No. 21-

IN THE

Supreme Court of the United States

JOSEPH J. SNYDER, SR.,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 3.318 of 38 C.F.R. provides veterans with 90 days of active, continuous service with presumptive service connection for amyotrophic lateral sclerosis, or ALS, thereby entitling a veteran who develops ALS to disability benefits from the Department of Veterans Affairs (Department or VA). 38 C.F.R. § 3.318. The presumption is not based on Congressional action, but rather is entirely a "regulatory creation." Appendix (App.) A at 3.

Petitioner Joseph J. Snyder, Sr., a U.S. Army veteran with 47 days of continuous, active service – who, because of an in-service injury, was unable to continue to serve – sought entitlement to VA disability benefits based on presumptive service connection for ALS. Since 2015, the VA has consistently denied him the benefit of the ALS presumption, leading Mr. Snyder, with representation by Paralyzed Veterans of America, to challenge these denials. *Id.* At both of the U.S. Court of Appeals for Veterans Claims and the Federal Circuit, Mr. Snyder argued that the Department did not have the statutory authority to include a 90-day service requirement in the presumption of service connection and that the 90-day service requirement was arbitrary and capricious, as the rulemaking record did not support any specific length of service requirement. *Id.* at 2, 8. Both lower courts disagreed with Mr. Snyder's analysis. *Id.* at 8, App. B at 1. Thus, the questions presented for review by this Court are:

1. Whether the Secretary of Veteran Affairs' imposition of a length of service requirement for the presumption of service connection

for ALS is counter to this Court's holdings in *Motor Vehicles Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29 (1983) and its progeny, which require "reasoned rulemaking," showing a rational connection between the facts found and the choices made?

2. Whether the Secretary's insertion of a condition precedent related to length of service into an evidentiary presumption violated the Veterans Benefits Act of 1957, which revoked the VA's authority to define who is – and who is not – a veteran for disability benefits based on this specific precondition?

3. Whether the Federal Circuit's decision declaring the extensive breadth of the Secretary's general rulemaking authority opens the door for the VA to impose upon veterans other requirements that Congress has not authorized for the receipt of benefits?

LIST OF ALL PARTIES

Joseph J. Snyder, Sr., petitioner on review, was the appellant below.

Denis McDonough, Secretary of Veterans Affairs, respondent on review, was the appellee at the U.S. Court of Appeals for the Federal Circuit.

Robert Wilkie, Secretary of Veterans Affairs, was the appellee at the U.S. Court of Appeals for Veterans Claims

RELATED PROCEEDINGS

1. U.S. Court of Appeals for the Federal Circuit

Snyder v. McDonough, No. 20-2168. Judgment issued June 9, 2021.

2. U.S. Court of Appeals for Veterans Claims

Snyder v. Wilkie, No. 19-3918. Judgment issued August 5, 2020

3. Board of Veterans' Appeals, Department of Veterans Affairs

In the Appeal of Joseph Snyder, Docket No. 19-10 099. Issued May 23, 2019

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INTRODUCTION

This petition presents an important issue that is critical to the thousands of veterans of the U.S. armed forces who suffer from amyotrophic lateral sclerosis, also known as ALS or Lou Gehrig's disease, and to the millions of veterans whose receipt of VA disability benefits is at risk from greater discretion afforded to the Secretary by the Federal Circuit's decision.

Here, the Secretary imposed a length-of-service requirement to permit a veteran to receive the benefit of an evidentiary presumption that the veteran's ALS was service connected (and therefore qualifying for VA disability benefits). And because of the nature of ALS, this evidentiary presumption effectively determines whether a veteran's ALS will qualify for service-connected disability benefits.

The basis for this requirement is contradicted by the very medical evidence the Secretary claims as support for it. This is not "reasoned decisionmaking." Moreover, the length-of-service requirement was upheld on nothing more than the unsupported notion that "at some point near the de minimis end of the spectrum of service length, there is too little time in service for there to have been enough activities in service to make the causal connection likely." App. A at 14.

The question of the parameters of the Secretary's general rulemaking authority also reaches beyond this case. First, because the Federal Circuit's decision authorizes the Secretary to act without Congressional authorization, the door is now open for any agency to rely on its general rulemaking authority for actions beyond those granted to it by Congress. Second, although the Secretary's unlawful and unreasoned length-of-service requirement undeniably works a

substantial and unjustified hardship on veterans who suffer from ALS, the Federal Circuit's rationale for accepting the requirement poses a substantial risk of providing the Secretary with unfettered discretion in imposing innumerable conditions on veterans' receipt of disability benefits, beyond the discretion granted to it by Congress.

Based then on both the broader implications of the Federal Circuit's decision for administrative law and the exceptional importance to the particular veterans affected by this limitation, Mr. Snyder requests that the Court grant certiorari and reverse the decision of the panel below.

OPINIONS BELOW

The Federal Circuit's panel opinion is reported at 1 F.4d 996 and can be found in Appendix A. The Federal Circuit's order denying rehearing en banc is unreported and can be found in Appendix D.

The U.S. Court of Appeals for Veterans Claim's memorandum decision is unreported and can be found in Appendix B.

The Board of Veterans' Appeals decision is unreported and can be found in Appendix C.

JURISDICTION

The judgment of the circuit court was filed on June 9, 2021. The order denying Mr. Snyder's petition for rehearing en banc was entered on August 24, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

LANGUAGE OF RELEVANT STATUTE

In 1957, Congress enacted what is now codified at 38 U.S.C. § 501:

> (a) The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including—
>
> (1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;
>
> (2) the forms of application by claimants under such laws;
>
> (3) the methods of making investigations and medical examinations; and
>
> (4) the manner and form of adjudications and awards.

38 U.S.C. § 501(a); *see* Veterans Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83 (June 17, 1957), at Title II, Part A, § 210(c) (App. E at 2-3).

LANGUAGE OF RELEVANT REGULATION

The Department of Veterans Affairs regulation at issue states:

> (a) Except as provided in paragraph (b) of this section, the development of amyotrophic lateral sclerosis manifested at any time after discharge or release from active military, naval, or air service is sufficient to establish service connection for that disease.
>
> (b) Service connection will not be established under this section:
>
> (1) If there is affirmative evidence that amyotrophic lateral sclerosis was not incurred during or aggravated by active military, naval, or air service;
>
> (2) If there is affirmative evidence that amyotrophic lateral sclerosis is due to the veteran's own willful misconduct; or
>
> (3) If the veteran did not have active, continuous service of 90 days or more.

38 C.F.R. § 3.318 (2021).

STATEMENT

A. Factual and Procedural Background

1. Comprehensive Medical Studies Demonstrate That Veterans Are Far More Likely To Die From ALS Than Those Who Did Not Serve, Regardless of the Length of Their Service.

ALS "is often relentlessly progressive and almost always fatal." AMYOTROPHIC LATERAL SCLEROSIS IN VETERANS: REVIEW OF THE SCIENTIFIC LITERATURE (2006) at 1, Nat'l Academies Press, *available at http://nap.edu/11757* (last visited Oct. 29, 2021) ("NAS Committee Report"). In the United States alone, as of 2016, the National ALS Registry[1] estimated that "over 16,000 people in the U.S. lived with ALS," or 5.2 of every 100,000 adults. Mehta, P. and J. Raymond, R. Punjani, T. Larson, F. Bove, W. Kaye, L.M. Nelson, B. Topol, M. Han, O. Muravov, C. Genson, B. Davis, T. Hicks, K. Horton, *Prevalence of amyotrophic lateral sclerosis (ALS), United States, 2016*, AMYOTROPHIC LATERAL SCLEROSIS & FRONTOTEMPORAL DEGENERATION (2021), *available at https://bit.ly/3jA4wF2* (last visited Oct. 26, 2021).

Paralyzed Veterans of America (PVA) internally tracks how many veterans with ALS it represents. From January 1, 2007, through August 27, 2020, PVA represented 11,680 veterans with ALS, including Mr. Snyder. And while PVA does

[1] Congress enacted legislation to create a National Amyotrophic Lateral Sclerosis Registry in 2008. ALS Registry Act, Pub. L. No. 110-373, 122 Stat. 4047 (Oct. 8, 2008). The Center for Disease Control and Prevention launched the registry in October 2010 and periodically produces a prevalence estimate. *See* About the Registry, National Amyotrophic Lateral Sclerosis (ALS) Registry, CTR. FOR DISEASE CONTROL & PREVENTION, *available at https://bit.ly/2Y2ywSx* (last visited Oct. 31, 2021).

not have an exact number, it is estimated that a "couple hundred" of the veterans with ALS who PVA represented did not meet the 90-day service requirement imposed by the regulation to receive presumptive service connection. U.S. Court of Appeals for the Federal Circuit, Oral Arg. at 26:36-27:12.

ALS has no cure and it guarantees that those afflicted will suffer a particularly cruel and painful decline. Victims of ALS suffer disruption of "communication between the highest levels of the nervous system and the voluntary muscles of the body" that leads "to weakness of muscles in a characteristic pattern and to spasticity." NAS Committee Report at 7. Eventually, they "are unable to move their arms and legs and cannot speak or swallow. When the connections between the neurons and the muscles responsible for breathing are disrupted, patients either die from respiratory failure or require mechanical ventilation to continue to breathe." *Id.* Most people who suffer from this horrible disease "die from respiratory failure within 5 years of the onset of symptoms." *Id.*

For reasons unclear to the scientific community, those with military service have a 50% greater chance of dying from ALS than those who did not serve. NAS Committee Report at 25. In 2005, Harvard University professors published the results of a study in several scientific journals, including *Neurology* and *Epidemiology*; the study found there was "a positive association between military service and an increased death rate from ALS." Weisskopf, M.G., Ph.D., & E.J. O'Reilly, M.Sc., M.L. McCullough, Sc.D., E.E. Calle, Ph.D., M.J. Thun, M.D., M. Cudkowicz, M.D., A. Ascherio, M.D., *Prospective study of military service and*

mortality from ALS, NEUROLOGY 64(1): 32-37 (Jan. 11, 2005), *available at https://bit.ly/3CI8q6v* (last visited Nov. 3, 2021) ("Weisskopf study"). The basis for the association was not clear, the researchers found, but statistical analysis demonstrated that there was statistically a much higher relative risk of death from ALS for those with military service, regardless of how long they served. *Id.* This study became known as the Weisskopf study.

Against this background, the Secretary asked the National Academy of Sciences to create a committee to review several scientific studies that were released in the early 2000s and had suggested there was an association between military service and the development of the disease. NAS Committee Report at 8-9. The National Academy of Sciences did so, creating the Committee on the Review of the Scientific Literature on Amyotrophic Lateral Sclerosis in Veterans (the "Committee"). *Id.* at v. The Committee noted that the Weisskopf study "showed that persons who reported *any* military service were *1.5 times* [i.e., 50%] more likely to have died with a notation of ALS on their death certificates as those who reported no military service." *Id.* at 32 (emphasis added). Notably, the Committee did not find that there was any connection between the increased incidence of ALS among veterans and the length of their term of service, but instead found that "there was an increase in risk *regardless of the number of years of service*." *Id.* (emphasis added). Finally, the Committee noted that the Weisskopf study was "the first to suggest a relationship between military service before the Gulf War and ALS mortality" and that the "implication is *that military service in general – not confined*

to exposures specific to the Gulf War – is related to the development of ALS." *Id.* at 34 (emphasis added).

Almost two years after the Committee presented its findings, the Secretary promulgated an interim final rule, establishing "a presumption of service connection for ALS for any veteran who develops the disease at any time after separation from service." Presumption of Service Connection for Amyotrophic Lateral Sclerosis, 73 Fed. Reg. 54,691, 54,691-92 (Sept. 23, 2008) (interim final rule). In the VA's news release announcing this action, the agency explained that it was aware that "the *continuing uncertainty regarding specific precipitating factors or events that lead to development of the disease* would present great difficulty for individual claimants seeking to establish service connection by direct evidence" and felt that this was a necessary step to help those veterans suffering from this horrible disease. *VA Secretary Establishes ALS as a Presumptive Compensable Illness*, News Release, OFFICE OF PUBLIC & INTERGOVERNMENTAL AFFAIRS, DEP'T OF VETERANS AFFAIRS, *available at https://bit.ly/3nGc9uW* (last visited Oct. 29, 2021) (emphasis added). The VA further explained in the September 2008 press release, that "[t]here simply isn't time to develop the evidence needed to support compensation claims [for ALS] before many veterans become seriously ill." *Id.*

The Secretary then took a step back from this very generous presumption, explaining the presumption "[did] not apply if the veteran did not have active, continuous service of 90 days or more." Presumption of Service Connection for Amyotrophic Lateral Sclerosis, 73 Fed. Reg. at 54,692. The Secretary rationalized

that while "the Weisskopf study relied upon by the IOM report concluded that the veterans have an increased risk of developing ALS compared to civilians *regardless of years of service*, a minimum-service requirement of 90 days would not be inconsistent with the study's findings because the study focused on veterans' 'years' of service and did not consider minimum periods of service." *Id.* (emphasis added). Although the Weisskopf study did not provide any basis for correlating 90 days of service and the development of ALS, or even address the question, the Secretary surmised that 90 days of active, continuous service would "ensure that an individual has had sufficient contact with activities in military service to encounter any hazards that may contribute to development of ALS," although the entire reason for the presumption is that the "hazards that may contribute to the development of ALS" are unknown. *Id.*

In making this determination, the Secretary referred to 38 U.S.C. § 1112(a), in which Congress provided presumptions of service connection for various conditions and required a minimum of 90 days of continuous service to be eligible for those specific presumptions. *Id.* The Secretary then adopted the 90-day minimum period from this statute to the ALS presumption, surmising that this would reflect Congress' judgment for the minimum length of service for <u>any</u> presumption of eligibility for service-connected disability benefits. *Id.*

On September 23, 2008, 38 C.F.R. § 3.318 became effective, concluding the VA's almost decade-long efforts to provide veterans with a beneficial presumption, should they ever be diagnosed with ALS. *Id.* at 54,691, 54,693 (promulgated at 38

C.F.R. § 3.318). This simple action of creating a presumption of service connection was a lifeline for the thousands of veterans who are diagnosed with this disease and for their families, who become caregivers and witnesses to the veteran's suffering. The creation of the presumption of service connection was laudable and is not being challenged. Indeed, without this presumption, as the Secretary has recognized, it would be effectively impossible for any veteran to establish that his or her ALS was service connected given that the causes of ALS are still unknown.

2. Petitioner Is A U.S. Army Veteran Diagnosed With ALS, But Is Denied VA Disability Benefits For His ALS Because He Was Medically Discharged Before Meeting the Minimum Service Period Required for the Presumption to Apply.

Mr. Snyder served honorably in the U.S. Army for 47 days in 1974. Appx. B at 2. He was medically discharged for an in-service knee injury that left him unfit for service. *Id*. He is a veteran under 38 U.S.C. § 101(2).

In November 2015, Mr. Snyder was diagnosed with ALS. *Id*. Shortly thereafter, Mr. Snyder made a claim for service connection for ALS, relying on 38 C.F.R. § 3.318. App. C at 3. The VA's Regional Office (RO) promptly denied his claim, explaining he did not have the requisite 90 days of continuous service. *Id*.

Several years later, Mr. Snyder sought to reopen his claim. *See id*. The RO again denied, but Mr. Snyder appealed. *See id*. The Board of Veterans' Appeals reopened his claim, but nonetheless denied on the merits. *See id*. at 3-6.

Mr. Snyder appealed to the U.S. Court of Appeals for Veterans Claims (Veterans Court), under 38 U.S.C. § 7252. There, he argued, *inter alia*, that the 90-day service requirement was arbitrary and capricious and that the Secretary had

created a "second-class" veteran by imposing this requirement, in that Mr. Snyder was a veteran eligible for other benefits, but ineligible for this one despite his status as a veteran and ALS diagnosis. *Id.* at 3. The Veterans Court affirmed the Board of Veterans' Appeals decision on July 14, 2020. *Id.* at 4.

