No. 21-234

In the Supreme Court of the United States

KEVIN R. GEORGE, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the 1977 decision of the Board of Veterans' Appeals denying petitioner's claim for disability benefits connected to his military service is "subject to revision on the grounds of clear and unmistakable error," 38 U.S.C. 7111(a), where a regulation in effect at the time of the denial, which the Board was required to apply in deciding petitioner's claim, was later determined by the agency and the court of appeals to have reflected an impermissible interpretation of the governing statute.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations: Page

Statutes and regulations—Continued: Page

Miscellaneous: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 991 F.3d 1227. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 25a-65a) is reported at 30 Vet. App. 364. The decision of the Board of Veterans' Appeals (Pet. App. 66a-80a) is unreported. A prior decision of the Board (Pet. App. 81a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2021. The petition for a writ of certiorari was filed on August 13, 2021, and was granted on January 14, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

In December 1975, petitioner, a former servicemember, filed a claim for disability benefits with the Department of Veterans Affairs (VA or Department) based on his schizophrenia. In 1977, the Board of Veterans' Appeals (Board) denied petitioner's appeal of the denial of that claim. Pet. App. 81a-87a. In 2016, the Board denied petitioner's request that it revise its 1977 decision under 38 U.S.C. 7111, which authorizes the "revision [of a Board decision] on the grounds of clear and unmistakable error," 38 U.S.C. 7111(a). See Pet. App. 66a-80a. The Court of Appeals for Veterans Claims (Veterans Court) affirmed. *Id.* at 25a-65a. The court of appeals affirmed. *Id.* at 1a-24a.

1. Petitioner served in the Marine Corps in 1975 after experiencing multiple pre-service schizophrenic episodes. In April 1975, at age 17, petitioner experienced "auditory hallucinations" that he believed were "from God." Record Before the Agency (A.R.) 553. Petitioner was taken to the University of Kansas Medical Center where, after a psychiatric examination, he was diagnosed with "Acute Schizophrenic Reaction." A.R. 552-553 (hospital emergency-treatment record); see A.R. 1244; cf. Pet. App. 82. The treating physician recorded that he had "intended to admit" petitioner to the hospital but that petitioner and his father "did not wish admission at th[at] time." A.R. 553. The physician prescribed medication, noted that he was "unable to make [a] clinic referral," and predicted that petitioner "may return to [the emergency room]." *Ibid.*

The following month, petitioner again experienced a schizophrenic episode when traveling from Kansas to Utah to join the Job Corps. Pet. Br. App. 5a-6a. During that trip, petitioner "hear[d] voices"; saw people "giving

him 'signs'" in an airport lobby; believed that a "bus driver was communicating with him through 'sequences'"; felt that "electronic media through radios" and "electrical forces" were "being 'used on him'"; and feared that "people were watching him" and would put "him and his family in danger." *Ibid.* Petitioner telephoned his cousins but "started feeling [on the call] that they weren't really his cousins." *Id.* at 5a. The cousins "urged him to return home to Kansas City." *Ibid.*

Petitioner's father then signed for petitioner to join the Marine Corps while petitioner was still 17. A.R. 1152; see C.A. App. 50. On May 28, 1975, during petitioner's medical examination for military service, petitioner did not disclose having any mental-health issues. C.A. App. 49. Petitioner instead reported that he had never "been treated for a mental condition"; had never "been a patient in any type of hospitals"; and had not "consulted or been treated by clinics, physicians, healers, or other practitioners within the past 5 years for other than minor illnesses." *Ibid.* The medical examination did not discover petitioner's schizophrenia, A.R. 1273, and petitioner was found fit for duty, Pet. Br. App. 6a.

On June 11, 1975, petitioner arrived for training at the Marine Corps Recruit Depot in San Diego. Pet. Br. App. 6a. On June 17, petitioner was sent for psychiatric evaluation after "performing poorly" and being "'belligerent.'" A.R. 1297. Petitioner again denied any "previous" psychiatric history, but he disclosed that he had a "family history of psychiatric treatment" and claimed that "he had 'electronic media in his T.V.' which allowed his neighbors to see him." *Ibid.* That day, petitioner was admitted to a Naval hospital for treatment for his "psychotic symptomatology." C.A. App. 51.

On July 11, 1975, after nearly a month of inpatient-hospital treatment, petitioner's military physician diagnosed him with "Acute Schizophrenic Reaction" with "Underlying Paranoid Personality." C.A. App. 50-51. The physician noted that petitioner had started "hearing voices" around April 1975, *id.* at 50, and discharged petitioner from the hospital with the recommendation that he be sent to an evaluation unit for discharge from military service, *id.* at 51; A.R. 1301. See Pet. Br. App. 6a.

Petitioner was returned to a training platoon rather than being sent directly to an evaluation unit. Pet. Br. App. 7a. On August 11, 1975, petitioner was transferred to an evaluation unit, where he "appeared quite disturbed and apprehensive," and a psychiatrist identified petitioner's "continuing auditory hallucinations, paranoid ideas of reference, and delusions." *Ibid.* Petitioner was treated and kept at a dispensary ward, where he was supervised by a psychiatrist. *Ibid.*

On August 14, 1975, a medical board issued a report (Pet. Br. App. 5a-9a) determining that petitioner was unfit for service. The board stated that petitioner had "no past history of any psychiatric care prior to enlistment," *id.* at 7a; had no "significant family history of psychiatric disorder," *ibid.*; and "first began experiencing symptoms" on his May 1975 trip to join the Job Corps, *id.* at 5a. The board determined that petitioner "now appears in his pre-enlistment state complicated by service aggravated stress, both prior to [his] initial [military] hospitalization and certainly subsequent training attempts." *Id.* at 7a. The board further determined that petitioner's schizophrenia "had its onset prior to enlistment," but that petitioner's condition had "progressed at a rate greater than is usual for such disor-

ders" "as a result of conditions peculiar to the service." *Id.* at 8a. For that reason, the medical board "considered [petitioner's condition] to have been aggrav[a]ted by a period of active duty." *Ibid.*

On August 29, 1975, a physical evaluation board agreed that petitioner was unfit for duty and recommended his discharge from service. Based on its further review, however, it determined that petitioner's condition existed prior to entry into service ("EPTE") and was "not aggravated" by service. Pet. Br. App. 13a-14a (capitalization altered). Petitioner was medically discharged effective September 30, 1975, after less than four months of active service. A.R. 491, 1304.

2. a. Congress has directed that, with limitations not relevant here, "the United States will pay [compensation] to any veteran" who is "disabled" as a result of (1) "personal injury suffered or disease contracted in line of duty," or (2) "aggravation of a preexisting injury suffered or disease contracted in line of duty" while on active duty during a period of war. 38 U.S.C. 1110; cf. 38 U.S.C. 1131 (peacetime disability). Such disabilities entitling a veteran to benefits are called "service connect[ed]" because they are "causally related to an injury sustained in the service." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985); see 38 U.S.C. 101(16).

A veteran seeking disability compensation must file a claim with the Department of Veterans Affairs (VA), 38 U.S.C. 5101(a)(1)(A), which before 2017 adjudicated such claims through a two-step process. First, a regional office of the Veterans Benefits Administration would issue an initial decision on the claim. *Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011); see 38 U.S.C. 511(a), 5104(a), 7105(b)(1); 38 U.S.C. 211(a), 4005(b)(1)

(1976); 38 C.F.R. 3.100(a), 20.3(a). Second, the veteran could appeal an adverse decision to the Board of Veterans' Appeals (Board), an adjudicatory body within the VA charged with issuing a final administrative decision. 38 U.S.C. 7101(a), 7104(a); see 38 U.S.C. 4001(a), 4004(a) (1976). As relevant here, Congress has specified that "[t]he Board shall be bound in its decisions by the regulations of the Department." 38 U.S.C. 7104(c); see 38 U.S.C. 4004(c) (1976).[1]

b. In December 1975, petitioner applied for veterans' disability benefits based on his schizophrenia. C.A. App. 113-121. Two statutory provisions were then potentially relevant to a determination whether his schizophrenia was service connected and therefore compensable. First, 38 U.S.C. 311 (1976) (now 38 U.S.C. 1111) provided that a veteran shall be taken to have been in "sound condition when examined, accepted, and enrolled for service," except for matters "noted at the time of examination" or "where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service." Second, 38 U.S.C. 353 (1976) (now 38 U.S.C. 1153) provided that "[a] preexisting injury or disease will be considered to have been aggravated" by active service "where there is an increase in

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[1] In 2017, Congress enacted several significant changes to the VA's adjudicatory process. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105. Among other modifications, those changes give a claimant the option of obtaining de novo review by a higher-level adjudicator within the Veterans Benefits Administration after a regional office's initial decision, before the claimant appeals to the Board. 38 U.S.C. 5104B(a) and (e), 5104C(a), 7105(b)(1)(A) and (c)(1). Those changes do not affect this case, which proceeded under the pre-2017 legacy process.

disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease."

