REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-2149

FRANCISCO L. MARCELINO

Appellant

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY BRIEF

The Board erred when it denied the Veteran service connection for his obesity.

In deciding that obesity is not a disease, the Board ignored VA's own interpretation of the term as well as the views of the Food and Drug Administration, the National Institute of Health, and the American Medical Association, all of which have determined that obesity is a disease. Apa. Open Br. at 2-7. The Secretary argues that deciding whether obesity is a disease is not a medical matter but one of policy. He relies on a General Counsel Opinion issued this past January, which he describes as his longstanding policy, even though it is contrary to a position the Secretary took in the Federal Circuit in 2012. He rejects all the considered and authoritative views referenced above and chooses instead to rely on recommendations not adopted by the American Medical Association, which argued that obesity is not conclusively demonstrated to be a disease.

As detailed below, the General Counsel Opinion on which he relies for his policy is not long-standing and its rationale is flawed. Further, any interpretive doubt must be resolved in favor of the Veteran. The Court should reject the Secretary's misinterpretation of the terms disease and obesity and remand this case for adjudication based on the recognition that obesity is a disease.

VA's interpretation, as reflected in the 2017 General Counsel Opinion, is not the Secretary's long-standing view. The Secretary relies on the VA General

Counsel opinion issued on January 6, 2017 (VAOPGCPREC 1-2017), to proffer that obesity may not be service-connected because it is not a disease or injury. Sec. Br. at 8. (A copy of the Opinion is attached in the Appendix). But contrary to the Secretary's assertion in that opinion and to this Court, the January 2017 General Counsel Opinion is not the Secretary's long-standing view of the matter: it is directly opposite to the view he took in a case before the Federal Circuit in 2012. *See Przybylski v. Shinseki*, No. 09-0145, 2012 WL 613817 (Vet. App. Feb. 28, 2012).[1]

In *Przybylski,* the veteran argued that the Board's determination that obesity was not a disease was clearly erroneous. This Court initially affirmed the Board's decision. *See Przybylski v. Shinseki*, No. 09-0145, 2011 WL 666499 (Feb. 24, 2011) (mem. dec.) On appeal to the Federal Circuit, that court granted the Secretary's motion to vacate and remand the CAVC decision. Pursuant to the Secretary's motion, the Circuit directed the CAVC to remand the appellant's claim to VA for a new medical opinion "determining whether [the appellant's] obesity is a disease on its own that may be service connected." *Przybylski v. Shinseki*, No. 09-0145, 2012 WL 613817, at *1 (Vet. App. Feb. 28, 2012) (quoting from Federal Circuit Order, available at 2012 LEXIS 2440 and on the CAVC docket 09-145). The Federal Circuit referenced the Secretary's assertion "that it was not clear from the doctor's report as to whether the

[1] Appellant cites this under Rule 30(a) for its persuasiveness and logic, as there is no precedent on point. The Court may also take judicial notice of the Secretary's position as the pleadings are public documents.

doctor was influenced by the Board's statements that suggested obesity could not be considered a disease for the purpose of service connection." *Id.*

Hence, as recently as 2012, the Secretary agreed that obesity could be service-connected as a disease. It did not then reference the allegedly long-standing policy that obesity was not a disease. The Secretary also agreed in 2012 that the issue was medical in nature, not a policy determination. As such, it rebuts the Secretary's assertion here that a medical opinion was not necessary to "explore the link between the Veteran's knee disabilities and his obesity," Sec. Br. at 10. The Court should reject the Secretary's latest interpretation of the terms.

VA's interpretation, as reflected in the 2017 General Counsel Opinion, is unreasonable and contrary to the law. The Court is not bound by VA General Counsel precedent opinions. *Osman v. Peake*, 22 Vet.App. 252, 256 (2008) (citing 38 U.S.C. § 7261(a)(3)). "Lacking the formalities of notice-and-comment rulemaking," General Counsel opinions are "entitled to deference only in so far as [they have] 'the power to persuade.'" *Wanless v. Shinseki*, 618 F.3d 1333, 1338 (Fed. Cir. 2010) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The weight that the Court should give these opinions "depends heavily upon their thoroughness, reasoning, and consistency with earlier and later pronouncements on the specific issue." *Osman*, 22 Vet.App. at 256 (citing *Skidmore*, 323 U.S. at 140).

Accordingly, this Court rejected a General Counsel Precedential Opinion's definition of a term for "faulty reasoning." *Theiss v. Principi*, 18 Vet.App. 204, 211

(2004). Similarly, this Court rejected a General Counsel Opinion that determined that the section 1159 protections do not apply to compensation awards made under § 1151 because it was not "in harmony with the statutory scheme and the general purposes of chapter 11 and title 38." *Hornick v. Shinseki*, 24 Vet.App. 50, 56 (2010).

