No. 25-

IN THE

Supreme Court of the United States

KEVIN STEELE,

Petitioner,

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Department of Veterans Affairs' ("VA") intentionally pro-claimant system for adjudicating benefits, a veteran's period for appealing the denial of a benefits claim only begins to run when the agency issues a notice of decision with respect to the claim at issue. Otherwise, the claim remains pending, permitting claimants to recover past benefits that were wrongly denied if entitlement is later established. Since at least 1990, the statute and regulation governing VA notices of decision have required the agency to provide, at a minimum, a "statement of the reasons for the decision," and to "clearly set forth" the "decision made" and the "reasons," whenever denying a benefit. Pub. L. No. 101-237, § 115(a), 103 Stat. 2062, 2065-66 (effective January 31, 1990) (codified as amended at 38 U.S.C. § 5104 (1991)); 38 C.F.R. §§ 3.103(b), (f) (1990); *see also* 38 U.S.C. § 5104 (2017) (strengthening notice requirements); 38 C.F.R. § 3.103(f) (same). Under the judge-made "implicit denial rule," however, the VA has deemed past claims "implicitly" denied—and the appeals period expired—whenever the agency concludes that a "reasonable claimant" would have *inferred* that the claim had been denied based on the VA's notice of decision on *another* claim.

The question presented is: Under the statutory and regulatory notice requirements governing VA decisions since 1990, is the VA permitted to retroactively deem a claim "implicitly denied" when the agency never issued a notice explicitly setting forth the claim at issue or the reason for its denial?

PARTIES TO THE PROCEEDING

Kevin Steele is the Petitioner here and was the Claimant-Appellant below.

Douglas A. Collins, Secretary of Veterans Affairs, is the Respondent here and was the Respondent-Appellee below.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Steele v. Collins, United States Court of Appeals for the Federal Circuit, No. 23-2049 (May 1, 2025)

Steele v. McDonough, United States Court of Appeals for Veterans Claims, No. 22-32 (Feb. 22, 2023)

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative History

Administrative Materials

Other Authorities

Kevin Steele respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

INTRODUCTION

While the veterans' benefits system operated in "splendid isolation" for much of American history,[1] Congress responded to calls for greater oversight of the Department of Veterans Affairs' handling of veterans' claims by opening the door to judicial review in 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). To safeguard meaningful access to judicial review for disabled veterans who largely faced the system unrepresented, and to allow them to make informed decisions about whether to appeal the VA's decisions on their claims, Congress soon enacted a statute that required the VA to provide notice of any decision affecting benefits and to provide "a statement of the reasons for the decision" when denying benefits. Veterans' Benefit Act of 1989, Pub. L. No. 101-237, § 115(a), 103 Stat. 2062, 2065-66 (1989) (codified as amended at 38 U.S.C. § 5104 (1991)). The VA thereafter acknowledged in its own regulation that notices of decisions must be "in writing," and must "clearly set forth" both "the decision made" and "the reason(s) for the decision." 38 C.F.R. §§ 3.103(b), (f) (1990). Since then, Congress has only strengthened those requirements. *See* 38 U.S.C. § 5104 (2017).

This case concerns the "implicit denial rule," a judicially created doctrine that allows the VA to retro-

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[1] *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (citing H.R. Rep. No. 100-963, pt. 1, p. 10 (1988)).

actively deem a claim "implicitly denied"—and the appeals period expired—when the VA never provided the veteran with explicit notice of the denial or the reason for the decision. Pet.App.10a. The VA can apply the rule whenever it finds that a "reasonable claimant" would have "*inferred*" that the claim was denied based on the VA's denial of *another* claim. Pet.App.15a, 21a.

The doctrine inflicts exceptional harm on the most vulnerable veterans and their families. Thousands of disabled veterans have had claims deemed implicitly denied, precluding them from recovering much-needed benefits that the VA wrongly withheld. Here, Marine Corps veteran Kevin Steele lost two decades of disability compensation for debilitating headaches when the VA found his initial claim implicitly denied. He first sought VA benefits for a head injury sustained during service in 1990 and informed the medical examiner then of his headaches—a condition that would have been compensable if found to be disabling and service connected. Pet.App.2-3a. A year later, however, the only notice of decision he received made no mention of his headaches; instead, it stated he could not be compensated for a "scar" on his scalp "as the only residual of his head injury" because the scar was "less than 10% disabling." Pet.App.3a, 64-65a. Mr. Steele did not appeal the decision.

When he again sought compensation for his headaches two decades later, the VA eventually agreed that his headaches were sufficiently disabling and service connected to be compensated but refused to award benefits dating back to his first headache claim because it deemed the claim "implicitly denied." The Court of Appeals for Veterans Claims ("Veterans

Court") affirmed on appeal. As did the Federal Circuit, holding that although Mr. Steele had never received explicit notice of a decision on his headaches, the Board of Veterans' Appeals applied the correct standard in deeming the claim denied based on its finding that a reasonable claimant would have "inferred" the denial and the reason for the denial from the decision on his scars. According to the Federal Circuit, the VA had no duty to expressly "connect the dots" for Mr. Steele, and any further scrutiny of the Board's finding was a "question of fact" beyond the court's jurisdiction. Pet.App.14a, 16a.

In so holding, and in denying Mr. Steele's petition for rehearing *en banc*, the Federal Circuit further ensconced a doctrine that has grown over two decades to supplant the codified notice requirements governing VA decisions. The doctrine impermissibly replaces Congress's bright-line requirements on the explicit contents of a written document with a fact-intensive retrospective inquiry into the understanding of a "reasonable claimant." Pet.App.21a. As a judicially fashioned rule of repose for the agency's notice violations, the doctrine is antithetical to the pro-claimant tenets of the veterans' benefit adjudication system Congress intended.

This case presents an ideal vehicle to address the Question Presented at a particularly critical time. The Federal Circuit recently acknowledged that the notice requirements in 38 U.S.C. § 5104 prohibit implicit denials, but only with respect to claims pending *on or after February 19, 2019*, the effective date of amendments to the statute made in the Veterans Appeals Improvement and Modernization Act ("AMA"). *Hamill v. Collins*, 166 F.4th 1030, 1039 (Fed. Cir.

2026). The same decision expressly reaffirms the doctrine's applicability to claims under the legacy system, allowing the VA to continue deeming unawarded legacy claims like Mr. Steele's implicitly denied when no explicit notice of decision ever issued. *Id*. at 1037, 1039. This includes claims submitted by the majority of disabled veterans living today. *Infra* 32 & n.5. Any further review of *Hamill* sought by the government can only serve as a vehicle to reinstate implicit denials for AMA claims, not to resolve its permissibility for legacy claims like Mr. Steele's. Given the Federal Circuit's firm stance on the latter question, no further percolation is possible.

The implicit denial rule has never been a legitimate exercise of judicial authority, and this case presents the Court with the ideal opportunity to uniformly address the doctrine's continued permissibility across legacy and AMA claims. The Court should grant the Petition.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-16a) is reported at 135 F.4th 1353. The opinion of the Veterans Court (Pet.App.17-25a) is not reported but is available at 2023 WL 2153686. The opinion of the Board of Veterans' Appeals (Pet.App.26-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2025. The court of appeals denied rehearing and rehearing *en banc* on October 31, 2025. The Chief Justice extended the time to file this petition until

March 17, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. § 3004 (1989) (renumbered as 38 U.S.C. § 5104 (1991)) states in relevant part:

> (a)(1) In the case of a decision by the Secretary under section 211(a) of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision.
>
> (2) In any case where the Secretary denies a benefit sought, the notice required by paragraph (1) of this subsection shall also include (A) a statement of the reasons for the decision, and (B) a summary of the evidence considered by the Secretary.

38 C.F.R. § 3.103 (1990), states in relevant part:

> (b) *The right to notice*—(1) *General.* Claimants are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

***

> (f) *Notification of decisions.* The claimant or beneficiary will be notified in writing of decisions affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effective as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant or beneficiary of the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal. Further, the notice will advise him or her of the periods in which an appeal must be initiated and perfected….

The pertinent text of these provisions, and of other relevant versions of these provisions, are reproduced in the Appendix, *infra*, at 75-79a.

STATEMENT

A. The Veteran's Right to Notice of Decisions

Veterans seeking VA disability benefits have one year from the issuance of a notice of decision on a claim to initiate an appeal. 38 U.S.C. § 7105(b)(1)(A). A timely appeal on a given claim allows the claimant to recover benefits dating back to the initial application if the VA later acknowledges entitlement. Otherwise, a denial becomes final after one year, and the claimant loses the right to seek further review of the decision and to recover past benefits if entitlement is later established. 38 U.S.C. § 7105(c); 38 C.F.R. § 3.104.

To initiate an appeal, a claimant must file a written Notice of Disagreement, a step many veterans face unassisted. 38 U.S.C. § 7105(a). As of 1989, while some veterans were represented by veteran service organizations, the majority claimants were not, and representatives were not reliably copied on notices from the VA. *See* U.S. GAO, Veterans' Benefits: Improvements Needed in Processing Veterans' Disability Claims, HRD-89-24, at 16, 31 tbl.11 (1989) ("GAO Report").[2] Up until the AMA, veterans could not obtain the advice of paid counsel until *after* they submitted a Notice of Disagreement. *Compare* Pub. L. No. 115-55, 131 Stat. 1105, 1111 (2017) *with* Pub. L. No. 109-461, 120 Stat. 3403, 3407 (2006) (permitting veterans to retain paid counsel only after submission of a notice of disagreement) and Pub. L. No. 100-687, 102 Stat. 4105, 4108 (1988) (prohibiting retention of paid counsel until a final decision from the Board of Veterans appeals).

Veterans Benefits Act ("VBA") of 1989

To safeguard meaningful access to appellate review for these largely unrepresented veterans, Congress first spoke in 1989 on the notice the VA must provide to veterans about its decisions. A year after passing the Veterans Judicial Review Act ("VJRA")—the landmark legislation that opened VA claims to judicial scrutiny—Congress enacted the Veterans Benefits Act, which first codified the notice statute now set forth at 38 U.S.C. § 5104. As first enacted, the provision required that for any "decision" by the secretary "affecting the provision of benefits," the VA "*shall*, on a timely basis, provide to the claimant (and to the

[2] *Accessible at*: https://www.gao.gov/products/hrd-89-24.

claimant's representative) *notice of such decision*" 38 U.S.C. § 3004 (1989); Pub. L. No. 101-237, § 115(a), 103 Stat. 2062, 2065-66 (1989) (codified as amended at 38 U.S.C. § 5104 (1991)) (emphasis added). Where the decision denies a benefit, the statute required that the notice also include "(A) *a statement of the reasons for the decision*, and (B) a summary of the evidence considered by the Secretary." *Id.* (emphasis added).

In explaining the provision's intent, the report of the Senate Committee on Veterans Affairs highlighted the need for full and clear explanations of the VA's decisions to afford unrepresented claimants a meaningful basis for deciding whether to challenge a given decision:

> Denial notices that lack meaningful information on the rationale of the decisions and available procedural options are fundamentally unfair. In an administrative system in which claimants are not represented by veterans' service organizations in 59.5 percent of the cases at the RO level and in 24.5 percent of the cases at the Board of Veterans' Appeals level and in which representation by attorneys is discouraged and infrequent, claimants have a need to be apprised *fully and clearly* of their procedural rights and the *reasons for the negative decisions regarding benefits to which they may be entitled.* Lacking such information, claimants for VA benefits very likely are impaired in making well-informed choices on whether to accept or appeal a VA decision.

S. Rep. No. 101-126, at 297 (1989) (emphasis added), reprinted in 1989 U.S.C.C.A.N. 1469, 1703. The Committee's concern stemmed from the systematic notice

problems identified in a June 1989 Government Accountability Office report on VA procedures. GAO Report, HRD-89-24, at 14-15. The report found notice deficiencies in 72 percent of disability compensation claims, including notices that failed to provide meaningful explanations of decisions in 60 percent of compensation cases reviewed, and some cases where no notices were mailed at all. The deficient notices identified by GAO relied on "conclusory" statements like "service connection [] not found" that failed to "provide a veteran with any indication about how VA reached its decision." *Id.* at 14. Certain veterans reported they had failed to appeal claim denials because they believed the claims were still being considered. *Id*. at 26-27.

Notably, the Senate had previously passed a similar notice provision as part of the VJRA but withdrew it as unnecessary because the "requirements are a fundamental part of due process rights." The findings in the GAO Report renewed the Committee's conviction that "such notice requirements should be established by statute." 1989 U.S.C.C.A.N. 1469, 1703.

When the Senate and House Committees on Veterans Affairs reached a compromise bill on the VBA, their explanatory statement further emphasized the clarity and specificity required in the notice provision. In particular, the Committees explained that (1) "the reference to denial of 'a benefit sought'" includes a claim that is even "partially denied"; and (2) that "the requirement to provide 'reasons for the decision' would not be met by such terms as 'service connection not found' or other such conclusory statements." 135 Cong. Rec. H9110, 1989 U.S.C.C.A.N. 1856, 1860 (Explanatory Statement).

After the VBA, the VA strengthened the language in its notice regulations, first by requiring that notices of decision "*clearly* set forth" "the decision made" and "the reason(s) for the decision," and later by requiring that notices also include a "summary of the evidence considered." 38 C.F.R. § 3.103(b) (1990) (emphasis added); 55 Fed. Reg. 13522-02, 13527 (Apr. 11, 1990); 58 Fed. Reg. 59365-01, 59366 (Nov. 9, 1993).

Veterans Appeals Improvement and Modernization Act ("AMA") of 2017

Congress spoke again on the notice requirements for VA decisions in 2017. This time, the revisions to the notice provision were part of a broader overhaul of the claims appeals process that (1) offered alternative channels for seeking review of claims decisions and (2) permitted claimants to engage paid counsel to assist with the initial decision over whether and how to initiate review. While preserving the basic requirement to provide notice of every decision in the provision's first paragraph, the new provision revised the second paragraph, expanding the two categories of required information specified by the VBA provision into seven separate categories:

Preserved First Paragraph

In the case of a decision by the Secretary under section [] of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision.

Amended Second Paragraph	
VBA	**AMA**
(a)(2) In any case where the Secretary denies a benefit sought, the notice required by paragraph (1) of this subsection shall also include (A) a statement of the reasons for the decision, and (B) a summary of the evidence considered by the Secretary.	(b) Each notice provided under subsection (a) shall also include all of the following: (1) Identification of the issues adjudicated. (2) A summary of the evidence considered by the Secretary. (3) A summary of the applicable laws and regulations. (4) Identification of findings favorable to the claimant. (5) In the case of a denial, identification of elements not satisfied leading to the denial. (6) An explanation of how to obtain or access evidence used in making the decision. (7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.

Pub. L. 115-55, § 2(e), 131 Stat. 1105, 1106 (2017) (AMA); Pub. L. No. 101-237, § 115(a), 103 Stat. 2062, 2065-66 (1989) (codified as amended at 38 U.S.C. § 5104 (1991)) (VBA of 1989).

VA incorporated these requirements into its notice regulation in 2019. 38 C.F.R. § 3.103(f) (current).