At the time, the VA had promulgated regulations implementing both statutory provisions. One regulatory provision stated that a veteran would be considered to have been in "sound condition when examined, accepted and enrolled for service," except as to matters noted at entry into service or "where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto." 38 C.F.R. 3.304(b) (1976). Another provision separately addressed the subsequent service-related aggravation of a veteran's preexisting condition, stating that "[c]lear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service." 38 C.F.R. 3.306(b) (1976). Read together, those regulations indicated that, if sufficient evidence showed that a veteran's injury or disease predated his service, a rebuttable presumption of aggravation would arise if a sufficient showing was made that the preexisting condition had "increase[d] in severity during service." *Ibid.*

In 1976, a VA regional office denied petitioner's claim, C.A. App. 55-56, on the ground that service connection had not been established, *id.* at 56. The office explained that "the symptoms of a psychosis clearly existed prior to service with acute exacerbation during [petitioner's] short period of military service [but] with no increased disability other than what might [have] be[en] expected when [petitioner was] discharged." *Ibid.*; see Pet. App. 81a.

c. In 1977, the Board of Veterans' Appeals denied petitioner's appeal. Pet. App. 81a-87a. The Board observed that a psychiatric evaluation had determined that petitioner's schizophrenia "existed prior to service," that a medical board had "confirmed" that opinion, and that a "subsequent physical evaluation board" had agreed. *Id.* at 83a. The Board also explained that, although the medical board had determined that petitioner's schizophrenia was "aggravated by his active duty," the physical evaluation board had subsequently reached a contrary conclusion based on its further review. *Ibid.*

Consistent with 38 C.F.R. 3.306(b) (1976) (see p. 7, *supra*), the Board explained that "[a] preexisting injury or disease will be considered to have been aggravated by active wartime service, where there is an increase in disability during such war service, unless there is clear and unmistakable evidence that the increase in disability is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record." Pet. App. 85a. The Board concluded that petitioner's "preexisting schizophrenia was not aggravated by his military service," and that "[e]ntitlement to service connection for schizophrenia has not been established." *Id.* at 86a. The Board did not specify whether it based that conclusion on a determination that petitioner's condition had not worsened during his service, or on a determination that any worsening reflected the natural progress of the schizophrenia rather than the effects of his military service.

d. More than 25 years after the Board's 1977 decision, the VA and the Federal Circuit determined that

the VA regulation governing the presumption of soundness (38 C.F.R. 3.304(b)), which had been relevant to the disposition of petitioner's claim, conflicted with the statutory presumption.

In 2003, after the VA's General Counsel became aware of briefs identifying an "apparent conflict" between 38 C.F.R. 3.304(b) and 38 U.S.C. 1111 (formerly Section 311), the General Counsel issued a precedential opinion "conclud[ing] that VA's regulation conflicts with the statute and is therefore invalid." VA, *Op. Gen. Counsel Prec. 3-2003*, at 1, 11 (July 16, 2003), https://go.usa.gov/xzPEB. The opinion explained that Section 3.304(b)—which "state[d] that the presumption of sound condition may be rebutted by clear and unmistakable evidence that a disease or injury existed prior to service"—conflicted with Section 1111 because it "omit-[ted] the second prong of [Section 1111's] standard," which requires proof that a preexisting "disease or injury was not aggravated by service." *Id.* at 2, 10-11; see *id.* at 6. The opinion further determined that Section 1153 (formerly Section 353), which establishes a presumption that a veteran's service has aggravated a preexisting condition only after "it is shown that a preexisting disease or injury increased in severity during service," did not affect Section 1111's separate provisions governing a presumption of a sound condition upon a veteran's entry into service. *Id.* at 2-3. The opinion acknowledged that requiring proof that a "preexisting condition was not aggravated *after* entry into service" is "seemingly illogical" and "has no obvious bearing upon the presumed fact of whether the veteran was in sound condition when he or she entered service." *Id.* at 8. The opinion concluded, however, that Section 1111 imposed that requirement. *Ibid.*

Shortly thereafter, based on the General Counsel's precedential opinion, the government confessed error in *Wagner* v. *Principi*, 370 F.3d 1089, 1092 (Fed. Cir. 2004). The *Wagner* court then concluded that the Veterans Court had erred in applying Section 3.304(b) because the regulation was inconsistent with Section 1111. *Id.* at 1091-1092. The court observed that Section 1111's language was "somewhat difficult to parse," and that the provision appeared on its face to be "'illogical'" and "somewhat self-contradictory" because it requires proof of non-aggravation *during* service in order to rebut a presumption of sound condition *at entry* into service. *Id.* at 1093 (citation omitted). The court ultimately agreed with the government, however, that "in light of [Section 1111's] statutory language and legislative history" (*id.* at 1094), if a pre-existing condition is not noted upon a veteran's entry into service, Section 1111 requires the government to present evidence of non-aggravation during service to rebut the presumption of soundness, *id.* at 1096. See *id.* at 1094-1096.

In 2005, the VA amended 38 C.F.R. 3.304(b) to conform to the General Counsel's 2003 opinion and the Federal Circuit's decision in *Wagner*. 70 Fed. Reg. 23,027, 23,029 (May 4, 2005).

3. a. When the Board issued its 1977 decision in this case, the decision was not subject to judicial review. See *Henderson*, 562 U.S. at 432 & n.1. In 1988, Congress established the Veterans Court to review Board decisions under standards similar to those set forth in the Administrative Procedure Act (APA), 5 U.S.C. 706, see 38 U.S.C. 7252(a), 7261(a), 7266(a), and authorized appeals from the Veterans Court to the Federal Circuit, 38 U.S.C. 7292(a), (c), and (d). See *Henderson*, 562 U.S. at 432-433 & n.2.

Absent such an appeal, administrative decisions resolving veterans' benefits claims are final, subject to limited exceptions. A decision of a VA regional office on a disability claim, if not appealed to the Board within one year and subject to certain exceptions, "shall become final and the claim shall not thereafter be readjudicated or allowed." 38 U.S.C. 7105(c); see 38 U.S.C. 7105(b)(1)(A); 38 U.S.C. 4005(b)(1) and (c) (1976). With limited exceptions, the Board's decision for the agency likewise "shall be final and conclusive and may not be reviewed by any other official or by any court," unless (after 1988) the veteran appeals the decision to the Veterans Court within 120 days. 38 U.S.C. 511(a) and (b)(4), 7252(a), 7266(a); see 38 U.S.C. 7104(a); 38 U.S.C. 211(a), 4004(a) (1976). Absent such an appeal, "when a claim is disallowed by the Board, the claim [ordinarily] may not thereafter be readjudicated and allowed." 38 U.S.C. 7104(b); see 38 U.S.C. 4004(b) (1976).

This case concerns an exception to that finality requirement. Pursuant to a 1997 statutory amendment, a "decision by the Board is subject to revision on the grounds of clear and unmistakable error." 38 U.S.C. 7111(a); see 38 U.S.C. 5109A (parallel provision applicable to a "decision by the Secretary"). A veteran may ask the Board to revise its decision for such error "at any time after that decision is made," 38 U.S.C. 7111(d), and "[i]f evidence establishes the error, the prior decision shall be reversed or revised." 38 U.S.C. 7111(a). "For the purposes of authorizing benefits," the Board's revision of its earlier decision will result in a fully retroactive award. 38 U.S.C. 7111(b) (providing that the decision to revise "has the same effect as if the decision had been made on the date of the prior decision").

b. In 2014, petitioner asked the Board to exercise its authority under 38 U.S.C. 7111 to revise its 1977 decision. C.A. App. 64-68. He argued that the Board in 1977 had committed "clear and unmistakable error" by "failing to correctly apply the provisions of 38 U.S.C. [1111]," *id.* at 65, which he viewed as requiring the VA to rebut Section 1111's presumption of soundness upon entry into service with clear and convincing evidence that his condition was "not aggravated by service," *id.* at 66.

Neither Section 7111 nor the parallel provision in Section 5109A defines the term "clear and unmistakable error." But "since at least 1928 the VA and its predecessors have provided for the revision of decisions which were the product of 'clear and unmistakable error.'" *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc) (citing United States Veterans' Bureau Reg. No. 187, § 7155 (1928)); see 38 C.F.R. 3.105(a) (1956 Cum. Supp. 1963) ("Previous determinations * * * will be accepted as correct in the absence of clear and unmistakable error."). The Federal Circuit has stated that Section 7111 was intended "to codify and adopt the [clear-and-unmistakable-error] doctrine as it had developed under 38 C.F.R. § 3.105" and as set forth in *Russell*, *supra*, and other Veterans Court decisions. *Cook* v. *Principi*, 318 F.3d 1334, 1342 & n.10, 1344 (2002) (en banc), cert. denied, 539 U.S. 926 (2003); see H.R. Rep. No. 52, 105th Cong., 1st Sess. 1-2 (1997) (House Report) (citing *Russell* and explaining that Sections 7111 and the parallel provision in Section 5109A were intended "to codify existing regulations which make decisions * * * subject to revision on the grounds of clear and unmistakable error"); S. Rep. No. 157, 105th Cong., 1st Sess. 3 (1997) (similar, citing *Russell*).

