No. 20-4692

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S BRIEF

Re

ARTHUR L. HAIRSTON, SR.

Appellant,

versus

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee.

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Statement of the Issue

Whether the Board misinterpreted the plain meaning of 38 C.F.R. § 3.23(b)?

Whether the provisions of 38 C.F.R. § 3.23(d)(4) are invalid?

Whether the Secretary's promulgation of the provisions of 38 C.F.R. § 3.275 supercedes what constitutes countable income?

Statement of the Case

This appeal concerns what Congress intended to be considered by the Secretary when determining whether an otherwise qualified veteran would receive the maximum annual rates for pension. The Secretary for decades has used what he characterizes as "countable income" to reduce the amount of pension paid to veterans who are qualified to receive VA pension benefits. The Secretary promulgated effective September 18, 2018 a regulation which set out for the first time a bright line test for countable assets in 38 C.F.R. § 3.275. As a result, the meaning of the language used by the Secretary in the provisions of 38 C.F.R. § 3.23(b) is not clear and was misinterpreted and misapplied by the Board. Further, the promulgation of § 3.275 renders the provisions of 38 C.F.R. § 3.23(d)(4) invalid to the extent that they permit the reduction of the amount of pension payable to an otherwise qualified veteran to receive the maximum annual rates for pension.

Course of Proceedings Below

Mr. Hairston served on active duty from August 1974 to November 1976. RBA 271. In October 1992, he applied for a non-service-connected pension. RBA 787-791. In a March 1993 rating decision, VA granted him a non-service-connected pension based

upon a determination that he was totally and permanently disabled. RBA 709-710 and 713-715. On December 30, 2016, VA terminated Mr. Hairston's pension because he able to maintain full-time employment. RBA 184-192.

In December 2018, Mr. Hairston reapplied for pension benefits. RBA 105-112. He reported that he earned an annual income of $35,000 from January 1, 2016, to January 1, 2018. RBA 105-112 at 109. He also reported that he had been married since July 2015 and that his wife's annual income was $20,494. RBA 105-112 at 109 and 112.

In a July 2019 decision, VA denied Mr. Hairston a non-service-connected pension on grounds that, effective January 1, 2019, his countable income exceeded the maximum annual rates for pension (MARP or MAPR). RBA 79-82. Specifically, VA relied upon Mr. Hairston's receipt of $6,876 in annual Social Security Benefits and that his wife's annual earnings were $20,494. RBA 79-82 at 79. Mr. Hairston appealed VA's decision to deny him any pension benefits and requested direct Board review of the evidence considered by the agency of original jurisdiction. RBA 68-78.

On June 17, 2020, the Board of Veterans Appeals denied Mr. Hairston entitlement to a non-service-connected pension based upon his countable income having exceeded the applicable maximum annual pension rates (MAPRs). RBA 4-11.

Arguments

STANDARD OF REVIEW

This Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); *see Butts v. Brown*, 5 Vet. App. 532 (1993) (*en banc*); *Palmer v. Nicholson*, 21 Vet. App. 434,

436 (2007). This Court also reviews *de novo* whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19 Vet. App. 36, 42-46 (2005). This Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet. App. at 538. In the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, the Court shall hold unlawful and set aside or reverse such finding if the finding is clearly erroneous. 38 U.S.C. § 7261(a)(4). *Padgett v. Nicholson*, 19 Vet. App. 133, 147 (2005).

This Court reviews "whether an applicable law or regulation was not applied" under the *de novo* standard. *Acciola v. Peake*, 22 Vet. App. 320, 324 (2008); *Joyce v. Nicholson*, 19 Vet. App. 36, 42-43 (2005). Upon such review, should this Court find that they were not applied, reversal of the Board's decision is required as well as remand, with instructions to the Board on how to correctly apply the applicable law or regulation.

Under the legal standard that governs this Court's prejudicial-error analysis, a claimant shows that an error is prejudicial when it "(1) prevented the claimant from effectively participating in the adjudicative process, or (2) affected or could have affected the outcome of the determination." *Simmons v. Wilkie*, 30 Vet. App. 267, 279 (2018); see also id. at 279–85 (providing details and examples); *accord Smith v. Wilkie*, 32 Vet. App. 332, 339 (2020) (noting that this Court "cannot conclude that an error [i]s not prejudicial where 'it is possible that the appellant would have sought and obtained additional medical opinions, evidence[,] or treatises' on the disputed question" (quoting *Daniels v.*

Brown, 9 Vet. App. 348, 353 (1996)).

Summary of the Arguments

The Board's decision to deny Mr. Hairston nonservice-connected pension benefits was based upon a misinterpretation of 38 C.F.R. § 3.23(b). The Board's denial of pension benefits to Mr. Hairston was based upon a misreading of the meaning of § 3.23(b), specifically, the words "the spouses annual income." The Secretary did not include in § 3.23(b) any reference to the spouses annual income as being so called "countable income" to be used to reduce the amount of a veteran's pension benefit amount.

The Board relied upon invalid provisions of 38 C.F.R. § 3.23(d)(4) which provide a definition of the meaning of the veteran's annual income as including the annual income of the veteran's dependent spouse. This definition is inconsistent with the language used by Congress in 38 U.S.C. § 1521(c) and § 1521(h)(1), which results in an invalid definition of the meaning of the phrase "veteran's annual income" as including the annual income of the veteran's dependent spouse.

Finally, Mr. Hairston asserts that the Secretary's promulgation of the provisions of 38 C.F.R. § 3.275 reflects a change in Congress's intent concerning the reduction in pensions benefits which supercedes what constitutes countable income and implements a changed approach. Going forward from September 18, 2018 Congress abandoned reduction of pension benefits in favor of an eligibility requirement.

I.

The Board misinterpreted and, as a result, misapplied the provisions of 38 C.F.R. § 3.23(b).

The Board's decision, RBA 4-11, included the following order: "Entitlement to non-service-connected pension benefits is denied." RBA 4-11 at 5. Congress mandated that: "Each decision of the Board shall include—an order granting appropriate relief or denying relief." *See* 38 U.S.C. § 7104(d)(3). This order was neither an order of "appropriate relief" nor an appropriate order denying relief because Mr. Hairston's countable income did not exceed the applicable maximum annual pension rates (MAPRs) for the period on appeal. RBA 4-11 at 5. This purported to be a finding of fact, *Id.*, upon which the Board made the following conclusion of law:

> The criteria for entitlement to payment of nonservice-connected pension benefits **based on the Veteran's countable income have not been met.** 38 U.S.C. § 1521; 38 C.F.R. §§ 3.3, 3.23, 3.271, 3.272, 3.273.

Id. (emphasis added).

The Board erred by using the phrase "based on the Veteran's countable income have not been met." The Board misinterpreted and as a result misapplied the provisions of 38 C.F.R. § 3.23(b). The title of 38 C.F.R. § 3.23 is "Improved pension rates - Veterans and surviving spouses." In 38 C.F.R. § 3.23(a) this regulation the Secretary identified seven categories of beneficiaries who are entitled to receive improved pensions. 38 C.F.R. § 3.23(b) is titled "Reduction for Income." The text of the regulation directs:

> The maximum rates of improved pension in paragraph (a) of this section shall be reduced by the amount of the countable

> annual income of the veteran or surviving spouse.

38 C.F.R. § 3.23(b). (Authority: 38 U.S.C. § 1521 and § 1541). These authorities are the statutes authorizing the payment of pensions to veterans in § 1521 and to a surviving spouse in § 1541.

The statute related to married veterans provides:

> The rate payable shall be reduced by the amount of the veteran's annual income and, subject to subsection (h)(1) of this section, the amount of annual income of such family members.

38 U.S.C. § 1521(c). The statute further provides:

> **In determining the annual income of a veteran**, if there is a child of the veteran who is in the custody of the veteran or to whose support the veteran is reasonably contributing, **that portion of the annual income of the child that is reasonably available to or for the veteran shall be considered to be income of the veteran, unless in the judgment of the Secretary to do so would work a hardship on the veteran**.

38 U.S.C. § 1521(h)(1). (emphases added). Congress made no provision for the reduction of the amount of pension benefits payable based upon the annual income of a spouse.