Mr. Snyder appealed to the U.S. Court of Appeals for the Federal Circuit on August 6, 2020, under 38 U.S.C. § 7292. The circuit court affirmed the Veterans Court's decision. App. A at 17. First, it found the Secretary's ability to regulate the "nature and extent of proof and evidence," under the general rulemaking authority found at 38 U.S.C. § 501(a), included the ability to create a 90-day service requirement as a precondition for application of the ALS presumption. *Id.* at 10-11. Second, the circuit court held that the service requirement was reasonable, based on 38 U.S.C. § 1112(a)'s inclusion of a 90-day service requirement and the Weisskopf study's reliance on "years" of service. *Id.* at 13-17.

Mr. Snyder sought reconsideration *en banc* on July 21, 2021. The Federal Circuit denied Mr. Snyder's petition on August 24, 2021.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION ERODES THIS COURT'S PRECEDENTS THAT AGENCIES MUST UNDERTAKE "REASONED DECISIONMAKING," AND IS OUT OF LINE WITH MOST OTHER CIRCUITS.

Since the 1960s, the Court has acknowledged the importance of "expert discretion" in the administrative process, but cautioned that if requirements did not limit agency actions, "the strength of modern government [could] become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962). Thus, for almost four decades, the Court has held an agency's rulemaking "must examine relevant data and articulate a satisfactory explanation for its actions, including a 'rational connection between the facts found and the choice made.' " *Motor Vehicles Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see Dep't of Homeland Security v. Regents of Univ. of Cal.*, -- U.S. --, 140 S. Ct. 1891, 1905 (2020) (reiterating that the agency must engage in "reasoned decisionmaking"). Doing so "allows courts to assess whether the agency has promulgated an arbitrary and capricious rule by 'entirely fail[ing] to consider an important aspect of the problem [or] offer[ing] an explanation for its decision that runs counter to the evidence before [it].' " *Little Sisters of the Poor Saints Peter & Paul Home v. Penn.*, -- U.S. --, 140 S. Ct. 2367, 2384 (2020) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Even as recently as June 2021, the Court re-iterated the scope of actions required by an agency for its actions to be "reasonable and reasonably explained,"

under the Administrative Procedures Act. *See FCC v. Prometheus Radio Project*, -- U.S. --, 141 S. Ct. 1150, 1158-60 (2021). Nevertheless, the Federal Circuit's decision allows the VA to become the kind of "monster" the Court warned of half a century ago, by failing to provide a "rational connection between the facts found and the choice made," *see Burlington*, 371 U.S. at 167, *State Farm*, 463 U.S. at 43; *see also Prometheus*, 141 S. Ct. at 1160; *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010) (holding "speculation cannot substitute for evidence"), and creates a schism between the Federal Circuit and the majority of other circuits in what analysis is necessary to comply with the *State Farm* standard. *See*, *e.g.*, *Wages & White Lion Investments, LLC v. U.S. Food & Drug. Admin.*, -- F.4th --, 2021 WL 4955257, *3-*6 (5th Cir. Oct. 26, 2021) (applying *Prometheus*, *Regents*, and *State Farm* to hold the FDA's actions failed to reasonably consider important aspects of the problem, failed to support its decisions, and relied entirely on experience and expertise from reviewing other applications without considering the relevant actions expressed by the particular party); *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Human Servs.*, 14 F.4th 856, 873-76 (8th Cir. 2021) (discussing at length the anecdotal evidence *in the record* used to justify the rule the Center for Medicare & Medicaid Services promulgated); *State v. Biden*, 10 F.4th 538, 552-555 (5th Cir. 2021) (relying on *Prometheus* and *State Farm* to hold that the Department of Homeland Security's conclusory statements and reliance on experience and expertise alone is not sufficient to meet the standards of reasoned decisionmaking); *Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150, 172-75 (1st Cir. 2021)

(addressing whether the SSA's practices are supported by any rational view of the record, in accordance with *State Farm*); *Farrell v. Blinken*, 4 F.4th 124, 137-38 (D.C. Cir. 2021) (explaining that while the Department of State has the discretion to impose procedural requirements, it failed to adequately explain the requirements as they applied to the appellant); *Ctr. for Biological Diversity v. Haaland*, 998 F.3d 1061, 1068-69 (9th Cir. 2021) (holding the U.S. Fish & Wildlife Service failed to provide more than a cursory explanation for its decision and failed to explain how cited studies were relevant to the current findings); *Islam v. Sec'y, Dep't of Homeland Security*, 997 F.3d 1333, 1336-37 (11th Cir. 2021) (explaining the circuit court's role, per *State Farm*, and addressing the record at length to determine that the U.S. Citizenship & Immigration Services engaged in reasoned decisionmaking); *Wollschlager v. FDIC*, 992 F.3d 574, 580-82 (6th Cir. 2021) (relying on *State Farm* to determine whether the FDIC relied on relevant facts, fairly explained its reasoning, and reached a sensible decision); *Sorreda Transport, LLC v. U.S. Dep't of Transportation*, 980 F.3d 1, 3-5 (1st Cir. 2020) (explaining it could not find a rational connection between the facts found by the Federal Motor Carrier Safety Administration and the choice made unless the agency's findings are supported by substantial evidence in the record as a whole).

A. The Weisskopf Study Does Not Support the Secretary's Determination that a 90-Day Service Requirement "Would Not Be Inconsistent with the Record."

As noted above, the Weisskopf study serves as the main scientific support for the rulemaking. The results of the study were clear: there is a "positive association between military service and an increased death rate from ALS." Weisskopf study, at 34. The basis for the results is also clear: the study compared the number of people in the study who died from ALS with military service to the number of cases of people in the study who died from ALS with no military service. *Id.* This calculation created an adjusted relative risk of 1.58, and it is this number that allowed the Committee to conclude there was "limited and suggestive evidence of an association between military service and later development of ALS." *Id.*; NAS Committee Report at 32-34.

The study was equally clear that there was not a statistically relevant greater risk of dying from ALS with more years of service. Weisskopf study, at 35. Rather, the study showed an adjusted relative risk of 1.95 for those with a median of two years of service, an adjusted relative risk of 2.16 for those with a median of three years of service, an adjusted relative risk of 1.62 for those with a median of 4 years of service, an adjusted relative risk of 1.71 for those with a median of 5 years of service, and finally an adjusted relative risk of 1.57 for those with a median of 9 years of service. *Id.* at 34. As these statistics demonstrate, contrary to the Secretary's rule, longer periods of service *do not* correlate to an increased risk of ALS. Indeed, based on these numbers, the study concluded "the increased risk of

ALS was *largely independent of the number of years served in the military*." *Id.* at 35 (emphasis added).

It is also clear what is *not* in the record: There is *no evidence* of a correlation between dying from ALS and a period of service of 90 days or more. *Id.* at 33-36. *That question was not asked or addressed*. Rather, it appears that the subjects in the Weisskopf study were asked what years they served, i.e. the dates, not how long they served, i.e., the number of years. *Id.* at 33. Thus, someone like Mr. Snyder – who only served for 47 days – would have answered the question by stating he served in 1974 and would have been counted as having one year of service; it would not show whether he served 30 days, 90 days, or 363 days.

There is also *no evidence* that there is an "environmental factor" to blame for the correlation for which there would need to be "sufficient contact." *See id.* at 36. In fact, the study suggests that traumatic injury and intense physical activity – both of which are "more common for military personnel" – may be the culprits. *Id.*

Therefore, as there is no evidence of a correlation between dying from ALS and any specific number of days of service, nor any correlation that could be drawn based on the study's limitations, *see Ethyl Corp. v. EPA*, 541 F.2d 1, 37-38 (D.C. Cir. 1976) (explaining an agency's decision may be fully supportable, although based on inconclusive evidence, *if it is based on suggestive results of numerous studies*), Mr. Snyder's argument would be the same whether the Secretary had required 15 days, 45 days, or 180 days: there is no basis *in the record* to require a specific period of service for the presumption.

The Court should therefore grant certiorari to address the Federal Circuit's error in finding the decision to insert a 90-day service limitation rational. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 465 (1951) (reiterating that Congress, through the Administrative Procedures Act, has given the courts the ability to set aside an agency action when "it cannot conscientiously find that the evidence supporting that decision [was] substantial"); *Interstate Commerce Comm'n v. Louisville & N.R. Co.*, 227 U.S. 88, 90-92 (1913) (holding an agency must make decisions based on the fats found, not "by administrative fiat" or by assumptions); *see Sorreda Transport*, 980 F.3d at 3-5; *FMC Corp. v. Train*, 539 F.2d 973, 980-86 (4th Cir. 1976) (analyzing whether the record supported the agency decisions made, and in those instances when the models did not address the specific question, a major element was missing from the calculation, or the agency simply made presumptions of similarity, finding the agency action was arbitrary); *see also Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 137-83 (D.C. Cir. 1985) (Skelly Wright, J., dissenting) (disagreeing with the majority that there was any record evidence to support the agency's actions and finding none, argued that the agency's actions should be considered arbitrary).

B. The Federal Circuit's Decision Is Based on Unsupported Assumptions, Not the Record.

Addressing why he was including a 90-day service requirement, the Secretary explained such a requirement would "ensure sufficient contact" with whatever military hazards led to the development of ALS. Presumption of Service Connection

for Amyotrophic Lateral Sclerosis, 73 Fed. Reg. at 54,692. The Secretary cited to nothing in the record as support for this proposition. *See id.*

Instead, the Secretary relied on the fact that Congress had previously relied on this period in an unrelated statute. *CS Wind Vietnam Co., Ltd. v. U.S.*, 832 F.3d 1367, 1376-77 (Fed. Cir. 2016) (explaining it is the agency's responsibility to utilize their expertise to *explain* why something was done before, not just rely on the fact that the action was done before); *see Biden*, 10 F.4th at 555-56; *Am. Petroleum Instit. v. EPA*, 706 F.3d 474, 481 (D.C. Cir. 2013) (explaining *State Farm* is satisfied when the agency grounds its decision in historical data and projection data). The Secretary also tiptoed around the fact that the Weisskopf study did not break down the periods below two years of service by stating "a minimum-service requirement of 90 days *would not be inconsistent* with the study's findings." Service Connection for Amyotrophic Lateral Sclerosis, 73 Fed. Reg. at 54,692 (emphasis added); *see Wages & White Lion Investments*, 2021 WL at *6; *United Technologies Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 562 (D.C. Cir. 2010) (reiterating that a circuit court does not defer to an agency's unsupported suppositions). The Federal Circuit then simply accepted the Secretary's premise that a minimum service requirement was necessary to "ensure sufficient contact," even though the record is clear that it is unknown what one must be in contact with (if anything at all) or how long the hypothetical contact must be to develop ALS. App. A at 14; *but see United Technologies Corp.*, 601 F.3d at 562.

State Farm's requirement of "reasoned decisionmaking" must mean more than "not be[ing] inconsistent" with the record facts; "reasoned decisionmaking" must mean the rules and rationale should actually be supported by the record evidence. *See Clark Cty., Nev. v. FAA*, 522 F.3d 437, 441-42 (D.C. Cir. 2008) (holding the FAA had not engaged in reasoned decisionmaking when the only evidence in the record supported a conclusion opposite of what the agency had decided); *Ariz. Pub. Serv. v. United States*, 742 F.2d 644, 649, 649 n.2 (D.C. Cir. 1984) (reiterating that the agency's decision needs to be supported by substantial record evidence and that "mere conjecture and abstract theorizing offered in a vacuum are inadequate to satisfy" the agency's responsibility to engage in reasoned decisionmaking); *Public Media Ctr. v. FCC*, 587 F.3d 1322, 1331-32 (D.C. Cir. 1978) (explaining an agency's explanation that its conclusion was rational and it found ample support in the record is not sufficient). Therefore, as the Secretary's unsupported assumptions do not meet the standards first announced in *Burlington,* honed in *State Farm*, and most recently applied in *Prometheus*, certiorari is warranted. *See Burlington*, 371 U.S. at 167, *State Farm*, 463 U.S. at 43; *see also Prometheus*, 141 S. Ct. at 1160; *Brewer*, 562 U.S. at 996.

C. The Federal Circuit's Decision Stretches the Secretary's Actions Beyond Logical Limits.

The Federal Circuit found that the Secretary did not find reliable evidence of a potential correlation between ALS and periods of service as short as 90 days. App. A at 14. The record does not support this finding.

The question of whether there was a potential correlation between ALS and shorter periods of service was not asked in the study, *cf.* Weisskopf study, at 33, nor can it logically be extrapolated from the information that was provided. *See State Farm*, 463 U.S. at 43; *Biden*, 10 F.4th at 555-56; *Am. Petroleum Instit.*, 706 F.3d at 481; *United Technologies Corp.*, 601 F.3d at 562; *FMC Corp.*, 539 F.2d at 980-86. The information is also not within the Secretary's expertise, such that he could generalize based on the agency's inherent knowledge. *See Great Lakes Comm. Corp. v. FCC*, 3 F.4th 470, 476-77 (D.C. Cir. 2021) (explaining it is appropriate for an agency to rely on common sense and predictive judgment when it is within the agency's area of expertise). Rather, the lack of knowledge about the causes of this disease necessarily means it is not within the agency's area of expertise or inherent knowledge. NAS Committee Report at 8.

Because the Federal Circuit needed to make a reasonableness determination based on the record evidence and "a reasonable predictive judgment based on the evidence it *had*," and did not do so, its decision is in direct contrast to other circuits' and this Court's decisions. *Prometheus*, 141 S. Ct. at 1160 (emphasis added); *State Farm*, 463 U.S. at 43; *Biden*, 10 F.4th at 555-56; *see also Am. Petroleum Instit.*, 706 F.3d at 481.; *United Technologies Corp.*, 601 F.3d at 562. Mr. Snyder therefore requests that the Court grant the petition for certiorari on the question of whether the Secretary has provided a rational, supported connection between the facts found in the record and the decision he made, in order to address this split and the lack of compliance with this Court's decisions.

II. THE SECRETARY'S AUTHORITY TO CREATE A PRESUMPTION DOES NOT EXTEND TO EXCLUDING A CLASS OF VETERANS FROM A LIFE-CHANGING BENEFIT BASED ON THE NUMBER OF DAYS OF SERVICE.

No one disputes that Congress gave the Secretary broad general rulemaking authority, but he cannot act where Congress has the prerogative. 38 U.S.C. § 501(a); *Sullivan v. Zebley*, 493 U.S. 521, 528 (1990) (noting when Congress has expressly granted the agency rulemaking power, the court's role is to determine whether the Secretary has exceeded the Secretary's statutory authority); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-302 (1979) (explaining "the exercise of quasi-legislative authority" must be "rooted in a grant of such power by the Congress and subject to limitations which that body imposes).

Despite the Federal Circuit's lack of discussion on this argument, 38 U.S.C. §501(a)(1) is clear: there is no express grant of authority to create veteran classes as part of the Secretary's general rulemaking authority to promulgate "regulations with respect to the nature and extent of proof and evidence."[2] *Id.* Nor can Congress' lack of express prohibition be seen as permission. *See N.Y. Stock Exchange LLC v. SEC*, 962 F.3d 541, 552-53 (D.C. Cir. 2020); *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 135 (D.C. Cir. 2006); *Railway Labor Execs' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994), *amended*, 38 F.3d 1224 (D.C. Cir. 1994).

[2] The Federal Circuit conceded that the plain language of the statute does not expressly provide for this authority. App. A at 9.

Rather, the legislative history shows Congress intended to retain certain authority – thus, there was no "gap to fill" nor was the Secretary's inclusion of a 90-day service requirement within the "generally defined grant" – and the Court should grant certiorari to correct the Federal Circuit's decision.