In *Russell*, the en banc Veterans Court stated that "a 'clear and unmistakable error' under [38 C.F.R.] 3.105(a) must be the sort of error which, had it not been made, would have manifestly changed the outcome at the time it was made." 3 Vet. App. at 313. The court further explained that a clear and unmistakable error must be "undebatable," such that "reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Id.* at 313-314. The court emphasized that a clear-and-unmistakable-error determination "must be based on * * * the law that existed at the time of the prior" decision—"the statutory or regulatory provisions extant at the time"—and that "changes in the law subsequent to the original adjudication * * * do not provide a basis for revising a finally decided case." *Ibid.*

Those principles continue to be codified in VA regulations. See 38 C.F.R. 3.105(a)(1)(i), (iii), and (iv), and 20.1403(a)-(e). Section 7111's implementing regulations provide that "[c]lear and unmistakable error is a very specific and rare kind of error" that "compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." 38 C.F.R. 20.1403(a). As relevant here, establishing such an error generally requires showing that "the statutory and regulatory provisions extant at the time were incorrectly applied." *Ibid.* Thus, a "clear and unmistakable error in a prior Board decision must be based on the record and the law that existed when that decision was made," 38 C.F.R. 20.1403(b)(1), and "does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the in-

terpretation of the statute or regulation," 38 C.F.R. 20.1403(e).

c. In 2016, the Board denied petitioner's request for revision under Section 7111. Pet. App. 66a-80a. As relevant here, the Board observed that, in 1977, under the then-applicable regulation implementing Section 1111's statutory predecessor, the Board "was not required to find clear and unmistakable evidence that [petitioner's] disability was not aggravated by service." *Id.* at 70a-71a (citing 38 C.F.R. 3.304 (1977)). The Board acknowledged that in 2003 and 2004, the VA General Counsel and the Federal Circuit had concluded that the regulation reflected an erroneous interpretation of Section 1111. *Id.* at 71a (citing *Op. Gen. Counsel Prec. 3-2003* and *Wagner*, *supra*). But the Board explained that "application of a subsequently-invalidated regulation * * * does not constitute 'obvious error' or provide a basis for reconsideration of the decision" under the clear-and-unmistakable-error standard. *Ibid.* (citation omitted). The Board therefore concluded that "the failure of the Board [in 1977] to find that [petitioner's] condition was not clearly and unmistakably aggravated by service as part of its presumption of soundness analysis cannot be considered to be [clear and unmistakable error]." *Ibid.* The Board further determined that the asserted error "would not have resulted in a manifestly different outcome to which reasonable minds could not differ." *Id.* at 78a-79a.

4. The Veterans Court affirmed. Pet. App. 25a-65a. Citing *Russell*, *supra*, the court explained that, to establish clear and unmistakable error, a claimant must show that "an error occurred based on * * * the law that existed at the time the decision was made" and "'manifestly changed the outcome' of the decision." Pet. App.

33a (citation omitted). For two independent reasons, the court concluded that the Board's 1977 decision did not constitute such an error. *Id.* at 42a-53a.

First, the Veterans Court explained that, "[i]n 1977, the Board was required to apply the law as it existed at that time, including [38 C.F.R.] 3.304(b)." Pet. App. 43a. Section 3.304(b) required the Board to find "clear and unmistakable evidence" only as to whether "a disability preexisted service," not as to whether it was aggravated by service. *Ibid.* The court accordingly determined that the Board had not committed clear and unmistakable error by adhering to that regulation. *Ibid.*

Second, the Veterans Court held that, even if the statute required the 1977 Board to find clear and unmistakable evidence as to aggravation to rebut the presumption of soundness, it would not support a claim of clear and unmistakable error in petitioner's case because petitioner had not "demonstrate[d] that these errors * * * would have manifestly changed the outcome of the 1977 Board's decision." Pet. App. 51a. The court explained that petitioner "d[id] not in any of his pleadings include analyses or arguments as to specific evidence in 1977" to demonstrate that the outcome would have been different, and the court "decline[d] to find facts to assist a represented appellant in addressing arguments he has * * * chosen not to raise." *Id.* at 51a-52a.

5. The court of appeals affirmed. Pet. App. 1a-24a. The court emphasized that a clear and unmistakable error "is a 'very specific and rare type of error,'" which "must be based on 'the record and the *law that existed at the time of the prior adjudication* in question,'" such that "'the statutory or regulatory provisions *extant at the time* were incorrectly applied.'" *Id.* at 13a-14a (ci-

tations omitted). The court reiterated that a clear and unmistakable error "must also be an 'undebatable' error that would have 'manifestly changed the outcome at the time it was made.'" *Id.* at 14a (citation omitted).

The court of appeals concluded that the 1977 Board was required by statute to apply 38 C.F.R. 3.304(b) (1977); that the Board had correctly applied that "then-binding regulation (Pet. App. 17a); and that the Board thus did not commit clear and unmistakable error in doing so. *Id.* at 15a-17a. The court explained that it had previously upheld the validity of 38 C.F.R. 20.1403(e), "which expressly states that [clear and unmistakable error] 'does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a *change in the interpretation* of the statute or regulation.'" Pet. App. 15a (citation omitted).

The court of appeals rejected petitioner's contention that "a new judicial pronouncement retroactively applies to *final* decisions, even those subject to a collateral attack, such as a request to revise a final Board" decision. Pet. App. 20a. The court explained that "new judicial pronouncements are to be given 'full retroactive effect in all cases *still open on direct review*' but not in final cases already closed." *Ibid.* (quoting *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993)). The court further explained that its decision comported with the meaning of "clear and unmistakable error" in 38 U.S.C. 5109A and 7111, given that Congress had enacted those provisions in 1997 to incorporate both the then-existing regulation, 38 C.F.R. 3.105 (1997), and "the Veterans Court's 'long standing interpretation of [clear and unmistakable error].'" Pet. App. 22a (citations omitted).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Board in 1977 did not commit a "clear and unmistakable error" within the meaning of 38 U.S.C. 7111, which would warrant revision of the Board's long-final decision on petitioner's original disability-benefits claim. No revision is warranted for two independent reasons.

A. First, the Board does not commit a "clear and unmistakable error" where, as here, it faithfully applies an existing VA regulation that Congress has required the Board to apply "in its decisions," 38 U.S.C. 4004(c) (1976) (currently 38 U.S.C. 7104(c)). That holds true even if, after the decision has become final and unappealable, the regulation is held invalid.

1. The phrase "clear and unmistakable error" does not encompass mere "error." Congress separately authorized the correction of Board error on *direct review*. Section 7111 instead imposes a much more demanding standard—"clear and unmistakable error"—for collateral review of otherwise final Board decisions. Under the most natural reading of that phrase, the Board does not commit such error by applying a VA regulation later deemed invalid. The Board in 1977 was required by law to apply that regulation in its decision, and an adjudicator is not naturally said to commit a "clear and unmistakable error" by doing something that it is *required* to do.

Petitioner contends (Br. 21, 24) that, "by definition," a decision "contrary to the plain terms of an unambiguous statute" as later construed by a court is a "'clear and unmistakable error.'" That is incorrect. The question whether a statute is unambiguous can present difficult issues, and reasonable adjudicators—including Members of this Court—often disagree about such mat-

ters. A judicial decision that no statutory ambiguity exists may resolve the interpretive issue, but it does not establish that those concluding otherwise have committed a "clear and unmistakable error."

2. Current VA regulations confirm that the Board in 1977 did not commit "clear and unmistakable error." For nearly 50 years, the first sentence of 38 C.F.R. 3.105 has stated that revision of decisions for such error cannot be based on "a change in law or a Department of Veterans Affairs issue" or "a change in interpretation of law or a Department of Veterans Affairs issue." Section 7111's implementing regulation likewise provides that "[c]lear and unmistakable error" does "not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." 38 C.F.R. 20.1403(e). Under those provisions, the Board's 1977 decision was not clear and unmistakable error, because the Board was required to apply Section 3.304(b) in that decision.

Section 3.304(b) was a binding regulation in 1977 and thus, under Section 3.105, both "law" and a "[VA] issue" that later changed. In any event, the 2003 agency opinion and 2004 court decision that held Section 3.304(b) invalid are post-decision "change[s] in interpretation of law." 38 C.F.R. 3.105. Petitioner is doubly wrong in suggesting (Pet. Br. 18, 34-35) that a "change in interpretation of law" includes only an agency's change from one "permissible" construction of ambiguous statutory text to another. The term "change in interpretation of law" is naturally understood to include a change that corrects an agency's prior erroneous interpretation of an unambiguous statute. And petitioner's artificially narrowed reading is particularly anomalous here. The

point of Section 3.105 is to identify the types of egregious errors warranting revision of final VA decisions. Yet the type of permissive agency interpretive change that petitioner identifies is a change from an initial permissible interpretation that was not itself erroneous—such that on petitioner's interpretation the reference to "change in interpretation of law" would do no meaningful work.

Petitioner's observation that a judicial interpretation of a statute reflects what the statute has always meant, while correct, is irrelevant. Such an interpretation can both establish what a statute has always meant *and* reflect a change in the prevailing *interpretation* of the law.

3. For the reasons stated above, the statutory term "clear and unmistakable error" would not naturally be construed to encompass an original adjudicator's faithful application of then-binding VA regulations, even if the statutory term had first originated in 1997 when Congress enacted the provision. But Congress did not write on a clean slate; it borrowed the term from an existing VA regulation—38 C.F.R. 3.105 (1997)—that had long allowed revision of otherwise final VA regional office decisions for "clear and unmistakable error." Congress's obvious transplantation of that well-established term is therefore properly understood to incorporate the term's preexisting regulatory scope, which allowed revision of an agency decision only if it was indisputable that the decision was fatally flawed at the time it was rendered, without considering subsequent legal changes that altered the understanding of the relevant statutory and regulatory framework.

