7 F.4th 1110
United States Court of Appeals, Federal Circuit.

MILITARY-VETERANS ADVOCACY, Petitioner
v.
SECRETARY OF VETERANS AFFAIRS, Respondent
National Organization of Veterans' Advocates, Inc., Petitioner
Paralyzed Veterans of America, Intervenor
v.
Secretary of Veterans Affairs, Respondent
Carpenter Chartered, Petitioner
v.
Secretary of Veterans Affairs, Respondent
Phillip Boyd Haisley, National Veterans Legal Services Program, Petitioners
v.
Secretary of Veterans Affairs, Respondent

2019-1600, 2019-1680, 2019-1685, 2019-1687
|
Decided: July 30, 2021

Synopsis

Background: Veterans' service organizations, law firm, and one individual veteran petitioned for review of Department of Veterans Affairs' (VA) regulations that implemented Veterans Appeals Improvement and Modernization Act (AMA) by reforming VA's administrative appeals system.

Holdings: The Court of Appeals, Chen, Circuit Judge, held that:

one organization on behalf of its veteran members had associational standing for two rulemaking challenges;

one organization on behalf of its attorney members had associational standing for one rulemaking challenge;

organizations lacked organizational standing for remaining rulemaking challenges;

veteran lacked personal standing;

veteran legal services organization lacked third-party standing;

law firm lacked personal and third-party standing;

regulation governing attorneys' fees was invalid;

regulation prohibiting concurrent supplemental claim and federal court appeal was invalid; and

regulation governing intent-to-file framework was invalid.

Petitions granted in part and dismissed in part.

Procedural Posture(s): Review of Administrative Decision.

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Held Invalid
38 C.F.R. § 14.636(c)(1)(i); 38 C.F.R. § 3.155; 38 C.F.R. § 3.2500(b)

***1116** Petition for review pursuant to 38 U.S.C. Section 502.

Attorneys and Law Firms

Robbie Manhas, Orrick, Herrington & Sutcliffe LLP, Washington, DC, argued for petitioner Military-Veterans Advocacy. Also represented by Melanie L. Bostwick; John B. Wells, Law Office of John B. Wells, Slidell, LA.

Michael Bern, Latham & Watkins LLP, Washington, DC, argued for petitioner National Organization of Veterans' Advocates, Inc. and intervenor Paralyzed Veterans of America. National Organization of Veterans' Advocates, Inc. also represented by Genevieve Patricia Hoffman, Roman Martinez, Barrett Tenbarge.

Linda E. Blauhut, Paralyzed Veterans of America, Washington, DC, for intervenor Paralyzed Veterans of America.

Kenneth M. Carpenter, Law Offices of Carpenter Chartered, Topeka, KS, argued for petitioner Carpenter Chartered.

Alex Schulman, Paul Hastings LLP, Washington, DC, argued for petitioners Phillip Boyd Haisley, National Veterans

Legal Services Program. Also represented by Stephen Blake Kinnaird; Barton F. Stichman, National Veterans Legal Services Program, Washington, DC.

Sosun Bae, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent in 2019-1600, 2019-1687. Also argued by William James Grimaldi in 19-1680, David Pehlke in 2019-1685. Also represented by Eric P. Bruskin, Jeffrey B. Clark, Martin F. Hockey, Jr., Robert Edward Kirschman, Jr.; Brian D. Griffin, Andrew J. Steinberg, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC; David J. Barrans in 2020-1687, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC.

Before Reyna, Clevenger, and Chen, Circuit Judges.

Opinion

Chen, Circuit Judge.

***1117** In 2017, Congress enacted the Veterans Appeals Improvement and Modernization Act (AMA) to reform the administrative appeals system of the Department of Veterans Affairs (VA). *See* Pub. L. No. 115–55, 131 Stat. 1105 (2017) (codified at scattered sections of 38 U.S.C.). The AMA replaced the existing VA appeals system, which had shepherded all denials of veteran disability claims through a one-size-fits-all appeals process. Under the AMA, claimants may now choose between three procedural options in response to an unfavorable initial decision: (1) filing a supplemental claim based on additional evidence, (2) requesting higher-level review within the VA based on the same evidentiary record, and (3) filing a notice of disagreement (NOD) to directly appeal to the Board of Veterans Appeals (Board). Pursuant to its notice-and-comment rulemaking authority, the VA promulgated a series of regulations to implement the AMA. *See VA Claims and Appeals Modernization*, 84 Fed. Reg. 138 (Jan. 18, 2019) (Final Rule). Several veterans' service organizations, a law firm, and an individual (collectively, Petitioners) filed four separate petitions raising thirteen rulemaking challenges to these regulations under 38 U.S.C. § 502. [1]

[1] Specifically, Petitioners include: Military-Veterans Advocacy (MVA) in *Military-Veterans Advocacy v. Sec'y of Veterans Affs.*, Appeal No. 19-1600; National Organization of Veterans' Advocates, Inc. (NOVA) and Paralyzed Veterans of America (PVA) in *Nat'l Org. of Veteran' Advocates, Inc. v. Sec'y of Veterans Affs.*, Appeal No. 19-1680; Carpenter Chartered in *Carpenter Chartered v. Sec'y of Veterans Affs.*, Appeal No. 19-1685; and Phillip Boyd Haisley and National Veterans Legal Services Program (NVLSP) in *Haisley v. Sec'y of Veterans Affs.*, Appeal No. 19-1687. These four appeals were treated as companion cases for purposes of oral argument. Because they involve overlapping legal issues and raise rulemaking challenges to related regulations, we address all four companion cases in this single opinion.

Before oral argument, we requested supplemental briefing on whether Petitioners have standing to challenge the regulations identified in their petitions. We conclude that two veterans' service organizations, MVA and PVA, have demonstrated associational standing based on claimed injuries to their members to collectively bring three of their seven challenges. Because we conclude that no Petitioner has demonstrated standing to raise any of the remaining challenges, we dismiss the petitions with respect to those challenges.

The three regulations for which MVA and PVA have standing to challenge all relate to supplemental claims—one of the three review lanes established by the AMA. Specifically, 38 C.F.R. § 14.636(c)(1)(i) limits when a veteran's representative may charge fees for work on supplemental claims; 38 C.F.R. § 3.2500(b) bars the filing of a supplemental claim when adjudication of the same claim is pending before a federal court; and 38 C.F.R. § 3.155 excludes supplemental claims from the intent-to-file framework. We hold that all three regulations are invalid for contravening the unambiguous meaning of their governing statutory provisions. Accordingly, we grant-in-part and dismiss-in-part MVA's and PVA's petitions in Appeal Nos. 19-1600 and 19-1680, ***1118** and we dismiss the remaining two petitions in Appeal Nos. 19-1685 and 19-1687 in their entirety.

BACKGROUND

I

Congress enacted the AMA in 2017 to reform the existing VA administrative appeals system, which was, by all accounts, "broken," marked by lengthy delays, and plagued with a formidable backlog of cases. *See* H.R. Rep. No. 115–135, at 5–8 (2017) ("The current backlog for appeals exceeds 470,000 claims and is growing."). Under the previous appeals system, often described as the "legacy system," [2] veteran disability claimants had only one pathway to seek administrative review of an unsatisfactory initial decision on their disability claim from the agency of original jurisdiction (AOJ). This one-size-fits-all-claims pathway was long and complicated, regardless of the extent or nature of the claimant's disagreement with the initial decision. Claimants initiated an appeal by filing a NOD to the AOJ's decision, and after an elaborate set of steps, could have their claim reviewed by the Board. [3]

2 The legacy system still applies to claims filed before the AMA effective date.

3 Specifically, under the legacy system, after a veteran submits a claim to the VA, that claim is reviewed by the AOJ, typically one of the Veterans Benefits Administration's (VBA) fifty-six regional offices. J.A. 109. The AOJ's initial decision decides whether the claimant is entitled to compensation and, if so, how much. A claimant who is unsatisfied with that initial decision may initiate an appeal within one year of the decision's notification date by filing a NOD. J.A. 110. After receiving the NOD, the AOJ reviews the claim again, and if the disagreement cannot be resolved, it issues a statement of the case (SOC) setting forth the agency's legal and factual position with respect to the disagreement. *Id.* The claimant then has sixty days to file a "[s]ubstantive [a]ppeal" to the Board (and request a hearing) by filing a form that provides "specific allegations of error of fact or law ... related to specific items in the [SOC]." *See* § 20.202 (2018). The Board subsequently reviews the case and can either grant the requested relief, deny that relief, or remand the case to the AOJ for additional fact finding and readjudication. J.A. 111. A claimant dissatisfied with the Board's final decision may continue an appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), and beyond the VA to our court and even to the Supreme Court. *Id.* Additionally, clear and unmistakable error (CUE), *see* § 5109A, and new and material evidence, *see* § 5108 (2016), claims allow for review of final judgments.

More problematic, however, was the "continuous evidence gathering and readjudication of the same matters" that caused appeals to "churn" in the system. *See* S. Rep. 115–126, at 29 (2017) (Jennifer S. Lee, Deputy Under Secretary for Health and Policy Services) ("Veterans and VA adjudicators are ... engaged in continuous evidence gathering and repeated readjudication of the same appeal. This cycle of evidence gathering and readjudication means that appeals often churn for years between the Board and the [AOJ] to meet complex legal requirements, with little to no benefit flowing to the Veteran."). Because the legacy system permitted claimants to submit new evidence at virtually any time prior to a final Board decision—including at the Board hearing—nearly half of the appeals before the Board resulted in a remand to the AOJ for additional development and readjudication. The VA, moreover, had a statutory duty to assist the claimant in obtaining evidence in support of the appeal throughout the entire appeals process. The introduction of new evidence at the Board would often result in a remand to the AOJ for readjudication of the claim in light of that evidence. Collectively, these features resulted in a protracted administrative appeals system in which claimants waited "an average ***1119** [of] five years for a final decision" from the Board, which was expected to increase to "an average [of] ten years for a final appeals decision by the end of 2027." *See* H.R. Rep. No. 115–135, at 5.

As relevant here, the AMA sought to reduce inefficiencies of the legacy appeals system by introducing several statutory reforms. These amendments reflect Congress's goal of streamlining the administrative appeals system while still protecting claimants' due process rights. *See id.* ("To help ensure that veterans receive timely appeals decisions in the future ... [t]he new appeals procedures created by this bill would reduce [the] VA's workload and help ensure that the process is both timely and fair."); *see also* S. Rep. No. 115–126, at 27 ("[T]he current system allows for repeated revisions and resubmissions of claims while maintaining an effective date for benefits based upon the original filing date of the claim. ... The proposed changes are intended

to significantly streamline the appeal process, which would allow appeals to be finalized in a shorter period of time with fewer employees.").

Central to the AMA's many reforms, claimants may now choose from three procedural lanes to obtain review of their claim within one year of the initial decision (in contrast to the legacy system's single pathway for appeal to the Board). 38 U.S.C. § 5104C(a)(1). Claimants may use only one lane at a time. § 5104C(a)(2)(A). Each lane has varying limitations on the submission of new evidence and the VA's duty to assist the claimant in obtaining such evidence.

The first lane is the filing of a supplemental claim, which allows a claimant to submit additional evidence to an AOJ for "readjudication" of the claim. §§ 5104C(a)(1)(B), 5108. The second lane is a request for "higher-level review" made within one year of the AOJ's decision. §§ 5104B(b)(1)(B), 5104C(a)(1)(A). This lane offers review of the claim by a higher-level claims adjudicator at the AOJ that is based on the *same* evidentiary record as the initial claim (i.e., the claimant may not submit new evidence), and the VA has no duty to assist during the review. §§ 5104B(d), 5103A(e). The third lane is a direct appeal to the Board, [4] which a claimant initiates by filing a NOD within one year of the AOJ's initial decision. As with the legacy appeals system, this lane permits claimants to submit additional evidence and request a Board hearing, if they wish. Unlike the legacy system, however, claimants must specify in the NOD their intention to add to the record and submit the additional evidence within a certain time frame (i.e., within 90 days of the NOD's filing or the Board hearing). In another departure from the legacy system, wherein the VA's duty to assist continued while a claim was on appeal before the Board, the VA has no duty to assist during a Board appeal under the AMA's modified procedures. § 5103A(e).

4 In contrast to legacy Board appeals, this third lane eliminates "intermediate and duplicative steps ... such as the [SOC] and the Substantive Appeal [form]." S. Rep. No. 115–126, at 30.

Should one lane of review prove unsuccessful, claimants may sequentially pursue another lane of review while maintaining the original effective date of the initial claim, so long as they "continuously pursue" that claim by selecting an appropriate alternative lane within one year of an unsatisfactory AOJ, Board, or Veterans Court decision. § 5110(a)(2)–(3). But two consequences arise when the claim is no longer in continuous pursuit—that is, when a claimant waits more than one year to ***1120** seek further review of an unsatisfactory AOJ, Board, or Veterans Court decision. First, at that time, claimants can no longer seek higher-level review or appeal to the Board but can only file a supplemental claim. *See* § 5104C(b). And second, any award under such a supplemental claim is no longer entitled to the initial claim's original effective date and will instead be assigned an effective date tied to the supplemental claim's date of receipt. § 5110(a)(3).

II

On August 10, 2018, pursuant to its authority under 38 U.S.C. § 501(a) to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [agency]," the VA published a notice of proposed rulemaking in the Federal Register inviting the public to comment on its proposed rules for implementing the AMA's reforms. *See VA Claims and Appeals Modernization*, 83 Fed. Reg. 39,818 (Aug. 10, 2018) (Proposed Rule). After receiving comments on the Proposed Rule, the VA promulgated the Final Rule on January 18, 2019, which along with the AMA [5] became effective on February 19, 2019.

5 The amendments under the AMA apply to all claims for which notice of a decision is provided by the Secretary on or after the later of: (1) the date that is 540 days after August 23, 2017, and (2) the date that is 30 days after the Secretary submits to the appropriate committees of Congress a certification of required resources and a summary of performance outcomes. *See* 131 Stat. at 1115. As the VA submitted the required documentation to Congress on January 18, 2019, the effective date of the amendments made by the AMA was February 19, 2019. The date 540 days after the date of enactment of the AMA was February 14, 2019.

Petitioners subsequently filed four separate petitions under § 502, collectively raising thirteen rulemaking challenges to the validity of several regulations. [6] Specifically, Mr. Haisley and NVLSP's petition challenged 38 C.F.R. § 3.105(a)(1)(iv). MVA's petition also challenged § 3.105(a)(1)(iv) in addition to 38 C.F.R. § 14.636(c)(1)(i) and 38 C.F.R. §

20.202(c)(2). NOVA and PVA's petition challenged 38 C.F.R. § 3.155(b), 38 C.F.R. § 3.156(b), 38 C.F.R. § 3.2500(b), and 38 C.F.R. § 3.2500(d)–(e) and 38 C.F.R. § 20.205(c). And finally, Carpenter Chartered's petition raised all but three of the above challenges (§ 3.105(a)(1)(iv),[7] § 3.2500(d)–(e) and § 20.205(c), and § 14.636(c)(1)(i)) and further raised six additional challenges, to: 38 C.F.R. § 3.1(p)(1)–(2), 38 C.F.R. § 3.103(c)(2), 38 C.F.R. § 3.151(c)(1)–(2), 38 C.F.R. § 14.636(c)(2)–(3), 38 C.F.R. § 20.202(a), and 38 C.F.R. § 20.800(e).

6 The Petitioners presented the thirteen challenges as follows: (1) 38 C.F.R. § 3.1(p)(1)–(2); (2) 38 C.F.R. § 3.103(c)(2); (3) 38 C.F.R. § 3.105(a)(1)(iv); (4) 38 C.F.R. § 3.151(c)(1)–(2); (5) 38 C.F.R. § 3.155; (6) 38 C.F.R. § 3.156(b); (7) 38 C.F.R. § 3.2500(b); (8) 38 C.F.R. § 3.2500 (d)–(e) and 38 C.F.R. § 20.205(c); (9) 38 C.F.R. § 14.636(c)(1)(i); (10) 38 C.F.R. § 14.636(c)(2)–(3); (11) 38 C.F.R. § 20.202(a); (12) 38 C.F.R. § 20.202(c)(2); and (13) 38 C.F.R. § 20.800(e).

7 Shortly before oral argument, Carpenter Chartered withdrew its challenge to § 3.105(a)(1)(iv). Petitioner's Notice, No. 19-1685 (Sept. 25, 2020), ECF No. 52.

The government's opening briefs opposed only NVLSP's and Carpenter Chartered's standing to challenge the implementing regulations. However, pursuant to our independent duty to verify standing, we requested supplemental briefing from each Petitioner to address "the precise grounds upon which it asserts standing to make each of the specific challenges raised by the petition." *See*, *e.g.*, Order Requesting Suppl. Briefing, No. 19-1600 (Sept. 16, 2020), ECF No. 55, at 1–2. Specifically, we ***1121** asked Petitioners to demonstrate the "actual or imminent injuries in fact, which are (a) concrete and particularized, and (b) traceable to a specific regulation" being challenged. *Id*. at 2. We also requested briefing on issues specific to the precise theory of standing asserted. *See*, *e.g.*, *id.* (requesting each Petitioner relying on associational standing to "demonstrate that they have a member that would otherwise have personal standing to challenge the specific regulations").

We have jurisdiction under § 502 to "directly review the validity of both the rulemaking process and the challenged VA regulations" in the Final Rule. *See Paralyzed Veterans of Am. v. Sec'y of Veterans Affs.*, 345 F.3d 1334, 1339 (Fed. Cir. 2003).

DISCUSSION

I. Standing

Before reaching the merits of Petitioners' challenges, we must first satisfy our "independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). This obligation to assure standing extends to when a party seeks judicial review of final agency action, as Petitioners do here.

The "irreducible constitutional minimum of standing" consists of three elements. *Id.* First, a plaintiff must personally present an "injury in fact," meaning "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *See id.* (cleaned up). This requirement ensures that the plaintiff has a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Second, there must be a causal connection between the injury and the conduct complained of—that is, plaintiff's injury must be "fairly traceable" to the challenged "putatively illegal conduct of the defendant," and not the result of independent action of some third party not before the court. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *see also California v. Texas*, —— U.S. ——, 141 S. Ct. 2104, 2113–15, —— L.Ed.2d —— (2021) (no causation where plaintiffs' injury—cost of purchasing health insurance—is not "fairly traceable" to any "allegedly unlawful [government] conduct" because the challenged Patient Protection and Affordable Care Act (ACA) provision mandating health insurance coverage was rendered "unenforceable" upon elimination of the tax penalty for noncoverage). Lastly, it must be "likely" that the injury will be redressable by the requested relief. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130; *see also California*, 141 S. Ct. at

2116 (no standing to challenge unenforceable ACA provision where plaintiffs sought only a declaratory judgment that provision is unconstitutional, which, by itself, is not an "acceptable Article III remedy" that can "redress a cognizable Article III injury").

Petitioners bear the burden of establishing these elements under the same standard that is applied at the summary judgment stage. *See Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1172–73 (Fed. Cir. 2017) (adopting the summary judgment burden of production in cases challenging final agency action). In other words, instead of resting on "mere allegations," a plaintiff must set forth by affidavit or other evidence "specific facts" to ***1122** adequately support its contentions. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

With respect to injury in fact, the Supreme Court has cautioned that " 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the 'some day' will be—do not support a finding of ... actual or imminent injury." *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130 (cleaned up) (no actual or imminent injury where affiants merely professed intent to visit endangered species without concrete plans to do so). Nor can generalized allegations of harm untethered to the "application of the challenged regulations" establish a "concrete and particularized" injury. *See Summers*, 555 U.S. at 495, 129 S.Ct. 1142 (no standing where harm alleged was "not tied to application of the challenged regulations" and did not identify a particular project subject to the challenged regulations that would impede petitioner's specific and concrete interests); *see also Lujan*, 504 U.S. at 566–67, 112 S.Ct. 2130 ("pure speculation and fantasy" or an "ingenious academic exercise in the conceivable" is insufficient to establish injury for standing).

Plaintiffs claiming standing to challenge the validity of a statute or regulation must generally assert an injury that is caused by that statute's or regulation's "actual or threatened *enforcement*, whether today or in the future." *California*, 141 S. Ct. at 2114. Where, as here, plaintiffs seek *pre*-enforcement review, the Supreme Court has required plaintiffs to show that "the likelihood of future enforcement is 'substantial.' " *Id.* In other words, while a plaintiff need not "await the consummation of threatened injury to obtain preventive relief," it must demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement" or show that the injury is "certainly impending." *Biotechnology Indus. Org. v. District of Columbia*, 496 F.3d 1362, 1370 (Fed. Cir. 2007) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)); *see also Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (plaintiff must demonstrate that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (allegation of future injury may suffice if threatened injury is "certainly impending" or there is a "substantial risk" the harm will occur).

We now turn to Petitioners' thirteen rulemaking challenges. All but two of these challenges address regulatory provisions concerning procedural and substantive requirements for obtaining VA benefits—involving, e.g., initial claims, administrative review, and CUE claims. The remaining two challenges involve regulatory provisions governing attorneys' fees for representing claimants in VA proceedings.

Petitioners consist of several veterans' service organizations, a law firm, and an individual. Collectively, they assert numerous theories of associational standing (on behalf of both veteran and attorney members), organizational standing, third-party standing, and personal standing. We address each in turn.

A. Associational Standing

MVA, NOVA, and PVA (collectively, the Associations) claim associational standing on behalf of their members, which requires an Association to demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the [Association's] purpose; and (c) neither the claim asserted ***1123** nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The Associations assert different theories of associational standing on behalf of both their veteran members and their attorney members.

We note, as an initial matter, that as to *Hunt*'s second and third prongs, the parties' only dispute is whether NOVA (and no other Petitioner) satisfies the second prong of associational standing—i.e., whether the interests NOVA seeks to protect are germane to its purpose. The government argues that NOVA's petition is not germane to the purposes enumerated in its bylaws, which are focused on ensuring that its members, as advocates, offer informed representation to veterans seeking benefits from the VA. Resp't Suppl. Br. (No. 19-1680) at 12–13. This court, however, recently resolved this dispute in NOVA's favor in *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, where we explained that NOVA's purpose is not as narrow as the government contends and more generally relates to "helping veterans obtain fair compensation for their claims"—which is "precisely the interest NOVA now seeks to protect in challenging" these rules. 981 F.3d 1360, 1371 (Fed. Cir. 2020) (en banc) (*NOVA*). Accordingly, we conclude that the Associations satisfy the second and third prongs of associational standing. Below, we address only *Hunt*'s first prong as to the Associations' veteran and attorney members.

1. *Hunt*'s First Prong: Veteran Members

The Associations make six rulemaking challenges [8] asserting associational standing on behalf of their veteran members, relying on *Disabled American Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000) (*DAV*). *DAV* held, in relevant part, that petitioner NOVA had satisfied *Hunt*'s first prong of associational standing because "NOVA includes at least one veteran as a member," and all veterans are "personally affected by the [challenged] rules," which impact their abilities to bring CUE claims. *See id.* at 689. Notably, *DAV* did not require NOVA to identify a specific veteran member that presented an injury that is actual or imminent, concrete, particularized, and fairly traceable to the challenged CUE rules.

8 (1) § 3.105(a)(1)(iv); (2) § 20.202(c)(2); (3) § 3.2500(b); (4) § 3.2500 (d)–(e) and § 20.205(c); (5) § 3.155; and (6) § 3.156(b). The Associations assert associational standing to challenge § 14.636(c)(1)(i) only on behalf of their attorney members, discussed *infra*, not their veteran members.

Shortly after oral argument occurred in this case, however, this court, sitting en banc in *NOVA*, partially overruled *DAV* insofar as "it held that [standing] can be established solely on the basis of NOVA member veteran status without identification of an individual affected member, the nature of [the] claimed injury, and the reasons that the challenged interpretive rule would adversely affect [that] member." 981 F.3d at 1369. Instead, an organization challenging VA rulemaking based on associational standing must show that it has at least one veteran member with an actual or potential claim that could be affected by the challenged rule. *See id.* at 1369–70.

As applied here, we begin our associational standing analysis by asking whether at least one Association has at least one veteran member with an actual or potential claim that could be affected by the challenged rules at issue. In response to our request for supplemental briefing ***1124** on this issue, the Associations submitted evidence in the form of signed declarations by some of their members. For the reasons below, we conclude that PVA has met its burden as to *Hunt*'s first prong for only two of the six rulemaking challenges.

First, § 3.2500(b) bars claimants from filing a supplemental claim based on new and relevant evidence while judicial review of their initial claim is pending on appeal in federal court. Clarence Noble, a PVA member and veteran, appealed the denial of his initial benefits claim to federal court, and while that appeal was pending, received new and relevant evidence he sought to submit in a supplemental claim. Under § 3.2500(b), however, Mr. Noble was barred from filing a supplemental claim because of his pending judicial appeal, thereby preventing him from timely applying for (and receiving) benefits based on this new evidence.

Second, § 3.155 excludes supplemental claims from the intent-to-file framework, which, by contrast, continues to apply to initial claims. Under this rule, a claimant filing a supplemental claim cannot rely on a preliminary submission to serve as an effective date placeholder. Stephen C. Schwenker, a PVA member and veteran of the United States Air Force, submitted his intent to file a supplemental claim, which the VA received on July 24, 2018. Mr. Schwenker believed he had one year from that date to gather the evidence necessary to demonstrate service-connection for his multiple sclerosis claim. While he was eventually awarded service-connection, the effective date of his award was September

17, 2019 (presumably, the day his formal supplemental claim was received), rather than July 24, 2018. Section 3.155 thus deprived him of an earlier effective date (and, as a result, additional benefits) based on the date of his intent-to-file submission.

Accordingly, we conclude that the facts alleged as to Mr. Noble and Mr. Schwenker establish that these PVA veteran members suffered an injury in fact that is fairly traceable to the alleged shortcomings of the challenged regulations, *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016), and as a result, PVA has associational standing on behalf of its veteran members to challenge § 3.2500(b) and § 3.155, *see NOVA*, 981 F.3d at 1370. Moreover, this evidence is in the form of signed member declarations setting forth specific facts, which is sufficient to meet the summary judgment burden of production applied to direct challenges of agency action. *See id.* (citing *Phigenix*, 845 F.3d at 1172–73, and *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130).

By contrast, the allegations pertaining to the four remaining challenges are too vague or speculative to establish an injury in fact. The allegations with respect to § 20.202(c)(2) and § 3.156(b), for example, fail to identify any particular veteran member who has presented an actual or imminent harm as a result of these regulations. NOVA and PVA also challenge § 3.2500(d)–(e) and § 20.205(c), which collectively limit a claimant's options for switching administrative review lanes more than a year after the initial decision. But the declarants merely allege that they are currently pursuing one form of administrative review and speculate that they may want to switch to another lane of administrative review at some point in the future. While standing may be predicated on future harm, these declarations express nothing more than " 'some day' intentions," which fail to demonstrate that a particular veteran member faces "actual or imminent injury" if foreclosed from switching lanes after one year. *See Lujan*, 504 U.S. at 564, 112 S.Ct. 2130.

***1125** Lastly, MVA challenges § 3.105(a)(1)(iv), which precludes a change in law (e.g., a change in the interpretation of a statute) from serving as the basis for a CUE claim. The only affected veteran member MVA specifically identifies is Michael Hodge, who is a Blue Water Navy veteran. Such veterans were previously ineligible for benefits based on a statutory interpretation that was later overturned in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc). Based on this new statutory interpretation, Mr. Hodge filed a CUE claim seeking revision of the pre-*Procopio* VA decision that denied his original claim for benefits in 2010. But the VA, citing § 3.105(a)(1)(iv), purportedly disregarded Mr. Hodge's CUE claim and, instead, required him to file a supplemental claim. One difference between a supplemental claim and a CUE claim pertains to the claim's original effective date: While a successful CUE claim provides benefits retroactive to the effective date of the claimant's original claim, a supplemental claim filed more than one year after the initial decision generally provides no retroactive benefits and is effective only as of the date the supplemental claim itself is filed. *See* § 5110(a)(3).

But as MVA concedes, Congress has already provided Blue Water Navy veterans with the relief they would have obtained had their CUE claim been allowed to proceed. *See* Pet'r Suppl. Br. (No. 19-1600) at 4 n.1. The Blue Water Navy Vietnam Veterans Act, Pub. L. No. 116–23, 133 Stat. 966 (2019) (codified at scattered sections of 38 U.S.C.), allows such veterans to receive retroactive effective dates for finally denied claims reconsidered and granted under the new law. Because the Act provides Blue Water Navy veterans with the *same* benefits that they otherwise would have received under the CUE pathway, we discern that as to Mr. Hodge, MVA failed to sufficiently present an actual or imminent harm fairly traceable to § 3.105(a)(1)(iv). We therefore conclude that Mr. Hodge lacks personal standing to challenge this regulation, and MVA cannot claim associational standing on his behalf.

2. *Hunt*'s First Prong: On Behalf of Attorney Members

The Associations also claim associational standing on behalf of their attorney members to make two sets of rulemaking challenges: the same six challenges to rules governing a veteran's claim for benefits addressed in the previous section (*supra* § I.A.1), and a challenge to § 14.636(c)(1)(i), which limits when attorneys' fees may be charged for work on veterans' benefits proceedings. Because we have previously concluded that PVA has standing on behalf of its veteran members to make two of these challenges (the challenges to § 3.2500(b) and § 3.155), we only address the Associations' arguments as to the remaining four challenges, to: (1) § 3.105(a)(1)(iv); (2) § 20.202(c)(2); (3) § 3.2500 (d)–(e)

and § 20.205(c); and (4) § 3.156(b). We also address the Associations' arguments as to § 14.636(c)(1)(i).

With respect to the four challenges addressed above, the Associations argue that their attorney members are injured because these rules make it more difficult for their veteran clients to obtain benefits, which, in turn, "diminish[es] the contingency fees [attorneys] will be able to earn" under such rules. Pet'rs Suppl. Br. (No. 19-1680) at 8. The Associations contend that both this court and the Supreme Court have already recognized that "these sorts of direct economic injuries to lawyers are adequate injury in fact to meet the constitutional minimum of Article III standing." *Id.* at 11 (citing ***1126** *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); *Kowalski v. Tesmer*, 543 U.S. 125, 129 n.2, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004); and *Willis v. Gov't Accountability Off.*, 448 F.3d 1341, 1348 (Fed. Cir. 2006)). For the reasons below, we decline to find the Associations have associational standing on behalf of their attorney members to make these four challenges, which concern the benefits that claimants can receive and not the contingency fees that their attorneys can recover.

As an initial matter, all three of the Associations' cited cases involve third-party standing, and not associational standing. In third-party standing, an attorney seeks to assert a legal right belonging to a third party—i.e., the attorney's *client*—based on a close attorney-client relationship and the client's inability to assert its own rights. *See Kowalski*, 543 U.S. at 130, 125 S.Ct. 564. The Associations' proposed theory of associational standing, on the other hand, purports to assert a legal right to fees belonging to their attorney members, such that those members "would otherwise have standing to sue in their own right." *See Hunt*, 432 U.S. at 343, 97 S.Ct. 2434. We are unaware of any binding authority recognizing that attorneys have a "legally protected interest" in safeguarding their fees against regulations that govern a client's benefits claim; nor have we seen a case holding that attorneys personally have standing to challenge such regulations in their own right. To decide otherwise would lead to the peculiar conclusion that an attorney has personal standing (and the service organization to which the attorney belongs has associational standing) to raise a rulemaking challenge whenever an agency promulgates a regulation that could negatively impact a client's ability to obtain benefits.

Even setting aside the fundamental distinctions between third-party standing and associational standing, the Associations' cited cases are readily distinguishable. Both *Caplin* and *Willis*, for instance, emphasize the petitioner's certainty of recovery in establishing injury in fact based on attorneys' fees. *Caplin* concluded that a law firm asserting third-party standing on behalf of its client had established an injury in fact fairly traceable to the challenged action because the action prevented the firm from collecting a fee to which it was "almost certainly" entitled. *See* 491 U.S. at 623 n.3, 109 S.Ct. 2646 ("[T]here can be little doubt that petitioner's stake in $170,000 of the forfeited assets—which it would almost certainly receive if the Sixth Amendment claim it advances here were vindicated—is adequate injury in fact to meet the constitutional minimum of Article III standing."). Likewise, in *Willis*, the outcome of the proceedings had already been adjudicated in the client's favor, and the attorney was undisputedly entitled to fees as a result. *See* 448 F.3d at 1348. This certainty is especially important where, as here, "[petitioner] is not himself the object of the government action ... he challenges" because standing is "substantially more difficult to establish." *Lujan*, 504 U.S. at 561–62, 112 S.Ct. 2130. Under such circumstances, standing hinges on the "unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* at 562, 112 S.Ct. 2130. Petitioners, then, bear the burden to "adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." *Id.*

Here, however, the Associations' allegations lack the certainty of recovery demonstrated in *Caplin* and *Willis* and, instead, are based on mere speculation that the challenged rules will preclude their clients from obtaining benefits that they otherwise ***1127** could have filed for and might have been awarded, which, in turn, would "diminish" their contingency fees. NOVA and PVA, for instance, challenge § 3.156(b)—which governs the submission of new and material evidence while a claim is pending under the legacy system—yet fail to identify a single attorney member with a client subject to this rule, let alone a concrete and specific set of circumstances that would lead to diminished fees. *See* Pet'rs Suppl. Br. (No. 19-1680) at 10 ("[S]ome NOVA members *reasonably expect* to represent veterans harmed by the elimination of effective date protection for such evidence." (emphasis added)). MVA challenges § 20.202(c)

(2) but, at most, asserts that this rule has dissuaded its attorneys from taking on clients they feel are likely to receive denials. *See* Pet'r Suppl. Br. (No. 19-1600) at Tab 3, Decl. of Robin Hood ¶ 4 (asserting that § 20.202(c)(2) has caused him to "turn down [claimants] that [have] chosen a [Board] lane that does not let them adequately develop their claim and [are] foreclosed ... from amending their choice" because the "claimant will most likely get a denial and [he] won't be able to earn any fees on a denial"). Similarly, for § 3.2500(d)–(e) and § 20.205(c), which limit switching of administrative review options after one year, NOVA and PVA allege that an attorney member represents a client who originally selected one lane but, because of this rule, is unable to switch into a potentially faster lane without losing his effective date. *See* Pet'rs Suppl. Br. (No. 19-1680) at Tab 3, Decl. of Robert Chisholm ¶ 8. But these alleged facts fail to establish that the rule presents a concrete threat of diminished attorneys' fees and, at best, merely indicate a possible delay in when the client receives benefits. Accordingly, even if diminished attorneys' fees can suffice as an injury in fact in some instances, the Associations' allegations as to these challenged regulations are simply too speculative.

As for § 3.105(a)(1)(iv), which excludes a change in judicial interpretation as a basis for CUE, MVA contends that this rule precludes its Blue Water Navy veteran clients from filing *Procopio*-based CUE claims, leaving them with only supplemental claims as a route for administrative review. This purportedly harms its attorneys because § 14.636 precludes them from recovering any fees for the majority (if not all) of their work on such supplemental claims. *See* Pet'r Suppl. Br. (No. 19-1600) at Tab 1, Decl. of John B. Wells ¶ 7. We decline to subscribe to this theory of standing for several reasons. As a threshold matter, we recently addressed and rejected a similar challenge to the validity of this regulation in *George v. McDonough*, 991 F.3d 1227 (Fed. Cir. 2021) (holding that CUE cannot arise from a subsequent change in interpretation of law by the agency or judiciary). Having already resolved the merits of MVA's challenge to § 3.105(a)(1)(iv), we decline to hold that it has standing based on a potential loss of attorneys' fees, given that "an 'interest in [attorneys'] fees is insufficient to create an Article III case[-]or[-]controversy where none exists on the merits of the underlying claim.' " *See Thole v. U.S. Bank N.A.*, —— U.S. ——, 140 S. Ct. 1615, 1619, 207 L.Ed.2d 85 (2020) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)); *see also Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) ("[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."). We also observe that MVA's alleged injury to its attorneys' ability to recover fees for supplemental claims is not directly caused by § 3.105(a)(1)(iv) ***1128** but rather § 14.636, which MVA also challenges. Thus, even assuming that MVA has established a concrete injury in fact, it has nonetheless failed to demonstrate that this injury is "directly traceable" to the specific rule being challenged. *See California*, 141 S. Ct. at 2117; *see also Summers*, 555 U.S. at 495, 129 S.Ct. 1142 (no standing where harm alleged was "not tied to application of the challenged regulations").

Moreover, far from approving the fee-based theory of injury that the Associations advance here, *Kowalski* carefully "assume[d], *without deciding*" that petitioners' allegations regarding economic injury as to their diminished fees were "sufficient" to demonstrate injury in fact. *See* 543 U.S. at 129 n.2, 125 S.Ct. 564 (emphasis added); *id.* at 129, 125 S.Ct. 564 ("In this case, we do not focus on the constitutional minimum of standing, which flows from Article III's case-or-controversy requirement. Instead, we shall assume the attorneys have satisfied Article III and address the alternative threshold question whether they have standing to raise the rights of others." (cleaned up)). Accordingly, the Associations' cited cases fail to support standing on behalf of their attorney members. [9]

9 Even if we were to conclude that the Associations have constitutional standing to challenge these regulations on behalf of their attorney members, we are skeptical that these members would fall within the class whom Congress has authorized to seek review under the Administrative Procedure Act (APA). *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (clarifying that the zone-of-interests analysis asks the statutory question of whether a "legislatively conferred cause of action encompasses a particular plaintiff's claim"). While the zone-of-interests test is not especially demanding, the Associations' grievance of diminished attorneys' fees appears to be "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot

reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). Nothing in the relevant AMA statutory provisions speaks to or even suggests that Congress intended to authorize attorneys to challenge these rules to protect their fees; instead, these provisions were "obviously enacted to protect the interests of" veterans and the VA itself, not attorneys. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

Lastly, we address MVA's claimed standing to challenge § 14.636(c)(1)(i). Unlike the other four challenges at issue, this rule directly affects attorneys' fees—by restricting fees for work performed on supplemental claims filed more than a year after the initial decision, but not for any other type of claim. Looking to the specific facts alleged, we find them sufficient to establish constitutional standing. Specifically, John B. Wells, an MVA member and attorney, alleges that, under this rule, he personally was denied "over $50,000 in fees ... for work [performed on] a supplemental claim older than one year." We thus hold that MVA has associational standing on behalf of its attorney members to challenge the validity of this regulation.

B. Organizational Standing

Petitioners NVLSP, MVA, NOVA, and PVA (collectively, the Organizations) next claim that they have organizational standing in their own right (and not on behalf of their members) to make the seven rulemaking challenges discussed above. Because we previously concluded that PVA and MVA collectively have standing to make three of these challenges, we only address the Organizations' arguments as to the remaining four challenges, to: (1) § 3.105(a)(1)(iv); (2) § 20.202(c)(2); (3) § 3.2500 (d)–(e) and § 20.205(c); and (4) § 3.156(b).

***1129** Organizational standing, like any other theory of standing, requires an Organization to demonstrate the three elements of injury in fact, causation, and redressability. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). To prove an injury in fact, an Organization must establish a "concrete and demonstrable injury to the [O]rganization's activities"—such as a "perceptibl[e] impair[ment]" of the Organization's mission—"with the consequent drain on the [O]rganization's resources." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982).

In the present case, the Organizations claim that the challenged rules purportedly make it more difficult for veterans to obtain benefits, thereby frustrating the Organizations' general purpose of helping veterans obtain benefits and draining their resources on educational guidance. We conclude that this asserted harm does not satisfy the *Havens* standard for organizational standing.

Demonstrating a concrete organizational injury requires more than showing a "setback to [an] organization's abstract social interests." *Id.* at 379, 102 S.Ct. 1114. The injury thus cannot be merely ideological, meaning that damage to the "special interest" of an organization does not qualify as an injury in fact; otherwise, "there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived." *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (*FWW*) ("An organization must allege more than a frustration of its purpose because frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.' " (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995))).

As our sister court, the D.C. Circuit, has explained, allegations that "the defendant's conduct perceptibly impaired the organization's ability to provide services," such as when "the defendant's conduct causes an 'inhibition of [the organization's] daily operations,' " suffice to establish a concrete injury to an organization's interest. *FWW*, 808 F.3d at 919 (quoting *PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)). Moreover, the consequent "drain" on resources must go beyond normal operating costs—that is, an organization does not suffer an injury in fact where it "expend[s] resources to educate its members and others" unless doing so subjects the organization to "operational costs beyond those normally expended." *Nat'l Taxpayers Union*, 68 F.3d at 1434; *see also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (organization's expenditures must be for "operational costs beyond those

normally expended to carry out its advocacy mission"). An organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy are likewise insufficient to give rise to an Article III injury. *FWW*, 808 F.3d at 919.

Havens itself is instructive on this point. There, the organization's (HOME) purpose was to provide clients with equal opportunity housing opportunities and information, pursuant to a federal law that provided a legal right to truthful, nondiscriminatory housing information. HOME claimed organizational injury when a real estate company, Havens Realty, engaged in unlawful racial steering practices, which directly unraveled and frustrated HOME's nondiscriminatory counseling and referral ***1130** services, requiring it to expend additional resources to counteract Havens Realty's misinformation. 455 U.S. at 379, 102 S.Ct. 1114; *see also PETA*, 797 F.3d at 1100 (Millett, J., dubitante) ("Put simply, what HOME used its own resources, information, and client base to build up, Havens Realty's racist lies tore down. That is the type of direct, concrete, and immediate injury that Article III recognizes.").

Here, the Organizations' allegations are insufficient to satisfy the *Havens* test. What the Organizations describe falls short of a "perceptibl[e] impair[ment]" to their conduct of daily operations or to advancing their purpose and mission of providing services. The challenged rules, as discussed, merely seek to streamline procedures for filing and obtaining administrative review of benefits claims, not directly foreclose claimants from obtaining benefits; nor can it be argued that these rules impair or unwind the Organizations' efforts in counseling and representing veterans in the benefits process (or otherwise block the Organizations' efforts to carry out their missions). As for the purported drain on the Organizations' resources, expenditures on educational programs to inform veterans of the governing regulatory provisions are merely part of the ordinary course of the Organizations' operations. For these reasons, we decline to conclude that NVLSP, MVA, NOVA, and PVA have organizational standing to challenge these rules.

C. Third-Party Standing and Personal Standing

1. Mr. Haisley and NVLSP

Mr. Haisley and NVLSP filed a joint petition challenging the validity of a single regulation, § 3.105(a)(1)(iv), pertaining to the scope of CUE. Mr. Haisley argues that he has personal standing to challenge this regulation as a Blue Water Navy veteran. We already addressed and rejected this argument with respect to MVA's challenge to this same regulation, and we do so again here.

Mr. Haisley also separately argues personal standing based on his plans to allege CUE with respect to the Regional Office's decision on his claim for prostate cancer. Specifically, he contends that he was initially awarded a 100% disability rating for this claim in June 2016 while he had "active malignancy," which was then lowered to 20% in March 2020 after he had completed cancer treatment and was left with "residual complications of prostate cancer." *See* Pet'rs Suppl. Br. (No. 19-1687) at Tab 1, Decl. of Phillip B. Haisley ¶ 3. We decline to find standing on these facts. When Mr. Haisley's declaration was filed, the ratings decision lowering his disability rating to 20% was still nonfinal. We find it difficult to understand why Mr. Haisley would purportedly let that decision become final to pursue a CUE claim, instead of timely initiating administrative review within one year based on the alleged error. Second, and more importantly, based on the specific facts alleged, if Mr. Haisley were to file a CUE claim, it appears that it would be based on an erroneous application of the ratings schedule, and not a change in judicial interpretation as addressed by § 3.105(a)(1)(iv). For these reasons, we conclude that Mr. Haisley fails to establish personal standing to challenge this regulation.

Next, NVLSP argues that it has third-party standing to challenge the CUE regulation. Third-party standing requires a Petitioner to demonstrate that (1) it has suffered an injury in fact giving it a sufficiently concrete interest in the outcome of the issue in dispute and otherwise satisfies Article III's case-or-controversy requirement; (2) it has a "close" relationship ***1131** with the third party that possesses the right being asserted; and (3) there exists some "hindrance" to that third party's ability to protect its own interests. *Kowalski*, 543 U.S. at 130, 125 S.Ct. 564. Here, NVLSP alleges it has third-party standing because it "currently represents" unnamed veterans before the Veterans Court "who seek review of a [Board] decision that rejected the argument that the challenged final agency decision contains CUE." *See* Pet'rs Suppl. Br. (No. 19-1687) at Tab 2, Decl. of Barton F. Stichman ¶ 5. We disagree.

NVLSP does not identify a single veteran with whom it has a close relationship who has had the CUE rule applied to them, or who has an imminent, "substantial risk" of having the rule applied to them. Nor do NVLSP's allegations specify if the CUE argument these veterans seek to advance is premised on a change in judicial interpretation, as specified in the challenged regulation. But even aside from these issues, it is unclear what injury in fact NVLSP suffers that shows it has a personal stake in the outcome of a challenge to this regulation. NVLSP first relies on organizational injury—an argument which we have already considered and rejected above. Next, citing *United States Department of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990), NVLSP argues that advocates have standing to challenge restrictions preventing them from pursuing desired relationships with claimants and, here, the CUE rule purportedly restricts its ability to represent certain veterans whose claims are excluded from the scope of CUE. Pet'rs Suppl. Br. (No. 19-1687) at 8–9. But *Triplett* (and similar cases in this line) addressed enforcement of a fee restriction statute that applies directly "against the *litigant* [i.e., advocate]" and "prevents a third party from entering into a relationship with the litigant ..., to which relationship the third party has a legal entitlement," i.e., "due process right to obtain legal representation." 494 U.S. at 720, 110 S.Ct. 1428 (emphasis added); *Kowalski*, 543 U.S. at 131, 125 S.Ct. 564 (explaining that *Triplett* "falls within that class of cases where we have allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights"). Here, however, the challenged regulation applies to the third-party claimant's CUE claim, and not to the attorney or to the attorney's relationship with the claimant.

Turning to the hindrance prong of third-party standing, NVLSP argues that claimants face significant obstacles to bringing suit in their own right due to the difficulties of navigating the VA administrative system. Pet'rs Suppl. Br. (No. 19-1687) at 13–14 (citing *Rosinski v. Wilkie*, 31 Vet. App. 1, 10 (2019)). But the generic obstacle NVLSP describes would purportedly hinder *all* veterans from protecting their interests with respect to *any* VA regulation and fails to demonstrate how any of its clients are hindered from challenging the CUE regulation at issue. *Kowalski*, moreover, rejected a similar argument that indigent criminal defendants are generally hindered from advancing their own constitutional rights because they are unable to navigate the appellate process pro se. *See* 543 U.S. at 132, 125 S.Ct. 564. While an attorney would be valuable to veterans challenging the validity of the CUE regulation, we do not think that the lack of an attorney here is the type of hindrance necessary to allow another to assert the claimant's rights, particularly in view of *Kowalski*'s finding that even pro se criminal defendants were not hindered enough for third-party attorney standing. *See id.*; *see also In re Stanley*, 9 Vet. App. 203, 213 (1996) ("VA claimants do not face the type ***1132** of obstacles to bringing their own challenges that ordinarily weigh in favor of finding third-party-rights standing."). Additionally, NVLSP's clients appear to have representation to advance their interests—NVLSP itself.

2. Carpenter Chartered

Lastly, Carpenter Chartered, a law firm, asserts both personal standing and third-party standing on behalf of its clients. Its petition makes all but three of the challenges addressed above (§ 3.105(a)(1)(iv), § 3.2500(d)–(e) and § 20.205(c), and § 14.636(c)(1)(i)), and also raised six additional challenges, to: § 3.1(p)(1)–(2), § 3.103(c)(2), § 3.151(c)(1)–(2), § 14.636(c)(2)–(3), § 20.202(a), and § 20.800(e), mostly pertaining to the procedures and substance of claim filings and administrative review, with the exception of § 14.636(c)(2)–(3), which governs attorneys' fees.

Carpenter Chartered's theory of personal standing bears similarities to organizational standing; as a law firm specializing in VA benefits law, it urges that it should be treated like a veterans' service organization. Carpenter Chartered also cites *Rosinski*, 31 Vet. App. 1, as purportedly establishing that law firms may have personal standing to challenge regulations such as those at issue here. We decline to conclude that a law firm has personal standing to challenge these rules for reasons similar to those already expressed for associational standing on behalf of attorney members. Carpenter Chartered has failed to establish how it suffers an injury in fact as a result of the challenged rules—especially where none of those rules (save for one) implicates attorneys. The one exception for which we might have found personal standing is § 14.636(c)(2)–(3), governing attorneys' fees for claims assessed under prior versions of § 5904(c)(1). Carpenter Chartered contends that § 5904(c)(1) as amended

under the AMA must apply to all claims regardless of when a decision issued, and that § 14.636(c)(2)–(3), which limit the applicability of amended § 5904(c)(1) to claims with a decision issued on or after the AMA's effective date, are invalid. Pet'r Br. (No. 19-1685) at 42–45. Yet Carpenter Chartered merely alleges by declaration that these regulations will harm both the firm and its clients—it fails to point to an example claim in which it, under its interpretation, could receive retroactive effect or allege any specific facts demonstrating how this rule may cause such injury. We therefore decline to find personal standing here.

Finally, Carpenter Chartered claims that it has third-party standing on behalf of its veteran clients and, to that end, submits several signed declarations from those clients. But as we explained for NVLSP's third-party standing argument, we reject this theory for at least the reason that Carpenter Chartered has failed to establish that its clients are hindered from bringing suit in their own right. This rings especially true as each and every one of Carpenter Chartered's declarants avers that he is a client of Carpenter Chartered and would have pursued an action in his own right, if requested. *See*, *e.g.*, Pet'r Suppl. Br. (No. 19-1685) at Tab 1, Decl. of Randy B. Bomhoff, Jr. ¶ 3 ("I would have allowed Carpenter Chartered to have filed this challenge in my name."). Accordingly, we also decline to find third-party standing under these circumstances.

II. Validity of Challenged Regulations

A. Standard of Review

Having determined that Petitioners lack standing to challenge all but three of the ***1133** regulations raised in their petitions, we now turn to the merits of those challenges.

We review petitions under § 502 in accordance with the APA, as codified in relevant part at 5 U.S.C. § 706. *See Nyeholt v. Sec'y of Veterans Affs.*, 298 F.3d 1350, 1355 (Fed. Cir. 2002). Under § 706, we must "hold unlawful and set aside agency action" we find "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 706(2); *see also Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (regulation must be set aside for being arbitrary and capricious where agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

Our review of an agency's interpretation of a statute that it administers is further governed by the framework articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Veterans Just. Grp., LLC v. Sec'y of Veterans Affs.*, 818 F.3d 1336, 1346 (Fed. Cir. 2016) (*VJG*). Under *Chevron*, we first ask "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S.Ct. 2778. If we conclude that it has, "that is the end of the matter," and the only question remaining is whether the regulation at issue accords with congressional intent. *Id.* at 842–43, 104 S.Ct. 2778. Under such circumstances, we "must reject administrative constructions which are contrary to clear congressional intent," as ascertained by the "traditional tools of statutory construction" and statutory history. *Id.* at 843 n.9, 104 S.Ct. 2778.

If, however, the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. The administering agency, under these circumstances, is entitled to make a "reasonable policy choice." *Id.* at 845, 104 S.Ct. 2778. Because a court may not simply substitute its own construction of a statutory provision for an agency's reasonable interpretation, such interpretations are afforded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. 2778 (footnote omitted).

B. Supplemental Claims under the AMA

The three regulations for which we find Petitioners MVA and PVA have standing to challenge all pertain to one of the new procedural lanes of AMA review—supplemental claims. Specifically, (1) § 14.636(c)(1)(i) limits when a veteran's representative may charge fees for work on supplemental claims; (2) § 3.2500(b) bars the filing of a supplemental claim

when adjudication of the same claim is pending before a federal court; and (3) § 3.155 excludes supplemental claims from the intent-to-file framework. Supplemental claims, as mentioned, permit a claimant to request readjudication of an initial claim based on "new and relevant evidence." § 5108(a). Under the AMA, such claims have replaced claims to reopen from the legacy system. *Compare* § 5108 (2016), *with* § 5108 (2019).

Several statutory provisions form the basis for the regulations at issue here. First, § 5104C(a) and § 5104C(b) recite a claimant's options for administrative review following an AOJ decision, including ***1134** the filing of a supplemental claim. Section 5104C(a) governs administrative review "within one year" of an AOJ decision, whereas § 5104C(b) governs administrative review after "more than one year has passed." [10]

10 38 U.S.C. § 5104C recites, in relevant part:

> (a) *Within one year* of decision.
>
> (1) Subject to paragraph (2), in *any* case in which the Secretary renders a decision on a claim, the claimant may take *any of the following actions* on or before the date that is one year after the date on which the [AOJ] issues a decision with respect to that claim:
>
> (A) File a request for higher-level review under section 5104B of this title.
>
> (B) File a supplemental claim under section 5108 of this title.
>
> (C) File a [NOD] under section 7105 of this title.
>
> (2)
>
> (A) Once a claimant takes an action set forth in paragraph (1), the claimant may not take another action set forth in that paragraph with respect to the same claim or same issue contained within the claim until—
>
> (i) the higher-level review, supplemental claim, or [NOD] is *adjudicated*; or
>
> (ii) the request for higher-level review, supplemental claim, or [NOD] is *withdrawn*.
>
> (B) *Nothing* in this subsection *shall prohibit* a claimant from taking any of the actions set forth in paragraph (1) *in succession* with respect to a claim or an issue contained within the claim.
>
> ...
>
> (b) *More than one year* after decision. In any case in which the Secretary renders a decision on a claim and more than one year has passed since the date on which the [AOJ] issues a decision with respect to that claim, the claimant may file a supplemental claim under section 5108 of this title.