A. Through the Veterans Benefits Act of 1957, Congress Left No Gap to Fill with Regard to the Extent of the "Generally Defined Grant" of Authority to Prescribe Regulations with Respect to the Nature and Extent of Proof and Evidence.

Well before the existence of the VA as a modern administrative agency, Congress granted the executive branch the authority to define classes of veterans. Economy Act, Pub. L. No. 2, Title I, § 4, 48 Stat. 8 (March 20, 1933). When the modern agency was created twenty-four years later, however, Congress did not reauthorize this grant to the executive branch. Instead, Congress returned this power to the legislative branch through the Veterans Benefits Act of 1957. Thus, where the Economy Act had an express grant, the Veterans Benefits Act replaced that language with purposeful silence. *Compare* eterans Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83 (June 17, 1957), at Title II, Part A, § 210(c) (App. E at 2-3) *with* Economy Act, Pub. L. No. 2, Title I, § 4 (App. E at 14).

This silence has meaning. *See Sullivan*, 493 U.S. at 537 (holding the Secretary cannot nullify congressional choice of actions); *Chrysler Corp.*, 441 U.S. at 301-302; *see also Regents of Univ. of Cal.*, 140 S. Ct. at 1921 (Roberts, C.J., dissenting) (emphasizing that an "agency literally has no power to act unless and until Congress confers power upon it"). Congress did not leave a "gap to fill," *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984); Congress

kept the authority for itself to say who is a veteran, how the classes of veterans can be divided, and when days of service can be required as a precondition of a class.[3,4]

The Federal Circuit's implicit determination otherwise is counter to this Court's holding in *Sullivan* and *Chrysler Corp.*, and certiorari should be granted for this Court to address the boundaries of the Secretary's general rulemaking authority in light of the veterans benefits statutory scheme.

B. The Federal Circuit's Decision Creates a Circuit Split For Determining Whether Congressional Silence Equates to a Grant of Regulatory Authority.

The Federal Circuit concluded that the Secretary's broad general rulemaking authority "encompasse[d] particular topics that are not themselves expressly mentioned as long as they come within the generally defined grant," App. A at 9; this creates a split among the circuits which have addressed this issue, suggesting a

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[3] This is not a simple recodification or a scrivener's error. *See United States v. Wells*, 519 U.S. 482, 496-97 (1997) (explaining recodification does not amend prior enactments unless it does so clearly, and when it is done clearly, the re-enactment canon would not apply). Congress enacted Part B – Part E of the Veterans Benefits Act of 1957 to address the different requirements or conditions to obtain compensation benefits, further demonstrating that *Congress* took back the ability to create classes and put conditions on service to be entitled to certain benefits. Veterans Benefits Act of 1957, Pub. L. No. 85-56, Title II, Part B – Part E (App. E at 7-12); *see Wells*, 519 U.S. at 496-97.

[4] The Federal Circuit's explanation that "[n]othing in 101(2) requires that all veterans be subject to the same regulatory evidentiary requirements, no matter their circumstances" missed Mr. Snyder's point. App. A at 11. The argument presented was not that 38 U.S.C. § 101(2) "requires that all veterans be subject to the same regulatory evidentiary requirements," but rather that, when those distinctions are made, it is for *Congress* to do so, not the Secretary. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining when a court reviews these types of cases, it "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic *and political* magnitude to an administrative agency").

grant of certiorari would be appropriate. *See Huawei Technologies USA, Inc. v. Fed. Comm. Comm'n*, 2 F.4th 421, 436 (5th Cir. 2021); *N.Y. Stock Exchange LLC*, 962 F.3d at 552-53; *Colo. River Indian*, 466 F.3d at 135; *Railway Labor Execs' Ass'n*, 29 F.3d at 671; *see also Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (holding Congressional silence does not equate to the granting of agency authority to exercise rulemaking authority in the area of silence).

In *Huawei*, the Fifth Circuit explained that contrary to the FCC's assertions that the court "must defer to the agency's construction of [the statute] unless the statute explicitly withholds authority to adopt" the rule, the circuit had "repeatedly rejected '[t]his nothing-equals-something' argument." *Huawei*, 2 F.4th at 436 (quoting *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460-62) (5th Cir. 2020)). The circuit court continued that only " 'legislative *intent to delegate* such authority . . . entitles an agency to advance its own statutory construction for review' under *Chevron's* 'deferential second prong.' " *Id.* (quoting *Gulf Fishermens*, 968 F.3d at 461). Thus, the Fifth Circuit held there must be some sort of specific intent to grant the agency the power sought, not just a "generally defined grant." *Compare id. with* App. A. at 9.

The D.C. Circuit has reached a similar conclusion for decades. *See Railway Labor Execs'*, 29 F. 3d at 671. There, the National Mediation Board effectively argued that "*Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not

written in 'thou shall not' terms)." The D.C. Circuit held this was not true, as it was "both flatly unfaithful to the principles of administrative law" and "refuted by precedent." *Id.*

In *Colorado River Indian Tribes*, the D.C. Circuit analyzed whether the National Indian Gaming Commission (Commission) had the "authority to promulgate regulations establishing mandatory operating procedures for certain kinds of gambling in tribal casinos." *Colo. River Indian Tribes*, 466 F.3d at 135. The Commission conceded, as the Federal Circuit did in *Snyder*, that "no provision of the [enabling statute] explicitly [granted the Commission] the power to impose operational standards." *Id.* at 137. Instead, the Commission argued that its general rulemaking authority implicitly provided it with the authority, "so long as [the regulations were] 'reasonably related to the purposes of the enabling legislation.' " *Id.* (quoting *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973)). The D.C. Circuit rejected the Commission's argument, stating while "Congress wanted to ensure the integrity of Indian gaming, . . . it [was] equally clear that Congress wanted to do this in a particular way," "through the 'statutory basis for the regulation of gaming' provided in the Act," not to give the Commission carte blanche. *Id.* at 140.

The D.C. Circuit rejected this argument again in *New York Stock Exchange*. There, the court noted that *Chevron* had changed "the framework for judicial review

of agency action. And *Mourning* has been effectively diluted by later cases."[5] *N.Y. Stock Exchange*, 962 F.3d at 546. The D.C. Circuit continued that an agency's suggestion that *Chevron* deference is due " 'any time a statute does not expressly *negate* the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent.' " *Id.* at 553 (quoting *Am. Bar Ass'n v FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005)).

Finally, in *Bayou Lawn*, the Eleventh Circuit discussed whether the Department of Labor had the authority to exercise rulemaking authority over the H-2B immigration program, when Congress had not explicitly provided the Department of Labor with that authority. *Bayou Lawn*, 713 F.3d at 1084-85. Holding the agency could not promulgate rules regarding the H-2B immigration program, the circuit court explained "if congressional silence [was] a sufficient basis upon which an agency may build a rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change and 'agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.' " *Id.* (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)).

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[5] The Federal Circuit's decision parallels the analysis in *Mourning*. As noted by the D.C. Circuit, however, this analysis is no longer leading precedent. *N.Y. Stock Exchange LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020). *Mourning* was last cited by the Court almost two decades ago and was last cited by the Federal Circuit in *Chrysler Corporation v. United States*, 592 F.3d 1330, 1336 (Fed. Cir. 2010), issued over a decade ago.

Therefore, because the Fifth, Eleventh, and D.C. Circuit have all held that an agency's authority must specifically be conferred and not supplied through omissions, the Federal Circuit's decision should be reviewed to address the conflict between the circuits on the important issue of whether the Secretary inherently has the authority to include a specific precondition for an evidentiary rule to apply.

C. The Federal Circuit's Decision Is An Outlier, Allowing the Agency to Add Service Requirements for Other Disabilities Without Congressional Authorization.

Every circuit to address whether an agency's actions fall within its "general rulemaking authority" has started with the same inquiry: is there a gap to fill within the statute? *See In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1255-61 (11th Cir. 2020) (analyzing the CARES Act and whether the Small Business Administration has the authority to implement certain rules related to the Paycheck Protection Program under its general rulemaking authority); *N.Y. Stock Exchange*, 962 F.3d at 556-58; *Fournier v. Sebelius*, 718 F.3d 1110, 1119-23 (9th Cir. 2013) (discussing whether the Social Security Administration has the authority under its general rulemaking authority to address question about dental coverage under Medicare); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 816-18 (10th Cir. 2012) (explaining the regulation was not valid when there was no gap to fill); *Hardy Wilson Memorial Hosp. v. Sebelius*, 616 F.3d 449, 456-58 (5th Cir. 2010) (holding the governing statute was ambiguous on the specific question asked and that the agency's general rulemaking authority gave it broad discretion in that instance); *Khan v. United States*, 548 F.3d 549, 554-56 (7th Cir. 2008) (explaining *Chevron*

review is appropriate for regulations promulgated under an agency's general rulemaking authority); *Citizens Coal Council v. U.S. EPA*, 447 F.3d 879, 890-92 (6th Cir. 2006) (discussing whether Congress has left any gaps for the EPA to fill under the Rahall Amendment and whether it was appropriate to rely on the agency's general rulemaking authority in that instance); *Kikalos v. C.I.R.*, 190 F.3d 791, 795-98 (7th Cir. 1999) (explaining the Commissioner of Internal Revenue had broad general rulemaking authority for areas where Congress had left a gap to fill); *Railway labor Execs'*, 29 F.3d at 670-71. Both prior to and after *Snyder*, the Federal Circuit was no different, addressing whether specific VA rulemakings fell within the Secretary's general rulemaking authority, only after conducting a thorough review of whether Congress had already spoken to the issue. *See Buffington v. McDonough*, 7 F.4th 1361, 1364-67 (Fed. Cir. 2021); *Gallegos v. Principi*, 283 F.3d 1309 (Fed. Cir. 2002); *Lofton v. West*, 198 F.3d 846 (Fed. Cir. 1999).

In *Lofton*, the Federal Circuit addressed whether the Secretary overstepped his authority in codifying "a long-standing common law principle known as the 'slayer's rule,' " which would prohibit the appellant from receiving dependency and indemnity compensation after she shot her veteran husband, when the relevant statute – 38 U.S.C. § 1310 – contained no such bar to receiving benefits. *Lofton*, 198 F.3d at 850. Finding that the statute was silent on the exact issue, the circuit court explained that the VA has the authority to promulgate a "slayer's rule" pursuant to its authority under 38 U.S.C. § 501(a) to "promulgate regulations that are 'necessary or appropriate to carry out the laws administered by the Department and

are consistent with those laws,' " so long as doing so was a reasonable "gap-filling measure." *Id.* (quoting 38 U.S.C. § 501(a)). Thus, the Federal Circuit continued, since Congress legislates against a common law background and did not specifically foreclose the "slayer's rule" application, including it in the regulations was a reasonable "gap-filling measure." *Id.*

A similar analysis took place in *Gallegos*. 283 F.3d at 1312-15. There, the Federal Circuit analyzed whether 38 U.S.C. § 7105 left a gap for the agency to define "notice of disagreement" by regulation. *Id.* at 1314. Finding that such a gap existed, the circuit court explained that the Secretary was within his authority to promulgate such a rule, as he had the authority under 38 U.S.C. § 501 to " 'prescribe all rules which are *necessary or appropriate* to carry out the laws administered by the Department and are consistent with those laws.' " *Id.* 1312 (quoting 38 U.S.C. § 501(a) (1994)) (emphasis in original).

Finally, in *Buffington*, the Federal Circuit addressed when a veteran's award of disability benefits is reinstated if the veteran later returns to active duty after being awarded VA benefits. *Buffington*, 7 F.4th at 1364. The veteran argued that his benefit should automatically restart at discharge from active service and that the governing regulation which required him to re-apply for the benefit was not a valid exercise of the Secretary's general rulemaking authority. *Id.*

The Federal Circuit began its analysis by discussing whether Congress had left a gap in the statutory scheme. *Id.* at 1364-65. It first analyzed 38 U.S.C. § 5304(c), and held Congress was clear that a veteran cannot receive both disability

payments and active service payments. *Id.* at 1365. The Court then turned to 38 U.S.C. § 5112(b)(3), and held that Congress clearly had set the effective date for *discontinuing* disability benefits, but had not explicitly "establish[ed] when or under what conditions compensation recommences once a disabled veteran leaves active service." *Id.* Thus, the circuit court held Congress had left a gap for the agency to fill. *Id.*

The Federal Circuit then addressed, before turning to *Chevron*'s second step, whether the Secretary had the authority to promulgate the specific rule. *Id.* at 1366-67. Focusing on 38 U.S.C. § 501(a), the circuit court held that the authority " 'to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws' " gave the Secretary the "power to fill gaps in the veterans' benefits scheme." *Id.* at 1366 (quoting 38 U.S.C. § 501(a) and citing *Contreras v. United States*, 215 F.3d 1267, 1274 (Fed. Cir. 2000)). The Federal Circuit then held that the Secretary's regulation was "a reasonable gap-filling regulation." *Id.* at 1367.

And while the Federal Circuit found a "gap" in each of the above cases, the D.C. Circuit laid the groundwork for what should happen when a court finds that no such "gap" exists, even with broad general rulemaking authority afforded to an agency. *N.Y. Stock Exchange*, 962 F.3d at 552-59; *Railway Labor Execs'*, 29 F.3d at 670-71. In *Railway Labor Execs'*, the D.C. Circuit analyzed whether the National Mediation Board had the authority to adopt certain procedures without an express statutory grant of such authority. *Railway Labor Execs'*, 29 F.3d at 670-71. The

Board argued "that it posess[ed] *plenary* authority to act within a given area simply because Congress [had] endowed it with *some* authority to act in that area." *Id.* at 670. The circuit court rejected this argument, holding that the

> *duty* to act under certain carefully defined circumstances simply [did] not subsume the *discretion* to act under other, wholly different, circumstances unless the statute bears such a reading. . . . The language of Section 2, Ninth, the structure of the Act, and the legislative history all compel a contrary conclusion

that the "Board is empowered" to certify employee representation "in every instance in which a question of representation arguably exists." *Id.* at 671 (emphasis in original). Thus, even though the Board had broad authority to act in certain circumstances, Congress had not left a gap to fill in *this* circumstance, and the Board's broad authority did not give the agency the authority to act here. *Id.*

Similarly, in *New York Stock Exchange*, the SEC essentially argued that its broad rulemaking authority "gave it authority to act, as it saw fit, without any other statutory authority to adopt" the specific program in question. *N.Y. Stock Exchange*, 962 F.3d at 554. The D.C. Circuit balked at this, explaining "an agency cannot purport to act with the force of law without delegated authority from Congress" and that "deference under *Chevron* step two is premised on either an 'express delegation of authority' or an 'implicit' 'legislative delegation to an agency,' " not just general rulemaking authority. *Id.* (quoting *Chevron*, 467 U.S. at 843-44).

As all of these cases demonstrate, two fundamental truths have evolved in these types of cases: one, the circuit court must first determine whether the

statutory provision leaves a "gap for an agency to fill," *Buffington*, 7 F.4th at 1364-65; *In re Gateway Radiology Consultants, P.A.*, 983 F.3d at 1255-61; *N.Y. Stock Exchange*, 962 F.3d at 556-58;, 718 F.3d at 1119-23; *Contreras-Bocanegra*, 678 F.3d at 816-18; *Hardy Wilson Memorial Hosp.*, 616 F.3d at 456-58; *Khan*, 548 F.3d at 554-56; *Citizens Coal Council*, 447 F.3d at 890-92; *Gallegos*, 283 F.3d at 1312; *Lofton*, 198 F.3d at 850; *Kikalos*, 190 F.3d at 795-98, and two, it is the gap in the statute that renders the regulation "necessary or appropriate." *Id.*

In *Snyder*, though, the Federal Circuit deviated from these fundamental truths, warranting certiorari.