4. The broader statutory context and practical considerations further counsel against expanding collateral

review in the manner that petitioner suggests. Congress has carefully balanced competing policy interests in finality, administrative efficiency, and appropriate access for veterans to seek benefits to which they may be entitled by providing claimants multiple paths to disability benefits. Claimants have 120 days to pursue direct APA-style review of Board decisions in the Veterans Court, 38 U.S.C. 7261(a), 7266(a); they may file a "supplemental claim" at any time based on new and relevant evidence to obtain readjudication of a claim, which ordinarily can result in benefits from the date of the supplemental application, 38 U.S.C. 5108(a), 5110(a); they may seek monetary relief from the Secretary for any "administrative error" on the part of the government, 38 U.S.C. 503(a); and they may seek collateral review to obtain retroactive benefits, but only for "clear and unmistakable error" judged by the existing state of the law as understood at the time. This Court should decline to upset that balance reflected in the statutory framework by expanding the nature of collateral review as petitioner suggests, particularly given the immense scope of the veterans' benefits system and the real-world constraints in which the system operates.

5. Petitioner's reliance on Social Security practices and the veterans canon is misplaced. Like the VA system, the Social Security system precludes revising an otherwise final denial of a claim based on a subsequent "change of legal interpretation." 20 C.F.R. 404.989(b).

The veterans canon is poorly suited to resolving any textual ambiguity here. Petitioner does not dispute that Section 7111 ratified and incorporated the VA's longstanding practice governing clear and unmistakable error. And an application of the canon here would distort, rather than advance, Congress's intent in craft-

ing procedural provisions that balance competing objectives, including the finality of agency decisions.

B. Even if petitioner's interpretation of Section 7111 were correct, he could not establish a clear and unmistakable error because he has not shown that the result in 1977 would have been manifestly different but for the error. It is possible that the Board would have reached a different outcome if it had required clear and unmistakable evidence that petitioner's schizophrenia was not aggravated during his period of service. But petitioner has not shown that the Board *definitely* would have reached a different outcome. The Board might have found by "clear and unmistakable evidence" that "any increase in disability [was] due to the natural progress of the condition" rather than to petitioner's service, Pet. App. 85a, by declining to credit the medical board's view regarding aggravation in light of indications that the medial board did not fully apprehend the nature of petitioner's preexisting illness.

ARGUMENT

THE BOARD OF VETERANS' APPEALS DID NOT COMMIT CLEAR AND UNMISTAKABLE ERROR WHEN IT DENED PETITIONER'S DISABILITY-BENEFITS CLAIM IN 1977

The court of appeals correctly held that the Board did not commit "clear and unmistakable error" within the meaning of 38 U.S.C. 7111 when it rendered its 1977 decision on petitioner's disability-benefits claim. That is so for two reasons.

First, the Board's 1977 decision faithfully applied a then-existing regulation, 38 C.F.R. 3.304(b) (1977), that the Board was required to follow "in its decisions," 38 U.S.C. 4004(c) (1976); see 38 U.S.C. 7104(c) (same). It was not clear and unmistakable error for the Board to do what it was required to do. The Federal Circuit's

subsequent conclusion that this version of Section 3.304(b) was invalid because it is inconsistent with 38 U.S.C. 1111 will be relevant if petitioner files a supplemental disability-benefits claim, 38 U.S.C. 5110(a), but it does not warrant a retroactive award of benefits on the ground that the 1977 Board committed clear and unmistakable error.

Second, to establish clear and unmistakable error, a claimant must not only show that the Board's *analysis* was unquestionably wrong when the 1977 decision was issued, but must also establish that the *outcome* of the proceeding would manifestly have been different if the error had not occurred. Petitioner cannot make that showing here. The judgment of the court of appeals should be affirmed.

A. Clear And Unmistakable Error Under 38 U.S.C. 7111 Does Not Occur When A Final Board Decision Complies With A Regulation That The Board Is Required By Statute To Apply

Section 7111 authorizes the revision on collateral review of a final Board decision that rests on "clear and unmistakable error." 38 U.S.C. 7111(a). Its companion provision, Section 5109A, similarly authorizes revision of decisions issued by VA regional offices on behalf of the Secretary. 38 U.S.C. 5109A(a); see Pet. Br. 5-6. The most natural understanding of the statutory language, the text of the VA's current implementing regulations, the regulatory backdrop against which Congress enacted Sections 5109A and 7111, and the broader statutory context all demonstrate that the Board's 1977 decision did not contain "clear and unmistakable error."

1. The term "clear and unmistakable error" is not naturally understood to encompass decisions in which an agency adjudicator faithfully applies a regulation that it is legally required to follow

Sections 7111 and 5109A set a high bar for a collateral challenge seeking to revise an otherwise final decision of the Board or regional office. Neither provision permits revision based on mere "error." In 1988, Congress separately authorized the correction of Board error on *direct review* by providing claimants with an APA-style appeal to the Veterans Court, which may adjudicate challenges to relevant VA regulations in reviewing Board decisions. 38 U.S.C. 7261(a), 7266(a); cf. 38 U.S.C. 502. Sections 7111 and 5109A impose a much more demanding standard for revision of otherwise final Board and regional office decisions, limiting revision to cases involving "clear and unmistakable error." 38 U.S.C. 5109A(a), 7111(a). Under the most natural reading of that statutory phrase, the Board did not commit such error in denying petitioner's 1977 benefits claim.

a. In 1958, Congress converted the Board from an adjudicatory body established by Executive Order into a body established by statute, see 38 U.S.C. 4001(a) (1958), and directed that "[t]he Board shall be bound in its decisions by the regulations of the [VA]," 38 U.S.C. 4004(c) (1958) (currently 38 U.S.C. 7104(c)). In 1977, when the Board decided petitioner's disability claim, it therefore was required to apply "in its decision[]" all relevant VA regulations, 38 U.S.C. 4004(c) (1976), including 38 C.F.R. 3.304(b) (1977).

By resolving petitioner's appeal in accordance with Section 3.304(b)'s then-existing provisions, the Board in 1977 did not commit "clear and unmistakable error." An adjudicator is not naturally said to commit a "clear and

unmistakable error" by doing something that it is *required* to do. The fact that a court may "disregard[]" a regulation that it views as violating statutory requirements, see Pet. Br. 42 (citation omitted), does not mean that a subordinate agency adjudicator may do so as well. That is particularly so where, as here, Congress has explicitly required the adjudicator to apply the regulation in rendering its decision. The natural reading of the phrase "clear and unmistakable error" in Section 7111 therefore does not encompass the 1977 Board decision at issue here.

Lower federal courts confront an analogous situation when a Supreme Court decision "directly controls" an issue but that precedent is perceived to "rest on reasons rejected in some other line of decisions." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (citation omitted). Courts in that situation are instructed to follow this Court's binding on-point precedent, "leaving to this Court the prerogative of overruling its decisions." *Ibid.* (citation omitted). When this Court has overruled a precedent and reversed the lower court that had faithfully applied it, the Court has emphasized that the inferior court was "correct" to reject claims that the precedent had foreclosed. *Id.* at 238. The lower courts in such circumstances may ultimately be found (on direct review) to have erred in entering judgment based on the subsequently invalidated precedent, but they would not fairly be described as committing "clear and unmistakable error." The same conclusion applies with equal force to the Board's faithful application of a VA regulation that a court later holds to be invalid.

Petitioner suggests (Br. 22) that the government's reading of Section 7111 "elevate[s] a contra-statutory regulation to the same status as the statute itself." But

Congress has provided an avenue to challenge the Board's application of a regulation that may be invalid: an appeal to the Veterans Court during the period prescribed by statute. 38 U.S.C. 7252(a), 7266(a).[2] And if a claimant files a supplemental claim based on new and relevant evidence, VA adjudicators will be required to "readjudicate the claim," 38 U.S.C. 5108(a), without applying any regulation that a court has set aside after the Board's earlier decision. Such a supplemental claim may produce an award of benefits from the date of that

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[2] If petitioner had wished to challenge the regulation in 1977, he had at least two options. First, he could have petitioned the VA for rulemaking to correct any perceived error. Second, he could have asked the VA's General Counsel to find the rule invalid. When the General Counsel was later apprised of Section 3.304(b)'s potential inconsistency with 38 U.S.C. 1111, he issued a precedential opinion stating that "Section 3.304(b) is * * * invalid and should not be followed," *Op. Gen. Counsel Prec. 3-2003*, at 11, which was then binding on the Board and regional offices, 38 U.S.C. 7104(c); 38 C.F.R. 14.507(b). See p. 9, *supra*.

In addition, petitioner could have attempted to challenge the regulation through a separate federal-court action. Pet. Br. 44 n.5. Before 1988, judicial review of the VA's denial of an individual's benefits claim was generally barred by 38 U.S.C. 211(a) (1982), which provided that "decisions of the [VA] Administrator on any question of law or fact" made under a veterans-benefit statute were "final and conclusive" and not subject to judicial review, *ibid.* See *Henderson* v. *Shinseki*, 562 U.S. 428, 432 & n.1 (2011). But several courts of appeals had held, in light of the strong presumption of judicial review, *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988), that Section 211(a) did not bar direct judicial challenges to a VA regulation based on its alleged inconsistency with the governing statute. See *Block* v. *Secretary of Veterans Affairs*, 641 F.3d 1313, 1318 (Fed. Cir. 2011) (discussing pre-1988 case law and observing that such decisions reviewed claims that VA "regulations were unauthorized or substantively unlawful"). But see *Roberts* v. *Walters*, 792 F.2d 1109, 1110-1111 & n.2 (Fed. Cir. 1986).

supplemental application. 38 U.S.C. 5110(a)(1). The *retroactive* benefits award that petitioner seeks, by contrast, requires proof that the earlier denial was tainted by "clear and unmistakable error," a term that is not naturally read to encompass faithful application of a regulation that the Board was legally required to follow.