§ 5104C (emphases added).

Within one year of an AOJ decision, a claimant may generally pursue "any" one of three lanes of administrative review by filing: a request for higher-level review, a supplemental claim, or a NOD for Board review. *See* § 5104C(a)(1). This general rule, however, is not without limits, as a claimant cannot *simultaneously* pursue two or more administrative review options for the same claim or issue. *See* § 5104C(a)(2)(A). But nothing can prohibit that claimant from pursuing each administrative review option *in succession*. *See* § 5104C(a)(2)(B).

By contrast, after more than one year has passed since the AOJ's decision, a claimant is left with only one option for administrative review—filing a supplemental claim. *See* § 5104C(b). Collectively, then, § 5104C establishes two types of supplemental claims based on when the claim is filed: § 5104C(a) supplemental claims filed within a year of an AOJ decision, and § 5104C(b) supplemental claims filed more than a year after an AOJ decision.

Aside from the timing of when they are filed, § 5104C(a) and § 5104C(b) supplemental claims also differ in two additional ways: their effective dates and the VA's duty to notify. Section 5110(a)(2) governs the effective date of awards and explains that supplemental claims "continuously pursued"—i.e., filed within one year of a prior decision from the AOJ, Board, or Veterans Court—are entitled to an effective date reaching back to "the date of filing of the initial application for a benefit" (i.e., the initial claim's filing date). But "supplemental claims received more than one year" after an AOJ or Board decision have an effective date "[no] earlier than the date of receipt of the supplemental claim." *See* § 5110(a)(3). Thus, § 5104C(a) supplemental claims filed in continuous pursuit may reach back to the initial claim's effective date, whereas § 5104C(b) supplemental claims not

filed within continuous pursuit are accorded an effective ***1135** date as of their date of receipt by the VA. *See* § 5110(a)(3). The VA, moreover, has a duty to notify claimants of any information or evidence necessary to substantiate their claims—including § 5104C(b) supplemental claims, *see* § 5103(a)(1)—but § 5104C(a) supplemental claims filed within one year after an AOJ or Board decision are expressly excluded from this duty, *see* § 5103(a)(3).

The final statutory provision at issue in this appeal is § 5904(c)(1), which, unlike the other provisions discussed, does not explicitly reference supplemental claims. This provision generally applies to all VA proceedings and appeals and governs when an attorney or agent may begin to charge fees for services rendered in connection with a veteran's claim for benefits:

> (c)(1) Except as provided in paragraph (4), in connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, a fee may *not* be charged, allowed, or paid for services of agents and attorneys with respect to services provided *before the date* on which a claimant is provided notice of the *[AOJ's] initial decision under section 5104 of this title with respect to the case*. The limitation in the preceding sentence does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court.

§ 5904(c)(1) (emphases added). Under this provision, the triggering event for when an attorney may begin to charge fees is when the claimant receives notice of the AOJ's "initial decision ... with respect to the case." *Id.*

Below, we address each of Petitioners' three challenges in turn.

C. 38 C.F.R. § 14.636(c)(1)(i): Attorneys' Fees

MVA first challenges the VA's regulation governing attorneys' fees and asserts that this regulation is invalid for treating § 5104C(a) and § 5104C(b) supplemental claims differently, contrary to the clear meaning of § 5904(c)(1).

1

To begin, we find it worthwhile to review the statutory history of restrictions on attorneys' fees for VA benefits claims. Congress has thrice changed the triggering event for when attorneys' fees may be charged, each time shifting the entry point for such fees—and thus a claimant's ability to retain paid representation—earlier in the administrative appeals process.

Previously, attorneys' fees had been strictly limited to $10 since 1864 due to the "relatively uncomplicated procedure" of "applying for VA benefits" in "the initial claim stages," *see* S. Rep. No. 100–418, at 63 (1988), which were "informal and non-adversarial," *see* H.R. Rep. No. 100–963 (1988), at 15. This limitation was left unchanged until 1988, when Congress enacted the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100–687, 102 Stat. 4105 (1988) (codified at scattered sections of 38 U.S.C.), to allow, for the first time, judicial review of VA decisions. H.R. Rep. No. 100–963, at 16. At the same time, Congress also enacted § 5904(c)(1) (formerly 38 U.S.C. § 3404(c)(1)) to relax the existing limitations on attorneys' fees, recognizing the importance of retaining legal counsel in both judicial proceedings and administrative appeals. *See* S. Rep. No. 100–418, at 63–64; H.R. Rep. No. 100–963, at 28.

When first enacted, § 5904(c)(1)'s predecessor permitted attorneys' fees to be charged only after "the [Board] first makes a final decision in the case." *See* § 3404(c)(1) (1988). This was intended to "preserve the non-adversarial initial benefits ***1136** process, while providing the veteran with the assistance of an attorney when that process has failed and the veteran is faced with the complexities of appealing, reopening, and/or correcting prior adverse decisions." *See Carpenter v. Nicholson*, 452 F.3d 1379, 1383 (2006); *see also Stanley v. Principi*, 283 F.3d 1350, 1356 (2002) ("[S]ection 5904(c) was designed to allow veterans to retain paid

counsel in connection with VA proceedings to reopen final Board decisions, but to bar the retention of paid counsel in connection with the original VA proceedings, which were viewed as presenting less complex issues."). The Senate Report distinguished reopening and reconsideration proceedings from the initial proceedings, explaining that "once the [Board] renders a decision adverse to the claimant on the merits, the need for the assistance of an attorney is then markedly greater with respect to such issues as seeking a *reopening and reconsideration* and deciding whether to proceed to court." *See* S. Rep. No. 100–418, at 63–64 (emphasis added).

Subsequently, in 2006, Congress amended § 5904(c)(1) to shift the triggering event for allowing paid representation from a final Board decision to when "a [NOD] is filed with respect to the case." *See* § 5904(c)(1) (2006). The accompanying legislative remarks explained that the amendment would permit claimants to obtain paid representation "before [the] VA," and not just after a final Board decision. 152 Cong. Rec. S11854, at S11855 (2006) (Sen. Akaka); *see also* 152 Cong. Rec. H8995-02, at H9018 (2006) (Rep. Miller) ("Current law prohibits an attorney from receiving a fee for representing a claimant until the [Board] renders its first decision on the claim. Unfortunately, the claims process has become very complex and can be very overwhelming to some claimants. This provision would give veterans the option of hiring an attorney earlier in the process if the veterans believe they need assistance with their claim."). Because fees could be charged "only after a [NOD] has been filed in a case," the amended statute continued to bar attorneys' fees for the initial application of benefits while, at the same time, expanding a claimant's ability to retain counsel to seek review of an unsatisfactory initial decision by the AOJ. *See* 152 Cong. Rec. S11854, at S11855.

Now, under the AMA, the triggering event for attorneys' fees has once again shifted earlier to permit paid representation after a claimant receives notice of the AOJ's "initial decision ... with respect to the case." *See* § 5904(c)(1) (2019); *see also* H.R. Rep. No. 115–135, at 3 (explaining this amendment permits "veterans to retain the services of attorneys and accredited agents who charge a fee when the [AOJ] provides notice of the *original decision*" (emphasis added)). As the VA acknowledged in its Final Rule, this amendment was necessary "to allow paid representation with respect to the claimant's *expanded options for seeking review of an initial decision on a claim*." Final Rule, 84 Fed. Reg. at 150 (emphasis added). In other words, because claimants are no longer limited to filing a NOD to seek review of an unsatisfactory initial AOJ decision (and can instead file a supplemental claim or request for higher-level review), "Congress necessarily had to shift the entry point for paid representation to the AOJ decision itself" in order "to permit paid representation *regardless of the form of review*." *Id.* (emphasis added). This shift was part of a continuing congressional effort to enlarge the scope of activities for which attorneys can receive compensation for assisting veterans.

2

***1137** Section 14.636(c)(1)(i),[11] titled "[c]ircumstances under which fees may be charged," permits attorneys to charge fees for work performed after an AOJ has issued "an initial decision on the claim." *See* § 14.636(c)(1)(i). The regulation, however, treats § 5104C(b) supplemental claims differently from all other forms of administrative review, including § 5104C(a) supplemental claims. *See* Final Rule, 84 Fed. Reg. at 150 (explaining that the regulation "treats supplemental claims differently based on whether they were filed within one year of a prior decision"). Specifically, § 5104C(a) supplemental claims, which are "continuously pursued" within one year of a prior decision, "will be considered part of the earlier [initial] claim," such that attorneys may charge fees for any work performed on the supplemental claim. *Id.* But for § 5104C(b) supplemental claims, which involve claim issues that are no different in substance from § 5104C(a) supplemental claims, fees may only be charged for work performed after "an initial decision on [the] supplemental claim" itself. *Id.* This regulation thus permits claimants to receive paid representation for all work on a § 5104C(a) supplemental claim—including the preparation and filing of such a claim—but requires a § 5104C(b) supplemental claim to be first denied before paid representation is available.

11 38 C.F.R. § 14.636(c)(1)(i) states:

> (c) Circumstances under which fees may be charged. Except as noted in paragraph (d) of this section, agents and attorneys may *only* charge fees as follows:

> (1)(i) Agents and attorneys may charge claimants or appellants for representation provided *after an [AOJ] has issued notice of an initial decision* on the claim or claims. ... For purposes of this paragraph (c)(1)(i), *an initial decision on a claim would include* an initial decision on an initial claim for an increase in rate of benefit, an initial decision on a request to revise a prior decision based on [CUE] (unless fees are permitted at an earlier point pursuant to paragraph (c)(1)(ii) or paragraph (c)(2)(ii) of this section), and *an initial decision on a supplemental claim that was presented after the final adjudication of an earlier claim*. However, *a supplemental claim will be considered part of the earlier claim if the claimant has continuously pursued the earlier claim* by filing any of the following, either alone or in succession: A request for higher-level review, *on or before one year* after the date on which the [AOJ] issued a decision; a supplemental claim, *on or before one year* after the date on which the [AOJ] issued a decision; a [NOD], *on or before one year* after the date on which the [AOJ] issued a decision; a supplemental claim, *on or before one year* after the date on which the Board of Veterans' Appeals issued a decision; or a supplemental claim, *on or before one year* after the date on which the Court of Appeals for Veterans Claims issued a decision.
>
> § 14.636(c)(1)(i) (emphases added).

MVA urges us to invalidate § 14.636(c)(1)(i) for contravening the clear statutory basis for this regulation as set forth in § 5904(c)(1). Specifically, MVA argues that the regulation's unequal treatment of § 5104C(a) and § 5104C(b) supplemental claims violates the AMA's "unambiguous[ ] require[ment] that all work on supplemental claims be capable of compensation." Pet'r Br. (No. 19-1600) at 49. MVA contends that nothing in the statute limits fees for § 5104C(b) claims or otherwise distinguishes fees for different types of supplemental claims. Instead, § 5904(c)(1) restricts only fees charged before an AOJ's "initial decision ... with respect to the case," and a supplemental claim is part of the same "case" as the initial claim, whether continuously pursued within a year of a prior decision or not.

The government does not attempt to argue that § 5904(c)(1)'s text directly supports differential treatment of § 5104C(a) and § 5104C(b) supplemental claims as to paid representation. Instead, it argues that the VA's regulation deserves deference because ***1138** the VA has an established practice of treating motions to reopen "finally-decided claims based on new evidence" as a "separate case[ ]" for the purposes of attorneys' fees, which it purports are analogous to § 5104C(b) supplemental claims under the AMA, and nothing in the AMA or its statutory history indicates that Congress intended for the VA to deviate from this practice. Resp't Br. (No. 19-1600) at 41. The government also contends that the regulation is consistent with congressional intent because the AMA itself treats § 5104C(a) and § 5104C(b) supplemental claims differently by assigning different effective dates and imposing different notification duties on the VA. We disagree and conclude that § 14.636(c)(1)(i) contradicts the unambiguous meaning of § 5904(c)(1), which permits paid representation for all forms of administrative review under the AMA, including § 5104C(b) supplemental claims.

Starting with the words of the statutory provision itself, § 5904(c)(1) states that attorneys' fees may not be charged for services provided before the date a claimant receives notice of the AOJ's "initial decision ... with respect to the case." On its face, the provision recites no other restriction on attorneys' fees. Nor does the provision distinguish between work performed on different types of administrative review under the AMA. Because all such review work necessarily occurs after the AOJ issues an "initial decision ... with respect to the case," a straightforward reading of § 5904(c)(1) indicates that work on all forms of review under the AMA—including § 5104C(b) supplemental claims—should be compensable.

Our reading of the statutory provision also comports with legislative intent, as supported by the statutory history. As the VA acknowledges, Congress shifted § 5904(c)(1)'s entry point for paid representation from the filing of a NOD to receiving notice of the AOJ's initial decision "to permit paid representation *regardless of the form of review*" a claimant chooses. *See* Final Rule, 84 Fed. Reg. at 150 (emphasis added). After receiving the AOJ's initial decision, a claimant may initiate review of that decision by either filing a NOD, requesting higher-level review, or filing a supplemental claim —even if that supplemental claim is filed "more than one year [after] the date on which the [AOJ] issues a decision with

respect to [the initial] claim." *See* § 5104C(b); *see generally* § 5104C (titled "[o]ptions following decision by [AOJ]" and including both § 5104C(a) and § 5104C(b) supplemental claims among such options). All are "form[s] of review" under the AMA. Section 5904(c)(1), moreover, is devoid of any indication that § 5104C(b) supplemental claims should be treated differently from other types of administrative review for purposes of attorneys' fees. Yet, no other form of review is subject to the same restrictions on attorneys' fees under the VA's regulation.

We also reject the government's argument that a § 5104C(b) supplemental claim filed more than a year after a prior decision is not part of the same "case" as that earlier decision, thereby barring attorneys from charging fees for any work on such claims until the supplemental claim itself is rejected. Logic dictates that § 5104C(b) supplemental claims, like any other form of administrative review under the AMA, should be construed as part of the same "case" as the initial AOJ decision being reviewed, just as an appeal or motion for reconsideration in litigation is considered part of the same "case" as the underlying decision. *See* 38 U.S.C. § 101(36) (defining "supplemental claim" as "a claim for benefits ... filed by a claimant who had previously filed a claim for the *same or similar* benefits on the *same or similar* basis" (emphases added)). While neither ***1139** § 5904(c)(1) nor any other provision of the AMA defines the term "case," the parallel language in § 5104C(a) and § 5104C(b) suggests that supplemental claims belong to the same "case" as the initial decision being reviewed, regardless of when they are filed. *Compare* § 5104C(a) ("in any *case* in which the Secretary renders a decision on a claim, the claimant may" file a supplemental claim within one year of when the AOJ issues a decision with respect to that claim (emphasis added)), *with* § 5104C(b) ("[i]n any *case* in which the Secretary renders a decision on a claim and more than one year has passed since the date [the AOJ] issues a decision with respect to that claim, a claimant may file a supplemental claim" (emphasis added)).

Although the government correctly notes that § 5104C(b) supplemental claims may have a different effective date and duty to notify than § 5104C(a) supplemental claims, *see* §§ 5110(a)(3), 5103(a)(3), we see no reason why these distinctions should matter in the context of charging attorneys' fees. That § 5104C(b) supplemental claims are not entitled to an effective date reaching back to the initial claim merely reflects Congress's efforts to "streamline" the "broken" legacy appeals process that allowed for "repeated revisions and resubmissions of claims while maintaining an effective date for benefits based upon the original filing date of the claim." *See* H.R. Rep. 115–135, at 8. Restricting the effective date of § 5104C(b) supplemental claims simply reflects a legislative choice to award claimants who delayed seeking review of their claims for over a year fewer benefits than those who "continuously pursued" administrative review. It says nothing of Congress's intent to restrict attorneys' fees or limit a claimant's ability to retain paid representation for § 5104C(b) supplemental claims. The government, moreover, has not identified any differences in the work that an attorney would perform on a § 5104C(a) claim as opposed to a § 5104C(b) claim that would justify compensating the former but not the latter.

As for the VA's "longstanding interpretation" of legacy reopening claims as belonging to a "case" separate from that of the original claim for benefits, the government argues that "Congress has now amended section 5904(c) twice and has not overruled [the] VA's statutory interpretation." Resp't Br. (No. 19-1600) at 46. From this purported inaction, the government presumes that Congress has implicitly ratified the VA's practice of restricting paid representation for legacy reopening claims and, by extension, for any "post-final decision claims based on new evidence." *Id.* at 47. This argument suffers from several flaws. Included among them is our express rejection of the VA's interpretation in both *Stanley* and *Carpenter*, discussed *infra*.

To begin with, an implicit ratification theory holds no water where, as here, the regulation at issue clearly contradicts the requirements of the statutory provision. *See Brown v. Gardner*, 513 U.S. 115, 121, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) ("There is an obvious trump to the reenactment argument ... in the rule that where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction."); *id.* at 122, 115 S.Ct. 552 ("A regulation's age is no antidote to clear inconsistency with a statute, and the fact [that the regulation] flies against the plain language of the statutory text exempts courts from any obligation to defer to it."). Reenactment, moreover, "[cannot] carry the day" where "there is no ... evidence to suggest Congress was even aware of the VA's interpretative position." *Id.* Here, as we have concluded, § 14.636(c)(1)(i)'s differential treatment of § 5104C(b) supplemental ***1140** claims clearly contravenes § 5904(c)(1)'s requirement that

paid representation be available for all forms of administrative review under the AMA. We also see no indication that Congress was aware of the VA's regulations restricting paid representation for reopening claims or distinguishing such claims as separate from "the case" of the initial claim. Under such circumstances, we reject the government's implicit ratification argument.

Far from "inaction" that would suggest implicit ratification of preexisting practices, the AMA dramatically overhauled the VA appeals process by replacing the "broken," one-size-fits-all legacy system with a new three-lane system. Given the extent and nature of the AMA's reforms, we think it unlikely that Congress intended to preserve the VA's "longstanding interpretation" of the fee statutory provision from the superseded legacy system, especially where the regulation at issue contradicts both the plain and ordinary meaning of the statutory provision and the statutory history. The AMA's three-lane system was intended to alleviate the legacy system's growing appeals backlog by allowing claimants to choose from new and more efficient administrative review pathways specifically tailored for their needs. But the AMA's reforms can only succeed if claimants are able to avail themselves of these additional pathways, and Congress, in turn, amended the fee provision to provide claimants with paid representation regardless of the form of administrative review sought. We would do little justice to Congress's amendments by clinging to a legacy administrative practice that markedly restricts paid representation for one lane of review. *Cf.* *Stanley*, 283 F.3d at 1356 (explaining that Congress amended the fee provision in 1988 because the "new right to judicial review" under the VJRA "would be a hollow right indeed without some easing of the limitation on attorneys' fees" (quoting S. Rep. No. 100–418, at 63)).

Lastly, we reject the government's proposition that this court has previously endorsed the VA's longstanding interpretation of the fee provision—that is, "the basic principle that a reopening proceeding is separate from the original case" and thus foreclosed from paid representation until the VA issues a decision on the reopening claim itself. Resp't Br. (No. 19-1600) at 39 (citing *Stanley*, 283 F.3d at 1358). Even assuming, as the government contends, that § 5104C(b) supplemental claims under the AMA are analogous to legacy reopening claims, we have never denied attorneys' fees for work performed on reopening proceedings based on the VA's understanding of "case." To the contrary, our decisions in *Stanley* and *Carpenter* reinforce our textual analysis that § 5904(c)(1) plainly permits paid representation for all forms of administrative review after the AOJ's initial decision on the original claim for benefits.

In *Stanley*, we considered an earlier (and more restrictive) version of the fee provision prohibiting attorneys from collecting fees until "the [Board] first makes a final decision in the case." *See* § 5904(c) (2000). The issue before us was whether an attorney could collect fees for work performed on a legacy reopening claim filed more than a year after an AOJ's initial decision, which thus became final. We held that such fees were permissible because § 5904(c) "was designed to allow attorneys' fees after the initial claims proceeding, in connection with proceedings to *reopen a claim on the ground of new and material evidence* or [CUE]," 283 F.3d at 1352 (emphasis added), and "[t]he retention of paid counsel would have been permissible at the point when the [AOJ's initial] decision became 'final,' " *id.* at 1357. In other words, even under a more limited version of the ***1141** fee provision, we permitted paid representation for administrative review proceedings filed more than a year after the AOJ's initial decision and based on new and material evidence. While *Stanley* described the "reopening proceeding ... [as] a separate 'case' " having a "final decision," that statement was made to *allow*, rather than *deny*, paid representation for reopening work under the then-existing fee provision, which required a "final decision" for attorneys' fees to be charged. *See id.* at 1358.

We later clarified *Stanley*'s reasoning in *Carpenter*, explaining that "a veteran's claim based on the specified disability does not become a different 'case' at each stage of the often lengthy and complex proceedings, including remands *as well as reopenings as in Stanley*." 452 F.3d at 1384 (emphasis added). Specifically, in *Carpenter*, we concluded that a later CUE challenge (which is necessarily filed after a decision on the original claim has become final and cut off from direct review) is part of the same "case" as other challenges to the initial decision. *See id.* at 1384. Attorneys may charge fees for work on CUE claims, we explained, because the fee provision "was designed to authorize compensation for attorney services rendered after the initial proceedings, undertaken by the veteran, have failed." *Id.* A "case" therefore "encompasses all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically

labeled." *Id.* Just as a CUE claim belongs to the same "case" as a veteran's original claim for benefits, thereby permitting paid representation for work performed after an AOJ's initial decision, so too does a § 5104C(b) supplemental claim seeking the "same or similar benefits on the same or similar basis" as the original claim. *See* § 101(38).

For these reasons, we hold that § 14.636(c)(1)(i) is contrary with the plain and ordinary meaning of § 5904(c)(1), and we thus invalidate that regulatory provision.

D. 38 C.F.R. § 3.2500(b): Prohibition on Concurrent Supplemental Claim and Federal Court Appeal

Section 3.2500(b) places two restrictions on the use of administrative review:

> (b) Concurrent election prohibited. With regard to the adjudication of a claim or an issue as defined in § 3.151(c), a claimant who has filed for review under one of the options available under paragraph (a) of this section [12] *may not, while that review is pending final adjudication, file for review under a different available option*. While the adjudication of a specific benefit is pending *on appeal before a federal court, a claimant may not file for administrative review of the claim* under any of [the] options listed in paragraph (a) of this section.

***1142** § 3.2500(b) (emphases added). First, this regulation prohibits claimants from pursuing two concurrent lanes of administrative review for the same "claim or [ ] issue." Separately, § 3.2500(b) also prohibits claimants from filing for administrative review of a claim "[w]hile adjudication of a specific benefit is pending on appeal before a federal court."

12 38 C.F.R. § 3.2500(a), titled "[r]eviews available," summarizes a claimant's three "administrative review options" under the AMA:

> (1) *Within one year* from the date on which the [AOJ] issues a notice of a decision on a claim or issue as defined in § 3.151(c), except as otherwise provided in paragraphs (c), (e), and (f) of this section, a claimant may elect one of the following administrative review options by timely filing the appropriate form prescribed by the Secretary:
>
> (i) A request for higher-level review under § 3.2601 or
>
> (ii) An appeal to the Board under § 20.202 of this chapter.
>
> (2) *At any time after* VA issues notice of a decision on an issue within a claim, a claimant may file a supplemental claim under § 3.2501.

§ 3.2500(a) (emphases added).

PVA challenges only the validity of § 3.2500(b)'s second prohibition on concurrent administrative and judicial review. We note, as an initial matter, that the only form of administrative review that is potentially available for a claim already pending on appeal before a federal court is a supplemental claim. [13] Thus, this prohibition primarily affects claimants who have already appealed their claim to a federal court (from an adverse Board decision) but believe they have "new and relevant evidence" for that same claim that could entitle them to benefits. [14] This regulation bars such claimants from filing a supplemental claim with the VA based on that "new and relevant evidence" while judicial appeal of their initial claim remains pending before this court or the Supreme Court. They must instead wait until the judicial appeal concludes to file any such supplemental claims.

13 This follows because only a final Board decision (initiated by filing a NOD) may be appealed to a federal court, and there can be no higher-level review by the AOJ of a final Board decision.

14 We assume that the VA meant "federal court" in § 3.2500(b) to include the Veterans Court, even though the Veterans Court is "an Executive Branch entity," *United States v. Arthrex, Inc.*, —— U.S.

> ——, 141 S. Ct. 1970, 1984, —— L.Ed.2d —— (2021). Regardless, we hold that § 5104C, our statutory basis for invalidating § 3.2500(b), permits a veteran to file a supplemental claim at any time after receiving an adverse Board decision.

This prohibition, PVA argues, is invalid because it "imposes new restrictions that are not contemplated in the statute." Pet'rs Br. (No. 19-1680) at 24. While § 5104C(a)(2)(A) [15] appears to provide a statutory basis for § 3.2500(b)'s first prohibition against concurrent lanes of administrative review, no statutory provision directly supports § 3.2500(b)'s second prohibition against concurrent administrative and judicial review. *Id.* PVA further contends that this prohibition harms claimants in two ways. First, § 3.2500(b) can delay a claimant's receipt of benefits. A claimant possessing "new and relevant evidence" that would entitle the claimant to benefits must wait until an ongoing judicial appeal concludes before a supplemental claim requesting readjudication based on that new evidence can be filed.

15 Section 5104C(a)(2)(A) explains that once a claimant pursues one lane of administrative review, the claimant cannot pursue another lane of administrative review "with respect to the same claim or issue until" that first review is "adjudicated" or "withdrawn."

But more importantly, PVA contends, claimants seeking to appeal an adverse Veterans Court decision are forced to make a "hard choice" between pursuing appellate review beyond the Veterans Court and filing a supplemental claim within continuous pursuit. Pet'rs Br. (No. 19-1680) at 24–26. This follows because § 5110(a)(2)—the statutory provision governing effective dates of "continuously pursued" claims—does not, on its face, recite that supplemental claims filed within one year of a Federal Circuit or Supreme Court decision are entitled to their original effective date. Such effective date protections are instead only expressly recited for supplemental claims filed within one year of a Veterans Court decision, a Board decision, or an AOJ decision. *See* ***1143** § 5110(a)(2)(B), (D)–(E); [16] *see also* § 3.2500(c), (h)(1) (implementing regulations reflecting same). Accordingly, while a claimant may still file a supplemental claim after unsuccessfully appealing an adverse Veterans Court decision to this court or the Supreme Court, the claimant risks losing entitlement to the original effective date for any benefits awarded on that supplemental claim. On the other hand, a claimant who chooses *not* to appeal an adverse Veterans Court decision and instead files a supplemental claim within continuous pursuit will retain the initial claim's original effective date for any benefits awarded. § 5110(a)(2)(E). But in doing so, that claimant gives up the opportunity to have this court review the Veterans Court's legal rulings under 38 U.S.C. § 7292. Consequently, PVA argues, § 3.2500(b) improperly forces claimants "to choose between pursuing the appeal rights granted to them by statute ... and protecting their effective date of benefits." Pet'rs Br. (No. 19-1680) at 23.

16 38 U.S.C. § 5110(a)(2) recites:

> (2) For purposes of determining the effective date of an award under this section, the date of application shall be considered *the date of the filing of the initial application for a benefit if the claim is continuously pursued* by filing any of the following, either alone or in succession:
>
> (A) A request for higher-level review under section 5104B of this title on or before the date that is one year after the date on which the [AOJ] issues a decision.
>
> (B) *A supplemental claim* under section 5108 of this title on or before the date that is one year after the date on which the *[AOJ] issues a decision*.
>
> (C) A [NOD] on or before the date that is one year after the date on which the [AOJ] issues a decision.
>
> (D) A *supplemental claim* under section 5108 of this title on or before the date that is one year after the date on which the *[Board] issues a decision*.
>
> (E) A supplemental claim under section 5108 of this title on or before the date that is one year after the date on which the *[Veterans Court] issues a decision*.
>
> § 5110(a)(2) (emphases added).

The government responds that, as a threshold matter, the primary harm PVA complains of—loss of effective date—will soon be irrelevant because the "VA plans to propose a regulatory change [to § 3.2500(c), (g)] to protect the effective dates of supplemental claims" filed within one year of a decision by this court or the Supreme Court. Resp't Br. (No. 19-1680) at 17. But more to the point, the government

argues, § 3.2500(b)'s requirement that claimants pursue administrative review sequentially (rather than concurrently) with judicial review in the federal courts is consistent with the AMA and should be sustained because it "reasonably promotes systemic efficiency without prejudicing claimants." *Id.* at 10.

We note that it has been over a year since the government filed its brief, and we have yet to see a notice of proposed rulemaking for the regulatory changes mentioned. Instead, on March 19, 2020, the VA issued a policy letter stating that "[e]ffective immediately, claims adjudicators must consider supplemental claims ... filed within one year of a Federal Circuit or Supreme Court decision as continuously pursued and apply the provisions of 38 C.F.R. § 3.2500(h)(1) when adjudicating the claim." *See* VA Policy Letter 20–01 (Mar. 19, 2020).

It is unclear what effect, if any, the VA's unfulfilled promise of forthcoming regulatory amendments and subsequent policy letter has on our analysis of § 3.2500(b)'s validity. But we ultimately need not resolve that question here. For even if the VA had amended its regulations through notice-and-comment rulemaking to extend effective date protections for supplemental claims filed within a year of a Federal ***1144** Circuit or Supreme Court decision, [17] we would nonetheless conclude that § 3.2500(b)'s bar on filing a supplemental claim during the pendency of a federal court appeal is invalid for contradicting the plain and ordinary meaning of § 5104C.

17 We make no conclusions as to whether such an amended regulation, if promulgated, would be valid.

Both parties agree that while § 5104C expressly bars concurrent lanes of *administrative* review, *see* § 5104C(a)(2)(A), it does not expressly prohibit concurrent administrative and *judicial* review. Thus, nothing in this statutory provision nor any other provision of the AMA expressly prohibits filing a supplemental claim during a pending appeal in federal court. The government interprets the absence of such a provision as a statutory gap for the VA to fill. *See* Resp't Br. (No. 19-1680) at 15–16. It contends that § 3.2500(b) is a reasonable construction of § 5104C(a)(2)(A) warranting deference because the additional prohibition against concurrent administrative and judicial review is consistent with the AMA's efficiency goals. We disagree and conclude that § 5104C leaves no gap to be filled because it unambiguously permits claimants to file supplemental claims while judicial review of the same underlying claim or issue is pending in federal court.

Section 5104C broadly authorizes a claimant to file a supplemental claim "[i]n *any* case in which the Secretary renders a decision on a claim," whether filed within one year of an AOJ decision or not. *See* § 5104C(a)(1)(B), (b) (emphasis added); *see also* H.R. Rep. No. 115–135, at 10 (explaining that § 5104C(b) would "[c]larify that in any case in which more than one year has passed in which the AOJ has issued a decision denying a claim, the claimant may file a supplemental claim"). Yet this broad authorization, as we have noted, is not without limits. Once a claimant has initiated one lane of administrative review, that claimant "may not" pursue another lane, such as filing a supplemental claim, "*until* the higher-level review, supplemental claim, or [NOD] is adjudicated[ ] or ... withdrawn." § 5104C(a)(2)(A) (emphasis added). But while the adjudication or withdrawal of any prior administrative review is a prerequisite to filing a subsequent supplemental claim, no provision of the AMA requires completion of an ongoing judicial review as yet another hurdle to filing a supplemental claim.

To the contrary, § 5104C(a)(2)(A) demonstrates that Congress knew how to bar two simultaneous forms of review but chose to only bar concurrent lanes of administrative review. That Congress did not include an analogous provision also barring concurrent administrative and judicial review suggests that it simply did not intend to do so. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 578, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006) ("A familiar principle of statutory construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."); *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). At the same time, § 5104C(a)(2)(B) makes clear that "*[n]othing* in this subsection shall prohibit a claimant from taking [administrative review actions] *in succession*." *See* § 5104C(a)(2)(B) (emphases added). ***1145** Section 5104C(a)(2)(B), then, protects a claimant's ability to file a supplemental claim following

an unsatisfactory Board decision, and we see nothing in the AMA that would change this outcome once that Board decision is appealed to the Veterans Court. Accordingly, § 5104C, read in its entirety, makes clear that a claimant whose initial claim is on appeal before a federal court does not have to wait until the completion of that appeal to file a supplemental claim.

The government responds that our reading of § 5104C undermines Congress's broad intent to improve the timely administration of the VA benefits program and reintroduces some of the inefficiencies the AMA sought to eliminate. Resp't Br. (No. 19-1680) at 19–20. But nothing in the AMA's text or statutory history suggests that the concerns driving Congress's reforms to the VA's legacy *administrative* review process are also implicated by concurrent judicial and supplemental claim review. Instead, permitting a claimant to file a supplemental claim during the long pendency of a judicial appeal could result in an earlier award of benefits, which is consistent with, and not contrary to, the AMA's goal of reducing protracted wait times for receiving a final decision on benefits. The statutory text and statutory history, moreover, indicate that Congress intended to allow supplemental claims to be filed "in any case in which more than one year has passed in which the AOJ has issued a decision denying a claim." H.R. Rep. No. 115–135, at 10; *see also* § 5104C(b). To the extent that the broad availability of supplemental claims undermines the AMA's efficiency goals, Congress already addressed that concern through § 5104C(a)(2)(A)'s express prohibition on simultaneously pursuing two different lanes of administrative review, and nothing indicates that Congress had similar concerns about concurrent judicial and supplemental claim review. For these reasons, we conclude that our reading of § 5104C is consistent with, and not contrary to, congressional intent under the AMA.

Because we conclude that § 5104C's statutory text unambiguously permits filing a supplemental claim during the pendency of an appeal before a federal court, we need not proceed to *Chevron*'s second step to consider the VA's policy justifications for the regulation. We therefore hold that § 3.2500(b) is invalid for contravening § 5104C's clear statutory text.

E. 38 C.F.R. § 3.155: Intent-to-File Framework

For claimants to receive VA benefits, "[a] specific claim in the form prescribed by the Secretary ... must be filed." *See* § 5101(a)(1). The VA, however, has long permitted claimants to establish a claim's effective date through a preliminary submission indicating an intent to apply for benefits, which serves as a placeholder until the claimant files a formal application for benefits within a specified period. *See VJG*, 818 F.3d at 1341. Under the current "intent-to-file" framework, [18] a claimant who signals an intention to apply for benefits through a format specified by regulation, and later completes a formal application for benefits within one year, will be ***1146** afforded an effective date as of the day the intent-to-file was signaled. *See id.* at 1342.

18 The "intent-to-file" framework was implemented in September 2014 to replace the previous "informal claims" framework. *See Standard Claims and Appeals Forms*, 79 Fed. Reg. 57,660 (Sept. 25, 2014); *see also* § 3.155(a) (2014). Under the "intent-to-file" framework, a claimant may signal a preliminary intent to apply for benefits by (1) saving an electronic application within a VA web-based claims application system; (2) submitting a VA standard form in either paper or electronic form; or (3) oral communication with designated VA personnel regarding the claimant's intent to file a claim. *See* § 3.155(b)(1)(i)–(iii).

Section § 3.155 governs the "manner and methods in which a claim can be initiated and filed," including the intent-to-file process set forth in § 3.155(b). The regulation's preamble expressly excludes supplemental claims—but not initial claims—from § 3.155(b)'s intent-to-file framework:

> The following paragraphs describe the manner and methods in which a claim can be initiated and filed. The provisions of this section are applicable to all claims governed by part 3, *with the exception that paragraph (b) of this section,*

> *regarding intent to file a claim, does not apply to supplemental claims*.

§ 3.155 (emphasis added).

In the Final Rule, the VA explained that the AMA's amendments to § 5110 required differential treatment of initial and supplemental claims. *See* 84 Fed. Reg. at 142. Because § 5110 "prescribes a one-year filing period" during which claimants may pursue supplemental claims while maintaining the initial claim's effective date, applying the intent-to-file framework "would allow for supplemental claim[s] [submitted] beyond the one-year period" to retain an earlier effective date, contrary to § 5110(a)(3)'s requirement that the effective date of such supplemental claims "shall not be earlier than the date of receipt." *See id.*

PVA argues that this regulation is arbitrary and capricious because the VA interprets "virtually identical" statutory language in § 5110(a)(1) and § 5110(a)(3) inconsistently. Section 5110(a)(3) states that the effective date of § 5104C(b) supplemental claims "shall not be earlier than the date of receipt of the supplemental claim," and § 5110(a)(1) likewise requires that the effective date of an initial claim "shall not be earlier than the date of receipt of application therefor." It thus makes little sense, PVA contends, for the VA to interpret this substantially similar language to forbid an intent-to-file submission in one instance but not another. PVA also argues that the VA's explanation for this rule runs counter to another regulatory provision that permits claimants who have filed an incomplete supplemental claim form to retain that filing date as their effective date so long as they submit a complete supplemental claim form within 60 days. *See* § 3.155(d)(1)(i) ("Upon receipt of a communication indicating a belief in entitlement to benefits that is submitted ... on a supplemental claim form ... that is not complete," the Secretary "shall notify the claimant ... of the information necessary to complete the application form" and "[i]f VA receives a complete claim within 60 days of notice by VA that an incomplete claim was filed, it will be considered filed as of the date of receipt of the incomplete claim.").

The government, for its part, does not defend the validity of § 3.155's preamble. Rather than litigate the regulation on the merits, the government asks that we dismiss and remand this challenge back to the agency. Specifically, "without conceding that [PVA's] challenge is meritorious," it avers that the "VA plans to propose a regulation to amend [§] 3.155 to apply the intent[-]to[-]file rule to [§] 5104C(b) supplemental claims" such that "[PVA's] challenge will become moot." Resp't Br. (No. 19-1680) at 43. But if the proposed amendments to § 3.155 have not materialized by the time we render judgment in this matter, the government requests a voluntary remand for the VA to complete its rulemaking process. *See id.* at 43–44.

We decline, as a threshold matter, to grant the government's request for voluntary remand. Much as was the ***1147** case for the promised regulatory changes to § 3.2500(b), we have yet to see any indication that the VA will amend § 3.155's preamble to include supplemental claims within the intent-to-file framework. While courts have discretion to grant a request for voluntary remand so that the agency can reconsider its previous position, *see SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001), the VA has already had quite some time to revise a plainly invalid regulation but failed to do so. Although the VA assured this court that it would make certain amendments to two of its regulations, several months have now passed since oral argument, and not one of these regulatory amendments has materialized. Nor has the VA provided any updates or a timeline for when such changes might occur. Under these circumstances, we are unpersuaded that a remand to the VA would be of any benefit, and we see no reason to avoid resolving the ultimate question of validity.

Turning to the merits, we agree with PVA that § 3.155's exclusion of supplemental claims from the intent-to-file framework is arbitrary and capricious. The VA's proffered explanation for this rule squarely contradicts other provisions of this regulation (i.e., § 3.155(d)(1)(i)) demonstrating that the effective date of a supplemental claim can, in fact, be earlier than the date that the VA receives the completed supplemental claim. Much like § 3.155(b)'s intent-to-file framework, this provision effectively permits a preliminary submission "indicating a belief in entitlement to benefits" to serve as an effective date placeholder for the later completed supplemental claim.

Moreover, it is a well-established canon of statutory construction that Congress is presumed to have intended for "identical words used in different parts of the same act ...

to have the same meaning." *See Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87, 55 S.Ct. 50, 79 L.Ed. 211 (1934) (in turn quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 76 L.Ed. 1204 (1932))). To overcome this presumption, the VA must demonstrate that it engaged in reasoned decision-making by providing an "adequate explanation" for its difference in interpretation of similarly worded statutory provisions. *See Nat'l Org. of Veterans' Advocs. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1380 (Fed. Cir. 2001) (setting aside regulation because the VA "purport[ed] to interpret virtually identical language contained in related veterans' benefits statutes to mean different things, without providing an adequate explanation for the inconsistency"); *see also State Farm*, 463 U.S. at 34, 103 S.Ct. 2856 (arbitrary and capricious standard requires that an agency demonstrate that it engaged in reasoned decision-making by providing an "adequate basis and explanation" for its decision). Here, the VA has not offered any explanation for why it interpreted the substantively identical language in § 5110(a)(1) and § 5110(a)(3) inconsistently. If the application for an initial claim is "deem[ed] ... to have been received as of the date of the intent to file a claim," we see no reason why that same interpretation may not also apply to deem a supplemental claim received as of the date of the intent-to-file submission. For these reasons, we hold that the VA acted arbitrarily and capriciously in excluding supplemental claims from the intent-to-file framework. Section 3.155's preamble, to the extent that it does so, is invalid.

CONCLUSION

In sum, MVA and PVA collectively have associational standing to challenge the validity ***1148** of § 14.636(c)(1)(i), § 3.2500(b), and § 3.155, and no Petitioner has demonstrated standing to challenge the validity of any other regulatory provisions raised in the petitions. We hold that all three regulatory provisions that MVA and PVA have standing to challenge are invalid. Section 14.636(c)(1)(i)'s restriction on attorneys' fees for § 5104C(b) supplemental claims is invalid because it contravenes the plain and ordinary meaning of § 5904(c)(1), which permits paid representation once a claimant receives notice of the AOJ's "initial decision ... with respect to the case." Section 3.2500(b)'s bar on filing supplemental claims during the pendency of a judicial appeal is invalid for contravening § 5104C's clear authorization for filing supplemental claims "[i]n *any* case in which the Secretary renders a decision on a claim." Lastly, § 3.155's preamble excluding only supplemental claims from the intent-to-file framework is arbitrary and capricious because the VA failed to adequately explain its inconsistent treatment of initial and supplemental claims given the substantially similar statutory language in § 5110(a)(1) and § 5110(a)(3). Accordingly, we grant-in-part and dismiss-in-part MVA's and PVA's petitions in Appeal Nos. 19-1600 and 19-1680, and we dismiss the remaining two petitions in Appeal Nos. 19-1685 and 19-1687 in their entirety.

GRANTED-IN-PART AND DISMISSED-IN-PART

COSTS

No costs.

All Citations

7 F.4th 1110

886 F.3d 1356
United States Court of Appeals, Federal Circuit.

Melba J. SAUNDERS, Claimant–Appellant
v.
Robert WILKIE, Acting Secretary of Veterans Affairs, Respondent–Appellee

2017-1466
|
Decided: April 3, 2018

Synopsis

Background: Veteran sought disability benefits based on pain from bilateral knee disorders. Board of Veterans' Appeals denied claim. Veteran appealed. The United States Court of Appeals for Veterans Claims, No. 15-975, Coral Wong Pietsch, J., 2016 WL 3002862, denied relief, and that decision was sustained by three judge panel, 2016 WL 4258493. Veteran appealed.

Holdings: The Court of Appeals, O'Malley, Circuit Judge, held that:

Court of Appeals had jurisdiction to determine whether veteran's pain alone could constitute disability;

even without specific diagnosis or identified disease or injury, pain alone could serve as functional impairment and therefore qualify as disability; and

remand to Court of Appeals for Veterans Claims for remand to Board of Veterans' Appeals for further development of veteran's claim was warranted.

Reversed and remanded.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

***1357** Appeal from the United States Court of Appeals for Veterans Claims in No. 15-975, Judge Coral Wong Pietsch.

Attorneys and Law Firms

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Mark E. Porada, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Chad A. Readler, Robert E. Kirschman, Jr., L. Misha Preheim; Y. Ken Lee, Jonathan Krisch, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Newman, Dyk, and O'Malley, Circuit Judges.

Opinion

O'Malley, Circuit Judge.

***1358** Melba Saunders appeals from a decision of the United States Court of Appeals for Veterans Claims ("the Veterans Court") denying her entitlement to disability benefits based on her reported pain from bilateral knee disorders. *Saunders v. McDonald*, No. 15-0975, 2016 WL 3002862 (Vet. App. May 25, 2016) (*Saunders I*), *aff'd*, 2016 WL 4258493 (Vet. App. Aug. 12, 2016) (*Saunders II*) (affirmed by a three-judge panel). The Veterans Court erred as a matter of law in finding that Saunders's pain alone, absent a specific diagnosis or otherwise identified disease or injury, cannot constitute a disability under 38 U.S.C. § 1110 (2016). We therefore reverse the Veterans Court's legal determination and remand for further proceedings.

I. BACKGROUND

Saunders served on active duty in the Army from November 1987 until October 1994. *Saunders I*, 2016 WL 3002862, at *1. Saunders did not experience knee problems before serving in the Army. During her service, however, Saunders sought treatment for knee pain and was diagnosed with patellofemoral pain syndrome ("PFPS"). *Id.* Saunders's May 1994 exit examination reflected normal lower extremities but

noted Saunders's reporting of a history of swollen knee and hip joints and bone spurs on her feet.

In 1994, Saunders filed a claim for disability compensation for knee pain, hip pain, and a bilateral foot condition. *Id.* The VA Regional Office ("RO") denied Saunders's claim because she failed to report for a required medical examination. Saunders did not appeal that decision.

In 2008, Saunders filed a new claim for a bilateral knee disability and for foot issues. The RO treated this application as a request to reopen the prior decision, granted the request, and denied both claims on the merits. As to Saunders's knee claim, the RO noted in the rating decision that Saunders was diagnosed with PFPS while in service, but the RO had "not received any current medical evidence" related to Saunders's knee condition.

In 2009, Saunders submitted a Notice of Disagreement, explaining that she had "sustained injuries to [her] knees" while on active duty, citing the PFPS diagnosis, and stating that she was "still experiencing pain and swelling in [her] knees." J.A. 643–44. The RO denied this claim in February 2010, citing a lack of evidence of treatment for a knee condition. Saunders appealed this decision to the Board of Veterans' Appeals ("the Board").

During a 2011 VA examination, the examiner noted that Saunders reported experiencing bilateral knee pain while performing various activities such as running, squatting, bending, and climbing stairs. The examiner found that Saunders had no anatomic abnormality, weakness, or reduced range of motion. The examiner also noted that Saunders had functional limitations on walking, that she was unable to stand for more than a few minutes, and that sometimes she required use of a cane or brace.

The examiner diagnosed Saunders with subjective bilateral knee pain and found that this pain led to (1) increased absenteeism and (2) effects on Saunders's ability to complete daily activities. The examiner also concluded that Saunders's knee condition was at least as likely as not caused by, or a result of, Saunders's military service. The VA later explained that "pain" could not be provided as a diagnosis for Saunders's knee condition, and requested that the examiner provide a complete rationale for the diagnosis. In a supplemental report, the examiner stated there was no pathology to render a diagnosis on Saunders's ***1359** condition, and noted that the theory of causation was based on the chronology of events during Saunders's service. After reviewing the supplemental report, the RO once again denied Saunders's claim because, in its view, Saunders had not demonstrated a currently diagnosed bilateral knee condition linked to military service.

Saunders appealed to the Board. Before the Board, Saunders argued that, because the examiner found that her knee conditions were linked to her service, and because she was treated while in service and afterwards for knee pain, she had sufficiently demonstrated service connection for her condition. The Board reopened Saunders's knee claim, concluding the additional evidence she offered was new and material, but denied her claim on the merits. The Board acknowledged that Saunders was diagnosed while in service with PFPS and that the examiner found that Saunders's knee condition was likely related to her active service. But the Board concluded that Saunders failed to show the existence of a present disability as is required for service connection. More specifically, the Board relied on the Veterans Court's ruling in *Sanchez–Benitez v. West*, 13 Vet.App. 282, 285 (1999) (*Sanchez–Benitez I*), in concluding that "pain alone is not a disability for the purpose of VA disability compensation." J.A. 22. Because the examiner did not provide a pathology to explain the pain Saunders reported, the Board denied Saunders service connection for her knee claim. [1]

1 The Board remanded Saunders's claim for service connection for bilateral bone spurs. That claim is not at issue in this appeal.

Saunders appealed that decision to the Veterans Court. She argued there that the Board erred legally in its interpretation of what constitutes a "disability" under 38 U.S.C. § 1110. The Veterans Court affirmed the Board's decision denying Saunders's claim. *Saunders I,* 2016 WL 3002862, at *6. The Veterans Court noted that, in *Sanchez–Benitez I*, it stated that it "*holds* that pain alone, without a diagnosed or identifiable underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted." *Id.* at *2 (emphasis added) (quoting *Sanchez–Benitez I*, at 285). Although Saunders asserted this statement was merely dicta, the Veterans Court noted that it had labeled this statement as a holding in *Sanchez–Benitez I*, "making it clear that it intended to establish precedent." *Id.*

The Veterans Court also rejected Saunders's contention that we converted the Veterans Court's holding on pain in *Sanchez–Benitez I* into dicta upon appeal. *Id.* (citing *Sanchez–Benitez v. Principi*, 259 F.3d 1356 (Fed. Cir. 2001) (*Sanchez–Benitez II*)). The Veterans Court explained that we decided *Sanchez–Benitez II* on alternative grounds: the panel on appeal did not need to reach the legal issue of whether pain is a disability because the panel instead held that it could not review the Board's factual determination that Sanchez–Benitez had failed to establish a nexus between his neck pain and his service. *Id.* at *2–3 (citing *Sanchez–Benitez II*, at 1361–62). The Veterans Court noted that it has applied the legal holding of *Sanchez–Benitez I* more than 100 times since that opinion issued, and that it has relied upon or affirmed the Board's application of this legal principle at least 83 times. *Id.* at *4.

Saunders moved for panel review of *Saunders I*, a one-judge decision. A Veterans Court panel granted her motion but adopted the one-judge decision in its entirety, ***1360** as it found no legal or factual defects in the first ruling. *Saunders II*, 2016 WL 4258493, at *1. The Veterans Court denied Saunders's motion for en banc review and entered judgment. Saunders timely appealed.

II. DISCUSSION

The parties dispute three issues on appeal: (1) whether this court has jurisdiction to hear Saunders's challenge to the Veterans Court's decision; (2) whether pain alone, without a specific pathology or an otherwise-identified disease or injury, can constitute a "disability" under 38 U.S.C. § 1110; and (3) if the Veterans Court erred in its legal interpretation, what is the proper remedy. We address each issue in turn. As explained below, we conclude that Saunders has raised a legal challenge to the Veterans Court's interpretation of "disability" that we may review, that the Veterans Court erred in its interpretation of § 1110, and that the proper remedy is to remand for the Board to apply the proper legal framework.

A. Jurisdiction

Under 38 U.S.C. § 7292(a), this court has jurisdiction to review a Veterans Court's decision with respect to the validity of a decision on a rule of law, or to the validity or interpretation of any statute or regulation relied on by the Veterans Court in making that decision. This court also has jurisdiction to "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision," and to "decide all relevant questions of law." 38 U.S.C. §§ 7292(c), (d)(1). "We review statutory and regulatory interpretations of the Veterans Court *de novo*." *Johnson v. McDonald*, 762 F.3d 1362, 1364 (Fed. Cir. 2014); *accord DeLaRosa v. Peake*, 515 F.3d 1319, 1321 (Fed. Cir. 2008). Absent a constitutional issue, however, we lack jurisdiction to review factual determinations or the application of law to the particular facts of an appeal from the Veterans Court. 38 U.S.C. § 7292(d)(2); *see Guillory v. Shinseki*, 603 F.3d 981, 986 (Fed. Cir. 2010); *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004).

The parties dispute whether we may exercise jurisdiction to hear this appeal. Saunders argues that we may exercise jurisdiction because her appeal presents a pure question regarding "the validity of a decision of the [Veterans] Court on a rule of law"—whether pain alone can be a disability under the meaning of § 1110. 38 U.S.C. § 7292(a); *see also id*. §§ (c)–(d). The Secretary contends that Saunders failed to challenge various findings that the Board and Veterans Court made as to her bilateral knee claim, that this court lacks jurisdiction to review those findings or the application of law to the facts, and that those findings preclude review of the underlying legal question Saunders raises. *Id.* § 7292(d)(2).

Despite the Secretary's contentions otherwise, Saunders has not challenged the factual findings of the Board and Veterans Court. Nor have factual findings been made that would preclude a finding of service connection for Saunders's claim if we conclude the Board and Veterans Court erred by finding that Saunders's pain could not be a disability under § 1110. The Veterans Court noted that Saunders did not dispute that her knee pain "cannot be linked to any underlying pathology." *Saunders I*, 2016 WL 3002862, at *2. But the Veterans Court did not make findings that preclude our review: it did not find, for example, that Saunders did not have an in-service disease, or that Saunders's knee pain was unrelated to an injury or disease—whether incurred in service or otherwise. In fact, if the Board had found that ***1361** Saunders's in-service diagnosis of PFPS was not a disease or injury, it would not have reopened her claim based on new and material evidence. J.A. 21–22. And neither the Board nor the Veterans Court

made an explicit finding that Saunders's knee pain does not limit the functionality of her knee.

None of these findings prohibits this court's review of the legal issue Saunders raises—whether pain without an accompanying pathology can constitute a "disability" under § 1110. The Secretary acknowledges, and the Veterans Court found, that Saunders focused her arguments before the Veterans Court on the legal questions of whether pain alone constitutes a § 1110 disability and whether the "holding" of *Sanchez–Benitez I* was merely dicta. And there is no real dispute between the parties that the Board and Veterans Court resolved Saunders's claim based solely on the holding of *Sanchez–Benitez I*, and our failure to overturn that holding in *Sanchez–Benitez II*. *Saunders I*, 2016 WL 3002862, at *2, *6; J.A. 22.

The critical questions, thus, in resolving Saunders's challenge are legal in nature—we must determine whether: (1) our decision in *Sanchez–Benitez II* requires a finding that pain cannot be a disability under the meaning of § 1110; and (2) if *Sanchez–Benitez II* does not require that conclusion, the statutory language instructs or permits finding that pain can serve as a disability. These are questions of law, and we therefore may exercise jurisdiction to review this challenge under 38 U.S.C. § 7292(a).