B. Development of the Implicit Denial Rule

Because by statute, notice of a decision is required to trigger the deadline for appeal, both the courts and the VA have long recognized that if the VA "fail[s] to notify the claimant of the denial of his claim," then that claim remains "pending," rather than "finally adjudicated." *See Adams v. Shinseki*, 568 F.3d 956, 960 (Fed. Cir. 2009) (citing *Cook v. Principi*, 318 F.3d 1334, 1340 (Fed. Cir. 2002) (explaining statutory basis for the pending claims rule)); 38 C.F.R. § 3.160(c) (defining "pending claim" as "[a] claim which has not been finally adjudicated"); 38 C.F.R. § 3.160(d) (defining "finally adjudicated claim" as a claim that is finally decided on appeal or a claim for which the appeal period, triggered by the issuance of a notice of decision on the claim, has passed).

For years, the Veterans Court held that claims remain pending until they are "*explicitly* adjudicated," and when first confronted with whether a claim could be deemed denied "sub silentio" based on a decision that failed to address the claim, the Veterans Court held that it could not. *Ingram v. Nicholson*, 20 Vet. App. 156, 164 (2006) (emphasis added), *opinion withdrawn and superseded on reconsideration*, 21 Vet. App. 232 (2007). Citing to the notice statutes and regulations binding the VA, the Veterans Court rejected

the government's theory that the VA's notice of decision on one claim could be the basis for the silent denial of another unmentioned claim raised at the same time. *Id*. at 169 (citing 38 U.S.C. §§ 5104(a)-(b); 38 C.F.R. § 3.103(b) (2005)). The decision also highlighted the fundamental unfairness of such a rule given the "frequently piecemeal" nature of veterans' benefits litigation:

> A veteran will submit a continuous stream of evidence and correspondence. Rather than holding all the claims until every one is ready to be decided, the Secretary will develop and decide multiple claims separately—often over a period of years. A savvy veteran could easily submit what he believes to be a claim and receive from the Secretary an adjudication of a previously raised claim for the same disability. The veteran could then submit more correspondence on the claim he was trying to raise and receive a request from the Secretary for evidence or to report for an examination. There could be years of intervening appeals, remands, and revised decisions before the claim is actually granted and the assignment of the effective date reveals that the Secretary did not recognize the initial submission as a claim for the benefit . . . . Accordingly, accepting a doctrine of sub silentio denials has grave implications for due process and protecting the appellate rights of veterans.

Id. at 170.

The Federal Circuit, however, reached a different conclusion later that year. In *Deshotel v. Nicholson*, the Federal Circuit held that a claim can be "deemed

denied," triggering the appeal period, when a veteran submits two related claims for benefits at the same time, and the RO issues a decision addressing one claim but not the other. 457 F.3d 1258, 1261 (Fed. Cir. 2006). In reaching this conclusion, the Federal Circuit never mentioned the veteran's right to notice. *Id.*

The Veterans Court wrestled with this new rule when the VA requested reconsideration in *Ingram v. Nicholson*, 21 Vet. App. 232 (2007) ("*Ingram II*"). Bound by the Federal Circuit's holding, the court nevertheless sought to distinguish and cabin *Deshotel* to its facts. The court concluded that a claim could be deemed denied absent explicit adjudication only when the notice of decision contained "recognition of the substance of the claim" "from which a claimant could deduce that the claim was adjudicated"—in other words, when the notice actually acknowledged the relevant claim in some way. *Id.* at 244. Any broader rule, the court held, would violate the VA's codified notice requirements.

It was not until two years later that the Federal Circuit itself grappled with the notice implications of implicit denials in *Adams v. Shinseki*. 568 F.3d at 963-65. There, confronted with a claim from the 1950s that presented only a constitutional—rather than a statutory or regulatory—due process challenge to the implicit denial rule, the Federal Circuit held that the doctrine did not violate the veteran's constitutional right to notice. *Id.* at 965. Without discussing the then-existing statutory and regulatory provisions on notice, the court reasoned that the implicit denial rule was, "at bottom, a notice provision" and "reflected an appropriate balance between the interest in finality and the need to provide notice to veterans when their

claims have been decided." *Id*. at 963, 965. That balance, the court concluded, was satisfied whenever the VA provided enough information for "*a reasonable claimant* [to] know that he would not be awarded benefits for his asserted disability." *Id.* at 963 (emphasis added).

Since *Adams*, the "reasonable claimant" test became the operative standard for the adequacy of notice in implicit denial cases, even when the relevant claims were bound by codified statutory and regulatory notice requirements. The Veterans Court later articulated four "factors" to be applied in assessing whether an express decision on one claim would reasonably be read to imply the denial of another: (1) "specificity" or "relatedness of the claims"; (2) "specificity of the adjudication"; (3) "timing of the claims"; and (4) "whether the claimant is represented." *Cogburn v. Shinseki*, 24 Vet. App. 205, 213 (2010). Under the *Adams* and *Cogburn* standard, the implicit denial rule has grown to encompass claims filed at different times, *Adams*, 568 F.3d at 964; claims resting on distinct medical diagnoses, *Cogburn v. McDonald*, 809 F.3d 1232, 1235-1236 (Fed. Cir. 2016); and claims that were submitted both formally and informally, *Munro v. Shinseki*, 616 F.3d 1293, 1298 (Fed. Cir. 2010); *Cogburn*, 809 F.3d at 1235-36. Although the Federal Circuit has condoned the Veterans Court's *Cogburn* factors as a test for the adequacy of notice in implicit denial cases, it has characterized the assessment of whether the proper notice standard was satisfied in any given case as a "question of fact" over which it lacks jurisdiction to review. *See* Pet.App.16a.

C. Mr. Steele's Claim

Petitioner Kevin Steele was serving in the Marine Corps aboard a ship when, during a drill, he hit his head on a metal pipe with so much force that he awoke dazed and needed sutures for a two-inch gash on his scalp. Pet.App.2a. In 1990, several years after his honorable discharge, Mr. Steele filed an application for disability compensation for his head injury, among other injuries from his service. The VA requested a medical examination, during which Mr. Steele identified two conditions related to the head injury: (1) a scar on his scalp and (2) headaches. Pet.App.2-3a.

A year later, Mr. Steele received a notice of decision from the VA regional office that denied benefits for various scars on his body but made no mention of his headaches. The notice stated that his "SCARS" were "service-connected" but less than 10% disabling and thus non-compensable. Pet.App.64-65a. As further explanation, the notice stated that although "service-connection [was] granted for [his] scalp scar as the only residual of his head injury," none of his scars were "considered disabling" and "noncompensable evaluations [were] assigned." Pet.App.65a. The notice did not say whether the VA had considered awarding benefits for his headaches, and if so, whether it found the headaches to be disabling or service-connected. While an internal rating decision sheet referenced the examiner's notes on his head-

aches, Pet.App.71a, that decision sheet was not provided to him with the notice of decision.[3] Mr. Steele did not file a notice of disagreement.

In 2013, Mr. Steele again sought compensation from the VA for his headaches, which were described in his medical records as "prostrating." Pet.App.58a. Based on a history of symptoms going back to his injury in service, the regional office found the headaches service connected and assigned a compensable disability rating. *Id*. The decision, however, did not award Mr. Steele benefits dating back to his 1991 claim.

This time, Mr. Steele appealed, seeking an earlier effective date for his claim. But after multiple proceedings, the Board denied Mr. Steele the benefit of his 1991 claim, reasoning that his initial headache claim had been "implicitly denied" by the rating decision on his scars. Pet.App.27a. Mr. Steele appealed to the Veterans Court, asserting that the Board's implicit denial finding was contrary to the VA's notice

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[3] These rating decision sheets are not published by the VA. Nothing suggests that this rating decision was included with the notice of decision sent to Mr. Steele in 1991, and it was not VA's practice before 2017 to include rating decisions with its notice letters. *See* Dep't of Veterans Affairs, Adjudication Procedures Manual (M21-1), VI.i.1.B.1.f (2017), https://tinyurl.com/3zdjse26 ("Decision notices regarding a VA rating decision that claims processors generated using Automated Decision Letter (ADL) did not include a copy of the rating decision. In order to comply with the requirement to provide claimants a summary of the evidence the rating activity considered, ADL copied the evidence the rating activity listed in the rating decision and pasted it into the decision notice. This approach changed on December 11, 2017, when Redesigned ADL (RADL) was deployed. Now, decision notices that notify a claimant of a rating decision include a copy of the rating decision.").

obligations. The Veterans Court affirmed, relying on established case law on the implicit denial rule.

Mr. Steele appealed to the Federal Circuit, again arguing that the VA's 1991 notice letter could not satisfy the VA's obligation to provide adequate notice for his headache claim. In a precedential decision, the panel held that the VA had no obligation to "expressly connect the dots" between his implicitly denied headache claim and the reasoning discernible from the notice. Pet.App.14a. Such a requirement, the Federal Circuit reasoned, would "leave no room for the implicit denial doctrine." *Id.* Because the implicit denial rule was firmly established in the court's case law, it was enough for the VA to find that "the stated reasons for the explicitly decided claim would reasonably be understood to also extend to the implicitly denied claim." *Id.*

Mr. Steele sought rehearing *en banc*, which the Federal Circuit denied. Pet.App.73-74a.

D. Implicit Denials after *Hamill v. Collins*

Not long after denying rehearing of the decision in Mr. Steele's case, the Federal Circuit issued a decision in a case involving the VA's implicit denial of a claim under the AMA. *Hamill v. Collins*, 166 F.4th 1030 (Fed. Cir. 2026). There, the court held, as a matter of first impression, that "under the AMA, a veteran's claims can no longer be implicitly denied." *Id.* at 1033. Specifically, the court held that "under the AMA, a veteran has an appealable decision for a particular issue only if the decision gives him *explicit* notice that the issue is being adjudicated and how it is being decided." *Id.* at 1038 (emphasis added). The holding is expressly limited to claims decided on or after the

AMA's February 2019 effective date, *id.* at 1039, leaving the VA free to continue deeming unawarded claims like Mr. Steele's denied based on any notice of decision issued under the legacy system.

REASONS FOR GRANTING THE PETITION

The time is ripe for the Court to grant certiorari to overturn a profoundly harmful yet deeply entrenched doctrine that the Federal Circuit has refused to abolish. The implicit denial rule deprives veterans of their statutory right to explicit notice of the VA's decisions at the critical point in the adjudication process when veterans must decide, often unrepresented, whether to initiate an appeal. Beyond the personal harm inflicted on veterans deprived of long-awaited benefits, the rule undermines the integrity of the veterans' benefits adjudication system by imposing the cost of VA errors—and the responsibility for identifying those errors—on veterans and then insulating those errors from meaningful judicial review.

Certiorari is needed because the doctrine's continued vitality is incompatible with any version of § 5104, which required from its first enactment that the VA provide notice of the "decision" made and "a statement of the reason for the decision." 38 U.S.C. § 3004 (1989). It also conflicts with the VA's articulation of its obligation in its own regulation to "clearly set forth the decision made … [and] the reason for the decision" in "writing." 38 C.F.R. §§ 3.103(b), (f). Nothing in the AMA's amendments changed the baseline protections Congress had mandated for veterans. Once Congress had spoken on the requirements for adequate notice, the Federal Circuit had no authority to temper those requirements with a judge-made standard.

This case is the ideal vehicle to uniformly resolve the continued permissibility of implicit denials for claims on which veterans are still awaiting benefits today. The Question Presented is squarely presented, properly preserved, and dispositive of Mr. Steele's entitlement to two decades of disability compensation. Because Mr. Steele's claim was deemed denied before the AMA's heightened requirements, a ruling on the governing notice requirements here would define the baseline protections owed to veterans under both the legacy and AMA systems. An equally strong vehicle is unlikely to reach the Court again.

I. The implicit denial rule inflicts exceptional harm on veterans and the pro-claimant system Congress built to serve them.

Since its original enactment, the requirements in 38 U.S.C. § 5104 were meant to protect veterans at a critical gateway in the benefits adjudication process: the point at which the veteran must decide whether to initiate or forfeit an appeal of the VA's decision on their benefits. Amid an informal collaborative process where the VA assists veterans in assembling evidence to develop claims, the veteran must decide—typically without counsel—whether to challenge the decision of the agency that was helping him. It was to safeguard a meaningfully informed choice for these veterans, that Congress first mandated full and clear disclosures of the VA's decisions and the reasons for those decisions. *See* 1989 U.S.C.C.A.N. 1469, 1703.

The implicit denial rule strips veterans of these protections in favor of a judge-made standard that the VA can apply to individual cases with limited judicial scrutiny. The resulting harm extends not only to

claimants awaiting benefits but to the integrity and fairness of the VA's adjudication system.

1. As the Federal Circuit has acknowledged, "no veteran can appeal a decision he does not understand to have been made." *Hamill*, 166 F.4th at 1038. Yet the implicit denial rule allows the VA to deem claims retroactively denied when the VA never *explicitly informed* the veteran of the decision made and there is no evidence the veteran *actually knew* of the denial before the appeals period expired. All the rule asks is whether a hypothetical "reasonable claimant" "*would have known*" that the claim had been denied based on factors evaluated in hindsight. *Adams*, 568 F.3d at 963.

In doing so, the doctrine shifts the cost of the VA's errors, and the responsibility for identifying them, to the unrepresented veterans the agency was created to serve. When the VA relies on implicit denial of a claim like Mr. Steele's, the outcome is typically that the veteran forfeits years of retroactive compensation for which he could otherwise show entitlement. For the veterans whose claims are deemed denied, the financial injury of that denial comes with the added insult that they should have acted sooner—that even with the weight of their disability, and without meaningful access to counsel, they should have "connect[ed] the dots" that the VA failed to connect for them and informed the VA of its own mistakes. *Cf.* Pet.App.14a.

This is antithetical to the basic pro-claimant tenets of the veterans' benefits adjudication system, which was designed to "place a thumb on the scale in the veteran's favor" at every step and to "take[] upon itself the risk of error" "in recognition of our [society's] debt to our veterans." *Henderson v. Shinseki*, 562 U.S. 428,

440 (2011); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-54 (1990). Against the grain of the pro-veteran adjudication scheme Congress created, the implicit denial rule serves as a judicially fashioned rule of repose for the VA that excuses its past notice failures at the expense of the veterans who desperately wait on its benefits.

2. The implicit denial rule also inflicts profound harm on the VA's adjudication system by allowing the agency to shield past errors, both procedural and substantive, from meaningful judicial review. First, by allowing the VA to assess the adequacy of its notice as a factual finding when deciding whether to deem a claim denied, the implicit denial rule substantially limits the degree of judicial oversight available for that assessment. The Veterans Court can only review the Board of Veterans' Appeals' findings for clear error, to be overturned only if they have "no plausible basis in the record," and the Federal Circuit is precluded from reviewing those findings. *See* 38 U.S.C. §§ 7261(a)(4), 7292(d); Pet.App.19a (citing *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990)).

Second, by retroactively terminating the period for direct appeal, a finding of implicit denial typically bars further review of the merits of the VA's decision to deny the claim. Thus, by deeming a claim implicitly denied, the VA precludes further scrutiny of the agency errors that led the VA to neglect the veteran's claim in the first place. This often includes failures by the VA to abide by its duties in fully developing the claim, sympathetically construing submissions, maximizing benefits, and reviewing the evidence in the light most favorable to the veteran. As one veterans court judge recognized, "[s]anctioning silent denials of implied claims relegates the real adjudicatory work to

the shadows, with a loss of transparency that sows confusion among the parties and undermines confidence in the system." *Hamill v. McDonough*, 37 Vet. App. 65, 78 (2023) (Jaquith, J., dissenting).