Petitioner invokes a passage from a 1997 committee report to suggest (Br. 43) that review for clear and unmistakable error should be available where the Secretary has issued an invalid regulation, because Congress intended such review to apply no matter "which part of the VA made the error," House Report 4. Petitioner's reliance on that passage is misplaced. Before 1997, "[r]egional office decisions [were] reversible on this basis [*i.e.*, for clear and unmistakable error] by regulation, but [Board] decisions [were] not." *Id.* at 2 (citing *Smith* v. *Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994)). In enacting the 1997 statutory amendments, Congress sought both (1) to "codify [in 38 U.S.C. 5109A the] existing regulations which ma[d]e decisions made by the Secretary at a regional office subject to revision on the grounds of clear and unmistakable error," and (2) to "make decisions made by the Board * * * subject to revision on the [same] grounds" by including parallel language in Section 7111. *Id.* at 1-2. While Congress authorized revision of both regional-office and Board decisions based on a showing of "clear and unmistakable error," and thus authorized revision "no matter * * * which part of the VA made the error," *id.* at 4, nothing in the statute makes that standard applicable to errors committed by the Secretary in his capacity as rulemaker.

b. Petitioner contends (Br. 21, 24) that, "by definition," a decision "contrary to the plain terms of an un-

ambiguous statute" as later construed by a court is a "'clear and unmistakable error.'" That is incorrect. For example, the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), involves a similar inquiry that examines "not what the law now is, but what the Government was substantially justified in believing it to have been" before the court ruled against it. *Pierce* v. *Underwood*, 487 U.S. 552, 561 (1988). Under the EAJA, a court's determination that an unambiguous statute forecloses the government's position "on *Chevron* step one grounds" does not resolve whether "the Government's [losing] position" was nevertheless "reasonable[]." *Halverson* v. *Slater*, 206 F.3d 1205, 1211 (D.C. Cir. 2000) (citation omitted). Likewise, it is not uncommon for Members of this Court to disagree about whether a statute unambiguously resolves a question.[3] A majority's determination that no ambiguity exists will finally resolve the interpretive issue, but it does not establish that other Justices have committed "clear and unmistakable error." See *ibid.* (observing that "*Chevron* step one cases" can "present[] quite difficult issues").

This case illustrates the point. In *Wagner* v. *Principi*, 370 F.3d 1089 (2004), the Federal Circuit found that 38 C.F.R. 3.304(b) in its then-current form was inconsistent with the presumption of soundness in 38 U.S.C. 1111 after tracing the evolution of the statutory text through multiple laws enacted from the 1920s to

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[3] See, *e.g.*, *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1362 (2018) (Breyer, J., joined by Ginsberg, Sotomayor, and Kagan, JJ., dissenting) (disagreeing with "the majority's claim that the statutory words" at issue "unambiguously" resolved the dispute); *Lawson* v. *FMR LLC*, 571 U.S. 429, 462 (2014) (Sotomayor, J., joined by Kennedy and Alito, JJ., dissenting) (criticizing majority's analysis for "fail[ing] to recognize that [the statute] is deeply ambiguous").

the 1940s and surveying legislative history that included floor statements made during World War II. *Wagner*, 370 F.3d at 1094-1096; see pp. 9-10, *supra*. But in finding the regulation deficient because it merely required sufficient proof of a preexisting condition to rebut the presumption of sound condition at entry into service, the court acknowledged that the statute was "somewhat difficult to parse" and recognized, like the VA General Counsel, that the provision appeared on its face to be "'illogical'" and "somewhat self-contradictory" because it requires proof of non-aggravation *during* service in order to rebut a presumption of sound condition *at entry* into service. *Wagner*, 370 F.3d at 1093 (citation omitted); see *Cotant* v. *Principi*, 17 Vet. App. 116, 129-130 (2003) (explaining why such a reading could produce "absurd" disparities between veterans whose preexisting conditions were noted at entry and those whose preexisting conditions were not).

2. Under the VA's current regulations implementing Sections 5109A and 7111, the term "clear and unmistakable error" does not encompass the Board's faithful application of a regulation that was later found to be invalid

Current VA regulations codified at 38 C.F.R. 3.105 and 20.1403 implement 38 U.S.C. 5109A and 7111 and clarify the concept of "clear and unmistakable error." As explained below, Section 3.105 long predates the 1997 legislation that incorporated the concept of "clear and unmistakable error" into the statutory scheme. Section 20.1403 was promulgated after 38 U.S.C. 7111 was enacted to implement Congress's determination that Board as well as regional office decisions should be subject to revision based on "clear and unmistakable error." Under those regulations, the Board's 1977 deci-

sion in petitioner's case is not subject to revision for "clear and unmistakable error."

a. For nearly 50 years, the first sentence of 38 C.F.R. 3.105 has stated that revision of decisions for "clear and unmistakable error," 38 C.F.R. 3.105(a), cannot be based on "a change in law or a Department of Veterans Affairs issue" or "a change in interpretation of law or a Department of Veterans Affairs issue." 38 C.F.R. 3.105; accord 38 C.F.R. 3.105 (1956 Cum. Supp. 1963). Section 20.1403 similarly requires that review for such error must be "based on the record and the law that existed when that decision was made." 38 C.F.R. 20.1403(b). "Clear and unmistakable error" therefore does "not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." 38 C.F.R. 20.1403(e). In other words, that standard is not satisfied if a "prior Board decision represents a correct application of the statute or regulation as it was interpreted at the time of the decision." *Disabled Am. Veterans* v. *Gober*, 234 F.3d 682, 697 (Fed. Cir. 2000), cert. denied, 532 U.S. 973 (2001).

Under those provisions, the Board's 1977 decision in petitioner's case is not subject to revision. In 1977, the Board was required by statute to apply Section 3.304(b) in adjudicating petitioner's disability claim. See p. 23, *supra*. That regulation was deemed invalid in 2003 and 2004, and in 2005 it was amended to correct its prior deficiencies. See pp. 9-10, *supra*. Those subsequent legal developments reflect "a change in law or a Department of Veterans Affairs issue" and "a change in interpretation of law." 38 C.F.R. 3.105; see 38 C.F.R. 20.1403(e) (subsequent "change in the interpretation of the statute

or regulation"). Accordingly, those developments do not establish that the Board committed "clear and unmistakable error" in 1977 when it denied petitioner's benefits claim.

i. The subsequent invalidation of Section 3.304(b) is a post-decision "change in law or a Department of Veterans Affairs issue." 38 C.F.R. 3.105.

Section 3.304(b) is "law" within the meaning of Section 3.105. The term "law" typically encompasses both statutes and binding regulations. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295 & n.18 (1979) (collecting cases). And Section 3.304(b) was binding on the Board when it rendered its 1977 decision. While petitioner is correct (Br. 18, 34) that the term "change in law" *includes* changes in "statutory" law, the term is not *limited* to such changes. Cf., *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 489 (1996) (plurality opinion) (discussing "statutory and regulatory law"). Section 3.304(b)'s invalidation in 2003 and 2004, and the 2005 amendment to that rule, therefore reflect the sort of post-decision "change in law" that falls outside the VA's longstanding conception of "clear and unmistakable error."

A disability-benefits regulation like Section 3.304(b) is also a "Department of Veterans Affairs issue" within the meaning of Section 3.105. That term is properly understood to encompass a published VA regulation that was promulgated by the Secretary and is binding on subordinate agency adjudicators. Cf. *Kennedy* v. *Wilkie*, 33 Vet. App. 114, 121-123 & n.35 (2020) (holding that the term "VA issue approved by the Secretary or by the Secretary's direction" in 38 C.F.R. 3.114(a) "is (1) a directive from or approved by the Secretary and (2) that is binding on VA"), appeal pending, No. 21-1798 (Fed. Cir. argued Mar. 10, 2022).

ii. In any event, the 2003 opinion of VA's General Counsel and the 2004 *Wagner* decision, which determined that Section 3.304(b) was invalid and should no longer be followed, were surely post-decision "change[s] in interpretation of law." 38 C.F.R. 3.105; see 38 C.F.R. 20.1403(e). Both altered the interpretation of 38 U.S.C. 1111 that Section 3.304(b) had formerly embodied. At least in cases like this, where the pertinent "interpretation" of the statute was initially contained in a regulation that was itself binding on the Board, subsequent decisions that displace that regulation based on a different interpretation of the statute constitute "change[s] in interpretation of law" within the meaning of Section 3.105.

Petitioner contends (Br. 18, 34-35) that the term "change in interpretation of law" encompasses an agency's change from one "'permissible construction[]'" of ambiguous statutory text to another, but not the correction of an agency's prior erroneous interpretation of an unambiguous statute, Br. 34 (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). That argument lacks merit. While an agency's switch from one permissible statutory interpretation to another is an *example* of a "change in interpretation of law," so too is a corrective change from an erroneous to a permissible interpretation.