B. Pain Can Constitute a Disability Under 38 U.S.C. § 1110

Saunders argues that the Veterans Court erred as a matter of law in holding that pain alone, without an accompanying pathology or identifiable condition, cannot constitute a "disability" under § 1110. This statute explains that wartime veterans are entitled to disability compensation:

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

38 U.S.C. § 1110 (emphasis added). A veteran seeking compensation under this provision must establish three elements: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). Saunders challenges the Veterans Court's legal treatment of the first prong: "the existence of a present disability."

As noted, *Sanchez–Benitez II* does not control the outcome of this case. There, the panel explicitly declined to resolve the legal issue before us in this case. *Sanchez–Benitez II*, at 1361–62. The panel instead concluded that the Board and Veterans Court found that the veteran had not met the nexus requirement as his current pain could not be attributed to the trauma he experienced while in service. *Id.* at 1362. We explicitly did not pass judgment on the legal issue before us in that case. *Id.* at 1361. And, we characterized as dicta the ***1362** very holding in *Sanchez–Benitez I* that is at issue here. *Id.*

We therefore turn to the language of the statute, "[a]s in any case of statutory construction, our analysis begins with the language of the statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999) (internal quotation marks omitted); *see also Allen v. Principi*, 237 F.3d 1368, 1375 (Fed. Cir. 2001) ("The starting point in every case involving construction of a statute is the language itself." (quoting *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629 (Fed. Cir. 1989))). As noted, § 1110 imposes a requirement that a disability must result "from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease

contracted in line of duty." But this statute does not expressly define what constitutes a "disability." "In the absence of an express definition," the presumption is that "Congress intended to give [statutory] words their ordinary meanings." *Terry v. Principi*, 340 F.3d 1378, 1382–83 (Fed. Cir. 2003) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995)).

1. "Disability" Refers to Functional Impairment

The parties do not seem to dispute that the term "disability" refers to a functional impairment, rather than the underlying cause of the impairment. The Secretary acknowledges that "the term 'disability' refers to a condition that impairs normal functioning and reduces earning capacity." Appellee Br. 21. The Secretary also acknowledges that 38 U.S.C. § 1155, the authority for the schedule for rating disabilities, "associates the concept of disability with a reduction or impairment in earning capacity." *Id.* at 22. And, the Secretary concedes that "VA regulations invoke functional limitation as the indicator of reduced earning capacity and the barometer of disability." *Id.*

This conclusion comports with the plain language of § 1110, which specifically states that compensation is due for a disability "*resulting* from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty," not that the disability itself *must be* the qualifying personal injury or aggravation suffered by the veteran. The dictionary definitions of "disability" offered by the parties reflect that the plain and ordinary meaning of the term relates to functional incapacitation or impairment, rather than the particular underlying cause of that condition. *See, e.g.*, *Disability*, Merriam–Webster's Collegiate Dictionary 354 (11th ed. 2014) (defining "disability" as "the condition of being disabled," that is, a "limitation in the ability to pursue an occupation because of a physical or mental impairment."); *Disability*, Webster's Third New International Dictionary 642 (1961) (defining "disability" as "the inability to pursue an occupation or perform services for wages because of physical or mental impairment"); *Disability*, Dorland's Illustrated Medical Dictionary 526 (32d ed. 2012) (defining "disability" as "an incapacity or lack of the ability to function normally; it may be either physical or mental or both"). In other words, while a diagnosed condition may result in a disability, the disability itself need not be diagnosed.

The VA's disability rating regulations also reflect this meaning, as the percentages in the disability rating schedule "represent as far as can practicably be determined the average *impairment* in earning capacity" resulting from "all types of diseases and injuries *encountered as a result of* or incident to military service .... and ***1363** their residual conditions in civil occupations." 38 C.F.R. § 4.1 (emphases added); *cf. Davis v. Principi*, 276 F.3d 1341, 1344 (Fed. Cir. 2002) (labeling 38 C.F.R. § 4.1 "[t]he Secretary's definition of 'disability,' " and acknowledging that "[t]he Secretary's definition of 'disability' comports well with its common usage."). The VA's regulation on "functional impairment" explains that "[t]he basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body to *function under the ordinary conditions of daily life* including employment." 38 C.F.R. § 4.10 ("Functional impairment") (emphasis added).

This definition also comports with the purpose of veterans compensation: to compensate for impairment to a veteran's earning capacity. The en banc Veterans Court has recognized this point in *Allen v. Brown*, 7 Vet.App. 439, 448 (1995), where it explained "that the term 'disability' as used in § 1110 refers to impairment of earning capacity." It also noted that, "in view of the statutory purpose to compensate veterans based upon degree of impairment of earning capacity, the direction in § 1110 to pay compensation '[f]or disability' resulting from injury or disease may reasonably be construed as a direction to pay compensation for impairment of earning capacity resulting from such injury or disease." *Id.* And, as Saunders points out, the legislative history of veterans compensation highlights Congress's consistent intent that there should be a distinction between a disability and its cause. *See, e.g.*, War Risk Insurance Act Amendments, Pub. L. No. 65–90, § 300, 40 Stat. 398, 405 (1917) ("That for death or disability resulting from personal injury suffered or disease contracted in the line of duty, ... the United States shall pay compensation as hereinafter provided."); An Act to grant Pensions, 12 Stat. 566, 566 (1862) (establishing pensions for service members who were or became "disabled by reason of any wound received or disease contracted ... in the line of duty").

When Congress has decided to depart from this distinction by defining "disability" as equivalent to an injury or disease, it has done so explicitly, according to Saunders. For example,

in chapter 17 of Title 38, referring to VA medical and nursing facilities, Congress stated that "[t]he term 'disability' means a disease, injury, or other physical or mental defect." 38 U.S.C. § 1701(1) (2016). But Congress has made no such explicit statement as to the meaning of "disability" in § 1110, and the en banc Veterans Court in *Allen* expressly held that the § 1701(1) definition does not apply to compensation benefits. 7 Vet.App. at 446. The Veterans Court reached this conclusion after finding that Congress had "specifically limited the application of the § 1701(1) definition of 'disability' " to subchapter 17, and that "the statutory purpose to compensate veterans based upon degree of impairment of earning capacity" led to a different meaning of the term in § 1110—namely, that it "refers to impairment of earning capacity." *Id.* at 447–48. Applying that definition, the court held that "*any additional impairment* of earning capacity resulting from an already service-connected condition, regardless of whether or not the additional impairment is itself a separate disease or injury caused by the service-connected condition, shall be compensated." *Id.* at 448 (emphasis in original).

For these reasons, we find that "disability" in § 1110 refers to the functional impairment of earning capacity, not the underlying cause of said disability.

2. Pain Alone May Be a Functional Impairment

We next consider whether pain alone can serve as a functional impairment ***1364** and therefore qualify as a disability, no matter the underlying cause. We conclude that pain is an impairment because it diminishes the body's ability to function, and that pain need not be diagnosed as connected to a current underlying condition to function as an impairment. The Secretary fails to explain how pain alone is incapable of causing an impairment in earning capacity, and we see no reason to reach such a conclusion. In fact, the Secretary concedes that "pain *can* cause functional impairment in certain situations, that disability can exist in those cases, and that a formal diagnosis is not always required." Appellee Br. 26 (emphasis in original).

Dictionary definitions for the term "impairment" support the conclusion that pain can serve as a functional impairment. Dorland's Medical Dictionary defines "impairment" as "any abnormality of, partial or complete loss of, or loss of the function of, a body part, organ, or system," and this dictionary uses pain as a specific example of an impairment. *Impairment*, Dorland's Illustrated Medical Dictionary 922 (32d ed. 2012). Webster's defines "impair" as "diminish in quantity, value, excellence, or strength." *Impair*, Webster's Third New International Dictionary 1131 (1961). And, Merriam–Webster's defines "impaired" as "disabled or functionally defective." *Impaired*, Merriam–Webster's Collegiate Dictionary 622 (11th ed. 2014). None of these definitions preclude finding that pain may functionally impair a veteran.

The VA's disability rating regulations also treat pain as a form of functional impairment. For example, 38 C.F.R. § 4.10 reads that "[t]he basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body to function under the ordinary conditions of daily life including employment." We have explained that the "functional loss" regulation, 38 C.F.R. § 4.40, "makes clear that functional loss may be due to pain and that pain may render a part seriously disabled." *Thompson v. McDonald*, 815 F.3d 781, 785–86 (Fed. Cir. 2016). Other regulations account for pain in determining the nature of a veteran's disability; one regulation identifies "[p]ain on movement" as one of the "factors of disability" in evaluating joints. 38 C.F.R. § 4.45(f). Another regulation notes that painful motion is a consideration in evaluating disabilities of the pelvic bones. *Id.* § 4.67. And "pain" in the lumbosacral and sacroiliac joints is to be given "careful consideration." *Id.* § 4.66. Similarly, "fatigue-pain" is a "cardinal sign[ ]" of muscle disability. *Id.* § 4.56(c). And, in *Sanchez–Benitez II*, we explained that, in the context of rating decisions, "[i]t is thus clear that pain is not wholly irrelevant to the assessment of a disability for which a veteran seeks compensation. ... In each of [38 C.F.R. §§ 4.40, 4.45, and 4.56], pain is considered in connection with assessing the extent of a particular stated disability, *i.e.*, disability being the functional loss of normal body working movements (section 4.40), disability in the joints (section 4.45), and disability of the muscles (section 4.56)." *Id.* at 1361.[2] Although the Secretary argues that the assignment of ratings is downstream from the initial determination that a veteran has a disability, these regulations indicate how the VA interprets the role of pain in assessing disability, and thus they are relevant to the question of whether pain can be a disability.

[2] The Veterans Court has also recognized this principle. In *Schafrath v. Derwinski,* 1 Vet.App. 589 (1991), the Veterans Court faulted the

> Board for denying compensation to a veteran experiencing disabling pain as a result of a service-connected elbow injury, because the Board ignored his reported pain. *Id.* at 591–93.

***1365** Given this broad recognition that pain is a form of functional impairment, if Congress intended to exclude pain from the definition of disability under § 1110, it would have done so expressly. *See, e.g.*, *Hamilton v. Lanning*, 560 U.S. 505, 517, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) (explaining that, if Congress intended for a term "to carry a specialized—and indeed, unusual—meaning" in the relevant statutory provision, "Congress would have said so expressly."). For example, Congress explicitly defined "disability" in the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment ...." 42 U.S.C. § 423(d)(1)(A) (2016). Under that statute, the physical or mental impairment must "result[ ] from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." *Id.* § 423(d)(3). And, "[a]n individual's statement as to pain ... shall not alone be conclusive evidence of disability as defined in this section," as "there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain." *Id.* § 423(d)(5)(A). None of this language exists in the veterans context, and we find no other indication that Congress intended that pain be excluded from the definition of a "disability" under § 1110.

An Act of Congress "should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). We must read the words of a statutory provision "in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Contrary to the Secretary's argument, 38 U.S.C. § 1117 does not indicate that pain devoid of underlying current pathology is not compensable under § 1110. Section 1117 establishes a presumption of service connection for certain Persian Gulf War veterans with qualifying chronic disabilities caused by undiagnosed illnesses or chronic multisymptom illnesses. This section specifically recognizes pain as a form of functional loss, specifying that "[m]uscle pain" and "[j]oint pain" can be manifestations of an undiagnosed illness and therefore can constitute a disability even in the absence of a diagnosis. 38 U.S.C. § 1117(g)(4)–(5) (2016). But nothing in § 1117 addresses whether pain alone can be a disability under § 1110—in fact, § 1117 reflects an understanding that pain may be a disability even in the absence of a diagnosis. To this end, we have previously stated that "the Veterans Court erred in concluding that pain cannot evidence a qualifying chronic disability under § 1117." *Joyner v. McDonald*, 766 F.3d 1393, 1395 (Fed. Cir. 2014). Section 1117 provides a presumption of service connection for a particular subset of disabilities arising from Persian Gulf service, but there is no reason to assume that § 1117 precludes an interpretation of § 1110 that encompasses pain as a disability.

In light of this, the Veterans Court's interpretation of § 1110 is not persuasive. In *Sanchez–Benitez I*, the Veterans Court acknowledged that "pain often warrants separate and even additional consideration during the course of rating a disability." 13 Vet.App. at 285 (citing to 38 C.F.R. §§ 4.40 (must consider pain in relation to functional loss of musculoskeletal system), 4.45 (must consider pain on movement in ***1366** rating joint disability), 4.56 (1998) (must consider pain in evaluating muscle disability)). But, there, the Veterans Court failed to offer any citation or reasoned analysis to explain its holding that pain alone could not qualify as a disability under the first prong of the service-connection test. *Id.* The Veterans Court did not discuss issues related to disability, pain, or functional impairment, nor did the Veterans Court in *Saunders I* perform any statutory analysis when defending *Sanchez–Benitez I*'s holding. *Saunders I*, 2016 WL 3002862, at *5.

Sanchez–Benitez I's holding reads out the distinction Congress made in § 1110 between the requirement for a disability and the requirement for in-service incurrence or aggravation of a disease or injury. If Congress meant to merge these requirements such that a disability must be a presently-diagnosed disease or injury, it could have said so explicitly, but it did not. "Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says." *Simmons v. Himmelreich*, —— U.S. ——, 136 S.Ct. 1843, 1848, 195 L.Ed.2d 106 (2016). And

we have emphasized the distinction between the disability and incurrence prongs in many cases, including in *Sanchez–Benitez II*:

> Thus, in order for a veteran to qualify for entitlement to compensation under those statutes, the veteran must prove existence of a disability, and one that has resulted from a disease or injury that occurred in the line of duty.

Id. at 1360–61.

The Veterans Court's interpretation of "disability" is also illogical in the broader context of the statute, given that the third requirement for service connection is establishment of a nexus between the present disability and the disease or injury incurred during service. If the disability must be the underlying disease or injury, there is no reason for a nexus requirement—and therefore *Sanchez–Benitez I* eviscerates the nexus requirement.

As noted, the Secretary does not challenge most, if any, of the rationale laid out above for why pain should be treated as a functional impairment. Instead, the Secretary argues that the definition Saunders proposes should be limited to require that pain must affect some aspect of the normal working movements of the body.[3] The Secretary cites to various Veterans Court decisions and VA regulations in support of his proposal. *See, e.g.*, *Mitchell v. Shinseki*, 25 Vet.App. 32, 43 (2011) ("[P]ain must affect some aspect of 'the *normal working movements* of the body' such as 'excursion, strength, speed, coordination, and endurance,' 38 C.F.R. § 4.40, in order to constitute functional loss" (emphasis added)). The Secretary contends that we agreed with this rationale in *Thompson*, as evidenced by our statement that 38 C.F.R. § 4.40, a rating regulation entitled "Functional ***1367** Loss" and referencing in relevant part disabilities of the musculoskeletal system, requires proof that the applicant "cannot perform the normal working movements of the body." 815 F.3d at 786.

3 Saunders argues that, even under the definition the Secretary proposes, her normal working movements are inhibited by her pain and she would therefore satisfy the disability prong. Although the Secretary attempts to ascribe Saunders's functional limitations primarily to Saunders's foot condition, because the Board recited a finding of absenteeism when discussing the foot condition but not the knee condition, Saunders rejects this position. Saunders notes that the Board's reference to increased absenteeism as to the foot condition addressed the period after the 2011 examiner report and was the basis on which the Board ordered an additional VA examination of Saunders's feet. The parties dispute whether this finding affects the relative contributions of Saunders's foot and knee conditions to the absenteeism noted in the 2011 examiner report. The examiner noted functional impairment was a result of both the foot and knee conditions. To the extent these factual findings should be clarified, the Board will be able to do so on remand.

But the Secretary has failed to point to a convincing reason to impose the requirement he proposes. This requirement does not cover all scenarios in which pain could amount to a functional limitation. As the Secretary acknowledges, there are scenarios such as debilitating headaches that could amount to functional impairment but do not necessarily affect the normal working movements of the body. Appellee Br. 26–27 n.11. The Veterans Court has ruled that functional loss is compensable even if the range of motion is not limited. *Schafrath,* 1 Vet.App. at 591–92 (noting that 38 C.F.R. § 4.40 contemplates multiple types of functional loss, and that functional loss is compensable regardless of whether it is caused by pain or by limited flexion); *Petitti v. McDonald*, 27 Vet.App. 415, 422–30 (2015) (rejecting Secretary's argument that 38 C.F.R. § 4.59, which governs the evaluation of painful motion, requires evidence observed during range-of-motion testing, and rejecting the Secretary's argument that "the mere presence of joint pain is not sufficient.").

We also reject the Secretary's suggestion that pain must be tied to physical evidence of a lack of functionality and/or physical evidence of a current disease or injury. The Secretary attempts to tie this proposed requirement to the language of 38 C.F.R. § 4.40, which states that "functional loss ... may be due to pain, supported by adequate *pathology*" (emphasis added). But the Secretary does not explain why an in-service

diagnosis of a disease cannot provide "adequate pathology" to explain presently-occurring pain. And, other portions of § 4.40 do not refer to "pathology," but instead state broadly that, for example, "a part which becomes painful on use must be regarded as seriously disabled."

This holding is also supported by common sense. As Saunders explains, a physician's failure to provide a diagnosis for the immediate cause of a veteran's pain does not indicate that the pain cannot be a functional impairment that affects a veteran's earning capacity. For example, the VA's "Chronic Pain Primer" acknowledged that "chronic pain can develop in the absence of the gross skeletal changes we are able to detect with current technology" such as MRI or X-ray, and common causes like muscle strain and inflammation "may be extremely difficult to detect." U.S. Dep't of Veterans Affairs, VHA Pain Management: Chronic Pain Primer, http://web.archive.org/web/20170501045051/https://www.va.gov/PAINMANAGEMENT/Chronic_Pain_Primer.asp. In some situations, such as for post-traumatic stress disorder, herbicide exposure in Vietnam, and unexplained illnesses affecting Middle East veterans, medical science simply has been unable, as of yet, to diagnose the disabling impact of service for veterans affected by these conditions.

We see no reason for the Secretary's concern that this holding will somehow improperly expand veterans' access to deserved service compensation for pain that did not arise from a disease or injury incurred during service. And nothing in today's decision disturbs either of the other requirements for demonstrating entitlement to service connection—that the disability is linked to an in-service incurrence or aggravation of a disease or injury.

We do not hold that a veteran could demonstrate service connection simply by asserting subjective pain—to establish a disability, the veteran's pain must amount to a functional impairment. To establish the presence of a disability, a veteran ***1368** will need to show that her pain reaches the level of a functional impairment of earning capacity. The policy underlying veterans compensation—to compensate veterans whose ability to earn a living is impaired as a result of their military service—supports the holding we reach today.

We hold that the Veterans Court erred as a matter of law in holding that pain alone, without an accompanying diagnosis or identifiable condition, cannot constitute a "disability" under § 1110, because pain in the absence of a presently-diagnosed condition can cause functional impairment.

C. Remedy

Finally, the parties dispute the proper remedy in this case, given our conclusion that the Veterans Court erred in its legal interpretation. Saunders contends that the Board's and examiner's findings mandate outright reversal of the Board's denial of her claim for service connection. The Secretary requests that we remand to the Veterans Court for remand to the Board for further development of Saunders's claim. We agree with the Secretary that remand is the appropriate remedy in this case.

The Board reopened Saunders's knee claim after finding Saunders had presented new and material evidence that "includes an impression of bilateral knee condition that was likely caused by or a result of service." J.A. 22. The Board noted Saunders's in-service diagnosis of PFPS and Saunders's complaints of knee pain following service. *Id.* The Board also noted the examiner's conclusion that Saunders's bilateral knee condition "was likely related to the Veteran's period of service." *Id.* But the Board based its rejection of Saunders's claim solely on *Sanchez–Benitez I*'s holding that pain alone cannot be a disability for the purpose of VA disability compensation. *Id.*

The Board has not considered whether Saunders satisfied her burden to show her bilateral knee condition qualifies as a "disability" under the correct legal definition for that term. More specifically, the Board made no factual findings as to whether Saunders's pain impaired her function, or as to the scope of any such impairment.

The Board also has not determined whether Saunders satisfied the incurrence and nexus prongs of the service connection test. More specifically, the Board has not made a factual finding as to whether Saunders's pain, if it qualifies as a disability, is traceable to an injury or disease that manifested itself during service. It could not have done so, because it applied the *Sanchez–Benitez I* holding which precluded finding Saunders's pain to constitute a disability.[4] Nor has the Board made explicit findings that Saunders proved

the existence of an in-service incurrence or aggravation of a disease or injury, or a causal relationship between her present alleged disability and the disease or injury incurred or aggravated during service.

4 Saunders contends that the Secretary has waived any challenge to these prongs of the service-connection test by failing to contest them before the Veterans Court. We decline to find waiver here. The Secretary did discuss its contention that Saunders failed to demonstrate pathology for her pain, which implicates both the incurrence and nexus prongs of the service-connection test. The Board may examine this question on remand, as it focused its earlier analysis solely on the disability prong.

We may not make these factual findings in the first instance. The proper course of action is for the Veterans Court to remand this matter to the Board. *See Byron v. Shinseki*, 670 F.3d 1202, 1205 (Fed. Cir. 2012) (ordering remand of factual determination to the Board "for further development and application of the correct ***1369** law" where "the Board misinterprets the law and fails to make the relevant initial factual findings" (internal quotations and citation omitted)). On remand, the Board must determine whether the examiner's findings as to Saunders's bilateral knee condition amount to functional impairment under the correct legal test for disability. To the extent necessary, the Board must also make factual findings as to the other prongs of the service-connection test.

III. CONCLUSION

For the reasons stated above, we find the Board legally erred as to its interpretation of the meaning of "disability" under § 1110, as pain alone, without an accompanying diagnosis of a present disease, can qualify as a disability. We remand this action for further proceedings consistent with this opinion.

REVERSED AND REMANDED

COSTS

Costs to Saunders.

All Citations

886 F.3d 1356

913 F.3d 1371
United States Court of Appeals, Federal Circuit.

Alfred PROCOPIO, Jr., Claimant-Appellant
v.
Robert WILKIE, Secretary of Veterans Affairs, Respondent-Appellee

2017-1821
|
Decided: January 29, 2019

Synopsis

Background: Former sailor sought entitlement to service connection for diabetes and prostate cancer. The Board of Veterans' Appeals denied the application. The United States Court of Appeals for Veterans Claims, No. 15-4082, Coral Wong Pietsch, 2016 WL 6816244, affirmed. Sailor appealed.

Holdings: The Court of Appeals, Moore, Circuit Judge, held that:

Agent Orange Act applied to those who served in the territorial sea of the "Republic of Vietnam," overruling *Haas v. Peake*, 525 F.3d 1168, and

regulations promulgated before the Act did not render Act ambiguous.

Reversed.

Lourie, Circuit Judge, filed an opinion concurring in the judgment.

O'Malley, Circuit Judge, filed a concurring opinion.

Chen, Circuit Judge, filed a dissenting opinion joined by Dyk, Circuit Judge.

Procedural Posture(s): Review of Administrative Decision.

***1372** Appeal from the United States Court of Appeals for Veterans Claims in No. 15-4082, Judge Coral Wong Pietsch.

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Before Prost, Chief Judge, Newman, Lourie, Dyk, Moore, O'Malley, Reyna, Wallach, Taranto, Chen, and Stoll, Circuit Judges.

Opinion

Opinion for the court filed by Circuit Judge MOORE, in which Chief Judge Prost and Circuit Judges Newman, O'Malley, Reyna, Wallach, Taranto, and Stoll join.

Concurring opinion filed by Circuit Judge Lourie.

Concurring opinion filed by Circuit Judge O'Malley.

Dissenting opinion filed by Circuit Judge Chen, in which Circuit Judge Dyk joins.

Moore, Circuit Judge.

***1373** Alfred Procopio, Jr., appeals a decision of the Court of Appeals for Veterans Claims denying service connection for prostate cancer and diabetes mellitus as a result of exposure to an herbicide agent, Agent Orange, during his Vietnam Warera service in the United States Navy. Because we hold that the unambiguous language of 38 U.S.C. § 1116 entitles Mr. Procopio to a presumption of service connection for his prostate cancer and diabetes mellitus, we reverse.

BACKGROUND

In 1991, Congress passed the Agent Orange Act, codified at 38 U.S.C. § 1116, granting a presumption of service connection for certain diseases to veterans who "served in the Republic of Vietnam":

> [A] disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975; and [B] each additional disease (if any) that (i) the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having positive association with exposure to an herbicide agent, and (ii) becomes manifest within the period (if any) prescribed in such regulations in a veteran who, during active military, naval, or air service, *served in the Republic of Vietnam* during the period beginning on January 9, 1962, and ending on May 7, 1975, and while so serving was exposed to that herbicide agent, shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service.

38 U.S.C. § 1116(a) (emphasis added). Under § 1116(f), such a veteran "shall be presumed to have been exposed during such service to [the] herbicide agent ... unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service."

In 1993, the Department of Veterans Affairs issued regulations pursuant to § 1116 that stated " 'Service in the Republic of Vietnam' includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6) (1993) ("Regulation 307"). In 1997 in a General Counsel opinion about a different regulation, the government interpreted Regulation 307 as limiting service "in the Republic of Vietnam" to service in waters offshore the landmass of the Republic of Vietnam only if the service involved duty or visitation on the landmass, including the inland waterways of the Republic of Vietnam, ("foot-on-land"

requirement). Gen. Counsel Prec. 27-97 (July 23, 1997); 62 Fed. Reg. 63,603, 63,604 (Dec. 1, 1997).

***1374** A panel of this court considered the government's interpretation of § 1116 in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). Mr. Haas had served in waters offshore the landmass of the Republic of Vietnam but was denied § 1116's presumption of service connection because he could not meet the government's foot-on-land requirement. *Id.* at 1173. Accordingly, we were asked to decide whether "serv[ice] in the Republic of Vietnam" in § 1116 required presence on the landmass or inland waterways of the Republic of Vietnam. *Id.* at 1172.

We applied the two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to § 1116 and Regulation 307. At *Chevron* step one, the *Haas* court held that § 1116 was ambiguous as applied to veterans who, like Mr. Haas, served in the waters offshore the landmass of the Republic of Vietnam but did not meet the foot-on-land requirement. 525 F.3d at 1184. At *Chevron* step two, the *Haas* court held Regulation 307 was "a reasonable interpretation of the statute" but itself ambiguous. *Id.* at 1186. It then "[a]ppl[ied] the substantial deference that is due to an agency's interpretation of its own regulations" under Auer v. Robbins, 519 U.S. 452, 461–63, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), to uphold the government's interpretation of Regulation 307, i.e., the foot-on-land requirement. Id. at 1195. See also Haas v. Peake, 544 F.3d 1306 (Fed. Cir. 2008).

Mr. Procopio served aboard the U.S.S. Intrepid from November 1964 to July 1967. In July 1966, the Intrepid was deployed in the waters offshore the landmass of the Republic of Vietnam, including its territorial sea.[1] Mr. Procopio sought entitlement to service connection for diabetes mellitus in October 2006 and for prostate cancer in October 2007 but was denied service connection for both in April 2009. Diabetes mellitus is listed in the statute under paragraph (2) of § 1116(a), and prostate cancer is listed in the pertinent regulation, 38 C.F.R. § 3.309(e). The Board of Veterans' Appeals likewise denied him service connection in March 2011 and again in July 2015, finding "[t]he competent and credible evidence of record is against a finding that the Veteran was present on the landmass or the inland waters of Vietnam during service and, therefore, he is not presumed to have been exposed to herbicides, including Agent Orange," under § 1116. The Veterans Court affirmed, determining it was bound by our decision in *Haas*. Mr. Procopio timely appealed.

1 The Board of Veterans' Appeals found, and the parties do not dispute, that Mr. Procopio served in the Republic of Vietnam's territorial sea. J.A. 32, 49-52.

A panel of this court heard oral argument on May 4, 2018, and on May 21, 2018, the parties were directed to file supplemental briefs on "the impact of the pro-claimant canon on step one of the *Chevron* analysis in this case, assuming that *Haas v. Peake* did not consider its impact." On August 16, 2018, the court sua sponte ordered the case be heard en banc. We asked the parties to address two issues:

> Does the phrase "served in the Republic of Vietnam" in ... § 1116 unambiguously include service in offshore waters within the legally recognized territorial limits of the Republic of Vietnam, regardless of whether such service included presence on or within the landmass of the Republic of Vietnam?
>
> What role, if any, does the pro-claimant canon play in this analysis?

In addition to the parties' briefs, we received seven amicus briefs. The en banc court heard oral argument on December 7, 2018.

***1375** DISCUSSION

Section 1116 extends the presumption of service connection to veterans who "served in the Republic of Vietnam" during a specified period if they came down with certain diseases. At issue is whether Mr. Procopio, who served in the territorial sea of the "Republic of Vietnam" during the specified period, "served in the Republic of Vietnam" under § 1116.

Chevron sets forth a two-step framework for interpreting a statute, like § 1116, that is administered by an agency. 467 U.S. at 842, 104 S.Ct. 2778. Step one asks "whether Congress has directly spoken to the precise question at issue." *Id.* "If the intent of Congress is clear, that is the end of the matter," and

we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43, 104 S.Ct. 2778. If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue," we proceed to *Chevron* step two, at which we ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778.

Here, we determine at *Chevron* step one that Congress has spoken directly to the question of whether Mr. Procopio, who served in the territorial sea of the "Republic of Vietnam," "served in the Republic of Vietnam." He did. Congress chose to use the formal name of the country and invoke a notion of territorial boundaries by stating that "service *in* the Republic of Vietnam" is included. The intent of Congress is clear from its use of the term "in the Republic of Vietnam," which all available international law unambiguously confirms includes its territorial sea. Because we must "give effect to the unambiguously expressed intent of Congress," we do not reach *Chevron* step two.

In 1954, the nation then known as Vietnam was partitioned by a "provisional military demarcation line" into two regions colloquially known as "North Vietnam" and "South Vietnam." Geneva Agreements on the Cessation of Hostilities in Vietnam, art. 1, July 20, 1954, 935 U.N.T.S. 149 ("Geneva Accords"). In 1955, South Vietnam was formally named, by proclamation of its president, the "Republic of Vietnam." *Provisional Constitutional Act Establishing the Republic of Viet-Nam*, Oct. 26, 1955, reprinted in A.W. Cameron (ed.), *Viet-Nam Crisis: A Documentary History, Volume I: 1940-1956* (1971).

International law uniformly confirms that the "Republic of Vietnam," like all sovereign nations, included its territorial sea. This was true in 1955 when the "Republic of Vietnam" was created. Geneva Accords at art. 4 (extending the provisional military demarcation line into the "territorial waters"). And this was true in 1991 when Congress adopted the Agent Orange Act. In 1958, the United States entered into the Convention on the Territorial Sea and the Contiguous Zone ("1958 Convention"), agreeing that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." 1958 Convention, art. 1(1), 15 U.S.T. 1606, T.I.A.S. No. 5639 (Apr. 29, 1958); *see also United States v. California*, 381 U.S. 139, 165, 85 S.Ct. 1401, 14 L.Ed.2d 296 (1965) (stating the 1958 Convention provides "the best and most workable definitions available" for defining coastal boundaries); Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 12 O.L.C. 238, 247 (1988) ("[T]he modern view is that the territorial sea is part of a nation and that a nation asserts full sovereignty rights over its territorial sea ...."). In 1982, the United Nations Convention on the Law of the Sea ("UNCLOS") echoed the 1958 Convention, stating "[t]he sovereignty of a coastal State extends ... to an adjacent belt of sea, described as the territorial ***1376** sea," having a breadth "not exceeding 12 nautical miles." Part II, arts. 2, 3, 1833 U.N.T.S. 397, 400 (Dec. 10, 1982). And the Restatement of Foreign Relations Law in effect when the Agent Orange Act was passed provided that "[a] state has complete sovereignty over the territorial sea, analogous to that which it possesses over its land territory, internal waters, and archipelagic waters," meaning "[t]he rights and duties of a state and its jurisdiction are the same in the territorial sea as in its land territory." Restatement (Third) of Foreign Relations Law §§ 511, cmt. b, 512, cmt. a (1987); *see also id.* ("[I]nternational law treats the territorial sea like land territory ...."); Presidential Proclamation 5928, 103 Stat. 2981 (1988) ("International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas."). [2]

[2] The dissent criticizes that these sources of international law merely "define the territorial waters over which a sovereign nation has dominion and control" but "do not purport to define territorial waters as part of the definition of the country itself." Dissent at 1389. But the area over which a sovereign nation has dominion and control *is* a definition of the country itself, and the dissent points to no sources supporting any other definition of the "Republic of Vietnam." The dictionaries and maps the dissent cites define other terms ("Vietnam," "United States," "Socialist Republic of Vietnam"). Dissent at 1389–90, 1390–91 nn.2-3. When trying to discern what Congress meant by "in the Republic of Vietnam," we think the contemporaneous definition provided by international law is a better source than the definitions of other countries provided by these generalist dictionaries and maps.

Thus, all available international law, including but not limited to the congressionally ratified 1958 Convention, confirms

that, when the Agent Orange Act was passed in 1991, the "Republic of Vietnam" included both its landmass and its 12 nautical mile territorial sea.[3] The government has pointed to no law to the contrary. This uniform international law was the backdrop against which Congress adopted the Agent Orange Act. By using the formal term "Republic of Vietnam," Congress unambiguously referred, consistent with that backdrop, to both its landmass and its territorial sea.[4] We also note that the statute expressly includes "active military, naval, or air service ... in the Republic of Vietnam," § 1116(a)(1), reinforcing our conclusion that Congress was expressly extending the presumption to naval personnel who served in the territorial sea. We conclude at *Chevron* step one that the intent of Congress is clear from the text of § 1116: Mr. Procopio, who served in the territorial sea of the "Republic of Vietnam," is entitled to § 1116's presumption.

3 There is no dispute that, when the Agent Orange Act was passed in 1991, a nation's territorial sea had a breadth "not exceeding 12 nautical miles." UNCLOS, 1833 U.N.T.S. at 400.

4 We do not, as the dissent contends, "create[ ] a new canon of statutory construction that any use of a formal country name necessarily includes the nation's territorial seas." Dissent at 1390. This case requires us to determine only what Congress meant when it used the phrase "in the Republic of Vietnam" in 1991.

We find no merit in the government's arguments to the contrary. Its primary argument is that *it* injected ambiguity into the term "Republic of Vietnam" prior to the Agent Orange Act by promulgating two regulations, 38 C.F.R. § 3.311a(a)(1) ("Regulation 311") and § 3.313(a) ("Regulation 313"). According to the government, Regulation 311 imposed the foot-on-land requirement, but Regulation 313 did not. The government contends that § 1116 codified *both* regulations and that, accordingly, it is ambiguous whether Congress intended to impose the foot-on-land requirement. We are not persuaded.

***1377** Regulation 311 created a presumption of service connection for chloracne and later soft-tissue sarcomas for veterans who served in "the Republic of Vietnam." It stated:

> "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam.

Regulation 313 created a presumption of service connection for Non-Hodgkin's lymphoma for veterans who served in "Vietnam." It stated:

> "Service in Vietnam" includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.

The government asks us to infer that Regulation 311 imposed the foot-on-land requirement, and that Regulation 313 did not. This distinction is essential to its argument that § 1116, which codified both, is ambiguous. We do not agree. We do not read Regulation 311, Regulation 313, or even later-adopted Regulation 307 as articulating the government's current foot-on-land requirement. And there is no indication anyone, including the government, did before § 1116 was adopted.

Regulation 311 grants a presumption of service connection for "service in the waters offshore *and* service in other *locations, if* the conditions of service involved duty or visitation in the Republic of Vietnam." Regulation 313 grants the presumption for "service in the waters offshore, *or* service in other locations *if* the conditions of service involved duty or visitation in Vietnam." We do not read these minor grammatical differences to compel the distinction the government urges. At best, the addition of a comma in Regulation 311 permits the clause "if the conditions of service involved duty or visitation in the Republic of Vietnam" to modify both "service in the waters offshore" and "service in other locations." But even if Regulation 311 is so read, it still does not impose the foot-on-land requirement: it covers everyone whose service included duty or visitation "in the Republic of Vietnam," which, under background law, embraces the territorial sea.

That is the straightforward meaning of the regulation even after taking full account of the comma. As the government

concedes, the "waters offshore" are broader than the territorial sea. *See* Oral Argument at 55:08–55:19 (government's counsel acknowledging offshore waters "can also include beyond the territorial seas"); *id.* at 55:40–56:10 (government's counsel confirming offshore waters extend beyond the territorial sea); *cf. id.* at 2:00–2:16 (Mr. Procopio's counsel stating "[t]he offshore water is broader than the territorial sea ... and it's an important difference because a nation is sovereign only in its territorial sea."). Regulation 311's requirement of "duty or visitation in the Republic of Vietnam" brings within coverage only a subset of all those who served "offshore," namely, those whose service included presence on land, in the inland waterways, or in the territorial sea, consistent with international law. That is, veterans who served in the waters offshore or in other locations would be eligible for the presumption if during such service they visited the Republic of Vietnam (which is defined as the landmass and territorial sea by international law).

Given the undisputed distinction between offshore waters and territorial seas, we see no basis for incorporating a foot-on-land requirement into Regulation 311. The only discussion of this provision appears in the proposed rulemaking where the government explains that, "[b]ecause some military personnel stationed elsewhere may have been present in the Republic of Vietnam, 'service in the Republic of Vietnam' will encompass *services elsewhere if* ***1378** *the person concerned actually was in the Republic of Vietnam*, however briefly." 50 Fed. Reg. at 15,848, 15,849 (Apr. 22, 1985). We see no evidence that the government understood Regulation 311 to include the foot-on-land requirement until *after* the Agent Orange Act was passed. The government first articulated this position in 1997, six years after the Act. Gen. Counsel Prec. 27-97 (July 23, 1997). We cannot read into § 1116 an ambiguity that relies on a distinction made only *after* § 1116 was adopted.

It is undisputed that Regulation 313 covering Non-Hodgkin's lymphoma does not include the foot-on-land requirement, meaning the presumption of service connection for Non-Hodgkin's lymphoma would have applied to veterans who served on the landmass or in the territorial sea. The government asserts that Regulation 311 presumed service connection for diseases—chloracne and soft-tissue sarcomas—linked to herbicide exposure, while Regulation 313 presumed service connection for a disease—Non-Hodgkin's lymphoma—*not* linked to herbicide exposure. But that asserted distinction does not indicate ambiguity in § 1116. Indeed, when Congress enacted § 1116 it expressly extended the presumption to Non-Hodgkin's lymphoma, as well as chloracne and soft-tissue sarcomas. And the government argues that § 1116 intended to codify Regulation 311 and Regulation 313. No fair reading of § 1116 can exclude the very veterans suffering from Non-Hodgkin's lymphoma that were entitled to Regulation 313's presumption, yet the government's (and the dissent's) reading does just that: According to the government, a veteran with Non-Hodgkin's lymphoma who served in the Republic of Vietnam's territorial sea would have been entitled to service connection under Regulation 313, but this same veteran would not be entitled to service connection under § 1116. This cannot be right. We decline to read § 1116, as the dissent urges, to both codify Regulation 313 and erode that regulation's coverage. We see no basis to conclude that Congress chose to reduce the scope of service connection for Non-Hodgkin's lymphoma without explanation.

In short, we do not understand Regulation 311 or Regulation 313 to articulate a foot-on-land requirement. We find no merit to the government's argument that § 1116 is ambiguous because "Congress's codification of the existing regulatory presumptions ... tells, at best, a conflicting story." Appellee's Br. 39–40. In 1991, Congress legislated against the backdrop of international law that had defined the "Republic of Vietnam" as including its territorial sea for decades. The government's foot-on-land requirement, first articulated in 1997, does not provide a basis to find ambiguity in the language Congress chose.

The government also argues the "Republic of Vietnam" in § 1116 does not include its territorial sea because when Congress intends to bring a territorial sea within the ambit of a statute, it says so expressly.[5] But the examples the government points to address *not* a nation's territorial sea, but only "waters adjacent." 10 U.S.C. §§ 3756, 6258, 8756 (extending the Korea Defense Service Medal to those who "served in the Republic of Korea or the waters adjacent thereto"); Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 513(b) (providing for the publishing of labor statistics on "veterans ... who served ... in naval missions in the waters ***1379** adjacent to Vietnam"); 38 U.S.C. § 101(30) (defining the term "Mexican border period" in the case of "a veteran who ... served in Mexico, on the borders thereof,

or in the waters adjacent thereto"). While the dissent calls this distinction "speculative," Dissent at 1391, both parties conceded at oral argument that the "waters adjacent" to a nation are distinct from, and extend beyond, its territorial sea. *See* Oral Argument at 26:50-27:18 (Mr. Procopio); *id.* at 55:00–55:15 (government). It is precisely because "waters adjacent" go *beyond* a nation's landmass and territorial sea that Congress needed to specify "waters adjacent" in these statutes. *See*, *e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of "particular language"); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88-92, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (comparing distinct usage of "attorney's fees" and "expert fees" among statutes). These statutes cast no doubt on our conclusion that, by using the formal term "Republic of Vietnam," Congress unambiguously referred, consistent with uniform international law, to both its landmass and its 12 nautical mile territorial sea.

5 The government conceded, though, at oral argument that if Congress were to pass a statute forbidding military action within a nation, that statute would be violated if the President sent forces into the nation's 12-mile territorial sea, as that would "impact the sovereign boundary of [the nation]." *See* Oral Argument at 27:37-28:13.

The other statutes the government cites likewise cast no doubt on this conclusion. The government has failed to cite any instance in which the unmodified use of a formal sovereign name has been construed to not include its territorial sea. Instead, the government would have us infer that because several statutes refer to both the "United States" and its "territorial seas" or "territorial waters," the term "United States" cannot be generally understood to include territorial sea. We see no basis for drawing that inference. As the Supreme Court has observed, there are "many examples of Congress legislating in that hyper-vigilant way, to 'remov[e] any doubt' as to things not particularly doubtful in the first instance." *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, —— U.S. ——, 138 S.Ct. 1061, 1074, 200 L.Ed.2d 332 (2018). [6]

6 In several cases, it is clear Congress' express reference to territorial sea was to remove any doubt as to a provision's meaning. For instance, in 16 U.S.C. § 2402(8)'s definition of "import," the statement that "any place subject to the jurisdiction of the United States" "include[s] the 12-mile territorial sea of the United States," clearly reflects Congress' express concern that "import" as defined in § 2402(8) could be misread to have the same meaning as it has under the customs laws of the United States. For customs purposes a good may not be imported until it arrives at a port, *see, e.g.*, 19 C.F.R. § 101.1, and the "customs territory of the United States" is limited to the States, the District of Columbia, and Puerto Rico, and does not include other sovereign territory of the United States, *see* Harmonized Tariff Schedule of the United States, General Note 2. Similarly, the reference to "United States waters" in 8 U.S.C. § 1158(a)(1) serves a clarifying purpose in light of caselaw holding "physical presence" is a term of art in immigration law requiring an alien to have landed on shore, *see Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995). Nothing in these provisions, 18 U.S.C. § 2280(b)(1)(A)(ii), or 33 U.S.C. § 1203, suggests Congress did not understand the term "United States" to generally include its territorial sea.

It is also unsurprising that Congress has found it expedient to define phrases including the term "United States" for use in particular statutes and in some of those instances it referred to the territorial sea of the United States. *E.g.*, 16 U.S.C. § 1362(15); 26 U.S.C. § 638(1); 46 U.S.C. §§ 2301, 4301, 4701(3). That provides little insight into Congress' use of the formal name of a foreign country *absent an express definition*. In short, none of these statutes sheds any light on how Congress understood the "Republic of Vietnam" when it passed the Agent Orange Act in 1991, and none create any ambiguity in the face of long-established, uniform international law recognizing the "Republic of Vietnam" includes its territorial sea.

***1380** Respectfully, the *Haas* court went astray when it found ambiguity in § 1116 based on "competing methods of defining the reaches of a sovereign nation" and the government's urged distinction between Regulations 311 and 313. 525 F.3d at 1184–86. As discussed above, international

law uniformly confirms that the "Republic of Vietnam" included its territorial sea. And we cannot read into § 1116 an ambiguity that relies on a distinction between Regulations 311 and 313 made by the government only *after* § 1116 was adopted. *Haas* is overruled. [7]

7 "[W]e have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes." *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Charging that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done,' " the dissent seems to suggest we can *never* overrule a precedent interpreting a statute. Dissent at 1388–89 (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008)). But we see no reason here to "place on the shoulders of Congress the burden of the Court's own error." *Monell*, 436 U.S. at 695, 98 S.Ct. 2018. The parties have presented arguments and evidence not considered in *Haas*. *Haas*, 525 F.3d at 1183-86. Moreover, the dissent's concern for "stability in the law" is misplaced. Dissent at 1388–89 (quoting *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1316 (Fed. Cir. 2013)). While there are certainly situations where parties' reliance on our settled law is of paramount concern (*see*, *e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture")), no such reliance concern exists here.

The parties and amici have differing views on the role the pro-veteran canon should play in this analysis. *See generally Henderson v. Shinseki*, 562 U.S. 428, 441, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011); *Brown v. Gardner*, 513 U.S. 115, 117-18, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946); *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 87 L.Ed. 1587 (1943). Given our conclusion that the intent of Congress is clear from the text of § 1116—and that clear intent favors veterans—we have no reason to reach this issue.

No judge on this court has determined that this veteran should be denied benefits under § 1116. One concurrence concludes that § 1116 is ambiguous but finds the agency's interpretation unreasonable. *See* Lourie, J., concurring. Because we decide that the statute is unambiguous, we need not decide whether the agency's interpretation is reasonable. The dissent concludes that § 1116 is ambiguous but claims it is "premature" to decide whether the agency's interpretation is unreasonable. Dissent at 1395–96 (refusing to consider the reasonableness of the agency's interpretation). Respectfully, by declining to reach *Chevron* step two, the dissent fails to decide this case. [8]

8 The dissent criticizes our interpretation of § 1116 as a "policy choice [that] should be left to Congress," noting the "cost of expanding the presumption of service connection." Dissent at 1394–95. Respectfully, we are interpreting a statute, not making a policy judgment. Moreover, the dissent's criticism seems out of place where it has not concluded that the agency's determination is reasonable or that Mr. Procopio should be denied his benefits.

CONCLUSION

Congress has spoken directly to the question of whether those who served in ***1381** the 12 nautical mile territorial sea of the "Republic of Vietnam" are entitled to § 1116's presumption if they meet the section's other requirements. They are. Because "the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. Mr. Procopio is entitled to a presumption of service connection for his prostate cancer and diabetes mellitus. Accordingly, we reverse.

REVERSED AND REMANDED

Lourie, Circuit Judge, concurring in the judgment.
I join the majority in reversing the judgment of the Veterans Court, but, respectfully, I would do so for different reasons.

I do not agree with the majority that international law and sovereignty principles, which would include the territorial waters of the Republic of Vietnam, render the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 unambiguous. *See* Majority at 1375–76. Sovereign borders are not necessarily what Congress had in mind when it enacted statutes for veterans' benefits, and specifically, when it enacted the Agent Orange Act. *See Haas v. Peake*, 525 F.3d 1168, 1175–83 (Fed. Cir. 2008) (discussing the difficulty in determining the likelihood of exposure to herbicides rather than any sovereignty concerns). The majority's holding thus covers more legal territory than necessary and decides an issue not before us.

I instead agree with the court in *Haas*, *see id.* at 1183–86, and the dissent, *see* Dissent at 1389–94, that "served in the Republic of Vietnam" is ambiguous under *Chevron* step one. The statute entitles a veteran to a presumption of service connection for certain diseases if the veteran "served in the Republic of Vietnam." 38 U.S.C. § 1116(a). That qualification does not tell us whether offshore waters are or are not included. Thus, as to that issue, the statute surely is ambiguous.

I also agree with the *Haas* court that under *Chevron* step two, the regulation promulgated by the agency reflects a reasonable interpretation of the statute. *See Haas*, 525 F.3d at 1186. However, unlike the court in *Haas*, I would hold that the agency's interpretation of its regulation is not owed any deference as generally required by *Auer v. Robbins*, 519 U.S. 452, 461–63, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), because the regulation is not ambiguous, *see Christensen v. Harris Cty.*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). *Contra Haas*, 525 F.3d at 1186–97.

The agency's regulation states that " '[s]ervice in the Republic of Vietnam' *includes* service in the waters offshore *and* service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (emphasis added). In interpreting the regulation, we need not resort to international definitions of national sovereignty over waters adjacent to land or to the pro-veteran canon; we should simply read the plain language of the regulation. And, the plain reading of this inclusive regulation specifies that service in the Republic of Vietnam includes (1) "service in the waters offshore" and (2) "service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." *Id.* Thus, a veteran who served in the "waters offshore" is included within the meaning of "service in the Republic of Vietnam" and entitled to presumptive service connection.

The agency in this case appears to have interpreted the "duty or visitation" clause to modify not only the service in "other locations," but also "waters offshore," creating a foot-on-land requirement. *See* Majority at 1393–94 (discussing the agency's ***1382** interpretation). However, if "duty or visitation" were required for all Vietnam veterans, the phrases "waters offshore" and "other locations" would be superfluous. *Cf. Hibbs v. Winn*, 542 U.S. 88, 102, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (citation omitted) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ...."). Under the agency's interpretation, it would matter not whether the veteran served in the "waters offshore" or "other locations" as long as the veteran set foot on the Vietnam landmass, which renders the "duty or visitation" clause the only operative phrase. That is contrary to the regulation's plain language.

While we, at least until higher law says otherwise, are obligated to give some degree of deference to an agency in interpreting its own regulation, *see Auer*, 519 U.S. at 461, 117 S.Ct. 905, deference has its limits. We are not obligated to give an agency deference when the regulation is not ambiguous, *see Christensen*, 529 U.S. at 588, 120 S.Ct. 1655, or when an "alternative reading is compelled by the regulation's plain language," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430, 108 S.Ct. 1306, 99 L.Ed.2d 515 (1988)), as it does here. Thus, I would reverse the judgment of the Veterans Court because the agency's regulation plainly entitled Mr. Procopio to a presumption of service connection for his prostate cancer and diabetes mellitus based on his service in the offshore waters of Vietnam.

O'Malley, Circuit Judge, concurring.

I agree with the majority's well-reasoned decision. The term "Republic of Vietnam," as it appears in 38 U.S.C. § 1116, unambiguously encompasses its territorial waters.

I write separately because I believe the pro-veteran canon of construction adds further support to the majority's conclusion. Specifically, I write to explain that: (1) the pro-veteran canon, like every other canon of statutory construction, can and should apply at step one of *Chevron* to help determine whether a statutory ambiguity exists; and, (2) even when a statute remains irresolvably ambiguous, when a choice between deferring to an agency interpretation of that statute—or particularly where that interpretation is itself ambiguous—and resolving any ambiguity by application of the pro-veteran canon come to a head, traditional notions of agency deference must give way. [1]

[1] I address both *Chevron* and *Auer* deference because we relied on both in *Haas v. Peake* to uphold the agency's regulation. We deferred to the agency's interpretation of its own ambiguous regulation under *Auer*, and then, in turn, found "that the regulation reflects a reasonable interpretation of the statute" under *Chevron*. 525 F.3d 1168, 1186 (Fed. Cir. 2008).

The Supreme Court has made clear that courts are obligated to apply *all* traditional tools of statutory interpretation at step one of *Chevron*. 467 U.S. at 843 n.9, 104 S.Ct. 2778. Indeed, "we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, —— U.S. ——, 138 S.Ct. 1348, 1358, 200 L.Ed.2d 695 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778.); *see also Epic Sys. Corp. v. Lewis*, —— U.S. ——, 138 S.Ct. 1612, 1630, 200 L.Ed.2d 889 (2018) ("[D]eference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity. And ***1383** [here,] that [ ] is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, *Chevron* leaves the stage." (internal citations and quotations omitted)); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (employing at *Chevron* step one the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Gazelle v. Shulkin*, 868 F.3d 1006, 1011–12 (Fed. Cir. 2017) (employing at *Chevron* step one the canon that "Congress 'legislate[s] against the backdrop of existing law' " (citation omitted)).

A court similarly may not defer to an agency's interpretation of its own regulation or any other interpretive ruling unless, after applying the same interpretative principles that apply in the context of statutory interpretation, the court finds the regulation or interpretation to be ambiguous. *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017) (en banc) ("We use the same interpretive rules to construe regulations as we do statutes[.]"); *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (same). Thus, there is no doubt that courts must apply all traditional tools of statutory construction before resort to agency deference, regardless of at what point the agency seeks deference.

There is also no doubt that the pro-veteran canon is one such traditional tool. *Henderson v. Shinseki*, 562 U.S. 428, 441, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011) ("We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." (quotations omitted)); *see* Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 515 (1989) ("[T]he consideration and evaluation of policy consequences" is "part of the traditional judicial tool-kit that is used in applying the first step of *Chevron*[.]"). The pro-veteran canon instructs that provisions providing benefits to veterans should be liberally construed in the veterans' favor, with any interpretative doubt resolved to their benefit. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991). The Supreme Court first articulated this canon in *Boone v. Lightner* to reflect the sound policy that we must "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. 561, 575, 63 S.Ct. 1223, 87 L.Ed. 1587 (1943). This same policy underlies the entire veterans benefit scheme. *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) ("[T]he veterans benefit system is designed to award entitlements to a special class of citizens,

those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign." (quotations omitted)).