II. The implicit denial rule is incompatible with the VA's past and present notice obligations under 38 U.S.C. § 5104.

As this Court has held, and the Federal Circuit acknowledged in *Hamill*, "[o]nce Congress addresses a subject, even a subject previously governed by federal common law, … the task of the federal courts is to interpret and apply statutory law, not to create common law." 166 F.4th at 1037-38 (citing *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n.34 (1981)). Here, Congress spoke directly, in both 1989 and 2017, to require explicit notice of basic information about the VA's decision each time it denies a benefit. The courts have no authority to replace those statutory requirements with a judicially created "reasonable claimant" standard under the implicit denial doctrine.

A. Congress spoke directly on the requirement for clear and explicit notice of all claim denials in the VBA.

In interpreting a statutory provision, courts begin with its plain text and context. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Fischer v. United States*, 603 U.S. 480, 486 (2024) (The Court "consider[s] both 'the specific context' in which [a phrase] appears 'and the broader context of the [law] as a whole'") (citation omitted)). For statutes governing adjudication of veterans' benefits, any remaining ambiguity should be resolved in the veteran's favor. *See Brown v. Gardner*,

513 U.S. 115, 118 (1994); *Henderson*, 562 U.S. at 441; *Rudisill v. McDonough*, 601 U.S. 294, 314 (2024).

1. Beginning with the text, at the time Mr. Steele's claim was pending, 38 U.S.C. § 5104 required the VA to provide notice of any "decision … affecting the provision of benefits," and for any decision "denying a benefit sought," to also provide "a statement of the reasons for the decision." §§ 5104(a), (b).

The provision's plain language requires the VA to convey the decision made and the reason for the decision explicitly, *i.e.*, as a "statement." *Id.* By definition, a "statement" is "something *stated*" rather than left unspoken: a "communication *setting forth* facts, demands, allegations, etc." *Statement*, Oxford English Dictionary (2d ed. 1989) (emphasis added); *Statement*, American Heritage Dictionary (2d ed. 1991) (emphasis added). The word does not, in ordinary usage, refer to information conveyed only through the reader's inference. Indeed, when this Court's jurisprudence requires a "clear *statement*" from Congress, that test requires unmistakable clarity, not an oblique suggestion. *See West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 746 (2022) (Gorsuch, J., concurring) ("'[O]blique or elliptical language' will not supply a clear statement.") (quoting *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005)); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (requiring, under the clear statement rule, that Congress be "unmistakably clear" in its language if its laws would alter balance of powers). It makes no sense for courts to read Congress's directive for a clear "statement" of the "reason for the decision" as requiring anything less than an explicit statement of why the VA had made a specific, explicitly specified, decision.

2. Even if the text of the statute in isolation could be stretched to encompass implicit denials, its broader context would clarify the need for clear explicit notice of each decision and its reasoning. As discussed, *supra* 7, 20, the notice provided under § 5104 serves as the only basis on which veterans can make an informed decision over whether to initiate or forfeit an appeal, and at the time of its first enactment, veterans were precluded from retaining paid counsel to assist with their interpretation of the VA's decision. Congress enacted the statute specifically to make notices of decisions understandable and informative to unrepresented veterans. 1989 U.S.C.C.A.N. 1469, 1703. The legislative history is replete with statements on the need for full, clear, and meaningful explanations of the reasons for adverse decisions, even disparaging explicit but conclusory statements like "service connection not found." *Id.*; 1989 U.S.C.C.A.N. 1856, 1860. As the Veterans Court observed in *Ingram II*, it is unreasonable to conclude that "silence in an RO decision as to a claim could be deemed to meet the statutory requirements" when even express but conclusory statements were considered inadequate. 21 Vet. App. at 252.

To the extent any ambiguity remained as to the degree of clarity required in § 5104, it should be resolved in favor of the veteran as part of the broader pro-veteran context in which the provision is situated. *Brown*, 513 U.S. at 118; *Henderson*, 562 U.S. at 441; *Rudisill*, 601 U.S. at 314.

3. The VA, in its own regulations, read the notice statute to require a clear explicit statement, in writing, on at least the decision made and the reason for

any denial of a claim. At the time Mr. Steele's headache claim was pending, the VA's notice regulation required that its notices be "in writing" and "clearly set forth the decision made … [and] the reason(s) for the decision." 38 C.F.R. §§ 3.103(b), (f) (1990). To "set forth" a decision is, by definition, to "express [it] in words" and to "explain it" in a "clear and organized way." *Set Forth*, American Heritage Dictionary (2d ed. 1985) ("to express in words"); *Set Something Forth*, Cambridge Advanced Learner's Dictionary (4th ed. 2013) ("to give the details of something or to explain it, especially in writing, in a clear, organized way"). Indeed, in interpreting the regulation, the Federal Circuit has held "as a matter of law" that a notice must "state, or clearly identify in some other manner, the claim(s) being denied [and] the reason for the decision" when the VA issues an "explicit denial." *Ruel v. Wilkie*, 918 F.3d 939, 942 (Fed. Cir. 2019).

4. This Court has recognized that a statutorily mandated notice should not be construed to permit omission of "integral information" that would "deprive [the notice] of its essential character." *Pereira v. Sessions*, 585 U.S. 198, 214 (2018). Thus, a "notice to appear" must contain information about the "time and place" of the appearance. *Id.* Here, too, for a "notice of decision" to satisfy its "essential character," it must set forth basic "integral information" about the "decision" made. *Id.* There is no reasonable reading of § 5104, as originally enacted in 1989, under which the VA could satisfy its obligation to issue a "notice of decision" without a clear statement of the specific "decision made" and the "reason for the decision."

Here, the notice of decision Mr. Steele received in 1991 could not have constituted an appealable "notice

of decision" on his headache claim under the governing notice statute and regulation. For Mr. Steele to have made a meaningfully informed decision about whether to appeal the VA's 1991 decision, he needed at least a basic statement (1) that the VA had considered and denied his headache claim and (2) that it was denied because the VA found it not disabling, not service-connected, or both. Nothing in the notice letter he received provided that basic information in any clearly discernible way. *See* Pet.App.64-65a. As it stood, all that Mr. Steele had before him in the form of a "decision" in 1991 was that the VA would not compensate him for his scars because they were not disabling. Pet.App.65a. The mere reference to his head scar as "the only residual" of his head injury does not set forth any decision on his headache claim or reason for denying it. Pet.App.65a. The Federal Circuit's holding that this "stated reason was not so devoid of meaning as to be insufficient to support the implicit denial" is incompatible with the VA's statutory notice obligations. Pet.App.16a.

B. The AMA amendments to § 5104 reinforce, rather than undermine, the preexisting statutory prohibition on implicit denials.

Nothing in the text or history of the AMA amendments to § 5104 suggests a change in the VA's basic obligation to provide *explicit* notice of the core information claimants need to decide whether to disagree with a VA decision: (1) the specific decision the VA made and (2) the reason for the decision. Rather, the AMA's amendments preserved these existing requirements while reorganizing and expanding the categories of required information to better prepare claimants for alternative pathways under the AMA.

1. The AMA did not change the basic requirement in the first paragraph of § 5104 that the VA provide "notice" of every "decision" made by the VA. With respect to decisions denying benefits, the new § 5104(b) expanded the categories of information required while using comparable language to indicate that the information should be provided expressly. The pre-AMA requirement to provide "a summary of the evidence considered by the Secretary" is reproduced verbatim in requirement (3) of the AMA provision. And the pre-AMA requirement for a "statement of the reason(s) for the decision" is expanded under the AMA across a list of multiple categories of information to be "identif[ied] or "summarized": "identification of the issues adjudicated"; "a summary of the applicable laws and regulations"; "identification of findings favorable to the claimant"; "identification of elements not satisfied leading to the denial"; and "identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation." *See supra* 10-11. Nothing in the language of the new AMA categories suggests that the basic preexisting requirement to provide a "*statement* of the reason for the decision" could be satisfied implicitly rather than explicitly.

2. Even under the Federal Circuit's holding in *Hamill*, an appealable notice of decision under the AMA does not rest on the presence of every single enumerated category in § 5104(b). Rather, an appealable notice of decision on a given issue requires only "*explicit* notice that the *issue is being adjudicated* and *how it is being decided*." *Hamill*, 166 F.4th at 1038 (first emphasis in original, remainder added). This is based on the court's reasoning that while other categories of missing information could be challenged by seeking review of the decision, "for a decision to be appealable,

it must [] put the veteran on notice that his issue has been adjudicated." *Id.* (emphasis added).

This basic rationale applies with the same if not greater force to claims in the legacy system. While some disclosures help inform veterans' decisions over the proper channel for seeking review in the AMA system, the basic requirement of setting forth *what the VA decided* and *why* go to the same decision facing pre- and post-AMA claimants over *whether* to seek review at all. Indeed, for pre-AMA claimants, who were precluded from obtaining counsel in making that decision, explicit clarity on the latter points was even more important.

C. Courts may not supplant Congress's codified notice requirements with a judicially formulated "reasonable claimant" standard.

Once Congress spoke on the requirements for notice, neither the Federal Circuit nor the Veterans Court could take it upon itself to prescribe alternative notice standards by reassessing the "appropriate balance" between the VA and veterans' interests. *Cf. Adams*, 568 F.3d at 963. As this Court has explained, "courts are not at liberty to jettison Congress' judgment" in favor of its own judicially created rules. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 335 (2017) (quotation omitted). That would give courts a "legislation-overriding role that is beyond the Judiciary's power." *Id.*

Even if the implicit denial rule were, "at bottom, a notice provision," as the Federal Circuit has characterized it, the judge-made provision cannot supplant the text of the statutory and regulatory provisions

that Congress enacted and the VA promulgated. *Adams*, 568 F.3d at 965. "[E]ven the most formidable policy arguments cannot overcome a clear statutory directive." *BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230, 245 (2021) (quotation omitted); *Hamill*, 166 F.4th at 1039.

Here, the notice standard developed by the Federal Circuit is incongruous not only with the statutory notice provision standing alone, but also with the broader adjudicatory scheme Congress created, particularly as it existed when § 5104 was first enacted. As the Veterans Court explained in the *Ingram* decisions, in VA's intentionally informal and non-adversarial process, claim development and adjudication proceed "piecemeal" often as part of a "continuous stream of evidence and correspondence" pertaining to multiple claims, assigned the same file number, under simultaneous consideration. *Ingram*, 20 Vet. App. at 170; *Ingram II*, 21 Vet. App. at 254. The implicit denial rule unjustifiably places the burden on veterans to find clarity in the chaos, rather than on the VA, as Congress intended. The rule also operates on the fiction that judges reviewing a curated paper record in hindsight can fairly discern what unrepresented disabled veterans, or bereaved family members, would "reasonably" have inferred about the VA's decisions based on isolated statements in letters sent decades ago.

III. This case is the right vehicle, at the right time, to resolve the VA's continued authority to find implicit denials.

This case is an ideal vehicle at an ideal time for this Court to uniformly resolve the continued permissibility of implicit denials across legacy and AMA claims.

1. The continued legitimacy of the implicit denial rule is ripe for this court's review. The Federal Circuit has drawn a firm line preserving the doctrine for pre-AMA claims, and its standards and justifications for the rule are deeply entrenched in the court's case law. *See Hamill*, 166 F.4th at 1034 (citing the court's string of cases, including Mr. Steele's, that have upheld the application of the implicit denial rule to pre-AMA claims), 1039 (dismissing policy concerns over its holding in part on the grounds that it only applies to AMA claims), 1037 (distinguishing the AMA's requirements from what was "previously acceptable"). The Federal Circuit has declined to reevaluate its implicit denial precedent *en banc*,[4] and because the court holds exclusive jurisdiction over appeals of veterans' benefits claims, no further percolation of the issue is possible.

2. As the law stands, vast numbers of unawarded legacy claims like Mr. Steele's remain subject to retroactive implicit denial. In the aftermath of *Hamill*,

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[4] The Federal Circuit has denied petitions for rehearing *en banc* raising the implicit denial rule in at least two cases, including this case, in the past five years. *See* Pet.App.73-74a; *Hampton v. McDonough*, 68 F.4th 1376 (Fed. Cir. 2023), *rehearing denied*, 2022-1359, (Fed. Cir. Aug. 21, 2023).

the VA can continue to deem any legacy claims implicitly denied if it can tie the denial to a decision issued to the veteran on a "related" claim before the AMA's effective date of February 19, 2019. This includes claims for benefits filed by the vast majority of living veterans today who left service before 2019, including the millions who served during the two-decade long Global War on Terror.[5] These are precisely the cases in which implicit denials inflict the most harm: Veterans under the legacy system had the least access to counsel in deciding whether to initiate appeals of VA decisions; and veterans with unawarded legacy claims today have waited the longest for their benefits and stand to lose the most from a finding of implicit denial.

There is no question that the VA is continuing to apply implicit denials with full force to legacy claims or that the courts are affirming the VA's denials. Since the Federal Circuit's decision in Mr. Steele's case, the Board issued well over a hundred decisions applying the implicit denial rule.[6] And in the six weeks since the Federal Circuit's decision in *Hamill*, the Veterans Court has already issued at least one decision affirming the continued applicability of *Steele*'s

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[5] *See* Who Are the Nation's Veterans?, USA Facts (Apr. 14, 2025), https://usafacts.org/articles/who-are-the-nations-veterans/ (indicating that of the 15.8 million living veterans, 91.7% were age 35 or older, such the majority would have entered and left service before 2019).

[6] Westlaw search for "(impli! /2 deni!) /p (adams or hamill or deshotel or cogburn or steele)" in Department of Veterans Affairs Administrative Decisions dated on or after May 1, 2025: 127 results.

holding to legacy claims after *Hamill*. *Fletcher v. Collins*, No. 24-6141, 2026 WL 482884, at *4 (Vet. App. Feb. 20, 2026).

3. The Question Presented is dispositive and squarely presented, and the Federal Circuit's holding exemplifies the need for this Court's review. Mr. Steele's claim was pending shortly after the enactment of the VBA, and it is uncontested that the notice he received did not expressly state the "decision" made with respect to his headache claim or the "reason for the decision" as required under § 5104. The implicit denial of that claim is the only basis for the VA's continued withholding of two decades of compensation for his service-connected headaches. Mr. Steele properly challenged the Board's finding of implicit denial on notice grounds at both the Veterans Court and the Federal Circuit. A decision here that the implicit denial is incompatible with § 5104 as originally enacted will also resolve any question the government may raise about the doctrine's compatibility with the heightened notice requirements in the AMA.

The Federal Circuit's decision here is also prime for certiorari because it illustrates the fundamental problems with the court's implicit denial case law. In addressing Mr. Steele's arguments on inadequate notice, the decision undertook no meaningful textual analysis of the VA's statutory or regulatory notice obligations, and relied instead on its own precedent that the implicit denial rule is itself a "notice provision." Pet.App.19a. The court then disclaimed jurisdiction to review the VA's application of the notice standard that the court created, leaving the VA with broad discretion to police its own compliance with its notice obligation. Pet.App.15-16a.

4. A similarly strong vehicle is unlikely to arise again. The *Hamill* case cannot serve as a vehicle for addressing implicit denials of pre-AMA claims because the adjudication of the claim at issue was subject to the AMA, which all parties agreed "heightened" the standard for notice. And although the VA continues to rely regularly on implicit denials for legacy claims under the VBA, future cases are unlikely to result in fully reasoned precedential decisions suitable for certiorari. Because the Federal Circuit has drawn a firm line preserving implicit denials for pre-AMA claims, veterans in future cases are unlikely to have a viable "legal question" on which to bring their challenge to an implicit denial; challenges based on the rule's application to particular cases are routinely dismissed for lack of jurisdiction in non-precedential decisions.[7] Thus this case is likely the Court's best opportunity to take up the Question Presented.