In any context, replacement of an invalid statutory interpretation with a valid one would naturally be described as a "change in interpretation of law." And petitioner's artificially narrow reading of that term would be particularly anomalous in the context of Section 3.105. When an agency changes its interpretation of an ambiguous statute from one permissible reading to another, the agency's initial interpretation was not erro-

neous. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-985 (2005). Petitioner's proposed reading of the term "change in interpretation of law" thus would limit that term to circumstances where no actual "error" has occurred. The point of Section 3.105, however, is to identify the sorts of particularly egregious errors that will warrant revision of VA benefits decisions that have become final, with the potential for a retroactive benefits award. Section 3.105's exclusion of cases involving a "change in interpretation of law," and the parallel language in 38 C.F.R. 20.1403(e) ("change in the interpretation of the statute"), will do no meaningful work if they are limited to circumstances where there was no error to begin with.

b. Petitioner's observation that a judicial interpretation of a statute reflects what the statute has "'*always* meant'" is correct but beside the point. Pet. Br. 35 (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). A new judicial construction of a statute can both establish what the statute has always meant and change the prevailing interpretation of the statute. In *Monell* v. *Department of Social Services*, 436 U.S. 658, 695-701 (1978), for instance, the Court construed 42 U.S.C. 1983 to authorize suits against municipalities, overruling the Court's contrary holding in *Monroe* v. *Pape*, 365 U.S. 167 (1961). As an authoritative judicial pronouncement, *Monell*'s holding is deemed to reflect the actual meaning of Section 1983 since its enactment in 1871. But *Monroe*'s holding was likewise so regarded when that decision was issued until it was overruled. Although *Monell* did not change the actual meaning of Section 1983, it surely changed the prevailing "interpretation" of that provision. A similar analysis applies here.

c. Under current 38 C.F.R. 3.105 and 20.1403(e), the Board in 1977 did not commit "clear and unmistakable error" by faithfully applying a VA regulation that was found to be invalid more than 25 years later. Petitioner's argument therefore necessarily depends on the proposition that the VA's current "clear and unmistakable error" regulations reflect an impermissible construction of Sections 5109A and 7111. That proposition is especially implausible, however, because, as explained below, the provisions that Congress enacted in 1997 were themselves designed to ratify and incorporate into the statutory scheme the approach set forth in the VA's preexisting clear-and-unmistakable-error regulation, 38 C.F.R. 3.105 (1997), which (at least for the purposes of the question presented here) was not materially different from the current rules.

3. Section 7111 incorporates the preexisting regulatory understanding of "clear and unmistakable error"

For the reasons stated above, the statutory term "clear and unmistakable error" would not naturally be construed to encompass an original adjudicator's faithful application of then-binding VA regulations, even if that term had first originated with Congress when it enacted Section 7111 (and Section 5109A) in 1997. In fact, however, the 1997 Congress did not write on a clean slate. A predecessor version of VA's current regulation, then codified at 38 C.F.R. 3.105 (1997), already had long provided for collateral review of otherwise final VA regional office decisions, and had allowed those decisions to be revised if the original adjudicator had committed "clear and unmistakable error." The 1997 statutory amendments ratified that agency practice and extended it to collateral review of Board decisions. By using a term of art ("clear and unmistakable error") with an es-

tablished regulatory meaning, Congress signaled its intent to carry forward existing limits on the scope of this form of collateral review. Because the relevant pre-1997 regulation (like its present counterpart) defined "clear and unmistakable error" to exclude changes in legal interpretations, Congress's incorporation of that term into the statute confirms the validity of the VA's current approach.

a. "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998); cf. *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)). That conclusion reflects a more general "longstanding interpretive principle: When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation omitted); see *FAA* v. *Cooper*, 566 U.S. 284, 292 (2012) ("[I]t is a 'cardinal rule of statutory construction' that, when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'") (citation omitted).

For 35 years before Congress enacted Section 7111 in 1997, the first sentence in the VA's regulation authorizing revision of otherwise final decisions for "clear and unmistakable error" had made clear that the regulation did not "apply" to contexts involving "a change in law or a [VA] issue, or a change in interpretation of law or a

[VA] issue." 38 C.F.R. 3.105 (1997); accord 38 C.F.R. 3.105 (1956 Cum. Supp. 1963). That longstanding regulatory text had described the scope of "clear and unmistakable error" review by reference to the legal understandings that existed when the prior decision was rendered. That limitation reflected the VA's determination that collateral review should be available in this context only in circumstances where the original adjudicator had incontrovertibly misapplied the provisions that governed its benefits decision.

The pre-existing regulation reflected the VA's longstanding view that, for this narrow category of errors, the appropriate disposition is not only to correct the earlier decision on a going-forward basis, but to provide retroactively the same stream of benefits that the claimant would have received if the error had not been made. Section 3.105 therefore provided that "[p]revious determinations which are final and binding * * * will be accepted as correct in the absence of clear and unmistakable error." 38 C.F.R. 3.105(a) (1997). But "[w]here evidence establishes such error, the prior decision will be reversed or amended," and the new decision authorizing benefits shall have "the same effect as if the corrected decision had been made on the date of the reversed decision." *Ibid.*; accord 38 C.F.R. 3.105(a) (1956 Cum. Supp. 1963).

In 1997, when Congress enacted Section 7111, that temporal focus was already firmly established. The Veterans Court had emphasized that a clear-and-unmistakable-error claim is a "collateral attack" on the sort of "otherwise final decision[]" for which the normal "presumption of validity" is particularly "strong[]." *Fugo* v. *Brown*, 6 Vet. App. 40, 44 (1993). In order to override that weighty interest in the finality of agency

decisions that are no longer appealable, "a very specific and rare kind of 'error'" was required. *Id.* at 43-44.

The en banc Veterans Court in *Russell* had further explained that "[t]he words 'clear and unmistakable error'" refer to "undebatable" errors for which "reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992). A tribunal's collateral review therefore "must be based on the record and the law that existed at the time of the prior [agency] decision" in order to identify "a 'clear and unmistakable error' in the previous 'determination,' that is, in the adjudicative process." *Id.* at 314. The en banc court explained that "[n]ew or recently developed facts or changes in the law subsequent to the original adjudication" therefore "do not provide a basis for revising a finally decided case." *Ibid.*

The relevant committee report prepared in connection with Congress's enactment of the 1997 amendment quoted the Veterans Court's descriptions of "clear and unmistakable error" in *Russell* and *Fugo* when discussing the preexisting regulatory framework that the bill was designed to "codify." House Report 2-3. The report thus confirms the natural inference from Congress's use of a term ("clear and unmistakable error") that already had a settled regulatory meaning. See *Cook* v. *Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (en banc) ("Congress' intent in drafting section 5109A was to codify and adopt the [clear-and-unmistakable-error] doctrine as it had developed under 38 C.F.R. § 3.105."), cert. denied, 539 U.S. 926 (2003). And as explained above, that term had historically been understood not to encompass an adjudicator's faithful application of a VA regulation that is eventually found to be invalid but

that was binding on the adjudicator when the original decision was made.

b. Petitioner relies in part (Br. 26-27, 41-42) on other Veterans Court decisions discussing the contours of "clear and unmistakable error" that predated Congress's 1997 codification of the concept. Those decisions are generally consistent with the court's focus in *Russell* and *Fugo* on the legal understandings that prevailed when the initial adjudication occurred. And none extended the concept of "clear and unmistakable error" to an adjudicator's faithful application of a binding regulation that is subsequently found to be invalid.

In *Berger* v. *Brown*, 10 Vet. App. 166 (1997), for instance, the court "specifically h[e]ld," in accordance with a VA General Counsel opinion, "that opinions from [the Veterans] Court that formulate new interpretations of the law subsequent to [a regional office] decision cannot be the basis of a valid [clear-and-unmistakable-error] claim." *Id.* at 170; see *id.* at 168; VA, *Op. Gen. Counsel Prec. 9-94*, at ¶ 6 (Mar. 25, 1994), https://go.usa.gov/xzdJv. The court thus rejected a claimant's attempt to apply "[a] new rule of law from a [statutory construction] case decided in 1993" during collateral review of an asserted "adjudicative error in 1969." *Id.* at 170. The court instead explained that no after-the-fact revision is warranted where the adjudicator applied a "*plausible* interpretation" of the law, viewed "in the context of the body of the law that existed in 1969." *Ibid.* (emphasis added).

The decision in *Damrel* v. *Brown*, 6 Vet. App. 242 (1994), similarly held that "only the 'law that existed at the time' of the prior adjudication * * * can be considered" in determining whether clear and unmistakable error occurred. *Id.* at 246. The claimant had sought to

rely on *Bell* v. *Derwinski*, 2 Vet. App. 611 (1992) (per curiam), which concluded that the Secretary has "constructive, if not actual, knowledge" of records "generated by the VA," *id.* at 613, to find clear and unmistakable error in a 1967 denial of benefits on the theory that the adjudicator should have considered a 1966 VA letter finding the veteran "totally disabled for insurance purposes." 6 Vet. App. at 244, 246. But because "[t]he constructive notice rule of *Bell* was not formulated until 1992," the court rejected the claim. *Id.* at 246.