Unlike its other cases to address this issue, and unlike every other circuit court that has been in a similar position, the Federal Circuit did not specifically analyze whether there was a gap to fill in 38 U.S.C. § 501 (and the statute to analyze must be 38 U.S.C. § 501, as there is no statute providing for the ALS presumption). *See* App. A. Instead, the Federal Circuit merely explained the Secretary's broad rulemaking authority "encompasses particular topics that are not themselves expressly mentioned." *Id.* at 9; *cf. Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8-9 (D.C. Cir. 2002) (explaining the circuit court cannot presume agency authority without Congress explicitly or impliedly leaving a gap to fill). This lack of discussion of *where* the statutory "gap" is that would give the Secretary an implied delegation of authority is not just an oversight by the circuit court, but rather has the potential to open Pandora's box.

For example, since the decision did not identify any "gap," the Secretary could now promulgate rules that impose arbitrary length of service requirements for *any* benefit, no matter how untethered to any factual justification for so doing. One such regulation could be to require 180 days of service to be eligible for service connection for post-traumatic stress disorder (PTSD), under the guise that a service member would not be exposed to sufficient stressors within the first 180 days of service for PTSD to manifest. And even if – as here – there was no data to specifically support that finding, just a finding that the rule was not "inconsistent with any data reviewed, " the Secretary could simply argue that there was a "gap" in his broad rulemaking authority to promulgate rules "necessary or appropriate" to carry out its organic statute and imposing length of service requirements, no matter how arbitrary, reasonably fills that gap.

The Federal Circuit's decision has therefore not only failed to comply with its own analysis, but it has created a "gap" with no limiting principle and sits as an outlier with at least six other circuit courts. Together, these deficiencies suggest certiorari is appropriate.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND SHOULD BE DECIDED IN THIS CASE.

More and more, we live in an administrative state, which "wields vast power and touches almost every aspect of daily life." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) (citing *Arlington v. FCC*, 569 U.S. 290, 313 (2013)) (Gorsuch, J., concurring). The Court has made clear though that this state should not go unchecked by the judiciary, and while the level of review afforded under the

Administrative Procedures Act is quite deferential, it is not without teeth. *See id.* at 2415-18; *see also Wages & White Lion Investments*, 2021 WL at *3. The questions presented in this petition ask the Court to address whether the administrative state, in exercising its already enormous authority, can rely upon the Congressional lacunae and evidentiary silence to set arbitrary requirements based solely on its unfettered discretion. Although it is undisputed that an agency can draw a line with respect to what is permitted or not permitted under a certain rule, it must have a reasoned basis for doing so. And arbitrary lines are not reasoned merely because they might not be "inconsistent" with the evidence. The Federal Circuit's decision holding the contrary lowers the bar of administrative scrutiny such that it presents no bar at all.

The question of whether the 90-day service requirement is arbitrary is also important because the Secretary and the Federal Circuit both acknowledged that obtaining service connection for this horrible disease on a direct basis is essentially impossible. In other words, this presumption effectively determines which veterans get disability benefits for ALS and which veterans do not. Thus, the Secretary's 90-day service requirement amounts to the VA turning its back on a group of veterans who have no way of obtaining service connection for this disease without this presumption. To take such drastic action, the Secretary, at a minimum, ought to have an affirmative justification rooted in actual evidence and premised on express Congressional authority for excluding these afflicted veterans and their families.

The Secretary does not, and the Court should address this action, as it is the antithesis of the VA's purpose.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Mr. Snyder respectfully requests that the Court grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals for the Federal Circuit

JOSEPH J. SNYDER,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2020-2168

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-3918, Judge William S. Greenberg.

Decided: June 9, 2021

JENNIFER ANN ZAJAC, Paralyzed Veterans of America, Washington, DC, argued for claimant-appellant. Also represented by LINDA E. BLAUHUT.

KYLE SHANE BECKRICH, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by JEFFREY B. CLARK, ELIZABETH MARIE HOSFORD, ROBERT EDWARD KIRSCHMAN, JR.; BRIAN D. GRIFFIN, DEREK SCADDEN, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before TARANTO, LINN, and CHEN, *Circuit Judges*.

TARANTO, *Circuit Judge*.

Joseph Snyder served in the U.S. Army for less than 50 days in 1974—during the Vietnam era, a "period of war," 38 C.F.R. § 3.2(f)—his service ending with an honorable discharge when a knee injury rendered him unfit. Four decades later, he was diagnosed with Amyotrophic Lateral Sclerosis (ALS). He sought disability benefits for ALS from the Department of Veterans Affairs (VA) under 38 U.S.C. § 1110, which provides for compensation for service-connected disability—specifically, for "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, air, or space service, during a period of war," subject to exceptions (for dishonorable discharge and willful misconduct or abuse of alcohol or drugs) inapplicable to Mr. Snyder. A decision of the U.S. Court of Appeals for Veterans Claims (Veterans Court) rejecting his claim for benefits based on ALS is before us.

In the Veterans Court, Mr. Snyder relied, to meet the fundamental requirement of service connection, solely on an argument about a VA regulation, adopted in 2008 and made final in 2009, that provides a presumption of service connection for veterans with ALS if specified preconditions are satisfied. 38 C.F.R. § 3.318(a), (b). Mr. Snyder undisputedly does not satisfy one of those preconditions—that the veteran "have active, continuous service of 90 days or more." *Id.* § 3.318(b)(3). Nevertheless, Mr. Snyder argued in the Veterans Court that the 90-day-service precondition is unlawful, because contrary to the statutory scheme and arbitrary and capricious, and that the presumption should remain in place with the precondition nullified, entitling him to a finding of service connection.

The Veterans Court rejected Mr. Snyder's contention that the 90-day-service precondition is unlawful. We have jurisdiction to review that legal conclusion. 38 U.S.C. § 7292(a). We decide the legal issue de novo. *Bazalo v. West*, 150 F.3d 1380, 1382 (Fed. Cir. 1998). We affirm.

I

Mr. Snyder challenges the validity of a portion of 38 C.F.R. § 3.318, which establishes a presumption of "service connection"—the term used for the requirement of § 1110 and the counterpart provision for peacetime service, 38 U.S.C. § 1131; *see Walker v. Shinseki*, 708 F.3d 1331, 1334 (Fed. Cir. 2013)—for veterans who develop ALS, under certain prescribed preconditions. Section 3.318 provides:

> (a) Except as provided in paragraph (b) of this section, the development of amyotrophic lateral sclerosis manifested at any time after discharge or release from active military, naval, or air service is sufficient to establish service connection for that disease.
>
> (b) Service connection will not be established under this section:
>
> > (1) If there is affirmative evidence that amyotrophic lateral sclerosis was not incurred during or aggravated by active military, naval, or air service;
> >
> > (2) If there is affirmative evidence that amyotrophic lateral sclerosis is due to the veteran's own willful misconduct; or
> >
> > (3) *If the veteran did not have active, continuous service of 90 days or more.*

38 C.F.R. § 3.318 (emphasis added).

This presumption is entirely a regulatory creation. Although Congress has enacted several provisions that

establish service-connection presumptions applicable in certain circumstances, *see*, *e.g.*, 38 U.S.C. §§ 1112, 1116–1118, Congress has created no statutory presumption applicable to ALS. The Secretary promulgated § 3.318 pursuant to the general rulemaking authority granted by 38 U.S.C. § 501(a) to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department . . . , including . . . regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws." The law being carried out, the Secretary specified, was the requirement of "service connection" stated in 38 U.S.C. § 1110. *See* Presumption of Service Connection for Amyotrophic Lateral Sclerosis, 73 Fed. Reg. 54,691, 54,692 (Sept. 23, 2008) (Interim Final Rule) (reciting § 501 authority applied to service-connection requirement of § 1110).

The Secretary's proposal and adoption of the regulation followed receipt of a VA-commissioned report by the National Academy of Sciences Institute of Medicine (IOM) that reviewed studies of the relationship of ALS to military service. *See* Institute of Medicine, *Amyotrophic Lateral Sclerosis in Veterans: Review of the Scientific Literature* (Nov. 2006) (IOM Report); *see also* Interim Final Rule, 73 Fed. Reg. at 54,691. The IOM Report notes that ALS is a neuromuscular disease that causes nerve cells in the brain and spinal cord to degenerate and, accordingly, is almost always fatal. IOM Report at 1. It also states that, although about 5–10% of ALS cases are inherited, the cause of the remaining cases is still unknown. *Id.* Nevertheless, the IOM Report states, the scientific literature indicated that there was "limited and suggestive evidence of an association between military service and later development of ALS." *Id.* at 3; *see also id.* at 35 (identical language in bold as final conclusion of the IOM Report).

Central to that conclusion in the IOM Report, *see id.* at 32–35, is a study by M.G. Weisskopf and colleagues

published not long before the IOM Report. The Weisskopf study compared the incidence of ALS-related deaths among those with military service and those without. M.G. Weisskopf et al., *Prospective Study of Military Service and Mortality from ALS*, 64 Neurology (1) 32 (2005) (Weisskopf). The Weisskopf study analyzed a population (previously assembled for unrelated purposes) of 408,288 individuals, of whom 281,874 had served in the military, including during World War I, World War II, the Korean War, or the Vietnam War.[1] *Id.* at 32. The study split those participants who had military service into equal "quintiles"—according to years of service—and calculated the median length of service, measured in whole-number years, for the participants in each quintile. *See id.* at 33 ("The total number of years of service was categorized by quintile. . . . For total years served, this was done by assigning medians to each quintile and modeling the median values as a continuous variable."); *id.* at 34 (table showing "Adjusted relative risk (RR) of ALS by years of military service, 1989–1998," rows for no military service and each of five quintiles, by "Median years").[2] Considering factors like age, smoking, and alcohol intake that might have affected rates of ALS, the Weisskopf study found that the relative risk of developing ALS was higher for those with military service than those without, that "[t]he increased risk of ALS was largely independent of the *number of years served* in the military," and that the increased risk was "largely independent of the branch of military service, the years when service occurred, *or the number of years served*." *Id.* at 34–35 (emphases added).

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[1] The study's results focused on participants' service in World War II, Korea, and Vietnam; only 592 people reported service during World War I. Weisskopf at 35.

[2] The median years of service, from the first quintile to the fifth quintile, respectively, were: 2 years, 3 years, 4 years, 5 years, and 9 years. Weisskopf at 34.

The 2006 IOM Report observes that, while other studies had focused only on the Gulf War, the Weisskopf study was "the first to suggest a relationship between military service before the Gulf War and ALS mortality." IOM Report at 34. The report notes greater limitations of the other studies reviewed, *id.* at 26–31, 35, but as to the Weisskopf study, it states that "overall it was a well-designed and well-conducted study" and that, despite "limitations inherent in an analysis of a cohort assembled for other purposes, the findings are intriguing." *Id.* at 34. "The implication is that military service in general—not confined to exposures specific to the Gulf War—is related to the development of ALS." *Id.* The IOM Report adds: "The findings, if validated in other studies, suggest that exposures during military service, even among those with no wartime service, might be responsible." *Id.*

In accordance with the conclusions of the IOM Report and the Weisskopf study, the Secretary proposed an interim final rule—effective immediately but subject to notice and comment before adoption as a permanent rule—establishing a presumption of service connection for "any veteran who develops [ALS] at any time after separation from service." Interim Final Rule, 73 Fed. Reg. at 54,691. The Secretary noted the observed link between ALS and military service and also found that it was "unlikely that conclusive evidence [of the causes of ALS] will be developed in the foreseeable future." *Id.* Given the rapidly progressive and degenerative nature of the disease, as well as "continuing uncertainty regarding specific precipitating factors or events that lead to development of [ALS]," the Secretary determined that there would be "great difficulty" for veterans seeking benefits for ALS to prove service connection in the absence of the presumption. *Id.* at 54,692.

After explaining the basis for adopting a presumption at all, the Secretary enumerated three circumstances for which post-military-service ALS would not suffice to establish service connection. *See id.* First, service connection

would not be established "if there is affirmative evidence that ALS was *not* incurred during or aggravated by" the veteran's military service—which is what justifies the "presumption" label. *Id.* (emphasis added); *see also* 38 C.F.R. § 3.318(b)(1). Next, service connection would not be presumed if, consistent with the exception in § 1110 itself, there is "affirmative evidence that ALS was caused by the veteran's own willful misconduct." Interim Final Rule, 73 Fed. Reg. at 54,692; *see also* 38 C.F.R. § 3.318(b)(2). Finally, and relevant here, service connection would not be presumed "if the veteran did not have active, continuous service of 90 days or more." Interim Final Rule, 73 Fed. Reg. at 54,692; *see also* 38 C.F.R. § 3.318(b)(3).

As to the 90-day-service precondition, the Secretary reasoned:

> Although the Weisskopf study relied upon by the IOM report concluded that veterans have an increased risk of developing ALS compared to civilians regardless of years of service, a minimum-service requirement of 90 days would not be inconsistent with the study's findings because the study focused on veterans' "years" of service and did not consider minimum periods of service. We believe that 90 days is a reasonable period to ensure that an individual has had sufficient contact with activities in military service to encounter any hazards that may contribute to development of ALS.

Interim Final Rule, 73 Fed. Reg. at 54,692. The Secretary noted that 90-day-service requirements also apply to presumptions of service connection for chronic and tropical diseases, citing 38 U.S.C. § 1112(a) and 38 C.F.R. § 3.307(a)(1). *Id.* Thus, the Secretary concluded, "Congress considered 90 days to be the minimum period necessary to support an association between such service and subsequent development of disease" and "for any shorter

period, it is more likely than not that ALS was not associated with service." *Id.*

After receiving comments, the Secretary adopted the interim rule as a final rule, which was later adopted as § 3.318. *See* Presumption of Service Connection for Amyotrophic Lateral Sclerosis, 74 Fed. Reg. 57,072, 57,072 (Nov. 4, 2009) (Final Rule). The Secretary noted:

> The ALS Association expressed support for this regulation and stated its belief that 90 continuous days of service in the military and a diagnosis of ALS are sufficient to establish presumptive service connection for that disease. New § 3.318 generally establishes presumptive service connection for ALS if a veteran had at least 90 continuous days of active military, naval, or air service and developed ALS at any time after separation from such service. We made no changes based on this comment.

Id. at 57,073.

II

Under the statute conferring jurisdiction on this court for this case, we must "hold unlawful and set aside" regulations that are (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (4) without observance of procedure required by law. 38 U.S.C. § 7292(d)(1). Mr. Snyder challenges the validity of § 3.318(b)(3)'s 90-day-service requirement, *first*, as exceeding the Secretary's statutory authority and, *second*, as arbitrary and capricious. Snyder Opening Br. at 16–29, 29–39. We must reject these challenges.

A

In promulgating 38 C.F.R. § 3.318, the Secretary invoked 38 U.S.C. § 501(a) as legal authority. We agree with the Secretary that § 501(a) supplies the required statutory authority for the regulation and that § 3.318, as an exercise of the § 501(a) authority to adopt conditional presumptions of facts required by 38 U.S.C. § 1110, is not contrary to other statutory provisions cited by Mr. Snyder.

Section 501(a) grants the Secretary the authority to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws," including "regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws." 38 U.S.C. § 501(a). Section 501(a) confers "broad" rulemaking authority. *Nat'l Org. of Veterans' Advocates, Inc. (NOVA) v. Sec'y of Veterans Affairs*, 669 F.3d 1340, 1345 (Fed. Cir. 2012). Such broad authority, defined in general terms, encompasses particular topics that are not themselves expressly mentioned as long as they come within the generally defined grant: "A regulation does not contradict the statutory scheme . . . simply because it addresses an issue on which the scheme is silent." *Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir. 1999).