***

Congress spoke not once, but twice, to the notice the VA owes to veterans when denying their claims. Each time, it legislated to protect the interests of claimants like Mr. Steele "who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock Repair Corp.*, 328 U.S. 275, 285 (1946). This Court should grant certiorari to stop the implicit denial rule's encroachment on that legislative judgment.

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[7] *See, e.g.*, *Jones v. McDonough*, No. 2020-2174, 2021 WL 6123915, at *4 (Fed. Cir. Dec. 28, 2021); *Penley v. McDonough*, No. 2021-2088, 2022 WL 5434204, at *1 (Fed. Cir. Oct. 7, 2022); *Poole v. Wilkie*, 752 F. App'x 968, 972 (Fed. Cir. 2018).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 17, 2026

APPENDIX

TABLE OF APPENDICES

Table of Appendices

APPENDIX A

United States Court of Appeals
for the Federal Circuit

KEVIN STEELE,
Claimant-Appellant

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2023-2049

Appeal from the United States Court of Appeals for Veterans Claims in No. 22-32, Judge Scott Laurer.

Decided: May 1, 2025

KENNETH M. CARPENTER, Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

ALBERT S. IAROSSI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by BRIAN M. BOYNTON, ERIC P. BRUSKIN, PATRICIA M. MCCARTHY; EVAN SCOTT GRANT, BRIAN D. GRIFFIN, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before PROST, LINN, and REYNA, *Circuit Judges*. LINN, *Circuit Judge*.

Veteran Kevin Steele appeals the decision by the United States Court of Appeals for Veterans Claims ("Veterans Court"), affirming the decision by the Board of Veterans Appeals ("Board") awarding an effective date no earlier than March 6, 2013, for service connected headaches. Because neither the Board nor the Veterans Court legally erred by holding that Steele's 1991 claim for headaches was implicitly denied and therefore finally adjudicated in 1991, we affirm.

BACKGROUND

Kevin Steele is an honorably discharged non-combat Marine veteran who served from 1978-1979 and 1980-1982. On June 13, 1991, Steele filed an original claim for, inter alia, a "head injury" that he attributed to a 1980 training incident. Soon after the incident, the Department of Veterans Affairs ("DVA") Examiner reported:

> In July, 1980 the patient, while [] on a military ship, injured his head. While doing a drill, he hit his head against a metal pipe under the cabin on the ship. He became dazed momentarily but he did not completely lose consciousness and he had a 2 inch gash on the frontal area of the skull which was sutured. *The only residual he has because of this head*

> *injury, are occasional headaches but they are not disabling.*

J. App'x at 21 ("1991 Examination") (emphasis added). The VA Regional Office ("RO") reviewed Steele's medical history noting that he "was seen on July 17, 1980 after sustaining trauma to his head with loss of consciousness," and that in 1990 he "had some complaints of a headache" but that "[t]here were no further complaints of headaches during service." J. App'x at 23-24 ("1991 RO Decision"). The RO further noted the "puncture scar of the frontal scalp," and that "[t]he veteran claimed only occasional headaches as a residual but these were not disabling." *Id.* at 24. The RO concluded that "[s]ervice connection is granted for the scar of the scalp as the only residual of the head injury in service, the scar of the left abdomen, and the scar of the right elbow. However, these scars are not considered to be disabling and noncompensable evaluations are assigned." *Id.*

On September 12, 1991, the RO sent Steele a notification letter, denying his claim for disability benefits. J. App'x at 25 ("1991 Notice Letter"). The letter noted three sets of "SCARS" that were service connected, but "less than 10% disabling," and concluded that: "SERVICECONNECTION IS GRANTED FOR YOUR SCALP SCAR AS THE ONLY RESIDUAL OF YOUR HEAD INJURY IN SERVICE." *Id.* at 25-26 (capitalization in original). Steele did not appeal the RO's decision.

On March 6, 2013, over 20 years later, Steele filed a claim for service connection for memory loss, shaking hands, depression, and fatigue. The Board

eventually held that this claim should have been construed to include a claim for traumatic brain injury ("TBI"), and Steele was awarded a 50% disability rating with a March 6, 2013 effective date. J. App'x at 167.

Three years later, on October 10, 2016, Steele filed a claim for service connection for headaches. J. App'x at 96. In January 2017, the RO granted service connection for headaches effective October 14, 2015—the date of receipt of the intent to file—and assigned a 50 percent disability rating. J. App'x at 28-33, 96. Eventually, the Board assigned an effective date "no earlier than the date of his residuals of TBI reopening petition, which is March 6, 2013." J. App'x at 168.

Steele appealed again, and, during the pendency of his appeal at the Veterans Court, joined with the government in filing a Joint Motion for Remand seeking to adjudicate whether his 1991 claim for service connected headaches remained open and thus entitled him to an earlier effective date, or, if closed, should be reopened due to clear and unmistakable error ("CUE").[1]

On September 7, 2021, the Board issued the decision on appeal here, denying an effective date before March 6, 2013, for headaches and all residuals of TBI. J. App'x at 191-98 ("September 2021 Decision"). Rejecting Steele's argument that his 1991 claim for headaches remained open because it was not finally adjudicated, the Board held that the 1991 RO Decision "at the very least, implicitly denied" Steele's

[1] The CUE claim took a different procedural route not relevant here.

claim for service connected headaches. J. Appx. at 195. In making that determination, the Board asked, "whether it would be clear to a reasonable person that VA's action that expressly refers to one claim is intended to dispose of others as well," *id.* (citing *Adams v. Shinseki*, 568 F.3d 956 (Fed. Cir. 2009)), and answered that a reasonable person would have understood that Steele's claim for headaches was denied in the 1991 RO Decision denying compensable service connection for head injury, *see id.* at 196-97.

Steele appealed to the Veterans Court, arguing that the Board's implicit denial in the August 1991 Decision violated the notice requirements of 38 C.F.R. § 3.103(e) (1991) under this Court's decision in *Ruel v. Wilkie*, 918 F.3d 939 (Fed. Cir. 2019). The Veterans Court held that the Board properly considered the *Cogburn* factors to determine whether a Veteran was put on notice of the implicitly denied claim, and that Steele had failed to raise the notice argument based on *Ruel* in the previous rounds of appeals to the Board or the Veterans Court. J. App'x at 5-6; *see Cogburn v. Shinseki*, 24 Vet. App. 205 (2010) (surveying four factors for determining whether a claim was implicitly denied).

Steele appeals.

DISCUSSION

I

We have jurisdiction to review the legal bases for the Veterans Court's decision under 38 U.S.C. § 7292(a), (c), but our jurisdiction is tightly circumscribed by statute. We may not review the

Veterans Court's factual determinations or applications of law to fact. 38 U.S.C. § 7292(d)(2). We may only review the Veterans Court's interpretation of a rule of law or statute or regulation "that was relied on by the [Veterans] Court," § 7292(a), or issues that raise Constitutional concerns. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991).

II

A

Ordinarily, a VA decision denying benefits must expressly identify the particular claim being denied, expressly state the reasons for the denial, and expressly provide notice of the right to appeal that claim. *See* 38 C.F.R. § 3.103(f) (1991).[2] That provision states:

> (f) **Notification of decisions**. The claimant or beneficiary will be notified in writing of decisions affecting the payment of benefits. . . .
>
> **Notice will include the reason for the decision** and the date it will be effective as well as the right to a hearing.
>
> The notification will also advise the claimant or beneficiary of the right to initiate an appeal.

[2] We apply the version of the regulation in place when the allegedly deficient 1991 Notice Letter and 1991 RO Decision were issued. Both parties apply this version in their arguments.

Id. (emphases added). Analyzing the substantively identical 1984 version of § 3.103,[3] we held:

> [A]s a matter of law, to meet the notice requirements of § 3.103(e), an explicit denial must state, or clearly identify in some manner, the claim(s) being denied.[FN] The decision must also meet the other requirements of § 3.103(e), **including the reason for the decision**, the date effectuated, and notice of appellate rights.

Ruel, 918 F.3d at 942 (emphasis added). In the footnote, we noted: "Our holding is limited to explicit denials, since that is what the Veterans Court determined occurred here." *Id.* at 942 n.3. This provision "mirrors constitutional due process by requiring notice that a claim has been denied." *Id.*

If the VA "fail[s] to notify the claimant of the denial of his claim or of his right to appeal an adverse decision," that claim will be "considered to be pending," rather than finally adjudicated. *Adams*, 568 F.3d at 960 (citing *Cook v. Principi*, 318 F.3d 1334, 1340 (Fed. Cir. 2002) (en banc) (superseded by statute on other grounds)). Such a pending claim holds open the first filing date as a reference point for the earliest effective date for later-filed claims. *Id.* ("If a claim is left pending, it can be addressed when a subsequent claim for the same disability is adjudicated by the [VA], in which case the effective date or any award of

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[3] *Ruel* analyzed 38 C.F.R. § 3.103(e) (1984), which was renumbered to 38 C.F.R. § 3.103(f) in the 1991 version.

benefits will be the effective date applicable to the original claim").

B

Since at least our decision in *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006), this Court has recognized that the reasons provided for an explicit denial with respect to one particular claim, may constitute an *implicit* denial of another (related) claim, "even if the [VA] did not expressly address that [related] claim in its decision," *Adams*, 568 F.3d at 961.[4] The condition precedent for the application of this doctrine is that:

> [The] regional office decision "discusses a claim in terms sufficient to put the claimant on notice that it was being considered and rejected . . . even if the formal adjudicative language does not specifically deny that claim."

Adams, 568 F.3d at 962-63 (quoting with approval *Adams v. Peake*, No. 06-0095, slip op. at 5, 2008 WL 2128085 (Vet. App. Feb. 20, 2008)) (internal quote in Veterans Court decision omitted). We also stated:

> The key question in the implicit denial inquiry is whether it would be clear to a reasonable person that the [VA's] action that expressly refers to one claim is intended to dispose of others as well.

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[4] We refer to the implicitly denied claim as the "related" claim throughout this opinion.

Id. at 964; *see also id.* ("[T]he implicit denial rule applies where a regional office's decision provides a veteran with reasonable notice that his claim for benefits was denied."). When this condition precedent is met, the discussion of the explicit denial is deemed to provide "adequate notice of, and an opportunity to respond to, the regional office's decision" on the related claim. *Id.* at 965; *see also Cogburn v. McDonald*, 809 F.3d 1232, 1236 (Fed. Cir. 2016) ("[W]hen the implicit denial rule applies, the claimant necessarily 'received adequate notice of, and an opportunity to respond to, the [VA's] decision.'").

Because notice is deemed sufficient, the related claims are "deemed to have been denied, and thus finally adjudicated," closing off the veteran's earlier claim filing date. *Adams*, 568 F.3d at 961.

III

A

Steele argues that the Board and the Veterans Court legally erred here by not requiring the VA to satisfy its notice obligation under § 3.103(f), specifically, by not requiring the VA to "include the reasons for the decision" implicitly denying benefits for headaches in its 1991 Notice Letter. Appellant's Br. at 8. Relying largely on our holding in *Ruel*, 918 F.3d at 942, Steele argues that a claim may not be implicitly denied unless the RO notice letter satisfies all the requirements of § 3.103(f) not just for the explicitly denied claim, but also for the implicitly denied claim.

Steele appears to acknowledge that an explicit denial may provide notice *of the fact that* a related claim is being denied, but argues that our implicit denial precedents do not extend that imputation of knowledge to the *reasons* for the denial, which must be expressly stated in the notice to satisfy § 3.103(f). *See* Oral Argument at 33:05-33:52, available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-2049_03072025.mp3 ("The implicit denial rule is about the knowledge imputed to the veteran of *what* was denied, not *why* [it] was denied.").

He argues that the RO's failure to satisfy § 3.103 prevented that decision from finally adjudicating his headache claim, and that he is therefore entitled to an effective date of June 13, 1991 for service connected headaches. *See* 38 C.F.R. § 3.400. Steele thus asks this court to instruct the Veterans Court to remand to the Board to reconsider an effective date earlier than March 6, 2013, for service connected headaches.

The government responds that satisfying the prerequisites for implicit denial also satisfies Constitutional and regulatory notice requirements. *See Cogburn*, 809 F.3d at 1236 ("[T]he application of the implicit denial rule does not violate [a claimant's] right to receive notice pursuant to the VA's due process regulation."); *Adams,* 568 F.3d at 964-65 (rejecting claimant's argument that the implicit denial rule violated due process rights to receive notice of the RO decision because "the implicit denial rule is, at bottom, a notice provision"). During oral argument, the government also argued that the VA need not expressly state the reasons underlying an implicit denial because: (1) it would effectively

eliminate implicit denials by requiring that every denial be expressly justified; and (2) consideration of the factors in *Cogburn v. Shinseki*, 24 Vet. App. 205, 212-13 (2010), *aff'd on different grounds by Cogburn*, 809 F.3d 1232, protects claimants' rights to receive notice about the reasons for the implicit denial. *See* Oral Argument at 24:50-25:25; 27:40-28:05. The government adds that Steele's reliance on *Ruel* is misplaced because that case is expressly limited to express denials. *Ruel*, 918 F.3d at 942 n. 3.

We do not find Steele's argument persuasive and agree, at least in part, with the government. First, an implicit denial does not exist in a vacuum. Rather, by its very nature, every implicit denial of a claim rests on the VA's explanations and findings made in support of an explicit decision on another claim. *See Adams*, 568 F.3d at 961. The reasonable notice of the implicit denial arises from the reasons given for the explicit decision. *Id.* at 962-63. The reasonable notice of the implicit denial may also arise from a favorable VA adjudication. *See, e.g.*, *Deshotel*, 457 F.3d 1258 (Fed. Cir. 2006) (explicit grant of service-connected disability for head trauma nevertheless implicitly denied a claim for a psychiatric condition where the RO noted the VA examination's judgment of no psychiatric symptoms).

It is well settled that the Board's underlying explicit determination must include "the reason for the decision" to satisfy the notice regulation in § 3.103. 38 C.F.R. § 3.103(f) (1991); *Ruel*, 918 F.3d at 942 (an explicitly denied claim must "state, or clearly identify in some manner, the claim(s) being denied . . . [and] the reason for the decision."). To support the legal

conclusion that a related claim was implicitly considered and adjudicated, that same reason must be "sufficient to put the claimant on notice that [the related claim] was being considered and rejected." *Adams, 568* F.3d at 962-63. One typical way this occurs is that the reasons for the explicit denial include a holding or finding that would be inconsistent with the granting of benefits for the related claim.

Such was the case in *Adams*. In denying a 1951 claim for disability compensation for "rheumatic heart," the Board found that "medical records do not disclose active rheumatic fever *or other active cardiac pathology during service*." *Adams*, 568 F.3d at 959 (emphasis in original). When Adams sought to reopen his claim in 1989, asserting a claim for endocarditis (a related heart condition), we affirmed the Board's implicit denial analysis, noting that the 1952 rejection of any "other active cardiac pathology" "reasonably informed" Adams that a claim "for any heart condition, including endocarditis, was denied." *Id.* at 963 (quoting Board's finding and Veterans Court's decision). The finding of no "other active cardiac pathology" was inconsistent with an award for benefits for rheumatic heart.