The decision in *Look* v. *Derwinski*, 2 Vet. App. 157 (1992), does not suggest otherwise. Although the court indicated that it was clear and unmistakable error for a 1962 regional office's "rating decision" to have "fail[ed] to apply 38 U.S.C. § 1151 properly," *id.* at 163, the court did not have occasion to consider whether the 1962 decision would have been compelled by the adjudicator's faithful application of a VA regulation whose "similarly worded" successor (38 C.F.R. 3.358(c)(3) (1990)) the Veterans Court subsequently deemed inconsistent with Section 1151. See 2 Vet. App. at 163-164; see also *id.* at 160-161. The court itself emphasized that a VA adjudicator "'is not free to ignore its own regulations.'" *Id.* at 164. And the court determined that the 1962 decision had "further erred" by "ignor[ing] the portion of the [then-existing] regulation" that supported granting the benefits claim, such that the 1962 decision was clearly and unmistakably erroneous "under a correct application of the law as it previously existed." *Id.* at 164 (citation omitted). In the 30 years since *Look*, no court has cited *Look*'s clear-and-unmistakable-error analysis, much less for petitioner's view that an agency adjudicator commits clear and unmistakable error by following

an existing regulation that the adjudicator was required by law to follow.

c. Petitioner observes (Br. 33-34) that Congress did not specifically incorporate into the text of Sections 5109A and 7111 the first sentence of 38 C.F.R. 3.105 (1997), which provided that the rule did not "apply" to "a change in law or a [VA] issue" or "a change in interpretation of law or a [VA] issue." But the incorporation into the statute of the term of art "clear and unmistakable error" is itself strong evidence of Congress's intent to "adopt[] the cluster of ideas" reflected in the preexisting VA regulation. *Cooper*, 566 U.S. at 292 (citation omitted). At the very least, statutory provisions that incorporate that preexisting regulatory term cannot reasonably be read to *preclude* the VA from continuing to apply its prior standards for determining which errors warrant revision of final benefits decisions. Cf. *Kucana* v. *Holder*, 558 U.S. 233, 249-250 (2010) (holding that, by incorporating into the applicable statute agency regulations that governed the immigration "process for filing motions to reopen," without similarly incorporating regulatory provisions specifying "discretion to grant or deny [such] motions," Congress "left th[at] matter where it was" before the statute was enacted).

4. The broader statutory context and practical considerations counsel against expanding collateral review in the manner that petitioner suggests

Congress has carefully balanced diverse interests in affording veterans multiple paths to disability benefits. Nearly a decade before it enacted Sections 5109A and 7111, Congress authorized direct judicial review of Board decisions. See 38 U.S.C. 7252, 7292; Pet. Br. 43-44. An appeal must be taken within 120 days after the Board's decision, 38 U.S.C. 7266(a), and the scope of re-

view is circumscribed. Although legal questions are reviewed de novo, other matters are subject to the arbitrary-and-capricious standard, and factual findings can be overturned only for clear error. 38 U.S.C. 7261(a). If an appeal is not timely taken, the Board's decision "shall be final and conclusive and may not be reviewed by any other official or by any court." 38 U.S.C. 511(a) and (b)(4). A claim "disallowed by the Board" ordinarily "may not thereafter be readjudicated and allowed." 38 U.S.C. 7104(b); see p. 11, *supra* (statutory finality requirements).

A claimant may file a "supplemental claim" at any time if he submits "new and relevant evidence," which triggers "readjudicat[ion]" of the claim. 38 U.S.C. 5108(a). But even if such a claim is successful, that limited exception to finality will generally result in benefits only from the date of the supplemental application. 38 U.S.C. 5110(a). Before 2017, a similar process permitted "reopen[ing]" of claims based on "new and material evidence." 38 U.S.C. 5108, 5110(a) (2012).

Congress has also authorized review for clear and unmistakable error as "a form of collateral attack on an otherwise final decision." House Report 3. Such a challenge, if successful, results in a retroactive benefits award "as if the decision had been made on the date of the prior decision." 38 U.S.C. 7111(b). That broad scope of relief reflects the correspondingly narrow scope of review that long governed such requests even before Congress incorporated this regulatory mechanism into the governing statute.

Finally, Congress has authorized the Secretary to grant "such relief * * * as the Secretary determines equitable," including monetary payments, if the Secretary determines that veterans' benefits "have not been pro-

vided by reason of administrative error" on the part of the government. 38 U.S.C. 503(a); see 38 C.F.R. 2.7(c). That discretionary authority provides a general safety valve for "administrative error," including after a collateral clear-and-unmistakable-error challenge has been denied. See *Moffitt* v. *Brown*, 10 Vet. App. 214, 225 (1997).

The current statutory framework thus reflects Congress's efforts over time to balance competing policy interests in finality, administrative efficiency, and appropriate access for veterans to seek benefits to which they may be entitled. For each of the mechanisms that it has provided—direct review, supplemental claims, collateral review, and Secretarial relief—Congress has specified applicable eligibility criteria and the scope of the relief that may be awarded if the claimant is successful. Petitioner is thus wrong to suggest (Br. 19) that "[g]eneral finality concerns" are irrelevant in construing the term "clear and unmistakable error." This Court should take appropriate cognizance of, and not "upset," "the balance [that] Congress [has] struck." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 77 (1982).

The immense scope of the veterans' benefits system underscores the need for such a calibrated approach. The VA estimates that there were approximately 19.5 million living veterans in 2020. VA, *Veteran Population Projections 2020-2040*, https://go.usa.gov/xzfjG. That year, the VA resolved nearly 1.4 million compensation claims and paid over $105 billion in disability benefits to more than five million veterans and their survivors. VA, *FY 2022 Budget Submission*, Vol. 3, at 51-53 (May 2021), https://go.usa.gov/xz6ud. As the Veterans Court warned in this case, "[t]he impact of allowing judicial decisions interpreting statutory provisions issued after

final VA decisions to support allegations of [clear and unmistakable error] would cause a tremendous hardship on an already overburdened VA system." Pet. App. 48a. The staggering scope of the benefits adjudication process within a real-world system that operates subject to resource limitations thus reinforces the importance of respecting the balance that Congress has struck.

5. Petitioner's reliance on Social Security practices and the veterans canon is misplaced

a. Petitioner's reliance (Br. 28-29) on Social Security practices is misplaced. As with VA benefits determinations, a request to revisit a Social Security claim "is precluded" if the request is premised on "a change of legal interpretation * * * upon which the initial determination was based." *Fox* v. *Bowen*, 835 F.2d 1159, 1163-1164 (6th Cir. 1987); see 20 C.F.R. 404.989(b). "[R]eopening to revise a determination" of Social Security benefits thus is not appropriate unless "the result reached [was] legally erroneous at the time it was reached." *Munsinger* v. *Schweiker*, 709 F.2d 1212, 1216 (8th Cir. 1983); see *ibid.* ("A case may not be reopened 'if the only reason for reopening is a *change* of legal interpretation or administrative ruling upon which the determination or decision was made.'") (citation omitted). In *Munsinger*, the court found that the original decision was legally erroneous at the time it was reached because the ALJ had misapplied the governing statute as it was then written. See *id.* at 1217. Here, by contrast, the 1977 Board *correctly* applied the regulation in effect at that time, see 38 C.F.R. 3.304(b) (1977).

b. Petitioner's invocation (Br. 31-32) of the veterans canon is unavailing. "[C]anons of construction are no more than rules of thumb that help courts determine

the meaning of legislation." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). For at least two reasons, the veterans canon is poorly suited to resolving any potential ambiguity in this particular context.

First, Section 7111 is one component of a carefully calibrated statutory scheme that is intended to balance competing objectives. Indeed, that balancing of interests is reflected even within Section 7111 itself. Section 7111(a) authorizes reopening of an otherwise final Board decision based on a showing of "clear and unmistakable error." 38 U.S.C. 7411(a). Section 7111(b) specifies that a revision of a prior Board decision on that ground "has the same effect as if the decision had been made on the date of the prior decision." 38 U.S.C. 7411(b). As discussed above, the broad scope of retroactive relief available on collateral review of otherwise final VA decisions has long been linked to the correspondingly demanding standard of clear and unmistakable error. Applying the canon's liberal-construction principle to one component of that scheme would distort, rather than advance, Congress's intent in crafting the legislation.

Second, as petitioner has acknowledged (Pet. Br. 8-9, 25; Pet. 16-17), the term at issue here ("clear and unmistakable error") had appeared in VA regulations for decades before Congress enacted Section 7111 in 1997. When it incorporated that term into the governing statutory scheme, Congress presumably expected and intended that Section 7111 would be construed in accordance with the VA's longstanding practices, under which the term did not include an adjudicator's faithful application of a then-binding VA regulation that is subsequently found to be invalid. Adopting a broader reading of that term based on the veterans canon would effec-

tively negate Congress's choice to use a longstanding term of art with an established regulatory meaning.

B. Petitioner Has Not Established That The Outcome Of The 1977 Board Proceedings Would Have Been Different But For The Board's Asserted Error

Even if petitioner's interpretation of Section 7111 were correct, he could not establish clear and unmistakable error warranting revision of the Board's 1977 decision. To satisfy the prerequisites for revising a Board decision that has become final, a claimant must demonstrate that "the result would have been manifestly different but for the error." 38 C.F.R. 20.1403(a). That requires a showing that "reasonable minds could not differ" on the conclusion that the error was not harmless. *Ibid.* Petitioner cannot make that showing and did not attempt to do so in the courts below.

Petitioner contends that the Board erred by applying Section 3.304(b), which did not expressly require clear and unmistakable evidence to rebut a presumption that his schizophrenia was aggravated by his service, even though such evidence is required by Section 1111. The Board's 1977 decision stated that "[a] preexisting injury or disease will be considered to have been aggravated by active wartime service, *where there is an increase in disability during such war service*, unless there is clear and unmistakable evidence that the increase in disability is due to the natural progress of the condition." Pet. App. 85a (emphasis added). The decision further stated that "[a]ggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record." *Ibid.* The Board concluded that petitioner's "preexisting schizophrenia was not aggravated by his military service" and that "[e]ntitlement to service con-

nection for schizophrenia ha[d] not been established." *Id.* at 86a.