Relying on § 501(a)(1), the Secretary has issued regulations—like the one at issue here—establishing a service-connection presumption for certain conditions without a statutory scheme explicitly permitting such presumptions. *See* 38 C.F.R. § 3.307(a)(6)(iv) (establishing a service-connection presumption for veterans exposed to herbicide agents "in or near the Korean DMZ"); *id.* § 3.307(a)(6)(v) (same for veterans who "regularly and repeatedly operated, maintained, or served onboard C-123 aircraft" "during the Vietnam era"); *id.* § 3.307(a)(7) (same for diseases "associated with exposure to contaminants in the water supply at

Camp Lejeune"); *id.* § 3.316 (same for diseases associated with "specified vesicant agents"). These presumptions, if otherwise supported on their merits and duly promulgated, come within the Secretary's power to issue "regulations with respect to the nature and extent of proof and evidence" that will suffice "to establish the right to benefits" claimed. 38 U.S.C. § 501(a)(1). A presumption, while not itself "evidence," is a measure "with respect to" the evidence that is necessary or sufficient under an applicable statutory standard. A presumption "affords a party, for whose benefit the presumption runs, the luxury of *not having to produce specific evidence to establish the point at issue*. When the predicate evidence is established that triggers the presumption, *the further evidentiary gap is filled by the presumption*." *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998) (emphases added).

Here, the presumption of service connection for ALS created by § 3.318 goes to the "nature and extent" of the evidence that a veteran must provide to prove service connection. A veteran with ALS need not "produce specific evidence," *id.*, showing that the disability "result[ed] from personal injury suffered or disease contracted in line of duty" or showing the specified "aggravation" in service, 38 U.S.C. § 1110. Instead, if the preconditions are satisfied, the presumption supplies the required evidence.[3] Evidentiary rules like this one are within the Secretary's rulemaking authority under § 501(a)(1).

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[3] The Board of Veterans' Appeals determined that Mr. Snyder had not made a case-specific showing of service connection. J.A. 17. That is hardly surprising, given that the causes of ALS are unknown. In the Veterans Court, Mr. Snyder relied solely on the regulatory presumption together with his argument that the presumption must be modified to eliminate the 90-day-service precondition.

Mr. Snyder suggests that because § 3.318 distinguishes veterans who meet particular requirements from those who do not, the regulation is an unlawful modification of the statutory definition of "veteran" in 38 U.S.C. § 101(2). *See* Snyder Opening Br. at 23–27. That contention is meritless. Section 3.318 does not modify the definition of "veteran," and there is no dispute that Mr. Snyder meets the definition. *See* Secretary Response Br. at 20. Nothing in § 101(2) requires that all veterans be subject to the same regulatory evidentiary requirements, no matter their circumstances. Various regulations make evidentiary distinctions without express statutory authorization. *See*, *e.g.*, 38 C.F.R. § 3.307(a)(6)(iv) (presumption applies only to veterans who operated "in or near the Korean DMZ"); *id.* § 3.307(a)(6)(v) (presumption applies only to veterans who "regularly and repeatedly operated, maintained, or served onboard C-123 aircraft" "during the Vietnam era"); *id.* § 3.307(a)(7) (presumption applies only to veterans who served at Camp Lejeune).

Mr. Snyder also points to 38 U.S.C. § 5303A to support his argument that the Secretary exceeded his statutory authority. *See* Snyder Opening Br. at 22–24. But that provision, like § 101(2), is not inconsistent with regulations that make evidentiary requirements dependent on particular circumstances that not all veterans share. Section 5303A adds a general minimum-service requirement to the requirement of being a veteran for general-benefits eligibility, 38 U.S.C. § 5303A(b)(1), (2), but defines numerous exceptions to that added requirement, *id.* § 5303A(b)(3). The provision does not preclude the Secretary's regulatory relaxation of evidentiary requirements for service connection for veterans having particular physical disabilities and also meeting specified conditions.

We therefore reject Mr. Snyder's argument that § 3.318, with its 90-day-service requirement, exceeds the Secretary's statutory authority and contradicts certain statutory provisions. Mr. Snyder has not challenged the

procedural propriety of the promulgation of § 3.318. But he does argue that the rule, with its 90-day-service requirement, is arbitrary and capricious. Snyder Opening Br. at 29–39. We turn to that challenge.

B

Arguing that the 90-day-service requirement is "arbitrary and capricious," Mr. Snyder contends that (1) the Secretary did not offer a reasonable justification for comparing ALS to chronic and tropical diseases when imposing a 90-day-service requirement, *id.* at 31–37, and (2) the Weisskopf study found that military service was associated with an increased risk of ALS regardless of time served, *id.* at 37–39. Applying the deferential standard of review required for our assessment of this challenge, we must reject Mr. Snyder's argument.

Under 38 U.S.C. § 7292(d)(1), whose pertinent language is identical to that of the judicial-review provision of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), we must "set aside any regulation relied on by the Veterans Court that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" *Hansen-Sorenson v. Wilkie*, 909 F.3d 1379, 1384 (Fed. Cir. 2018) (quoting 38 U.S.C. § 7292(d)(1)). We follow the practice of treating the first two terms in the list as forming a single "arbitrary-and-capricious standard." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). That standard requires the agency's action to "be reasonable and reasonably explained." *Id.*

We have recognized that "treating like cases differently *can* be arbitrary and capricious," *Hansen-Sorenson*, 909 F.3d at 1384 (emphasis added and internal quotation marks omitted), but whether cases are "like" is a matter initially for the agency, and on that question, as on other factual and policy questions, distinctions need not be based on "conclusive proof," *Carpenter, Chartered v. Sec'y of Veterans Affairs*, 343 F.3d 1347, 1353 (Fed. Cir. 2003). Our

review of a regulation for compliance with the arbitrary-and-capricious standard is "deferential." *Prometheus Radio Project*, 141 S. Ct. at 1158. We may not "substitute [our] own policy judgment" for that of the Secretary. *Id.*; *see also McKinney v. McDonald*, 796 F.3d 1377, 1383 (Fed. Cir. 2015). In reviewing a challenge like Mr. Snyder's, "[a] court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio Project*, 141 S. Ct. at 1158. Although "we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). We conclude that § 3.318 passes muster under those standards.

The Secretary set forth most of his reasoning in announcing the Interim Final Rule. 73 Fed. Reg. at 54,691–92. The Secretary made clear that the question was what facts might justifiably support a presumption of the statutorily required element that a veteran's ALS is connected to "military service," *id.* at 54,691, *i.e.*, to "activities in military service," *id.* at 54,692—more specifically, what facts "support a presumption that the resulting disability was incurred in the line of duty during active military, naval, or air service," *id.* That focus on the needed connection to active military service reflects the statutory standard of 38 U.S.C. § 1110, which the Secretary cited. Interim Final Rule, 73 Fed. Reg. at 54,692.

The Secretary relied on the IOM report and particularly the IOM Report's description of the Weisskopf study as providing "'limited and suggestive evidence'" of an ALS association with military service, *id.* at 54,691, to conclude that "there is sufficient evidence indicating a correlation between ALS and activities in military service" to support

"a presumption of service connection" for veterans with ALS, *id.* at 54,691–92. The Secretary simultaneously concluded, however, that the justified presumption was conditional on a minimum period of service of 90 days. *Id.* at 54,692. "[W]e believe that, for any shorter period, it is more likely than not that ALS was not associated with service." *Id.*

The Secretary's rationale is easy to discern. First, the general logic is that the statutory requirement at issue is one of causal connection to activities in military service and, in the absence of evidence to the contrary, at some point near the de minimis end of the spectrum of service length, there is too little time in service for there to have been enough activities in service to make the causal connection likely. *See id.* (deeming it appropriate to adopt "a reasonable period to ensure that an individual has had sufficient contact with activities in military service to encounter any hazards that may contribute to development of ALS"). That logic is reasoned and reasonable.

Second, focusing on the record regarding ALS, the Secretary found no reliable evidence of a correlation between ALS and service of periods as short as 90 days. Specifically, the crucial Weisskopf "study focused on veterans' '*years*' of service and did not consider minimum periods of service." *Id.* (emphasis added). That reading of the Weisskopf study is supported by the study itself, which, as quoted above, makes clear that time measurements were in units of years, not any smaller units, and which supplies no evidence of a service-ALS correlation for veterans with service of periods substantially shorter than a year.

Third, the Secretary concluded that 90 days was "a reasonable period to ensure" a minimum degree of contact with hazards that may contribute to development of ALS. *Id.* Specifically, the Secretary observed that Congress had used a 90-day-service period for its presumption of service connection for chronic and tropical diseases. *Id.* (citing 38

U.S.C. § 1112(a) and its regulatory counterpart, 38 C.F.R. § 3.307(a)(1)). If, as we have concluded, it was reasonable for the Secretary to adopt some minimum period of service for that purpose, Mr. Snyder has not given us a basis for deeming it unreasonable for the Secretary to borrow the particular period Congress chose to achieve the same purpose for another substantial class of conditions. *See* 38 U.S.C. § 1101(3), (4) (listing numerous diseases that are "'chronic disease[s]'" or "'tropical disease[s]'").

Mr. Snyder contends that the Secretary should have compared ALS to other presumptions having *no* minimum service requirements. Snyder Opening Br. at 36–37. But the presumptions Mr. Snyder points to, both statutory and regulatory, involve "exposure to a substance or set of substances with known risks, either directly or through presence in a particular place, such as Vietnam," Secretary Response Br. at 39, or a type of circumstance (time as a prisoner of war) associated with specified medical conditions.[4] The ALS presumption does not: It is not known what causes ALS, either generally or within the range of activities that are part of military service. We have "no basis for concluding that the Secretary cannot reasonably distinguish the ALS situation" from situations that involve a "specific harm-causing chemical agent, use of specific equipment, or periods of time at a specific location." *Hansen-Sorenson*, 909 F.3d at 1384.

There was no evidence requiring the Secretary to make a different choice. Mr. Snyder has not pointed to such evidence in the rulemaking record but ignored by the Secretary. In fact, in adopting the Final Rule, the Secretary

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[4] These include service-connection presumptions for diseases associated with time spent as a prisoner of war (38 U.S.C. § 1112(b)); exposure to radiation (*id.* § 1112(c)), exposure to Agent Orange in Vietnam (*id.* § 1116), and service in the Persian Gulf War (*id.* § 1118).

noted that the ALS Association endorsed the 90-day-service requirement, and Mr. Snyder has not identified any contrary comments that went unmentioned by the Secretary. Final Rule, 74 Fed. Reg. at 57,073. Supportive comments "in the rulemaking record" can "buttress[]" a finding that an agency's regulation is reasonable. *Carpenter*, 343 F.3d at 1355–56. Mr. Snyder also has not pointed to evidence that was readily available to the Secretary but not obtained. *See CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1380 n.7 (Fed. Cir. 2016) (recognizing that "an agency's 'failure to adduce empirical data that can readily be obtained' can sometimes require setting aside an agency's decision" under the APA (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009))). Indeed, the Secretary expressly "welcome[d] comments on any relevant peer-reviewed literature concerning ALS that ha[d] been published since the November 2006 IOM report." Interim Final Rule, 73 Fed. Reg. at 54,692. And the Secretary was under "no general obligation . . . to conduct or commission [his] own empirical or statistical studies." *Prometheus Radio Project*, 141 S. Ct. at 1160.

In these circumstances, neither the evidence nor logic required the Secretary to limit his options to either ignoring length of service altogether or declining to adopt a presumption at all. The Secretary could reasonably choose a familiar short period to avoid what he reasonably found would be too demanding an evidentiary standard (no presumption) or too lenient a standard (no minimum service period) for applying the statutory requirement of service connection to veterans with ALS. We conclude that the Secretary "reasonably considered the relevant issues and reasonably explained the decision" and made a choice within the "zone of reasonableness." *Prometheus Radio Project*, 141 S. Ct. at 1158; *see also McKinney*, 796 F.3d at 1383–84 (upholding a regulation where the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action" (internal quotation marks

omitted)). We therefore hold that the 90-day-service requirement of § 3.318(b)(3) is not arbitrary and capricious.

III

For the foregoing reasons, the decision of the Veterans Court is affirmed.

The parties shall bear their own costs.

AFFIRMED

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3918

JOSEPH J. SNYDER, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

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

GREENBERG, *Judge*: Joseph J. Snyder appeals through counsel that part of a May 23, 2019, Board of Veterans' Appeals decision that denied service connection for amyotrophic lateral sclerosis (ALS).[1] Record (R.) at 5-10. The appellant asks the Court to invalidate 38 C.F.R. § 3.318. Because this case is controlled by existing caselaw, the Court is left with no choice but to affirm the May 2019 decision.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations such as their widows, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding

[1] The Board also found that new and material evidence had been submitted to reopen the ALS claim. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

From the beginning of the Republic statutory construction concerning congressional promises to veterans has been of great concern. "By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?" *Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60, 69 (1803).

The appellant served on active duty in the U.S. Army from July 18, 1974, until September 3, 1974. R. 2091. He was discharged based on recurrent subluxation of his knees, rendering him unfit for service. R. at 2100-01.

In November 2015, the appellant was diagnosed with ALS. *See* R. at 1977-78.

In May 2019, the Board denied the appellant service connection for ALS because it found that the appellant did not have active, continuous service for 90 days or more. R. at 5.

Presumptive service connection is warranted for the development of amyotrophic lateral sclerosis manifested at any time after discharge or release from active military, naval, or air service is sufficient to establish service connection for that disease, except if the veteran did not have active, continuous service of 90 days or more.[2] 38 C.F.R. § 3.318 (2020).

In *Bowers v. Shinseki*, 26 Vet.App. 201 (2013), the Court affirmed a Board decision where a claimant was denied service connection for ALS because he had no active duty service and although he served a period of active duty for training, this period did not qualify him as a "veteran;" the Board therefore found that the claimant did not qualify for presumptive service connection for ALS. *See* Bowers, 26 Vet.App. at 208. The decision states: "The Court is sympathetic to Mrs. Bowers's perception that it is unfair to exclude from this presumption those whose service was limited to active duty for training. As this Court has recognized, however, and

[2] The Court notes that the regulation contains two other exceptions that are not relevant here. *See* 38 C.F.R. § 3.318(b).

as the Federal Circuit has reminded us, the Secretary has discretion in making many determinations regarding the availability of VA benefits." *Bowers*, 26 Vet.App. at 207 (citing *Haas v. Peake*, 525 F.3d 1168, 1197 (Fed. Cir. 2008)). The Court then explained that

> [b]y using the specific and statutorily defined phrase "active military, naval, or air service" to identify who is eligible for benefits under § 3.318, the Secretary has decided to limit the application of this presumption to those who qualify as veterans under 38 U.S.C. § 101(2), in effect excluding those whose active service is solely defined as "active duty for training," regardless of the length of that service, unless "the individual concerned was disabled or died from a disease or injury incurred or aggravated" therein. 38 U.S.C. § 101(24)(B). "But just because some instances of overinclusion or underinclusion may arise does not mean that the lines drawn [by VA] are irrational," *Haas*, 525 F.3d at 1193, and Mrs. Bowers fails to persuade the Court that § 3.318 conflicts with any statutory requirements. Moreover, remedying this situation is beyond the Court's power; we may not rewrite a regulation that was lawfully implemented and is a reasonable exercise of the rulemaking authority delegated to the Secretary by Congress. *See Smith v. Nicholson*, 451 F.3d 1344, 1349-50 (Fed. Cir. 2006) (citing Auer v. Robbins, 519 U.S. 452, 461-62, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)). Rather, it is left up to either the Secretary to modify his regulation if he sees fit or to Congress to consider whether to enact legislation expanding the class of former servicemembers eligible to receive VA disability compensation benefits presumptively for amyotrophic lateral sclerosis.

Id. at 207-08.

The U.S. Court of Appeals for the Federal Circuit then affirmed the Court's decision, stating that "[t]he Veterans Court's interpretation of the regulation is consistent with the statutory scheme." *Bowers v. Shinseki*, 748 F.3d 1351, 1353 (Fed. Cir. 2014).