Similarly, in *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006), Veteran Deshotel filed a claim for compensation for service connected residuals of a head injury, which the RO granted in a decision in which it found that his physical examination showed no evidence of a psychiatric condition. *Id.* at 1259-60. We affirmed the Board's implicit denial determination for service connected psychiatric condition, *id.* at 1262, later noting that "[u]nder those circumstances,

a reasonable veteran would have known that his claim for disability compensation for a psychiatric condition was denied." *Adams*, 568 F.3d at 63 (discussing *Deshotel*). This makes sense. Having no psychiatric condition at the time of the original decision was inconsistent with an award for benefits of a psychiatric condition.

The *Adams* court drew a strong contrast between these two cases and the situation addressed by the Veterans Court in *Ingram v. Nicholson*, 21 Vet. App. 232 (2007). In *Ingram*, Veteran Ingram filed a claim for non-service connected pension benefits after his lung was removed at a VA hospital, a claim that was compensable only by showing permanent unemployability. The VA denied this claim because he failed to show that his unemployability was *permanent*. *Id.* at 235. Ingram later filed a claim for benefits under 38 U.S.C. § 1151, seeking benefits for an esophageal leak caused by the VA's medical care in performing the lung removal. *Id.* The Board awarded him compensation under § 1151, which did *not* require permanent unemployability. In reviewing the effective date, the Veterans Court explained that the VA's earlier decision denying compensation for permanent unemployability did *not* implicitly deny Ingram's claim under § 1151 because "each claim stands alone and is not contingent on any action (favorable or unfavorable) by the RO on the other claim." *Id.* at 247. The Veterans Court noted that the elements of the two claims were "entirely different," and commented that "when Mr. Ingram was informed that his claim for pension benefits was denied because his condition was 'not established as permanent,' he had no reason to know" how (or whether) his § 1151

claim was decided. *Id.* As we summarized in *Adams*, "the regional office's explanation of its rejection of Mr. Ingram's non-service connection claim for pension benefits did not give Mr. Ingram reasonable notice that it was also rejecting his claim for disability compensation under section 1151." *Adams*, 568 F.3d at 962. This was because the original denial was based on a finding of no permanent unemployability—a finding that had no bearing on Ingram's eligibility for compensation under § 1151.

Although the reasons given for the explicit VA action must be stated and reasonably support the implicit denial, as described above, the VA need not expressly connect the dots between the stated explanation and the implicitly denied claim. Such a requirement would leave no room for the implicit denial doctrine. *Adams*, 568 F.3d at 961 ("The 'implicit denial' rule provides that, in certain circumstances, a claim for benefits will be deemed to have been denied, and thus finally adjudicated, *even if the DVA did not expressly address that claim in its decision*." (emphasis added)). It makes little sense to require an express statement of reasons separately addressing a claim that is not itself explicitly discussed. Rather, the veteran receives sufficient notice of both the fact of the implicit denial and the reasons therefore when the stated reasons for the explicitly decided claim would reasonably be understood to also extend to the implicitly denied claim.

To that extent, "the application of the implicit denial rule does not violate [a claimant's] right to receive notice pursuant to the VA's due process regulation," *Cogburn*, 809 F.3d at 1236 (discussing an

earlier but identical version of the notice provision at § 3.103 that also included the requirement of providing the reasons for the decision).

B

Here, the September 2021 Board decision correctly analyzed notice to Steele of the implicit rejection of his headache claim by asking whether the explicit denial of his claim for head injury in the 1991 RO Decision and the 1991 Notice Letter[5] provided Steele with "reasonable notice that his claim for benefits [for service connected headaches] was denied." J. App'x at 195. To answer this question, the Board considered the reasons stated for the explicit denial of Steele's head injury claim and how they applied to the implicitly denied claim in analyzing the four non-exclusive "*Cogburn* factors." *Id.* (applying *Cogburn v. Shinseki*, 24 Vet. App. 205 (2010)).

Considering these factors, the Board held that "the [1991] adjudication alluded to the headaches 'claim' in such a way that it could be reasonably inferred that the claim was denied," because Steele had sufficient notice, noting that: the explicitly denied claim for brain injury and headaches were "closely related"; that the 1991 Examination "noted the headaches as a residual of the brain injury, but considered them not disabling"; and that the 1991 RO Decision found that

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[5] At oral argument, Steele argued that our analysis should be restricted to the 1991 Notice Letter and exclude the 1991 RO Decision. *See* Oral Argument at 15:02-15:23. Steele cites no support for the proposition that the explanation in an RO decision itself cannot provide the reasons for an implicit denial. We see no reason for the exclusion, and Steele has forfeited this argument by not making it in his opening brief.

scars were the "**only** residual of the head injury in service." J. App'x at 196-97 (emphasis in original). The Veterans Court affirmed. We see no legal error in this analysis or the Board's findings or the Veterans Court's affirmance.

While one might question whether the terse statement of the reason for the explicit denial here was sufficient to satisfy the implicit denial standard set forth above, that is a question of fact beyond our jurisdiction to address. What we can say is that the stated reason was not so devoid of meaning as to be insufficient to support the implicit denial as a matter of law, and the Board did not fail to consider the correct standard for implicit denial.

To the extent Steele argues that the denial of his headache claim here was *explicit, see* Oral Argument at 14:33-15:01, that argument is contrary to: (1) Steele's own argument that his claim for service connection for headaches was not adjudicated in 1991, J. App'x at 193 (Board's September 2021 Decision summarizing Steele's arguments); and (2) the Board's finding of fact that the 1991 decision "*implicitly* denied service connection for headaches," J. App'x at 191. Further, Steele forfeited this argument by failing to present it anywhere in his opening brief to this court.

CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-0032

KEVIN STEELE, APPELLANT,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LAURER, *Judge*.

MEMORANDUM DECISION

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

LAURER, *Judge*: United States Marine Corps veteran Kevin Steele appeals, through counsel, a September 7, 2021, Board of Veterans' Appeals (Board) decision denying an effective date before March 6, 2013, for migraine headaches.[6] Appellant

[6] Record (R.) at 5-12. Appellant's September 2017 motion to revise the effective date for service-connected headaches based on clear and unmistakable error (CUE) in the August 1991 rating decision was referred to the agency of original jurisdiction. *See*

urges the Court to reverse the Board decision based on two prejudicial errors: an implicit denial error and a related notice error.[7] The Secretary contends that appellant misinterpreted the Court's caselaw, ignored the Board's analysis of the implicit denial doctrine, and established no Board error, so the Court should affirm the Board's decision.[3] For the reasons below, the Court affirms the Board's decision.

I. ANALYSIS

A. Legal Landscape

Generally, "[a] claim for benefits, whether formal or informal, remains pending until it is finally adjudicated."[8] The implicit denial doctrine restricts that general rule: it provides that in some cases, even if a VA decision doesn't explicitly address a claim, the claim may still be found denied and thus finally adjudicated.[9] If a "reasonable person" would understand from a decision that his request for benefits was denied, even though the claim wasn't "explicitly addressed in the decision," the implicit denial doctrine applies, and VA can treat that claim as "adjudicated and denied."[10] The implicit denial

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R. at 5. Because a Board referral isn't a final decision subject to judicial review, and appellant doesn't challenge the Board's referral, the Court declines to review that claim. *See Young v. Shinseki*, 25 Vet.App. 201, 202 (2012) (en banc order) (per curiam).

[7] Appellant's Brief (Br). at 4-12.

[8] *Adams v. Shinseki*, 568 F.3d 956, 960 (Fed. Cir. 2009); *see* 38 C.F.R. § 3.160(c) (2022).

[9] *Locklear v. Shinseki*, 24 Vet.App. 311, 315 (2011).

[10] *Locklear*, 24 Vet.App. at 315; *see Jones v. Shinseki*, 619 F.3d 1368, 1373 (Fed. Cir. 2010) ("The key question is whether sufficient notice has been provided so that a veteran would know,

doctrine is a "notice provision,"[11] so to assess the notice that a reasonable person would glean from a decision, the Court must consider the four *Cogburn* factors when it applies implicit denial.[12] Under *Cogburn*, the Board must consider (1) the specificity or relatedness of the explicitly adjudicated and implicitly adjudicated claims, (2) the specificity of the adjudication, (3) the timing of the claims, and (4) whether the claimant has representation.[13]

The Court reviews the Board's implicit denial finding[14] and other findings of material fact for clear error[15] and will overturn those findings only if they have no plausible basis in the record and leave the Court with "'the definite and firm conviction'" that the Board erred.[16] The Court reviews the Board's legal conclusions de novo.[17] And for all factual findings and legal conclusions, the Board must provide adequate reasons or bases that help appellant understand the precise basis for its decision and facilitate this Court's review.[18] Appellant bears the burden of establishing

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or reasonably can be expected to understand, that he will not be awarded benefits for the disability asserted in his pending claim . . . .").

[11] *Adams*, 568 F.3d at 965.

[12] *Cogburn v. Shinseki*, 24 Vet.App. 205, 212-13 (2010).

[13] *Cogburn*, 24 Vet.App. at 212-13.

[14] *Locklear v. Nicholson*, 24 Vet.App. 311, 318 (2011) (reviewing the Board's implicit denial finding under the "clearly erroneous" standard).

[15] 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999), *aff'd*, 287 F.3d 1377 (Fed. Cir. 2002).

[16] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[17] *See Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc).

[18] *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

error,[19] and the Court abides by the prejudicial error rule,[20] so unless appellant establishes a prejudicial error, the Court will affirm the Board's decision.

B. Implicit Denial and Notice Error

Appellant posits two prejudicial errors in his appeal: first, that the Board erred by finding that the VA regional office (RO) implicitly denied his claim for headaches, and second, that as a result, he received legally deficient notice.[21] Based on his reading of *Ruel*,[22] appellant argues that the implicit denial doctrine conflicts with the notice requirements of § 3.103(e)[23]—since the Board found that his claim was implicitly denied, he argues that his notice didn't track the then-applicable version of § 3.103(e).[24] The Secretary disagrees. First, he points the Court to the Board's extensive *Cogburn* analysis, which appellant largely brushes aside.[25] Then he contends that

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[19] *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court . . . ."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

[20] *Conway v. Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004) (requiring the Veterans Court to take due account of the rule of prejudicial error); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that, in cases of notice error, the burden is on the appellant to allege prejudice and explain how the asserted error caused harm).

[21] Appellant's Br. at 4-12.

[22] *Ruel v. Wilkie*, 918 F.3d 939 (Fed. Cir. 2019).

[23] The then-current version of 38 C.F.R. § 3.103(e) (1991) stated that "[n]otice will include the reason for the decision and the date it will be effectuated[, . . .] the right to a hearing[, ...] his right to initiate an appeal[, . . . and] the periods in which an appeal must be initiated and perfected."

[24] Appellant's Br. at 8-12.

[25] Secretary's Br. at 9-12.

appellant missed his chance to challenge the notice provided since he didn't raise the issue before the Board.[26] On the merits, the Secretary argues that appellant misreads *Ruel*, which applies only to explicit denials and doesn't address the implicit denial doctrine.[27]

The Court finds appellant's argument unconvincing. To start, appellant puts great stock in his conclusory statement that no "reasonable claimant" would've known from the 1991 RO decision that VA had denied service connection for headaches.[28] He argues that there was "no recognition of the substance of a claim for headaches" in the 1991 RO decision and that there was no "explicit adjudication of a subsequent claim" for headaches even though the issue was reasonably raised.[29] He concludes by arguing that the Board clearly erred as a matter of fact and law because the 1991 rating decision didn't "adjudicat[e] [or] explicitly den[y] service connection for headaches."[30]

The problem with appellant's argument is that the Board found that appellant's claim for headaches was *implicitly* denied.[31] As the Secretary notes, no one contends that the RO *explicitly* denied a claim for headaches,[32] so the thrust of appellant's argument sounds in the wrong key. The Board also analyzed the

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[26] Secretary's Br. at 14-15.
[27] Secretary's Br. at 15-18.
[28] Appellant's Br. at 7.
[29] Appellant's Br. at 7.
[30] Appellant's Br. at 8.
[31] R. at 9-12.
[32] *See* Secretary's Br. at 17.

"reasonable claimant" standard using the *Cogburn* factors.[33] Yet appellant doesn't address that analysis at all—he just reiterates that the rating decision didn't explicitly adjudicate a claim for headaches, which he considers clear error. But that position misses the point of the implicit denial doctrine and the Board's application of that doctrine to his case. The Court uses the *Cogburn* factors to assess whether a reasonable claimant would've known that his claim had been implicitly denied.[34] Appellant repeatedly asserts that a reasonable claimant wouldn't have known, but he offers no substantive argument to back his assertion, and he ignores the analytical framework that the Board correctly used.[35] The Secretary picked up on this problem, so he correctly asserts that the Board's analysis was thorough, plausibly backed by the record, and effectively unchallenged.[36] Appellant doesn't challenge the *Cogburn* analysis and fails to meaningfully point to any error with the Board decision[37]—all of which amounts to waiver.[38] The Court discerns no error in

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[33] *See* R. at 9-12.

[34] *Cogburn*, 24 Vet.App. at 210-13 (synthesizing implicit denial caselaw and articulating the factors the Court should use to measure whether a claimant would reasonably understand that his claim had been implicitly denied).

[35] *Hilkert*, 12 Vet.App. at 151.

[36] *See* Secretary's Br. at 10-18. *But see* Appellant's Reply Br. at 1.

[37] *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008).

[38] *See Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995); *see also SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319

the Board's finding that the RO implicitly denied appellant's claim.[39]

As for the notice error argument, appellant advances a strained view of the precedent that binds this Court's decision making. He relies on the Federal Circuit's decision in *Ruel*—which addressed explicit denials—to argue that the Board can't use the implicit denial doctrine because of notice concerns.[40] But the *Ruel* Court stated that its holding was "limited to explicit denials."[41] An argument that simultaneously strains the caselaw and conflates distinct legal doctrines is unpersuasive.

And appellant has missed his chance to raise this argument. He's been represented by the same law office since as early as October 2019,[42] and since then

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(Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived.").

[39] *See* R. at 10, 7232-34.

[40] *See* Appellant's Br. at 10-11.

[41] *Ruel*, 918 F.3d at 942 n.3 (explaining that the Veterans Court was reviewing a Board decision that contained only an explicit denial and didn't apply the implicit denial doctrine, so the Court's holding was necessarily "limited to explicit denials, since that is what the Veterans Court determined occurred here").

[42] *See* R. at 5049-50 (showing a January 22, 2016, Appointment of Individual as Claimant's Representative showing that appellant's former counsel, Shannon Holstein, was no longer representing appellant because the representation had been "revoked by vet[eran] in favor of [attorney] Kenneth Carpenter 10/7/2019"); *see also* Fee Agreement, *Steele v. Wilkie*, U.S. Vet. App. No 19-862 (Feb. 7, 2019) (showing that on February 1, 2019, appellant retained Kenneth Dojaquez, who at the time worked for Bluestein Thomson Sullivan LLC but whose email address and firm affiliation on the docket reflect Carpenter Chartered); *see also* Joint Motion for Partial Remand (JMPR), *Steele v.*

appellant's claim for an earlier effective date has twice appeared before this Court.[43] That same law office negotiated both of the joint motions for remand, and neither motion raised a procedural notice issue.[44] In this appeal, counsel failed to raise this argument until now.[45] Absent extraordinary circumstances, appellants can't resurrect procedural issues here that they didn't first raise before the Board.[46] Appellant missed at least three chances[47] to raise this procedural issue, and there's no apparent extraordinary circumstance.[48] Since appellant

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Wilkie, U.S. Vet. App. No. 19-862 (Oct. 3, 2019) (listing Carpenter Chartered as the firm of record).