The 1977 Board thus recognized that, in determining whether "[a] preexisting injury or disease [was] aggravated by wartime service," the agency must consider two subsidiary questions: (1) whether the veteran's medical condition worsened during the relevant period (*i.e.*, whether there was "an increase in disability during such war service"); and (2) if so, whether that worsening was caused by the military service rather than by "the natural progress of the condition." Pet. App. 85a. The Board in 1977 recognized that, where the first prerequisite is satisfied, the veteran is entitled to benefits "unless there is clear and unmistakable evidence that the increase in disability is due to the natural progress of the condition" rather than caused by the military service. *Ibid.* That aspect of the Board's decision was consistent with 38 C.F.R. 3.306(b) (1976), which provided that "[c]lear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service." The Board did not appear, however, to view the "clear and unmistakable evidence" requirement as applicable to the antecedent question whether the veteran's medical condition worsened during the relevant time period.

In denying petitioner's claim for benefits, the 1977 Board did not specify which of the two requirements described above it believed petitioner had failed to satisfy. It is therefore possible that the Board would have reached a different outcome if it had required clear and unmistakable evidence that petitioner's schizophrenia did not worsen during his period of service. But there is no basis to conclude that the Board *definitely* would

have reached a different outcome if the binding VA regulation at the time had reflected the understanding of the statute that the current version of the rule embodies. The Board might instead have found "clear and unmistakable evidence" that "any increase in disability [was] due to the natural progress of the condition" rather than caused by petitioner's service. Pet. App. 85a.

In that regard, the Board might have declined to credit the medical board's conclusion as to the strength of petitioner's claim, in light of indications that the medical board had not fully apprehended the scope of petitioner's preexisting illness. See p. 4, *supra* (noting that medical board had understood petitioner's schizophrenic symptoms to have first manifested during May 1975 trip, but that treating physician had recorded an onset of symptoms the previous month). Records later submitted confirmed not only that petitioner had symptoms in April 1975, but also that he was then diagnosed and treated for an acute schizophrenic reaction. See pp. 2-3, *supra*; A.R. 1108. And as the Veterans Court held, petitioner did not provide that court with any "analyses or arguments" establishing that he was prejudiced by the flaw in the prior regulation. See *id.* at 52a. Petitioner's inability to establish that the Board's 1977 decision would have been different if the regulation then in effect had been consistent with the governing statute imposes an independent barrier to his effort to obtain a fully retroactive award by establishing "clear and unmistakable error" under 38 U.S.C. 7111(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 38 U.S.C. 211 (1976) provided in pertinent part:

Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

* * * * *

2. 38 U.S.C. 503 provides in pertinent part:

Administrative error; equitable relief

(a) If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.

* * * * *

3. 38 U.S.C. 511 provides:

Decisions of the Secretary; finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to—

(1) matters subject to section 502 of this title;

(2) matters covered by sections 1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.

4. 38 U.S.C. 4004 (1976) provided:

Jurisdiction of the Board

(a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.

(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim

based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.

5. 38 U.S.C. 4005 (1976) provided in pertinent part:

Filing of notice of disagreement and appeal

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Administrator.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereafter referred to as the "agency of original jurisdiction"). A notice of disagree-

ment postmarked before the expiration of the one-year period will be accepted as timely filed.

* * * * *

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

* * * * *

6. 38 U.S.C. 5108 provides in pertinent part:

Supplemental claims

(a) IN GENERAL.—If new and relevant evidence is presented or secured with respect to a supplemental claim, the Secretary shall readjudicate the claim taking into consideration all of the evidence of record.

* * * * *

7. 38 U.S.C. 5108 (2012) provided:

Reopening disallowed claims

If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.

8. 38 U.S.C. 5109A provides:

Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

9. 38 U.S.C. 5110 provides in pertinent part:

Effective dates of awards

(a)(1) Unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension,

shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

(2) For purposes of determining the effective date of an award under this section, the date of application shall be considered the date of the filing of the initial application for a benefit if the claim is continuously pursued by filing any of the following, either alone or in succession:

(A) A request for higher-level review under section 5104B of this title on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision.

(B) A supplemental claim under section 5108 of this title on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision.

(C) A notice of disagreement on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision.

(D) A supplemental claim under section 5108 of this title on or before the date that is one year after the date on which the Board of Veterans' Appeals issues a decision.

(E) A supplemental claim under section 5108 of this title on or before the date that is one year after the date on which the Court of Appeals for Veterans Claims issues a decision.

(3) Except as otherwise provided in this section, for supplemental claims received more than one year after the date on which the agency of original jurisdiction

issued a decision or the Board of Veterans' Appeals issued a decision, the effective date shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of the supplemental claim.

* * * * *

(g) Subject to the provisions of section 5101 of this title, where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. In no event shall such award or increase be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier.

* * * * *

10. 38 U.S.C. 5110 (2012) provided in pertinent part:

Effective dates of awards

(a) Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

* * * * *

(g) Subject to the provisions of section 5101 of this title, where compensation, dependency and indemnity

compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. In no event shall such award or increase be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier.

* * * * *

11. 38 U.S.C. 7104 provides in pertinent part:

Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be readjudicated and allowed and a claim based upon the same factual basis may not be considered.

(c) The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.

* * * * *

12. 38 U.S.C. 7105 provides in pertinent part:

Filing of appeal

(a) Appellate review shall be initiated by the filing of a notice of disagreement in the form prescribed by the Secretary. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Secretary.

(b)(1)(A) Except in the case of simultaneously contested claims, a notice of disagreement shall be filed within one year from the date of the mailing of notice of the decision of the agency of original jurisdiction pursuant to section 5104, 5104B, or 5108 of this title.

* * * * *

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or decision of the agency of original jurisdiction shall become final and the claim shall not thereafter be readjudicated or allowed, except—

(1) in the case of a readjudication or allowance pursuant to a higher-level review that was requested in accordance with section 5104B of this title;

(2) as may otherwise be provided by section 5108 of this title; or

(3) as may otherwise be provided in such regulations as are consistent with this title.

* * * * *

13. 38 U.S.C. 7105 (2012) provided in pertinent part:

Filing of notice of disagreement and appeal

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Secretary.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

* * * * *

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

* * * * *

14. 38 U.S.C. 7111 provides:

Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits.

(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

15. 38 U.S.C. 7252 provides:

Jurisdiction; finality of decisions

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

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

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

16. 38 U.S.C. 7261 provides in pertinent part:

Scope of review

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

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

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

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

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

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

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

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

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

* * * * *

17. 38 U.S.C. 7266 provides in pertinent part:

Notice of appeal

(a) In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

* * * * *

18. 38 C.F.R. 3.105 provides in pertinent part:

Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§ 3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a)(1) *Error in final decisions.* Decisions are final when the underlying claim is finally adjudicated as provided in § 3.160(d). Final decisions will be accepted by VA as correct with respect to the evidentiary record and the law that existed at the time of the decision, in the

absence of clear and unmistakable error. At any time after a decision is final, the claimant may request, or VA may initiate, review of the decision to determine if there was a clear and unmistakable error in the decision. Where evidence establishes such error, the prior decision will be reversed or amended.

(i) *Definition of clear and unmistakable error.* A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(ii) *Effective date of reversed or revised decisions.* For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply.

(iii) *Record to be reviewed.* Review for clear and unmistakable error in a prior final decision of an agency of original jurisdiction must be based on the evidentiary record and the law that existed when that decision was made. The duty to assist in § 3.159 does not apply to

requests for revision based on clear and unmistakable error.

(iv) *Change in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation.

(v) *Limitation on Applicability.* Decisions of an agency of original jurisdiction on issues that have been decided on appeal by the Board or a court of competent jurisdiction are not subject to revision under this subsection.

(vi) *Duty to assist not applicable.* For examples of situations that are not clear and unmistakable error see 38 CFR 20.1403(d).

(vii) *Filing Requirements*—(A) *General.* A request for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the requesting party or that party's authorized representative. The request must include the name of the claimant; the name of the requesting party if other than the claimant; the applicable Department of Veterans Affairs file number; and the date of the decision to which the request relates. If the applicable decision involved more than one issue, the request must identify the specific issue, or issues, to which the request pertains.

(B) *Specific allegations required.* The request must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the prior decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Nonspecific allega-

tions of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy the requirement of the previous sentence.

* * * * *

19. 38 C.F.R. 3.105 (1997) provided in pertinent part:

Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§ 3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a) *Error.* Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision

had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply.

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20. 38 C.F.R. 3.105 (1956 Cum. Supp. 1963) provided in pertinent part:

Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his knowledge (§ 3.500(b)); there is a change in law or a Veterans Administration issue, or a change in interpretation of law or a Veterans Administration issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a) *Error.* Previous determinations on which an action was predicated, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmis-

takable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b) (2) will apply.

* * * * *

21. 38 C.F.R. 20.1403 provides:

Rule 1403. What constitutes clear and unmistakable error; what does not.

(a) *General.* Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(b) *Record to be reviewed*—(1) *General.* Review for clear and unmistakable error in a prior Board decision must be based on the record and the law that existed when that decision was made.

(2) *Special rule for Board decisions on legacy appeals issued on or after July 21, 1992.* For a Board decision on a legacy appeal as defined in § 19.2 of this chapter issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans

Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

(c) *Errors that constitute clear and unmistakable error.* To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.

(d) *Examples of situations that are not clear and unmistakable error*—(1) *Changed diagnosis.* A new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision.

(2) *Duty to assist.* The Secretary's failure to fulfill the duty to assist.

(3) *Evaluation of evidence.* A disagreement as to how the facts were weighed or evaluated.

(e) *Change in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation.