) shall specify for each type of claim for benefits the general information and evidence required to substantiate the basic elements of such type of claim; and

(iv) shall specify the time period limitations required pursuant to subsection (b).

(3) The requirement to provide notice under paragraph (1) shall not apply with respect to a supplemental claim that is filed within the timeframe set forth in subparagraphs (B) and (D) of section 5110(a)(2) of this title.

(b) Time limitation.—

(1) In the case of information or evidence that the claimant is notified under subsection (a) is to be provided by the claimant, such information or evidence must be received by the Secretary within one year from the date such notice is sent.

(2) This subsection shall not apply to any application or claim for Government life insurance benefits.

(3) Nothing in paragraph (1) shall be construed to prohibit the Secretary from making a decision on a

claim before the expiration of the period referred to in that subsection.

(4) Nothing in this section shall require the Secretary to provide notice for a subsequent claim that is filed while a previous claim is pending if the notice previously provided for such pending claim—

(A) provides sufficient notice of the information and evidence necessary to substantiate such subsequent claim; and

(B) was sent within one year of the date on which the subsequent claim was filed.

(5)

(A) This section shall not apply to any claim or issue where the Secretary may award the maximum benefit in accordance with this title based on the evidence of record.

(B) For purposes of this paragraph, the term "maximum benefit" means the highest evaluation assignable in accordance with the evidence of record, as long as such evidence is adequate for rating purposes and sufficient to grant the earliest possible effective date in accordance with section 5110 of this title.

APPENDIX G

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.159

§ 3.159 Department of Veterans Affairs assistance in developing claims.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing:

(i) The claimant's name;

(ii) His or her relationship to the veteran, if applicable;

(iii) Sufficient service information for VA to verify the claimed service, if applicable;

(iv) The benefit sought and any medical condition(s) on which it is based;

(v) The claimant's signature; and

(vi) In claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income;

(vii) In supplemental claims, identification or inclusion of potentially new evidence (see § 3.2501);

(viii) For higher-level reviews, identification of the date of the decision for which review is sought.

(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence.

(1) Except as provided in paragraph (3) of this section, when VA receives a complete or substantially complete initial or supplemental claim, VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the "notice"). In the notice, VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice. If the claimant has not responded to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice in accordance with the requirements of paragraph (b)(4) of this section, VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information.

(Authority: 38 U.S.C. 5102(b), 5103A(3))

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a supplemental claim under § 3.2501 within one year of the date VA issues notice of a prior decision;

(ii) Upon receipt of a request for higher-level review under § 3.2601;

(iii) Upon receipt of a Notice of Disagreement under § 20.202 of this chapter; or

(iv) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(4) After VA has issued a notice of decision, submission of information and evidence substantiating a claim must be accomplished through the proper filing of a review option in accordance with § 3.2500 on a form prescribed by the Secretary. New and relevant evidence may be submitted in connection with either the filing of a supplemental claim under § 3.2501 or the filing of a Notice of Disagreement with the Board under 38 CFR 20.202, on forms prescribed by the Secretary, and election of a Board docket that permits the filing of new evidence (see 38 CFR 20.302 and 20.303).

(c) VA's duty to assist claimants in obtaining evidence. VA has a duty to assist claimants in obtaining evidence to substantiate all substantially

complete initial and supplemental claims, and when a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error on the part of the agency of original jurisdiction, until the time VA issues notice of a decision on a claim or returned claim. VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. VA will not pay any fees charged by a custodian to provide records requested. When a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error, the agency of original jurisdiction has a duty to correct any other duty to assist errors not identified by the higher-level adjudicator or the Board.

(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up

request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be

futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval, air, or space service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at

non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions.

(i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §§ 3.309, 3.313, 3.316, 3.317, and 3.320 manifesting during an applicable presumptive period provided the claimant has the required

service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) For requests to reopen a finally adjudicated claim received prior to the effective date provided in § 19.2(a) of this chapter, this paragraph (c)(4) applies only if new and material evidence is presented or secured as prescribed in § 3.156.

(iv) This paragraph (c)(4) applies to a supplemental claim only if new and relevant evidence under § 3.2501 is presented or secured.

(Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for an initial or supplemental claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that

further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records.

(1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))

(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed

appropriate by the Secretary, through the promulgation of regulations.

(Authority: 38 U.S.C. 5103A(g))