Few provisions embody this veteran-friendly purpose more than § 1116's presumption of service connection for those who served in the Republic of Vietnam. Congress enacted this presumption in response to concerns that the agency was "utilizing too high a standard for determining if there is a linkage between exposure to Agent Orange and a subsequent manifestation of a disease" and was thereby "failing to give the benefit of the doubt to veterans in prescribing the standards in ***1384** the regulations for VA to use in deciding whether to provide service connection for any specific disease." Sidath Viranga Panangala et al., Cong. Research Serv., R41405, Veterans Affairs: Presumptive Service Connection and Disability Compensation 14 (2014) (quoting *Nehmer v. United States Veterans' Admin.*,712 F. Supp. 1404, 1423 (N.D. Cal. 1989)); *see also Agent Orange Legislation and Oversight: Hearing on S. 1692 & S. 1787 Before the S. Comm. on Veterans' Affairs*, 1988 Leg., 2nd Sess. 5 (statement of Sen. Thomas A. Daschle, Member, S. Comm. on Veterans' Affairs) ("[T]here is a time for study and more study, and there is a time for leadership. In the case of veterans exposed to Agent Orange ... science will never be able to dictate policy. That is our role."). Section 1116 was designed to afford veterans the benefit of the doubt in the face of scientific uncertainty.

Courts have "long applied" the pro-veteran canon of construction to such provisions. *Henderson*, 562 U.S. at 441, 131 S.Ct. 1197. And, because we presume Congress legislates with the knowledge of judicial canons of statutory construction, we should apply this canon to resolve doubt in a claimant's favor because that is precisely what Congress intended when it enacted the Agent Orange Act in 1991 against the backdrop of *Boone*. *King*, 502 U.S. at 220 n.9, 112 S.Ct. 570. Thus, when interpreting such statutes, or regulations promulgated thereunder, we may not resort to agency deference unless, after applying the pro-veteran canon along with other tools of statutory interpretation, we are left with an unresolved ambiguity. [2]

[2] Of course, application of the pro-veteran canon will not always resolve ambiguities in a statute or regulation in the veterans' favor. For example, in *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, we resorted to agency deference despite applying the pro-veteran canon because other canons of statutory construction and the pro-veteran canon pulled in opposite directions. 260 F.3d 1365, 1378 (Fed. Cir. 2001). And, in *Burden v. Shinseki*, we found that the pro-veteran canon was not enough to resolve a statutory ambiguity when deciding whether to award benefits to a veteran's surviving common law spouse over the veteran's children because neither interpretation had a particularly pro-veteran reading. 727 F.3d 1161, 1169–70 (Fed. Cir. 2013). Thus, while application of the pro-veteran canon may resolve any apparent ambiguity, it will not always do so.

The government contends that applying the pro-veteran canon before resorting to agency deference would usurp the agency's role of gap-filling. But the government forgets that an agency has no responsibility to fill gaps if we find that Congress did not leave such a gap. *SAS*, 138 S.Ct. at 1358; *City of Arlington v. F.C.C.*, 569 U.S. 290, 327, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge."). And, importantly, it ignores that "the duty to interpret statutes as set forth by Congress is a duty that rests with the judiciary." *Bankers Tr. N.Y. Corp. v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000). Deference cannot displace either this duty or the duty to consider appropriate legal doctrines when exercising it.

When the pro-veteran canon and agency deference come to a head, it is agency deference—the weaker of two doctrines at any level—that must give way. Several justices of the Supreme Court have urged their colleagues "to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." *Pereira v. Sessions*, —— U.S. ——, 138 S.Ct. 2105, 2121, 201 L.Ed.2d 433 (2018) (Kennedy, J., concurring); *see also Michigan v. E.P.A.*, —— U.S. ——, 135 S.Ct. 2699, 2712, 192 L.Ed.2d 674 (2015) (Thomas, J., concurring) ("I write separately to note that [the ***1385** agency's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."). By requiring courts to defer to an agency's interpretation of a statute—not because it is the correct interpretation but because it is merely reasonable—*Chevron* deference "wrests from Courts the ultimate interpretative authority to say what

the law is," and thereby "raises serious separation-of-powers questions." *Michigan*, 135 S.Ct. at 2712.

The case for *Auer* deference is even weaker. Not only have several justices expressed concerns with *Auer* deference, the Supreme Court recently granted certiorari on the question of whether the Court should overrule *Auer* entirely. *Kisor v. Shulkin*, 880 F.3d 1378 (Fed. Cir. 2018), *cert. granted*, *Kisor v. Wilkie*, —— U.S. ——, 139 S.Ct. 657, —— L.Ed.2d ——, 2018 WL 6439837 (2018) (granting certiorari on question of "[w]hether the Court should overrule *Auer* and *[Bowles v.] Seminole Rock [& Sand Co.,* 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)]" and declining to consider "[a]lternatively"-presented question of "whether *Auer* deference should yield to a substantive canon of construction"). As I have previously opined, *Auer* deference "encourages agencies to write ambiguous regulations and interpret them later, which defeats the purpose of delegation, undermines the rule of law, and ultimately allows agencies to circumvent the notice-and-comment rulemaking process." *Kisor v. Shulkin*, 880 F.3d 1378, 1379–80 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of en banc) (internal quotations and alterations omitted) (citing *Hudgens v. McDonald*, 823 F.3d 630, 639 n.5 (Fed. Cir. 2016) (O'Malley, J.); *Johnson v. McDonald*, 762 F.3d 1362, 1366–68 (Fed. Cir. 2014) (O'Malley, J., concurring)). In this way, *Auer* deference leaves agencies' rulemaking authority unchecked and, as with *Chevron*, raises serious questions regarding separation of powers. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 621, 133 S.Ct. 1326, 185 L.Ed.2d 447 (2013) (Scalia, J., dissenting) (explaining that *Auer* "contravenes one of the great rules of separation of powers" that "[h]e who writes the law must not adjudge its violation")

Of course, we have no authority to overturn either *Chevron* or *Auer*. But we can and should consider these well-documented weaknesses when agency deference conflicts with the pro-veteran canon of construction. Questionable principles of deference should not displace long-standing canons of construction. Here, there is no justification for deferring to the agency's interpretation of "Republic of Vietnam" when that interpretation fails to account for the purpose underlying the entire statutory scheme providing benefits to veterans. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) ("Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation. ... A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (internal quotations and alterations omitted)). Rather, deference should yield to the canon that embodies this very purpose. To hold otherwise would not only wrest from us our interpretative authority to say what the law is, it would displace congressional intent.

Similarly, there is no justification for deferring to the agency's interpretation of its own ambiguous regulation when it twice attempted and failed to codify the foot-on-land requirement through the notice-and-comment rulemaking process. ***1386** Presumptions of Service Connection for Certain Disabilities, and Related Matters, 69 Fed. Reg. 44,614, 44,620 (July 27, 2004); Definition of Service in the Republic of Vietnam, 73 Fed. Reg. 20,566, 20,567 (Apr. 16, 2008). We should not reward the agency with *Auer* deference when it circumvents the rules mandated by Congress in the Administrative Procedure Act in its effort to reach a result contrary to the pro-veteran canon. And, when the agency does not deny that its interpretation of the regulations to which it now points to support the foot-on-land requirement has been inconsistent over the years, the case for deference is weaker still. *Haas*, 525 F.3d at 1190 ("[T]he agency's current interpretation of its regulations differs from the position it took in some previous adjudications and seemed to take in its Adjudication Manual[.]"). Thus, in a case like this one, where questionable resort to agency deference and the pro-veteran canon come to a head, agency deference must yield.

The government contends that the pro-veteran canon, like the rule of lenity—which "requires interpreters to resolve ambiguity in criminal laws in favor of defendants"—is a canon of last resort that cannot trump agency deference. *Whitman v. United States*, —— U.S. ——, 135 S.Ct. 352, 353, 190 L.Ed.2d 381 (2014). This comparison misses the mark. While the Supreme Court cautions against the overuse of the rule of lenity, it has treated the pro-veteran canon more favorably. *Compare Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." (internal quotations omitted)), *with Henderson*, 562 U.S. at 441, 131 S.Ct. 1197 ("We have long applied the canon that

provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." (quotations omitted)). This is not surprising considering that the principles animating the rule of lenity differ greatly from those of the pro-veteran canon. The rule of lenity merely reflects a "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment," but it is "not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct." *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955). In contrast, the pro-veteran canon recognizes this country's equitable obligation to "those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575, 63 S.Ct. 1223.

In this way, the pro-veteran canon is more analogous to the substantive canon of construction applied in the context of Indian law, which instructs that "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). As the Supreme Court has explained, "standard principles of statutory construction do not have their usual force" when weighed against the pro-Indian canon because the canon is "rooted in the unique trust relationship between the United States and the Indians." *Id.*

Applying this principle, courts have found that the pro-Indian canon trumps agency deference under *Chevron*. *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) ("*Chevron* deference is not applicable" in the context of Indian law because "the special strength" of this canon trumps the normally-applicable deference.); *see also Ramah Navajo Chapter v. Lujan,* 112 F.3d 1455, 1461–62 (10th Cir. 1997) ("[T]he ***1387** canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes."). The same should be true in this context.

As explained above, this country's relationship with its veterans is also both unique and important. The policy that we owe a debt of gratitude to those who served our country, which is the driving purpose behind the Agent Orange Act, is derived from the same sources as the pro-veteran canon, i.e., that those who served their country are entitled to special benefits from a grateful nation. *See, e.g.*, 137 Cong. Rec. E1486-01, 137 Cong. Rec. E1486-01, E1486, 1991 WL 65877, *1 ("We owe it to our Vietnam veterans to enact badly needed legislation such as this so that they are given a full and proper 'thank you.' "); *Barrett*, 363 F.3d at 1320. Therefore, when the pro-veteran canon and reflexive agency deference conflict, the canon should control.

By codifying in § 1116 a presumption of service connection for those who served in the Republic of Vietnam, Congress recognized that veterans should not have to fight for benefits from the very government they once risked their lives to defend. We ignore this purpose when we fail to apply the pro-veteran canon to resolve ambiguities in statutes and regulations that provide benefits to veterans; and, by failing to hold that agency deference must yield to the pro-veteran canon, we permit agencies to do the same. The practical result is that veterans like Mr. Procopio, even after returning home, are still fighting. Therefore, while I agree with the majority's decision, I write separately to lament the court's failure—yet again—to address and resolve the tension between the pro-veteran canon and agency deference. [3]

3 While the Supreme Court will consider whether *Auer* should be overruled and, thus, not available in any cases, it did not agree to consider a second question raising whether principles of agency deference generally must yield when at odds with the pro-veteran canon of construction.

Chen, Circuit Judge, dissenting, with whom Circuit Judge Dyk joins.

Mr. Procopio suffers from prostate cancer and type 2 diabetes. He claims that his conditions are service connected, relying on a statutory provision, 38 U.S.C. § 1116, that creates a presumption of service connection for service members who "served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." We granted en banc review to determine whether this provision unambiguously applies to Blue Water Navy veterans, like Mr. Procopio, who served in the territorial waters of Vietnam.

The majority concludes that the statute unambiguously applies to Blue Water Navy veterans who did not set foot on the Vietnam landmass and overrules our prior decision

to the contrary in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). In my view, the statute is ambiguous, and the majority inappropriately preempts Congress's role in determining whether the statute should apply in these circumstances—an issue which Congress is grappling with at this very time.

Our court has already confronted this precise interpretive question for veterans who served on ships off the coast of Vietnam during the Vietnam War. And we concluded, after considering the statute and its legislative history, that this statutory phrase is ambiguous. *See id.* at 1185–86. By repudiating a statutory interpretation from a 10-year old precedential opinion without any evidence of changed circumstances, today's decision undermines the principle of *stare decisis*.

***1388** Contrary to the majority's conclusion, international law and sovereignty principles do not dictate that Congress unambiguously intended "Republic of Vietnam" to include its territorial waters. No prior case has announced a principle that a statute's reference to a country name should be treated as a term of art that encompasses both the country's landmass and territorial waters. Such a rule is particularly anomalous in the context of a statute governing veterans' disability benefits, which in no way implicates a foreign country's sovereignty over territorial waters. Further, I see nothing in the legislative history of § 1116 suggesting that Blue Water Navy veterans would be covered by the presumption of service connection. Because herbicides were sprayed throughout the landmass of the Republic of Vietnam, it is at least a reasonable understanding of the statute that Congress at the time of the Agent Orange Act directed its statutory presumption of service connection towards those service members who had actually served within the country's land borders. I would therefore find, as we did in *Haas*, that § 1116 is ambiguous under *Chevron* step one. Accordingly, I respectfully dissent.

STARE DECISIS AND *HAAS V. PEAKE*

This court has already ruled on the statutory interpretation of service "in the Republic of Vietnam" under 38 U.S.C. § 1116(a)(1). In *Haas*, we addressed whether a veteran who served on a ship that traveled in the territorial waters of Vietnam but who never went ashore "served in the Republic of Vietnam." 525 F.3d at 1172. There, we reviewed the statute and legislative history and concluded that the phrase was ambiguous. *Id.* at 1184.

Despite our court's settled statutory interpretation from a decade ago, the majority nevertheless elects to re-open this already-decided interpretive issue. In doing so, the majority disregards *stare decisis*, which serves an important purpose in American law. *See Deckers Corp. v. United States*, 752 F.3d 949, 956 (Fed. Cir. 2014) ("*[S]tare decisis* exists to 'enhance [ ] predictability and efficiency in dispute resolution and legal proceedings' through creation of settled expectations in prior decisions of the court.") (citation omitted).

In *Robert Bosch, LLC v. Pylon Manufacturing Corp.*, we considered what effect *stare decisis* has when this court reviews panel decisions en banc. 719 F.3d 1305, 1316 (Fed. Cir. 2013) (en banc). We pointed out that "the implications of stare decisis are less weighty than if we were [reconsidering] a precedent established by the court en banc." *Id.* (internal quotation marks omitted). Nevertheless, we concluded that "panel opinions, like en banc opinions, invoke the principle of stare decisis," reasoning that, "because [our precedent] represents the established law of the circuit, a due regard for the value of stability in the law requires that we have good and sufficient reason to reject it at this late date." *Id.* (internal quotation marks and citation omitted) (alteration in original).

The Supreme Court has warned that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.' " *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (citation omitted). "A difference of opinion within the Court ... does not keep the door open for another try at statutory construction ...." *Watson v. United States*, 552 U.S. 74, 82, 128 S.Ct. 579, 169 L.Ed.2d 472 (2007). Indeed, "the very point of *stare decisis* is to forbid us from revisiting a debate every time there are reasonable arguments to be made on both sides." ***1389** *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1283 (Fed. Cir. 2014) (en banc), *abrogated by Teva Pharm. USA, Inc. v. Sandoz, Inc.*, —— U.S. ——, 135 S.Ct. 831, —— L.Ed.2d —— (2015) (quoting *Morrow v. Balaski*, 719 F.3d 160, 181 (3d Cir. 2013) (Smith, J., concurring)). Congress has the responsibility for revising its statutes; the Judiciary should be more circumspect before forsaking prior statutory interpretations. *See Neal v. United States*, 516 U.S. 284, 295–96, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996). Indeed,

the recent debates in Congress, which required consideration of the significant cost of the proposed addition of Blue Water Navy veterans underscores why Congress, rather than the courts, should be the one to revisit our interpretation in *Haas*. *See* Citation of Supplemental Authority 1, ECF No. 39; Blue Water Navy Vietnam Veterans Act, H.R. 299, 115th Cong. (2017–18) ("Blue Water Navy Vietnam Veterans Act of 2018"). The Supreme Court's admonishment against overruling prior statutory interpretation is particularly apt here, where Congress has been actively considering whether to take any action in response to this court's interpretation.

Our statutory interpretation in *Haas* has been the law of this court for over ten years. Neither party has identified any intervening development of the law that has removed or weakened the conceptual underpinnings from *Haas* in this regard. I would therefore follow *Haas* to conclude that the statutory phrase at issue is ambiguous.

STATUTORY AMBIGUITY

I do not find persuasive the majority's conclusion that international law dictates its interpretation. The *Haas* court considered similar sources of evidence but still concluded that the statutory phrase was ambiguous. *Haas*, 525 F.3d at 1184. All of the international law sources relied upon by the majority relate to laws that statutorily define the territorial waters over which a sovereign nation has dominion and control. *See, e.g.*, Restatement (Third) of Foreign Relations Law § 511(a) ("The territorial sea: a belt of sea that may not exceed 12 nautical miles, measured from a baseline that is either the low-water line along the coast or the seaward limit of the internal waters of the coastal state or, in the case of an archipelagic state, the seaward limit of the archipelagic waters"); *United States v. California*, 332 U.S. 19, 33, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947) ("That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact."); 1958 Convention on the Territorial Sea and the Contiguous Zone, art. 1(1), 15 U.S.T. 1606, T.I.A.S. No. 5639 (Apr. 29, 1958) ("The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."); United Nations Convention on the Law of the Sea, art. 2, 1833 U.N.T.S. 397, 400 (Dec. 10, 1982, entered into force on Nov. 16, 1994) ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."). They do not purport to define territorial waters as part of the definition of the country itself.

Section 1116, a U.S. veterans' disability benefits statute, has nothing to do with the dominion and control of a foreign sovereign over territorial waters. Nor would an opinion construing a U.S. veterans' disability benefits statute be in any danger of violating the law of the nations. *See Murray v. Schooner Charming Betsy*, 6 U.S. 2 Cranch 64, 2 L.Ed. 208 (1804).

There is no support for a rule that a statute that refers to a country includes ***1390** the country's territorial waters. [1] The majority admonishes the government for "fail[ing] to cite any instance in which the unmodified use of a formal sovereign name has been construed to not include its territorial sea" (Majority Op. at 1379) but the same can be said of the majority. The majority creates a new canon of statutory construction that any use of a formal country name necessarily includes the nation's territorial seas, without citing a single instance where Congress has stated this intent or where the Judiciary has construed a statute's use of a formal country name to include the country's territorial seas.

1 Moreover, there is no clear evidence that the now-defunct Republic of Vietnam ever claimed a territorial sea extending 12 nautical miles from its shore, including during the Vietnam War. *See* Majority Op. at 1376–77. Up until 1988, the United States only claimed a three-mile nautical belt as its territorial sea. *See* Territorial Sea of the United States of America, Presidential Proclamation 5,928, 103 Stat. 2981, 2982 (Dec. 27, 1988); *see also United States v. California*, 332 U.S. 19, 33–34, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). There is no reason to believe that the Republic of Vietnam, when it existed, would have done otherwise.

Dictionaries from 1991, when the Agent Orange Act was passed, often defined countries in terms of square miles of the land mass. [2] The same is true of maps, which typically show

the land area of a country. [3] I am unaware of any dictionary or standard map that defines countries in terms of land plus the territorial sea, nor does the majority point to any.

2 *See, e.g.*, *Vietnam*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1991) ("a country in SE Asia, comprising the former states of Annam, Tonkin, and Cochin-China: formerly part of French Indochina; divided into North Vietnam and South Vietnam in 1954 and reunified in 1976. [pop] 64,000,000; 126,104 sq. mi. (326,609 sq. km)"); *Vietnam*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1991) ("country SE Asia in Indochina; state, including Tonkin & N Annam, set up 1945–46; with S. Annam & Cochin China, an associated state of French Union 1950–54; after civil war, divided 1954–75 at 17th parallel into republics of North Vietnam (* Hanoi) & South Vietnam (* Saigon) reunited 1975 (* Hanoi) area 127,207 sq mi (330,738 sq km), pop 52,741,766" (emphasis omitted)); *Vietnam*, WEBSTER'S NEW GEOGRAPHIC DICTIONARY (1988) ("Republic, SE Asia, divided 1954–75 into North Vietnam and South Vietnam ..."); *United States of America*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1991) ("country made up of the North American area extending from the Atlantic Ocean to the Pacific Ocean between Canada and Mexico, together with Alas. & Hawaii; 3,615,211 sq. mi. (9,376,614 sq. km); pop. 240,856,000; cap. Washington; also called the United States"); *United States of America*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (2001) ("United States"); *United States*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (2001) ("a republic in the N Western Hemisphere comprising 48 conterminous states, the District of Columbia, and Alaska in North America, and Hawaii in the N Pacific. 249,632,692; conterminous United States, 3,615,122 sq. mi. (9,363,166 sq. km); Washington, D.C. ... Also called United States of America"); *United States of America* commonly shortened to *United States*, WEBSTER'S NEW GEOGRAPHIC DICTIONARY (1988) ("Federal republic, North America, bounded on N by Canada and (in Alaska) by the Arctic Ocean, on E by the Atlantic Ocean, on S by Mexico and Gulf of Mexico, and on W by Pacific Ocean; 3,615,123 sq. m. (excluding Great Lakes); pop. (1980c) 226,545,805; * Washington, D.C.").

3 *See, e.g.*, NATIONAL GEOGRAPHIC, ATLAS OF THE WORLD 18–19 (6th ed. 1990) [hereinafter, "ATLAS OF THE WORLD"] (depicting the United States in terms of land area); CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 1991 324, 332 (1991). National Geographic's Atlas of the World also defined countries in terms of the size of their land mass. *See, e.g.*, ATLAS OF THE WORLD at 127 ("Socialist Republic of Vietnam Area: 329,556 sq km (127,242 sq mi)").

Congress has repeatedly shown that when it wants to include a country's territorial waters, it does so expressly. *See, e.g.*, Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 513(b), 94 Stat. 2171 (1980) (defining eligibility ***1391** for educational assistance and other service-connected benefits as "veterans who during the Vietnam era served in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam shall be considered to be veterans who served in the Vietnam theatre of operations"); Tax Reform Act of 1986, H. Rep. No. 99-841, at 599 (1986), as reprinted in 1986 U.S.C.C.A.N. 4075, 4687 (clarifying that "income attributable to services performed in the United States or in the U.S. territorial waters is U.S. source."); 18 U.S.C. § 2280(b)(1)(A)(ii) (criminalizing certain acts if committed "in the United States, including the territorial seas"). [4] This is true even when Congress uses a sovereign nation's formal name in the statute. *See* 10 U.S.C. §§ 3756, 6258, 8756 (extending the Korea Defense Service Medal to veterans who "served in the Republic of Korea or the waters adjacent thereto"). The underlying assumption in each of these statutes is that the use of the country name is not sufficient to include territorial or adjacent waters. The majority's contrary conclusion renders Congress's express inclusion or exclusion of territorial seas in these statutes superfluous, which is "at odds with one of the most basic interpretive canons, that ' "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." ' " *Corley v.*

United States, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06 pp. 181–186 (rev. 6th ed. 2000))). And the majority's attempt to explain a few of these examples away by creating a distinction between Congress's use of the term "waters adjacent" versus territorial waters or seas is speculative and entirely unconvincing. *See* Majority Op. at 1378–79.

4 *See also, e.g.*, 38 U.S.C. § 101(30) (referring to veterans who "served in Mexico, on the borders thereof, or in the waters adjacent thereto"); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Division C, § 604, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1158(a)(1)) ("[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section ...."); 16 U.S.C. § 2402(8) (defining "import" to mean "to land on, bring into, or introduce into, or attempt to land on, bring into or introduce into, any place subject to the jurisdiction of the United States, including the 12-mile territorial sea of the United States"). *Compare* 26 U.S.C. § 638(1) ("United States" includes "subsoil of those submarine areas which are adjacent to the territorial waters of the United States"), *with id.* at § 7701(a)(9) ("United States" includes "only the States and the District of Columbia").

By enacting the Agent Orange Act, Congress intended to help Vietnam veterans who had manifested certain specified diseases as a result of having been exposed to Agent Orange. *See* 38 U.S.C. § 1116. The VA has explained that "virtually all herbicide spraying in Vietnam, which was for the purpose of eliminating plant cover for the enemy, took place over land." 73 Fed. Reg. 20566–01, 20568 (Apr. 16, 2008) (citing Jeanne Mager Stellman et al., *The extent and patterns of usage of Agent Orange and other herbicides in Vietnam*, 422 NATURE 681, 681–687 (2003)). It therefore stands to reason that Congress would restrict the service connection presumption to those veterans who were actually exposed to Agent Orange on the landmass of Vietnam.[5] *Accord* ***1392** *Haas*, 525 F.3d at 1192–93. Congress did not possess any information suggesting that herbicides had been used up to three or twelve nautical miles from the shore.

5 Mr. Procopio counters this understanding with another theory—that "ships in the near-shore marine waters collected water that was contaminated with the runoff from areas sprayed with Agent Orange," and the "[s]hipboard distillers converted the marine water into water for the boilers and potable water by vaporizing them and condensing the liquid" in a way that "enhanced the effect of Agent Orange." Appellant En Banc Op. Br. at 19. But Mr. Procopio presents no evidence that Congress at the time of the Agent Orange Act was aware of or had considered the potential dangers from contaminated runoff.

The majority errs in dismissing the relevance of §§ 3.311a and 3.313, regulations that existed before the enactment of § 1116. The majority suggests that Congress was enacting the statute against a background in which the existing regulations covered territorial waters, but it misunderstands the history behind each rule. Regulation 3.311a was promulgated in 1985 to implement the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Public Law 98–542, 98 Stat. 2725, 2725–34 (1984) ("1984 Dioxin Act"). Section 5 of the 1984 Dioxin Act directed the VA to establish guidelines grounded in "sound scientific and medical evidence" that require the veterans' death or disability be based on actual exposure to herbicides containing dioxin. *Id.* at 2727–28. The 1984 Dioxin Act noted that there was evidence that specific diseases—chloracne, porphyria cutanea tarda, and soft tissue sarcoma—were linked to exposure to dioxin-containing herbicides. *Id.* at 2725. Thereafter, the VA promulgated § 3.311a. The § 3.311a rulemaking notice noted that herbicides "were used during the Vietnam conflict to defoliate trees, remove ground cover, and destroy crops," and that many veterans "were deployed in or near locations where Agent Orange was sprayed." Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 15848, 15849 (Apr. 22, 1985). Because the regulation required exposure to dioxin-containing herbicides and herbicides had been sprayed on Vietnam's landmass, the

VA imposed a foot-on-land requirement for veterans that served offshore or in locations other than Vietnam:

> "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam.

38 C.F.R. § 3.311a(b) (1986). The natural reading of the regulation's use of the conjunctive "and" confirms that the prepositional phrase applied both to offshore veterans and those stationed outside of Vietnam.

The VA promulgated § 3.313 for an entirely different purpose. Contrary to § 3.311a, § 3.313 was not linked to herbicide exposure, but rather was based on a 1990 CDC study that determined that *all* Vietnam veterans—including those that served on the landmass as well as those who served offshore—had a higher incidence rate of non-Hodgkin's lymphoma than non-Vietnam veterans. Claims Based on Service in Vietnam, 55 Fed. Reg. 43123–01 (Oct. 26, 1990). The 1990 study further concluded that no correlation existed between non-Hodgkin's lymphoma and exposure to Agent Orange. *Id.* The VA therefore worded § 3.313 specifically to apply to all offshore veterans, without a foot-on-land requirement:

> Service in Vietnam includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.

38 C.F.R. § 3.313(a) (1990). The natural reading of the regulation's use of the disjunctive "or" and movement of the comma to offset "offshore" from the rest of the sentence confirms that the offshore veterans were not subject to a foot-on-land requirement. While the grammatical differences ***1393** between the two regulations may appear to be small, they set forth critical distinctions driven by the different purposes between the regulations.

When the VA promulgated these two regulations, their meanings were not ambiguous. The ambiguity arose when Congress appeared to codify both VA regulations in the Agent Orange Act, one regulation with a foot-on-land requirement and one without. 137 Cong. Rec. H719-01 (1991) ("[T]he bill would ... codify decisions the Secretary of Veterans Affairs has announced to grant presumptions of service connection for non-Hodgkin's lymphoma and soft-tissue sarcoma in veterans who served in Vietnam ...."). The Agent Orange Act used the term "served in the Republic of Vietnam" without defining the term:

> [A] disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975;

38 U.S.C. § 1116(a)(1)(A).

As we concluded in *Haas*, § 1116's use of "Republic of Vietnam" rather than "Vietnam" counsels against the majority's reading of the statute because the language more closely tracks that used in § 3.311a, which imposed the foot-on-land requirement on offshore veterans. *Haas*, 525 F.3d at 1185–86. A congressional choice to codify the foot-on-land requirement from § 3.311a would have been a reasonable one, since both § 3.311a and the Agent Orange Act—unlike § 3.313—required that the service connection be based on actual exposure to herbicides during the war. Moreover, "Congress included non-Hodgkin's lymphoma [from § 3.313(a)] on the list of diseases specifically identified in the Agent Orange Act based on evidence that, contrary to the conclusion of the 1990 CDC study, non-Hodgkin's lymphoma was in fact associated with exposure to Agent Orange." *Id.* at 1179 n.1 (citing *Report to the Secretary of Veterans Affairs on the Association Between Adverse Health Effects and Exposure to Agent Orange, reprinted in Links Between Agent Orange, Herbicides, and Rare Diseases: Hearing before the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Gov't Relations*, 101st Cong., 2d Sess. 22, 41 (1990)). Against this regulatory backdrop prior to the codification of service connection presumption for certain diseases through the Agent Orange Act, it is far from clear that Congress intended § 1116 to encompass veterans who served in offshore waters up to 12

nautical miles away from Vietnam. During that lead-up to the Agent Orange Act, the majority cites no evidence that Blue Water Navy veterans had been receiving service connection presumptions for any of these diseases listed in § 3.311a.

The majority's conclusion that "Republic of Vietnam" in § 3.311a "covers everyone whose service included duty or visitation 'in the Republic of Vietnam,' which, under background law, embraces the territorial sea" (Majority Op. at 1377) is incorrect, because it assumes that the VA also bought into the majority's newly announced principle that reciting a sovereign's formal name in a statute or—for purposes of § 3.311a—a regulation, necessarily includes the country's territorial seas. The majority cites no case law or other support for this assumption. Nor does the majority cite support for its subsequent conclusion that § 3.311a encompasses "only a subset" of offshore veterans—those that served on land, within the internal waterways, or within the territorial seas of Vietnam. *See id.* There is no evidence in the regulation or its history that the VA intended this interpretation.

***1394** I also disagree with the majority's conclusion that § 1116's language specifying that the presumption is applicable to veterans regardless of what military branch they served in (*i.e.*, "active military, naval, or air service in the Republic of Vietnam") has any bearing on whether offshore veterans are subject to a foot-on-land requirement. *See* Majority Op. at 1376. A veteran who served in the Navy but spent time on the landmass of Vietnam is no less likely to have a service connection due to exposure to Agent Orange than a veteran who served on the land in Vietnam in the Army. Moreover, this statutory phrase is commonly used in other sections of Title 38, suggesting that Congress did not have something particular in mind as to how it repeated this phrase in § 1116. *See*, *e.g.*, 38 U.S.C. § 1110 (entitling certain veterans to compensation for disability, injury, or disease contracted or aggravated "in the active military, naval, or air service, during a period of war"); *id.* § 1112(b) (establishing presumption of service connection for prisoners of war where condition became manifest "after active military, naval, or air service").

After reviewing the applicable provisions, it is not clear to me that Congress unambiguously intended "served in the Republic of Vietnam" to include Blue Water veterans. Although international law establishes that sovereign nations have dominion and control over their territorial seas, a U.S. veterans' benefits statute has nothing to do with regulating interactions with a foreign sovereign. And the Agent Orange Act's legislative history provides no support for the majority's conclusion. I therefore believe, as this court concluded in *Haas*, that the statutory phrase "Republic of Vietnam" is ambiguous when applied to service in the waters adjoining the landmass of Vietnam. *See Haas*, 525 F.3d at 1184.

As for the liberal construction principle known as the pro-veteran canon, neither the Supreme Court nor this court has applied it at step one of *Chevron* as a means for deeming Congress's intent clear for an otherwise unclear statute. But even if it were relevant to the step one inquiry, I do not view this canon, given its indeterminate nature, as compelling the conversion of this ambiguous statute into an unambiguous one.

The significance of the policy choice and budget impact that the court makes today further underscores why more compelling indicia are required before concluding that Congress clearly intended the majority's statutory interpretation. Congress recently estimated that it would need to allocate an additional $1.8 billion during fiscal year 2019, and $5.7 billion over 10 years, to fund the Blue Water Navy Vietnam Veterans Act of 2018, a bill that would have explicitly expanded the presumption of Agent Orange exposure to Blue Water Navy veterans. *See* Blue Water Navy Vietnam Veterans Act of 2018: Hearing on H.R. 299 Before the S. Comm. on Veterans' Affairs, 115th Cong. 1, 4 (2018) (statement of Dr. Paul R. Lawrence, Under Secretary, Benefits Department, Veterans' Affairs). The bill passed the House unanimously in 2018 but failed to pass the Senate before the end of the 2018 session, due, in part, to concerns over the cost of expanding the presumption of service connection. It is not for the Judiciary to step in and redirect such a significant budget item—rather, that policy choice should be left to Congress.

I do not reach the question of whether *Haas* should be reaffirmed insofar as it held that at step two of *Chevron*, deference was owed to the interpretation of the statute by the VA. *See id.* at 1184, 1192–93. Relying on principles of *Auer* deference, the *Haas* panel held that the VA had ***1395** interpreted the statute to preclude coverage of Blue Water Navy veterans who had not set foot on the Vietnam landmass. *See id.* at 1186–90, 1197. The court also held that the interpretation was reasonable in the light of the evidence available to the VA at the time it made its interpretation. *Id.*

at 1195, 1197. The court declined to consider other evidence not considered by the VA. *Id.* at 1194.

In ordering rehearing en banc we asked that the parties address the question of ambiguity.[6] In accordance with our order the parties have not, in fact, fully addressed the step two *Chevron* issues. At the same time there have been relevant developments that bear on that question. The Supreme Court has recently granted certiorari to address the question of whether *Auer* should be overruled.[7] There have been additional studies of the issue of Blue Water Navy diseases attributable to dioxin exposure, and the issue continues to be studied, with a new report predicted to become available next April. Under these circumstances, I think it premature to address *Haas*' treatment of step two of *Chevron*.

6 *See* Order Granting En Banc Rehearing at 2, *Procopio v. Wilkie*, No. 17-1821 (Fed. Cir. Aug. 16, 2018), ECF No. 63 (ordering the parties to brief the following issue: "Does the phrase 'served in the Republic of Vietnam' in 38 U.S.C. § 1116 unambiguously include service in offshore waters within the legally recognized territorial limits of the Republic of Vietnam, regardless of whether such service included presence on or within the landmass of the Republic of Vietnam?").

7 *See* Order Granting Certiorari, *Kisor v. Wilkie*, No. 18-15, —— U.S. ——, 139 S.Ct. 657, —— L.Ed.2d ——, 2018 WL 6439837 (Dec. 10, 2018) ("The petition for writ of certiorari is granted limited to Question 1 presented by the petition"); Cert. Pet., *Kisor v. Wilkie*, No. 18-15 (Jun. 29, 2018) ("1. Whether the Court should overrule *Auer* and *Seminole Rock*.").

All Citations

913 F.3d 1371

940 F.3d 1304
United States Court of Appeals, Federal Circuit.

Ernest L. FRANCWAY, Jr., Claimant-Appellant
v.
Robert WILKIE, Secretary of Veterans Affairs, Respondent-Appellee

2018-2136
|
Decided: October 15, 2019

Synopsis

Background: The Board of Veterans' Appeals denied veteran's claim for disability compensation for low back disability, and he appealed. The United States Court of Appeals for Veterans Claims, No. 16-3738, Michael P. Allen, Amanda L. Meredith, Joseph L. Toth, JJ., affirmed, 2018 WL 718564, and three-judge panel adhered to that decision 2018 WL 2065565. Veteran appealed.

Holdings: The Court of Appeals, Dyk, Circuit Judge, held that:

requirement that a veteran seeking disability compensation raise the issue of competency of a VA medical examiner before the VA is required to present affirmative evidence of the physician's qualifications is best referred to simply as a "requirement," and not a "presumption of competency" of the medical examiner; overruling *Rizzo v. Shinseki*, 580 F.3d 1288; *Bastien v. Shinseki*, 599 F.3d 1301, and

Court of Appeals lacked jurisdiction to evaluate Veterans Court's determination that veteran had not raised issue of medical examiner's competency with sufficient clarity.

Affirmed.

Opinion, 930 F.3d 1377, superseded.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

***1305** Appeal from the United States Court of Appeals for Veterans Claims in No. 16-3738, Judge Michael P. Allen, Judge Amanda L. Meredith, Judge Joseph L. Toth.

Attorneys and Law Firms

William H. Milliken, Sterne Kessler Goldstein & Fox, PLLC, Washington, DC, argued for claimant-appellant. Also represented by Michael E. Joffre.

William James Grimaldi, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Joseph H. Hunt, Martin F. Hockey, Jr., Robert Edward Kirschman, Jr.; Lara Eilhardt, Samantha Ann Syverson, Y. Ken Lee, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Prost, Chief Judge, Lourie and Dyk, Circuit Judges.

Opinion

Opinion for the court filed by Circuit Judge Dyk, in which Prost, Chief Judge and Lourie, Circuit Judge, join.

Footnote 1 of the opinion is joined by Prost, Chief Judge, Newman, Lourie, Dyk, Moore, O'Malley, Reyna, Wallach, Taranto, Chen, Hughes, and Stoll, Circuit Judges.

Dyk, Circuit Judge.

Ernest L. Francway appeals from the Court of Appeals for Veterans Claims' ("Veterans Court's") decision affirming the Board of Veterans' Appeals' ("Board's") denial of Francway's claim for disability compensation. We affirm.

BACKGROUND

Francway served on active duty in the United States Navy from August 1968 to May 1970. While serving on an aircraft carrier in 1969, Francway contends that he was "hit by a gust of wind while carrying a set of wheel chocks" and "[t]he resulting fall caused him to injure his back." Francway Br. at 4. He contends he "was placed on bedrest for a week and assigned to light duty for three months following the incident." *Id.* Francway claims that this injury is connected to

a current lower back disability, noting that after his accident he was treated for back problems while in service.

In April 2003, Francway filed a claim with the Department of Veterans Affairs ("VA") for service connection for his back disability. Between 2003 and 2011, Francway ***1306** was examined multiple times by an orthopedist and had his medical records separately reviewed by the orthopedist and an internist. They concluded, along with a physician's assistant that examined Francway, that Francway's current back disability was not likely connected to his injury in 1969.

After multiple appeals to and from the Board and remands back to the VA regional office ("RO"), in 2013, Francway sought to open his claim based on new and material evidence from his longtime friend, in a so-called "buddy statement," attesting to Francway's history of lower back disability after his injury in 1969. The Board again remanded the case to the RO based on the allegations in the "buddy statement," with instructions that Francway's "claims file should be reviewed by an appropriate medical specialist for an opinion as to whether there is at least a 50 percent probability or greater ... that he has a low back disorder as a result of active service." J.A. 1046 (emphasis added). The Board also instructed that "[t]he examiner should reconcile any opinion provided with the statements from [Francway and his "buddy statement"] as to reported episodes of back pain since active service." *Id.* (emphasis omitted).

In 2014, Francway was examined by the same orthopedist who had examined him previously. The orthopedist concluded that Francway's current back symptoms were unlikely to be related to his injury in 1969, but the orthopedist did not address the "buddy statement." Subsequently, the internist who had previously provided the VA a medical opinion on Francway's disability reviewed Francway's file and the "buddy statement," and concluded that it would be speculative to say his current back symptoms were related to his earlier injury. The RO again denied Francway's entitlement to benefits for his back disability.

The Board concluded that there was insufficient evidence of a nexus between Francway's injury in 1969 and his current back disability and that the VA had complied with the earlier remand orders. Francway then appealed to the Veterans Court, arguing for the first time that the internist who had reviewed the "buddy statement" was not an "appropriate medical specialist" within the meaning of the remand order. The Veterans Court held that Francway had not preserved that claim because Francway did not challenge the examiner's qualifications before the Board.

Francway appealed to this court. We have jurisdiction pursuant to 38 U.S.C. § 7292(c). A request for initial hearing en banc was denied. *Francway v. Wilkie*, No. 18-2136 (Nov. 28, 2018), ECF No. 30. We review questions of law de novo, but, absent a constitutional issue, we "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

DISCUSSION

I

Since 2009, we have held that the Board and Veterans Court properly apply a presumption of competency in reviewing the opinions of VA medical examiners. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009).

Francway first contends that the presumption of competency is inconsistent with the VA's duty to assist veterans, *see* 38 U.S.C. § 5103A (requiring the VA to assist veterans with benefit claims), and the benefit-of-the-doubt rule, *id.* § 5107(b) (requiring the VA to give the benefit of the doubt to the veteran when the evidence is ***1307** in approximate equipoise), and that there is no statutory basis for the presumption. We see no inconsistency since the "presumption of competency" is far narrower than Francway asserts and is not inconsistent with the statutory scheme. [1]

[1] The en banc court formed of PROST, *Chief Judge,* NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*, has determined that to the extent that the decision here is inconsistent with *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009), and *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), those cases are overruled. We note that in the future, the requirement that the veteran raise the issue of

> the competency of the medical examiner is best referred to simply as a "requirement" and not a "presumption of competency."

"The purpose of the [VA] is to administer the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans." 38 U.S.C. § 301(b). In line with this mandate, the VA processes claims for service-connected disability benefits sought by veterans, *see, e.g.*, *id.* §§ 1110, 1131, and, to perform this duty, the VA relies on medical examiners who provide medical examinations and medical opinions based on review of the evidence in the record, *id.* § 5103A(d); 38 C.F.R. § 3.159(c)(4). Both the statute and implementing regulations require that these medical examinations and opinions be based on competent medical evidence, defined, in relevant part, as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1).

The presumption of competency originated in our decision in *Rizzo*. As we said in *Rizzo*, "[a]bsent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion." 580 F.3d at 1291. Although it is referred to as the presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this presumption is rebutted when the veteran raises the competency issue.

The limited nature of the presumption has been consistently recognized in our caselaw. Beginning with *Rizzo*, we have held that "where ... the veteran does not challenge a VA medical expert's competence or qualifications before the Board," the "VA need not affirmatively establish that expert's competency." *Id.* at 1291 (emphasis added); *id.* ("Absent some challenge ...." (emphasis added)); *id.* ("Absent some challenge ....") (emphasis added)). Similarly, in *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011), we held that "when a veteran suspects a fault with the medical examiner's qualifications, it is incumbent upon the veteran to raise the issue before the Board." *Id.* at 1365–66 (emphasis added). "[T]he VA and Board are not required to affirmatively establish competency of a medical examiner unless the issue is raised by the veteran." *Id.* at 1366 (emphasis added). Our holding in *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013), is consistent with this understanding. Although we noted that "[i]f an objection is raised it may be necessary for the veteran to provide information to overcome the presumption," *id.* at 585 (emphasis added), the statement was referring to the specificity of the challenge rather than requiring the veteran to submit evidence that is within the control of the VA.

Francway contends that *Rizzo* held that the veteran bears the burden of persuasion, ***1308** or at least production, of showing that the examiner was incompetent. The only support for that contention is a quote in *Rizzo* from the Veterans Court's decision in *Cox v. Nicholson*, 20 Vet. App. 563 (2007): "[T]he appellant bears the burden of persuasion on appeals to th[e Veterans] Court to show that such reliance was in error." *Rizzo*, 580 F.3d at 1290–91 (quoting *Cox*, 20 Vet. App. at 569). First, the Veterans Court's language in *Cox* that Francway cites concerned the veteran's burden on appeal to show prejudicial error with the Board's decision and did not concern which party bears the initial burden of demonstrating the examiner's competence or lack thereof. Second, although the presumption of competency is based on *Rizzo* and subsequent cases from our court, those cases did not place the burden of persuasion or evidentiary production on the veteran, as discussed above.

The presumption of competency requires nothing more than is required for veteran claimants in other contexts—simply a requirement that the veteran raise the issue. The Supreme Court has implicitly recognized that the veteran bears such a burden of raising an issue in *Shinseki v. Sanders*, 556 U.S. 396, 129 S.Ct. 1696, 173 L.Ed.2d 532 (2009). There, the Supreme Court noted the burden placed on the claimant in ordinary litigation to raise an issue and establish prejudicial error. *Id.* at 410, 129 S.Ct. 1696. When the Court held that the veteran bears the burden of showing prejudicial error, it necessarily assumed that the veteran bears the burden of raising the claim of error in the first instance. *See id.*; *see also, e.g.*, *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009) ("[A] veteran is obligated to raise an issue in a notice of disagreement if he wishes to preserve his right to assert that issue on appeal ...."). There is nothing in the statute or its interpretation that relieves the veteran from the obligation to raise an issue in the first instance in the general run of cases. [2]

[2] We do not address the applicability of the presumption of competency in cases where the veteran did not challenge the examiner's competence, but the record independently demonstrates an irregularity in the process of selecting the examiner. *See* VA Br. at 36 (citing *Wise v. Shinseki*, 26 Vet. App. 517 (2014)) (conceding that the presumption would not apply in such a situation).

Here, once the veteran raises a challenge to the competency of the medical examiner, the presumption has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner's qualifications. The Board must then make factual findings regarding the qualifications and provide reasons and bases for concluding whether or not the medical examiner was competent to provide the opinion. 38 U.S.C. § 7104(d).

Since the veteran is obligated to raise the issue in the first instance, the veteran must have the ability to secure from the VA the information necessary to raise the competency challenge. Once the request is made for information as to the competency of the examiner, the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner. This is mandated by the VA's duty to assist. *See* 38 U.S.C. § 5103A; *Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013) (collecting cases).

The VA agrees with this interpretation of the presumption of competency and the VA's duties. At oral argument, the VA agreed that "[the presumption] is not an evidentiary burden, it's kind of a burden to request [the examiner's qualifications]." Oral Arg. at 25:34–38. The VA also recognized ***1309** its burden to "substantively respond" to the veteran's challenge "[o]nce the veteran [sufficiently] raises the issue" and that after a challenge is raised "the VA can't come in [to the Board] and say we're entitled to the presumption that this person is competent and you have to assume he is competent." Oral Arg. at 32:29–42. Then, as the VA notes, the Board has to "make a decision as to whether the medical officer was actually competent and provide reasons and bases explaining that decision." Oral Arg. 28:50–29:02.

II

Francway alternatively contends that his brief to the Board sufficiently raised the issue of the medical examiner's competency because it broadly argued that the medical examinations and opinions were inadequate. But "whether an examiner is competent and whether he has rendered an adequate exam are two separate inquiries." *Mathis v. McDonald*, 834 F.3d 1347, 1351 (Fed. Cir. 2016) (Hughes, J., concurring in denial of rehearing en banc). The Veterans Court found that Francway had not raised the competency issue with sufficient clarity to the Board. Based on the proper understanding of the presumption of competency described above, we find no legal error with the Veterans Court's decision, and we lack jurisdiction to determine whether the Veterans Court's decision is correct as a factual matter.

III

Francway separately contends that this case is distinguishable because the issue of the examiner's competency arose in the context of a remand order from the Board requiring an "appropriate medical specialist." In such a situation, Francway argues that the Board cannot presume the competency of the selected examiner in a specialty because the presumption is one of general medical competence not one regarding an examiner's expertise in various specialties.

We see no reason to distinguish between how the presumption applies to "general" medical examiners as compared to "specialists." The presumption is that the VA has properly chosen an examiner who is qualified to provide competent medical evidence in a particular case absent a challenge by the veteran. *Parks*, 716 F.3d at 585; 38 C.F.R. § 3.159(c)(4). Here, as noted above, Francway did not raise the issue of the medical examiner's competence before the Board so the presumption applies. Thus, we see no legal error in the Veterans Court's decision affirming the Board's denial of Francway's claim to compensation for his back injury.

CONCLUSION

Because Francway did not challenge the medical examiner's qualifications before the Board, which is all that the presumption of competency requires, we do not find legal error with the Veterans Court's decision.

AFFIRMED

COSTS

No costs.

All Citations

940 F.3d 1304

United States Court of Appeals for the Federal Circuit

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., PETER CIANCHETTA, MICHAEL REGIS, ANDREW TANGEN,
Petitioners

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2020-1321

Petition for review pursuant to 38 U.S.C. Section 502.

Decided: December 8, 2020

ROMAN MARTINEZ, Latham & Watkins LLP, Washington, DC, argued for petitioners. Also represented by SHANNON MARIE GRAMMEL, BLAKE STAFFORD.

ERIC P. BRUSKIN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by JEFFREY B. CLARK, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; Y. KEN LEE, JULIE HONAN, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

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STEPHEN BLAKE KINNAIRD, Paul Hastings LLP, Washington, DC, for amici curiae National Veterans Legal Services Program, Paralyzed Veterans of America, Veterans of Foreign Wars. Also represented by ALEX SCHULMAN. Amicus curiae National Veterans Legal Services Program also represented by BARTON F. STICHMAN, National Veterans Legal Services Program, Washington, DC.

ANGELA K. DRAKE, Veterans Clinic, University of Missouri School of Law, Columbia, MO, for amicus curiae National Law School Veterans Clinic Consortium.

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

DYK, *Circuit Judge*.

National Organization of Veterans' Advocates, Inc., ("NOVA"), Peter Cianchetta, Michael Regis, and Andrew Tangen petition this court under 38 U.S.C. § 502 to review two interpretive rules that are set out in two provisions of the Veterans Affairs ("VA") Adjudication Procedures Manual M21-1 (the "Manual") and a Federal Register publication. The first interpretive rule, the Knee Joint Stability Rule, was promulgated on April 13, 2018, and is set forth in Section III.iv.4.A.6.d of the Manual. It assigns a joint instability rating under Diagnostic Code ("DC") 5257, 38 C.F.R. § 4.71a, based on the amount of movement that

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[1] Circuit Judge Moore did not participate.

occurs within the knee joint. The second interpretive rule, the Knee Replacement Rule, provides that evaluation under DC 5055, 38 C.F.R. § 4.71a, is not available for partial knee replacement claims. The Knee Replacement Rule was first published in the Federal Register. That publication announced that section 4.71a was amended to include an explanatory note that "'prosthetic replacement' means a total, not a partial, joint replacement," 80 Fed. Reg. 42,040, 42,041 (July 16, 2015). The Knee Replacement Rule was later published in a somewhat different form in a Manual provision, which was promulgated on November 21, 2016, and is currently located in Section III.iv.4.A.6.a of the Manual. The Manual provision informs regional office staff that evaluation under DC 5055, 38 C.F.R. § 4.71a, is not available for partial knee replacement claims filed and decided on or after July 16, 2015.

We conclude that NOVA has standing because it has veteran members who are adversely affected by the challenged Rules. We also conclude that the Knee Joint Stability Rule Manual provision is an interpretive rule reviewable under section 502 and that it constitutes final agency action. As to the Knee Replacement Rule, we also conclude that we have jurisdiction under section 502 and that it is final agency action. However, we leave to the merits panel the question whether the Knee Replacement Manual provision or the Federal Register publication constitutes the reviewable agency action. We thus conclude that we have jurisdiction over the petition for review.

We also hold that the petitioners' challenge is timely under the six-year statute of limitations provided by 28 U.S.C. § 2401(a) and that Federal Circuit Rule 15(f), establishing a 60-day time limit for bringing section 502 petitions, is invalid.

We refer this case to a panel for adjudication on the merits.

BACKGROUND

Petitioners seek review of two interpretive rules governing disability claims for service-related knee injuries. The first rule, the Knee Joint Stability Rule, was promulgated in the Manual in April 2018 and addresses the rating schedule for knee instability under DC 5257, 38 C.F.R. § 4.71a. The governing regulation assigns a 30 percent rating for "Severe" joint instability, a 20 percent rating for "Moderate" joint instability, and a 10 percent rating for "Slight" joint instability. DC 5257, 38 C.F.R. § 4.71a. In turn, the Knee Joint Stability Rule instructs VA regional office staff to assign a slight knee instability rating for 0–5 mm of joint translation, a moderate rating for 5–10 mm of joint translation, and a severe rating for 10–15 mm of joint translation.

In 2017, VA published a notice of proposed rulemaking in the Federal Register proposing a nearly identical measurement-based assessment method for knee instability claims. According to petitioners, however, "multiple commenters complained that the measurement-based schedule for grading knee instability was too subjective and prone to error, insofar as it is affected by the amount of pressure applied by the physician. They also complained that the new schedule focused too narrowly on a rigid measurement, and thus would not account for the actual, functional loss suffered by veterans." Pet'r's Br. 14. VA did not adopt the proposed rule and instead promulgated the Knee Joint Stability Rule in the Manual, which incorporates essentially the same measurement-based grading schedule. Petitioners argue that the Knee Joint Stability Rule is subjective and therefore "arbitrary and capricious and must be set aside." Pet'r's Br. 14.

The second rule is the Knee Replacement Rule. Different versions of the Rule are set forth in a Federal Register notice and a Manual provision. The governing regulation, DC 5055, 38 C.F.R. § 4.71a, provides for a minimum 100

percent disability rating "[f]or 1 year following implantation of [a] prosthesis." The Federal Register notice was published in July 2015 and explained that "VA is adding an explanatory note under 38 CFR 4.71a . . . which notifies readers that 'prosthetic replacement' means a total, not a partial, joint replacement, except as it is otherwise stated under DC 5054." 80 Fed. Reg. 42,040, 42,041 (July 16, 2015) ("2015 Interpretive Guidance"). The Knee Replacement Manual provision was promulgated in November 2016 and addresses disability ratings for knee replacements under DC 5055, 38 C.F.R. § 4.71a. The Knee Replacement Manual provision instructs VA regional office staff not to apply this diagnostic code when evaluating partial knee replacement claims filed and decided on or after July 16, 2015.