The Secretary cites to *Terry v. Principi*, 340 F. 3d 1378 (Fed. Cir. 2014) as support. VAOPGCPREC 1-2017. *Terry* in fact supports the Appellant as it confirms that the Secretary must have a rational basis for his decision and that VA acts reasonably when it relies on medical authorities for medical issues.

In *Terry*, VA based its exclusion of refractive error of the eye (such as presbyopia) from the statutory terms injury and disease on the fact that such conditions "are recognized in the medical literature as being constitutional or developmental abnormalities." *Id.* at 1384. The *Terry* Court further found that the exclusion is consistent with the definitions of "injury" and "disease," which require that the cause of the disability be due to "damage inflicted on the body by an external force," or "any deviation from or interruption of the normal structure or function of a part, organ, or system of the body." *Id.* at 1384, citing *Dorland's Illustrated Medical Dictionary*. Presbyopia is due to aging, which is neither an external force nor a deviation from or interruption of the normal structure or function of the body. "Therefore, the interpretation adopted by the Secretary . . . is not arbitrary, capricious, or manifestly contrary to the statute" and "it represents a permissible construction of the statute." *Id.*

The same cannot be said here. As explained below, the medical community recognizes obesity as a disease. And obesity is a deviation from the normal structure or function of the body. Hence, the Secretary's interpretation, excluding obesity, is legally impermissible.

a. Obesity is a disease. The Secretary acknowledges that "some organizations and federal agencies have found that obesity is a disease." Sec. Br. at 8. He understates the weight of authority: it includes the National Institute of Health, the American Medical Association, and VA itself. *See* Apa. Open. Br. at 5-7.

VA rejects these authorities, preferring to rely on recommendations not adopted by the AMA. VAOPGCPREC, Discussion ¶ 6. Those dissenting views, however, were based on the medical community's lack of a "single, clear, authoritative, and widely-accepted definition of disease." *Id. And see* Sec. Br. at 8. But VA has already explicitly defined "disease[,]" as the Court noted in in *Fountain v. McDonald*, 27 Vet.App. 258, 269 (2015). This definition designates a disease as "any deviation from or interruption of the normal structure or function of any part, organ, or system of the body as manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." *Fountain,* 27 Vet.App. at 269. *See also Terry*, *supra*, at 1383 (finding no ambiguity in the term disease). The Secretary's reliance on the dissenting views in the AMA fails to appreciate the definition provided by case law.

But even if there were some ambiguity as to whether obesity is a disease, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner,* 513 U.S. 115, 118 (1994). The Court should not defer to the Secretary's interpretation when the Secretary's interpretation is unreasonable, or "conflicts with the beneficence underpinning VA's veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions." *Trafter v. Shinseki*, 26 Vet. App. 267, 272 (2013). The Secretary's restrictive view conflicts with his stated policy of rendering a decision that "grants every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (2016). And a more liberal interpretation of the terms is not just available, but rests on authoritative medical views and is consistent with VA and governmental policy in other areas.

Even disregarding other agencies' recognition of obesity as a disease, VA's position is arbitrary and capricious because VA itself has already recognized obesity as a disease. "[I]t is worth recognizing that the agency itself has, at a high level, previously interpreted the relevant statutes as" the Veteran does. *See Osman*, 22 Vet.App. at 259. VA medical centers use International Classification of Diseases codes – which categorize diseases – to classify medical histories, including histories of obesity. *See, e.g.*, R-1363; Apa. Open Br. at 5; *International Classification of Diseases* (n.d.), Mosby's Medical Dictionary, 8th edition (2009), *available at* http://medical-dictionary.thefreedictionary.com/International+Classification+of+Diseases, (last

accessed April 25, 2017). Additionally, VA's MOVE! Weight Management Program recognizes obesity as a disease. *See Healthfinder: Watch Your Weight*, http://www.prevention.va.gov/MOVE.asp (last accessed April 25, 2017); Apa. Open Br. at 6; *see also Bell v. Derwinski*, 2 Vet.App. 611, 612 (1992). In light of this recognition, VA should interpret the term disease to include obesity.

b. Having one definition for compensation and another definition for treatment and other purposes is irrational and contrary to VA practice. VA also rejects the above-cited authorities on the ground that those definitions are used in the context of treatment, not compensation. Sec. Br. at 13. There is no rational basis for this distinction. Indeed, when VA amended its rules governing ratings for psychiatric disorders, it did so in a way to make its classifications consistent with the DSM-IV. Its purpose was to "ensure that it uses current medical terminology and unambiguous criteria, and that it reflects medical advances which have occurred since the last review." Schedule for Rating Disabilities; Mental Disorders, Proposed Rule, 60 Fed. Reg. 54825 (Oct. 26, 1995). That was a reasoned view. VA's current approach is not.