[43] R. at 1126-34 (Oct. 29, 2019, JMPR), 94-100 (Apr. 28, 2021, Joint Motion for Remand (JMR)).

[44] *See* R. at 1126-34 (Oct. 29, 2019, JMPR), 94-100 (Apr. 28, 2021, JMR).

[45] *See* R. at 18-23.

[46] *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015).

[47] *See* JMPR, *Steele v. Wilkie*, U.S. Vet. App. No. 19-862 (Oct. 3, 2019); JMR, *Steele v. McDonough*, U.S. Vet. App. No. 20-6488 (Apr. 28, 2021); *see also* R. at 18-23 (additional argument in support of appellant's present appeal). Carpenter Chartered filed both motions and the argument before the Board in the present appeal.

[48] *See Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000) (explaining that the Veterans Court can exercise its discretion in the interest of judicial efficiency and invoke the issue exhaustion doctrine to decline to hear an argument that wasn't properly raised); *Massie v. Shinseki*, 25 Vet.App. 123, 127 (2011) (tending to invoke the doctrine of issue exhaustion when appellant has representation because the "[i]nterests of judicial economy demand that a represented veteran present all theories and assignments of error to VA before appealing to this Court").

establishes no error,[49] reversal isn't warranted,[50] and the Court affirms the Board's decision.[51]

II. CONCLUSION

For these reasons, the Court AFFIRMS the September 7, 2021, Board decision.

DATED: February 22, 2023

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)

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[49] *Hilkert*, 12 Vet.App. at 151.

[50] *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) ("[R]eversal is the appropriate remedy when the only permissible evidence is contrary to the Board's decision." (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996))).

[51] *Coburn v. Nicholson*, 19 Vet.App. 427, 430 (2006) ("[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy." (citing *Tucker v. West*, 11 Vet.App. 369, 374 (1998))).

APPENDIX C

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

KEVIN STEELE

Represented by

Kenneth M. Carpenter, Attorney

SS 481 9 559

Docket No. 16-07 599

Advanced on the Docket

DATE: September 7, 2021

ORDER

An effective date earlier than March 6, 2013, for the award of service connection for migraine headaches is denied.

REFERRED

A motion for revision of the effective date of the award of service connection for headaches based on clear and unmistakable error (CUE) in the August

1991 rating decision was submitted in September 2017 but not adjudicated by the Agency of Original Jurisdiction (AOJ). The motion is referred to the AOJ for adjudication in the first instance. Board decisions addressing the issue of CUE were vacated by the Court of Appeals for Veterans Claims. The most recent Board decision was vacated because the Board did not have jurisdiction over the CUE motion.

FINDINGS OF FACT

1. An August 1991 rating decision assigned an evaluation for scars as the only disabling residual of the Veteran's claimed traumatic brain injury.

2. The August 1991 rating decision implicitly denied service connection for headaches.

3. The Veteran did not appeal the August 1991 rating decision nor submit new and material evidence within one year.

4. The Veteran's claim to reopen the issue of service connection for headaches or claim for an increase for his traumatic brain injury was received by VA on March 6, 2013.

CONCLUSION OF LAW

5. The criteria for an effective date earlier than March 6, 2013, for the award of service connection for migraine headaches have not been met. The criteria for an effective date earlier than February 5, 2015, for the award of service connection for bilateral pes planus have not been met. 38 U.S.C. §§ 5110; 38 C.F.R. §§ 3.102, 3.400.

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served on active duty from March 1980 to April 1982.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a January 2017 rating decision of a Department of Veterans Affairs (VA) Regional Office (RO).

The Board denied the Veteran's claim of entitlement to an effective date prior to March 6, 2013, for the establishment of service connection for migraine headaches, including on the basis of CUE in an August 1991 rating decision in October 2018. The Veteran appealed the Board's decision to the United States Court of Appeals for Veterans Claims (Court). In an October 2019 Order, the Court granted a Joint Motion for Partial Remand (JMPR) and remanded the matter to the Board for action consistent with the motion. The JMPR did not disturb the favorable October 2018 Board finding of an effective date of March 6, 2013 for the award of service connection for migraine headaches. As such, the issue was remanded to the Board.

A Board decision in May 2020 denied the Veteran's claim of entitlement to an effective date prior to March 6, 2013, for the establishment of service connection for migraine headaches on the basis of CUE in an August 1991 rating decision. The Veteran again appealed the Board's decision to the Court. In an Order dated in May 2021, the Court granted a JMPR to vacate the Board's decision and remand the case for readjudication in accordance with the JMPR.

Specifically, the JMPR found that the Board adjudicated the CUE motion over which the Board had no jurisdiction because the AOJ had not yet adjudicated the motion. The JMPR further found that the Board failed to adjudicate the issue of an effective date earlier than March 6, 2013, over which the Board did have jurisdiction, and which had been vacated by the October 2019 JMPR. The case is back before the Board for further adjudication.

An effective date earlier than March 6, 2013, for the award of service connection for migraine headaches.

The Veteran, through his representative, asserts that he is entitled to an effective date of June 13, 1991, for the award of service connection for his migraine headaches as residuals of a traumatic brain injury. The Veteran submitted his claim for service connection for a head injury on June 13, 1991. The Veteran asserts that: VA failed to adjudicate the issue of service connection for headaches in August 1991; VA was required to so adjudicate the issue because a July 1991 VA examiner found that headaches were the residual of the in-service head injury, therefore, reasonably raising the claim: and, VA's failure to adjudicate the issue of service connection for headaches until January 2017 meant the claim was pending since June 1991. The Veteran seeks an evaluation of 10 percent beginning June 13, 1991, and of 50 percent beginning October 23, 2008.

Generally, the effective date for the grant of service connection based on an original claim, a claim reopened after final disallowance, or a claim for

increase is either the day following separation from active service or the date entitlement arose if the claim is received within one year after separation from service. Otherwise it will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C. § 5100(b)(1); 38 C.F.R. § 3.400(b). Effective dates assigned as part of the initial award of service connection, i.e. "initial evaluations," are considered to belong in this category. Generally, a claim that has been denied in a final unappealed rating decision may not thereafter be reopened and allowed. 38 U.S.C. § 7105(c). An exception to this rule is where new and material evidence is submitted within one year of the rating decision.

New and material evidence is defined as evidence not previously submitted to agency decisionmakers which bears directly and substantially upon the specific matter under consideration; such new and material evidence can be neither cumulative nor redundant of the evidence previously of record, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a)(prior to February 19, 2019). Furthermore, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed but were not associated with the claims file when VA first decided the claim, VA will reconsider the claim, rather than requiring new and material evidence. *See* 38 C.F.R. § 3.156(c)(1). However, reconsideration is inapplicable to records that VA could not have obtained when it decided the claim because the claimant failed to provide sufficient information for VA to identify and obtain the records. *See* 38 C.F.R. § 3.156(c)(2). Under 38 C.F.R. §

3.156(c)(1), in order to be "relevant," the service record at issue must speak to a matter in dispute and therefore affect the outcome of the case. *Kisor v. Wilkie*, 969 F.3d 1333 (2020).

The Veteran asserts that the August 1991 rating decision is not final as to the issue of service connection for headaches because that issue was not adjudicated.

In this case, the Veteran was notified of the August 1991 rating decision in a September 1991 letter. He did not appeal nor submit new and material evidence within one year of the notice of the rating decision. Military personnel records were associated with the claims file beginning in April 2014. These records do not speak to a matter in dispute in the August 1991 adjudication because they do not address his head injury or his headaches. Therefore, the rating decision is final and the claim is not entitled to reconsideration on the basis of the foregoing regulations.

As to the Veteran's contention that the claim of service connection for headaches remains pending because it was unadjudicated, the Board disagrees, for several reasons. First, the issue of service connection for headaches was, at the very least, implicitly denied in the August 1991 rating decision. Secondly, the initial evaluation for traumatic brain injury assigned in the August 1991 rating decision upon award of service connection considered, but rejected, headaches as a TBI residual. Finally, to the extent the Veteran points to the VA examination report as raising a separate claim of service connection for headaches, it

does not meet the criteria of a claim as that criteria was defined in August 1991.

Pursuant to the implicit denial doctrine, a claim for benefits will be deemed to have been denied, and thus finally adjudicated, even if VA did not expressly address that claim in its decision. *Cogburn v. Shinseki,* 24 Vet. App. 205, 210 (2010) (citing Adams, 568 F.3d at 961). The key question in the "implicit denial" inquiry is whether it would be clear to a reasonable person that VA's action that expressly refers to one claim is intended to dispose of others as well. *Adams v. Shinseki*, 568 F.3d 956 (Fed. Cir. 2009). Four factors must be considered to determine whether a claim was implicitly denied:

> (a) The specificity or relatedness of the claims (*e.g.*, is the claim for a generalized set of symptoms, a specifically diagnosed disorder, or two (or more) specifically diagnosed disorders that are closely related);
>
> (b) Whether the adjudication alluded to the pending claim in such a way that it could reasonably be inferred that the prior claim was denied;
>
> (c) The timing of the claims (*e.g.*, were the claims filed in the same application, within a short period of time from each other, *etc.*); and
>
> (d) Whether the claimant is represented.

Cogburn, 24 Vet. App. at 212-214.

The Board first provides factual background, then examines these factors.

In his June 1991 application, the Veteran submitted a claim of service connection for a head injury. Service treatment records dated July 1980 reflect that the Veteran sought treatment with complaints of head trauma with loss of consciousness. In a March 1982 separation examination, a neurological clinical evaluation was reported as normal.

The Veteran was afforded a VA examination in July 1991. The examination report stated that "[w]hile doing a drill, he hit his head against a metal pipe under the cabin on the ship. He became dazed momentarily but he did not completely lose consciousness and he had a 2 inch gash on the frontal area of the skull which was sutured. The only residual he has because of this head injury, are occasional headaches but they are not disabling."

The August 1991 rating decision awarded a noncompensable evaluation for a scar of the frontal scalp "as the only residual of the head injury in service." The RO considered the in-service headaches reported after the head injury. The rating decision specifically stated that "[i]nitially, the Veteran had some complaints of a headache. There were no further complaints of headaches during service." The rating decision also specifically stated that a "puncture scar of the frontal scalp was noted on VA examination. The Veteran claimed only occasional headaches as a residual but these were not disabling."

Service connection for headaches was implicitly denied as a residual of the traumatic brain injury the Veteran sustained in service. The Veteran's claim was

for a brain injury. He did not make a specific claim for headaches. A brain injury and headaches are closely related as they are both related to the same body part: the head. Additionally, the AOJ discussed headaches in the adjudication process as related to the brain injury claim. In fact, the July 1991 VA examination noted the headaches as a residual of the brain injury, but considered them not disabling. This weighs in favor of a finding that service connection for headaches was implicitly denied.

The adjudication alluded to the headaches "claim" in such a way that it could reasonably be inferred that the claim was denied. The rating decision specifically discussed headaches in detail. This is shown by the rating decision's statement that the Veteran had "some complaints of a headache," that there were "no further complaints of headaches during service," and that he "claimed only occasional headaches as a residual but these were not disabling." A discussion of headaches followed by the conclusion that they were only occasional and not disabling, and then a later statement that the scar was the "**only** residual of the head injury in service," would allow a reasonable person to conclude that service connection for a headache disability was implicitly denied.

As noted above, whether the finding that the scar was the only residual is clearly and unmistakably erroneous has been referred to the AOJ. This weighs in favor of a finding that service connection for headaches was implicitly denied.

For these reasons, the Board finds that the August 1991 rating decision implicitly denied the claim.

As for the third factor, timing, there was only one claim. The third *Cogburn* factor does not apply to the Veteran. As for the fourth factor, the claimant was represented by a national Veterans Service Organization at the time of the claim and of the August 1991 adjudication. This does not weigh against him because VSO representation is considered *pro se. See Acree v. O'Rourke,* 891 F.3d 1009, 1013, fn. 4 (Fed. Cir. 2018) (stating [assistance from [a service organization] 'is not equivalent to representation by a licensed attorney.") (citing *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009)). Therefore this *Cogburn* factor does not weigh against the Veteran.

Finally, to the extent that the Veteran contends that the VA examination constituted an informal claim of service connection for headaches, the Board finds that it cannot constitute an informal claim under 38 C.F.R. § 3.155 as treatment records do not indicate an intent to apply for service connection benefits. 38 C.F.R. § 3.155 (a) (prior to March 24, 2015). Although the provisions of 38 C.F.R. § 3.157 as it existed prior to March 24, 2015, allowed for a report of examination or hospitalization by VA to be accepted as an informal claim for benefits (without any indication of intent to apply for benefits) in certain instances, these provisions were limited to instances where the Veteran was applying for an increased rating where service connection or pension has already been established, or when a claim for compensation was previously disallowed for the reasons that the service-connected disability was noncompensable, none of which apply in this case. *See Brannon v. West*, 12 Vet. App. 32, 34-35 (1998).

Because the Board finds any implicit claim of service connection for headaches was denied in the August 1991 rating decision and the evaluation of a brain injury as adjudicated in the August 1991 rating decision did not include a compensable evaluation for headaches, the August 1991 rating decision was final as to headaches. Accordingly, the Board looks to when the Veteran filed a claim to reopen or an increased rating claim for his traumatic brain injury.

In this regard, the next correspondence from the Veteran altogether after 1991 was March 6, 2013. This is the effective date of his service-connected headaches. There is no earlier possible date to which the award of service connection for headaches (or the separate compensable evaluation for headaches) could be assigned. Accordingly, an effective date earlier than March 6, 2013, must be denied.

s/

D. Martz Ames
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board A. Rocktashel, 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

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office

KEVIN STEELE

VA File Number

Represented By:

SHANNON KENNEDY HOLSTEIN

Rating Decision

7/22/2017

INTRODUCTION

The records reflect that you are a veteran of the Peacetime. You served in the Marine Corps from October 5, 1978, to February 9, 1979 and from March 5, 1980, to April 14, 1982. You filed a claim for increased evaluation that was received on May 18, 2017. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. Service connection for traumatic brain injury is granted with an evaluation of 70 percent effective May 24, 2017.

2. Entitlement to individual unemployability is granted effective May 24, 2017.

3. Basic eligibility to Dependents' Educational Assistance is established from May 24, 2017.

4. Evaluation of migraines (claimed as headache condition), which is currently 50 percent disabling, is continued.

5. Evaluation of scalp scar residual of head injury (claimed as head injury), which is currently 0 percent disabling, is continued.

6. Evaluation of scar, left abdomen (claimed as left side injury) and right elbow scar, which is currently 0 percent disabling, is continued.

EVIDENCE

- VA Form 21-8940, Veteran's Application For Increased Compensation Based On Unemployability received
- Social Security received 5-18-17
- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits received 5-24-17

- Available service treatment records covering the periods of service from 10-5-78 to 2-9-79 and from 3-5-80 to 4-14-82

- VA Letter of 6-2-17

- Social Security medical records received 6-1-07

- VA Form 9 Appeal to Board of Veteran's Appeals received 6-24-17

- VA/VES examinations of 6-20-17 and 6-29-17, with photograph of head scar

- Veteran's request for extension of time to submit argument and evidence to Board of Veteran's Appeals dated 6-30-17

- VA Medical Center Minneapolis medical records pertaining to claimed conditions from 9-28-15 and 6-15-17, electronically reviewed and placed into VBMS 7-22-17

- VA Black Hills HCS medical records pertaining to claimed conditions, from 4-15-16 to 7-1717, electronically reviewed and placed into VBMS 7-22-17

REASONS FOR DECISION

1. Service connection for traumatic brain injury.

Service connection for traumatic brain injury has been established as directly related to military service.