The appellant argues that that 90-day service requirement for presumptive service connection for ALS is arbitrary and capricious, and that there is no rational basis for this requirement. Appellant's Brief at 4-16. The appellant argues that with respect to service connection for ALS, there is no logical connection between developing ALS and requiring a claimant to serve 90 days on active duty to be eligible for presumptive service connection for this condition. Appellant's Brief at 5. The appellant's initial brief does not mention the Court's holding in *Bowers*. In his reply brief, the appellant argues that the Court in *Bowers* did not address the specific question presented here, that is, whether the 90-day active duty requirement is lawful. Appellant's Reply Brief at 6. It is the appellant's contention that, "the Court did not actually discuss whether the regulation was arbitrary and capricious or a reasonable exercise of the rulemaking authority; the Court merely stated in passing that it did not have the authority to 'rewrite a

regulation that was lawfully implemented and is a reasonable exercise of the rulemaking authority.'" Appellant's Reply Brief at 6 (quoting Bowers, 26 Vet.App. 207-08).

The Court concludes that the appellant has failed to persuade he Court that this matter is not controlled by the Court's holding in *Bowers*. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (finding that the appellant bears the burden of persuasion on appeals to this Court), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000). Like the requirement that a claimant must have "active military, naval, or air service," *see Bowers*, 26 Vet.App. at 207, the 90-day service requirement reflects the Secretary's decision to limit the application of this presumption to claimants who meet the active duty requirement. Although the appellant argues that there is no basis for the 90-day language, the Court concludes that any decision adopting the appellant's argument would be inconsistent with the Court's holding in *Bowers*. Simply pointing to a different portion of the regulation as invalid does not undermine the Court's holding that "it is left up to either the Secretary to modify his regulation if he sees fit or to Congress to consider whether to enact legislation expanding the class of former servicemembers eligible to receive VA disability compensation benefits presumptively for amyotrophic lateral sclerosis." *Id*. at 208.

For the foregoing reason, the May 23, 2019, Board decision is AFFIRMED.

DATED: July 14, 2020

Copies to:

Jennifer A. Zajac, Esq.

VA General Counsel (027)

APPENDIX C

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
JOSEPH SNYDER [redacted]
REPRESENTED BY Docket No. 19-10 099
Paralyzed Veterans of America, Inc. **Advanced on the Docket**

DATE: May 23, 2019

ORDER

The petition to reopen the previously denied claim of entitlement to service connection for amyotrophic lateral sclerosis (ALS), based on the receipt of new and material evidence, is granted.

Service connection for ALS is denied.

FINDINGS OF FACT

1. A January 2016 rating decision denied the claim of entitlement to service connection for ALS; the Veteran did not appeal the decision and this denial became final.

2. Evidence received since the final January 2016 rating decision is not cumulative or redundant of the evidence of record at the time of the prior final rating decision and raises a reasonable possibility of substantiating the Veteran's claim of entitlement to service connection for ALS.

3. The Veteran did not have active, continuous service of 90 days or more.

4. The Veteran's ALS did not originate in service and is not otherwise etiologically related to service.

CONCLUSIONS OF LAW

1. New and material evidence has been received sufficient to reopen the previously denied claim of entitlement to service connection for ALS. 38 U.S.C. §§ 5108, 7105(c) (2012); 38 C.F.R. §§ 3.156, 20.1103 (2018).

2. The criteria for service connection for ALS have not been met. 38 U.S.C. § 101, 1110, 5107 (2012); 38 C.F.R. §§ 3.6, 3.102, 3.303, 3.318 (2018).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from July 18, 1974 to September 3, 1974.

1. Whether new and material evidence has been received to reopen a claim of entitlement to service connection for ALS.

Where a claim has been finally adjudicated, a claimant must present new and material evidence to reopen the previously denied claim. 38 U.S.C. § 5108; 38 C.F.R. § 3.156(a). New evidence is evidence not previously submitted to agency decision makers. 38 C.F.R. § 3.156(a). Material evidence is evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. *Id*. New and material evidence cannot be either cumulative or redundant of the evidence of record at the time of the last prior final denial and must raise a reasonable possibility of substantiating the claim. *Id*.

For the purposes of reopening a claim, newly submitted evidence is generally presumed to be credible. *Justus v. Principi*, 3 Vet. App. 510, 513 (1992). New and material evidence is not required as to each previously unproven element of a claim in order to reopen. *Shade v. Shinseki*, 24 Vet. App. 110, 120 (2010). There is a low threshold for determining whether evidence raises a reasonable possibility of substantiating a claim. *Id.* at 117–18.

Here, the Regional Office (RO) denied service connection for ALS in January 2016 based essentially on a finding that the Veteran was not entitled to presumptive service connection for ALS because he did not have active, continuous service for 90 days or more. 38 C.F.R. § 3.318. In the year following the decision, the Veteran did not submit any statements expressing disagreement with the denial of service connection for nor did he submit any documents concerning the claim of service connection for ALS that could be considered new and material evidence. 38 C.F.R. §§ 3.156(b), 20.302. Therefore, the January 2016 rating decision became final. 38 U.S.C. §§ 7104, 7105; 38 C.F.R. §§ 3.104, 20.302, 20.1103.

The pertinent evidence of record in January 2016 consisted of the Veteran's service treatment records, military personnel record, the Veteran's lay statements, lay statements regarding the Veteran's health prior to service, and post-service treatment records. The evidence indicated that the Veteran was generally healthy prior to service, had served from July 18, 1974 to September 3, 1974 in basic training, and had a diagnosis of ALS.

In December 2018, the Veteran was awarded service connection for bilateral knee disabilities for a combined rating of 90 percent. Therefore, the Veteran attained "veteran status" by demonstrating incurrence of bilateral knee injuries during his period of active duty for training (ACDUTRA). *See Biggins v. Derwinski*, 1 Vet. App. 474, 478 (1991).

The Veteran's status as a Veteran is new as the status was not previously of record. As it relates to an unestablished fact, by itself or when considered with other evidence, necessary to substantiate the claim, the Board finds that new and material evidence has been submitted and the petition to reopen the claim for service connection for ALS must be granted. *See* 38 U.S.C. § 5108; 38 C.F.R. § 3.156(a).

2. Service connection for ALS.

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C. §§ 1110; 38 C.F.R. § 3.303. The term "active military, naval, or air service" is defined to include any period of

active duty for training (ACDUTRA) during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty. 38 U.S.C. § 101(24); *see also* 38 C.F.R. § 3.6(a). To establish status as a Veteran based upon a period of ACDUTRA, a claimant must establish that he was disabled from disease or injury incurred or aggravated in the line of duty during that period of ACDUTRA. 38 C.F.R. § 3.1(a), (d); *Harris v. West*, 13 Vet. App. 509 (2000); *Paulson*, 7 Vet. App. 466.

The record indicates that the Veteran is currently service-connected due to bilateral knee injuries during ACDUTRA. Therefore, the Veteran is considered to have had active military service for his period of ACDUTRA.

Establishing service connection generally requires: (1) evidence of a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship (i.e., a nexus) between the claimed in-service disease or injury and the current disability. *Shedden v. Principi*, 281 F.3d 1163, 1167 (Fed. Cir. 2004).

When there is an approximate balance of positive and negative evidence on an issue material to a determination, the VA resolves reasonable doubt in favor of the claimant. 38 U.S.C. § 5107; 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). To deny a claim on its merits, the evidence must preponderate against the claim. *Alemany v. Brown*, 9 Vet. App. 518 (1996).

Except as provided in 38 C.F.R. § 3.318(b), the development of ALS manifested at any time after discharge or release from active military, naval, or air service is sufficient to establish service connection for that disease. 38 C.F.R. § 3.318(a). Service connection will not be established if, in pertinent part, the Veteran did not have active, continuous service of 90 days or more. 38 C.F.R. § 3.318(b)(3).

As noted above, the Veteran's service is considered active military service. However, as the Veteran served on active duty for less than 90 days, he is not entitled to the presumption of service connection for ALS under 38 C.F.R. § 3.318. Although the Veteran's award of service connection for his bilateral knee disabilities established that his time of service is considered active duty for ratings

purposes, it does not waive the 90-day requirement for the presumption of service connection for ALS.

Even though service connection for ALS cannot be presumptively service connected under 38 C.F.R. § 3.318, service connection may still be granted if the Veteran establishes that his ALS is etiologically related to service.

The record indicates that the Veteran was diagnosed with ALS in November 2015 and had symptoms related to ALS for 1 to 2 years prior to the diagnosis. The record does not support, nor does the Veteran submit, that his ALS began in service or that his ALS is etiologically related to an in-service event or injury.

After reviewing the evidence of record, the Board finds that the Veteran's ALS did not originate in service and that there is no causal connection between the Veteran's current ALS and service. Although the Veteran is entitled to the benefit of the doubt where the evidence is in approximate balance, the benefit of the doubt doctrine is inapplicable where, as here, the preponderance of the evidence is against the claim for service connection. The claim is denied. *See* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 58 (1990).

(Continued on the next page)

The preponderance of the evidence is against a finding that an in-service event caused the Veteran's current ALS. Therefore, the criteria for service connection for the Veteran's ALS have not been met and the claim must be denied. 38 U.S.C. § 5107(b); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

A. ISHIZAWAR
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD N. Shah, Associate Counsel

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

APPENDIX D

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JOSEPH J. SNYDER,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2020-2168

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-3918, Judge William S. Greenberg.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, LINN[1], DYK, PROST, O'MALLEY, REYNA, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

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

O R D E R

Joseph J. Snyder filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on August 31, 2021.

FOR THE COURT

August 24, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX E

(a) The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including—

(1)

regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;

(2)

the forms of application by claimants under such laws;

(3)

the methods of making investigations and medical examinations; and

(4)

the manner and form of adjudications and awards.

38 U.S.C. § 501.

suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was the result of his own willful misconduct: *Provided*, That venereal disease shall not be presumed to be due to willful misconduct if the person in service complies with the regulations of the appropriate service department requiring him to report and receive treatment for such disease: *Provided further*, That the requirement for line of duty will not be met if it appears that at the time the injury was suffered or disease contracted the person on whose account benefits are claimed (1) was avoiding duty by deserting the service, or by absenting himself without leave materially interfering with the performance of military duties; or (2) was confined under sentence of court-martial or civil court: *Provided*, *however*, That disease, injury, or death incurred without willful misconduct on the part of the service person shall be deemed to have been incurred in line of duty if the sentence of the court-martial did not involve an unremitted dishonorable discharge or if the offense for which convicted by civil court did not involve a felony as defined under the laws of the jurisdiction where the service person was convicted by such civil court.

DISCHARGE OR RELEASE INCLUDES RETIREMENT

SEC. 106. For the purposes of all laws administered by the Veterans' Administration, retirement of an individual from the military, naval, or air service shall be considered to be a discharge or release from such service.

TITLE II—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

PART A—VETERANS' ADMINISTRATION

VETERANS' ADMINISTRATION AN INDEPENDENT AGENCY

SEC. 201. The Veterans' Administration is an independent establishment in the executive branch of the Government, especially created for or concerned in the administration of laws relating to the relief and other benefits provided by law for veterans, their dependents, and their beneficiaries.

SEAL OF THE VETERANS' ADMINISTRATION

SEC. 202. The seal of the Veterans' Administration shall be judicially noticed. Copies of any public documents, records, or papers belonging to or in the files of the Veterans' Administration, when authenticated by the seal and certified by the Administrator or by any employee of the Veterans' Administration to whom proper authority shall have been delegated in writing by the Administrator, shall be evidence equal with the originals thereof.

PART B—ADMINISTRATOR OF VETERANS' AFFAIRS

APPOINTMENT AND GENERAL AUTHORITY OF ADMINISTRATOR

SEC. 210. (a) The Administrator of Veterans' Affairs is the head of the Veterans' Administration. He is appointed by the President, by and with the advice and consent of the Senate. He shall receive a salary of $21,000 a year, payable monthly.

(b) The Administrator, under the direction of the President, is responsible for the proper execution and administration of all laws

administered by the Veterans' Administration and for the control, direction, and management of the Veterans' Administration. Except to the extent inconsistent with law, he may consolidate, eliminate, abolish, or redistribute the functions of the bureaus, agencies, offices, or activities in the Veterans' Administration, create new bureaus, agencies, offices, or activities therein, and fix the functions thereof and the duties and powers of their respective executive heads.

(c) The Administrator has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans' Administration and are consistent therewith, including regulations with respect to the nature and extent of proofs and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws, the forms of application by claimants under such laws, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards.

DECISIONS BY ADMINISTRATOR; OPINIONS OF ATTORNEY GENERAL

43 Stat. 612.
38 USC 445.
60 Stat. 788.
66 Stat. 678.
70 Stat. 419.

SEC. 211. (a) Except as provided in section 19 of the World War Veterans' Act, 1924 (38 U. S. C., sec. 455), section 617 of the National Service Life Insurance Act of 1940 (38 U. S. C., sec. 817), section 261 (a) of the Veterans' Readjustment Assistance Act of 1952 (38 U. S. C., sec. 971 (a)), and section 501 (a) of the War Orphans' Educational Assistance Act of 1956 (38 U. S. C., sec. 1033 (a)), the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration 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.

(b) The Administrator may require the opinion of the Attorney General on any question of law arising in the Administration of the Veterans' Administration.

DELEGATION OF AUTHORITY AND ASSIGNMENT OF DUTIES

SEC. 212. (a) The Administrator may assign duties, and delegate authority to render decisions, with respect to all laws administered by the Veterans' Administration, to such officers and employees as he may find necessary. Within the limitations of such delegations or assignments, all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Administrator.

(b) There shall be included on the technical and administrative staff of the Administrator such staff officers, experts, inspectors, and assistants (including legal assistants), as the Administrator may prescribe.

REPORTS TO THE CONGRESS

SEC. 213. The Administrator shall make annually, at the close of each fiscal year, a report in writing to the Congress, giving an account of all moneys received and disbursed by the Veterans' Administration, describing the work done, and stating the activities of the Veterans' Administration for such fiscal year.

PUBLICATION OF LAWS RELATING TO VETERANS

SEC. 214. The Administrator may compile and publish all Federal laws relating to veterans' relief, including such laws as are administered by the Veterans' Administration as well as by other agencies of

the Government, in such form as he deems advisable for the purpose of making currently available in convenient form for the use of the Veterans' Administration and full-time representatives of the several service organizations an annotated, indexed, and cross-referenced statement of the laws providing veterans' relief. The Administrator may maintain such compilation on a current basis either by the publication, from time to time, of supplementary documents or by complete revision of the compilation. The distribution of the compilation to the representatives of the several service organizations shall be as determined by the Administrator.

RESEARCH BY ADMINISTRATOR

SEC. 215. (a) The Administrator shall conduct research in the field of prosthesis, prosthetic appliances, orthopedic appliances, and sensory devices.

(b) In order that the unique investigative materials and research data in the possession of the Government may result in improved prosthetic appliances for all disabled persons, the Administrator may make available to any person the results of his research.

(c) There is authorized to be appropriated annually $1,000,000, to remain available until expended, to carry out this section.

TRANSCRIPT OF TRIAL RECORDS

SEC. 216. The Administrator may purchase transcripts of the record, including all evidence, of trial of litigated cases.

PART C—VETERANS' ADMINISTRATION REGIONAL OFFICES; EMPLOYEES

CENTRAL AND REGIONAL OFFICES

SEC. 230. (a) The Central Office of the Veterans' Administration shall be in the District of Columbia. The Administrator may establish such regional offices and such other field offices within the United States, its Territories, Commonwealths, and possessions, as he deems necessary.

(b) The Administrator may exercise authority under this section in territory of the Republic of the Philippines until June 30, 1960.

PLACEMENT OF EMPLOYEES IN MILITARY INSTALLATIONS

SEC. 231. The Administrator may place officers and employees of the Veterans' Administration in such Army, Navy, and Air Force installations as may be deemed advisable for the purpose of adjudicating disability claims of, and giving aid and advice to, members of the Armed Forces who are about to be discharged or released from active military, naval, or air service.

EMPLOYMENT OF TRANSLATORS

SEC. 232. The Administrator may contract for the services of translators, without regard to the Act of August 5, 1882 (5 U. S. C., secs. 39, 46, and 50) and the Classification Act of 1949.

63 Stat. 954, 972.
5 USC 1071 note.

EMPLOYEES' APPAREL; SCHOOL TRANSPORTATION; RECREATIONAL EQUIPMENT; VISUAL EXHIBITS

SEC. 233. The Administrator, subject to such limitations as he may prescribe, may—

(1) furnish and launder such wearing apparel as may be prescribed for employees in the performance of their official duties;

(2) transport children of Veterans' Administration employees located at isolated stations to and from school in available Government-owned automotive equipment;

(3) provide recreational facilities, supplies, and equipment for the use of patients in hospitals, and employees in isolated installations; and

(4) provide for the preparation, shipment, installation, and display of exhibits, photographic displays, moving pictures and other visual educational information and descriptive material.

For the purposes of subparagraph (4), the Administrator may purchase or rent equipment.

TELEPHONE SERVICE FOR MEDICAL OFFICERS

SEC. 234. The Administrator may pay for official telephone service and rental in the field whenever incurred in case of official telephones for medical officers of the Veterans' Administration where such telephones are installed in private residences or private apartments or quarters, when authorized under regulations established by the Administrator.

COURSES OF INSTRUCTION FOR PROFESSIONAL PERSONNEL

SEC. 235. (a) The Administrator may provide courses of instruction for the professional personnel of the Veterans' Administration, and may detail employees to attend such courses.

(b) The Administrator may detail not more than 2 per centum of the professional personnel of the Veterans' Administration to attend professional courses conducted by agencies other than the Veterans' Administration.

(c) Employees detailed to attend courses under this section shall in addition to their salaries be paid their expenses incident to such detail, including transportation.

(d) This section does not authorize travel or instruction outside the forty-eight States and the District of Columbia.

TITLE III—COMPENSATION FOR SERVICE-CONNECTED DISABILITY OR DEATH

PART A—GENERAL

DEFINITIONS

SEC. 301. For the purposes of this title—

(1) The term "veteran" includes a person who died in the active military, naval, or air service.

(2) The term "period of war" includes, in the case of any veteran—

(A) any period of service performed by him after November 11, 1918, and before July 2, 1921, if such veteran served in the active military, naval, or air service after April 5, 1917, and before November 12, 1918; and

(B) any period of continuous service performed by him after December 31, 1946, and before July 26, 1947, if such period began before January 1, 1947.

(3) The term "chronic disease" includes—
Anemia, primary
Arteriosclerosis
Arthritis
Atrophy, progressive muscular
Brain hemorrhage
Brain thrombosis
Bronchiectasis
Calculi of the kidney, bladder, or gallbladder
Cardiovascular-renal disease, including hypertension
Cirrhosis of the liver
Coccidioidomycosis
Diabetes mellitus
Encephalitis lethargica residuals
Endocarditis
Endocrinopathies
Epilepsies
Hodgkin's disease
Leprosy
Leukemia
Myasthenia gravis
Myelitis
Myocarditis
Nephritis
Other organic diseases of the nervous system
Osteitis deformans (Paget's disease)
Osteomalacia
Palsy, bulbar
Paralysis agitans
Psychoses
Purpura idiopathic, hemorrhagic
Raynaud's disease
Sarcoidosis
Scleroderma
Sclerosis, amyotrophic lateral
Sclerosis, multiple
Syringomyelia
Thromboangiitis obliterans (Buerger's disease)
Tuberculosis, active
Tumors, malignant, or of the brain or spinal cord or peripheral nerves
Ulcers, peptic (gastric or duodenal)
and such other chronic diseases as the Administrator may add to this list;

(4) The term "tropical disease" includes—
Amebiasis
Blackwater fever
Cholera
Dracontiasis
Dysentery
Filiariasis
Leishmaniasis, including kala-azar
Leprosy
Loiasis
Malaria
Onchocerciasis

Oroya fever
Pinta
Plague
Schistosomiasis
Yaws
Yellow fever

and such other tropical diseases as the Administrator may add to this list.

SPECIAL PROVISIONS RELATING TO WIDOWS

Post, p. 485.

SEC. 302. No compensation shall be paid to the widow of a veteran under this title unless she was married to him—

(1) before the expiration of ten years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated; or

(2) for ten or more years.

The foregoing shall not be applicable to any widow who, with respect to date of marriage, could have qualified as a widow for death compensation under any law administered by the Veterans' Administration in effect on the day before the effective date of this Act.

PART B—WARTIME DISABILITY COMPENSATION

BASIC ENTITLEMENT

SEC. 310. For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as hereinafter provided in this part, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

PROVISIONAL ACCEPTANCE

SEC. 311. Any person who, after April 5, 1917, and before November 12, 1918, (1) applied for enlistment or enrollment in the active military, naval, or air service and was provisionally accepted and directed or ordered to report to a place for final acceptance into such service, or (2) was drafted for military, naval, or air service and after reporting pursuant to the call of his local draft board and prior to rejection, or (3) after being called into the Federal service as a member of the National Guard but before being enrolled for the Federal service, suffered an injury or contracted a disease in line of duty and not the result of his own misconduct, will be considered to have incurred such disability in the active military, naval, or air service. Such person and the survivors of any such person who died from such disability before January 1, 1957, will be entitled to compensation provided by this title for veterans of World War I and their dependents.

PRESUMPTION OF SOUND CONDITION

SEC. 312. For the purposes of section 310, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or

disease existed before acceptance and enrollment and was not aggravated by such service.

PRESUMPTIONS RELATING TO CERTAIN DISEASES

SEC. 313. For the purposes of section 310, and subject to the provisions of section 314, in the case of any veteran who served for ninety days or more during a period of war—

(1) a chronic disease becoming manifest to a degree of 10 per centum or more within one year from the date of separation from such service;

(2) a tropical disease, and the resultant disorders or disease originating because of therapy, administered in connection with such diseases, or as a preventative thereof, becoming manifest to a degree of 10 per centum or more within one year from the date of separation from such service, or at a time when standard or accepted treatises indicate that the incubation period thereof commenced during such service;

(3) active tuberculous disease developing a 10 per centum degree of disability or more within three years from the date of separation from such service;

(4) multiple sclerosis developing a 10 per centum degree of disability or more within two years from the date of separation from such service;

shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.

PRESUMPTIONS REBUTTABLE

SEC. 314. (a) Where there is affirmative evidence to the contrary, or evidence to establish that an intercurrent injury or disease which is a recognized cause of any of the diseases within the purview of section 313, has been suffered between the date of separation from service and the onset of any of such diseases, or the disability is due to the veteran's own misconduct, service connection pursuant to section 313 will not be in order.

(b) Nothing in section 313 or subsection (a) of this section shall be construed to prevent the granting of service connection for any disease or disorder otherwise shown by sound judgment to have been incurred in or aggravated by active military, naval, or air service.

RATES OF WARTIME DISABILITY COMPENSATION

SEC. 315. For the purposes of section 310—

(a) if and while the disability is rated 10 per centum the monthly compensation shall be $17;

(b) if and while the disability is rated 20 per centum the monthly compensation shall be $33;

(c) if and while the disability is rated 30 per centum the monthly compensation shall be $50;

(d) if and while the disability is rated 40 per centum the monthly compensation shall be $66;

(e) if and while the disability is rated 50 per centum the monthly compensation shall be $91;

(f) if and while the disability is rated 60 per centum the monthly compensation shall be $109;

(g) if and while the disability is rated 70 per centum the monthly compensation shall be $127;

(h) if and while the disability is rated 80 per centum the monthly compensation shall be $145;

(i) if and while the disability is rated 90 per centum the monthly compensation shall be $163;

(j) if and while the disability is rated as total the monthly compensation shall be $181;

(k) if the veteran, as the result of service-incurred disability, has suffered the anatomical loss or loss of use of a creative organ, or one foot, or one hand, or both buttocks, or blindness of one eye, having only light perception, the rate of compensation therefor shall be $47 per month independent of any other compensation provided in subsections (a) through (j) of this section; and in the event of anatomical loss or loss of use of a creative organ, or one foot, or one hand, or both buttocks, or blindness of one eye, having only light perception, in addition to the requirement for any of the rates specified in subsections (l) through (n) of this section, the rate of compensation shall be increased by $47 per month for each such loss or loss of use, but in no event to exceed $420 per month;

(l) if the veteran, as the result of service-incurred disability, has suffered the anatomical loss or loss of use of both hands, or both feet, or of one hand and one foot, or is blind in both eyes, with 5/200 visual acuity or less, or is permanently bedridden or so helpless as to be in need of regular aid and attendance, the monthly compensation shall be $279;

(m) if the veteran, as the result of service-incurred disability, has suffered the anatomical loss or loss of use of two extremities at a level, or with complications, preventing natural elbow or knee action with prosthesis in place, or has suffered blindness in both eyes, rendering him so helpless as to be in need of regular aid and attendance, the monthly compensation shall be $329;

(n) if the veteran, as the result of service-incurred disability, has suffered the anatomical loss of two extremities so near the shoulder or hip as to prevent the use of a prosthetic appliance or has suffered the anatomical loss of both eyes, the monthly compensation shall be $371;

(o) if the veteran, as the result of service-incurred disability, has suffered disability under conditions which would entitle him to two or more of the rates provided in one or more subsections (l) through (n) of this section, no condition being considered twice in the determination, or has suffered total deafness in combination with total blindness with 5/200 visual acuity or less, the monthly compensation shall be $420;

(p) in the event the veteran's service-incurred disabilities exceed the requirements for any of the rates prescribed in this section, the Administrator, in his discretion, may allow the next higher rate or an intermediate rate, but in no event in excess of $420; and

(q) if the veteran is shown to have had a service-incurred disability resulting from an active tuberculous disease, which disease in the judgment of the Administrator has reached a condition of complete arrest, the monthly compensation shall be not less than $67.

ADDITIONAL COMPENSATION FOR DEPENDENTS

SEC. 316. (a) Any veteran entitled to compensation at the rates provided in section 315, and whose disability is rated not less than

50 per centum, shall be entitled to additional compensation for dependents in the following monthly amounts:

(1) If and while rated totally disabled and—

(A) has a wife but no child living, $21;

(B) has a wife and one child living, $35;

(C) has a wife and two children living, $45.50;

(D) has a wife and three or more children living, $56;

(E) has no wife but one child living, $14;

(F) has no wife but two children living, $24.50;

(G) has no wife but three or more children living, $35; and

(H) has a mother or father, either or both dependent upon him for support, then, in addition to the above amounts, $17.50 for each parent so dependent.

(2) If and while rated partially disabled, but not less than 50 per centum, in an amount having the same ratio to the amount specified in paragraph (1) as the degree of his disability bears to total disability.

(b) The additional compensation for a dependent or dependents provided by this section shall not be payable to any veteran during any period he is in receipt of an increased rate of subsistence allowance or education and training allowance on account of a dependent or dependents under any other law administered by the Veterans' Administration.

The veteran may elect to receive whichever is the greater.

PART C—WARTIME DEATH COMPENSATION

BASIC ENTITLEMENT

SEC. 321. The surviving widow, child or children, and dependent parent or parents of any veteran who died before January 1, 1957 (or after April 30, 1957, under the circumstances described in section 501 (a) (3) (B) of the Servicemen's and Veterans' Survivor Benefits Act) as the result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during a period of war, shall be entitled to receive compensation at the monthly rates specified in section 322.

70 Stat. 880.
38 USC 823 note.

RATES OF WARTIME DEATH COMPENSATION

SEC. 322. The monthly rates of death compensation shall be as follows:

(1) Widow but no child, $87;

(2) Widow with one child, $121 (with $29 for each additional child);

(3) No widow but one child, $67;

(4) No widow but two children, $94 (equally divided);

(5) No widow but three children, $122 (equally divided) (with $23 for each additional child, total amount to be equally divided);

(6) Dependent mother or father, $75;

(7) Dependent mother and father, $40 each.

PART D—PEACETIME DISABILITY COMPENSATION

BASIC ENTITLEMENT

SEC. 331. For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was dis-

charged under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as hereinafter provided in this part, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

PROVISIONAL ACCEPTANCE

SEC. 332. Any person, who, after August 26, 1940, and before January 1, 1947, or during the Korean conflict (1) applied for enlistment or enrollment in the active military, naval, or air service and was provisionally accepted and directed or ordered to report to a place for final acceptance into such service, (2) was selected for military, naval, or air service and after reporting pursuant to the call of his local draft board and prior to rejection, or (3) after being called into the Federal service as a member of the National Guard but before being enrolled for the Federal service, suffered an injury or contracted a disease in line of duty and not the result of his own misconduct, will be considered to have incurred such disability in the active military, naval, or air service. Such person and the survivors of any such person who died from such disability before January 1, 1957, will be entitled to compensation provided by this title for veterans of service during other than a period of war and their dependents. If the disability was incurred during World War II or the Korean conflict, the applicable rates of compensation provided by parts B and C shall be payable.

PRESUMPTION OF SOUND CONDITION

SEC. 333. For the purposes of section 331, every person employed in the active military, naval, or air service for six months or more shall be taken to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance and enrollment, or where evidence or medical judgment is such as to warrant a finding that the disease or injury existed before acceptance and enrollment.

PRESUMPTIONS RELATING TO CERTAIN DISEASES

SEC. 334. (a) For the purposes of section 331, and subject to the provisions of subsections (b) and (c) of this section, any veteran who served for six months or more and contracts a tropical disease or a resultant disorder or disease originating because of therapy administered in connection with a tropical disease, or as a preventative thereof, shall be deemed to have incurred such disability in the active military, naval, or air service when it is shown to exist within one year after separation from active service, or at a time when standard and accepted treatises indicate that the incubation period thereof commenced during active service.

(b) Service connection shall not be granted pursuant to subsection (a), in any case where the disease or disorder is shown by clear and unmistakable evidence to have had its inception before or after active service.

(c) Nothing in this section shall be construed to prevent the granting of service connection for any disease or disorder otherwise shown by sound judgment to have been incurred in or aggravated by active service.

RATES OF PEACETIME DISABILITY COMPENSATION

SEC. 335. For the purposes of section 331 of this Act, the compensation payable for the disability shall be equal to 80 per centum of the compensation payable for such disability under section 315 of this Act, adjusted upward or downward to the nearest dollar.

ADDITIONAL COMPENSATION FOR DEPENDENTS

SEC. 336. Any veteran entitled to compensation at the rates provided in section 335, and whose disability is rated not less than 50 per centum, shall be entitled to additional monthly compensation for dependents equal to 80 per centum of the additional compensation for dependents provided in section 316, and subject to the limitations thereof.

CONDITIONS UNDER WHICH WARTIME RATES PAYABLE

SEC. 337. Any veteran otherwise entitled to compensation under the provisions of this part shall be entitled to receive the rate of compensation provided in sections 315 and 316 of this Act, if the disability of such veteran resulted from an injury or disease received in line of duty (1) as a direct result of armed conflict, (2) while engaged in extrahazardous service, including such service under conditions simulating war, or (3) after December 31, 1946, and before July 26, 1947.

PART E—PEACETIME DEATH COMPENSATION

BASIC ENTITLEMENT

SEC. 341. The surviving widow, child or children, and dependent parent or parents of any veteran who died before January 1, 1957 (or after April 30, 1957, under the circumstances described in section 501 (a) (3) (B) of the Servicemen's and Veterans' Survivor Benefits Act) as the result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during other than a period of war, shall be entitled to receive compensation as hereinafter provided in this part.

70 Stat. 880.
38 USC 823 note.

RATES OF PEACETIME DEATH COMPENSATION

SEC. 342. For the purposes of section 341, the monthly rates of death compensation payable shall be equal to 80 per centum of the rates prescribed by section 322.

CONDITIONS UNDER WHICH WARTIME RATES PAYABLE

SEC. 343. The dependents of any deceased veteran otherwise entitled to compensation under the provisions of this part shall be entitled to receive the rate of compensation provided in section 322 of this Act, if the death of such veteran resulted from an injury or disease received in line of duty (1) as a direct result of armed conflict, (2) while engaged in extrahazardous service, including such service under conditions simulating war, or (3) after December 31, 1946, and before July 26, 1947, or (4) while the United States was engaged in any war before April 21, 1898.

[CHAPTER 2.]

JOINT RESOLUTION

March 17, 1933.
[H. J. Res. 75.]
[Pub. Res., No. 1.]

To provide for certain expenses incident to the first session of the Seventy-third Congress.

Appropriations for certain expenses, first session, Seventy-third Congress.
Mileage.
Sums available.
Vol. 47, pp. 1351, 1354.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the appropriations for mileage of Senators, Representatives, the Resident Commissioner from Puerto Rico, and the Delegate from Hawaii, and for expenses of the Delegate from Alaska and the Resident Commissioners from the Philippine Islands, contained in the Legislative Appropriation Act for the fiscal year 1934, are hereby made immediately available and authorized to be paid to Senators, Representatives, Delegates, and Resident Commissioners, for attendance on the first session of the Seventy-third Congress.

Stationery.
Vol. 47, p. 1358.

The appropriation for stationery for Representatives, Delegates, and Resident Commissioners, and for the committees and officers of the House, contained in the Legislative Appropriation Act for the fiscal year 1934, is hereby made immediately available for expenditure on account of the first session of the Seventy-third Congress notwithstanding the provisions of section 304 of the Act of June 30, 1932 (47 Stat. 408): *Provided*, That from such sum each Representative, Delegate, and Resident Commissioner shall be allowed $90 for stationery allowance or commutation therefor.

Limitations waived.
Vol. 47, p. 408.

Proviso.
Stationery allowance.

Approved, March 17, 1933.

[CHAPTER 3.]

AN ACT

March 20, 1933.
[H.R. 2820.]
[Public, No. 2.]

To maintain the credit of the United States Government.

Maintenance of credit of United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

Veterans.

VETERANS

Pensions.
Regulations of the President.
Post, pp. 524, 1282.
Executive orders, Nos. 6089-6100, March 31, 1933; 6156-6159, June 6, 1933; 6231-6234, July 28, 1933.
Classes entitled.
Disease, etc., in line of duty.

SECTION 1. That subject to such requirements and limitations as shall be contained in regulations to be issued by the President, and within the limits of appropriations made by Congress, the following classes of persons may be paid a pension:

(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service.

Certain war-time services.

(b) Any person who served in the active military or naval service during the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection, or the World War, and who is permanently disabled as a result of injury or disease: *Provided*, That nothing contained in this title shall deny a pension to a Spanish-American War veteran past the age of sixty-two years entitled to a pension under existing law, but the President may reduce the rate of pension as he may deem proper.

Proviso.
Spanish - American War veteran over 62.

Widows, dependent parents, etc.

(c) The widow, child, or children, dependent mother or father, of any person who dies as a result of disease or injury incurred or aggravated in line of duty in the active military or naval service.

Designated war service.

(d) The widow and/or child of any deceased person who served in the active military or naval service during the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection.

(e) For the purpose of subparagraph (b) of this section, the World War shall be deemed to have ended November 11, 1918. Fixing World War service.

SEC. 2. The minimum and maximum monthly rate of pension which may be paid for disability or death shall be as follows: For disability, from $6 to $275; for death, from $12 to $75. Minimum and maximum rates. *Post*, p. 524.

SEC. 3. For each class of persons specified in subparagraphs (a) and (b) of section 1 of this title the President is hereby authorized to prescribe by regulation the minimum degrees of disability and such higher degrees of disability, if any, as in his judgment should be recognized and prescribe the rate of pension payable for each such degree of disability. In fixing rates of pensions for disability or death the President shall prescribe by regulation such differentiation as he may deem just and equitable, in the rates to be paid to veterans of different wars and/or their dependents and to be paid for Degrees of disability. Death.

(a) Disabilities and deaths resulting from disease or injury incurred or aggravated in line of duty in war-time service; War-time service.

(b) Disabilities and deaths resulting from disease or injury incurred or aggravated in line of duty in peace-time service; Peace-time service.

(c) Disabilities and deaths not incurred in service. Not in service.

SEC. 4. The President shall prescribe by regulation (subject to the provisions of section 1 (e) of this title) the date of the beginning and of the termination of the period in each war subsequent to the Civil War, including the Boxer Rebellion and the Philippine Insurrection, service within which shall for the purposes of this Act be deemed war-time service. The President shall further prescribe by regulation the required number of days of war or peace time service for each class of veterans, the time limit on filing of claims for each class of veterans and their dependents, the nature and extent of proofs and presumptions for such different classes, and any other requirements as to entitlement as he shall deem equitable and just. The President in establishing conditions precedent may prescribe different requirements or conditions for the veterans of different wars and their dependents and may further subdivide the classes of persons as outlined in section 1 of this title and apply different requirements or conditions to such subdivisions. Prescribing duration of certain wars. Regulations as to service, claims, etc. Classification, conditions, etc.

SEC. 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision. Finality of decisions.

SEC. 6. In addition to the pensions provided in this title, the Administrator of Veterans' Affairs is hereby authorized under such limitations as may be prescribed by the President, and within the limits of existing Veterans' Administration facilities, to furnish to veterans of any war, including the Boxer Rebellion and the Philippine Insurrection, domiciliary care where they are suffering with permanent disabilities, tuberculosis or neuropsychiatric ailments and medical and hospital treatment for diseases or injuries. Domiciliary care. *Post*, pp. 301, 525.

SEC. 7. The Administrator of Veterans' Affairs subject to the general direction of the President and in accordance with regulations to be issued by the President shall administer, execute, and enforce the provisions of this title and for such purpose shall have the same authority and powers as are provided in sections 425, 430, 431, 432, 433, 434, 440, 442, 443, 444, 447, 450, 451, 453, 455, 457, 458, 459, 459a, 459c, 459d, 459e, 459f, title 38, U. S. C., and such other sections of title 38, U. S. C., as relate to the administration of the laws granting pensions. Administrator of Veterans' Affairs. Authority, etc. U.S.C., p. 1215.

Delegation of authority.

SEC. 8. The Administrator of Veterans' Affairs is hereby authorized in carrying out the provisions of Title 1 of this Act or any other pension Act to delegate authority to render decisions to such person or persons as he may find necessary. Within the limitations of such delegations, any decisions rendered by such person or persons shall have the same force and effect as though rendered by the Administrator of Veterans' Affairs. The President shall personally approve all regulations issued under the provisions of this title.

Approval of regulations.

Claims for benefits.
Filing, hearings, review, etc.

SEC. 9. Claims for benefits under this title shall be filed with the Veterans' Administration under such regulations, including provisions for hearing, determination, and administrative review, as the President may approve, and payments shall not be made for any period prior to date of application. When a claim shall be finally disallowed under this title and the regulations issued thereunder, it may not thereafter be reopened or allowed. No person who is entitled to any benefits under this title shall participate in any determination or decision with respect to any claim for benefits under this title.

Payments, reopening, etc.

Participation by beneficiary in decision.
Post, p. 526.

Retired emergency officers.
Continuance of pay, if retirement due to service injury, etc.
Post, p. 112.

SEC. 10. Notwithstanding the provisions of section 2 of this title, any person who served as an officer of the Army, Navy, or Marine Corps of the United States during the World War, other than as an officer of the Regular Army, Navy, or Marine Corps during the World War, who made valid application for retirement under the provisions of Public No. 506, Seventieth Congress, enacted May 24, 1928, sections 581 and 582, title 38, United States Code, and who prior to the passage of this Act has been granted retirement with pay, shall be entitled to continue to receive retirement pay at the monthly rate now being paid him if the disability for which he has been retired resulted from disease or injury or aggravation of a preexisting disease or injury incurred in line of duty during such service: *Provided*, That such person entered active service between April 6, 1917, and November 11, 1918: *Provided*, That the disease or injury or aggravation of the disease or injury directly resulted from the performance of military or naval duty, and that such person otherwise meets the requirements of the regulations which may be issued under the provisions of this Act.

Vol. 45, p. 735, amended.
U.S.C., Supp. VI, p. 727.

Provisos.
World War service.
Disability in line of duty, etc.

Offenses under repealed acts.
Post, p. 11.
Incurred penalties, etc., prosecuted.

SEC. 11. All offenses committed and all penalties or forfeiture incurred under the acts repealed by section 17 of this title may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made and any person who forfeited rights to benefits under any such acts shall not be entitled to any benefits under this title.

Perjury.

Punishment for.

SEC. 12. That whoever in any claim for benefits under this title or by regulations issued pursuant to this title, makes any sworn statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

Fraudulently accepting pension.

Punishment for.

SEC. 13. That if any person entitled to payment of pension under this title, whose right to such payment under this title or under any regulation issued under this title, ceases upon the happening of any contingency, thereafter fraudulently accepts any such payment, he shall be punished by a fine of not more than $2,000 or by imprisonment for not more than one year, or both.

Fraudulently obtaining money, etc.

SEC. 14. That whoever shall obtain or receive any money, check, or pension under this title, or regulations issued under this title, without being entitled to the same, and with intent to defraud the United States or any beneficiary of the United States, shall be punished by a fine of not more than $2,000, or by imprisonment for not more than one year, or both.

False affidavits, etc.

SEC. 15. Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under this title, shall forfeit all rights, claims, and benefits under this title, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

Punishment for.

Embezzlement by guardian, etc.

SEC. 16. Every guardian, curator, conservator, committee, or person legally vested with the responsibility or care of a claimant or his estate, having charge and custody in a fiduciary capacity of money paid, under the provisions of this title, for the benefit of any minor or incompetent claimant, who shall embezzle the same in violation of his trust, or convert the same to his own use, shall be punished by a fine not exceeding $2,000 or imprisonment at hard labor for a term not exceeding five years, or both.

Veterans of designated wars.

Public laws granting certain allowances, etc., repealed.
U.S.C., p. 1191.
Post, p. 526.

SEC. 17. All public laws granting medical or hospital treatment, domiciliary care, compensation and other allowances, pension, disability allowance, or retirement pay to veterans and the dependents of veterans of the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection, and the World War, or to former members of the military or naval service for injury or disease incurred or aggravated in the line of duty in the military or naval service (except so far as they relate to persons who served prior to the Spanish-American War and to the dependents of such persons, and the retirement of officers and enlisted men of the Regular Army, Navy, Marine Corps, or Coast Guard) are hereby repealed, and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted. The Administrator of Veterans' Affairs under the general direction of the President shall immediately cause to be reviewed all allowed claims under the above referred to laws and where a person is found entitled under this Act, authorize payment or allowance of benefits in accordance with the provisions of this Act commencing with the first day of the fourth calendar month following the month during which this Act is enacted and notwithstanding the provisions of section 9 of this Act, no further claim in such cases shall be required: *Provided*, That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: *Provided further*, That, subject to such regulations as the President may prescribe, allowances may be granted for burial and funeral expenses and transportation of the bodies (including preparation of the bodies) of deceased veterans of any war to the places of burial thereof in a sum not to exceed $107 in any one case.

Term insurance.
U.S.C., p. 1225.

Review of allowed claims.

Ante, p. 10.

Provisos.
Matured insurance.

Funeral, etc., expenses.
Post, p. 310.

Disabled veterans, pensions, etc.

The provisions of this title shall not apply to compensation or pension (except as to rates, time of entry into active service and special statutory allowances), being paid to veterans disabled, or dependents of veterans who died, as the result of disease or injury directly connected with active military or naval service (without benefit of statutory or regulatory presumption of service connection)

Emergency officers' retired pay not included.

pursuant to the provisions of the laws in effect on the date of enactment of this Act. The term "compensation or pension" as used in this paragraph shall not be construed to include emergency officers' retired pay referred to in section 10 of this title.

Ante, p. 10.

Payments for fiscal year 1934 reduced.

Post, p. 521.

SEC. 18. For the fiscal year ending June 30, 1934, any pension, and/or any other monetary gratuity, payable to former members of the military or naval service in wars prior to the Spanish-American War, and their dependents, for service, age, disease, or injury, except retired pay of officers and enlisted men of the Regular Army, Navy, Marine Corps, or Coast Guard, shall be reduced by 10 per centum of the amount payable.

Effect of Executive orders.

SEC. 19. The regulations issued by the President under this title which are in effect at the expiration of two years after the date of enactment of this Act shall continue in effect without further change or modification until the Congress by law shall otherwise provide.

Transmittal to Congress.

SEC. 20. The President shall transmit to the Congress, as soon as practicable after the date of their issue, copies of all regulations issued pursuant to this title.

TITLE II

Officers and employees.

OFFICERS AND EMPLOYEES

Post, p. 521.

SEC. 1. When used in this title—

Terms construed. Persons included.

(a) The terms "officer" and "employee" mean any person rendering services in or under any branch or service of the United States Government or the government of the District of Columbia, but do not include (1) officers whose compensation may not, under the Constitution, be diminished during their continuance in office; (2) the Vice President, the Speaker of the House of Representatives, Senators, Representatives in Congress, Delegates, and Resident Commissioners; (3) officers and employees on the rolls of the Senate and House of Representatives; (4) any person in respect of any office, position, or employment the amount of compensation of which is expressly fixed by international agreement; and (5) any person in respect of any office, position, or employment the compensation of which is paid under the terms of any contract in effect on the date of the enactment of this title, if such compensation may not lawfully be reduced.

Exempted.

"Compensation" defined.

(b) The term "compensation" means any salary, pay, wage, allowance (except allowances for travel), or other emolument paid for services rendered in any civilian or noncivilian office, position, or employment; and includes the retired pay of judges (except judges whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished), and the retired pay of all commissioned and other personnel of the Coast and Geodetic Survey, the Lighthouse Service, and the Public Health Service, and the retired pay of all commissioned and other personnel of the Army, Navy, Marine Corps, and Coast Guard; but does not include payments out of any retirement, disability, or relief fund made up wholly or in part of contributions of employees.

Payments excluded.

Determination of salaries, part of fiscal year 1933 and all of 1934.

Post, p. 521.

SEC. 2. For that portion of the fiscal year 1933 beginning with the first day of the calendar month following the month during which this Act is enacted, and for the fiscal year ending June 30, 1934, the compensation of every officer or employee shall be determined as follows:—

Basis for computing.

(a) The compensation which such officer or employee would receive under the provisions of any existing law, schedule, regulation, Executive order, or departmental order shall first be determined as though this title (except section 4) had not been enacted.

38 C.F.R. § 3.318 Presumptive service connection for amyotrophic lateral sclerosis.

(a) Except as provided in paragraph (b) of this section, the development of amyotrophic lateral sclerosis manifested at any time after discharge or release from active military, naval, or air service is sufficient to establish service connection for that disease.

(b) Service connection will not be established under this section:

(1) If there is affirmative evidence that amyotrophic lateral sclerosis was not incurred during or aggravated by active military, naval, or air service;

(2) If there is affirmative evidence that amyotrophic lateral sclerosis is due to the veteran's own willful misconduct; or

(3) If the veteran did not have active, continuous service of 90 days or more.

(Authority: 38 U.S.C. 501(a)(1))
[73 FR 54693, Sept. 23, 2008]