Petitioners argue that the Knee Replacement Rule violates this court's decision in *Hudgens v. McDonald*, which concluded that the Veterans Court "erred in its judgment that DC 5055 is limited to instances of full knee replacement." 823 F.3d 630, 637 (Fed. Cir. 2016). In so holding, this court addressed the 2015 Interpretive Guidance, stating that "we cannot ignore that, during the pendency of this appeal, the agency found the need to clarify the language" of the governing regulation and that "[s]uch '*post hoc* rationalization' does not warrant deference under *Auer*," that is, deference to the agency's own interpretation of its regulation. *Id.* at 639. Petitioners contend that nothing in *Hudgens* suggests that VA can "apply its flawed interpretation of DC 5055 to claims filed after the 2015 Interpretive Guidance." Pet'r's Br. 12. Therefore, petitioners argue that "[t]he Knee Replacement Rule violates *Hudgens* and is unlawful." *Id.* at 13.

On January 3, 2020, NOVA filed a petition for review that, as amended on October 23, 2020, challenged these two interpretive rules. Petitioners argued that this court has jurisdiction over their petition because both Rules "qualify as interpretive rules for purposes of Section 502."

Am. Pet. 2. They asked this court to overrule *Disabled American Veterans v. Secretary of Veterans Affairs* ("*DAV*"), 859 F.3d 1072 (Fed. Cir. 2017), which held that this court lacked section 502 jurisdiction to review interpretive rules promulgated in the Manual.

The petition for review further stated that its challenge was timely under 28 U.S.C. § 2401(a), which provides a six-year statute of limitations governing civil actions brought against the United States. However, petitioners acknowledged that their challenge was not timely under Federal Circuit Rule 47.12(a), now Federal Circuit Rule 15(f) with minor language changes, which states that an "action for judicial review under 38 U.S.C. § 502 of a rule and regulation of the Department of Veterans Affairs must be filed with the clerk of court within 60 days after issuance of the rule or regulation or denial of a request for amendment or waiver of the rule or regulation." Petitioners argued that this "60-day limitations period impermissibly conflicts with the six-year statute of limitations made applicable to Section 502 civil actions by Section 2401(a)." Am. Pet. 5. It therefore asked this court to "resolve the conflict" and set aside rule 15(f). *Id.* at 6.

We granted en banc review and asked that the parties address two issues:

> A. Whether this court has jurisdiction under 38 U.S.C. § 502 to review provisions of the Department of Veterans Affairs' Adjudication Procedures Manual M21-1 that are binding on the agency's initial adjudicators but not on the Board of Veterans' Appeals, and whether this court should overrule *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017).
>
> B. Whether the time for filing a direct action for judicial review under

> 38 U.S.C. § 502 is governed by the 60-day deadline specified by Federal Circuit Rule 47.12(a) or only by the six-year statute of limitations in 28 U.S.C. § 2401(a).

Order Granting En Banc Review, No. 20-1321 (May 6, 2020), ECF 50, at 3.

The government's opening brief did not oppose NOVA's standing to challenge the two Knee Rules. However, pursuant to our independent duty to verify standing, we asked for supplemental briefing to address three questions relating to NOVA's standing:

> (1) Are the allegations of the Petition sufficient to establish standing, even without any evidence from NOVA, given that the Secretary does not challenge standing, or must NOVA submit evidence to establish Article III standing, *see Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1171–73 (Fed. Cir. 2017); *Shrimpers & Fishermen of RGV v. Texas Commission on Environmental Quality*, 968 F.3d 419, 423–24 (5th Cir. 2020) (citing cases from six other circuits)?
>
> (2) Is there evidence that, at the time of the Petition, NOVA had members with standing to challenge the provisions at issue?
>
> (3) Does NOVA have standing on any basis apart from having had members who would have had standing to challenge the provisions at issue?

Order Requesting Supplemental Briefing, No. 20-1321 (Sept. 15, 2020), ECF 87, at 1–2.

In response, NOVA argued that its petition sufficiently established that it had associational standing because "NOVA's allegations in its petition in this case match—nearly verbatim—the allegations deemed sufficient in [*Disabled American Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000)]." Pet'r's Suppl. Br. 5. NOVA alternatively argued that "many of NOVA's veteran members—including Mr. Cianchetta, Mr. Tangen, and Mr. Regis—currently suffer from knee disabilities and have been receiving, or are currently seeking, disability benefits governed by the Knee Rules." *Id.* at 8. In support, NOVA submitted declarations from these three veteran members. NOVA also argued that "NOVA has many attorney members who are adversely affected by the Knee Rules because those rules diminish the contingency fees they will be able to earn, and the business they will be able to retain, by representing veterans in disability claims proceedings before VA." *Id.* at 10. NOVA submitted declarations from attorney members alleging that the Knee Rules affect their ability to earn contingency fees and retain clients. In response to our order, the government for the first time challenged NOVA's standing, arguing that NOVA had not established that it met the requirements for associational standing.

Following oral argument, NOVA moved for permission to amend its petition for review to include an additional challenge to the 2015 Interpretive Guidance published in the Federal Register and to add three veteran members as named petitioners. We granted NOVA's unopposed motion and permitted it to file an amended petition.[2]

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[2] Exercising our discretion, we granted permission to add these named petitioners under the circumstances here. As we discuss, NOVA's associational standing to challenge the Knee Rules does not depend on the joinder of these individuals.

DISCUSSION

I. Standing

This court has an "independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). We first consider NOVA's associational standing based on claimed injury to its veteran members (as opposed to its claim of standing based on its lawyer members).

As an organization, NOVA would have associational standing to challenge the Rules at issue if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). NOVA carries a burden to prove standing that is the same as that applied at summary judgment. *Phigenix, Inc.*, 845 F.3d at 1172–73 (adopting the summary judgment burden of production in cases challenging final agency action); *see also Shrimpers & Fishermen of RGV* , 968 F.3d at 423 (same).

NOVA's petition asserted that "[m]any of NOVA's members are veterans" and that those members are "personally affected" by the challenged Manual provisions because "they will be directly harmed when they bring their own claims for benefits." Original Pet. 6. The petition did not name such individual members. NOVA additionally stated that its challenge to the two Manual provisions was "germane to NOVA's purpose" of providing "representation for all persons seeking benefits through the federal veteran's benefits system, and in particular those seeking judicial review of denials of veterans' benefits." *Id.* at 6–7 (quoting *Gober*, 234 F.3d at 689) (internal quotation marks omitted). Finally, NOVA explained that its challenge "d[id] not require the participation of NOVA's individual

members" because the petition "presents a pure question of law: whether VA's promulgation of each rule was legally valid" under the Administrative Procedure Act ("APA"). *Id.* at 7.

NOVA argues that under its original petition it has associational standing to challenge both Rules "for essentially the same reasons this Court expressly held that NOVA had standing in *DAV v. Gober*," which is because it has veteran members. *Id.* at 6. *Gober* addressed NOVA's standing to challenge VA's promulgation of rules concerning the application of the clear and unmistakable error ("CUE") standard in VA proceedings. 234 F.3d 682, 689 (Fed. Cir. 2000). The *Gober* court found that NOVA satisfied the first prong of associational standing because "NOVA includes at least one veteran as a member." *Id.* *Gober* did not require the identification of association members affected by the new CUE rules. *Id.* The *Gober* court additionally found that NOVA's challenge to the CUE rules was "germane" to NOVA's purpose of providing "representation for all persons seeking benefits through the federal veteran's benefits system, and in particular those seeking judicial review of denials of veterans' benefits." *Id.* (internal quotation marks omitted). Because the third prong of associational standing was uncontested, the court found that NOVA had standing. *Id.*

NOVA argues that the "allegations in its petition . . . match—nearly verbatim—the allegations deemed sufficient in *Gober*" and therefore it must necessarily have standing. Pet'r's Suppl. Br. 5. However, we conclude that *Gober* was incorrectly decided insofar as it held that the first prong of the *Hunt* test can be established solely on the basis of NOVA member veteran status without identification of an individual affected member, the nature of his or her claimed injury, and the reasons that the challenged interpretive rule would adversely affect the member. The Supreme Court has made clear that petitioners must make a more "concrete and particularized" showing of injury.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'"). As the Court concluded in *Valley Forge Christian College v. Americans United for Separation of Church & State*, "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)). For example, in *Summers*, the Supreme Court held that an environmental group failed to establish standing to challenge Forest Service regulations because respondents failed to identify an "application of the invalidated regulations that threaten[ed] imminent and concrete harm to the interests of their members." 555 U.S. at 494–96.

To the extent *Gober* found *Hunt*'s first prong satisfied based solely on the veteran status of some of NOVA's members, it is overruled. We now hold that when an organization challenges VA rulemaking and invokes the veteran status of a member to meet the first prong of the *Hunt* test for associational standing, the organization must show that the veteran member has an actual or potential claim and that this claim is sufficiently affected by the particular challenged rule to meet the requirements of actual or imminently threatened concrete harm and the other requirements for that member to have Article III standing. *See id.*; *E. Paralyzed Veterans Ass'n, Inc. v. Sec'y of Veterans Affs.*, 257 F.3d 1352, 1356 (Fed. Cir. 2001) (finding associational standing when veterans association showed it had at least one member who was sufficiently affected by the challenged VA regulations).

Under this standard, NOVA has met its burden on *Hunt*'s first prong. In response to our request for supplemental briefing on standing, NOVA submitted declarations

of NOVA members who have "suffered an injury in fact . . . that is fairly traceable to" the alleged shortcomings of each of the two challenged Manual provisions. *Spokeo*, 136 S. Ct. at 1547. For example, Michael Regis has been a member of NOVA since 2018 and is a veteran of the United States Air Force. He was diagnosed with knee instability in 2016 and is currently seeking benefits under DC 5257. Because of his instability diagnosis, Mr. Regis states that he faces a substantial risk of being denied the disability rating to which he believes he is entitled based on the regional office's application of the Knee Joint Stability Rule.

Andrew Tangen has been a member of NOVA since 2017 and is a veteran of the United States Navy. He received a 10 percent disability rating under DC 5257 on September 21, 2018, which was after the Knee Joint Stability Rule took effect. He states that he faces an ongoing injury from having his disability rating governed by the Knee Joint Stability Rule.

Finally, Peter Cianchetta has been a NOVA member since 2017 and is a veteran of the United States Air Force. Mr. Cianchetta was referred for partial knee replacement surgery on October 26, 2019, and received a partial knee replacement on September 14, 2020. He states that he faces imminent denial of his claim for benefits under the Knee Replacement Rule.

This evidence is sufficient to meet the summary judgment burden of production applied to direct challenges of agency action. *Phigenix*, 845 F.3d at 1172–73; *see also Lujan*, 504 U.S. at 561 (noting that, "[i]n response to a summary judgment motion," the plaintiff "must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e) [supporting his or her standing], which for purposes of the summary judgment motion will be taken to be true").

Although each of the declarants states that he faces an ongoing or imminent injury from the challenged provisions,

the government makes only one argument for why none of them meets the first prong of *Hunt*—namely, that none of them had a knee joint stability or partial knee replacement claim pending before a regional office when NOVA filed its petition for review. However, Supreme Court precedent makes clear that standing does not require a pending adjudicative proceeding in order to generate a cognizable Article III injury.

For example, the Supreme Court has affirmed the standing of regulated entities to bring pre-enforcement challenges to agency action. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 153–54 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In the patent context, a pending infringement action is not required to establish standing to challenge patent validity. *See Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1339 (Fed. Cir. 2008) ("A patentee can cause such an injury in a variety of ways, for example, by creating a reasonable apprehension of an infringement suit, . . . demanding the right to royalty payments, . . . or creating a barrier to the regulatory approval of a product that is necessary for marketing . . . ."). Similarly, in the criminal context, "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging" a law. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." (emphasis removed)). Here, too, NOVA is not required to prove that it had a member with a pending knee instability or knee replacement claim in order to meet *Hunt*'s first requirement for associational standing. We therefore conclude NOVA has met the first requirement for associational standing under the *Phigenix* standard.

To satisfy the second prong of the associational standing test, NOVA must show that "the interests it seeks to protect are germane to the organization's purpose." *Hunt*, 432 U.S. at 343. The government argues that NOVA's petition is not germane to NOVA's purpose because "NOVA's stated purposes are focused, naturally, on ensuring that its members, as advocates, offer quality, informed representation to veterans seeking benefits from VA." Resp't. Suppl. Br. 13. It is true that the five enumerated purposes in NOVA's bylaws are directed toward improving the services NOVA's lawyer members provide to their veteran clients. However, the government's view of NOVA's purposes is too narrow. As we found in *Gober*, NOVA's general purpose is to aid veterans in obtaining benefits. 234 F.3d at 689; *see also* Pet'r's Suppl. Br. Tab 5, Ex. A (stating that NOVA aims "[t]o develop and encourage high standards of service and representation for all persons seeking benefits through the federal veterans' benefits system and in particular those seeking judicial review of denials of veterans' benefits"); *id.* at Tab 5, Decl. of Diane Boyd Rauber ("NOVA's overarching purpose [in the cases it brings to challenge VA agency action] is to . . . ensure that veterans are treated fairly and receive the benefits they are due under law . . . ."). NOVA's mission is therefore focused on helping veterans obtain fair compensation for their claims. This interest in fair adjudication of veteran disability benefits is precisely the interest NOVA now seeks to protect in challenging these two interpretive rules. NOVA has consequently shown that it "will . . . have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary." *United Food & Com. Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555–56 (1996).

Finally, NOVA's challenge to the Rules does not require "individualized proof" because this case presents a purely legal question asking whether VA's Knee Joint Stability and Knee Replacement Rules are unlawful under the

Administrative Procedure Act. *Hunt*, 432 U.S. at 344. Nor does the government contend otherwise. NOVA has sufficiently shown that it has associational standing to challenge the Knee Joint Stability Rule and the Knee Replacement Rule.

We note that NOVA additionally argues that it "satisfies the first associational standing prong" because "NOVA has many attorney members who are adversely affected by the Knee Rules because those rules diminish the contingency fees they will be able to earn, and the business they will be able to retain, by representing veterans in disability claims proceedings before VA." Pet'r's Suppl. Br. 7, 10. Because we find that NOVA has established standing based on the harm suffered by its veteran members, we need not reach the standing of its lawyer members. Similarly, although NOVA argues that it additionally has organizational standing on behalf of its lawyer members, we need not reach this issue.

II. Jurisdiction Under Section 502 – The Knee Joint Stability Rule

We turn to the question of jurisdiction. For reasons we will explain below, we deal separately with the Knee Joint Stability Rule and the Knee Replacement Rule. Under section 502, this court may review "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. § 502.

A. 5 U.S.C. § 553

Initially, we consider whether the Knee Joint Stability Rule constitutes "an action of the Secretary to which section . . . 553 of title 5 . . . refers." *Id.* Section 553 governs the notice-and-comment rulemaking process under the APA. It states that "[g]eneral notice of proposed rule making shall be published in the Federal Register . . . [and] [a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule

making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(b), (c). Additionally, it provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." *Id.* § 553(e). NOVA does not suggest that the Knee Joint Stability Rule is a substantive rule that should have gone through notice-and-comment under section 553. Nor does it argue that it was denied "the right to petition for the issuance, amendment, or repeal" of the Rule under section 553(e). Instead, NOVA contends that, even though the Knee Joint Stability Rule was not promulgated through notice-and-comment rulemaking, it is still reviewable because "[s]ection 553 repeatedly refers to 'interpretive rules,'" i.e., it exempts them from notice and comment rulemaking. Pet'r's Br. 45; *see* 5 U.S.C. § 553(b)(A), (d).

It is implausible on its face that Congress encompassed exemptions when it referenced, in section 502, "[a]n action . . . to which section . . . 553 . . . refers." The more plausible meaning limits the scope to the actions to which section 553's requirements *pertain*, i.e., *apply*, not action that section 553 declares outside its requirements. *See* Webster's II New College Dictionary 953 (3d ed. 2005) ("1. To pertain: concern"); *pertain*, Oxford English Dictionary (3d ed. 2005) ("4. *Intransitive.* To apply; to be or remain in place, to continue to be applicable."). Section 553 provides several exemptions from its notice-and-comment and publication requirements. In addition to exempting "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," it also exempts provisions involving "a military or foreign affairs function of the United States" or "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)–(b). There can be no suggestion that section 502 permits review of agency action that falls within one of these section 553 exemptions, even if it is outside section 552(a)(1). *See, e.g.*, *Conyers v. Sec'y*

of Veterans Affs., 750 F. App'x 993, 997 (Fed. Cir. 2018) (recognizing that section 502 jurisdiction does not apply to agency action within the "personnel exception" of section 553 unless the agency action also falls under section 552(a)(1)). Section 502's "refers" language is not so broad as to encompass agency action expressly excluded from section 553's procedures. We therefore do not have jurisdiction to review these Rules as agency action to which section 553 "refers."

B. 5 U.S.C. § 552(a)(1)

Section 502 also gives this court jurisdiction over "[a]n action of the Secretary to which section 552(a)(1) . . . refers."[3] Section 552(a)(1) governs agency action that must be published in the Federal Register, such as "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). Thus, section 502 provides prompt direct review by this court of "statements of general policy" and "interpretations of general applicability" in addition to "substantive rules of general applicability." *Id.*[4]

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[3] Section 502 provides in pertinent part:

> An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit.

[4] Sections 552(a)(1) and 552(a)(2) provide in relevant part:

> (a) Each agency shall make available to the public information as follows:

In our earlier decision in *DAV*, we held that we did not have jurisdiction to review a Manual provision addressing the definition of a medically unexplained chronic multi-symptom illness. 859 F.3d 1072, 1078 (Fed. Cir. 2017). The decision explained that "Congress expressly exempted from § 502 challenges to agency actions which fall under § 552(a)(2)." *Id.* at 1077–78; *see also id.* at 1075 ("Section 502's express exclusion of agency actions subject to § 552(a)(2) renders the M21-1 Manual beyond our § 502 jurisdiction unless DAV can show the VA's revisions more readily fall under §§ 552(a)(1) or 553."). The government has agreed that reading sections 552(a)(2) and 552(a)(1) as being mutually exclusive is incorrect because "[i]n some respects, the criteria that Section 552(a)(1) and (2) establish

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> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
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> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
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> (2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—
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> ***
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> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
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> (C) administrative staff manuals and instructions to staff that affect a member of the public; . . .
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overlap." Respondent Brief in Opposition at 22–23, *Gray v. Wilkie*, 139 S. Ct. 2764 (2019) (No. 17-1679), 2018 WL 4298030; *see also Procopio v. Sec'y of Veterans Affairs*, 943 F.3d 1376, 1379–80 (Fed. Cir. 2019) (exercising section 502 jurisdiction over a VA memorandum instructing staff to stay certain benefits decisions, without addressing the fact that it constituted an instruction to staff under section 552(a)(2)(C), because the memorandum constituted an interpretation of general applicability under section 552(a)(1)). The government also concedes that whether an interpretive rule is actually published in the Federal Register does not dictate whether this court has jurisdiction, as "VA cannot insulate a rule from pre-enforcement review simply by placing it in the Manual." Resp't Br. 30. The government nevertheless argues that we do not have jurisdiction to review Manual provisions under section 502 for other reasons.

Because we find that the Knee Joint Stability Rule falls within the "general applicability" language of section 552(a)(1)(D), we overrule our contrary holding in *DAV*. We start with the Supreme Court's premise that "many [agency] manual instructions surely qualify as guidelines of general applicability." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 n.1 (2019). The VA Manual provision governing knee joint stability is one of them. The Knee Joint Stability Rule governs benefits received under DC 5257, 38 C.F.R. § 4.71a. The Manual provision announces VA's adoption of an interpretive rule establishing a new metric for assessing knee instability claims. It limits VA staff discretion, and, as a practical matter, impacts veteran benefits eligibility for an entire class of veterans. On its face, the Knee Stability Rule is an "interpretation[] of general applicability" because it governs all regional office adjudications of knee instability claims, affecting an open-ended category of veterans with knee instabilities. 5 U.S.C. § 552(a)(1).

The history of section 552 supports our conclusion that the Knee Joint Stability Rule is "of general applicability." Congress has long used the phrase "of general applicability" to differentiate between government action that applies to a general segment of the public rather than to specific named individuals. For example, in 1935 Congress passed the Federal Register Act ("FRA"), which required publication of "such documents or classes of documents as the President shall determine from time to time have *general applicability* and legal effect." Pub. L. No. 74-220, § 5(a)(2), 49 Stat. 500, 501 (1935) (emphasis added). In 1937, the FRA was amended to add a requirement that agency documents "hav[ing] *general applicability* and legal effect" be published in what became the Code of Federal Regulations. Pub. L. No. 75-158, § 11(a), 50 Stat. 304, 304 (1937) (emphasis added). Regulations implementing this new codification requirement clarified that documents of "general applicability and legal effect" were those "relevant or applicable to the general public, the members of a class, or the persons of a locality, as distinguished from named individuals or organizations." 2 Fed. Reg. 2450, 2451-52 (Nov. 12, 1937).

In 1946, Congress enacted the APA, which also addressed publication of rules in the Federal Register. Section 2(c) of the APA utilized the same "general applicability" language appearing in the FRA, defining "Rule" as "the whole or any part of any agency statement of *general or particular applicability* and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency." Pub. L. No. 79-404, § 2(c), 60 Stat. 237, 237 (1946) (emphasis added). The distinction between an agency statement of "general" as opposed to "particular applicability" was explained in a House Report, which noted that the phrase "or particular applicability" was added to "assure coverage of rulemaking addressed to named persons," indicating that "general . . . applicability"

was understood as excluding such rules. H.R. Rep. No. 79-1980 at 283, n.1 (1946) (Comm. Amendment).

Under Section 3(a) of the original APA, agencies were required to "separately state and currently publish in the Federal Register" specific agency action including "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law." Pub. L. No. 79-404, § 3(a)(3), 60 Stat. 237, 238.

In 1966, Congress enacted the Freedom of Information Act ("FOIA") and moved the APA's Federal Register publication requirement to section 3 of FOIA. Pub. L. No. 89-487, § 3(a), 80 Stat. 250, 250 (1966). This provision was codified at what is now 5 U.S.C. § 552(a)(1). Section 552(a)(1) provided that "[e]very agency shall separately state and currently publish in the Federal Register for the guidance of the public" agency documents including "substantive rules of general applicability adopted as authorized by law, and statements of general policy *or interpretations of general applicability* formulated and adopted by the agency." *Id.* § 3(a)(D) (emphasis added). Thus, FOIA required publication of "interpretations of general applicability" rather than using the previous language—"interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law." *Compare* Pub. L. No. 89-487, § 3(a) *with* Pub. L. No. 79-404, § 3(a)(3). Congress described this change as merely "technical" in nature. S. Rep. No. 89-813, at 6 (1965).[5] Congress plainly intended "general applicability"

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[5] The Attorney General's 1967 memorandum—considered "a reliable guide in interpreting FOIA," *FCC v. AT & T Inc.*, 562 U.S. 397, 409 (2011); *Nat'l Archives &*

to be interpreted as applying generally and "not . . . addressed to and served upon named persons in accordance with law." *Id.* Congress's use of "general applicability" suggests its intent to incorporate the consistent understanding of "general applicability" dating back to the enaction of the FRA. *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (explaining the "longstanding interpretive principle" that "[w]hen a statutory term is obviously transplanted from another legal source, it brings the old soil with it." (internal quotation marks omitted)). Thus, "general applicability" in section 552(a)(1) is best understood as indicating agency action addressed to a class of persons rather than to named persons or organizations. *See, e.g.*, *Nguyen v. United States*, 824 F.2d 697, 700 (9th Cir. 1987) ("The legislative history thus indicates a rather obvious definition of 'general': that which is neither directed at specified persons nor limited to particular situations.").

The Knee Joint Stability Rule falls easily within the "general applicability" language of section 552(a)(1)(D). The Rule is of general application, applying to all veteran claims for knee joint instability benefits before a VA regional office. Indeed, the government appears to concede that the Knee Joint Stability Rule would be reviewable if it were binding on all agency adjudicators. But the government argues that "[t]o be 'of general applicability,' . . . an interpretation must be 'binding' on the agency and members of the public who interact with the agency." Resp't Br.

Recs. Admin. v. Favish, 541 U.S. 157, 169 (2004)—explained that the change was "formal only." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 10 (June 1967) (*FOIA Memorandum*). The Attorney General also stated the technical change made sense because "of general applicability" "exclude[s] rules addressed to and served upon named persons." *Id.*

21. The government contends that the Knee Joint Stability Manual provision does not bind the Board of Veterans Appeals and is therefore not a true "interpretation[] of general applicability." § 552(a)(1)(D). Understanding the government's position requires an understanding of the VA adjudicative system.[6]

The VA adjudicates disability benefits claims through a "two-step process." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011).[7] Veterans first file a claim before Veterans Benefits Administration ("VBA") staff in one of VA's regional offices, who make "an initial decision on whether to grant or deny benefits." *Id.* "[I]f a veteran is dissatisfied with the regional office's decision, the veteran may obtain *de novo* review by the Board of Veterans' Appeals." *Id.* In order to "provide[] guidance to [VBA] employees and stakeholders" the VA "consolidates its policy and procedures into one resource known as the M21-1 Manual." *DAV*, 859 F.3d at 1074. VBA staff making the initial benefits decisions are bound by policies in the Manual. *Gray v. Sec'y of Veterans Affs.*, 875 F.3d 1102, 1106 (Fed. Cir. 2017), *vacated and remanded by Gray v. Wilkie*, 139 S. Ct. 2764 (2019), *vacated and dismissed as moot by Gray v. Sec'y of Veterans Affs.*, 774 F. App'x 678 (Fed. Cir. 2019). However, while the Board is "required to discuss any relevant provisions contained in the [Manual] as part of its duty to provide adequate reasons or bases" for its decisions, it is not bound by the Manual. *Overton v.*

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[6] The government, of course, agrees that interpretive rules do not bind the agency in court proceedings.

[7] The Veterans Appeals Improvement and Modernization Act of 2017 modified this two-step process by granting veterans a wider range of appeal options following an adverse regional office decision. Pub. L. No. 115-55, 131 Stat. 1105; 38 U.S.C. §§ 5104B, 5104C. However, the parties appear to agree that the two-step process still exists.

Wilkie, 30 Vet. App. 257, 264 (2018); *see also* 38 U.S.C. § 7104(c) (explaining that the Board is bound by "regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department"). Because the Manual binds regional office staff, but not the Board, the government contends that Manual provisions are not sufficiently "binding" to constitute interpretations of general applicability.

The text and history of section 552(a)(1) do not suggest that the reference to "interpretations of general applicability" excludes interpretive rules that bind only front-line adjudicators. As discussed above, the phrase "of general applicability" is directed only to the question whether the rule applies to a class of persons rather than to selected individuals. In other words, "general applicability" does not refer to general applicability within the agency, but to general applicability to members of the public. The government argues that the legislative history requires "interpretations of general applicability" to be "binding" on agency adjudicators, citing two Congressional reports that accompanied the original APA. Resp't Br. 22. However, these reports do not support the government's interpretation, but instead state that section 3(a) of the APA "forbids secrecy of rules binding or applicable to the public, or of delegations of authority." S. Rep. No. 79-752, 12 (1945) (emphasis added); *see also* H.R. Rep. No. 79-1980, 22 (1946) (similar). The use of the language "binding or applicable to the public" suggests that the "applicable to the public" concept does not mean rules that are "binding." The obligation to publish under section 552(a)(1) does not turn on whether VA action is binding on the Board, but on whether an interpretive rule affects a segment of the general public.[8]

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[8] The government relies on two circuit decisions for the proposition that courts that have considered "nonbinding instructions in agency manuals of the kind at issue here

The government also argues that publication in the Federal Register is only required for matters that "would adversely affect a member of the public." Resp't Br. 25 (quoting *New York v. Lyng*, 829 F.2d 346, 354 (2d Cir. 1987)). Even under that standard, the Knee Joint Stability Rule would need to be published because the Knee Joint Stability Rule adversely affects veterans by denying them benefits to which they would otherwise be entitled without the procedural protections afforded by FOIA as discussed in detail below. The Knee Joint Stability Rule, as a rule of "general applicability," has a substantive effect on veterans

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have 'unanimously held that publication in the Federal Register under § 552(a)(1) is not required.'" Resp't Br. 19 (quoting *Capuano v. Nat'l Transp. Safety Bd.*, 843 F.2d 56, 58 (1st Cir. 1988)). However, both cases relied on by the government are distinguishable because they concerned agency manuals that did not have a substantive impact on the rights of the public or did not mark a change in agency practice. *Capuano*, 843 F.2d at 57–58 (finding that a Federal Aviation Administration "enforcement manual" did not need to be published in the Federal Register when it merely informed agency employees that "[s]uspension may be used for punitive purposes" and specified criteria they should use when asking "the Board to impose suspension or a lesser sanction" because the Manual was "not intended to affect the rights, duties, obligations, or conduct of pilots or any other member of the public" as "[a] pilot's obligation . . . is to refrain from those activities that call for a sanction, whether that sanction is strict or lenient"); *Notaro v. Luther*, 800 F.2d 290, 291 (2d Cir. 1986) (finding a Parole Commission training aid did not need to be published in the Federal Register because "the approach set out in the training aid accords with the Commission's regulations and past practices" and "did not establish a presumption of nonperipherality" that mandated a particular result in appellant's parole hearing).

suffering from knee instability, warranting the formal notice that publication in the Federal Register entails.[9] Significantly, the VA itself once viewed this change to a measurement-based instability rating system as significant enough to warrant following notice and comment procedures.[10]

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[9] The government argues that Congress's goal of providing "guidance of the public" through Federal Register publication is "equally, if not better, served by making nonbinding interpretations available online on VA's website." Resp't Br. 21. However, the basic VA website does not seem to contain the current version of the Manual. Instead, the government says that the current Manual is published on the KnowVA website at https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000073398/M21-1,%20Adjudication%20Procedures%20Manual,%20Table%20of%20Contents. Resp't Br. 3 n. 4. Further, the version of the Manual on the KnowVA site does not explain the role the Manual plays in benefits adjudication. In contrast, documents published in the Federal Register are aggregated on a single website and presented in a standardized format that includes a summary of "the 'what,' 'why,' and 'effect' of the document" in "language a non-expert will understand." *Document Drafting Handbook*, Office of the Federal Register at 2-5 (Aug. 9, 2019), https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf. Even in cases where the Federal Register incorporates material by reference, the agency must ensure easy public access by "stating where and how copies may be examined and readily obtained with maximum convenience to the user." 1 C.F.R. § 51.9.

[10] *See* 82 Fed. Reg. 35,719, 35,723 (Aug. 1, 2017) (publishing a notice of proposed rulemaking that proposed a

We finally note that the Supreme Court has recognized the importance of publishing agency documents like this in the Federal Register, although it based its holding on the agency's own internal publication procedures rather than on section 552(a)(1). *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (finding that a policy set forth in the Indian Affairs Manual restricting eligibility for general assistance benefits to "Indians living 'on reservations'" was unenforceable for lack of publication in the Federal Register).

We conclude that the Knee Joint Stability Rule was required to be published in the Federal Register under section 552(a)(1) and that we consequently have jurisdiction under section 502. In so holding, we overrule our contrary decisions in *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017), and *Gray v. Secretary of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017), *vacated and remanded by Gray v. Wilkie*, 139 S. Ct. 2764 (2019), *vacated and dismissed as moot by Gray v. Sec'y of Veterans Affs.*, 774 F. App'x 678 (Fed. Cir. 2019).

III. Final Agency Action – The Knee Joint Stability Rule

The government argues that even if the Knee Joint Stability Rule constitutes an interpretation of general applicability under section 552, it does not constitute reviewable final agency action.

Section 502 does not itself contain a finality requirement, but instead states that review "shall be in accordance with chapter 7 of title 5." 38 U.S.C. § 502. In turn, 5 U.S.C. § 704 states that "[a]gency action made reviewable by statute and final agency action for which there is no other

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nearly identical measurement-based method for assigning knee instability ratings). The VA never promulgated a final rule implementing the suggested measurement-based evaluation method, but instead revised the Manual to adopt a nearly identical method.

adequate remedy in a court are subject to judicial review." While section 704 does not expressly state that agency action made reviewable by statute must be final, the Supreme Court has recognized that agency judicial review provisions are presumed to have a finality requirement. *See, e.g.*, *Lujan*, 497 U.S. at 894 (stating that "[e]xcept where congress explicitly provides for our correction of the administrative process at a higher level of generality, [courts] intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect"); *Bell v. New Jersey*, 461 U.S. 773, 778 (1983) ("The strong presumption is that judicial review will be available only when agency action becomes final . . . ." (citing *FPC v. Metro. Edison*, 304 U.S. 375, 383–85 (1938))). The legislative history of section 704 confirms Congress's presumption of a "finality requirement as a prerequisite for judicial review." *Carter/Mondale Presidential Comm., Inc. v. Fed. Election Comm'n*, 711 F.2d 279, 285 n.9 (D.C. Cir. 1983). Nothing in section 502 overcomes the presumption. Therefore, as we found in *Ashford University, LLC v. Secretary of Veterans Affairs*, "section 502, by incorporating 5 U.S.C. § 704, includes a finality requirement." 951 F.3d 1332, 1344 (Fed. Cir. 2020).

To qualify as final agency action, the Knee Joint Stability Rule must (1) "mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature" and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)) (internal quotation marks omitted). The government argues that the Knee Joint Stability Rule satisfies neither of these requirements because "a regional office's reliance on or reference to a provision in the Manual does not mark the consummation of the agency's decision-making process"

and "[l]egally binding consequences can flow only from the agency's final adjudication of an individual claim in a given case." Resp't Br. 42. We disagree.

First, the Knee Joint Stability Rule marks the consummation of the VA's manual-drafting process and reflects VA's determination that regional office staff must apply the measurement-based rating analysis when evaluating knee instability claims. The provision "is properly attributable to the agency itself and represents the culmination of that agency's consideration of an issue." *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 404 (D.C. Cir. 2020). It is not "of a merely tentative or interlocutory nature," *Bennett*, 520 U.S. at 178, nor is it "only the ruling of a subordinate official," *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (internal quotation marks omitted). Instead, the Rule was implemented in the Manual following analysis and approval by "a team at VA headquarters," Resp't Br. 4, and at the "direction of the Under Secretary for Benefits," J.A. 1, 66.[11] While it is true that the Knee Joint Stability

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[11] The Secretary of Veterans Affairs "delegated" authority, as authorized by 38 U.S.C. § 512(a), "to the Under Secretary for Benefits and to supervisory or adjudicative personnel within the jurisdiction of the Veterans Benefits Administration designated by the Under Secretary to make findings and decisions under the applicable laws, regulations, precedents, and instructions, as to entitlement of claimants to benefits under all laws administered by the Department of Veterans Affairs governing the payment of monetary benefits to veterans . . . ." 38 C.F.R. § 3.100(a). *See Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1269 (D.C. Cir. 2018) ("The manner in which an agency's governing statutes and regulations structure its decisionmaking processes is a touchstone of the finality analysis.").

Rule may be subject to future change, this does not alter the finality analysis.[12]

The government's approach would exclude from review all agency rules, which are non-final in the sense that they may be interpreted, and their validity determined, in later adjudicatory proceedings. However, the whole regime of challenges to rules assumes that rules are often going to be applied in future individual adjudications. Parties are routinely permitted to bring pre-enforcement challenges without waiting until they are subject to a pending adjudication involving the rule. *See, e.g.*, *Abbott Lab'ys*, 387 U.S. at 139–40. Since *Abbott Laboratories*, "preenforcement review of agency rules and regulations has become the norm, not the exception." *Clean Air Implementation Project v. EPA.*, 150 F.3d 1200, 1204 (D.C. Cir. 1998). The District of Columbia Circuit has emphasized that "an interpretive rule construing existing law can constitute final [agency] action." *POET Biorefining,* 970 F.3d at 406.

Section 502 is precisely such a statute permitting preenforcement review. As we have previously found, "the judicial review provision of 38 U.S.C. § 502 is another instance in which Congress has declared its preference for preenforcement review of agency rules." *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 330 F.3d 1345, 1347 (Fed. Cir. 2003). Here, despite the potential for future adjudicatory interpretations of the Knee Joint Stability

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[12] *See POET Biorefining*, 970 F.3d at 404 ("The possibility of revision 'is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal.'" (quoting *Hawkes*, 136 S. Ct. at 1814)); *Appalachian Power Co. v. E.P.A*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("EPA may think that because the Guidance, in all its particulars, is subject to change, it is not binding and therefore not final action. . . . But all laws are subject to change.").

Rule, the manual-creating process as to this Rule is complete. The Knee Joint Stability Rule satisfies the first prong of the *Bennett* finality test.

Second, the Knee Joint Stability Rule is a rule "by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 136 S. Ct. at 1813. The government primarily focuses on this second prong of the finality test, arguing that no legal consequences can flow from the Knee Joint Stability Rule until the rule is applied in the adjudication of a benefits claim.

The government's theory is that the Rule lacks legal consequences because it is not binding on the agency as a whole, but only on front-line adjudicators. The "'pragmatic' approach [the Supreme Court] ha[s] long taken to finality" is inconsistent with the government's position. *Hawkes*, 136 S. Ct. at 1815. In *Hawkes*, the Court found that jurisdictional determinations issued by the Army Corps of Engineers were reviewable final agency action because they bound the agency for five years, even though they were not binding in citizen suits. *Id.* at 1814–15. So too in *Frozen Food Express v. United States*, the Court used a pragmatic approach to finality that is even more clearly pertinent here. 351 U.S. 40 (1956).

In *Frozen Food*, the Court evaluated the finality of an Interstate Commerce Commission order clarifying which commodities constituted an "agricultural product" that could be transported by common carriers without a permit from the Commission. *Id.* at 41–42. The Court held that this order was final agency action based on the order's "immediate and practical impact," despite the fact that the order did not itself subject any regulated entity to an enforcement action or sanction, *id.* at 44–45, and despite the "Commission's willingness, in individual cases, to reconsider its determinations with respect to particular commodities," *id.* at 47 (Harlan, J., dissent). *See also Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir.

2019) ("*Hawkes* instructs that whether an agency action has direct and appreciable legal consequences is a 'pragmatic' inquiry . . . based on the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it." (internal quotation marks omitted)); *POET Biorefining,* 970 F.3d at 405 (same).

Here, interpretive rules in the Manual have a practical effect on veterans seeking benefits. Because nearly all veteran benefits claims are resolved at the regional office stage, the Manual is effectively "the last word for the vast majority of veterans." *Gray*, 875 F.3d at 1114 (Dyk, J., dissenting in part and concurring in the judgment); *compare* U.S. Dep't of Veterans Affairs, FY 2021 Budget Submission, BVA-169 (Feb. 2020), https://www.va.gov/budget/docs/summary/fy2021VAbudgetvolumeIIIbenefitsBurialProgramsAndDeptmentalAdministration.pdf (stating that more than 1.3 million disability compensation rating claims were completed in 2019) *with id*. at BVA-278 (stating that the Board received 78,344 appeals in 2019). It typically takes years for challenges to regional office determinations to plow through adjudication before finally reaching the Board. *See Martin v. O'Rourke*, 891 F.3d 1338, 1350 (Fed. Cir. 2018) (Moore, J., concurring) ("In total the appeals process takes over five and a half years on average from the time a notice of disagreement is filed until the Board issues a decision, which often sets the stage for more proceedings on remand." (emphasis removed)).

Insulating interpretive rules contained in the Manual from judicial review would also be inconsistent with the approach taken by our sister circuits. For example, in *Appalachian Power*, the District of Columbia Circuit found that an EPA guidance document explaining when and how "periodic monitoring" of emissions was required under the Clean Air Act was final agency action. 208 F.3d at 1019–23. The court explained that while the Guidance was

not a legislative rule, it had "as a practical matter, . . . a binding effect" sufficient to find finality because of its impact on state authorities. *Id.* at 1020–23. This was so even though the document contained a disclaimer expressly stating that it was "intended solely as guidance, [did] not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party." *Id.* at 1023.

Applying a similarly practical approach, the Fifth Circuit, in *Texas v. EEOC*, found that an EEOC guidance document was reviewable final agency action because the guidance "binds EEOC staff to an analytical method in conducting Title VII investigations and directs their decisions about which employers to refer for enforcement actions." 933 F.3d 433, 443 (5th Cir. 2019). In so holding, the court rejected the EEOC's argument that the guidance "'applies solely to how the EEOC conducts a preliminary, non-final step in the administrative process,' i.e., how it investigates a charge of discrimination and decides whether to issue a right-to-sue letter." *Id.* at 444. Finally, in *Natural Resources Defense Council v. EPA*, the District of Columbia Circuit found an EPA guidance document constituted reviewable final agency action because it removed the discretion of Regional Air Division Directors to refuse to accept state emission-control plans that did not comply with a specific EPA standard. 643 F.3d 311, 319–20 (D.C. Cir. 2011). The court concluded that "the Guidance binds EPA regional directors and thus qualifies as final agency action." *Id.*

Our finality determination is further supported by the fact that VA has sought, and received, *Auer* deference for its Manual provisions, i.e., deference to the agency's interpretations in the Manual of the agency's regulations. *See Mason v. Shinseki*, 743 F.3d 1370, 1374–75 (Fed. Cir. 2014); *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011); *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir.

2009).[13] Under *Bennett*, final agency action must constitute the "consummation of the agency's decisionmaking process . . . [and] must not be of a merely tentative or interlocutory nature." 520 U.S. at 178 (internal quotation marks omitted). The Supreme Court has similarly stated that *Auer* deference is only appropriate for regulatory interpretations "actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019). The granting of *Auer* deference to Manual provisions therefore shows "the requisite legal consequences for APA finality purposes." *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 644 (6th Cir. 2004).[14]

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[13] The Supreme Court has recognized the significance of other manuals by relying on them to interpret an agency's statutory obligations. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 385 (2003) (noting that the Social Security Administration's Program Operations Manual System's definitions of "legal process" were "not products of formal rulemaking, [but] they nevertheless warrant respect"); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 90–91,101–02 (1995) (finding that the Medicare Provider Reimbursement Manual was a valid interpretive rule and that "it was reasonable for the Secretary to follow that policy here to deny respondent's claim for full reimbursement of its defeasance loss").

[14] Indeed, Manual provisions have greater practical impact on other benefits cases than Board decisions, which are not binding in future cases and appear not to be entitled to *Auer* deference. *Kisor*, 139 S. Ct. at 2424 (stating that the Solicitor General suggested that *Auer* deference may not be appropriate for Board decisions because "all 100

Because the Knee Joint Stability Rule is an interpretive rule of general applicability and constitutes reviewable final agency action, we have jurisdiction over NOVA's petition for review under section 502.

IV. The Knee Replacement Rule

We now turn to the Knee Replacement Rule. NOVA has amended its petition for review to challenge both the 2015 Interpretive Guidance published in the Federal Register as well as the Knee Replacement Manual provision. This Rule, whether published in the Federal Register or in the Manual, would be reviewable under section 502 for the same reasons explained above for the Knee Joint Stability Rule. It constitutes an interpretive rule under section 552(a)(1).

However, the question is whether the Manual provision or the agency's earlier publication in the Federal Register is reviewable. The Manual provision is reviewable only if it makes a substantive change to the Rule and supersedes the Federal Register publication. It is not reviewable if it is merely a republication of the previous Federal Register Notice.

This is so because Manual provisions that merely republish prior agency interpretations or restate existing law need not be published under section 552(a)(1) and are not reviewable under section 502.[15] They also do not constitute

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or so members of the VA Board act individually" and their decisions have "no 'precedential value'").

[15] *See Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1351 (10th Cir. 1987) (finding that Housing and Urban Development memoranda did not need to be published in the Federal Register under section 552(a)(1) because they "merely reiterate the statutory and regulatory rule" already in place); *Stuart-James Co., Inc. v. S.E.C.*, 857 F.2d 796, 801 (D.C. Cir. 1988) (finding that the SEC

final agency action.[16]

We leave it to the merits panel to determine whether the Manual provision containing the Knee Replacement Rule merely reiterates the 2015 Interpretive Guidance or is independently a reviewable interpretive rule. However, since either the 2015 Interpretive Guidance or the Manual

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was not required to publish its interpretation of "unrealized profit" under section 552(a)(1) because the interpretation "merely explained an already existing regulation; it did not 'adopt new rules or substantially modify existing rules, regulations, or statutes.'" (quoting *Lewis v. Weinberger*, 415 F. Supp. 652, 659 (D.N.M.1976))); *Notaro v. Luther*, 800 F.2d 290, 291 (2d Cir. 1986) (concluding that a provision in a correctional facility training manual did not need to be published under section 552(a)(1) because it did not have a "substantive impact" and was in accord "with the Commission's regulations and past practices."); *D&W Food Ctrs., Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986) (holding under section 552(a)(1) that an interpretation is not "'of general applicability' if (1) only a clarification or explanation of existing laws is expressed, and (2) the interpretation results in no significant impact on any segment of the public."); *see also Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977) (finding that a provision in the Food Stamp Certification Handbook announced a change in agency practice and therefore needed to be published under section 552(a)(1)).

[16] *See Hyatt v. U.S. Patent & Trademark Office*, 904 F.3d 1361, 1372 (Fed. Cir. 2018); *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014) ("The APA makes reviewable 'final agency action.' . . . Because an agency's renewal of an earlier decision does not alter the status quo, it does not restart the statute of limitations.").

provision is reviewable under section 502, this court has jurisdiction over NOVA's amended petition.

V. Timeliness of NOVA's Challenge

Because we find that we have section 502 jurisdiction over NOVA's petition for review, we must determine whether NOVA's challenge is timely.

Section 502 "does not contain its own statute of limitations." *Preminger v. Sec'y of Veterans Affs.*, 517 F.3d 1299, 1307 (Fed. Cir. 2008). Under section 2401 of title 28 of the United States Code, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). In *Preminger*, this court held that the six-year statute of limitations in § 2401(a) applies to pre-enforcement challenges under 38 U.S.C. § 502. 517 F.3d at 1307. In reaching this conclusion, we noted that our sister circuits have consistently found that actions for judicial review under the APA are subject to the limitations period in section 2401(a). *Id.*

The government agrees that section 2401 applies to this case but argues that our local rule concurrently shortens the time to file a petition for review and "governs section 502 actions in tandem with section 2401(a)." Resp't Br. 51.

Local Rule 15(f) states that:

> A petition for judicial review of an action of the Secretary of the Department of Veterans Affairs under 38 U.S.C. § 502 must be filed with the clerk of court within sixty (60) days after issuance of the action challenged in the petition.

Fed. Cir. R. 15(f).

Preminger did not address the apparent conflict between the 60-day limitations period set by Federal Circuit Rule 15(f) and the six-year limitations period set by

Congress in section 2401(a). But, in earlier cases we have held that petitioners must comply with the 60-day limit in Federal Circuit Rule 47.12(a). *See, e.g.*, *Jackson v. Brown*, 55 F.3d 589, 592 (Fed. Cir. 1995) ("[A] request for Section 502 review in this court had to be filed within 60 days of the issuance" of the challenged VA action); *Samudio v. Sec'y, Dep't of Veterans Affairs*, 14 F.3d 612 (Table), 1993 WL 525463 (Fed. Cir. 1993) (unpublished); *Nuevas v. Sec'y of Dep't of Veterans Affairs*, 9 F.3d 977 (Table), 1993 WL 452676 (Fed. Cir. 1993) (unpublished).

Thus, the question before us is whether this court can promulgate rules setting a shorter limitations period than the applicable statutory limitations period set by Congress. This question has significance for this case. The 2015 Interpretive Guidance was published in the Federal Register on July 16, 2015, and the Knee Replacement Manual provision was promulgated in November 2016. The Knee Joint Stability Rule was promulgated in April 2018. Therefore, NOVA's petition for review was brought well within section 2401(a)'s six-year limitation period. However, NOVA's petition was brought long after this court's 60-day deadline had passed. NOVA's challenge is timely only if this court's rule is unenforceable as inconsistent with section 2401(a).

We find that 28 U.S.C. § 2401(a) alone governs the time limit for bringing pre-enforcement claims under Section 502. This court has power to promulgate rules for conducting court business. 28 U.S.C. § 2071(a). However, "[s]uch rules shall be consistent with Acts of Congress." *Id.* We are aware of no appellate decisions that have approved a local rule *either* expanding *or* limiting the time to file a claim where a statutory time limit applies.

The courts of appeals have uniformly rejected district court rules setting a time limit inconsistent with the Federal Rules of Civil Procedure. *See, e.g.*, *Paluch v. Sec'y Pa. Dep't Corr.*, 442 F. App'x 690, 692–93 (3d Cir. 2011)

(finding that district court's local rule could not impose a 14-day period to file a motion to alter or amend the judgment when Federal Rule of Civil Procedure 59(e) allowed 28 days to file such a motion); *Jackson v. Crosby*, 375 F.3d 1291, 1296 (11th Cir. 2004) (finding that a district courts local rule could not provide three extra days for filing a Rule 59 motion because this was inconsistent with Fed. R. Civ. P. Rule 6(b)'s "ban on extending the rule's ten-day limitations period"); *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 459 (3d Cir. 2000) (finding that a district court local rule permitting challenges to court costs within five days "after notice of such taxation" was "a nullity" "insofar as [it] conflicted with Rule 54(d)(1)").[17]

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[17] The government relies on cases declining to apply the six-year limitations period of section 2401(a) to Age Discrimination in Employment Act ("ADEA") claims to support its argument that "[c]ourts have rejected the contention that when section 2401(a) applies in the absence of a specific statutory time limit, it provides the only applicable time limit." Resp't Br. 52.

However, these cases relied on the logical inconsistency that would result from applying the six-year limitation period from section 2401(a) to ADEA claims against the federal government in light of the 90-day statutory limitation period provided for ADEA claims against a private employer. *See Price v. Bernanke*, 470 F.3d 384, 388 (D.C. Cir. 2006) (stating that applying section 2401 "would lead to the anomalous result that a 90-day statute of limitations would apply for claims brought against a private employer under the ADEA, . . . but a period of six years would apply for claims against the federal government"); *Edwards v. Shalala*, 64 F.3d 601, 605 (11th Cir. 1995) ("Further, it is inconsistent to suggest that Congress would allow a two to three year statute of limitations for a claim brought against a private employer, but provide a period up to six years for

In contexts other than that of court rules adopted under 28 U.S.C. § 2071, the Supreme Court has disallowed court departures from statutory limits. In *Bowles v. Russell*, the Supreme Court held that a district court order may not extend the jurisdictional time limit for filing a notice of appeal beyond the statutory time limit for filing such an appeal. 551 U.S. 205, 206–07 (2007) (finding that a petitioner's notice of appeal was untimely when filed within the 17-day period allowed by the district court's order but after the 14-day period allowed by Rule 4(a)(6) and 28 U.S.C § 2107(c)). And the Supreme Court has held that courts do not have authority to "jettison Congress' judgment on the timeliness of suit" by truncating a statutory limitations period. *Petrella v. Metro-Goldwyn-Mayer*, 572 U.S. 663, 667 (2014) (rejecting the application of laches to bar a copyright claim brought within the statutory limitations period); *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960–61 (2017) (holding that laches cannot be invoked as a defense against a claim for patent infringement damages brought within the 35 U.S.C. § 286 six-year limitations period); *id.* at 960 ("When Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief.").

The government seeks to distinguish *Petrella* and *SCA Hygiene* (and presumably the other cases as well) on the ground that they dealt with statutory time limits specific to a particular area of the law, while "section 2401(a) is not part of the VJRA and, therefore, does not 'reflect[] a

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claims brought against the government."); *Lavery v. Marsh*, 918 F.2d 1022, 1026–27 (1st Cir. 1990) ("'[I]t would indeed be anomalous to hold . . . that a federal catch-all provision governs with respect to ADEA claims when there are available other relevant statutory provisions more specifically geared to the claim brought.'").

congressional decision' concerning section 502 claims authorized by the VJRA." Resp't Br. 55. The government's argument is unavailing. Congress "kn[o]w[s] how to impose" a more limited statutory time limit on challenges to agency action "when it [chooses] to do so." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176–77 (1994); *see also State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016) ("Again, the FCA's structure shows that Congress knew how to draft the kind of statutory language that petitioner seeks to read into § 3730(b)(2)."); *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 394 (2015) ("As those examples show, Congress knew how to distinguish between regulations that had the force and effect of law and those that did not, but chose not to do so in Section 2302(b)(8)(A).").

For example, the Hobbs Act, which governs judicial review of actions by several agencies including the Federal Communication Commission, Department of Agriculture, and Department of Transportation, expressly includes a time limit on judicial review. *See* 28 U.S.C. § 2344 (providing a 60-day period for review of final agency orders under the Hobbs Act). Numerous other statutes similarly provide time limits for judicial review and depart from the six-year statute of limitations under section 2401. *See* 2 U.S.C. §1407(c)(3) (providing a 90-day deadline for challenges to final decision of the Office of Compliance); 7 U.S.C. § 2461 (providing a 60-day window for challenges to actions by the Secretary of Agriculture); 15 U.S.C. § 2060 (providing a 60-day window for challenging consumer product safety rules); 15 U.S.C. § 2618 (providing a 60-day period to challenge rules related to the control of toxic substances); 28 U.S.C. § 1296(b) (providing a 30-day deadline for review of actions of the Secretary of Labor); 30 U.S.C. § 1276(a)(1) (providing a 60-day period for review of certain Environmental Protection Agency actions related to coal mining); 33 U.S.C. § 2717(a) (providing a 90-day period of review for challenges to regulations

promulgated under the Oil Pollution Act of 1990); 41 U.S.C. § 7107(a)(1) (providing a 120-day deadline for challenges to decisions by the Board of Contract Appeals); 42 U.S.C. § 7607(b)(1) (providing a 60-day period for challenging Environmental Protection Agency action under the Clean Air Act).