c. The lack of an enumerated disability rating for obesity within the rating schedule does not support VA's interpretation. The OGC opinion interprets the omission of obesity from the rating schedule as a determination that it is not a disease under 38 U.S.C. §§ 1110 and 1131. VAOPGCPREC 1-2017, Discussion ¶ 8. It reasons that since obesity is "well-known" and "widespread," "if VA had intended to consider obesity as a disease,

it would almost certainly have included provisions in its rating schedule related to obesity." *Id.*

But as the Secretary recognizes, the rating schedule is not exhaustive. 38 C.F.R. § 4.20 (2016). It allows for compensation for unlisted conditions under closely related diseases or injuries. *Id.* Its argument is thus unpersuasive, and frustrates the fundamental purpose of rating by analogy. *See, e.g., U.S. v. Morton,* 467 U.S. 822, 834 (1984).

The OGC opinion also opined that obesity cannot be a disease pursuant to the rating schedule by "not[ing] that obesity is listed as a criterion for a 30% rating under 38 C.F.R. § 4.119 (2016), Diagnostic Code (DC) 7907, Cushing's syndrome," which "indicates that obesity is a sign of another disease and does not indicate that obesity is a disease in and of itself." VAOPGCPREC 1-2017, Discussion ¶ 7, n.4; *but see* Sec. Br. at 15.

This reasoning is arbitrary, logically flawed, and inconsistent with VA's application of the rating schedule. *Osman*, 22 Vet.App. at 260 ("The Supreme Court counsels that inconsistency in interpretation is a factor to be considered when evaluating the persuasiveness of an agency interpretation.") (citing *Skidmore*, 323 U.S. at 140). A careful review of DC 7907 reveals that this DC also lists hypertension as a "sign" of Cushing's syndrome under the 100% rating criteria. 38 C.F.R. § 4.119. Following the reasoning put forth by the OGC opinion, hypertension could not be a

service-connectable disease. Nevertheless, hypertension can be service connected under 38 C.F.R. § 4.104 (2016), DC 7101. As such, this argument lacks merit.

The Secretary's speculation that VA "almost certainly" would have included obesity in the rating schedule if it thought it was a disease is unpersuasive, and is in fact an "expression of a whim[.]" VAGOPREC 1-2017, Discussion ¶ 9; *see, e.g., American Telephone & Telegraph Co. v. U.S.,* 299 U.S. 232, 237 (1936). Rather than relying on what VA "almost certainly" would have done, the Veteran relies on VA's actual actions and the plain language of the regulation. As seen, it agreed in 2012 that obesity could be service connected even though it was not listed in the rating schedule. And the rating schedule permits service connection for unlisted diseases.

But for the Board's error in applying VA's failure to recognize obesity as a disease, the Veteran would have been entitled to prove direct service connection. *See* Apa. Open Br. at 8-9. Remand is required with instructions that the Board properly recognize obesity as a disease for purposes of section 1110 and consider whether Mr. Marcelino's obesity is at least as likely as not related to his active service.

CONCLUSION

The Board erred when it denied the Veteran's claim as a matter of law. The Board ignored VA's own interpretation of the terms obesity and disease, as well as the views of the Food and Drug Administration, the National Institute of Health, and the American Medical Association, all of which have determined that obesity is a disease. The Secretary's effort to justify the Board's decision suffers from the same

deficiencies. He claims the Agency has a "longstanding policy" of not interpreting obesity as a disease – based on a 2017 General Counsel Opinion that is contrary to a position the Secretary took in the Federal Circuit five years ago. He rejects the authoritative views of the National Institute of Health, the American Medical Association, and VA itself.

The Secretary offers no reasonable basis for his latest interpretation and it is not "in harmony with the statutory scheme or the general purposes" of Title 38. *Hornick, supra*. The Court should vacate the Board's decision and remand the appeal with instructions to readjudicate the issue of the Veteran's entitlement to service connection for his obesity in accordance with the Court's opinion.

Respectfully Submitted,

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APPENDIX

Department of Veterans Affairs

Memorandum

Date: January 6, 2017

VAOPGCPREC 1-2017

From: Acting General Counsel (022)

Subj: Service Connection Based on Obesity

To: Executive in Charge, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

1. Is obesity per se a "disease" for purposes of establishing entitlement to service connection under 38 U.S.C. §§ 1110 and 1131?

2. If obesity is a disease, may obesity be considered the result of a veteran's willful misconduct for purposes of line-of-duty determinations under 38 U.S.C. § 105(a)?

3. Is obesity per se a "disability" for purposes of secondary service connection under 38 C.F.R. § 3.310?

4. If obesity is not a disease, could it be an "in-service event" from which a service-connected disability may result?

5. If obesity is not a disease, could it be an "intermediate step" between a service-connected disability and a current disability that may be service connected on a secondary basis under 38 C.F.R. § 3.310(a)?

HELD:

1. The longstanding policy of the Department of Veterans Affairs (VA), that obesity per se is not a disease or injury for purposes of 38 U.S.C. §§ 1110 and 1131 and therefore may not be service connected on a direct basis, is consistent with title 38, United States Code.

2. Because obesity is not considered a disease for purposes of 38 U.S.C. §§ 1110 and 1131, we do not need to determine whether it may be considered the result of a veteran's willful misconduct for purposes of line-of-duty determinations under 38 U.S.C. § 105(a).

3. Obesity per se is not a "disability" for purposes of 38 C.F.R. § 3.310. If, in a particular case, obesity resulting from a service-connected disease or injury is found to produce impairment beyond that contemplated by the applicable provisions of VA's rating schedule, VA may consider an extra-schedular rating under 38 C.F.R. § 3.321(b)(1) for the service-connected condition based on that impairment.

2.

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4. Obesity cannot qualify as an in-service event because it occurs over time and is based on various external and internal factors, as opposed to being a discrete incident or occurrence, or a series of discrete incidents or occurrences.

5. Obesity may be an "intermediate step" between a service-connected disability and a current disability that may be service connected on a secondary basis under 38 C.F.R. § 3.310(a).

DISCUSSION:

1. These issues arise in the context of a remand to the Board of Veterans' Appeals (Board) by the United States Court of Appeals for Veterans Claims (Veterans Court). A veteran who weighed 595 pounds as of July 2013 filed a claim for disability compensation, seeking service connection for weight gain and obesity, including as secondary to service-connected hypertension. He alleged that his obesity has caused disabilities involving his back, heart, ankles, and a psychiatric disorder. In April 2014, the Board denied the veteran's claim for service connection for weight gain and obesity, to include as secondary to service-connected hypertension, in part based on its conclusion that obesity was not a disability under VA disability compensation laws. The veteran appealed to the Veterans Court, and the parties entered into a joint remand as to the Board's denial of service connection for weight gain and obesity, to include as secondary to service-connected hypertension. On remand, the parties agreed that the Board would address: (1) whether obesity is a disability that is compensable as secondary to a service-connected condition under 38 C.F.R. § 3.310(a); and (2) whether it is properly considered a disease or a defect.

2. "*Obesity* refers to an excess amount of body fat" as determined by height and weight. Nat'l Inst. of Diabetes & Digestive & Kidney Diseases, U.S. Dep't of Health & Human Servs., *Overweight and Obesity Statistics*, 1, available at http://www.niddk.nih.gov/health-information/health-statistics/Documents/stat904z.pdf; *see also* DORLAND'S ILLUSTRATED MED. DICTIONARY 1309 (32nd ed. 2012) (defining "obesity"). Body mass index (BMI), which is calculated by dividing weight in kilograms by height in meters squared (kg/m^2), is used most commonly to estimate obesity. *Id.* A person with a BMI of 30 kg/m^2 or more is considered obese.[1] Nat'l Heart, Lung &

[1] In 2013, 69% of U.S. adults were estimated to be overweight, which included 35% of U.S. adults estimated to be obese. *Managing Overweight and Obesity in Adults,* at 4. The prevalence of overweight is 2 to 3% more common in veterans, and obesity is about equally prevalent in veterans, after adjusting for age, gender, and race/ethnicity. Thomas D. Koepsell *et al.*, *Obesity, Overweight, and Their Life Course Trajectories in Veterans and Non-Veterans*, 20 OBESITY 434, 437 (2011); Nathaniel Almond *et al., The Prevalence of Overweight and Obesity among U.S. Military Veterans*, 173 MIL. MED. 544, 544 (2008). The Veterans Health Administration (VHA) estimates that the incidence of obesity and overweight among the veterans VHA serves is 76%. VHA

3.

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Blood Inst., Nat'l Insts. of Health (NIH), *Managing Overweight and Obesity in Adults: Systemic Evidence Review From the Obesity Expert Panel, 2013*, 4 (2013), available at http://www.nhlbi.nih.gov/health-pro/guidelines/in-develop/obesity-evidence-review; *see also* 42 C.F.R. § 410.18(e)(3).