Moreover, nothing in the provisions of 38 C.F.R. § 3.23 identify the Veteran's countable income as the criteria for entitlement to payment of non-service-connected pension benefits. This regulation unambiguously provides that the maximum rates of improved pension set out in 38 C.F.R. § 3.323(a) shall be reduced **only** by the amount of the countable annual income of the veteran, in accordance with 38 U.S.C. § 1521. It **does not** include the countable income of the veteran's spouse. The other reference

made in this regulation is to the countable income of the surviving spouse for **her** payment of a pension.

The Board in its decision correctly stated:

> Basic entitlement to pension exists if, among other things, **the claimant's income is not in excess of the MAPR** specified in 38 C.F.R. § 3.23. 38 U.S.C. § 1521; 38 C.F.R. § 3.3(a)(3).

RBA 4-11 at 6. (emphasis added). However, Mr. Hairston has no income.

Yet the Board in its decision relied upon the following to justify not paying any pension benefits to Mr. Hairston:

> Additionally, annual income includes the Veteran's own annual income, and, where applicable, the annual income of a dependent spouse and, with certain exceptions, the annual income of each child of the Veteran in his custody or to whose support the Veteran is reasonably contributing. 38 C.F.R. § 3.23(d)(4).

RBA 4-11 at 7. As will be discussed in the next section of the this brief, the provisions of 38 C.F.R. § 3.23(d)(4) are invalid as a matter of law.

38 C.F.R. § 3.271, cited by the Board, is titled: "COMPUTATION OF INCOME." This regulation does provide that:

> Payments of any kind from any source shall be counted as income during the 12-month annualization period in which received unless specifically excluded under § 3.272.

38 C.F.R. § 3.271(a). However, it does not say payments of any kind from any source **from the veteran's spouse**. 38 C.F.R. § 3.272, also cited by the Board, is titled: "EXCLUSIONS FROM INCOME." This provision, like the preceding provision, makes **no reference** to exclusions from the veteran's spouse's income. The final

regulation cited by the Board in its conclusion of law was 38 C.F.R. § 3.273, which is titled: "RATE COMPUTATION." This provision, like the preceding two provisions, makes **no reference** to the veteran's spouse's income in regards to rate computation.

Thus, the only two provisions relevant to the criteria for entitlement to payment of non-service-connected pension benefits based on the Veteran's countable income are 38 C.F.R. § 3.23(b) and (d). The Board explained:

> For the purpose of determining initial entitlement or resuming payments on an award that was previously discontinued, the monthly rate of pension shall be computed by reducing the applicable maximum pension rate by the countable income on the effective date of entitlement and dividing the remainder by twelve. 38 C.F.R. § 3.273(a). VA subtracts the total amount of countable income in one year, less excluded income, from the MAPR; then, if a positive amount remains, the rest is divided by twelve to determine the monthly pension benefit. When a change in the MAPR occurs, the Board repeats the calculation with the new MAPR as the starting amount. 38 C.F.R. § 3.273(b)(1). When a change in income occurs, the MAPR will be reduced by the new annualized income effective on the date that the increased income began. 38 C.F.R. § 3.273(b)(2).

RBA 4-11 at 7. This explanation relies upon a misinterpretation of § 3.23(b) by misreading the text of this regulation to include the veteran's spouse when it clearly does not.

Questions of regulatory interpretation are questions of law that the Court reviews *de novo*. *Foster v. McDonough*, 34 Vet.App. 338, 344-45 (2021); *see also Butts v. Brown*, 5 Vet.App. 532, 539 (1993)(*en banc*). This Court looks first to the text and structure of a regulation, which is the best indication of its plain meaning. *See Goodman v. Shulkin*, 870 F.3d 1383, 1386 (Fed. Cir. 2017). If the plain meaning of the regulation is clear on its

face, then such plain meaning controls. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). In this matter, the plain meaning of § 3.23(b) is clear on its face and, as such, the plain meaning controls. Thus, the maximum rates of improved pension in § 3.23(a) shall be reduced by the amount of the countable annual income of the veteran and **not** by the annual income of the veteran's spouse.

Reviewing courts are not permitted to rewrite the text of a regulation to include criteria absent from its face. *Langdon v. McDonough*, 1 F.4th 1008, 1011 (Fed. Cir. 2021). No doubt, the Secretary is going to argue that § 3.23(d) is equally clear on its face when it defines "Veteran's annual income" as including both the veteran's annual income and the annual income of the veteran's dependent spouse. Such an argument, however, must fail because a definition cannot import text to support a definition which is absent from the text of that portion of the regulation it purports to be defining. In this case, the Secretary's use of the word "shall" when describing that only the countable annual income of the veteran is to be deducted from the maximum rate of the improved pension, the Secretary cannot add in the countable income of the spouse. The use of the term "shall" by the Secretary removed from the decision-maker the discretion to reduce a pension by any other amount other than the countable annual income of the veteran. *See Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) (noting that the term "shall," as opposed to "may," imposes mandatory obligations). *See also McBurney v. Shinseki*, 23 Vet.App. 136, 147 (2009).

Thus, the Board in this case relied upon a misinterpretation of regulation and, as a result, misapplied the provisions of 38 C.F.R. § 3.23(b). Section 3.23(b) **only** identifies

one source of countable income and that source is the veteran. As a result of this misinterpretation, the Board made a clear error of law by including his spouses countable income in Mr. Hairston's countable income. But for this error, the Board would have been obligated to restore Mr. Hairston's pension, not deny him a pension.

II.

The provisions of 38 C.F.R. § 3.23(d)(4) are invalid.

The Board's reliance on the provisions of 38 C.F.R. § 3.23(d)(4) was unwarranted because those provisions are invalid as a matter of law. "Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). To be valid, regulations must be consistent with the statute under which they are promulgated. *United States v. Larionoff*, 431 U.S. 864, 873 (1977). *See* VAOPGCPREC 09-97. The definition provided in § 3.23(d)(4) is completely inconsistent with the command of Congress, as expressed in 38 U.S.C. § 1521(c) and § 1521(h)(1).

In § 1521(c), Congress explicitly addressed Mr. Hairston's circumstances, which are that he was a married veteran living with his spouse. Congress unambiguously stated:

> The rate payable shall be reduced by the amount of the veteran's annual income and, **subject to subsection (h)(1) of this section**, the amount of annual income of such family members.

38 U.S.C. § 1521(c). Congress was equally clear in subsection (h)(1) that:

> In determining the annual income of a veteran, if there is a child of the veteran who is in the custody of the veteran or to whose support the veteran is reasonably contributing, that

> portion of the annual income of the child that is reasonably available to or for the veteran shall be considered to be income of the veteran, unless in the judgment of the Secretary to do so would work a hardship on the veteran.

38 U.S.C. § 1521(c). Clearly, the rate payable shall be reduced by the amount of the veteran's annual income **only** if there is a child of the veteran who is in the custody of the veteran or to whose support the veteran is reasonably contributing and **only then** will that portion of the annual income of the child that is reasonably available to or for the veteran be considered to be income of the veteran. No mention is made by Congress of the income of the spouse. It is evident that Congress knew how to attribute income from another source to the veteran. And it is undebatable that Congress made no such attribution to the income of the veteran's spouse. Thus, when the Secretary chooses to do so by expanding the definition of the veteran's countable income in § 3.23(d)(4), it is utterly invalid because it is blatantly inconsistent with both § 1521(c) and § 1521(h)(1).

III.

The Secretary's promulgation of the provisions of 38 C.F.R. § 3.275.

In January 2015, the Secretary published a proposed amendment to his pension regulations which proposed:

> . . . regulations **would establish new requirements pertaining to the evaluation of net worth and asset transfers for pension purposes and would identify those medical expenses that may be deducted from countable income for VA's needs-based benefit programs**.

80 FR 3840, January 23, 2015. (emphasis added). In the summary of Major Provisions, the Secretary wrote:

> Proposed § 3.274 would establish a clear net worth limit. **VA does not currently have a bona fide net worth limit**. The proposed net worth limit is the dollar amount of the maximum community spouse resource allowance established for Medicaid purposes at the time the final rule is published. This amount is currently $119,220, which would be indexed for inflation by adjusting it at the same time and by the same percentage as cost-of-living increases provided to Social Security beneficiaries. **The amount of a claimant's net worth would be determined by adding the claimant's annual income to his or her assets**.

80 FR 3840, 3841 January 23, 2015. (emphases added). Thus, when VA adjudicated Mr. Hairston's pension claim in 1993, VA did not have "a bona fide net worth limit." Furthermore, the Secretary's intent was unambiguous: a claimant's net worth would be determined by adding the claimant's annual income to his or her assets.

In September 2018, the Secretary published his final rule, noting that: "Multiple commenters took issue with our proposal **to use a bright-line net worth limit for pension entitlement**." 83 FR 47246-01, 47248 Sept. 18, 2018. (emphasis added). This removes any doubt that the purpose of this regulatory amendment was to create "a bright-line net worth limit for pension entitlement." The Secretary unambiguously indicated:

> **we believe the best approach moving forward, for both pension claimants and the efficiency of the system, is employing, as the net worth limit, the standard maximum CSRA prescribed by Congress**.
>
> . . . . .
>
> We believe that setting the net worth limit at the maximum CSRA—which in 2018 is $123,600—**allows more claimants to qualify for the benefit than before**.

Id. (emphasis added). Therefore, consistent with the Secretary's published interpretation

of his amendments, VA created a bright-line net worth limit for pension entitlement.

This Court must consider where the Secretary placed his bright-line net worth limit for pension entitlement in 38 C.F.R. § 3.275. The Secretary placed this regulation between the provisions of 38 C.F.R. § 3.271 and § 3.279, which cover **Regulations Applicable to the Improved Pension Program**, which became effective January 1, 1979. (emphasis added). The preceding regulation, 38 C.F.R. § 3.274 is titled: "Net worth and VA pension." The new regulation is titled: "How VA determines the asset amount for pension net worth determinations."

The unambiguous mandate of 38 U.S.C. § 1521 is that the Secretary shall pay to each veteran of a period of war who meets the service requirements of this section and who is permanently and totally disabled from a non-service-connected disability a pension at the rate prescribed by the statute. *See* 38 U.S.C. § 1521(a).

The Secretary's regulation at 38 C.F.R. § 3.23(b) is titled "Reduction for income." The authority attributed by the Secretary for § 3.23(b) is 38 U.S.C. § 1521. But Congress in § 1521(h)(1) only indicated that the purpose of this section of the statute was to determine the annual income of a veteran. Congress said nothing in § 1521 suggesting a need to promulgate a regulation which would reduce the amount of pension paid veterans. Nowhere in § 1521 did Congress use the phrase "the countable annual income of the veteran or surviving spouse." Put another way, Congress created no gap in § 1521 for the Secretary to fill allowing the Secretary to reduce the amount of pension paid veterans.

Thus, there exists no basis in any statute which authorizes the Secretary to

promulgate a regulation which reduces the pension authorized by Congress. To the contrary, Congress mandated that veterans who are determined to be permanently and totally disabled shall be paid a pension in the amount set out in the statute. *See* 38 U.S.C. § 1521(b) or (c). The Board in its decision erroneously stated: ". . . the law passed by Congress specifically prohibits the payment of VA pension benefits when the Veteran's countable income exceeds certain levels." RBA 4-11 at 9.

However, the Board did not identify this law which was purportedly passed by Congress which "specifically prohibits the payment of VA pension benefits when the Veteran's countable income exceeds certain levels," because there is no such law. The Board, after acknowledging Mr. Hairston's assertion that he met the "corpus of estate" requirement for pension benefits, *id*, responded as follows:

> While it is true that net worth or corpus of estate requirements found in 38 C.F.R. § 3.274 must be met to receive pension benefits, **the fact that his net worth is not a bar to pension benefits does not alleviate the additional requirement that his income also not exceed the MAPR specified in 38 C.F.R. § 3.23**. 38 U.S.C. § 1521; 38 C.F.R. § 3.3(a)(3).

Id. (emphasis added). The Board's assertion that Mr. Hairston can meet the net worth requirements found in § 3.274, which the Board conceded "must be met to receive pension benefits," cannot be reconciled with the Board's conclusion of law that the criteria for entitlement to payment of non-service-connected pension benefits based on Mr. Hairston's "countable income" have not been met. RBA 4-11 at 5.