The fact that Congress chose not to impose such a limit in section 502 is powerful evidence that Congress intended section 2401(a) to govern. *See, e.g.*, *Pinter v. Dahl*, 486 U.S. 622, 650 (1988) (finding that a statute's "failure to impose express liability for mere participation in unlawful sales transactions suggests that Congress did not intend that the section impose" this liability because, as shown by other statutes imposing this kind of liability, "[w]hen Congress wished to create such liability, it had little trouble doing so."); *see also Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1217 (11th Cir. 2015) ("Where Congress knows how to say something but chooses not to, its silence is controlling.").

The government also argues that Congress has approved of the "constraints imposed by Rule 15(f)," Resp't Br. 54, because a senate report to the Veterans' Benefits Improvement Act of 2008 acknowledged Rule 15(f)'s 60-day limit when discussing legislation allowing section 502 challenges to VA's schedule of ratings, *see* S. Rep. No. 110-449, at 14 (2008). However, this kind of offhand statement, made in connection with subsequent legislation, is not a reliable indicator of Congress's intent when drafting section 502. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote." (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring))).

Although Congress may wish to amend section 502 to incorporate a shorter time limit on bringing pre-enforcement claims, that decision is for Congress, and not this

court, to make. Rule 15(f)'s 60-day limit is invalid, and petitioner's petition is timely because it was filed within six years of the challenged agency action.

CONCLUSION

NOVA has associational standing to challenge both the Knee Joint Stability Rule and Knee Replacement Rule. This court has jurisdiction over NOVA's challenge to the Knee Joint Stability Rule under 38 U.S.C. § 502. We also have jurisdiction to review the Knee Replacement Rule. However, we refer to the panel whether the Rule is reviewable as a Manual provision or as a Federal Register publication. The challenged Rules constitute final agency action. Finally, we hold that Federal Circuit Rule 47.12(a), now republished at Rule 15(f), is invalid as inconsistent with 28 U.S.C. § 2401(a) and the petition is timely.

The petition for review is therefore granted, and the case is referred to a panel for disposition on the merits.

GRANTED

COSTS

No costs.

1 F.4th 1059
United States Court of Appeals, Federal Circuit.

Adolfo R. ARELLANO, Claimant-Appellant
v.
Denis MCDONOUGH, Secretary of Veterans Affairs, Respondent-Appellee

2020-1073
|
Decided: June 17, 2021

Synopsis

Background: Veteran filed suit challenging decision of Board of Veterans' Appeals, denying him earlier effective date for service connection for his schizoaffective disorder type with post-traumatic stress disorder (PTSD). The Court of Appeals for Veterans Claims, Michael P. Allen, J., 2019 WL 3294899, affirmed, upon determining that Board did not err in declining to toll operation of statute concerning effective dates of awards. Veteran appealed.

The Court of Appeals held that equitable tolling was not available to allow earlier effective date.

Affirmed.

Chen, Circuit Judge, joined by Moore, Chief Judge, Lourie, Prost, Taranto, and Hughes, Circuit Judges, filed opinion concurring in judgment.

Dyk, Circuit Judge, joined by Newman, O'Malley, Reyna, Wallach, and Stoll, Circuit Judges, filed opinion concurring in judgment.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

Appeal from the United States Court of Appeals for Veterans Claims in No. 18-3908, Judge Michael P. Allen.

Attorneys and Law Firms

James R. Barney, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, argued for claimant-appellant. Also represented by Alexander Edison Harding, Kelly Horn.

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Hannah Lauren Bedard, Kirkland & Ellis LLP, Washington, DC, for amicus curiae Charles J. Raybine. Also represented by William H. Burgess.

Paul Wright, Marietta, SC, as amicus curiae, pro se.

Before Moore, Chief Judge [*], Newman, Lourie, Dyk, Prost [**], O'Malley, Reyna, Wallach [***], Taranto, Chen, Hughes, and Stoll, Circuit Judges.

[*] Chief Judge Kimberly A. Moore assumed the position of Chief Judge on May 22, 2021.

[**] Circuit Judge Sharon Prost vacated the position of Chief Judge on May 21, 2021.

*** Circuit Judge Evan J. Wallach assumed senior status on May 31, 2021.

Opinion

Concurring opinion filed by Chen, Circuit Judge, in which Moore, Chief Judge, and Lourie, Prost, Taranto, and Hughes, Circuit Judges, join.

Concurring opinion filed by Dyk, Circuit Judge, in which Newman, O'Malley, Reyna, Wallach, and Stoll, Circuit Judges, join.

Per Curiam.

***1060** Upon consideration en banc, a unanimous court holds that equitable tolling is not available to afford Mr. Arellano an effective date earlier than the date his application for benefits was received.

The court is equally divided as to the reasons for its decision and as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1) in other circumstances. The effect of our decision is to leave in place our prior decision, *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), which held that principles of equitable tolling are not applicable to the time period in 38 U.S.C. § 5110(b)(1).

Accordingly, the judgment of the United States Court of Appeals for Veterans Claims is affirmed.

AFFIRMED

COSTS

No costs.

Chen, Circuit Judge, with whom Moore, Chief Judge, and Lourie, Prost, Taranto, and Hughes, Circuit Judges, join, concurring in the judgment.

By statute, the "effective date of an award" of disability compensation to a veteran "shall not be earlier than the date" the veteran's "application" for such compensation is received by the Department of Veterans Affairs (VA). 38 U.S.C. § 5110(a)(1). Section 5110(b)(1), however, provides an exception that permits an earlier effective date if the VA receives the application within one year of the veteran's discharge from military service: under such circumstances, the effective date of the award shall date back to "the day following the date of the veteran's discharge or release." *Id.* § 5110(b)(1). This case poses the question of whether, under an equitable-tolling theory, an award on an application received more than one year after the veteran's discharge date may still ***1061** be accorded an effective date of the day after discharge. Specifically, we consider whether the rebuttable presumption of equitable tolling for statutes of limitations established in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), applies to the one-year period in § 5110(b)(1).

This question arises from Adolfo R. Arellano's appeal from a decision of the Court of Appeals for Veterans Claims (Veterans Court) denying him an effective date earlier than the date his disability benefits application was received by the VA. Though Mr. Arellano filed his application more than 30 years after he was discharged from the Navy, he argues that § 5110(b)(1)'s one-year period should be equitably tolled in his case to afford his award an earlier effective date (and his compensation an earlier starting date) reaching back to the day after his discharge from service.

Mr. Arellano also urges us to overrule our prior decision in *Andrews v. Principi*, which held that § 5110(b)(1) is not a statute of limitations amenable to equitable tolling but merely establishes an effective date for the payment of benefits, thereby categorically foreclosing equitable tolling under this provision. 351 F.3d 1134, 1137–38 (Fed. Cir. 2003). Because this court sitting en banc is equally divided on this issue, our decision today does not alter our precedent that § 5110(b)(1) is not a statute of limitations to which *Irwin*'s presumption of equitable tolling applies. Accordingly, the Veterans Court's decision, which relies on *Andrews* to deny Mr. Arellano an earlier effective date under § 5110(b)(1), is affirmed.

Judge Dyk and five of our colleagues, however, would overturn *Andrews* and conclude that § 5110(b)(1) is a statute of limitations entitled to *Irwin*'s presumption. But their basis for affirming the Veterans Court's decision rests on deciding, in the first instance, that the facts of Mr. Arellano's case do not warrant equitable tolling. We disagree with this approach both in substance and process. Even if *Irwin*'s presumption were to somehow apply here, it would be rebutted by the

statutory text of § 5110, which evinces clear intent from Congress to foreclose equitable tolling of § 5110(b)(1)'s one-year period. Moreover, it is not our role as an appellate court to decide whether Mr. Arellano's factual circumstances warrant equitable tolling where no prior tribunal has considered the issue and no party has argued for such an outcome.

BACKGROUND

A

Congress has provided by statute for the payment of monetary benefits to veterans with disabilities arising from service. 38 U.S.C. § 1110. To obtain disability compensation, veterans must first file a claim with the VA. 38 U.S.C. § 5101(a)(1). With certain limited exceptions not relevant here, no compensation may be paid before such a claim is filed. *Id.* (with exceptions not applicable here, a "claim ... must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary"). The size of a veteran's disability compensation award is determined, in part, by the effective date assigned to his award—i.e., the date on which benefits begin to accrue. An earlier effective date means a greater accrual of benefits.

Section 5110 of Title 38 governs the effective date of VA benefits awards. Two of its provisions are at issue in this appeal. First, § 5110(a)(1) sets forth the default rule that the effective date of an award cannot be earlier than the date the VA ***1062** receives the veteran's application submitting a claim for that award:

> Unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

§ 5110(a)(1).[1] Accordingly, the natural consequence of § 5110(a)(1)'s default rule is that no disability compensation is payable for periods predating the VA's receipt of the application for benefits, "[u]nless specifically provided otherwise" by statute.

[1] No party has identified a material difference, for present purposes, between "claim" and "application," and the VA's regulations appear to use these terms interchangeably. *See*, *e.g.*, 38 C.F.R. § 3.1(p) (defining "claim" as "a written or electronic communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the [VA] submitted on an application form prescribed by the Secretary").

Section 5110 sets forth several exceptions to § 5110(a)(1)'s default rule, each providing for a retroactive effective date—that is, an effective date earlier than the date VA received the application—which, in turn, leads to a greater benefits award than under the default rule. *See* § 5110(b)–(n). Many of § 5110's exceptions pertain to specific circumstances that may delay the filing of an application for benefits. These include: discharge from the military, § 5110(b)(1); increase in the severity of a disability, § 5110(b)(3); the "permanent[ ] and total[ ] disab[ility]" of a veteran, § 5110(b)(4); death of a spouse, § 5110(d); and correction of military records, § 5110(i). Each of § 5110's enumerated exceptions, however, expressly limits the retroactivity of the effective date to one year. *See*, *e.g.*, § 5110(g) ("In no event shall [an] award or increase [under this paragraph] be retroactive for more than one year from the date of application therefor ....").

As relevant here, one of those enumerated exceptions—§ 5110(b)(1)—provides that a disability compensation award's effective date may date back to the day after a veteran's discharge if the application for such benefits is received within one year after discharge:

> The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within

> one year from such date of discharge or release.

§ 5110(b)(1).

On the face of the statute, then, the effective date for awards based on applications received more than one year after discharge (that do not otherwise fall within any of § 5110's other enumerated exceptions) "shall not be earlier than the date of receipt of application therefor." § 5110(a)(1). This appeal considers whether equitable tolling may apply to § 5110(b)(1)'s one-year period to permit an effective date reaching back to the day after the veteran's discharge from service, even though the application for that award was received more than one year after discharge.

The equitable-tolling doctrine, as traditionally understood, "permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.' " *See Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, —— U.S. ——, 137 S. Ct. 2042, 2050, 198 L.Ed.2d 584 (2017) (quoting ***1063** *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10, 134 S.Ct. 1224, 188 L.Ed.2d 200 (2014)). Such "extraordinary circumstances" include "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," but exclude "a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96, 111 S.Ct. 453 (footnote omitted). But before deciding whether the factual circumstances are extraordinary enough to justify equitable tolling, a court must first determine whether the statutory time limit at issue is one amenable to equitable tolling.

This court has previously addressed whether § 5110(b)(1)'s one-year period is subject to equitable tolling in *Andrews*. There, the claimant-appellant, Ms. Andrews, submitted a claim for disability compensation approximately fourteen months after her discharge from service. 351 F.3d at 1135. As a result, she was awarded compensation effective as of the date the VA received her claim. Ms. Andrews appealed that decision, arguing that § 5110(b)(1)'s one-year period should be equitably tolled for at least two months (on a failure-to-notify theory) to qualify her for an earlier effective date dating back to the day after discharge. We disagreed, holding that the "principles of equitable tolling ... are not applicable to the time period in § 5110(b)(1)." *Id.* at 1137. This follows, we explained, because § 5110(b)(1) "does not contain a statute of limitations, but merely indicates when benefits may begin and provides for an earlier date under certain limited circumstances." *Id.* at 1138. Unlike how a statute of limitations operates, this statutory provision "addresses the question of when benefits begin to accrue, not whether a veteran is entitled to benefits at all," and "[p]assage of the one-year period in § 5110(b)(1) ... does not foreclose payment for the veteran." *Id.* On that basis, we affirmed the denial of an earlier effective date for Ms. Andrews's claim.

B

We now turn to the facts of Mr. Arellano's appeal. Mr. Arellano served honorably in the Navy from November 1977 to October 1981. Nearly 30 years later, on June 3, 2011, the VA regional office (RO) received Mr. Arellano's claim for service-connected disability benefits for his psychiatric disorders. The RO granted service connection with a 100 percent disability rating for "schizoaffective disorder bipolar type with PTSD [post-traumatic stress disorder]." J.A. 506. The granted effective date of Mr. Arellano's award was the date his claim was received—i.e., June 3, 2011.

Mr. Arellano appealed his effective-date determination to the Board of Veterans' Appeals (Board), arguing that his mental illness had prevented him from filing his claim earlier. Mr. Arellano submitted, as support, a medical opinion by his psychiatrist indicating that he had been "100% disabled since 1980," when he was "almost crushed and swept overboard while working on the flight deck of [an] aircraft carrier." J.A. 529. Given his disability, Mr. Arellano argued that § 5110(b)(1)'s one-year period should be equitably tolled to qualify him for an effective date retroactive to the day after his discharge from the Navy. The Board rejected his equitable-tolling argument, and the Veterans Court affirmed that decision, concluding that Mr. Arellano's claim was "squarely foreclosed by binding precedent" in *Andrews*. *See Arellano v. Wilkie*, No. 18-3908, 2019 WL 3294899, at *2 (Vet. App. July 23, 2019).

Mr. Arellano then timely appealed to this court, and the case was heard before a panel on July 6, 2020. On August 5, 2020, we took the case *en banc* and entered a ***1064** *sua sponte* order directing the parties to brief the following issues:

> A. Does the rebuttable presumption of the availability of equitable tolling articulated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 [111 S.Ct. 453, 112 L.Ed.2d 435] (1990), apply to 38 U.S.C. § 5110(b)(1), and if so, is it necessary for the court to overrule *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003)?
>
> B. Assuming *Irwin*'s rebuttable presumption applies to § 5110(b)(1), has that presumption been rebutted?
>
> C. Assuming this court holds that *Irwin*'s rebuttable presumption applies to § 5110(b)(1), would such a holding extend to any additional provisions of § 5110, including but not limited to § 5110(a)(1)?
>
> D. To what extent have courts ruled on the availability of equitable tolling under statutes in other benefits programs that include timing provisions similar to § 5110?

Order Granting En Banc Review, No. 20-1073 (Aug. 5, 2020), ECF No. 45, at 2–3.

DISCUSSION

A

Our jurisdiction to review decisions of the Veterans Court is limited by statute. *See*38 U.S.C. § 7292. "The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." § 7292(d)(1). Because our review of this decision involves a question of statutory interpretation—namely, the availability of equitable tolling for a particular statutory provision—we have jurisdiction over this matter. We review questions of law, such as this one, de novo. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991).

Irwin sets forth the analytical framework that guides our decision. At issue there was whether a statute of limitations in a suit against the government was subject to equitable tolling. Specifically, the *Irwin* petitioner sought equitable tolling of 42 U.S.C. § 2000e-16(c)'s 30-day deadline for filing a Title VII civil action against the federal government in district court after receiving a right-to-sue notice from the Equal Employment Opportunity Commission (EEOC). While statutes of limitations in suits between private litigants are "customarily" subject to equitable tolling, an analogous presumption had not yet been established for suits against the government. *See Irwin*, 498 U.S. at 95, 111 S.Ct. 453. *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95–96, 111 S.Ct. 453. This case thus established a rule of general applicability for equitable tolling of statutes of limitations in suits against the government, with the caveat that "Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 96, 111 S.Ct. 453.

From this, we have understood the *Irwin* framework to consist of two steps. First, we must determine whether the rebuttable presumption of equitable tolling applies to the statutory provision at issue. And, if so, we must then determine whether that presumption has been rebutted—or in other words, whether there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply" to the statute. *See United States v. Brockamp*, 519 U.S. 347, 349–50, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997). We address each step of the analysis in turn.

B

Before determining whether *Irwin*'s presumption of equitable tolling applies to ***1065** § 5110(b)(1), we first elucidate our understanding of the presumption's origins and limits.

"Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). One such background principle is that "federal statutes of limitations are generally subject to equitable principles of tolling," *see Rotella v. Wood*, 528 U.S. 549, 560–61, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000), which is "a long-established feature of American jurisprudence derived from 'the old chancery rule,' " *Lozano*, 572 U.S. at 10–11, 134 S.Ct. 1224 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed.

743 (1946)). Justification for this principle comes from recognizing that tolling can be consistent with the purpose of a statute of limitations under certain circumstances. In other words, because a statute of limitations is designed "to encourage the plaintiff to pursue his rights diligently" after a cause of action has accrued, when an "extraordinary circumstance prevents him from bringing a timely action" despite his diligence, "the restriction imposed by the statute of limitations [no longer] further[s] the statute's purpose" and can be equitably tolled. *CTS Corp. v. Waldburger*, 573 U.S. 1, 10, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014) (cleaned up).

Given that "Congress must be presumed to draft limitations periods in light of this background principle," *Young v. United States*, 535 U.S. 43, 49–50, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002), courts have customarily "presume[d] that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute," *Lozano*, 572 U.S. at 11, 134 S.Ct. 1224. And while this practice began in lawsuits between private litigants, *Irwin* subsequently extended the presumption to suits against the government. 498 U.S. at 95–96, 111 S.Ct. 453 ("[T]he *same* rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." (emphasis added)); *see also id.* at 96, 111 S.Ct. 453 ("[I]t is evident that no more favorable tolling doctrine may be employed against the [g]overnment than is employed in suits between private litigants.").

Because the presumption serves as a proxy for the background legal principles that Congress is understood to legislate against, it follows that *Irwin*'s presumption is limited to only those statutory provisions that are established in common law as subject to equitable tolling—namely, statutes of limitations. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) ("[*Irwin*'s] presumption seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in the mine run of instances where it enacted a [g]overnment-related statute of limitations."). To that end, the Supreme Court has so far applied the presumption of equitable tolling *only* to statutory provisions that Congress clearly would have viewed as statutes of limitations. *See, e.g., Lozano*, 572 U.S. at 13–14, 134 S.Ct. 1224 ("[W]e have only applied [the] presumption [in favor of equitable tolling] to statutes of limitations."); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–95, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (holding that a limited filing period for EEOC charges is like a statute of limitations that is subject to waiver, estoppel, and equitable tolling). This comports with the understanding that equitable tolling "applies when there is a statute of limitations; it is, in effect, *a rule of interpretation tied to that limit*." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 681, 134 S.Ct. 1962, 188 L.Ed.2d 979 (2014) ***1066** (emphasis added); *see also Equitable Tolling*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "equitable tolling" as "[t]he doctrine that the *statute of limitations* will not bar a claim if ..." (emphasis added)); *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946) ("[E]quitable [tolling] is read into every federal statute of limitation."). Conversely, the Supreme Court has declined to presume that equitable tolling applies where the time limit at issue functions "*[u]nlike* a statute of limitations," *see Hallstrom v. Tillamook County*, 493 U.S. 20, 27, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989) (emphasis added), or lacks "a background principle of equitable tolling," *see Lozano*, 572 U.S. at 12, 134 S.Ct. 1224. *See also Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158–59, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (declining to presume that "an agency's internal appeal deadline" is subject to equitable tolling because the Supreme Court had "never applied the *Irwin* presumption to [such a provision]"). As these cases reflect, determining that Congress would have viewed a provision as a statute of limitations is a necessary first step in inferring congressional intent to permit equitable tolling of that provision. Accordingly, absent some other established background principle of law permitting equitable tolling for the statutory provision at issue, *Irwin*'s presumption applies only to those statutory provisions that Congress clearly would have viewed as statutes of limitations.

Our conclusion is supported not only by *Irwin*'s logic and the subsequent cases applying it, but also, by the limitations of the Appropriations Clause of the Constitution, art. I, § 9, cl. 7, on the payment of money from the public fisc contrary to the express terms of a statute. *See Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990). The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." As the Supreme Court explained in *Richmond*: "For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law;

in other words, the payment of money from the Treasury must be authorized by a statute." 496 U.S. at 424, 110 S.Ct. 2465.[2] Thus, where a plaintiff seeks to enlarge the monetary benefits awarded by the express terms of a statute through equitable tolling (as Mr. Arellano does here), we must decide whether Congress intended to authorize payment of those additional benefits via equitable tolling. This, in turn, necessarily implicates the question of whether Congress would have viewed the benefits provision at issue as a statute of limitations carrying the usual feature of equitable tolling.

2 That is not to say, however, that the Appropriations Clause bars all equitable tolling against the government for monetary claims. Instead, if "application of the doctrine [of equitable tolling] is consistent with Congress' intent in enacting a particular statutory scheme, [then] there is no justification for limiting the doctrine to cases that do not involve monetary relief." *See Bowen v. City of New York*, 476 U.S. 467, 479, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986).

Our analysis therefore begins by asking whether § 5110(b)(1)'s effective date provision is such a provision. As discussed below, and consistent with our reasoning in *Andrews*, § 5110(b)(1) is not a statute of limitations.

C

To determine whether § 5110(b)(1) is a statute of limitations, we consider whether ***1067** this provision satisfies the "functional characteristics" of such statutes. *Lozano*, 572 U.S. at 15 n.6, 134 S.Ct. 1224 ("[T]he determination [of] whether [a statutory provision] is a statute of limitations depends on its functional characteristics ...."). As explained below, § 5110(b)(1) does not have the functional characteristics of a statute of limitations. We see two reasons why Congress would not have thought that the provision belongs to that category of laws.

First, § 5110(b)(1) does not operate to bar a veteran's claim for benefits for a particular service-connected disability after one year has passed. Instead, like the general rule of § 5110(a)(1), it determines one of many elements of a benefits claim that affects the amount of a veteran's award but, unlike a statute of limitations, does not eliminate a veteran's ability to collect benefits for that very disability. Second, and relatedly, § 5110(b)(1) lacks features standard to the laws recognized as statutes of limitations with presumptive equitable tolling: its one-year period is not triggered by harm from the breach of a legal duty owed by the opposing party, and it does not start the clock on seeking a remedy for that breach from a separate remedial entity. *See* 1 Calvin W. Corman, LIMITATION OF ACTIONS, § 6.1, at 370 (1991). The statutory scheme governing veterans' benefits makes clear that the VA is not obligated to pay any benefits before a claim applying for such benefits is filed, so there is no duty, or breach of duty, at the onset of § 5110(b)(1)'s one-year period (i.e., the day after discharge). Moreover, no remedial authority separate from the VA is involved in an initial application for veterans' benefits.[3] The effective-date provision in this case, then, is of a sufficiently different character from that of statutes of limitations entitled to *Irwin*'s presumption. These marked differences undermine any inference that Congress would have viewed § 5110(b)(1) as falling within that ***1068** category of laws, so as to justify judicial override of Congress' express statutory limits on benefits payments. Below, we address these differences in function and characteristics in detail.

3 Judge Dyk contends that the need for a separate remedial authority is inconsistent with three cases purportedly establishing that "a statute governing the timeliness of a claim to an agency for payment from that agency is a statute of limitations." Dyk Op. 1089 (citing *United States v. Williams*, 514 U.S. 527, 534 & n.7, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995); *Colvin v. Sullivan*, 939 F.2d 153, 156 (4th Cir. 1991); and *Warren v. Off. of Pers. Mgmt.*, 407 F.3d 1309, 1316 (Fed. Cir. 2005)). None of these cases, however, addresses equitable tolling of such statutes, let alone holds that they are entitled to *Irwin*'s presumption. Instead, these cases merely use the phrase "statute of limitations" briefly in dicta as a colloquial expression for a statutory time limit. But as *Williams* readily demonstrates, the fleeting and casual use of this phrase in no way establishes that *Irwin*'s presumption applies to those time limits or that they can be equitably tolled.
Williams concerns the same statutory provision (26 U.S.C. § 6511) revisited two years later in

Brockamp. While equitable tolling was not at issue in *Williams*, *Brockamp* raised the question of whether § 6511 may be equitably tolled under *Irwin*. Rather than concluding that *Irwin*'s presumption applies, the Supreme Court carefully "assume[d] ... only for argument's sake" that § 6511's time limit was an *Irwin*-covered statute of limitations. *See Brockamp*, 519 U.S. at 349–50, 117 S.Ct. 849; *see also Auburn*, 568 U.S. at 159, 133 S.Ct. 817. And even under that assumption, the Court nonetheless concluded that Congress did not intend for equitable tolling to apply to § 6511's time limit. *Brockamp*, 519 U.S. at 350–54, 117 S.Ct. 849.

These cases, moreover, do not involve statutory provision functionally similar to § 5110(b)(1), or otherwise establish a background principle of law that would authorize a tribunal to override § 5110(b)(1)'s express statutory limits on monetary governmental benefits. And unlike an initial application for veterans' benefits, these cases implicate a preexisting duty to pay owed by the government. *Williams*, *Colvin*, and *Warren* therefore fail to establish that a tribunal may override, through equitable tolling, an indisputably applicable statutory limit on governmental monetary benefits.

1

A statute of limitations, simply put, is a "law that bars claims after a specified period." *Statute of Limitations*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Statutes of limitations are designed to encourage plaintiffs to pursue diligent prosecution of known claims," *Cal. Pub. Emps. Ret. Sys.*, 137 S. Ct. at 2049 (internal quotation marks omitted), by "prescrib[ing] a period within which certain rights ... may be enforced," *Young*, 535 U.S. at 47, 122 S.Ct. 1036. By barring stale claims, statutes of limitations "assure fairness to defendants" and "promote justice by preventing surprises through the revival of claims that have been allowed to slumber." *See Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965) (internal quotation marks omitted).

To determine whether the functional characteristics of a statute of limitations are met, the Supreme Court has focused the inquiry on whether the statute at issue encourages plaintiffs to promptly pursue their claims or risk losing remedies for those claims. In *Young*, for instance, the Court held that a statutory "three-year lookback period" for the IRS to collect overdue, unpaid taxes from a taxpayer in bankruptcy proceedings was a statute of limitations because it "encourages the IRS to protect its rights" by "collecting the debt or perfecting a tax lien—before three years have elapsed." 535 U.S. at 47, 122 S.Ct. 1036 (citations omitted). There, the relevant statute afforded the IRS certain "legal remedies" for collecting a tax debt accrued within three years before a debtor's bankruptcy petition filing: the tax debt is nondischargeable and the IRS's claim enjoys eighth priority [4] in bankruptcy. *Id.* at 47–48, 122 S.Ct. 1036. But if the IRS "sleeps on its rights" by failing to act within the three-year lookback period, then the IRS loses those "legal remedies" for collecting that debt. Specifically, "its claim loses priority and the debt becomes dischargeable" in bankruptcy, so that a bankruptcy decree will release the debtor from any obligation to pay and leave the IRS unable to collect on that debt. *Id.* The Court concluded that such a provision—which bars the IRS from recovering any tax debt accrued more than three years before bankruptcy proceedings begin—is a statute of limitations because it serves the "same basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* The Supreme Court also employed similar reasoning in *Zipes*, determining that the period for filing a charge of employment discrimination with the EEOC (a precondition to a federal-court action) operates as a statute of limitations given "its purpose [of] preventing the pressing of stale claims" and "giv[ing] prompt notice to the [defendant] employer"—the very "end[s] served by a statute of limitations." 455 U.S. at 394, 398, 102 S.Ct. 1127 (internal quotation marks omitted).

4 The bankruptcy priority scheme determines the order in which claims are paid. Claims with higher priority are entitled to payment in full before anything can be distributed to claims of lower rank. *See* 1 Richard I. Aaron, *Bankruptcy Law Fundamentals* § 8:10 (2020 ed.).

By contrast, *Lozano* considered a time limitation that did not function as a statute of limitations and was therefore

not subject ***1069** to equitable-tolling principles. There, the Supreme Court declined to apply the presumption of equitable tolling to a treaty provision that did not did not "establish[ ] any certainty about the respective rights of the parties" and, instead, addressed policy concerns irrelevant to the functioning of a statute of limitations. 572 U.S. at 14–15, 134 S.Ct. 1224. At issue was a Hague Convention provision requiring the return of a child abducted by a parent in a foreign country, so long as the left-behind parent requests return "within one year." 572 U.S. at 4, 134 S.Ct. 1224. After one year, the child must still be returned to the left-behind parent "*unless* it is demonstrated that the child is now settled." *Id*. at 15, 134 S.Ct. 1224 (emphasis added). Expiration of the one-year period thus "does not eliminate the remedy [for] the left-behind parent—namely, the return of the child" and, instead, merely "opens the door" to consider "the child's interest" as well as the parent's interest. *Id*. at 14–15, 134 S.Ct. 1224. Such a provision "is not a statute of limitations," the Court explained, because the "continued availability of the return remedy after one year preserves the possibility of relief for the left-behind parent and prevents repose for the abducting parent." *Id.* Moreover, the additional consideration of the child's interest is "not the sort of interest addressed by a statute of limitations."*Id.*; *see also In re Neff*, 824 F.3d 1181, 1186–87 (9th Cir. 2016) (holding that a statutory provision is not a statute of limitations because it does not serve the purposes of "repose, elimination of stale claims, and certainty" and, instead, addressed unrelated policy concerns). [5] The Court thus concluded that equitable tolling was unavailable for the treaty provision at issue.

5 In *Neff*, the statutory provision at issue foreclosed discharge in bankruptcy for debtors who improperly transferred property "within one year" of filing a bankruptcy petition. 824 F.3d at 1183. The Ninth Circuit concluded that such a provision is not a statute of limitations because it "is not designed to encourage a specific creditor to prosecute its claim promptly to avoid losing rights" and, in fact, "does not encourage (or require) a creditor to take any action at all." *Id.* at 1186. Moreover, the purpose of the statute—to deter and penalize dishonest debtors from "seeking to abuse the bankruptcy system"—concerned policy matters unrelated to "the sort of interest addressed by a statute of limitations." *Id.* at 1187 (citing *Lozano*, 572 U.S. at 15, 134 S.Ct. 1224).

Similarly, in *Hallstrom v. Tillamook County*, the Court determined that a provision requiring plaintiffs to give notice of alleged environmental violations to the relevant agency 60 days prior to commencing a civil action was not a statute of limitations subject to equitable modification. 493 U.S. at 27, 110 S.Ct. 304. The Court explained: "*Unlike* a statute of limitations, [the] 60-day notice provision is not triggered by the violation giving rise to the action." *Id.* (emphasis added). Instead, plaintiffs "have full control over the timing of their suit," as "they need only give notice to the appropriate [agency] and refrain from commencing their action for at least 60 days. *Id*. The 60-day notice period, therefore, did not encourage plaintiffs to diligently file claims or risk losing remedies for a violation.

Here, as in *Lozano* and *Hallstrom*, § 5110(b)(1)'s effective-date provision does not have the key "functional characteristics" that define a statute of limitations. Because a veteran seeking disability compensation "faces no time limit for filing a claim," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011), "[t]here is no statute of limitations" for filing such a claim, *Walters v. Nat'l Ass'n ofRadiation Survivors*, 473 U.S. 305, 311, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). The timing of *when* the claim is filed affects only an element of ***1070** the claim itself—the effective date—and not whether the veteran is entitled to benefits at all. *See Collaro v. West*, 136 F.3d 1304, 1308 (Fed. Cir. 1998) (explaining that "the effective date of the disability" is one of five elements to a veteran's application for benefits). A veteran is entitled to press the same claim for a specific service-connected disability regardless of whether the claim is filed within a year after discharge or 30 years after discharge, as was the case for Mr. Arellano. Section 5110(b)(1), like the treaty provision in *Lozano*, thus does not set forth any period after which a veteran is foreclosed from pressing that claim and receiving benefits if the claim is established.

The timing provision of § 5110(b)(1), in fact, does not function to bar stale claims or encourage the diligent prosecution of known claims. To the contrary, § 5110(b)(1) was adopted to "remove[ ] injustices where there is delay in filing [a] claim due to no fault of the veteran and payment could otherwise be made only from [the filing] date of [the] claim." *See* 89 Cong. Rec. A4026 (1943) (statement of Rep.

Rankin). Section 5110(b)(1)'s one-year grace period thus forgives a veteran's temporary *delay* in filing a claim in the immediate aftermath of a veteran's transition back to civilian life upon discharge from military service. This provision is itself an equitable exception provided by Congress to address injustices that may arise from § 5110(a)(1)'s default rule and, in that respect, speaks to policy concerns that are "not the sort of interest addressed by a statute of limitations." *See Lozano*, 572 U.S. at 15, 134 S.Ct. 1224. Given (1) the well-established understanding of what constitutes a statute of limitations, and (2) the nature of § 5110(b)(1)'s effective-date provision, § 5110(b)(1) does not satisfy the "functional characteristics" of a statute of limitations.

Mr. Arellano, in response, asserts that even if § 5110 preserves the possibility of prospective benefits for an ongoing disability regardless of when the claim is filed, a veteran will nonetheless lose out on retroactive benefits dating back to the day after discharge if his claim is not filed within one year of discharge. Section 5110(b)(1)'s one-year period therefore encourages veterans to diligently file their disability claims after discharge to protect their rights to retroactive benefits. He argues that § 5110(b)(1) is "similar" to the statutory-lookback periods for copyright and patent damages in *Petrella* and *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, —— U.S. ——, 137 S. Ct. 954, 197 L.Ed.2d 292 (2017), respectively, insofar as these statutes all "limit [the amount of] claimants' damages but not their ability to seek redress for an ongoing ... injury." Appellant's Supp. Reply Br. 10. We disagree.

This argument overlooks the distinction that § 5110(b)(1) establishes the effective date of a *single* benefits claim for an ongoing disability, whereas an ongoing course of infringement in *Petrella* and *SCA Hygiene* comprises a "series of discrete infringing acts," *each* of which is a distinct harm giving rise to an independent claim for relief that starts a new limitations period. *See Petrella*, 572 U.S. at 671–72, 134 S.Ct. 1962. The copyright damages statute states: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). As *Petrella* explains, this statute is subject to the "separate accrual rule"—that is, "when a defendant commits successive violations, the statute of limitations runs separately from each violation," such that each violation "gives rise to a *discrete 'claim'* that 'accrue[s]' at the time the wrong occurs." 572 U.S. at 671, 134 S.Ct. 1962 (alteration in original) (emphasis added). "In short, ***1071** *each* infringing act starts a new limitations period." *Id.* (emphasis added). Subsequently, in *SCA Hygiene*, the Supreme Court confirmed that the "same reasoning" from *Petrella* applies to the six-year lookback period in the patent damages statute, 35 U.S.C. § 286. As with copyright infringement, each individual act of patent infringement gives rise to a discrete claim that starts its own six-year limitations period for seeking a remedy for that act. *See* 1 Robert A. Matthews, Jr., Annotated Patent Digest § 9:2 (2021 ed.) (explaining that in a series of discrete infringing acts, "each act ... can constitute its own separate act of [patent] infringement"). The lookback periods for copyright and patent damages, therefore, function just as a traditional statute of limitations would to foreclose pressing of stale claims, while permitting timely claims to proceed.

By contrast, § 5110(b)(1)'s one-year grace period never bars a veteran's benefits claim regardless of when it was filed and, instead, establishes an element of the claim itself (i.e., the effective date of the award). *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (distinguishing an "essential element of a claim for relief" from a jurisdictional statutory limitation). Mr. Arellano, moreover, has not demonstrated that a single claim seeking benefits for a specific disability can comprise two discrete claims for retrospective and prospective benefits, each arising from a distinct injury that starts its own limitations period. Nor is there a basis for construing his claim in this manner, given that retrospective and prospective benefits arise from the same "five common elements" of a single benefits claim: "[1] status as a veteran, [2] existence of disability, [3] a connection between the veteran's service and the disability, [4] the degree of disability, and [5] the effective date of the disability." *See Collaro*, 136 F.3d at 1308. Thus, neither § 507(b)'s copyright limitations period nor § 286's patent limitations period support finding that § 5110(b)(1) functions as a statute of limitations amenable to equitable tolling.

Mr. Arellano next analogizes to *Young*'s three-year lookback period, arguing that § 5110(b)(1)—which bars only *retroactive* benefits predating the date the VA received his claim, but not *prospective* benefits beginning from the date the VA received his claim—is no less a statute of limitations than the lookback period in *Young*. We disagree. *Young*'s lookback period is a "limited statute of limitations" in the sense that it arises only in the situation when a tax debtor files a bankruptcy petition and bars certain "legal remedies" (i.e.,

priority and nondischargeability in bankruptcy) outside of the lookback period. *See*535 U.S. at 47–48, 122 S.Ct. 1036. But the Supreme Court concluded it was "a statute of limitations nonetheless" because any tax debt accrued more than three years before the date of the bankruptcy petition becomes fully dischargeable, leading to the "elimination of stale claims." *Id.* Expiration of the three-year lookback period therefore barred the entirety of the IRS's claim, just as a traditional statute of limitations would. *See id.* at 47, 122 S.Ct. 1036 (explaining that the lookback period functions as a statute of limitations by barring "[o]ld tax claims" falling outside the statutory period). Here, under § 5110(b)(1), disability compensation claims received within one year of discharge are afforded an earlier effective date that results in, at most, one year of retroactive benefits. But unlike *Young*'s lookback period, passage of this one-year period does not bar a veteran from attaining any effective date at all and, instead, bars only an effective date earlier than the date of receipt. The practical effect of § 5110(b)(1), then, is not to foreclose a veteran from all benefits but only ***1072** from those retroactive from the day his claim is received.

Mr. Arellano, however, offers the following variation on *Young*: instead of having only one tax year at issue, suppose that the Youngs owed tax debt from multiple years. The IRS would then be barred from recovering tax debt from the years outside the three-year lookback period but could still recover any of the debt from within that period. *See* Oral Arg. at 30:32–32:52. Under this hypothetical, Mr. Arellano contends, the lookback period merely affects the *amount* of relief the IRS would be entitled to recover but does not entirely bar the IRS from such relief, meaning that it is a "more limited statute of limitations, but a statute of limitations nonetheless." *See Young*, 535 U.S. at 48, 122 S.Ct. 1036. So too here, Mr. Arellano asserts, where filing a benefits claim after § 5110(b)(1)'s one-year grace period merely affects the amount of benefits awarded without barring the claim itself.

But this hypothetical is no different from the lookback periods in *Petrella* and *SCA Hygiene* and is distinguishable for the same reason: § 5110(b)(1) establishes the effective date of a *single* application for disability benefits, whereas each year of tax debt in Mr. Arellano's hypothetical corresponds to a *separate* IRS claim involving different facts and liabilities. *See*, *e.g.*, *Young*, 535 U.S. at 46, 122 S.Ct. 1036 (three-year lookback period applies to "claims" for unpaid taxes "for a *taxable year*" (emphasis added)). In other words, "[i]f the IRS has a claim for taxes for which the return was due within three years before the bankruptcy petition was filed," then the IRS's claim is protected and "nondischargeable in bankruptcy." *Id.* But if the claim is for unpaid taxes from a return due more than three years before the bankruptcy petition was filed, then that individual claim is lost and dischargeable in bankruptcy. Because the tax debt arising from each tax year constitutes its own distinct claim against a taxpayer, *Young*'s lookback period operates as any other statute of limitations would to bar stale claims arising from older tax years while providing remedies for timely claims. *See id.* at 49, 122 S.Ct. 1036 (the lookback period "define[s] *a subset of claims* eligible for certain remedies" when a tax debtor is in bankruptcy (emphasis added)). Accordingly, for the reasons discussed above, *Young*'s lookback period fails to demonstrate that § 5110(b)(1) functions as a statute of limitations.

2

Section 5110(b)(1) also differs from statutes of limitations in additional ways—namely, with respect to the onset of its one-year period and the remedial authority involved. These differences further undermine any inference that Congress must have viewed § 5110(b)(1) as a statute of limitations that would presumptively allow judicial override of express statutory limits on benefits payments under *Irwin*.

The "standard rule" is that a statute of limitations begins to run when the cause of action "accrues," i.e., when "the plaintiff has a 'complete and present cause of action.' " *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98, 61 S.Ct. 473, 85 L.Ed. 605 (1941)); *see also Wallace v. Kato*, 549 U.S. 384, 388, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). Unless Congress indicates otherwise, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201, 118 S.Ct. 542. The earliest opportunity for a plaintiff to sue under such circumstances is when the opposing ***1073** party has violated some duty owed to that plaintiff, such as contractual obligations or a duty of care. *See* 1 Calvin W. Corman, LIMITATION OF ACTIONS, § 6.1, at 370 (1991) ("The earliest opportunity for a complete and present cause of action is that moment when the plaintiff has suffered

a *legally recognizable harm* at the hands of the defendant, such as the time of contract breach or the commission of a tortious wrong." (emphasis added)). In *Bay Area Laundry*, for instance, the Supreme Court held that a cause of action against an employer that withdraws from a multiemployer pension plan is not complete, and therefore the statute of limitations does not run, until a demand for payment is made by the plan's trustees and rejected by that employer. 522 U.S. at 202, 118 S.Ct. 542. This follows, the Court explained, because "the statute makes clear that the withdrawing employer owes nothing *until* its plan demands payment," and absent such a demand, the employer has no duty of payment that could be violated to give rise to a cause of action. *See id.* (emphasis added).

As applied to the veterans' benefits context, the earliest point at which a veteran could have a "complete and present cause of action" is when the VA has failed to satisfy a legal duty owed to the veteran, such as when his claim for benefits has been wrongfully adjudicated or denied. In this vein, we have recognized that the 120-day time limit for a veteran to appeal an unsatisfactory Board decision to the Veterans Court is a statute of limitations to which *Irwin*'s presumption applies. *See Jaquay v. Principi*, 304 F.3d 1276, 1283 (Fed. Cir. 2002) (en banc) (citing *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc)). But the one-year period in § 5110(b)(1), beginning on the day after discharge from service, does not measure the time from harm caused by a breach of duty, or even from a breach of duty, to the filing of the claim. This, together with the fact that the claim is not made to a separate entity with authority to address an asserted breach, makes it unlikely that Congress conceived of this timing rule as a statute of limitations for *Irwin* purposes.

Indeed, in an initial application for disability compensation where § 5110 governs the effective-date determination, the VA has not yet violated any legal duty owed to the claimant that would trigger a statute of limitations to run. The statutory scheme governing veterans' benefits makes clear that the VA is not obligated to pay any benefits before a claim applying for such benefits is filed. In particular, § 5101(a)(1)(A) states that "a specific claim in the form prescribed by the Secretary ... *must* be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." § 5101(a)(1)(A) (emphasis added). This provision explains that the filing of a benefits claim must first occur for any benefits to accrue or be paid by the VA. The VA thus has no preexisting duty to award benefits, and a veteran has no corresponding right to receive such benefits, until after a claim applying for benefits is filed by the veteran with the VA. *See Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998) ("Section 5101(a) is a clause of general applicability and mandates that a claim must be filed in order for any type of benefit to accrue or be paid."), *cert. denied*, 525 U.S. 834, 119 S.Ct. 90, 142 L.Ed.2d 71 (1998); *McCay v. Brown*, 106 F.3d 1577, 1580 (Fed. Cir. 1997) (stating § 5101(a) requires that "a claim must be on file before benefits may be obtained"). Without a preexisting right, there can be no violation of that right for which a veteran would seek redress, which could then be barred if not pursued within a specified limitations period. *See* Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS 136–37 (William ***1074** N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *id.* at 137 (stating that it is wrong to "allow a primary right to be confused with a remedial right of action, which is a very different legal animal" and criticizing "confusion between a primary claim to a performance and a remedial capacity to invoke a sanction for nonperformance"). Section 5110(b)(1)'s effective-date provision, then, is of a different character than a statute of limitations because the filing of a benefits claim is not an action seeking a remedy for previously due, but wrongfully unpaid, benefits. *See Hallstrom*, 493 U.S. at 27, 110 S.Ct. 304 (holding that a statutory time limit is "[u]nlike a statute of limitations" because it is not "triggered by the violation giving rise to the action" and is therefore not subject to equitable modification and cure).

Logic also supports our conclusion that there is no cause of action, and therefore no statute of limitations that could be equitably tolled, until after a claimant files an initial claim for benefits and receives an unsatisfactory VA decision on that claim. A claimant seeking an increased benefits award, as Mr. Arellano does here, has no basis to maintain a suit against the VA until at least two events have transpired. He must first file an initial claim seeking benefits from the VA. And second, he must receive the VA's initial decision determining the amount of his award. Only then could that claimant have a cause of action against the VA if he disagrees with the amount of benefits awarded. *Cf. Bay Area Laundry*, 522 U.S. at 202, 118 S.Ct. 542 ("Absent a demand, even a willing employer cannot satisfy its payment obligation, for the withdrawing employer cannot determine, or pay, the amount of its debt until the plan has calculated that amount."). Yet if § 5110(b)(1) were a statute of limitations as Mr. Arellano and Judge Dyk contend,

a claimant would have a cause of action on the day after his discharge from service—before any claim for benefits has been filed and before the VA has made an initial determination on the claim with which the claimant could disagree. "Such a result is inconsistent with basic limitations principles," *id.* at 200, 118 S.Ct. 542, and we do not see how a statute of limitations could begin to run on the day after discharge.

Judge Dyk responds that this reasoning is inconsistent with "cases holding that a provision barring benefits for failure to file [a claim] within a prescribed period constitutes a statute of limitations, regardless of any alleged breach of duty by the government." Dyk Op. at 1088. He cites our decision in *Cloer v. Sec'y of Health & Hum. Servs.*, where we held that the Vaccine Act's 36-month deadline for filing a petition for compensation for a "vaccine-related injury" is a statute of limitations that begins to run on the date the first symptom or manifestation of onset of the injury claimed occurs. 654 F.3d 1322, 1340–44 (Fed. Cir. 2011) (en banc). The Vaccine Act's 36-month filing deadline, however, is easily distinguishable from § 5110(b)(1)'s effective date provision.

Unlike § 5110(b)(1), the Vaccine Act's filing deadline is phrased and functions as a traditional statute of limitations that *bars* a plaintiff from seeking relief from a tribunal once the specified time limit has passed. Specifically, 42 U.S.C. § 300aa-16(a)(2) recites: "if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." Nothing in this provision purports to affect the amount of compensation awarded on a successful petition. In contrast to § 5110(b)(1)'s effective date provision, ***1075** which does not bar a claimant from filing an application for benefits more than one year after discharge, § 300aa-16(a)(2) bars the filing of a petition for compensation after 36 months have passed since the "first symptom or manifestation of onset or of the significant aggravation" of claimant's vaccine-related injury. Section 300aa-16(a)(2) thus exhibits the functional characteristics germane to all statutes of limitations by encouraging claimants to promptly file a petition or risk losing remedies available under the Vaccine Act.

Moreover, in contrast to an initial application seeking veterans' benefits from the VA, the Vaccine Act's filing deadline arises in a context in which a plaintiff seeks redress in federal court for a *preexisting* duty owed by the defendant. Prior to the Act, a plaintiff injured by a vaccine could directly sue the vaccine's manufacturer in civil court, alleging harm caused by that manufacturer's breach of duty. But due to concerns that civil actions against vaccine manufacturers were unsustainably raising vaccine prices and driving manufacturers out of the market, Congress enacted the Vaccine Act to create a streamlined process to "stabilize the vaccine market and expedite compensation to injured parties." *Sebelius v. Cloer*, 569 U.S. 369, 372, 133 S.Ct. 1886, 185 L.Ed.2d 1003 (2013) (citing H.R. Rep. No. 99-908, at 4 (1986)). Payments awarded under the Act are funded by the vaccine manufacturers themselves through an excise tax levied on each dose of vaccine. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 239–40, 131 S.Ct. 1068, 179 L.Ed.2d 1 (2011); H.R. Rep. No. 99-908, at 34 (excise tax on vaccine manufacturers are intended to "generate sufficient annual income for the Fund to cover all costs of compensation"). However, the government (specifically, the Secretary of Health and Human Services) administers the program and, in doing so, assumes the preexisting legal duty owed to a claimant who has suffered a vaccine-related injury. *See*42 U.S.C. § 300aa-12(b)(1) ("In all proceedings brought by the filing of a petition under [§] 300aa-11(b) of this title, the Secretary shall be named as the respondent, shall participate, and shall be represented.").

While the Vaccine Act eases certain evidentiary burdens by not requiring claimants to prove "wrongdoing by the manufacturer" or causation for on-Table injuries, *see*H.R. Rep. 99-908, at 12 (1986), initiating a Vaccine Act proceeding bears substantial similarities to initiating a civil action governed by a statute of limitations. Both require an injured party to seek—within a statutory time period—a remedy before a federal court predicated on a legal duty owed by another. Just as a plaintiff initiates a civil action by serving the defendant and timely filing a complaint in court, "[a] proceeding for compensation under [the Vaccine Act] shall be initiated by service upon the Secretary and the filing of a petition ... with the United States Court of Federal Claims" within 36 months of the first symptom or manifestation of vaccine-related injury. *See*42 U.S.C. § 300aa–11(a)(1). Nothing in this initiation process speaks to the administrative context in which § 5110(b)(1) operates, wherein a claimant files an initial application with the VA seeking an award of monetary benefits from that agency, such that the application's

date of receipt determines (in part) the total amount of benefits awarded.

Our understanding of the functional distinction between § 5110(b)(1)'s effective-date provision and a statute of limitations is further confirmed by observing that "the *creation of a right* is distinct from the provision of *remedies for violations* of that right." *See* ***1076** *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (emphasis added). A statute of limitations pertains to the latter, but not the former, by establishing a period for a veteran to seek a remedy for the violation of a right to benefits. Section 5110(b)(1)'s effective-date provision, on the other hand, is an element of the veteran's claim seeking benefits that pertains to the creation of a right to benefits but not to the remedies for violations of that right. *Cf. Cloer*, 654 F.3d at 1335 (explaining that § 300aa-11(c)(1)(D)(i)'s requirement a claimant suffer the effects of a vaccine-related injury for "more than 6 months after the administration of the vaccine" is "a condition precedent to filing a petition for compensation" that "is intended to restrict eligibility to the compensation program, not to act as a statutory tolling mechanism for the [36-month] statute of limitations"). Accordingly, § 5110(b)(1), which establishes the effective date of a claim whose filing is necessary "for benefits to be paid or furnished" by the VA, is not a statute of limitations because it pertains only to the creation of the right to be paid benefits, and not to the provision of remedies for violations of that right. For this reason, too, Congress would not have viewed § 5110(b)(1) as a statute of limitations.

D

Having determined that Congress would not have viewed § 5110(b)(1) as a statute of limitations, we are left to consider whether some other background principle of law supports applying *Irwin*'s presumption of equitable tolling to § 5110(b)(1)'s effective-date provision. We see nothing in the cases identified by Mr. Arellano and Judge Dyk that would establish any such principle of law.

1

We are unaware of any case that applies *Irwin*'s presumption to a statutory provision functionally similar to § 5110(b)(1)—namely, one that does not encourage the diligent prosecution of a claim by barring a claimant from seeking relief after the statutory period elapses and, instead, establishes an element of the claim itself. Instead, cases applying *Irwin*'s presumption have all involved a time limit that functions as a statute of limitations by foreclosing a plaintiff from seeking relief once that time has passed. *See*, *e.g.*, *United States v. Kwai Fun Wong*, 575 U.S. 402, 135 S. Ct. 1625, 191 L.Ed.2d 533 (2015) (two-year time limit for bringing a tort claim against the government); *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (one-year period for filing a petition for federal habeas relief); *Scarborough v. Principi*, 541 U.S. 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004) (30-day deadline for filing an application for attorney's fees under the Equal Access to Justice Act); *Bailey*, 160 F.3d at 1363–64 (120-day time limit to file notice of appeal with the Veterans Court); *Cloer*, 654 F.3d at 1341–42 (36-month deadline to file a petition under the Vaccine Act).

Mr. Arellano and Judge Dyk point to a statute governing Social Security disability insurance benefits, 42 U.S.C. § 423(b), which states: "An individual who would have been entitled to a disability insurance benefit for any month had he filed application therefor before the end of such month shall be entitled to such benefit if such application is filed before the end of the 12th month immediately succeeding such month." In other words, this provision provides that qualifying claimants may receive retroactive benefits up to a year prior to the date of application. But as Mr. Arellano and amici concede, courts have so far *declined* to find equitable exceptions available for this statutory period. *See* Appellant's Suppl. Br. 45–49; Military-Veterans ***1077** Advocates Amicus Br. 8; *see also Shepherd ex rel. Shepherd v. Chater*, 932 F. Supp. 1314, 1318 (D. Utah 1996) ("Courts have uniformly refused to find equitable exceptions to the statutory limit on retroactive benefits."). Moreover, several cases explain that "filing [an application within § 423(b)'s one year period] is a substantive condition of eligibility" for retroactive Social Security benefits, rather than a statute of limitations that may be equitable tolled. *See Yeiter v. Sec'y of Health & Hum. Servs.*, 818 F.2d 8, 10 (6th Cir. 1987) (explaining that appellant was not entitled to retroactive benefits from an earlier date because she had not filed an application within 12 months of that date, and "filing is a substantive condition of eligibility"); *Sweeney v. Sec'y of*

Health, Ed. & Welfare, 379 F. Supp. 1098, 1100 (E.D.N.Y. 1974) (declining to apply equitable exceptions based on physical disability to award retroactive benefits because "the filing of an application [is] a condition precedent to payment of benefits"). While courts have yet to analyze the availability of equitable tolling for this statute under the *Irwin* framework, neither Mr. Arellano nor amici argue that *Irwin* compels a different result. *See* Military-Veterans Advocates Amicus Br. 10 ("Nonetheless, the reasoning of these courts points toward the conclusion that *Irwin*'s presumption of equitable tolling would be rebutted in the context of retroactive Social Security benefits under §§ 402(j) and 423.").

Judge Dyk nonetheless contends that § 423(b) is not only a "statute of limitations," but that its approach to claims involving retroactive benefits is "not unusual" in government benefit programs, which purportedly "often" permit claimants to recover future benefits while establishing a statute of limitations for past benefits. *See* Dyk Op. at 1089–90. He cites a single district court case for this proposition, *see Begley v. Weinberger*, 400 F. Supp. 901, 911 (S.D. Ohio 1975), which merely opines in passing that § 423(b) is a "statute of limitations" for "retroactive disability insurance benefits." *Begley*, however, does not discuss equitable tolling, and its holding does not rely on its characterization of § 423(b) as a statute of limitations. In the 46 years since *Begley* was decided, no opinion has cited it for the proposition that § 423(b) is a statute of limitations, until Judge Dyk's opinion in this appeal. Nor are we aware of any other case characterizing § 423(b) as a "statute of limitations." Section 423(b) thus fails to establish a background principle of equitable tolling applicable to § 5110(b)(1). [6]

6 If § 423(b) were deemed a statute of limitations, as Judge Dyk contends, such a determination would be a trailblazing event, making equitable tolling potentially available (absent congressional intent otherwise) in large swaths of Social Security cases involving retroactive benefits, contrary to what courts had uniformly held pre-*Irwin*. Even more troubling is Judge Dyk's assertion that government benefits programs "often" include "statutes of limitations" for retroactive benefits. If this too is accurate, then the ramification of his reasoning is that equitable tolling could potentially apply to many, if not all, of those statutes (assuming *Irwin*'s presumption has not been rebutted), thereby opening the door for retroactive benefits in numerous different statutory schemes.

Mr. Arellano responds that a background principle of law applying equitable tolling to functionally similar statutes is not necessary for *Irwin*'s presumption to apply to § 5110(b)(1). Appellant's Reply Br. 13–14. He contends that *Scarborough* expressly rejected any such requirement by explaining that "it is hardly clear *Irwin* demands a precise private analogue," especially in "matters such as the administration of benefits programs." 541 U.S. at 422, 124 S.Ct. 1856; *see also id.* ("Because many statutes that create claims for relief against the United States or its agencies apply *only* to Government defendants, ***1078** *Irwin*'s reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent." (emphasis added)). But seeking a background principle of law that demonstrates equitable tolling is not exclusive to statutes of limitations is a far cry from requiring a "precise private analogue." *Scarborough* itself is instructive on this point. There, the Supreme Court considered whether a timely application for attorneys' fees under the Equal Access to Justice Act (EAJA) may be amended after the 30-day filing deadline expired to cure a defect in the application. The Court held that a curative amendment should be allowed based on the "relation back" doctrine, which permits a later amendment to relate back to the day of the original filing under certain circumstances. In doing so, the Court rejected an argument that the relation back doctrine is limited to its codification in the Federal Rules of Civil Procedure, which governs only amended district court "pleadings" and not EAJA fee applications. *See id.* at 417–18, 124 S.Ct. 1856. While not requiring "a precise private [litigation] analogue," the Court observed that (1) it had previously applied the relation back doctrine in "analogous settings" to fee applications; and (2) the doctrine itself predated the Federal Rules and had "its roots in [the] former federal equity practice" of the courts. *Id.* at 417–18, 124 S.Ct. 1856. Rather than rejecting the requirement for a background principle of law, the Court's application of the relation back doctrine in the context of an EAJA fee application was premised on just such a principle —namely, the historical practice of the relation back doctrine outside the limited context of district court pleadings. Here, however, courts have applied the presumption of equitable tolling only to statutes of limitations that run once a cause of

action accrues, and Mr. Arellano has not identified a case or background principle of law demonstrating otherwise.

2

The language and administrative context of § 5110(b)(1), moreover, are unlike that of any statute of limitations we have seen. Neither *Irwin*, nor any of the cases in this line, considered a statute of limitations having "effective date" language. At the same time, § 5110(b)(1) does not use the typical statute-of-limitations language establishing when a plaintiff must file an action against a defendant in a tribunal or else lose the claim—the setting addressed by all statutory provisions treated as statutes of limitation in the *Irwin* line.

Section 5110(b)(1) instead addresses a structurally distinct setting—i.e., filing an initial claim with a federal agency to obtain monetary benefits from that agency, wherein the claim's receipt date determines the amount of awardable benefits but not whether the claim is barred. Unlike the traditional context in which a statute of limitations operates, the relevant "defendant" and "tribunal" for § 5110(b)(1) are one and the same (the VA), and the "defendant" has yet to violate any legal duty owed to the claimant that would give rise to a cause of action. While Judge Dyk asserts that the Supreme Court and several circuits have found equitable tolling applicable to "time requirements in administrative agency proceedings," *see* Dyk Op. at 1087, none of the cases he cites address the type of agency proceedings relevant here. These cases instead involve filing deadlines for administrative complaints, which address the same structural setting as any statute of limitations, wherein a complainant seeking redress for a respondent's breach of duty before an independent tribunal. *Cloer*, as previously explained, involved a deadline for filing a petition before a federal court and not an ***1079** agency. *See*42 U.S.C. § 300aa–11(a)(1). This deadline is effectively no different than a traditional statute of limitations that establishes a period in which a plaintiff may sue a government defendant in federal court. Similarly, *Zipes*, *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996), and *Farris v. Shinseki*, 660 F.3d 557, 563 (1st Cir. 2011), which all relate to the deadline for filing a charge of discrimination with the EEOC, address a setting in which an injured complainant seeks redress before a separate entity (the EEOC) with the authority to address the asserted breach of duty by the employer, whether through adjudication, enforcement, or lesser measures. Thus, none of these cases speak to filing an initial claim with a federal agency to obtain monetary benefits from that agency, and we are unaware of any case holding that a provision with language or operational context similar to § 5110(b)(1) is a statute of limitations.

Section 5110(b)(1), for these additional reasons, would not have looked like a statute of limitations to Congress, meaning we cannot presume that Congress intended for this provision to carry the default feature of equitable tolling. The effective-date provision is therefore not a statute of limitations but merely determines the starting date for the right to payment on a veteran's benefits claim. Because no background principle of law establishes that we may equitably toll such a statutory provision, *Irwin*'s presumption is inapplicable to § 5110(b)(1)'s effective date provision. Our reasoning here is consistent with *Andrews*' longstanding holding that principles of equitable tolling are inapplicable to the one-year period in § 5110(b)(1), *see*351 F.3d at 1137–38, our equally divided court today leaves that holding undisturbed.

E

Although § 5110(b)(1) is not a statute of limitations amenable to equitable tolling, even if *Irwin*'s presumption were to apply, equitable tolling would nonetheless be unavailable because it is "inconsistent with the text of the relevant statute." *Young*, 535 U.S. at 49, 122 S.Ct. 1036 (quoting *United States v. Beggerly*, 524 U.S. 38, 48, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998)). "[T]he word 'rebuttable' means that the presumption is not conclusive," and "[s]pecific statutory language, for example, could rebut the presumption by demonstrating Congress' intent to the contrary." *John R. Sand & Gravel Co.*, 552 U.S. at 137–38, 128 S.Ct. 750. Here, *Irwin*'s presumption—were it to apply—would be rebutted by Congress' highly detailed statutory scheme dictating specific legislative choices for when a veteran's claim may enjoy an effective date earlier than the date it was received by the VA.

There are several ways to rebut the presumption of equitable tolling, all of which seek to answer *Irwin*'s "negatively phrased question: "Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to

apply?" *See Brockamp*, 519 U.S. at 350, 117 S.Ct. 849. One way "is to show that Congress made the time bar at issue jurisdictional." *Kwai Fun Wong*, 135 S. Ct. at 1631. Another way is to demonstrate that the statutory text precludes equitable tolling. *See Brockamp*, 519 U.S. at 352, 117 S.Ct. 849; *Beggerly*, 524 U.S. at 48, 118 S.Ct. 1862. Additionally, the statutory history and administrative context can demonstrate that Congress did not intend for equitable tolling to apply. *See Auburn*, 568 U.S. at 159–60, 133 S.Ct. 817. We address each in turn.

Neither party here argues that § 5110(b)(1)'s effective-date provision is jurisdictional. *See* Appellant's Supp. Br. 24–28; Appellee's Supp. Br. 57–60. And for good reason. Nothing in § 5110 purports to ***1080** define a tribunal's jurisdiction, and the filing of a benefits claim more than one year after discharge does not deprive any tribunal of jurisdiction to adjudicate that claim. *Cf. Henderson*, 562 U.S. at 438, 131 S.Ct. 1197 (finding no clear indication that Congress intended for § 7266(a)'s 120-day filing deadline for Veterans Court appeals to be jurisdictional where the statute "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the Veterans Court" (cleaned up)). Filing a claim more than a year after discharge merely means that a provision of § 5110 other than § 5110(b)(1) governs the claim's effective date.

But concluding that § 5110(b)(1)'s effective date provision is nonjurisdictional does not end our inquiry because "Congress may preclude equitable tolling of even a nonjurisdictional statute of limitations." *See Kwai Fun Wong*, 135 S. Ct. at 1631 n.2; *see also Auburn*, 568 U.S. at 149, 133 S.Ct. 817 (holding that "the presumption in favor of equitable tolling does not apply" to a nonjurisdictional agency appeal deadline given the statutory history and administrative context); *Nutraceutical Corp. v. Lambert*, —— U.S. ——, 139 S. Ct. 710, 714, 203 L.Ed.2d 43 (2019) (the mere fact that a statutory provision "lacks jurisdictional force ... does not render it malleable in every respect," for such provisions may nonetheless be "mandatory" and "not susceptible [to] equitable [tolling]"). "Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the *text* of the rule leaves room for such flexibility." *Id.* (emphasis added). We therefore look to the statutory text to discern whether Congress intended to displace the general availability of equitable tolling with its own preferred regime of concrete deadlines.

Section 5110 begins with the default rule: "*Unless specifically provided otherwise in this chapter*, the effective date of an award ... shall not be earlier than the date of receipt of application therefor." § 5110(a)(1) (emphasis added). Section 5110(a)(1), together with § 5101(a)'s requirement that a claim "must be filed in order for benefits to be paid or furnished," establishes the baseline rule that no benefits may accrue or be awarded before a claim asserting the right to such benefits is filed, "unless specifically provided" for by statute. Section 5110 then proceeds to list more than a dozen detailed exceptions to the default rule that permit an earlier effective date and, as a result, additional benefits accruing up to one year before the VA receives the claim. Section 5110(b)(1)'s day-after-discharge provision is one such enumerated exception. By mandating that any exception to the default rule must be provided for "specifically" and "in this chapter," the most natural reading of § 5110 is that Congress implicitly intended to preclude the general availability of equitable tolling by explicitly including a more limited, specific selection of equitable circumstances under which a veteran is entitled to an earlier effective date and specifying the temporal extent of the exceptions for those circumstances. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001). In other words, the text of § 5110 makes clear that Congress did not intend for the VA or the courts to create additional exceptions other than those choices it "specifically provided" in the statute. Because none of § 5110's specifically enumerated exceptions, nor any other provision "of this chapter," provide for equitable tolling of § 5110(b)(1)'s one-year period, such tolling is unavailable as it is not "specifically provided" for "in this chapter."

Mr. Arellano and Judge Dyk respond that courts have construed statutory language far more imperative than that of § 5110(a)(1) to permit equitable tolling. ***1081** Specifically, they rely on *Kwai Fun Wong*'s analysis of the Federal Tort Claims Act, which states that "[a] tort claim against the United States *shall be forever barred* unless it is presented [to the agency] within two years ... or unless action is begun within six months."28 U.S.C. § 2401(b) (emphasis added). There, the Supreme Court held that the phrase "shall be forever barred," though "mandatory" and "emphatic," did not render the filing deadline at issue jurisdictional and foreclosed from equitable tolling. *Kwai FunWong*, 135 S. Ct. at 1632–33. But this argument misses the mark. *Kwai Fun Wong* stands for the unremarkable proposition that *Irwin*'s presumption is not rebutted merely because the statutory text "reads like an

ordinary, run-of-the-mill statute of limitations" to bar relief unless a claim is brought within a specified amount of time. *Id.* at 1633 (quoting *Holland*, 560 U.S. at 647, 130 S.Ct. 2549). Holding otherwise would have effectively eviscerated *Irwin*'s presumption because, as the Court explained, most statutes of limitations are framed in that manner. *Id.* at 1632. The Court clarified that "Congress must do something special, beyond setting an exception-free deadline," to prohibit a court from equitably tolling the deadline. *Id.* Congress did just that here: not only is § 5110(b)(1)'s one-year period itself an exception to the default effective-date rule, § 5110 further provides numerous other detailed, technical exceptions to the default effective-date rule, thereby creating a catalog of congressional choices that foreclose courts from recognizing any additional, unwritten exceptions.

Indeed, § 5110's enumeration of a wide range of specific exceptions to the default rule hews closer to the "highly detailed" and "technical" exceptions that foreclosed equitable tolling in *Brockamp* than to *Kwai Fun Wong*'s "fairly simple language [that] can often [be] plausibly read as containing an implied 'equitable tolling' exception." *Brockamp*, 519 U.S. at 350, 117 S.Ct. 849. At issue in *Brockamp* was a statute reciting time limits for taxpayers to file tax refund claims. Just as with § 5110, the *Brockamp* statute provided a default rule with "basic time limits" for filing such claims, followed by "very specific exceptions" establishing "special time limit rules" for certain claims relating to precise circumstances ("operating losses, credit carrybacks, foreign taxes, self-employment taxes, worthless securities, and bad debts"). *Id.* at 351–52, 117 S.Ct. 849. The Court concluded that the statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate ... that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote," thereby rebutting the presumption of equitable tolling. *Id.* at 352, 117 S.Ct. 849. The same reasoning applies here, where Congress has explicitly provided more than a dozen detailed exceptions to § 5110(a)(1)'s default rule prohibiting an effective date earlier than the date of receipt. And "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *TRW*, 534 U.S. at 28, 122 S.Ct. 441 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980))[7]; *see also* ***1082** *Rotkiske v. Klemm*, —— U.S. ——, 140 S. Ct. 355, 360–61, 205 L.Ed.2d 291 (2019) ("[i]t is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts" because doing so "is not a construction of a statute, but, in effect, an enlargement of it by the court" (internal quotation marks omitted)).

7 Mr. Arellano also argues that the principle of statutory construction quoted from *TRW* applies only where it would render one of those exceptions insignificant or superfluous. *E.g.*, Appellant's Supp. Reply Br. 21–22. But while that principle may be strongest in such a case, it is clearly instructive even where no exception would be effectively read out of the statute. *See Andrus*, 446 U.S. at 616–17, 100 S.Ct. 1905 (declining to recognize an additional exception where statute recites explicitly enumerated exceptions to a general prohibition, even where no other exception would be rendered superfluous by the addition); *United States v. Smith*, 499 U.S. 160, 166, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991) (same).

The implication that § 5110's explicitly enumerated exceptions preclude the judicial recognition of additional equitable exceptions can, of course, be overcome by "contrary legislative intent." *See TRW*, 534 U.S. at 28, 122 S.Ct. 441 (quoting *Andrus*, 446 U.S. at 616–17, 100 S.Ct. 1905). But we see nothing in the statutory text, structure, or history that persuades us that such an intent exists for § 5110. To the contrary, § 5110's enumerated exceptions confirm that Congress has already considered which equitable considerations may provide a retroactive effective date and declined to provide the relief Mr. Arellano seeks. These exceptions cover specific circumstances beyond the veteran's control that may delay the filing of a claim, such as: discharge from the military, § 5110(b)(1); increase in the severity of a disability, § 5110(b)(3); the "permanent[ ] and total[ ] disab[ility]" of a veteran, § 5110(b)(4); death of a spouse, § 5110(d); and correction of military records, § 5110(i).[8]

8 Though several of § 5110's enumerated exceptions address equitable circumstances in which the filing of a claim may be delayed, Judge Dyk nonetheless contends that no provision of § 5110 other than §

> 5110(b)(4) "speak[s] to equitable tolling," and § 5110(b)(4) alone "can hardly be read as evincing a desire by Congress to eliminate equitable tolling" generally as to disability compensation. Dyk Op. at 1094. He does not explain why, if retroactive effective date provisions are statutes of limitations (as he insists), provisions analogous to § 5110(b)(4) that permit an earlier effective date when a claimant delays filing a claim due to the death of a spouse or parent, an increase in disability severity, or even discharge from military service do not likewise "speak to equitable tolling." Judge Dyk appears to argue that *Irwin*'s presumption may not be rebutted unless a statute explicitly references more than one circumstance for which courts have traditionally permitted equitable tolling (e.g., defective pleadings, deception through defendant's misconduct, severe disability) but cites no support for such a proposition. Nor would the enumerated exceptions in *Brockamp* satisfy his heightened standard for rebutting *Irwin*'s presumption.

More importantly, § 5110(b)(4) addresses the precise circumstances that prevented Mr. Arellano—a "veteran who is permanently and totally disabled"—from filing his claim earlier, but in the context of disability *pension*, *see* 38 U.S.C. ch. 15, and not the disability compensation at issue here, *id.*, ch. 11. Section 5110(b)(4) provides a one-year grace period for disability pension filings by a permanently and totally disabled veteran who was "prevented by a disability from applying for disability pension for a period of at least 30 days beginning on the date on which the veteran became permanently and totally disabled." This provision demonstrates that Congress considered the very circumstances that delayed Mr. Arellano from filing a claim and nonetheless declined to afford equitable relief beyond what was already provided in § 5110(b)(1). It is not our role as a court to second-guess Congress' judgment as to when such equitable exceptions are warranted. To decide otherwise would amount to "[a]textual judicial supplementation," which "is particularly inappropriate when, as here, Congress has ***1083** shown that it knows how to adopt the omitted language or provision" that would equitably toll § 5110(b)(1) for permanently and totally disabled veterans. *See Rotkiske*, 140 S. Ct. at 361; *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 578, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006) ("A familiar principle of statutory construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). We therefore decline, as the Supreme Court did in *Brockamp*, to read additional, unwritten equitable exceptions into the statute.

Though we need not look beyond the unambiguous statutory text, the statutory history of § 5110 reinforces our conclusion that Congress did not intend for equitable tolling to apply to § 5110(b)(1)'s effective date provision. In the seventeen years since our court decided *Andrews* in 2003, we have repeatedly followed its holding, each time reiterating that equitable tolling is inapplicable to § 5110's effective date rules. *See Titone v. McDonald*, 637 F. App'x 592, 593 (Fed. Cir. 2016) (per curiam); *Butler v. Shinseki*, 603 F.3d 922, 926 (Fed. Cir. 2010) (per curiam); *AF v. Nicholson*, 168 F. App'x 406, 408–09 (Fed. Cir. 2006); *Ashbaugh v. Nicholson*, 129 F. App'x 607, 609 (Fed. Cir. 2005) (per curiam). Congress has amended § 5110 four times since *Andrews*, and at no point has it expressed disapproval of *Andrews* and its progeny or otherwise indicated that equitable tolling is available under this statute. *See Auburn*, 568 U.S. at 159, 133 S.Ct. 817 (no legislative intent of equitable tolling where Congress had amended the relevant statute "six times since 1974, each time leaving [the provision at issue] untouched" and had never "express[ed] disapproval" of the agency's longstanding regulation setting deadlines). To the contrary, Congress' amendments adding provisions § 5110(a)(2)–(3) under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Pub. L. No. 115–55, § 2(*l*), 131 Stat. 1105, 1110, underscore an intent to continue limiting retroactivity to one year. *See*§ 5110(a)(2) (a claim receiving an adverse decision retains "the date of the filing of the initial application for a benefit" as the effective date on appeal if the claim is "continuously pursued" within "one year after the date" of the adverse decision); § 5110(a)(3) (the effective date of "supplemental claims received *more than one year*" after the RO or Board decision "shall not be earlier than the date of receipt of the supplemental claim" (emphasis added)).

The statutory history of § 5110(b)(4) also confirms that Congress did not intend to provide more equitable relief than what was specifically enumerated in the statute. When § 5110(b)(4) was proposed in 1973, Congress explained that "[t]he *1-year period* prescribed by the proposal ... is considered *reasonable*" to address the filing "delays" of "permanently and totally disabled" veterans whose "very

condition upon which entitlement may depend may also prevent prompt application for benefit." *See*H.R. Rep. No. 93-398), at 14 (1973) (emphases added). Congress, moreover, remarked that the proposed one-year grace period would bring the effective-date rules governing disability pension into conformity with those already governing disability compensation in § 5110(b)(1) and death benefits in § 5110(d). *See id.* Because § 5110(b)(4)'s one-year grace period was considered a "reasonable" equitable remedy for filing delays by permanently and totally disabled veterans, this statutory history supports our conclusion that Congress did not intend for equitable tolling of § 5110(b)(1)'s analogous one-year grace period.

***1084** While acknowledging that § 5110(b)(4) speaks to equitable tolling and indicates "Congressional willingness to delay veterans' filing obligations where a disability makes meeting them difficult or impossible," *see* Dyk Op. at 1099, Judge Dyk nonetheless argues that this provision merely signals "a beneficent Congressional act, [and] not a rebuttal of the *Irwin* presumption," *id.* at 16 (citing *Cloer*, 654 F.3d at 1343).[9] But this ignores *Cloer*'s precise reasoning. *Cloer* explains that enumerated statutory exceptions do not necessarily rebut *Irwin*'s presumption where those exceptions address a "special need" that is *unrelated* to equitable tolling concerns. *See id.* Unlike § 5110(b)(4) and other exceptions addressing specific equitable circumstances warranting a delayed claim filing, *Cloer* concluded that the two exceptions to the Vaccine Act's 36-month filing deadline are driven by "specific concern[s] unrelated to equitable tolling considerations," such as minimizing "confusion" and addressing "scientific advances in medicine," and thus do not "show a desire by Congress to bar equitable tolling." *Id.* at 1343–44; *see also, id.* at 1343 ("Individual factual circumstances, the first of equitable tolling claims, played no role in enactment of this provision.").

9 Despite maintaining that § 5110(b)(4) does not signal congressional intent to preclude equitable tolling beyond the statutory limits, Judge Dyk nonetheless claims this provision demonstrates congressional intent to deny Mr. Arellano and other disabled claimants with a caregiver or other representative equitable relief beyond what is expressly provided by statute. *See* Dyk Op. at 1096–97 – ——.

Mr. Arellano and Judge Dyk also argue that § 5110's listed exceptions are irrelevant because they are exceptions to § 5110(a)(1)'s default effective-date rule, and not § 5110(b)(1)'s one-year grace period. In their view, the question is whether § 5110(b)(1)'s one-year period can be tolled, and because that period does not itself have any enumerated exceptions, precedent such as *TRW* and *Brockamp* are not controlling. But this argument ignores that tolling § 5110(b)(1)'s one-year grace period would operate as an exception to not only § 5110(b)(1)'s one-year grace period but also to § 5110(a)(1)'s default rule. This follows because, as mentioned, § 5110(b)(1) is itself an equitable exception to § 5110(a)(1)'s default rule. *Cf. Beggerly*, 524 U.S. at 48, 118 S.Ct. 1862 (declining to further toll a statute "providing that the statute of limitations will not begin to run until plaintiff 'knew or should have known of [the government's] claim,' [because it] has already effectively allowed for equitable tolling"). It would be odd to conclude that, because Congress chose to soften the default effective-date rule by providing specific enumerated equitable exceptions, it has somehow opened the door for courts to create their own exceptions-to-the-exception through equitable tolling.

Mr. Arellano further argues that the relevant administrative context and subject matter of § 5110(b)(1)—veterans' benefits—support equitable tolling. We acknowledge that Congress is more likely to have intended equitable tolling for statutes "designed to be 'unusually protective' of claimants" where "laymen, unassisted by trained lawyers, initiate the process." *See Auburn*, 568 U.S. at 160, 133 S.Ct. 817 (citing *Bowen v. City of New York*, 476 U.S. 467, 480, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986) and *Zipes*, 455 U.S. at 397, 102 S.Ct. 1127). And it is undoubtedly true that the statutory scheme for veterans' benefits is "uniquely pro-claimant [in] nature," *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000), and imbued with "[t]he solicitude of Congress for veterans," *United States v. Oregon*, 366 U.S. 643, 647, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961).

***1085** But these general background principles cannot override the unambiguous meaning of the statutory text. *See Kisor v. Wilkie*, —— U.S. ——, 139 S. Ct. 2400, 2415–16, 204 L.Ed.2d 841 (2019) (ambiguity often resolved by full consideration of "text, structure, history, and purpose"); *cf. Andrus*, 446 U.S. at 618–19, 100 S.Ct. 1905 ("[A]lthough the rule by which legal ambiguities are resolved to the benefit to the Indians is to be given the broadest possible scope,

a canon of construction is not a license to disregard clear expressions of ... congressional intent." (cleaned up)); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("canons of construction are no more than rules of thumb," and the text is the "one, cardinal canon" a court must turn to "before all others"). Here, for the reasons we have set forth, the comprehensiveness of the congressionally enumerated exceptions to the § 5110(a)(1) default rule leave no room for additional judicially recognized exceptions. Similarly, the language, context, and characteristics of the § 5110(b)(1) time provision leave no room for reasonably concluding that Congress viewed it as a statute of limitations. Those conclusions leave no ambiguity. Where, as here, "the words of a statute are unambiguous, this first step of the interpretive inquiry is our last."*Rotkiske*, 140 S. Ct. at 360.

We recognize there are circumstances under which it may seem unjust to preclude equitable tolling. But where the statutory text demonstrates "a clear intent to preclude tolling, courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving." *Nutraceutical*, 139 S. Ct. at 714; *see also California v. Sierra Club*, 451 U.S. 287, 297, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."). "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *see also United States v. First Nat'l Bank of Detroit*, 234 U.S. 245, 260, 34 S.Ct. 846, 58 L.Ed. 1298 (1914) ("The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws.").

For these reasons, equitable tolling is inconsistent with Congress' intent in enacting § 5110(b)(1), and *Irwin*'s presumption—were it to apply in this instance—would have been rebutted.

F

Lastly, we briefly address Judge Dyk's conclusion that equitable tolling is unavailable on the undisputed facts of Mr. Arellano's appeal. *See* Dyk Op. at 1099 n.20. Because both the Board and the Veterans Court concluded that equitable tolling was categorically unavailable for § 5110(b)(1) as a matter of law, neither had reason to consider whether the specific facts of Mr. Arellano's case justified equitable tolling. Nor did they consider whether further factual development would be warranted if equitable tolling were not categorically unavailable. In the event of a reversal, Mr. Arellano has requested that we remand this case for further proceedings so he can present why his factual circumstances warrant equitable tolling. *See* Appellant's Suppl. Br. 49; Appellant's Br. 32. The government, for its part, has never argued in this court that we can—or should—affirm the denial of equitable tolling on the facts of Mr. Arellano's case; it has only argued that equitable tolling is unavailable as a matter of law.

***1086** However, Judge Dyk contends that we may determine the application of equitable tolling in the first instance "[w]here the facts are undisputed, [and] all that remains is a legal question, even if that legal question requires the application of the appropriate standard to the facts of a particular case." Dyk Op. at 1099 n.20 (quoting *Former Employees of Sonoco Prod. Co. v. Chao*, 372 F.3d 1291, 1294–95 (Fed. Cir. 2004)). But neither *Former Employees*, nor any case cited within, holds that we may apply a legal standard to the facts where the Veterans Court (and the Board): (1) did not address any of those facts in denying equitable tolling; (2) made no factual findings on this issue; (3) did not consider whether further factual development may be warranted to adequately answer that question; and (4) did not consider Judge Dyk's rigid "caregiver rule" that bars equitable tolling for totally and permanently disabled veterans who have a caregiver. For that reason, it is unsurprising that Mr. Arellano has not alleged "any special circumstances" in relation to his caregiver, as Judge Dyk observes, since no one until today had suggested that having a caregiver creates a default presumption against equitable tolling in this context or in any other setting where equitable tolling can arise. Thus, even if *Irwin*'s presumption of equitable tolling were to apply to § 5110(b)(1), which it does not, we would remand this case for further factual development—which is all the more justified because Mr. Arellano has expressly requested this outcome under such circumstances and no party has argued that we may affirm the Veterans Court's decision on factual grounds.

CONCLUSION

For the aforementioned reasons, and consistent with our longstanding holding in *Andrews*, § 5110(b)(1) is not a statute of limitations subject to *Irwin*'s presumption of equitable tolling. But even if *Irwin*'s presumption were to apply, it would be rebutted by the statutory text of § 5110, which evinces clear intent from Congress to foreclose equitable tolling of § 5110(b)(1)'s one-year period.

Dyk, Circuit Judge, with whom Newman, O'Malley, Reyna, Wallach, and Stoll, Circuit Judges, join, concurring in the judgment.

The court here agrees that Mr. Arellano's claim for benefits was untimely, but the court is equally divided on the question whether 38 U.S.C. § 5110(b)(1) is subject to equitable tolling. Judge Chen (joined by Chief Judge Moore and Judges Lourie, Prost, Taranto, and Hughes) would hold that the section is not a statute of limitations, and, even if it were, the presumption of equitable tolling under *Irwin* has been rebutted. An equal number of judges (Judges Newman, O'Malley, Reyna, Wallach, Stoll, and myself) join this opinion and would hold that § 5110(b)(1) is a statute of limitations subject to equitable tolling, that the *Irwin* presumption of equitable tolling applies, but that § 5110(b)(1) cannot be equitably tolled for mental disability in the circumstances of this case.

I

The effective date of an award of service-connected benefits is governed by 38 U.S.C. § 5110. "Unless specifically provided otherwise in this chapter, the effective date of an award ... shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a)(1). An exception to § 5110(a)(1) is available under § 5110(b)(1), which provides:

> The effective date of an award of disability compensation to a veteran shall be ***1087** the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.

38 U.S.C. § 5110(b)(1); *see also*38 C.F.R. § 3.400(b)(2)(i)(2020) ("Day following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later.").

Here, the claim for benefits was filed on June 3, 2011, thirty years after the veteran's discharge, and benefits were allowed as of the date the claim was filed, June 3, 2011. The question is whether § 5110(b)(1) may be equitably tolled based on mental disability so that the veteran can receive retroactive benefits to the date his entitlement arose, which was within a year of his discharge, thirty years earlier.

II

"Time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.' " *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (quoting *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989)). *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."*Id.* at 95–96, 111 S.Ct. 453.

The Supreme Court and several circuits have found equitable tolling to be applicable to time requirements in administrative agency proceedings. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) ("[F]iling a timely charge of discrimination with the [Equal Employment Opportunity Commission] is ... a requirement that, like a statute of limitations, is subject to ... equitable tolling."); *Farris v. Shinseki*, 660 F.3d 557, 563 (1st Cir. 2011) (citation omitted) ("[F]ailure to comply with an agency's applicable time limit may expose the plaintiff's federal law suit to dismissal ... subject to narrowly applied equitable doctrines such as tolling ...."); *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996) ("Because the deadlines for filing administrative complaints operate as statutes of limitations, the doctrines of equitable tolling and estoppel apply."). The

Supreme Court has "never suggested that the presumption in favor of equitable tolling is generally inapplicable to administrative deadlines," *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 162, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (Sotomayor, J., concurring), and has suggested that *Irwin* can apply to "matters such as the administration of benefit programs," *Scarborough v. Principi*, 541 U.S. 401, 422, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004).

III

The framework governing the *Irwin* presumption of equitable tolling has two steps.

The first step is determining whether the statute is a statute of limitations, in which case the *Irwin* presumption will apply. Courts "have only applied [the] presumption [of equitable tolling] to statutes of limitations," *Lozano v. Montoya Alvarez*, 572 U.S. 1, 13–14, 134 S.Ct. 1224, 188 L.Ed.2d 200 (2014), or a "filing period" that "operate[s] as a statute of limitations," *Zipes*, 455 U.S. at 394, 102 S.Ct. 1127. The second step is determining if the presumption has been rebutted.

A

Judge Chen at the first step would hold that 38 U.S.C. § 5110(b)(1) is not a statute of limitations or otherwise subject to tolling, and he would reaffirm our *Andrews* ***1088** panel decision in this respect. I think this view is quite clearly incorrect.

Judge Chen urges that the limitations period on past benefits for disability compensation in § 5110(b)(1) is not a statute of limitations because the one-year period "[1] is not triggered by harm from the breach of a legal duty owed by the opposing party, and [2] it does not start the clock on seeking a remedy for that breach from a separate remedial entity." Chen Op. 1067 (citing 1 Calvin W. Corman, LIMITATION OF ACTIONS, § 6.1, at 370 (1991)). In Judge Chen's view, § 5110(b)(1) is not a statute of limitations because "there is no duty, or breach of duty, at the onset of § 5110(b)(1)'s one-year period (i.e., the day after discharge)" and "no remedial authority separate from the [Department of Veterans Affairs ("VA")] is involved in an initial application for veterans' benefits." *Id.* at 1067 – ——.

Judge Chen's opinion is bereft of support for these supposed rules. The cited treatise contains only general language describing general principles of statutes of limitations. *See* Corman, *supra*, § 6.1, at 370 ("The earliest opportunity for a complete and present cause of action is that moment when the plaintiff has suffered a legally recognizable harm at the hands of the defendant, such as the time of contract breach or the commission of a tortious wrong."). Judge Chen cites no case, and I am aware of none, holding that statutes of limitations are limited as Judge Chen suggests. [1]

[1] Judge Chen relies on *Hallstrom*, which concerned the citizen suit provision of the Resource Conservation and Recovery Act of 1976 that required 60 days' notice before filing suit. *See*493 U.S. at 22, 110 S.Ct. 304 (citing 42 U.S.C. § 6972(b)(1) (1982)). *Hallstrom* noted in passing that, "[u]nlike a statute of limitations," the "60-day notice provision is not triggered by the violation giving rise to the action." *Id.* at 27, 110 S.Ct. 304. The Supreme Court's characterization of the notice provision at issue in *Hallstrom* hardly suggests that a violation is essential to the existence of statute of limitations.

The cases establish that there are no such rules. The notion that statutes of limitations are triggered only by a breach of legal duty is quite inconsistent with cases holding that a provision barring benefits for failure to file within a prescribed period constitutes a statute of limitations, regardless of any alleged breach of duty by the government. This has been made clear by *Scarborough*, where (as noted above) the Supreme Court explained that *Irwin*'s reasoning may extend to "the administration of benefit programs." 541 U.S. at 422, 124 S.Ct. 1856.

A primary example of a no-fault statute of limitations is the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"), which requires that, for vaccines administered after October 1, 1988, a "petition" for "compensation" for a vaccine-related injury be filed within 36 months "after the date of the occurrence of the first symptom or manifestation of onset ... of such injury." 42 U.S.C. § 300aa-16(a)(2).

Vaccine Act claims are not tied to fault by the government. The system established by the Vaccine Act "was 'intended to be expeditious and fair' and 'to compensate persons with recognized vaccine injuries ... without a demonstration that a manufacturer was negligent or that a vaccine was defective.' " *Zatuchni v. Sec'y of Health & Hum. Servs.*, 516 F.3d 1312, 1316 (Fed. Cir. 2008) (quoting H.R. Rep. 99-908, at 12, *reprinted in* 1986 U.S.C.C.A.N. 6344, 6353).

> Under this compensation system, vaccine-injured persons may obtain a full and fair award for their injuries even if the manufacturer has made as safe a vaccine as possible. Petitioners are compensated because they suffered harm ***1089** from the vaccine—even a 'safe' one—not because they demonstrated wrongdoing on the part of the manufacturer.

H.R. Rep. 99-908, at 26, *reprinted in* 1986 U.S.C.C.A.N. at 6367.

We have nonetheless held en banc that 42 U.S.C. § 300aa-16(a)(2) establishes a statute of limitations subject to equitable tolling under *Irwin*. *See Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1340–44 (Fed. Cir. 2011) (en banc); *see also id.* at 1341 n.9. We held that "[t]he statute of limitations begins to run on a specific statutory date: the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury recognized as such by the medical profession at large." *Id.* at 1340. We reached this conclusion because "the plain words of the statute trigger the statute of limitations on the date of the first symptom or manifestation of onset of the injury claimed," and Congress did not intend for a discovery rule to apply. *See id.* at 1336, 1340. The prescribed period is a statute of limitations even though the underlying claim is not based on a breach of duty, either by the government or the manufacturer. *See Zatuchni*, 516 F.3d at 1316; H.R. Rep. 99-908, at 12, *reprinted in* 1986 U.S.C.C.A.N. at 6353.

The second of Judge Chen's factors—the involvement of a "separate remedial entity," Chen Op. 1066–67—is also inconsistent with cases in the administrative context, in which the Supreme Court and other courts have made clear that a statute governing the timeliness of a claim to an agency for payment from that agency is a statute of limitations. *See United States v. Williams*, 514 U.S. 527, 534 & n.7, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995) (26 U.S.C. § 6511(a) is a "statute of limitations" that "bar[s] ... tardy" tax refund claims filed with the Internal Revenue Service); *Colvin v. Sullivan*, 939 F.2d 153, 156 (4th Cir. 1991) (referring to 42 U.S.C. § 1320b-2(a), which provides for a two-year period during which states are permitted to file claims with the federal government for expenditures made in carrying out a state plan under specific subchapters of the codification of the Social Security Act, as a "statute of limitations"); *cf. Warren v. Off. of Pers. Mgmt.*, 407 F.3d 1309, 1316 (Fed. Cir. 2005) (referring to the two-year period "after the date on which the marriage of [a] former spouse ... is dissolved" to make an election with the Office of Personal Management to provide a survivor annuity for the former spouse, *see*5 U.S.C. § 8339(j)(3), as a "statute of limitations").

B

Judge Chen offers an alternative theory—that § 5110(b)(1) is not a statute of limitations because it "does not eliminate a veteran's ability to collect benefits for [a service-connected] disability," Chen Op. 1067, but instead "forgives a veteran's temporary delay in filing a claim in the immediate aftermath of a veteran's transition back to civilian life upon discharge from military service," *id.* at 1070 (emphasis omitted). In my view, this analysis blinks reality.

The claim for benefits here has two components: (1) a retrospective claim for benefits for past disability, and (2) a prospective claim for future benefits. The statute imposes no statute of limitations for prospective benefits, and a veteran may be entitled to forward-looking benefits after the one-year period prescribed by § 5110(b)(1) runs. *See Henderson v. Shinseki*, 562 U.S. 428, 431, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011) ("A veteran faces no time limit for filing a claim ...."). But § 5110(b)(1) does impose what is clearly a one-year statute of limitations for retrospective claims—making retrospective ***1090** benefits unavailable unless the claim is filed within one year after discharge. Section 5110(b)(1) is a "more limited statute of limitations," *see Young v.*

United States, 535 U.S. 43, 48, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002), applicable only to retrospective benefit claims, but it is a statute of limitations nonetheless. Section 5110(b)(1) "is a limitations period because it prescribes a period within which certain rights ... may be enforced." *See id.* at 47, 122 S.Ct. 1036. It bars retroactive benefits if the claim is filed more than a year after discharge.

This approach to periods of limitations for claims for benefits is not unusual. Government benefits programs often provide that an individual qualifying for benefits may recover future benefits once an application is filed but is limited in the recovery of past benefits to a set period before the filing of the application. One example is the statute providing for Social Security disability benefits, which provides no limit on the recovery of future benefits once an application has been filed but imposes a twelve-month limitations periods on the recovery of past benefits—in other words, a statute of limitations. *Begley v. Weinberger*, 400 F. Supp. 901, 911 (S.D. Ohio 1975) (noting a "one-year statute of limitations upon the availability of retroactive disability insurance benefits" established by 42 U.S.C. § 423(b)). [2]

2 The cases Judge Chen cites, both decided before *Irwin*, are not to the contrary. *See* Chen Op. 1076–77 (citing *Yeiter v. Sec'y of Health & Hum. Servs.*, 818 F.2d 8, 10 (6th Cir. 1987); and then citing *Sweeney v. Sec'y of Health, Ed. & Welfare*, 379 F. Supp. 1098, 1100 (E.D.N.Y. 1974)).
Yeiter rejected the argument that "Congress did not intend the one-year limit on retroactive benefits [in 42 U.S.C. § 423(b)] to apply where the failure to file for benefits arises from the disability itself." 818 F.2d at 9. *Sweeney* held that "equitable considerations [were] irrelevant" to the application of § 423 "to this case." 379 F. Supp. at 1100–01. Neither held that § 423(b) is not a statute of limitations.

Section 5110(b)(1) is nearly the same as the statutes of limitation in copyright actions and patent infringement, where the statutes bar recovery for past events if the claim is not filed within a specified period, but permit recovery for future acts. The copyright limitations period is governed by 17 U.S.C. § 507, [3] which the Supreme Court has described as a "limitations period [that] allows plaintiffs during [the copyright] term to gain retrospective relief running only three years back from the date the complaint was filed." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 672, 134 S.Ct. 1962, 188 L.Ed.2d 979 (2014); *see also id.* at 670, 134 S.Ct. 1962 (describing copyright limitations period as a "a three-year look-back limitations period"). [4] Thus, "the infringer is insulated from liability for earlier infringements of the same work." *Id.* at 671, 134 S.Ct. 1962.

3 "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b).

4 The copyright statute of limitations has been held to be subject to equitable tolling. *See Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 340 (5th Cir. 1971) ("[T]he intent of the drafters [of the predecessor of § 507(b)] was that the limitations period would affect the remedy only, not the substantive right, and that equitable considerations would therefore apply to suspend the running of the statute.").

Likewise, § 5110(b)(1) is similar to the limitations period in patent infringement actions, 35 U.S.C. § 286, [5] which "represents a judgment by Congress that a patentee may recover damages for any infringement ***1091** committed within six years of the filing of the claim." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, LLC, —— U.S. ——, 137 S. Ct. 954, 961, 197 L.Ed.2d 292 (2017). In so holding, the Supreme Court rejected the argument that § 286 was not a "true statute of limitations" because it "runs backward from the time of suit." *Id.* at 961–62 (citing *Petrella*, 572 U.S. at 672, 134 S.Ct. 1962). [6]

5 "Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." 35 U.S.C. § 286.

6 The holdings of *Petrella* and *SCA Hygiene* addressed whether the provisions were statutes of limitations because that affected application of the doctrine of laches. *See Petrella*, 572 U.S. at 686, 134 S.Ct. 1962; *SCA Hygiene*, 137 S. Ct. at 967.

Judge Chen attempts to distinguish these cases on the ground that "§ 5110(b)(1) establishes the effective date of a single benefits claim for an ongoing disability, whereas an ongoing course of infringement in *Petrella* and *SCA Hygiene* comprises a 'series of discrete infringing acts,' each of which is a distinct harm giving rise to an independent claim for relief that starts a new limitations period." Chen Op. 1070 (quoting *Petrella*, 572 U.S. at 671–72, 134 S.Ct. 1962). The same is true here. The claim is not a single benefits claim, but a claim for a series of payments allegedly due. *See*38 U.S.C. § 1110 (establishing basic entitlement for disability compensation); *id.* § 1114 (providing monthly rates for disability compensation); *id.* § 1115 (providing additional compensation for dependents); *see also* Veterans' Compensation Cost-of-Living Adjustment Act of 2020, Pub. L. 116-178, 134 Stat. 853 (providing cost-of-living adjustment).

The Supreme Court's decision in *Young*, 535 U.S. 43, 122 S.Ct. 1036, also supports the view that § 5110(b)(1) is a statute of limitations. In *Young*, the Supreme Court considered whether a three-year lookback period provided by § 507 of the Bankruptcy Code was a statute of limitations. *See*11 U.S.C. § 507(a)(8)(A)(i). Under this lookback period, "[i]f the IRS has a claim for taxes for which the return was due within three years before the bankruptcy petition was filed, the claim enjoys eighth priority ... and is nondischargeable in bankruptcy." *Young*, 535 U.S. at 46, 122 S.Ct. 1036. "The period thus encourages the IRS to protect its rights —by, say, collecting the debt, or perfecting a tax lien— before three years have elapsed." *Id.* at 47, 122 S.Ct. 1036 (citations omitted). "If the IRS sleeps on its rights, its claim loses priority and the debt becomes dischargeable." *Id.* The Supreme Court acknowledged that, "unlike most statutes of limitations, the lookback period bars only *some*, and not *all*, legal remedies for enforcing the claim," *id.* (footnote omitted), and noted that "[e]quitable remedies may still be available," *id.* at 47 n.1, 122 S.Ct. 1036. That qualification "ma[de] it a more limited statute of limitations, but a statute of limitations nonetheless" subject to equitable tolling. *Id.* at 48, 122 S.Ct. 1036.

In determining that the lookback period was a statute of limitations, the Supreme Court found it significant that "the lookback period serve[d] the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.' " *Young*, 535 U.S. at 47, 122 S.Ct. 1036 (second alteration in original) (quoting *Rotella v. Wood*, 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000)).

Section 5110(b)(1), like the provision at issue in *Young*, serves the same basic policies of limitations periods. It encourages veterans to file for disability compensation benefits within a year of their discharge, or else lose retroactive benefits that they would otherwise be entitled to. It limits veterans' "opportunity for recovery" and ***1092** the government's "potential liabilities," *see Rotella*, 528 U.S. at 555, 120 S.Ct. 1075, to only forward-looking benefits if the filing deadline is missed.

Judge Chen attempts to find support in the Supreme Court's *Lozano* decision. *Lozano* involved Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, which was held not to be a statute of limitations. "When a parent abducts a child and flees to another country," the Hague Convention "generally requires that country to return the child immediately if the other parent requests return within one year." *Lozano*, 572 U.S. at 4, 134 S.Ct. 1224. After the one-year period has expired, under Article 12, the court "shall also order the return of the child, unless it is demonstrated that the child is now settled." *Id.* at 15, 134 S.Ct. 1224 (citation and quotation marks omitted). *Lozano* did not involve a statute, but rather a treaty provision, which "was not adopted against a shared background of equitable tolling." *Id.* at 11, 134 S.Ct. 1224. Also, this treaty provision in *Lozano* did not provide a cut-off for monetary recovery, unlike § 5110(b)(1), which provides "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" by providing a cut-off date for retroactive disability benefits. *See Rotella*, 528 U.S. at 555, 120 S.Ct. 1075. *Lozano* has no relevance here.

Nor is this case similar to *Hallstrom*, on which Judge Chen also relies. As noted above, *Hallstrom* concerned a 60-day notice provision of the Resource Conservation and Recovery Act of 1976. 493 U.S. at 22, 110 S.Ct. 304 (citing 42 U.S.C. § 6972(b)(1) (1982)). The Supreme Court held that this "60-day notice provision" was "[u]nlike a statute of limitations" because "petitioners [had] full control over the timing of their suit: they need only give notice to the appropriate parties and refrain from commencing their action for at least 60 days."

Id. at 27, 110 S.Ct. 304. Section § 5110(b)(1) is not a notice provision.

In sum, § 5110(b)(1) is a statute of limitations, and the *Irwin* rebuttable presumption of equitable tolling applies. As Judge Newman has noted, "[t]he time period of § 5110(b)(1) is not a jurisdictional restriction, and its blanket immunization from equitable extension, whatever the circumstances, appears to be directly contrary to the legislative purpose." *Butler v. Shinseki*, 603 F.3d 922, 928 (Fed. Cir. 2010) (Newman, J., concurring in the result).

IV

"To be sure, *Irwin*'s presumption is rebuttable." *United States v. Kwai Fun Wong*, 575 U.S. 402, 419, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015). Judge Chen concludes that even if the presumption of equitable tolling applies to § 5110(b)(1), the presumption has been rebutted. I disagree. Congress has not clearly indicated a general prohibition against equitable tolling as to § 5110(b)(1).

The Supreme Court has identified several factors that determine whether the equitable tolling presumption has been rebutted, and here, almost all of the factors signal that there is no general prohibition against equitable tolling. [7]

7 Our decision in *Cloer* identified many of the same factors. *See*654 F.3d at 1342. The Supreme Court has identified further factors since we decided *Cloer* that I discuss here. *See generally Auburn*, 568 U.S. 145, 133 S.Ct. 817; *Kwai Fun Wong*, 575 U.S. 402, 135 S.Ct. 1625.

The first factor is the language of the statute. The language of a statute of limitations may indicate that it is jurisdictional, in which case a court must enforce the ***1093** limitation "even if equitable considerations would support extending the prescribed time period." *Kwai Fun Wong*, 575 U.S. at 408–09, 135 S.Ct. 1625. In determining whether a statute is jurisdictional, courts have often held that it does not matter if a statute's language is "mandatory" or "emphatic" if "text speaks only to a claim's timeliness, not to a court's power." *Id.* at 410–11, 135 S. Ct. 1625.

Section 5110(b)(1) is not jurisdictional, as Judge Chen concedes. Chen Op. 1079–80 – ——. Nevertheless, Judge Chen relies on the use of the phrase "[u]nless specifically provided otherwise in this chapter" in § 5110(a)(1), concluding that by using that term, Congress "implicitly intended to preclude the general availability of equitable tolling by explicitly including a more limited, specific selection of equitable circumstances under which a veteran is entitled to an earlier effective date and specifying the temporal extent of the exceptions for those circumstances." *Id.* at 1080 – ——.

In *Kwai Fun Wong*, the Supreme Court held that the use of the phrase "shall be forever barred" in the Federal Tort Claims Act limitations period, 28 U.S.C. § 2401(b), though "mandatory" and "emphatic," "[spoke] only to a claim's timeliness, not to a court's power," and did not designate § 2401(b) as a jurisdictional time bar not subject to equitable tolling. 575 U.S. at 410–11, 135 S.Ct. 1625. Here, too, the phrase "[u]nless specifically provided otherwise in this chapter" in § 5110(a)(1), though mandatory and emphatic, does not clearly foreclose equitable tolling of § 5110(b)(1).

Second, the detailed nature of a statute may suggest that Congress did not intend for a statute of limitations to be equitably tolled. "Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception." *United States v. Brockamp*, 519 U.S. 347, 350, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997). A statute that "uses language that is not simple" and "sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions" could indicate Congress's intent to preclude equitable tolling. *Id.*

Judge Chen determines that the language and structure of § 5110's subsections are "highly detailed" and "technical." Chen Op. 1081 (quoting *Brockamp*, 519 U.S. at 350, 117 S.Ct. 849). While it is true that § 5110 is a detailed statute, it "use[s] fairly simple language." *See Brockamp*, 519 U.S. at 350, 117 S.Ct. 849. For example, § 5110(b)(1) simply states that "[t]he effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release." 38 U.S.C. § 5110(b)(1). Section § 5110, even considered as a whole, is not as detailed as the tax statute at issue in *Brockamp*, 26 U.S.C.

§ 6511, where equitable tolling was disallowed. This factor does not weigh against equitable tolling of § 5110(b)(1).

Third, we consider if a statute of limitations has "explicit exceptions to its basic time limits," which may preclude equitable tolling. *Brockamp*, 519 U.S. at 351, 117 S.Ct. 849. Judge Chen concludes that "§ 5110's enumerated exceptions confirm that Congress has already considered which equitable considerations may provide a retroactive effective date and declined to provide the relief Mr. Arellano seeks." Chen Op. 1082.

We noted in *Cloer* that "exceptions to statutes of limitations do not necessarily rebut the bedrock *Irwin* presumption in favor of equitable tolling," and that "an exception may signal a beneficent Congressional ***1094** act, not a rebuttal of the *Irwin* presumption." 654 F.3d at 1343. Although § 5110(b)(1) is itself an exception to the general effective date rule of § 5110(a)(1), there are no explicit exceptions to the one-year period in § 5110(b)(1). [8]

8 Under the VA's regulation, "[t]ime limits within which claimants or beneficiaries are required to act to perfect a claim or challenge an adverse VA decision may be extended for good cause shown." 38 C.F.R. § 3.109(b) (2020). The government argues that this regulation does not apply to § 5110(b)(1), and Mr. Arellano does not contend otherwise.

Nor do the other provisions of § 5110 speak to equitable tolling, with the exception of § 5110(b)(4), which provides a retroactive period of disability pension benefits for a veteran who is "prevented by a disability from applying for disability pension." 38 U.S.C. § 5110(b)(4)(B).

Apart from § 5110(b)(4), this is not a situation in which the statute "has already effectively allowed for equitable tolling." *See United States v. Beggerly*, 524 U.S. 38, 48, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998). The other § 5110 provisions discuss situations—for example, when a child turns 18, 38 U.S.C. § 5110(e)(2); when there has been a report or finding of death of a service member, *id.* § 5110(j); or when there has been an annulment of marriage, *id.* § 5110(k)—which do not on their face relate to equitable tolling or indicate Congress's intent to preclude equitable tolling of § 5110(b)(1).

With respect to § 5110(b)(4), it is true that § 5110(b)(4) speaks to one limited aspect of equitable tolling (tolling for disability), but only in the unique context of disability pension and not disability compensation. While this may indicate a desire to limit equitable tolling for mental disability in specific circumstances (as discussed below), this can hardly be read as evincing a desire by Congress to eliminate equitable tolling generally as to disability compensation. It is simply an example of "a beneficent Congressional act, not a rebuttal of the *Irwin* presumption." *See Cloer*, 654 F.3d at 1343.

Fourth, Congress is more likely to have intended a statute of limitations that governs a statutory scheme "in which laymen, unassisted by trained lawyers, initiate the process" to be subject to equitable tolling, *Zipes*, 455 U.S. at 397, 102 S.Ct. 1127 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972)), in contrast to statutory schemes that govern sophisticated parties "assisted by legal counsel," *Auburn*, 568 U.S. at 160, 133 S.Ct. 817.

The fact that "the veteran is often unrepresented during the claims proceedings," *Shinseki v. Sanders*, 556 U.S. 396, 412, 129 S.Ct. 1696, 173 L.Ed.2d 532 (2009), especially, as here, "in the early stages of the application process," when "the veteran is almost always unassisted by legal counsel," *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000), suggests that Congress intended for equitable tolling to be available. [9] This is in contrast to situations such as in *Auburn*, where the statutory scheme at issue governed reimbursements to healthcare providers. The statute "[was] not designed to be unusually ***1095** protective of claimants," was not one "in which laymen, unassisted by trained lawyers, initiate the process," and "applie[d] to sophisticated institutional providers assisted by legal counsel." 568 U.S. at 160–61, 133 S.Ct. 817 (citations and internal quotation marks omitted) (holding that equitable tolling did not apply to the 180-day statutory deadline for health care providers to file appeals with the Provider Reimbursement Review Board under 42 U.S.C. § 1395***oo***(a)(3)).

9 *See also* Department of Veterans Affairs Board of Veterans' Appeals, Annual Report Fiscal Year 2020, 36, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf (24.4% of legacy appeals before the Board of Veterans' Appeals ("Board") in fiscal

year 2020 had attorney representation); Connie Vogelmann, Admin. Conf. of the United States, *Self-Represented Parties in Administrative Hearings* 29 (Oct. 28, 2016), https://www.acus.gov/sites/default/files/documents/Self-Represented-Parties-Administrative-Hearings-Final-Report-10-28-16.pdf (10.5% of claimants before the Board between fiscal years 2011–2015 had attorney representation).

Fifth, we consider the subject matter of the statute. If the statute of limitations "is contained in a statute that Congress designed to be 'unusually protective' of claimants," that will suggest Congress intended for equitable tolling to apply. *Bowen v. City of New York*, 476 U.S. 467, 480, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986) (quoting *Heckler v. Day*, 467 U.S. 104, 106, 104 S.Ct. 2249, 81 L.Ed.2d 88 (1984)).

"[T]he uniquely pro-claimant nature of the veterans compensation system" suggests that Congress intended at least some form of equitable tolling to be available. *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000). The veterans' claims process is "designed to be 'unusually protective' of claimants," *see Bowen*, 476 U.S. at 480, 106 S.Ct. 2022, and "is designed to function throughout with a high degree of informality and solicitude for the claimant," *Henderson*, 562 U.S. at 431, 131 S.Ct. 1197 (quoting *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 311, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985)). [10]

10 Although *Walters* noted in passing that "[t]here is no statute of limitations" in the veterans' claims process generally, 473 U.S. at 311, 105 S.Ct. 3180, the court appears to have been referring to the fact that "[a] veteran faces no time limit for filing a claim," *Henderson*, 562 U.S. at 431, 131 S.Ct. 1197.

"Congress has expressed special solicitude for the veterans' cause." *Shinseki*, 556 U.S. at 412, 129 S.Ct. 1696. "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Id.* "[T]he veterans benefit system is designed to award 'entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.' " *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring)). [11]

11 In *Bailey*, we held that the 120-day period for a claimant to appeal an adverse decision of the Board to the Court of Appeals for Veterans Claims ("Veterans Court"), 38 U.S.C. § 7266, is subject to equitable tolling. 160 F.3d at 1368 (en banc). *Bailey* and its progeny, including *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc), were overruled by our en banc decision in *Henderson v. Shinseki*, 589 F.3d 1201, 1203 (Fed. Cir. 2009) (en banc), reversed in *Henderson v. Shinseki*, 562 U.S. 428, 441–42 & n.4, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). The effect of the Supreme Court's decision was to reinstate our decision in *Bailey*, and we have since reaffirmed that "[t]he filing deadline of § 7266 is not jurisdictional and may be tolled where appropriate." *James v. Wilkie*, 917 F.3d 1368, 1372 (Fed. Cir. 2019).

The veterans benefits system is unlike the tax collection system, which the Supreme Court held was not subject to equitable tolling because "Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system." *Brockamp*, 519 U.S. at 352–53, 117 S.Ct. 849.

"[O]nce a claim is filed, the VA's process for adjudicating it at the regional office and the Board is *ex parte* and nonadversarial." ***1096** *Henderson*, 562 U.S. at 431, 131 S.Ct. 1197; *see*38 C.F.R. §§ 3.103(a), § 20.700(c) (2020). "In the context of the non-adversarial, paternalistic, uniquely pro-claimant veterans' compensation system, and consistent with our decision in *Bailey*, the availability of equitable tolling pursuant to *Irwin* should be interpreted liberally with respect to filings during the non-adversarial stage of the veterans' benefits process." *Jaquay*, 304 F.3d at 1286.

These factors, as well as "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991), lead to the conclusion that there is no clear indication that Congress intended to broadly foreclose equitable tolling

in § 5110(b)(1), and that equitable tolling should be available in appropriate cases.

Nor does the fact that Congress amended § 5110 four times since *Andrews* indicate approval of *Andrews*. The presumption that reenactment of a statute ratifies the settled interpretation of that statute is strongest when there is evidence that "Congress was indeed well aware of [the prior interpretation]." *Lindahl v. OPM*, 470 U.S. 768, 782, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985); *see also Lorillard v. Pons*, 434 U.S. 575, 580–81, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). However, "[r]e-enactment—particularly without the slightest affirmative indication that Congress ever had the [prior judicial interpretation] decision before it—is an unreliable indicium at best." *C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 75 S.Ct. 473, 99 L.Ed. 483 (1955); *see also Brown v. Gardner*, 513 U.S. 115, 121, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) (declining to find that reenactment of a statute ratified the VA's interpretation of that statute in part because "the record of congressional discussion preceding reenactment ma[de] no reference to the VA regulation [interpreting the statute at issue], and there is no other evidence to suggest that Congress was even aware of the VA's interpretive position."); *Micron Technology, Inc. v. U.S.*, 243 F.3d 1301, 1310 (Fed. Cir. 2001). There is not the slightest indication that Congress when it amended § 5110 was aware of our decision in *Andrews*, and there is no basis for concluding that Congress intended to approve that decision. [12] Nor is this a well-settled administrative interpretation as in *Auburn*, 568 U.S. 145, 133 S.Ct. 817. *Auburn* concerned Congress's delegation of rulemaking authority relating to a specific statutory provision to the Secretary of Health and Human Services, and the Secretary's implementation of that authority. 568 U.S. at 159, 133 S.Ct. 817. Here, by contrast, we are dealing with the decision of a single circuit court, which has not been reviewed by the Supreme Court.

12 This is especially true because, as Judge Newman pointed out in her concurrence in *Butler*, it is unclear whether the broad language in *Andrews* was even relevant to its resolution of the precise issue for which it is now cited to us. 603 F.3d at 927 ("The Veterans Court enlarged *Andrews* beyond its premises, in holding that tolling of the one-year term of retroactivity under § 5110(b)(1) is never available.").

Judge Chen's approach is particularly difficult to defend because it would bar equitable tolling in all cases, including cases where equitable tolling could be argued to be particularly important and appropriate. This approach forecloses the possibility of equitable tolling entirely, even in circumstances in which there is no indication that Congress intended strict enforcement of the one-year period of § 5110(b)(1).

V

The fact that the statute does not foreclose equitable tolling in the case of ***1097** § 5110(b)(1) does not suggest that equitable tolling is available in every circumstance. While the statute does not indicate a general prohibition against equitable tolling, "[f]ederal courts have typically extended equitable relief only sparingly." *Irwin*, 498 U.S. at 96, 111 S.Ct. 453. To determine when equitable tolling is justified, we apply well-established equitable tolling principles to the circumstances presented. Such analysis is done on a case-by-case basis, though general principles will often guide the analysis in a broad swath of cases.

Equitable tolling analysis begins with the governing statutory scheme. Even where the *Irwin* presumption has not been rebutted, the statute and statutory scheme are instructive as to the particular circumstances that will justify equitable tolling. *See Mapu v. Nicholson*, 397 F.3d 1375, 1381 (Fed. Cir. 2005) (concluding that "Congress's explicit decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump any extension of equitable tolling to this case"); *Cloer*, 654 F.3d at 1345 (no relief under equitable tolling because of "a policy calculation made by Congress not to afford a discovery rule to all Vaccine Act petitioners and Dr. Cloer's failure to point to circumstances that could justify the application of equitable tolling to forgive her untimely claim"). The statutory scheme here helps inform the scope of equitable tolling on the ground of mental disability.

First, an individual who lacks mental capacity may have a caregiver sign a form for benefits on his or her behalf. Under 38 U.S.C. § 5101, as amended in 2012, [13] if an "individual lacks the mental capacity ... to provide substantially accurate information needed to complete a form; or ... to certify that the

statements made on a form are true and complete," 38 U.S.C. § 5101(e)(1), [14] then "a form filed ... for the individual may be signed by a court-appointed representative, a person who is responsible for the care of the individual, including a spouse or other relative, or ... agent authorized to act on behalf of the individual under a durable power of attorney," *id.* § 5101(a)(2).

13 *See* Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. 112-154, Title V, § 502(a), 126 Stat. 1165, 1190.

14 38 U.S.C. § 5101(d) (2020) was renumbered as § 5101(e) in 2021. *See* Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. 116-315, § 2006(a), 134 Stat. 4932 (enacted Jan. 5, 2021).

In addition, 38 C.F.R. § 3.155 provides that "some person acting as next friend of claimant who is not of full age or capacity may indicate a claimant's desire to file a claim for benefits by submitting an intent to file a claim to [the] VA." 38 C.F.R. § 3.155(b) (2020). "Upon receipt of the intent to file a claim, [the] VA will furnish the claimant with the appropriate application form prescribed by the Secretary." *Id.* Thus, § 3.155 "provide[s] a way for claimants who cannot engage in a legal contract due to age or disability to be represented by someone (or next friend) who can do so on their behalf." Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57,667 (Sept. 25, 2014) (Final Rule). [15]

15 A similar provision existed under the informal claim system, which ended in 2015. *See Shea v. Wilkie*, 926 F.3d 1362, 1366 n.3 (Fed. Cir. 2019). Under the informal claim system, "[a]ny communication or action, indicating an intent to apply for one or more benefits under the laws administered by [the VA], from a claimant ... or some person acting as next friend of a claimant who is not sui juris" could be "considered an informal claim," which was a longstanding practice of the VA. 26 Fed. Reg. 1561, 1570, (codified at 38 C.F.R. § 3.155(a)) (Feb. 24, 1961). *Compare id. with* 38 C.F.R. § 3.155(a) (2014).

***1098** In the context of the Vaccine Act, the provision that allows a "legal representative," 42 U.S.C. § 300aa-11(b)(1)(A), to file a petition on the behalf of a person who is disabled, "does not foreclose the availability of equitable tolling for claimants with mental illness," under all circumstances. *K. G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1381 (Fed. Cir. 2020). *K.G.* makes clear that the mere fact that a guardian has been appointed for a claimant is a factor in the equitable tolling inquiry, but only one factor. While that fact is true for veterans as well, it is a more important factor in the veteran's context than in Vaccine Act cases. That is because Congress has gone further in the veteran's context, by allowing any person on the claimant's behalf to indicate an intent to file a claim, and making a mere indication of a desire to file a claim sufficient to start the claims process. *See* 38 C.F.R. § 3.155(b) (2020).

Thus, absent special circumstances demonstrating an inability of the caregiver to at least indicate an intent to file a claim (which can trigger the claim filing process), [16] I believe it would be only the rare case where a mentally disabled veteran with a caregiver would be entitled to equitably toll § 5110(b)(1).

16 For claims of equitable tolling prior to 2015, as is the case here, the relevant inquiry would be whether there are special circumstances demonstrating an inability of the caregiver to submit an informal claim. *See* 38 C.F.R. § 3.155(a) (2014).

Second, 38 U.S.C. § 5110(b)(4) provides a one-year period for a retroactive effective date for disability pension (a form of compensation distinct from service-connected benefits). [17] That subsection provides:

> (A) The effective date of an award of disability pension to a veteran described in subparagraph (B) of this paragraph shall be the date of application or the date on which the veteran became permanently and totally disabled, if the veteran applies for a retroactive award within one year from such date, whichever is to the advantage of the veteran.
>
> (B) A veteran referred to in subparagraph (A) of this paragraph is a veteran who is permanently and totally disabled and who is prevented by a disability from applying for disability pension for a period of at least 30 days beginning on the date on which the veteran became permanently and totally disabled.

38 U.S.C. § 5110(b)(4) (emphasis added).

17 Disability pension is available for veterans who are "permanently and totally disabled from non-service-connected disability," 38 U.S.C. § 1521(a), and pension is need-based, so veterans who exceed a maximum annual income or net worth set by regulation will not qualify. *See id.* § 1522; 38 C.F.R. §§ 3.274, 3.275 (2020); *see also* H.R. Rep. No. 79-2425 (June 28, 1946); Act of July 9, 1946, Pub. L. No. 79-494, 60 Stat. 524.

The predecessor to subsection (A) of § 5110(b)(4) was adopted [18] based on a proposal from the VA to address "problems resulting from the veteran's disability [that] delays [the veteran's] application for the benefit," whereby "the very condition upon which entitlement may depend may also prevent prompt application for the benefit." H.R. Rep. 93-398, 1973 U.S.C.C.A.N. 2759, 2772 (July 25, 1973) (letter dated May 10, 1973, from Donald E. Johnson, Administrator of Veterans Affairs). The VA's proposal "would alleviate this situation by affording the disabled veteran a year from onset of disability to apply for pension and, if he is otherwise eligible, authorize payment retroactively to the date on which he became permanently ***1099** and totally disabled." *Id.* "The 1-year period prescribed by the proposal within which to apply for disability pension [was] considered reasonable ...." *Id.*

18 The predecessor to § 5110(b)(4)(A) was enacted in 1973 as 38 U.S.C. § 3010(b)(2). *See* Act of Dec. 6, 1973, Pub. L. 93-177, sec. 6, 87 Stat. 694, 696.

This provision was further amended in 1984 in part to add subsection (B), which specified that veterans who qualify for the one-year lookback period for disability pension are veterans "who [are] permanently and totally disabled and who [are] prevented by a disability from applying for disability pension for a period of at least 30 days beginning on the date on which the veteran became permanently and totally disabled." Deficit Reduction Act of 1984, Pub. L. 98–369, sec. 2501, 98 Stat. 494, 1116–17. [19]

19 The predecessor to § 5110(b)(4)(B) was enacted in 1984 as 38 U.S.C § 3010(b)(3)(B). Deficit Reduction Act of 1984, Pub. L. 98–369, sec. 2501(a)(1), 98 Stat. at 1116.

While pension benefits are different from disability benefits, this provision is instructive because it indicates Congressional willingness to delay veterans' filing obligations where a disability makes meeting them difficult or impossible, but not to do so indefinitely, or even for a substantial period of time.

Against this backdrop, I now turn to the particular circumstances presented here. [20] Mr. Arellano's brother, Pedro Arellano Lamar, has been Mr. Arellano's "caregiver since [Mr. Arellano] returned home mentally disabled in November 1981." J.A. 554; *see also id.* at 565. Yet, the VA did not receive Mr. Arellano's application until June 3, 2011. According to Mr. Arellano's counsel, Mr. Arellano's brother, "acting as guardian ad litem," filed the application on Mr. Arellano's behalf. Oral Arg. 41:25–42:06, 43:27–44:10, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-1073_02042021.mp3. There is no allegation that Mr. Lamar was somehow prevented from filing, or faced obstacles in his attempt to file, Mr. Arellano's request for benefits sooner. Unlike in *K. G.*, there is no claim that Mr. Arellano was estranged from Mr. Lamar or refused to interact with him. *See*951 F.3d at 1377. Indeed, Mr. Arellano signed the application himself at Mr. Lamar's direction. There is nothing in the record that justifies the inordinate thirty-year delay in filing the application at issue.

20 We have recognized that in determining the application of equitable tolling, "[w]here the facts are undisputed, all that remains is a legal question, even if that legal question requires the application of the appropriate standard to the facts of a particular case." *Former Employees of Sonoco Prod. Co. v. Chao*, 372 F.3d 1291, 1294–95 (Fed. Cir. 2004) (collecting cases). Because we assume the facts are as Mr. Arellano describes them, we address the availability of tolling in the first instance.

Because Mr. Arellano had a caregiver who could have filed (and indeed did later file) an application on Mr. Arellano's behalf, and no special circumstances are alleged, equitable tolling on the ground of Mr. Arellano's mental disability is not warranted, especially for such an untimely filing. Equitable tolling for mental disability is not available in this case.

CONCLUSION

I would hold that § 5110(b)(1) is a statute of limitations that is subject to the rebuttal presumption of equitable tolling under *Irwin*. I would also hold that the presumption has not been rebutted as to equitable tolling, but that equitable tolling is not available to Mr. Arellano's specific circumstances. Thus, I concur in the judgment.

All Citations

1 F.4th 1059

4 F.4th 1381
United States Court of Appeals, Federal Circuit.

Bruce R. TAYLOR, Claimant-Appellant
v.
Denis MCDONOUGH, Secretary of Veterans Affairs, Respondent-Appellee

2019-2211
|
July 22, 2021

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-2390, Judge Joseph L. Falvey, Jr., Judge William S. Greenberg, Judge Amanda L. Meredith.

Attorneys and Law Firms

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Before Moore, Chief Judge, Newman, Lourie, Dyk, Prost, O'Malley, Reyna, Taranto, Chen, Hughes, and Stoll, Circuit Judges.

SUA SPONTE REHEARING EN BANC

Per Curiam.

ORDER

This case was argued before a panel of three judges on June 4, 2020, and a panel opinion issued on June 30, 2021. Thereafter, a sua sponte request for a poll on whether to rehear this case en banc was made. A poll was conducted and a majority of the judges in regular active service voted for sua sponte en banc consideration.

Accordingly,

IT IS ORDERED THAT:

(1) The panel opinion of June 30, 2021, is vacated and the appeal is reinstated.

(2) This case will be reheard en banc sua sponte under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 35(a). The court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified, as well as any senior circuit judge who participated in the panel decision and elects to participate as a member of the court en banc, in accordance with the provisions of 28 U.S.C. § 46(c).

(3) The parties are requested to file new briefs. The briefs should address the following issues:

A. (i) In view of precedents such as *OPM v. Richmond*, 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990), and *McCay v. Brown*, 106 F.3d 1577 (Fed. Cir. 1997), did the panel in *Taylor v. McDonough*, No. 2019-2211, 3 F.4th 1351, 1355–57 (Fed. Cir. June 30, 2021), correctly determine that under the doctrine of equitable estoppel the government is estopped from asserting 38 U.S.C. § 5110(a)(1) against Mr. Taylor's claim for an earlier effective date?

***1382** (ii) Specifically, would granting Mr. Taylor's claim of entitlement to an earlier effective date under the doctrine of equitable estoppel be contrary to statutory appropriations and thus barred by the Appropriations Clause? If not, does the doctrine require the VA to give Mr. Taylor his requested effective date for his disability benefits if the government prevented him from timely filing an adequate benefits claim?

(iii) If any precedents of this court, such as *McCay*, preclude Mr. Taylor from succeeding based on equitable estoppel, should they be overruled?

B. If equitable estoppel does not afford Mr. Taylor the effective date he claims, does Mr. Taylor have a claim for denial of a constitutional right of access to VA processes for securing disability benefits for which he met the eligibility criteria, considering authorities such as *Christopher v. Harbury*, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002), that address a constitutional

right of access to courts and other government forums of redress?

C. If there is such a right of access, is the test for its violation whether the government has engaged in "active interference" that is "undue," as suggested by *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011), and related cases? If not, what is the test?

D. Assuming the right exists, and applying the proper test, was the right of access violated here?

(i) Taken together, did the required promise of military secrecy, the threat of court martial, and the failure to provide a VA mechanism for the timely filing or adjudication of an adequate claim, as Mr. Taylor alleges, constitute an affirmative interference with a right of access?

(ii) Did the VA lack a sufficient justification for not providing a mechanism for the timely filing or adjudication of an adequate claim if it could have provided such a mechanism while protecting classified information? Has the VA done so in some circumstances? *See* U.S. Dep't of Veterans Affs., *Adjudication Procedures Manual* M21-1, pt. IV, subpt. ii, ch. 1, sec. I (Developing Claims Related to Special Operations Incidents). Did the VA lack a sufficient justification for not even communicating to Mr. Taylor that he could file a minimal claim that would have to await adjudication indefinitely, until secrecy protections were lifted?

E. If the government violated Mr. Taylor's right of access, what is the remedy?

(4) While the issue of equitable tolling is preserved, the court does not wish to secure further briefing on equitable tolling and will not revisit the issue of equitable tolling in this case, (A) the court having resolved that issue adversely to Mr. Taylor in *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), and (B) the court having recently declined to set aside the decision in *Andrews* in *Arellano v. McDonough*, 1 F.4th 1059 (Fed. Cir. 2021).

(5) Appellant Bruce R. Taylor's en banc opening brief is due 60 days from the date of this order. Appellee Secretary of Veterans Affairs' en banc response brief is due within 45 days of service of Mr. Taylor's en banc opening brief, and Mr. Taylor's reply brief within 30 days of service of the response brief. The court requires 30 paper copies of all briefs and appendices provided by the filer within 5 business days from the date of electronic filing of the document. The parties' briefs must comply with Fed. Cir. R. 32(b)(1).

***1383** (6) The court invites the views of amici curiae. Any amicus brief may be filed without consent and leave of court. Any amicus brief supporting Mr. Taylor's position or supporting neither position must be filed within 14 days after service of Mr. Taylor's en banc opening brief. Any amicus brief supporting the Secretary's position must be filed within 14 days after service of the Secretary's en banc response brief. Amicus briefs must comply with Fed. Cir. R. 29(b).

(7) This case will be heard en banc on the basis of the briefing ordered herein and oral argument.

(8) Oral argument will be held at a time and date to be announced later.

All Citations

4 F.4th 1381 (Mem)

991 F.3d 1227
United States Court of Appeals, Federal Circuit.

Kevin R. GEORGE, Claimant-Appellant
v.
Denis MCDONOUGH, Secretary of Veterans Affairs, Respondent-Appellee
Michael B. Martin, Claimant-Appellant
v.
Denis McDonough, Secretary of Veterans Affairs, Respondent-Appellee

2019-1916
|
2020-1134
|
Decided: March 16, 2021

Synopsis

Background: Marine Corps veteran sought review of decision of Board of Veterans' Appeals denying entitlement to disability compensation benefits for schizophrenia. The Court of Appeals for Veterans Claims, 2017 WL 3880796, affirmed, and veteran's motion for reconsideration was denied, 30 Vet.App. 364. Veteran appealed. Army veteran claimed that Veterans Affairs (VA) had committed clear and unmistakable error (CUE) with regard to entitlement to disability compensation benefits for asthma. The Board of Veterans' Appeals denied veteran's motion for revision of denial decision. Veteran appealed. The Court of Appeals for Veterans Claims, 2019 WL 3449689, affirmed. Veteran appealed.

The Court of Appeals, Chen, Circuit Judge, held that new judicial pronouncement did not retroactively apply to final decisions.

Affirmed.

Procedural Posture(s): Review of Administrative Decision.

***1228** Appeal from the United States Court of Appeals for Veterans Claims in No. 16-2174, Chief Judge Margaret C. Bartley, Judge Amanda L. Meredith, Senior Judge Robert N. Davis.

Appeal from the United States Court of Appeals for Veterans Claims in No. 18-124, Chief Judge Margaret C. Bartley.

Attorneys and Law Firms

Kenneth M. Carpenter, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellant Kevin R. George.

Amy F. Odom, Chisholm Chisholm & Kilpatrick, Providence, RI, argued for claimant-appellant Michael B. Martin. Also represented by April Donahower, Zachary Stolz.

Tanya Koenig, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Eric P. Bruskin, Jeffrey B. Clark, Martin F. Hockey, Jr., Robert Edward Kirschman, Jr.; Brian D. Griffin, Andrew J. Steinberg, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Lourie, Chen, and Stoll, Circuit Judges.

Opinion

Chen, Circuit Judge.

***1229** Kevin R. George and Michael B. Martin (collectively, Appellants) are military veterans whose respective claims for disability benefits were denied several decades ago in final decisions by the Department of Veterans Affairs (VA). More recently, Appellants each filed a motion for revision of those denial decisions, alleging that the VA in those decisions had committed clear and unmistakable error (CUE). The VA's denials had been based in part on a straightforward application of a then-existing regulation, 38 C.F.R. § 3.304(b) ("Presumption of soundness"), that was years later overturned. In Appellants' view, the VA's reliance on a now-invalidated regulation in its denials of Appellants' original claims establishes CUE.

The United States Court of Appeals for Veterans Claims (Veterans Court) affirmed the Board of Veterans' Appeals' (Board) denials of Appellants' CUE motions, reasoning that the VA did not commit a clear and unmistakable legal error when it faithfully applied the version of the presumption of soundness regulation that existed at the

time of the denials. Because *Jordan v. Nicholson* and *Disabled American Veterans v. Gober* establish that a legal-based CUE requires a misapplication of the law as it was understood at that time, and cannot arise from a subsequent change in interpretation of law by the agency or judiciary, we *affirm*. *See Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005); *Disabled Am. Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000) (*DAV*), *overruled in part on other grounds by Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360, 1373 (Fed. Cir. 2020) (en banc).

BACKGROUND

These companion appeals involve similar facts and legal issues. Before discussing the details of each case, we first address the statutory presumption of soundness at issue in both appeals.

A. Statutory Presumption of Soundness

The statutory presumption of soundness recites:

> [E]very veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease *existed before acceptance and enrollment and was not aggravated by such service*.

38 U.S.C. § 311 (1970) (now codified as 38 U.S.C. § 1111) [1] (emphasis added). Under this standard, a veteran is presumed to have been in sound condition at entry to service as to disorders that are not identified on the veteran's entrance medical examination. The presumption, however, can be rebutted by "clear and unmistakable evidence" that the disorder "existed before acceptance and enrollment and was not aggravated by service." *Id*.

1 For ease of reference, we hereafter refer to the statutory presumption of soundness as 38 U.S.C. § 1111.

In 1970, the VA's implementing regulation for § 1111 did not require clear and unmistakable evidence of lack of aggravation by service for rebuttal. *See* 38 C.F.R. § 3.304(b) (1970). [2] In other words, for the ***1230** VA to rebut the presumption of soundness, the 1970 version of § 3.304(b) required only clear and unmistakable evidence that the disorder "existed prior [to service]." *Id.* This version of the regulation prevailed until 2003, when the VA invalidated the regulation for conflicting with the language of § 1111, *see* VA Gen. Counsel Prec. 3–2003 (July 16, 2003) (2003 OGC opinion), and subsequently amended the regulation to require evidence of *both* preexisting condition and no aggravation, *see* 70 Fed. Reg. 23,027, 23,028 (May 4, 2005).

2 Specifically, 38 C.F.R. § 3.304(b) (1970) stated:

> The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that *an injury or disease existed prior thereto*. Only such conditions as are recorded in examination reports are considered as noted.

Id. (emphasis added). This language remained unchanged from the time of Mr. Martin's 1970 regional office decision to Mr. George's 1977 Board decision.

We confirmed the correctness of the VA's changed understanding of the statute in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004). There, we began our statutory analysis by acknowledging that § 1111's "rebuttal standard is somewhat difficult to parse" and "on its face ... appears to be somewhat self-contradictory." *Id.* at 1093. After a careful examination of the statutory history, we determined that Congress intended for the presumption of soundness to apply "even when there was evidence of a preexisting condition, [so long as] the government failed to show clear and unmistakable evidence that the preexisting condition was not aggravated" by service. *Id.* at 1096. *Wagner* thus held that the VA must show "clear and unmistakable evidence of both

a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness." *Id.*

B. Mr. George's Appeal

Mr. George served in the U.S. Marine Corps from June to September 1975. His medical entrance examination made no mention of any psychiatric disorders. Yet, a week after enlistment, Mr. George suffered a psychotic episode requiring extended hospitalization and was diagnosed with paranoid schizophrenia. Two months into his service, a military medical board confirmed the schizophrenia diagnosis and found Mr. George unfit for duty. The medical board determined that his condition had preexisted service because he had experienced "auditory hallucinations, paranoid ideas of reference, and delusions" prior to enlistment. J.A. 53–54. The medical board also determined that his condition was aggravated by service, observing that he "now appeared quite disturbed" and was "withdrawn [and] tearful." *Id.* At his time of discharge, however, a physical evaluation board concluded that his condition was *not* aggravated by service, finding that Mr. George "essentially appear[ed] in his preenlistment state" and that his schizophrenia was "in remission." J.A. 55.

In December 1975, Mr. George filed a disability benefits claim, contending that his schizophrenia was aggravated by service. The VA regional office (RO) denied his claim for lack of service connection, which the Board affirmed in September 1977. While the Board did not specifically cite the statutory presumption of soundness or the implementing regulation, it concluded that his schizophrenia "existed prior to military service" and "was not aggravated by his military service." J.A. 60. Mr. George did not appeal the Board's decision, which became final.

Years later, in December 2014, Mr. George requested revision of the 1977 Board decision based on CUE, asserting that the Board had failed to correctly apply 38 U.S.C. § 1111. Mr. George argued ***1231** that he had been improperly denied the presumption of soundness because his "entrance examination to service was negative for any preservice mental disorder" and the record "[did] not clearly and unmistakably indicate that [his] schizophrenia was not aggravated by service." J.A. 66–67. If not for the 1977 Board's purported failure to "rebut *both* prongs of the presumption," Mr. George alleged that he would have been granted service-connected benefits for schizophrenia. J.A. 67 (emphasis added).

The Board, in 2016, denied Mr. George's request, finding no CUE in the 1977 Board decision. Relevant to this appeal, the Board observed that, as of 1977, 38 C.F.R. § 3.304(b) did "not require[ ] clear and unmistakable evidence that the disability was not aggravated by service" to rebut the presumption of soundness. J.A. 73. While acknowledging that the 2003 OGC opinion and *Wagner* later invalidated § 3.304(b) for conflicting with the statute, the Board concluded that "judicial decisions that formulate new interpretations of the law subsequent to a VA decision cannot be the basis of a valid CUE claim." J.A. 74. Thus, any purported failure by the 1977 Board to find that Mr. George's schizophrenia was not clearly and unmistakably aggravated by service "cannot be considered to be CUE." *Id.* Mr. George appealed to the Veterans Court.

A divided panel of the Veterans Court affirmed, concluding that *Wagner*'s interpretation of § 1111 could not retroactively apply to establish CUE in the 1977 Board decision. *See George v. Wilkie*, 30 Vet. App. 364, 373 (2019) ("*Wagner* does not change how [§ 1111] was interpreted or understood before it issued."). Instead, citing this court's decisions in *DAV* and *Jordan*, the Veterans Court determined that the 1977 Board was required to apply the law *existing at the time*, namely, the 1977 version of 38 C.F.R. § 3.304(b). Because that version of § 3.304(b) required only clear and unmistakable evidence that an injury preexisted service to rebut the presumption of soundness, the Veterans Court concluded that the 1977 Board's alleged failure to also demonstrate clear and unmistakable evidence of no aggravation did not constitute CUE. *Id.* at 374–75.

The Veterans Court next considered a trio of cases involving a CUE claim filed by a widow, Mrs. Patrick, seeking death and indemnity compensation benefits. *See Patrick v. Principi*, 103 F. App'x 383 (Fed. Cir. 2004) (*Patrick I*); *Patrick v. Nicholson*, 242 F. App'x 695 (Fed. Cir. 2007) (*Patrick II*); *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011) (*Patrick III*). As relevant here, *Patrick II* concluded that *Wagner* could form the basis for a CUE claim attacking a final VA decision that had relied on the now-invalidated version of § 3.304(b), because "[*Wagner*'s] interpretation of § 1111 ... did not change the law but explained what § 1111 had always meant." *Patrick II*, 242 F. App'x at 698.

The Veterans Court determined that it was not bound by the *Patrick* cases, which contradicted the reasoning of *DAV* and *Jordan*. *George*, 30 Vet. App. at 374–75. *Patrick II*, the main case supporting Mr. George's position, was nonprecedential and issued after *DAV* and *Jordan*, and *Patrick III*, the only precedential opinion in this line of cases, pertained to attorneys' fees under the Equal Access to Justice Act (EAJA) and did not directly address whether *Wagner* supports a basis for CUE.

The Veterans Court also determined that permitting retroactive application of *Wagner*'s statutory interpretation would contravene the law on finality of judgments. While recognizing that "CUE is a statutorily permitted collateral attack on final VA decisions," the court observed ***1232** that "Mr. George's appeal of the denial of benefits for schizophrenia was not open for *direct* review when *Wagner* was decided," and to hold that a judicial pronouncement of the law retroactively applies to final decisions closed to direct review would undermine long-standing principles of finality and *res judicata*. *George*, 30 Vet. App. at 372–73, 376 (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991)). CUE instead requires "the application of the law as it was understood at the time of the [underlying] decision," and such an application of law "does not become CUE by virtue of a subsequent interpretation of the statute or regulation." *George*, 30 Vet. App. at 373. [3]

3 The Veterans Court majority also concluded that even assuming *Wagner* retroactively applies to support allegations of CUE in final VA decisions, Mr. George failed to demonstrate that this alleged error, based on the evidence extant in 1977, would have manifestly changed the outcome of the 1977 Board's decision to deny him benefits for schizophrenia. *George*, 30 Vet. App. at 377–78. Because we conclude that the error alleged is outside the scope of CUE, as discussed *infra*, we need not reach this alternative holding.

A dissenting judge opined that *Wagner* merely provided an "authoritative statement" of what § 1111 has always meant and thus should not be understood as implementing a "new understanding or interpretation" of that statute. *Id.* at 379. The dissent further concluded that the 1977 Board's failure to abide by § 1111's true meaning "constituted an undebatable and outcome-determinative misapplication of the law," which is "precisely" the type of error CUE was designed to remedy. *Id.* at 383.

C. Mr. Martin's Appeal

Mr. Martin served in the U.S. Army from August 1965 to February 1966, and from June 1968 to August 1969. At entry to service, Mr. Martin reported never having had "asthma," "shortness of breath," or "hay fever," J.A. 13, and his medical examination reported his lungs and chest as "normal," J.A. 15. During his second period of service, in November 1968, he sought treatment at an allergy clinic for a stuffy nose, sneezing, itchy eyes, and nocturnal wheezing. Contrary to his entrance examination, Mr. Martin reported a childhood history of asthma with similar symptoms. A note from his personal physician, dated January 1969, confirmed that Mr. Martin had started treatment for asthma as a child and had been "treated for this problem intermittently since that time." J.A. 10. A medical examiner diagnosed and treated Mr. Martin for "rhinitis and asthma, mixed infectious-allergic, with dust-mold and ragweed sensitivity." J.A. 11. By discharge, however, his separation examination did not report any asthma or related symptoms.

Shortly thereafter, in October 1969, Mr. Martin filed a claim for service-connected disability benefits for asthma. In support of his claim, Mr. Martin underwent a VA medical examination in December 1969, which noted that he had "made a good adjustment" following in-service treatment, but upon returning home after discharge, had experienced wheezing and shortness of breath during the ragweed season. J.A. 21. Mr. Martin was diagnosed with "[a]sthma due to sensitivity of ragweed class." J.A. 24.

The RO denied Mr. Martin's claim in February 1970 for lack of service connection. The RO found that following Mr. Martin's November 1968 treatment at the allergy clinic, there was "no further showing of complaints relative to asthma in service and [the] separation examination ***1233** was negative." J.A. 26. While acknowledging that Mr. Martin had reported asthma symptoms in his December 1969 medical examination four months after service, the RO concluded that:

"In view of the pre-service history of asthma[,] it is held that the solitary exacerbation in service with a subsequent asymptomatic period of better than a year does not establish aggravation." J.A. 25–26. Mr. Martin did not appeal the RO decision.

In July 2013, Mr. Martin requested revision of the 1970 RO decision based on CUE, contending that the RO had failed to correctly apply "both" prongs of 38 U.S.C. § 1111. J.A. 27–28. As with Mr. George's case, the Board denied the request, finding no CUE in the 1970 RO decision because the regulation in force at that time did not require clear and unmistakable evidence of no aggravation. J.A. 39–40. Citing *George*, the Veterans Court affirmed the Board's decision:

> The denial of service connection in *George*, like the RO's denial here, predated the Federal Circuit's decision in *Wagner v. Principi* .... *George* held that *Wagner* does not apply retroactively to final decisions and affirmed the Board's finding that the VA decision did not contain CUE. The Court must reach the same conclusion here and affirm the Board's ... finding that the February 1970 rating decision does not contain CUE.

Martin v. Wilkie, No. 18-0124, 2019 WL 3449689, at *3 (Vet. App. July 31, 2019) (citations omitted).

Both Mr. George and Mr. Martin timely appealed to this court. We have jurisdiction under 38 U.S.C. § 7292.

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is prescribed by statute. *Scott v. Wilkie*, 920 F.3d 1375, 1377–78 (Fed. Cir. 2019). We may "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" and "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). We review claims of legal error in a decision of the Veterans Court without deference. *See Szemraj v. Principi*, 357 F.3d 1370, 1374–75 (Fed. Cir. 2004).

A motion for revision based on "clear and unmistakable error" is a statutorily authorized collateral attack on a final decision of the Board or RO that, if successful, results in a "reversed or revised" decision having "the same effect as if [it] had been made on the date of the [original] decision." *See* 38 U.S.C. §§ 7111, 5109A. [4] In other words, a meritorious CUE claimant may be entitled to benefits retroactive to the date of the original claim. CUE, however, is a "very specific and rare type of error," *Cook v. Principi*, 318 F.3d 1334, 1345 (Fed. Cir. 2002) (en banc), and must be based on "the record and the *law that existed at the time of the prior adjudication* in question," such that "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions *extant at the time* were incorrectly applied," *see Willsey v. Peake*, 535 F.3d 1368, 1371 (Fed. Cir. 2008) (emphases added) (citing *Russell v. Principi*, 3 Vet. App. 310, 313–14 (1992) (en banc)). CUE must also be an "undebatable" error that would have "manifestly changed the outcome at the time it was made." *Willsey*, 535 F.3d at 1371.

4 38 U.S.C. § 7111 governs CUE arising from a Board decision whereas § 5109A governs CUE arising from an RO decision.

***1234** A

Appellants first contend that their CUE claims do not seek to retroactively apply a changed interpretation of the law and, instead, are simply premised on the VA's purported failure to correctly apply the statute as written. Appellants assert that § 1111's meaning is plain and unambiguous, regardless of the VA's contrary interpretation set forth at the time in § 3.304(b). Rather than establish a "new" interpretation of § 1111, Appellants argue that *Wagner* "merely provided an authoritative statement of what [§ 1111] had *always* meant," including at the time of Appellants' respective VA decisions. *See* Martin Appellant's Br. 8 (internal quotation marks omitted) (citing *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994)). This reasoning, Appellants contend, comports with our nonprecedential decision in *Patrick II*, where we permitted a CUE claim to proceed based on the

argument that the VA had "misapplied § 1111." *See Patrick II*, 242 F. App'x at 698.

We disagree with Appellants' argument because it overlooks the significance of the VA's regulation that existed at the time of the original decisions and fails to account for our caselaw. *Jordan*, in view of *DAV*, squarely forecloses Appellants' argument that *Wagner*'s later-in-time interpretation of § 1111 can serve as the basis for CUE. *DAV* upheld, over rulemaking challenge, the validity of CUE regulation 38 C.F.R. § 20.1403(e), which expressly states that CUE "does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a *change in the interpretation* of the statute or regulation." *See DAV*, 234 F.3d at 695–98 (emphasis added).[5] In analyzing the regulation's specific carve-out of subsequent, changed interpretations as a basis for CUE, we clarified that "[t]he new interpretation of a statute can only retroactively [a]ffect decisions still open on direct review, not those decisions that are final." *Id.* at 698. This limit on CUE, we explained, is consistent with Congress' intent that "changes in the law subsequent to the original adjudication ... do not provide a basis for revising a finally decided case." *Id.* at 697–98. *DAV* thus established that CUE must be analyzed based on the law as it was *understood at the time* of the original decision and cannot arise from a subsequent change in the law or interpretation thereof to attack a final VA decision.

5 38 C.F.R § 20.1403 governs CUE in Board decisions, whereas 38 C.F.R. § 3.105 governs CUE in RO decisions. We note that in 2019, § 3.105 was amended to include subsection (a)(1)(iv), which mirrors the language of § 20.1403(e). *See VA Claims and Appeals Modernization*, 84 Fed. Reg. 138 (Jan. 18, 2019) (final rule). In promulgating § 3.105(a)(1)(iv), the VA explained that "no substantive changes [were] intended to the existing law governing revision of final [RO] decision based on CUE," *see VA Claims and Appeals Modernization*, 83 Fed. Reg. 39,818, 39,820 (Aug. 10, 2018) (notice of proposed rulemaking), and the purpose of the amendment was to "conform[ ]" the regulation governing CUE in final RO decisions with the existing regulation governing final Board decisions, 84 Fed. Reg. at 142. Mr. Martin acknowledges that the substance of § 3.105(a)(1)(iv) applies to his appeal, *see* Martin Appellant's Reply Br. 6 n.2, and makes no attempt to distinguish *DAV* and *Jordan* based on the governing CUE regulation (§ 20.1403 vs. § 3.105) or statute (§ 7111 vs. § 5109A).

Jordan subsequently applied *DAV*'s understanding of CUE to the statutory presumption of soundness. There, in 1983, the Board denied Mr. Jordan's benefits claim for lack of service connection under then-governing 38 C.F.R. § 3.304(b)—the same version of the regulation that was applied to Appellants' original claims. *See* ***1235** *Jordan*, 401 F.3d at 1297. Mr. Jordan never appealed the Board's decision, which became final. Several years later, in 1999, Mr. Jordan filed a CUE claim asserting that the 1983 Board had "misinterpreted provisions in 38 U.S.C. § 1111." *Id.* Like Appellants, Mr. Jordan claimed that § 1111's presumption of soundness had not been rebutted because the 1983 Board had failed to establish that his preexisting condition was not aggravated by service. The Board denied his CUE claim, and Mr. Jordan then appealed to the Veterans Court. While his Veterans Court appeal was pending, the VA issued its 2003 OGC opinion invalidating 38 C.F.R. § 3.304(b) for conflicting with § 1111. Nevertheless, the Veterans Court found no CUE because, as *DAV* held, CUE "does not include the otherwise correct application of a statute or regulation" where there has been a subsequent "change in the interpretation of [that] statute or regulation." *Id.* On appeal before us, Mr. Jordan argued that there was no subsequent change in interpretation because 38 C.F.R. § 3.304(b) was "void *ab initio*" for being contrary to § 1111's "facially apparent meaning." *Id.* We rejected that argument because "the accuracy of the regulation as an interpretation of the governing legal standard does not negate the fact that [§ 3.304(b)] did provide the first commentary on section 1111, and was therefore the initial interpretation of that statute," which subsequently changed with the issuance of the 2003 OGC opinion. *Id.*

Here, as in *Jordan*, Appellants' argument that their CUE claims are not premised on a "change in the law" fails to appreciate that 38 C.F.R. § 3.304(b) provided the initial interpretation of § 1111, regardless of any inaccuracies subsequently reflected in *Wagner*. Section 3.304(b) established the VA's controlling interpretation of § 1111's rebuttal standard at the time of Appellants' VA decisions, and it would make little sense for the Board's

and RO's "otherwise correct application" of this then-binding regulation to constitute adjudicative error, let alone CUE. *See* 38 C.F.R. §§ 20.1403(e), 3.105(a)(1)(iv). Indeed, Appellants do not dispute that VA adjudicators, at the time of their original Board and RO decisions, were bound by § 3.304(b). *See also* 38 U.S.C. § 7104(c) ("The Board shall be bound in its decisions by the regulations of the Department ...."). And contrary to Appellants' assertion that § 1111's language is plain and unambiguous, *Wagner* found the language of § 1111's rebuttal standard "somewhat difficult to parse" and "self-contradictory" "on its face." *See* 370 F.3d at 1093.

That *Wagner* was the first judicial interpretation of § 1111 by this court does not lead to a contrary result. *Jordan* does not differentiate between new agency interpretations and new judicial interpretations, and instead, refers to *both* the 2003 OGC opinion and *Wagner* as evidence of a change in interpretation of § 1111. *See Jordan*, 401 F.3d at 1298. *Jordan*, moreover, determined that granting CUE claims premised on a changed interpretation of law—whether based on *Wagner* or the 2003 OGC opinion—would fail to "give adequate weight to the finality of judgments," given that "[t]he Supreme Court has repeatedly denied attempts to reopen final decisions in the face of new judicial pronouncements." *Id.* at 1299; *see also DAV*, 234 F.3d at 698 (concluding that new statutory interpretations cannot, through a CUE motion, retroactively affect decisions that are final). We thus cabined the reach of CUE motions to exclude retroactive application of a new judicial or agency pronouncement to a final VA decision on a benefits claim.

Even though *Jordan* precludes CUE claims based on retroactively applying either our interpretation in *Wagner* or the VA's interpretation in the 2003 OGC opinion, ***1236** Appellants nonetheless urge us to follow the contrary reasoning of the *Patrick* cases and hold that *Wagner* can serve as the basis for their CUE claims. Specifically, *Patrick II*, in a nonprecedential decision, distinguished *Jordan* as purportedly addressing only "whether a change in the regulatory interpretation of a statute had retroactive effect on CUE claims, not whether our interpretation of the statute in *Wagner* had retroactive effect on CUE claims." *See Patrick II*, 242 F. App'x at 698. Because Mrs. Patrick's CUE claim was premised on our interpretation of § 1111 in *Wagner*, and not on the VA's changed regulatory interpretation of § 1111, *Patrick II* determined that *Jordan*'s "limited holding" did not apply to bar Mrs. Patrick's claim. *Id.* Subsequently, *Patrick III* summarized *Patrick II*'s reasoning in dicta and reversed the denial of Mrs. Patrick's application for EAJA fees, explaining that the lower court had failed to consider "the fact that the government had adopted an interpretation of [§ 1111] that was wholly unsupported by either the plain language of the statute or its legislative history" in assessing whether the government's position was substantially justified. *See Patrick III*, 668 F.3d at 1334.

We conclude, as the Veterans Court did, that we are not bound by the *Patrick* cases to reach a holding contrary to *DAV* and *Jordan*. *Patrick II* is a nonprecedential decision that issued after *DAV* and *Jordan*. Indeed, we expressly denied a motion to reissue *Patrick II*'s nonprecedential decision as precedential. *See Patrick v. Shinseki*, No. 06-7254 (Fed. Cir. Aug. 21, 2007), ECF No. 26. And *Patrick III*, though precedential, does not directly address whether *Wagner* can serve as a basis for CUE. While *Patrick III* summarizes *Patrick II*'s reasoning in the background section and in a footnote, its description of *Patrick II* in dicta does not elevate it to binding precedent. *See* Fed. Cir. R. 32.1(d) ("The court ... will not give one of its own nonprecedential dispositions the effect of binding precedent.").

B

Appellants next argue that the Veterans Court misconstrued principles of finality and retroactivity in Supreme Court decisions, such as *Harper* and *Beam*. When properly read, Appellants contend, these cases "support the retroactive application of judicial pronouncements in cases that are open to collateral attack," Martin Appellant's Br. 19, or, if not, are otherwise "irrelevant" to their CUE claims given *Rivers*'s pronouncement that a judicial construction of a statute is an authoritative statement of what that statute has always meant, George Appellant's Br. 22. We disagree.

Nothing in these cases supports Appellants' contention that a new judicial pronouncement retroactively applies to *final* decisions, even those subject to a collateral attack, such as a request to revise a final Board or RO decision for CUE. *See Routen v. West*, 142 F.3d 1434, 1437 (Fed. Cir. 1998) (explaining that "basic principles of finality and res judicata apply to ... agency decisions" that have not been appealed and have become final). Instead, *Harper* adopted a rule consistent

with *Beam* that new judicial pronouncements are to be given "full retroactive effect in all cases *still open on direct review*" but not in final cases already closed. *See Harper*, 509 U.S. at 96, 113 S.Ct. 2510 (emphasis added); *see also, e.g.*, *Beam*, 501 U.S. at 529, 111 S.Ct. 2439 ("Retroactivity in civil cases must be limited by the need for finality; once suit is barred by *res judicata* ..., a new rule cannot reopen the door already closed." (citation omitted)); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758, 115 S.Ct. 1745, 131 L.Ed.2d 820 (1995) ("New legal ***1237** principles, even when applied retroactively, do not apply to cases already closed."); *DAV*, 234 F.3d at 698 ("[t]he new interpretation of a statute can only retroactively [a]ffect decisions still open on direct review, not those decisions that are final," and is therefore not a basis for CUE); *Jordan*, 401 F.3d at 1299 (recognizing that "new judicial interpretations" of a statute generally apply only to "pending cases").

While *Rivers* states that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction," 511 U.S. at 312–13, 114 S.Ct. 1510, it never holds that judicial constructions of statutes should be retroactively applied to *final* decisions, such as the VA decisions at issue here. Instead, *Rivers* cites to *Harper*, which expressly limits retroactivity of judicial decisions to pending "cases still open to direct review." *See id.* at 312, 114 S.Ct. 1510 (citing *Harper*, 509 U.S. at 97, 113 S.Ct. 2510). And *DAV* likewise cites *Harper* for support in upholding the validity of 38 C.F.R. § 20.1403(e), which states that CUE does not arise from "the correct application of the statute or regulation as it was interpreted at the time of the decision." *DAV*, 234 F.3d at 697.

C

Our determination that *Wagner* cannot serve as the basis for Appellants' CUE claims accords with the legislative intent behind the CUE statutes, 38 U.S.C. §§ 7111 and 5109A. Neither statute addresses subsequent changes in law, interpretations of law, or otherwise defines CUE. Instead, these statutes merely provide that a prior decision shall be revised for CUE "[i]f evidence establishes the error." *See id.* §§ 7111(a), 5109A(a). Upon revision, the statutes then authorize retroactive benefits from the effective date of the original decision. *See id.* §§ 7111(b), 5109A(b).

The statutory history, however, is more instructive. Prior to their statutory enactment, CUE had been solely an administrative practice governed by VA regulation for several decades, dating back to 1928. *DAV*, 234 F.3d at 686. Congress enacted §§ 7111 and 5109A in 1997 to "codify [the] existing regulation[ ]" governing CUE in RO decisions and extend those principles to Board decisions as well. *See* H.R. Rep. No. 105–52, at 1 (1997). These statutes "made no change in the substantive standards" governing CUE and "merely codified the prior regulation" provided in 38 C.F.R. § 3.105, *see Donovan v. West*, 158 F.3d 1377, 1382 (Fed. Cir. 1998), and the Veterans Court's "long standing interpretation of CUE," *see Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999). We therefore look to the pre-codified version of § 3.105 and established CUE standards to understand Congress' intent in enacting the CUE statutes.

As an initial matter, we observe that the VA's CUE regulation predates the enactment of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat 4105 (1988), which, for the first time, permitted judicial review of VA decisions. Because § 3.105 predates judicial review, this regulation and the VA's administrative practice, before 1988, could not have contemplated CUE would arise from a new judicial interpretation of a statute.

More importantly, as of the CUE doctrine's statutory codification in 1997, § 3.105's preamble provided that revision of a final RO decision based on CUE was available "*except* where" the alleged error was based on "a change in law or Department of Veterans Affairs issue, or a *change in interpretation of law* or a Department of Veterans Affairs issue ***1238** (§ 3.114)."[6] 38 C.F.R. § 3.105 (1997) (emphases added); *see also Russell*, 3 Vet. App. at 313 ("[C]hanges in the law subsequent to the original adjudication ... do not provide a basis for revising a finally decided case."). Given that § 3.105 plainly excluded a "change in law" or "change in interpretation of law" from CUE, we conclude that by codifying this regulation, Congress did not intend for CUE to go so far as to attack a final VA decision's correct application of a then-existing regulation that is subsequently changed or invalidated, whether by the agency or the judiciary.[7] In other words, the VA does not

commit clear and unmistakable error in a benefits claim decision when it faithfully applies a regulation as it existed at the time of decision, even if that regulation is later revised or invalidated.

6 We do not construe § 3.105's reference to § 3.114 to be limiting. We nonetheless observe that the substance of § 3.114 comports with our above understanding of CUE. As of 1997, § 3.114 pertained, in relevant part, to the effective date of awards pursuant to liberalizing laws. It explained that where an award is made pursuant to a "liberalizing law" or "liberalizing VA issue," the effective date of that award "shall not be earlier than the effective date of the act or administrative issue" itself. *See* 38 C.F.R. § 3.114(a) (1997). Thus, even where a subsequent law liberalizes benefits that were unavailable under a prior understanding of the law, the effective date of those benefits cannot be earlier than the effective date of the liberalizing law itself. Likewise, here, our understanding of CUE precludes *Wagner*'s interpretation of § 1111 from providing retroactive benefits predating *Wagner* itself.

7 We note that the VA reached this conclusion in its 1994 OGC opinion, VA Gen. Counsel Prec. 9-94 (Mar. 25, 1994), which addressed whether Veterans Court decisions invalidating VA regulations or statutory interpretations have retroactive effect through CUE. As with our decision today, the VA also interpreted § 3.105's preamble to exclude changes in interpretation of law by judicial precedent as a basis for CUE. *See id.* at 2 ("[I]t is our view that section 3.105(a) provides no authority ... for retroactive payment of benefits when the [Veterans Court] invalidates a VA interpretation or regulation.").

Accordingly, we reject Appellants' theory as to the scope of CUE and hold that our interpretation of § 1111 in *Wagner* cannot be the basis for Appellants' CUE claim.

CONCLUSION

We have considered Appellants' remaining arguments but find them unpersuasive. For the reasons set forth above, we affirm the Veterans Court's decisions.

AFFIRMED

COSTS

No costs.

All Citations

991 F.3d 1227