3. Pursuant to 38 U.S.C. §§ 1110 and 1131, VA is authorized to pay compensation to veterans "[f]or 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." The term "disease" is not defined in title 38, United States Code. Therefore, "Congress left it up to the VA to 'fill the gap left by the statute with respect to the question of what kinds of conditions qualify' as diseases" for purposes of entitlement to veterans benefits. *O'Bryan v. McDonald*, 771 F.3d 1376, 1378 (Fed. Cir. 2014) (quoting *Terry v. Principi*, 340 F.3d 1378, 1383 (Fed. Cir. 2003)). VA has not defined the terms "injury" and "disease" in regulations. However, in *Terry*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) opined that "Congress could not have intended to include every defect, infirmity, and disorder within the scope of compensable disabilities." 340 F.3d at 1386. In fact, 38 C.F.R. § 3.303(c) provides that "[c]ongenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of applicable legislation" for disability compensation purposes. *See also* 38 C.F.R. § 4.9 (same). The court stated that "[t]he fact that [presbyopia] is due to developmental problems associated with aging rather than due to trauma that was incurred during military service is a reasonable basis for excluding 'refractive error of the eye' from the construction of the terms 'injury' and 'disease.'" *Id.* at 1384.

4. This office has previously considered the meaning of the terms "disease" and "injury" as used in the statutes authorizing disability compensation. In VAOPGCPREC 82-90 and VAOPGCPREC 2-93, we indicated that the term "disease" has been broadly defined by a medical dictionary as "any deviation from or interruption of the normal structure or function of any part, organ, or system of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." VAOPGCPREC 82-90 and VAOPGCPREC 2-93, para. 3 (citing DORLAND'S ILLUSTRATED MED. DICTIONARY 385 (26th ed. 1974) (defining "disease").[2] In those opinions, we also noted that the term has been variously defined in the case law as "a morbid condition of the body or of some organ or part; an illness; [or] a sickness." VAOPGCPREC 82-90; VAOPGCPREC 2-93, para. 3. In VAOPGCPREC 86-90, we distinguished "disease" from "injury" by applying common

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Directive 2010-007, para. 2.a. (Feb. 12, 2010); *see* Marian Tanofsky-Kraff *et al.*, *Obesity and the US Military Family*, 21 OBESITY 2205, 2206 (2013) (72% of veterans are overweight or obese).

[2] DORLAND'S ILLUSTRATED MED. DICTIONARY 528 (32nd ed. 2012) contains essentially the same definition of "disease."

usage, which denotes injury as "harm resulting from some type of external trauma" and disease as "harm resulting from some type of internal infection or degenerative process." *See also* VAOPGC 6-86 (Mar. 27, 1986) (referring to injury as resulting from external trauma, *i.e.*, application of external force or violence, and disease as a response to environmental factors, infective agents, inherent defects, or a combination of these factors). Although these opinions cite definitions of "disease" from various authorities, they do not interpret VA statutes or regulations as establishing a single specific definition of that term. To the extent these opinions describe a specific standard for distinguishing "disease" from congenital defects or injuries, they do not describe a standard for distinguishing disease from things, like obesity, that have not traditionally been considered to fall within any of those categories.

5. The opinion request notes that several organizations, including the American Medical Association (AMA), and Federal agencies have stated that obesity is a disease. AMA Resolution 420, *Recognition of Obesity as a Disease* (June 2013), available at https://download.ama-assn.org/resources/doc/hod/x-pub/a13-resolutions.pdf; Social Security Ruling, SSR 02-1p; Titles II and XVI: Evaluation of Obesity, 67 Fed. Reg. 57,859, 57,860 (Sept. 12, 2002); Nat'l Heart, Lung & Blood Inst., NIH, *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults* xi (1998); Rev. Rul. 2002-19, 2002-16 I.R.B. 778, 2002-1 C.B. 778; Regulations on Statements Made for Dietary Supplements, 65 Fed. Reg. 1000, 1027 (Jan. 6, 2000); Jeffrey I. Mechanick, *et al.*, *American Association of Clinical Endocrinologists' Position Statement on Obesity and Obesity Medicine*, 18 ENDOCRINE PRACTICE 644 (2012). However, these statements were made for a variety of purposes other than disability compensation.

6. The findings of the AMA and some Federal agencies that obesity is a disease do not compel the same result by VA. We note that, although the AMA voted to recognize obesity as a disease, the decision was intended "to advance obesity treatment and prevention." AMA Resolution 420, *Recognition of Obesity as a Disease*. In fact, the AMA decision was contrary to the recommendation of the AMA's Council on Science & Public Health (CSAPH) , *Is Obesity a Disease*?, CSAPH Report 3-A-13, available at http://www.ama-assn.org/ama/pub/about-ama/our-people/ama-councils/council-science-public-health/reports/2013-reports.page?; *see* AMA Council on Scientific Affairs (CSA), *Recommendations for Physician and Community Collaboration on the Management of Obesity*, CSA Report 4-A-05, at 5-7, available at https://download.ama-assn.org/resources/doc/csaph/x-pub/a05csa4-fulltext.pdf. The AMA CSAPH concluded in 2013 that "[w]ithout a single, clear, authoritative, and widely-accepted definition of disease, it is difficult to determine conclusively whether or not obesity is a medical disease state." CSAPH Report 3-A-13, at 6; *see* James R. Hebert, *et al.*, *Scientific Decision Making, Policy Decisions, and the Obesity Pandemic*, 88 MAYO CLINIC PROCEEDINGS 593, 594-96 (2013). Also, the analysis by both the CSAPH and the CSA indicates that, even with regard to the criteria contained in DORLAND'S definition of "disease," discussed in VA General Counsel opinions, there is disagreement as to

whether obesity satisfies these criteria.[3] CSAPH Report 3-A-13, at 11, Table 3; CSA Report 4-A-05, at 6-7, 14. While organizations and agencies that classify obesity as a disease reasonably may do so for purposes of promoting understanding, prevention, and treatment of conditions that jeopardize a person's health, it does not necessarily follow that obesity must be considered a disease for purposes of title 38, United States Code, as a matter of law. Rather, the question of whether obesity should be considered a disease involves exercise of the gap-filling authority vested in VA under 38 U.S.C. § 501, which may include consideration of factual and policy considerations, such as whether there is general consensus that obesity is a disease or continued divergence of opinion.

7. Under 38 U.S.C. § 1155, the Secretary is authorized to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries" and the ratings must be based as far as practicable, "upon the average impairments of earning capacity resulting from such injuries in civil occupations." The "rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service." 38 C.F.R. § 4.1. VA has given meaning to the statutory terms "injury" and "disease" through promulgation of the rating schedule codified in part 4 of title 38, Code of Federal Regulations, which identifies specific conditions and categories of conditions for which compensation is payable. There are more than 700 conditions in the rating schedule that are compensable, but the schedule does not include obesity.[4]

8. The Department's interpretation of the terms "disease" and "injury" may also be reflected in administrative directives, forms, and publications discussing specific conditions, but we are unaware of any administrative document discussing

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[3] The CSAPH stated that, rather than trying to decide whether "obesity meets arguably arbitrary disease criteria, the more relevant question is 'would health outcomes be improved if obesity is considered a chronic, medical disease state?'" CSAPH Report 3-A-13, at 4. Nonetheless, the Council stated that this question could not be answered definitively. *Id.* at 4-5.

[4] We note that obesity is listed as a criterion for a 30% rating under 38 C.F.R. § 4.119, Diagnostic Code (DC) 7907, Cushing's syndrome, but this indicates that obesity is a sign of another disease and does not indicate obesity is a disease in and of itself. S. Heshka & D.B. Allison, *Is Obesity A Disease?*, 25 INT'L J. OF OBESITY 1401, 1403 (2001) (obesity is one of the signs of Cushing's syndrome); *see* Hebert, *supra* at 596 (obesity is a "sign of underlying primary pathologic abnormalities"). DC 7903, Hypothyroidism, at 38 C.F.R. § 4.119, includes weight gain as a criterion for a 60% rating, but as VA explained when promulgating the rule, weight gain due to hypothyroidism is largely due to fluid retention which distinguishes it from simple obesity. Schedule for Rating Disabilities; Endocrine System Disabilities, 61 Fed. Reg. 20,440, 20,441 (May 7, 1996).

compensation for obesity. While VA regulations recognize that the rating schedule is not exhaustive, *see* 38 C.F.R. § 4.20, we interpret the omission of obesity in the VA rating schedule to reflect the Department's considered judgment that the condition is not a disease or injury for purposes of 38 U.S.C. §§ 1110 and 1131. *See e.g.*, Schedule for Rating Disabilities; Endocrine System Disabilities, 61 Fed. Reg. 20,440, 20,445 (May 7, 1996) (laboratory test results of hyperlipidemia, elevated triglycerides, and elevated cholesterol are not appropriate entities for rating schedule); *see generally Cook v. Principi*, 318 F.3d 1334, 1339 n.6 (Fed. Cir. 2002) (citation omitted) (under *expressio unius est exclusio alterius* canon of construction, "the expression of one thing is the exclusion of another"). Because obesity is a well-known and widespread condition, if VA had intended to consider obesity as a disease, it would almost certainly have included provisions in its rating schedule related to obesity.

9. The analysis of the AMA Councils reflect that there are substantial bases for concluding that obesity does not satisfy the elements of the definition of "disease" in DORLAND'S and other authorities, which generally contemplate an impairment or deviation from normal functioning of a body part or system, identified by characteristic signs or symptoms. CSAPH Report 3-A-13 at 11, Table 3 (summarizing arguments for and against finding obesity to be a disease) and 10, Table 2 (discussing various definitions of "disease"); CSA Report 4-A-05 at 5-7 (summarizing arguments for and against finding obesity to be a disease). According to the AMA CSA, it can be argued that the only identifiable sign of obesity is its defining characteristic, *i.e.*, an excess accumulation of fat in the body. CSA Report 4-A-05 at 6; S. Heshka & D.B. Allison, *supra* at 1403. Other conditions such as high blood pressure often accompany a BMI of 30 or greater, but these conditions are not always present. S. Heshka & D.B. Allison, *supra* at 1402. The excess accumulation of body fat, measured by BMI, is not necessarily an impairment. CSA Report 4-A-05 at 6; S. Heshka & D.B. Allison, *supra* at 1403. Although BMI is a screening tool used in conjunction with other tools such as blood pressure to assess an individual's risk for diseases such as diabetes and arteriosclerosis, as for harm caused by obesity itself, research has not yet found a true causal connection between obesity and morbidity and/or mortality.[5] CSA Report 4-A-05 at 6; CSAPH Report 3-A-13, at 1; *see* Paul Campos, *et al.*, *The Epidemiology of Overweight and Obesity: Public Health Crisis or Moral Panic?*, 35 INT'L J. OF EPIDEMIOLOGY 55, 56-57 (2006). Thus, there is support for the conclusion that obesity

[5] "The majority of epidemiological studies have shown that people who are overweight or moderately obese live at least as long as normal weight individuals and often longer." J.-P. Chaput, *et al.*, Obesity: a disease or a biological adaptation? An update, 13 OBESITY REVS. 681, 682 (2012). For example, despite an association between obesity and overweight and increased prevalence of cardiovascular disease (CVD), evidence now indicates that overweight and obese patients with the same CVS diagnoses have better short- and long-term prognoses than do leaner patients. Hebert, *supra* at 596.

does not satisfy the elements of a "disease" as defined by DORLAND'S or other authorities. We therefore conclude that the Department's policy, that obesity per se is not a disease for purposes of establishing entitlement to service connection under 38 U.S.C. §§ 1110 and 1131, is consistent with governing statutes and General Counsel precedential decisions and supported by a number of scientific authorities discussed above.

10. Obesity also generally cannot be service connected on a secondary basis as a disability directly resulting from a veteran's service-connected disability. Section 3.310(a) of title 38, United States Code, provides that "disability which is proximately due to or the result of a service-connected disease or injury shall be service connected." Section 3.310 further provides that secondary service connection may be warranted when a service-connected condition causes an increase in the severity of a "nonservice-connected disease or injury." 38 C.F.R. § 3.310(b). For the reasons noted above, obesity is not a "disease or injury" within the meaning of section 3.310(a) or (b). Further, the fact that VA has not included obesity or weight gain as ratable conditions in its schedule for rating disabilities indicates that VA does not view obesity or weight gain itself as constituting a "disability" within the meaning of section 3.310(a). VA is authorized to pay compensation under 38 U.S.C. §§ 1110 and 1131 for "disability" that results from an injury suffered or disease contracted in line of duty or for aggravation of a preexisting injury suffered or disease contracted in line of duty. The meaning of the word "disability" in 38 U.S.C. §§ 1110 and 1131 may be gleaned from 38 U.S.C. § 1155, which requires the Secretary of Veterans Affairs to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries" and that the rating in the rating schedule must "be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations." Obesity is generally described as an excess accumulation of body fat, measured by dividing weight in kilograms by height in meters squared. While there is evidence that severe obesity, *i.e.*, BMI of greater than 40, impairs physical and social function, "impairment is not inevitable or even usual in most persons who meet the present BMI or percentage fat criteria for obesity . . . many obese persons suffer no impairment as a consequence of their obesity." S. Heshka & D.B. Allison, *supra* at 1402-03. Accordingly, VA generally has not considered, and need not consider, obesity itself as meeting the criteria to be considered a "disability" for purposes of relevant statutes and regulations.

11. The fact that obesity generally is neither a disease nor a disability does not, however, preclude a finding, in a particular case, that obesity resulting from a service-connected disease or injury contributes to disability and therefore should be considered in assigning a disability evaluation for the service-connected condition. If appropriate, such consideration may be given in a particular case under the provision in 38 C.F.R. § 3.321(b)(1) concerning extra-schedular ratings. The criteria in VA's rating schedule are generally considered adequate for purposes of rating disability due to service-connected diseases. 38 C.F.R. § 4.1. Because obesity, *per se*, does not impair earning

capacity, VA's rating schedule generally does not identify obesity as a relevant factor in evaluating disability due to specific diseases or injuries, with the exception of Cushing's syndrome, as to which the rating schedule provides that the existence of obesity in conjunction with certain other manifestations warrants a compensable disability rating. 38 C.F.R. § 4.119, DC 7907. However, 38 C.F.R. § 3.321(b)(1) recognizes that VA's rating schedule may in some instances be inadequate and allows for assignment of an "extra-schedular" rating if a particular case "presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards." 38 C.F.R. § 3.321(b)(1). Accordingly, if the evidence in a particular case shows that obesity results from a service-connected condition and under the unique circumstances of the case, the resulting disability picture indicates marked interference with employment, VA may assign an extra-schedular rating in accordance with the standards and procedures in section 3.321(b)(1).