Equally, the Board is incorrect in its assertion that the fact that Mr. Hairston's net worth is not a bar to pension benefits does not alleviate the additional requirement that

his income also not exceed the MAPR specified in 38 C.F.R. § 3.23. There is no requirement that a veteran's income not exceed the MAPR specified in 38 C.F.R. § 3.23. The Board read into § 3.23 a requirement that a veteran's income not exceed the MAPR that is simply not in that regulation. As has been noted above, § 3.23(a) merely references the maximum annual rates of improved pension and nothing more. Whereas, § 3.23(b) only says that: "The maximum rates of improved pension in paragraph (a) of this section shall be reduced by the amount of the countable annual income of the veteran or surviving spouse," without Congress ever using the phrase "countable annual income of the veteran."

But all of this begs the question presented to the Board, which was that since his net worth, which includes his income and his spouses income, obviously does not exceed $123,600, in accordance with the mandate of Congress in § 1521(a), the Secretary was required to pay to him the full amount of his pension without reduction. This is true because the Secretary created a bright-line net worth limit for pension entitlement. Under this bright line, it is only appropriate to reduce the pension benefit amount when the veteran's net worth exceeds the newly adopted bright-line net worth limit for pension entitlement.

Under the Secretary's net worth test as set out in § 3.274, when a veteran's assets and income combined exceed the net worth limit, a veteran is ineligible to receive a pension. This was what the Board did in its order; it denied Mr. Hairston entitlement to nonservice-connected pension benefits. The Secretary's new test is much fairer because under that bright-line test Mr. Hairston's pension benefits would not have been

reduced even if his spouses income would have been counted since his net worth would not have exceed $ 123,600. This test supercedes the criteria any possible preexisting criteria under the provisions of § 3.23(b) because as opposed to the test under § 3.274 there is a precise amount of assets and income when combined which dictates when the Secretary is precluded from paying pension by treating all VA pension beneficiaries the same. Under the application of § 3.274, Mr. Hairston is entitled to the payment of his pension in the amount set out in § 1521(a). Under the provisions of § 3.23(b), Mr. Hairston was erroneously denied pension by the Board even though he did not meet the net worth bar because his net worth does not exceed $123,600. As such, this Court should set aside the Board's decision as not in accordance with law.

CONCLUSION

The Board made three errors in considering Mr. Hairston's appeal each one of which requires that this Court reverse the Board's decision to deny Mr. Hairston a non-service-connected pension. The appeal, however, raises a fundamental question about the intent of Congress in providing pensions. Until September of 2018, the Secretary had interpreted that intent to be narrow as it related to what the Secretary perceived as countable income. By creating the concept of countable income, the Secretary had the means to limit if not eliminate the payment of pensions. But, when the Secretary promulgated the provisions of 38 C.F.R. § 3.274, he created the long overdue bright-line net worth limit for establishing and ensuring pension entitlement.

What the Secretary did to Mr. Hairston he had been doing for decades, which was to misinterpret and misapply his own regulations and subvert the intent of Congress to

provide needs based pensions to those who served in periods of war and had become totally and permanently disabled. Mr. Hairston's appeal symbolizes this institutional disregard of Congress's intent to provide needs based pensions by manufacturing a means to limit, or in Mr. Hairston's case eliminate, the payment of any pension. The motivation of the institution is immaterial. It is the damage which this Court must correct. This case confirms that, notwithstanding the promulgation of a bright-line net worth limit as the baseline for entitlement to a pension, the institution continued to misinterpret its regulations and the mandate of Congress to provide and not deny pensions.

The retention of invalid regulations such as 38 C.F.R. § 3.23(d)(4) is illustrative of this institutional resistence to change. For decades the Secretary has had two different tests for paying pension benefits, one for the payment of monthly pensions and one for qualifying for aid and attendance benefits. But, as this case demonstrates, if VA uses different tests, veteran's pension payments are reduced or eliminated, preventing or reducing the pension payment while the Secretary applies a different test for access to aid and attendance benefits.

This Court must reverse the Board's decision to deny Mr. Hairston entitlement to pension benefits, invalidate the provisions of 38 C.F.R. § 3.23(d)(4) and remand with instructions to the Board to direct the Secretary to award Mr. Hairston pension benefits from January 1, 2019.

Respectfully submitted by,

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Appellant,
Arthur L. Hairston, Sr.
Electronically filed on July 28, 2022

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