An evaluation of 70 percent is assigned from May 24, 2017. This is the date of receipt of your claim for this condition.

The rating schedule contains ten important facets of TBI related to cognitive impairment and subjective symptoms. It provides criteria for levels of impairment for each facet, as appropriate, ranging from 0 to 3, and a 5th level, the highest level of impairment, labeled "total." However, not every facet has every level of severity. The Consciousness facet, for example, does not provide for an impairment level other than "total" since any level of impaired consciousness would be totally disabling. A 100 percent evaluation will be assigned if "total" is the level of evaluation for one or more facets. If no facet is evaluated as "total," the overall percentage evaluation will be assigned based on the level of the highest facet as follows: 0 = noncompensable; 1 = 10 percent; 2 = 40 percent; and 3 = 70 percent. For example, a 70 percent evaluation will be assigned if 3 is the highest level of evaluation for any facet.

A level of severity of "2" has been assigned for your Memory, Attention, Concentration, Executive Functions Facet based on:

- Objective evidence on testing of mild impairment of memory, attention, concentration, or executive functions resulting in mild functional impairment.

A level of severity of "1" has been assigned for your Judgement Facet based on:

- Mildly impaired judgment. For complex or unfamiliar decisions, occasionally unable to

identify, understand, and weigh the alternatives, understand the consequences of choices, and make a reasonable decision.

A level of severity of "0" has been assigned for your Social Interaction Facet based on:

- Social interaction is routinely appropriate.

A level of severity of "3" has been assigned for your Orientation Facet based on:

- Often disoriented to two or more of the four aspects (person, time, place, situation) of orientation.

A level of severity of "0" has been assigned for your Motor Activity (with intact motor and sensory system) Facet based on:

- Motor activity normal.

A level of severity of "2" has been assigned for your Visual Spatial Orientation Facet based on:

- Moderately impaired. Usually gets lost in unfamiliar surroundings, has difficulty reading maps, following directions, and judging distance. Has difficulty using assistive devices such as GPS (global positioning system).

A level of severity of "1" has been assigned for your Neurobehavioral Effects Facet based on:

- One or more neurobehavioral effects that occasionally interfere with workplace interaction, social interaction, or both but do not preclude them.

A level of severity of "0" has been assigned for your Communication Facet based on:

- Able to communicate by spoken and written language (expressive communication), and to comprehend spoken and written language.

The following facet(s) cannot be used to support your evaluation as it is being used to support an evaluation for separate disability or has been found to be unrelated:

- Subjective Symptoms Facet

An overall 70 percent evaluation is assigned for your traumatic brain injury based on the highest level of severity of "3".

A higher evaluation of 100 percent is not warranted for traumatic brain injury (TBI) unless the evidence shows:

- Complete inability to communicate either by spoken language, written language, or both, or to comprehend spoken language, written language, or both. Unable to communicate basic needs; or,

- Persistently altered state of consciousness, such as vegetative state, minimally responsive state, coma under the consciousness facet; or,

- Severely impaired judgment. For even routine and familiar decisions, usually unable to identify, understand, and weigh the alternatives, understand the consequences of choices, and make a reasonable decision. For example, unable to

determine appropriate clothing for current weather conditions or judge when to avoid dangerous situations or activities; or,

- Objective evidence on testing of severe impairment of memory, attention, concentration, or executive functions resulting in severe functional impairment; or,

- Motor activity severely decreased due to apraxia; or,

- Consistently disoriented to two or more of the four aspects (person, time, place, situation) of orientation; or,

- Severely impaired. May be unable to touch or name own body parts when asked by the examiner, identify the relative position in space of two different objects, or find the way from one room to another in a familiar environment.

2. Entitlement to individual unemployability.

Entitlement to individual unemployability is granted effective May 24, 2017. This is the date in which service connection has been granted for your traumatic brain injury. We are not able to grant entitlement to individual unemployability effective May 18, 2017, which is the date we received your application for individual unemployability because you were not entitled on that date. As of May 18, 2017, your service connected disabilities included your migraines and scars of your head, right elbow, and abdomen. These disabilities are not sufficiently

disabling to prevent you from securing and maintaining substantially gainful employment. However, when service connection is granted for your traumatic brain injury effective May 24, 2017, your service connected disabilities combine to be severe enough to warrant a grant of entitlement to individual unemployability. To be clear, your service connected disabilities of traumatic brain injury, migraines, and scars of the head, right forearm, and abdomen operate in concert to warrant a grant of entitlement to individual unemployability.

Entitlement to individual unemployability is granted because you are unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

3. Eligibility to Dependents' Educational Assistance under 38 U.S.C. Chapter 35.

Basic eligibility to Dependents' Educational Assistance is established from May 24, 2017. This is the date in which you were determined to be permanently and totally disabled in the grant of entitlement to individual unemployability.

Eligibility to Dependents' Educational Assistance is derived from a veteran who was discharged under other than dishonorable conditions; and, has a permanent and total service-connected disability; or a permanent and total disability was in existence at the time of death; or the veteran died as a result of a service-connected disability. Also, eligibility exists for a serviceperson who died in service. Finally, eligibility can be derived from a service member who, as a member of the armed forces on active duty, has been

listed for more than 90 days as: missing in action; captured in line of duty by a hostile force; or forcibly detained or interned in line of duty by a foreign government or power.

Basic eligibility to Dependents' Education Assistance is granted as the evidence shows the veteran currently has a total service-connected disability, permanent in nature.

4. Evaluation of migraines (claimed as headache condition) currently evaluated as 50 percent disabling.

The evaluation of migraines (claimed as headache condition) is continued as 50 percent disabling.

We have assigned a 50 percent evaluation for your migraines (claimed as headache condition) based on:

- Very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability

This is the highest schedular evaluation allowed under the law for migraine.

5. Evaluation of scalp scar residual of head injury (claimed as head injury) currently evaluated as 0 percent disabling.

The evaluation of scalp scar residual of head injury (claimed as head injury) is continued as 0 percent disabling.

#1: A scar, located on your head, face, or neck, measures 8.0 cm in length, 0.3 cm in width (0.3 in^2

(2.0 cm^2) overall). The scar is neither hyperpigmented nor hypopigmented. The evidence shows the scar is smooth on palpation. The scar is not painful. The scar is stable. The scar's underlying soft tissue is intact. The scar's skin is soft and flexible. The texture of the scar is normal. The scar is not adherent to underlying tissue.

We have assigned a noncompensable evaluation for your scalp scar residual of head injury (claimed as head injury) based on:

- Zero characteristics of disfigurement

Note: In every instance where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met. {38 CFR §4.31}

An additional, separate compensable evaluation under Diagnostic Code 7804 is not warranted unless there is at least one scar that is painful or unstable.

A higher evaluation of 10 percent is not warranted for scar(s) of the head, face, or neck unless the evidence shows one characteristic of disfigurement.

Higher evaluations may also be warranted based on loss of auricle and/or anatomical loss of one or both eyes.

The eight characteristics of disfigurement, for purposes of evaluation under 38 CFR §4.118 are: scar 5 or more inches 13 or more cm) in length; scar at least one-quarter inch 0.6 cm) wide at widest part; surface

contour of scar elevated or depressed on palpation; scar adherent to underlying tissue; skin hypo- or hyper-pigmented in an area exceeding six square inches 39 cm^2 skin texture abnormal irregular, atrophic, shiny, scaly, etc.) in an area exceeding six square inches 39 cm^2 underlying soft tissue missing in an area exceeding six square inches 39 cm^2 and, skin indurated and inflexible in an area exceeding six square inches 39 cm^2) The characteristics) of disfigurement may be caused by one scar or by multiple scars; the characteristics) required to assign a particular evaluation need not be caused by a single scar in order to assign that evaluation. A characteristic of disfigurement, even if present in more than one scar, is only counted once for evaluation purposes.

6. Evaluation of scar, left abdomen (claimed as left side injury) and right elbow scar currently evaluated as 0 percent disabling.

The evaluation of scar, left abdomen (claimed as left side injury) and right elbow scar is continued as 0 percent disabling. Please note, we are now evaluating these scars together, as a single disability.

#1: A scar, located on your right upper extremity, measures 0.1 in^2 (0.5 cm^2) superficial and linear. The scar is neither painful nor unstable.

#2: A scar, located on your anterior trunk, measures 0.3 in^2 (2.0 cm^2) superficial and linear. The scar is neither painful nor unstable.

We have assigned a noncompensable evaluation for your scar, left abdomen (claimed as left side injury) based on:

- One or more linear scars

Note: In every instance where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met. {38 CFR §4.31}

An additional, separate compensable evaluation under Diagnostic Code 7804 is not warranted unless there is at least one scar that is painful or unstable.

A higher evaluation is not warranted unless scars are considered disabling because of limitation of function of the affected part.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.

Rating Decision

ACTIVE DUTY			
EOD	**RAD**	**BRANCH**	**CHARACTER OF DISCHARGE**
10/05/1978	02/09/1979	Marine Corps	Honorable
03/05/1980	04/14/1982	Marine Corps	Under Honorable Conditions

LEGACY CODES			
ADD'L SVC CODE	**COMBAT CODE**	**SPECIAL PROV CDE**	**FUTURE EXAM DATE**
	1		None

JURISDICTION: Claim for Increase Received 05/18/2017

ASSOCIATED CLAIM(s): 020; Claim for Increase; 05/18/2017

SUBJECT TO COMPENSATION (1.SC)

8045 TRAUMATIC BRAIN INJURY
Service Connected, Peacetime, Incurred
Static Disability
70% from 05/24/2017

8100	MIGRAINES (CLAIMED AS HEADACHE CONDITION) Service Connected, Peacetime, Incurred Static Disability 50% from 10/14/2015
7800	SCALP SCAR RESIDUAL OF HEAD INJURY (CLAIMED AS HEAD INJURY) Service Connected, Peacetime, Incurred Static Disability 0% from 06/13/1991
7805	RIGHT ELBOW SCAR (CLAIMED AS RIGHT ELBOW INJURY) Service Connected, Peacetime, Incurred Static Disability 0% from 06/13/1991 to 05/18/2017
7805	SCAR, LEFT ABDOMEN (CLAIMED AS LEFT SIDE INJURY) AND RIGHT ELBOW SCAR Service Connected, Peacetime, Incurred Static Disability 0% from 06/13/1991

Combined Evaluation for Compensation:

0% from 06/13/1991
50% from 10/14/2015

90% from 05/24/2017
Individual Unemployability Granted from May 24, 2017

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSCPeacetime)

5242	NECK CONDITION TO INCLUDE DEGENERATIVE JOINT DISEASE Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
5242	LOW BACK CONDITION TO INCLUDE DEGENERATIVE JOINT DISEASE Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
5252	RIGHT THIGH CONDITION Not Service Connected, No Diagnosis Original Date of Denial: 04/22/2014
5252	LEFT THIGH CONDITION Not Service Connected, No Diagnosis Original Date of Denial: 04/22/2014

5271	LIMITED MOTION OF ANKLE-LEFT LOWER ANKLE CONDITION (CLAIMED AS ANKLE INJURY) Not Service Connected, Not Aggravated by Service Original Date of Denial: 04/22/2014
5284	RIGHT FOOT CONDITION Not Service Connected, No Diagnosis Original Date of Denial: 04/22/2014
6354	FATIGUE [Environmental Hazard - Camp Lejeune] Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
6602	ASTHMA Not Service Connected, Not Aggravated by Service Original Date of Denial: 01/10/2017
8103	HAND CONDITION CLAIMED AS HANDS SHAKING [Environmental Hazard - Camp Lejeune]

	Not Service Connected, Not Incurred/Caused by Service
	Original Date of Denial: 04/22/2014
8199-8105	NERVE DAMAGE Not Service Connected, Not Incurred/Caused by Service
	Original Date of Denial: 04/22/2014
9434	DEPRESSION Not Service Connected, Not Incurred/Caused by Service
	Original Date of Denial: 04/22/2014
9499-9410	MEMORY LOSS [Environmental Hazard - Camp Lejeune] Not Service Connected, Not Incurred/Caused by Service
	Original Date of Denial: 04/22/2014

ANCILLARY DECISIONS

Basic Eligibility under 38 USC Ch 35 from 05/24/2017

The veteran did not provide his employment history for the last 5 years he worked. He stated he can not remember. Memory loss is associated with his traumatic brain injury. Records from Social Security and his treatment records show that he has not been able to work for many years prior to the receipt of his claim. Additionally, the TBI examiner noted the veteran didn't remember the kind of appointment he was attending, he did not know it was 2017, and he did not know where he was during the examination. Further efforts to get the veteran to provide the information are most likely futile.

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eSign: certified by VSCRBOLA, RVSR

APPENDIX E

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office

KEVIN STEELE

VA File Number

Represented By:

SHANNON KENNEDY HOLSTEIN

Rating Decision

01/10/2017

INTRODUCTION

The records reflect that you are a veteran of the Peacetime. You served in the Marine Corps from October 5, 1978 to February 9, 1979 and from March 5, 1980 to April 14, 1982. You filed a new claim for benefits that was received on October 10, 2016. Based on a review of the evidence listed below, we have made the following decisions on your claim.

DECISION

1. Service connection for migraines (claimed as headache condition) is granted with an evaluation of 50 percent effective October 14, 2015.

2. Service connection for asthma is denied.

EVIDENCE

- Service treatment records for the periods October 5, 1978 to February 9, 1979 and March 5, 1980 to April 14, 1982
- Veteran's Intent to File a Claim for Benefits, received October 14, 2015
- VA letter, dated October 15, 2015
- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits, received October 10, 2016
- Evidence, State of Iowa Industrial and Workers Compensation Commission, received October 14, 2015
- Evidence, photographs, submitted by veteran, received October 14, 2015
- Medical evidence, Central Iowa Orthopedics, Des Moines, IA, dated March 3, 1988 to July 21, 1998
- Medical evidence, Robert A. Hayne, M.D., Des Moines, IA, dated July 27, 1987 to May 5, 1998

- Medical evidence, Dr. David Durand, dated April 1, 1997
- Medical evidence, Iowa Methodist Medical Center, Des Moines, IA, dated January 22, 1998
- Medical evidence, Des Moines Orthopedic Surgeons, P.C., Des Moines, IA, dated February 23, 1999
- VA Form 21-0820 Report of General Information, dated October 14, 2015
- VA letter concerning your claim, dated November 10, 2015
- Treatment records, VA Medical Center Minneapolis, dated September 28, 2015
- Treatment records, VA Medical Center Omaha, dated April 30, 2008
- Treatment records, VA Medical Center Black Hills, dated September 5, 2012 to January 6, 2017
- VA contract examination, dated November 26, 2016

REASONS FOR DECISION

1. Service connection for migraines (claimed as headache condition).

Service connection for migraines (claimed as headache condition) has been established as directly related to military service.

The effective date is October 14, 2015, the date that we received your intent to file a claim for benefits.

An evaluation of 50 percent is granted if the record shows very frequent, completely prostrating, and prolonged attacks productive of severe economic inadaptability.

We have assigned a 50 percent evaluation for your migraines (claimed as headache condition) based on:

- Very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability

Additional symptom(s) include:

- Characteristic prostrating attacks occurring on an average once a month over last several months

This is the highest schedular evaluation allowed under the law for migraine.

2. Service connection for asthma.

The evidence shows that asthma existed prior to service. There must be objective evidence of worsening of a pre-existing condition in order to establish service connection by aggravation. There is no evidence that the condition permanently worsened as a result of service.

The evidence does not show that your condition, which existed prior to service permanently worsened as a result of service. The VA medical opinion found no link between your diagnosed medical condition and

military service. We did not find a link between your medical condition and military service.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

Rating Decision

ACTIVE DUTY			
EOD	**RAD**	**BRANCH**	**CHARACTER OF DISCHARGE**
10/05/1978	02/09/1979	Marine Corps	Honorable
03/05/1980	04/14/1982	Marine Corps	Under Honorable Conditions

LEGACY CODES			
ADD'L SVC CODE	**COMBAT CODE**	**SPECIAL PROV CDE**	**FUTURE EXAM DATE**
	1		None

JURISDICTION: New Claim Received 10/10/2016

ASSOCIATED CLAIM(s): 020; New; 10/10/2016

SUBJECT TO COMPENSATION (1.SC)

8100	MIGRAINES (CLAIMED AS HEADACHE CONDITION) Service Connected, Peacetime, Incurred Static Disability 50% from 10/14/2015
7800	SCALP SCAR RESIDUAL OF HEAD INJURY (CLAIMED AS HEAD INJURY) Service Connected, Peacetime, Incurred Static Disability 0% from 06/13/1991
7805	RIGHT ELBOW SCAR (CLAIMED AS RIGHT ELBOW INJURY) Service Connected, Peacetime, Incurred Static Disability 0% from 06/13/1991 to 05/18/2017
7805	SCAR, LEFT ABDOMEN (CLAIMED AS LEFT SIDE INJURY) AND RIGHT ELBOW SCAR Service Connected, Peacetime, Incurred

Static Disability
0% from 06/13/1991

COMBINED EVALUATION FOR COMPENSATION :

0% from 06/13/1991
50% from 10/14/2015

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Peacetime)

5242	NECK CONDITION TO INCLUDE DEGENERATIVE JOINT DISEASE Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
5242	LOW BACK CONDITION TO INCLUDE DEGENERATIVE JOINT DISEASE Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
5252	RIGHT THIGH CONDITION Not Service Connected, No Diagnosis Original Date of Denial: 04/22/2014

5252	LEFT THIGH CONDITION Not Service Connected, No Diagnosis Original Date of Denial: 04/22/2014
5271	LIMITED MOTION OF ANKLE- LEFT LOWER ANKLE CONDITION (CLAIMED AS ANKLE INJURY) Not Service Connected, Not Aggravated by Service Original Date of Denial: 04/22/2014
5284	RIGHT FOOT CONDITION Not Service Connected, No Diagnosis Original Date of Denial: 04/22/2014
6354	FATIGUE [Environmental Hazard - Camp Lejeune] Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
6602	ASTHMA Not Service Connected, Not Aggravated by Service Original Date of Denial: 01/10/2017

8103	HAND CONDITION CLAIMED AS HANDS SHAKING [Environmental Hazard - Camp Lejeune] Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
8199-8105	NERVE DAMAGE Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
9434	DEPRESSION Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014
9499-9410	MEMORY LOSS [Environmental Hazard - Camp Lejeune] Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 04/22/2014

I certify that I have reviewed and electronically signed this decision. VSCFSAIL

APPENDIX F

Department of Veterans Affairs

Kevin Steele

210 Walnut St.
Des Moines, IA 50309

(RO Copy)

September 12, 1991

File Number: K Steele

We cannot grant your claim for payment of disability benefits.

The disabilities listed below are service-connected but they are less than 10% disabling and compensation is not payable.

SCARS
SCARS
SCARS

There is entitlement to necessary treatment by the VA for any service-connected disability. Application for necessary treatment should be made at the nearest VA office, outpatient clinic or hospital. Bring this letter if applying in person. If applying by letter, please include the VA file number shown above.

The evidence does not establish service connection for the following:

LIMITED MOTION OF ANKLE-LEFT LOWER
LEFT ANKLE CONDITION

THE EVIDENCE REVIEWED INCLUDES YOUR SERVICE MEDICAL RECORDS; MEDICAL RECORDS FROM BROADLAWNS DATED 04-01-78 THROUGH 10-01-79; AND YOUR DES MOINES VA MEDICAL CENTER EXAMINATION OF 07-31-91.

SERVICE-CONNECTION IS GRANTED FOR YOUR SCALP SCAR AS THE ONLY RESIDUAL OF YOUR HEAD INJURY IN SERVICE. SERVICE-CONNECTION IS ALSO ESTABLISHED FOR THE SCAR OF YOUR LEFT ABDOMEN AND YOUR

RIGHT ELBOW SCAR. HOWEVER, THESE SCARS ARE NOT CONSIDERED DISABLING AND NONCOMPENSABLE EVALUATIONS ARE ASSIGNED. THE EVIDENCE REVEALS A RATHER SEVERE LEFT ANKLE SPRAIN AND POSSIBLE OTHER INJURY PRIOR TO YOUR TERM OF SERVICE. THE TWISTING INJURY IN SERVICE, WITHOUT EVIDENCE OF TRAUMA, IS NOT CONSIDERED TO BE AGGRAVATION OF THE PRESERVICE INJURY, NOR CAN YOUR CURRENT SUBJECTIVE COMPLAINTS BE RELATED TO THE ONE INCIDENT IN SERVICE

R. C. CHICKERING
ADJUDICATION OFFICER

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

We have based our determination on the evidence of record in your case and the applicable law. This summarizes your procedural and appellate rights in connection with this determination. For more complete information, please refer to the Rules of Practice of the Board of Veterans Appeals (38 CFR Part 19), a copy of which will be provided to you or your representative on request.

NEW EVIDENCE. You may submit additional evidence you have not already sent to us to strengthen your claim. It is in your interest to send us any new evidence as promptly as possible. We will carefully consider it and let you know whether it changes our determination.

PERSONAL HEARING - GENERAL. While it is not required, you have the right to a personal hearing to present evidence or argument on any point of importance in your claim. If you desire a personal hearing, notify this office and we will arrange a time and place for the hearing. You may bring witnesses if you desire and their testimony will be entered in the record. We will furnish the hearing room, provide hearing officials, and record the proceedings. We cannot pay any other expenses of a hearing.

APPEAL OF THIS DETERMINATION. You may appeal our determination to the Board of Veterans Appeals (BVA) at any time within 1 year from the date of this letter. You must start the appeal process by filing a Notice of Disagreement. You may do this by writing a letter to this office stating that you wish to

appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. After you have filed a Notice of Disagreement, you will be provided with a Statement of the Case containing the facts and applicable laws and regulations on which we based our determinations and the reasons for those determinations.

PERSONAL HEARING ON APPEAL. Following an appeal of this determination, you may personally appear before a Section of the Board of Veterans Appeals in Washington, D.C., before appropriate personnel in this office acting as a hearing agency for the BVA, or before a traveling Section of the BVA during a regularly scheduled field visit. A request of a Travel Board hearing should be submitted in writing to this office. These requests will be honored in the order of receipt.

REPRESENTATION. You may be represented, without charge, by an accredited representative of a recognized service organization. You may also have an agent or an attorney assist you with your claim. Typical examples of counsel who may be available include attorneys in private practice or legal aid services.

ATTORNEY OR AGENT FEE LIMITATION. No fee may be charged, allowed, or paid for services provided by agents or attorneys before the Board of Veterans Appeals first makes a final decision in your claim. An attorney or agent may charge you a fee under certain circumstances for services provided after a BVA decision, if you should desire to reopen your claim

with this office or seek review in the United States Court of Veterans Appeals. For more information, please refer to the BVA's Rules of Practice, referred to in the first paragraph above.

APPEAL OF BVA DECISION. A final BVA decision may be appealed to the United States Court of Veterans Appeals. Such an appeal must be filed within 120 days from the date of the BVA decision.

APPENDIX G

VETERANS ADMINISTRATION

RATING DECISION

1. REGIONAL OFFICE NO. - 333

2. TYPE OF RATING – Disability

3. ORIGINAL DISABILITY RATING? Yes

4. VETERAN'S FILE NO.

5. VETERAN'S INITIALS AND SURNAME – K. STEELE

6. COPY TO

7. VETERAN'S SOCIAL SECURITY NO.

8. DATE OF CLAIM – 06-13-91

9. DATE OF THIS RATING – 08-28-91

10. DATE OF BIRTH

11. DATE OF DEATH

12. ACTIVE DUTY (Mo, day, yr.)

13. ADDL. SERVICE CODE

EOD – 03-05-80

RAD – 04-14-82

EOD – 10-05-78

RAD – 02-09-79 (ACDUTRA)

14. COMBAT STATUS – 1

15. DATE OF LAST EXAMINATION – 07-31-91

16. DATE OF FUTURE PHYSICAL EXAMINATION (Mo./yr.) – No Exam

17. EMPLOYABLE (COMPENSATION ONLY) – YES

18. COMPETENT – Yes

19. SPECIAL PROVISION CODE

20. NO. OF ADDITIONAL DIAGNOSTICS

21. NO. OR ADDITIONAL S/C DIAGNOSTICS

22. SPECIAL MONTHLY COMPENSATION

(a) STATUS

(b) BASIC SMC

(c) HOSPITAL SMC

(d) LOSS OF USE

(e) ANAT LOSS

(f) OTHER LOSS

CURRENT

FUTURE

23. NARRATIVE

J. Original Claim

I. Service connection for residuals of head injury, left abdominal injury, left ankle injury, and right elbow injury

E. Service medical records
Medical records from Broadlawns, 04-01-78 to 10-01-79
VA examination of 07-31-91, VA Medical Center, Des Moines

F. A review of service medical records reveal that the veteran was seen on July 17, 1980, after sustaining trauma to his head with loss of consciousness. No abnormalities were noted on neurological examination, and the veteran was oriented times three. An August 4, 1990, entry reveals he received a 4.5 cm. superficial laceration to the parietal frontal region of the scalp which was sutured. Initially, the veteran had some complaints of a headache. There were no further complaints of headaches during service. A puncture scar of the frontal scalp was noted on VA examination. The veteran claimed only occasional headaches as a residual but these were not disabling.

The veteran was seen in March 1981 for a thorn in the left side of his stomach of nine months duration. In April 1981 he underwent surgical removal of a small mass on the left flank, described as a neuroma. Subsequent redness was noted. Separation examination describes a one-half inch scar in the left abdomen. A small scar with no residual pain was noted on VA examination.

Records from Broadlawns Hospital reveals that the veteran was treated for a left ankle strain in April 1, 1978, prior to service. He had significant residual pain when seen three weeks later on April 25, 1978. Report of Medical History at the time of enlistment

refers to fractured ankles in September 1977. The veteran was treated in service on June 10,. 1981, for a twisted ankle. An ace wrap was applied. No examination of the left ankle was done at the time of VA examination. The veteran stated he was able to ambulate well and had full range of motion. However, the ankle gave out on him about twenty times during the last few years.

Service records reveal that on January 28, 1982, the veteran fell down and lacerated his right elbow. A 1 1/2 inch by 1/4 inch scar was sutured. This injury was not noted on the VA examination requested, and there was no mention of it.

D. Service connection is granted for the scar of the scalp as the only residual of the head injury in service, the scar of the left abdomen, and the scar of the right elbow. However, these scars are not considered to be disabling and noncompensable evaluations are assigned. Evidence reveals a rather severe left ankle sprain and possible other injury prior to service. The twisting injury in service, without evidence of trauma, is not considered to be aggravation of the preservice injury, nor can current subjective complaints be related to the one incident in service.

7805 1. SC (PTE INC)
SCAR, LEFT ABDOMEN
0% from 06-13-91

7805 SCAR, FRONTAL SCALP
0% from 06-13-91

7805 SCAR, RIGHT ELBOW
0% from 06-13-91

APPENDIX H

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

KEVIN STEELE,
Claimant-Appellant

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2023-2049

Appeal from the United States Court of Appeals for Veterans Claims in No. 22-32, Judge Scott Laurer.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, LINN[1], DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[2]

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

[2] Circuit Judge Newman did not participate.

PER CURIAM.

O R D E R

Kevin Steele filed a combined petition for panel rehearing and rehearing en banc. National Organization of Veterans' Advocates, Military-Veterans Advocacy Inc., and National Law School Veterans Clinic Consortium each separately requested leave of court to file a brief as amicus curia, which the court granted. A response to the petition was invited by the court and filed by Douglas A. Collins.

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

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Frances M. McNulty
Chief Deputy Clerk of Court

October 31, 2025
Date

APPENDIX I

RELEVANT STATUTES AND REGULATIONS

38 U.S.C. § 3004 (1989) (effective 1990) (renumbered as 38 U.S.C. § 5104 (1991))— Decisions and notices of decisions

(a)(1) In the case of a decision by the Secretary under section 211(a) of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision.

(2) In any case where the Secretary denies a benefit sought, the notice required by paragraph (1) of this subsection shall also include (A) a statement of the reasons for the decision, and (B) a summary of the evidence considered by the Secretary.

38 U.S.C. § 5104 (2017) (effective 2019)(current) —Decisions and notices of decisions

(a) In the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision.

(b) Each notice provided under subsection (a) shall also include all of the following:

(1) Identification of the issues adjudicated.

(2) A summary of the evidence considered by the Secretary.

(3) A summary of the applicable laws and regulations.

(4) Identification of findings favorable to the claimant.

(5) In the case of a denial, identification of elements not satisfied leading to the denial.

(6) An explanation of how to obtain or access evidence used in making the decision.

(7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.

38 C.F.R. § 3.103 (b), (f) (1990)—Procedural due process and appellate rights.

(b) ***The right to notice*—(1) *General.*** Claimants are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

***

(f) ***Notification of decisions***. The claimant or beneficiary will be notified in writing of decisions affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effective as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant or beneficiary of the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal. Further, the notice will advise him or her of the periods in which an appeal must be initiated and perfected. (See part 19, subpart B, of this chapter, on appeals.)

38 C.F.R. § 3.103 (b), (f) (2019) (current)— Procedural due process and appellate rights.

(b) ***The right to notice*** —

> (1) ***General***. Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice will clearly set forth the elements described under paragraph (f) of this section, the right to a hearing on any issue involved in the claim as provided in paragraph (d) of this section, the right of representation, and the right, as well as the necessary procedures and time limits to initiate a higher-level review, supplemental claim, or appeal to the Board of Veterans' Appeals.

***

(f) ***Notification of decisions***. The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting of relief. Written notification must include in the notice letter or enclosures or a combination thereof, all of the following elements:

> (1) Identification of the issues adjudicated;
>
> (2) A summary of the evidence considered;
>
> (3) A summary of the laws and regulations applicable to the claim;

(4) A listing of any findings made by the adjudicator that are favorable to the claimant under § 3.104(c);

(5) For denied claims, identification of the element(s) required to grant the claim(s) that were not met;

(6) If applicable, identification of the criteria required to grant service connection or the next higher-level of compensation;

(7) An explanation of how to obtain or access evidence used in making the decision; and

(8) A summary of the applicable review options under § 3.2500 available for the claimant to seek further review of the decision.