12. Having concluded that obesity is neither a disease nor a disability for purposes of VA disability compensation, the next question is whether it may qualify as an "in-service event" that can cause a disability. You inquire as to whether, for example, obesity occurring during and continuing after service may be found to be the cause of subsequently diagnosed diabetes for purposes of establishing service connection for the diabetes. A disease that is diagnosed after service discharge may provide a basis for service connection if the evidence establishes an in-service event, injury, or disease caused the disease. *See Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1355-56 (Fed. Cir. 2003) (validating 38 C.F.R. § 3.159(c)(4)(i)(B), under which one of the prerequisites for a VA medical examination or opinion is evidence establishing an in-service event, injury, or disease). The term "event" is defined in 38 C.F.R. § 3.159(a)(4) to mean "one or more incidents associated with places, types, and circumstances of service giving rise to disability." *See* Duty to Assist, 66 Fed. Reg. 17,834, 17,835 (Apr. 4, 2001) (proposing to define "event" to encompass "a potentially harmful occurrence . . . associated with a particular duty assignment or place of duty). VA derived that definition from 38 U.S.C. § 1154(a), which directs VA, in claims for service connection, to consider "the places, types, and circumstances of [the] veteran's service as shown by [the] veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence." Duty to Assist, 66 Fed. Reg. 45,620, 45,622 (Aug. 29, 2001). VA's definition is consistent with other definitions relating the term "event" to a discrete occurrence. *See* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/event (last visited Nov. 29, 2016) (event is "something that happens: occurrence" or "noteworthy happening"); see *Event causing injury*, BALLENTINE'S LAW DICTIONARY (2010) (event causing injury means "accidental means by which the effect on the body – the injury – is caused"). For VA purposes, the term "event" encompasses exposure to environmental hazards as well as such activities as parachute jumping. 66 Fed. Reg. at 45,622. It also encompasses a series of discrete incidents or occurrences that may occur over a period of time and can be identified with

"places, types, and circumstances of service giving rise to disability," such as working in a smoke-filled environment or where hazardous substances are present, working in an environment with long-term noise exposure, *e.g.*, in an artillery unit, or having work duties consisting of carrying heavy pieces of equipment. *See*, *e.g.*, *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006) (exposure to noise from a rifle range, bombing, artillery fire, trucks, and heavy equipment could establish the in-service event requirement for service connection for a hearing disability).

13. We do not believe that obesity qualifies as an in-service event, as contemplated in 38 C.F.R. § 3.159(a)(4), which, as noted above, is derived from 38 U.S.C. § 1154(a). Obesity is not itself a discrete incident or occurrence associated with the places, types, and circumstances of service. 38 U.S.C. § 1154(a); 66 Fed. Reg. at 45,622. Rather, obesity occurs over time and is based on various external and internal factors and processes, many of which cannot be considered discrete events. *See Scientific Decision Making, Policy Decisions, and the Obesity Pandemic*, 88 MAYO CLINIC PROCEEDINGS at 596 ("Clearly, obesity arises from the dynamic interplay of the external environment, inclusive of the social milieu, built environment, and food energy availability; behavioral and developmental processes; and a variety of genes and epigenetic effects that, in turn, control a myriad of metabolic systems and subsystems that regulate body composition, energy intake (EI) and energy expenditure (EE), and nutrient partitioning.").

14. Finally, we address whether obesity could qualify as an "intermediate step" between a service-connected disability and a current disability, for example, whether a veteran could establish entitlement to service connection for hypertension if a veteran's service-connected back disability causes obesity due to lack of exercise, which leads to hypertension. Under 38 C.F.R. § 3.310(a), disability which is proximately due to or the result of a service-connected disease or injury is service connected. "Proximate cause" is defined as a "'cause that directly produces an event and without which the event would not have occurred.'" VAOPGCPREC 6-2003 (quoting *Black's Law Dictionary* 213 (7th ed. 1999)). When there are potentially multiple causes of a harm, an action is considered to be a proximate cause of the harm if it is a substantial factor in bringing about the harm and the harm would not have occurred but for the action. *Shyface v. Sec'y of Health & Human Svs.*, 165 F.3d 1344, 1352 (Fed. Cir. 1999) (citing RESTATEMENT (SECOND) OF TORTS §§ 430 cmt. d. and 433 cmt. d. (1965)).

15. A determination of proximate cause is basically one of fact, for determination by adjudication personnel. VAOPGCPREC 6-2003 and 19-1997. With regard to the hypothetical presented in the previous paragraph, adjudicators would have to resolve the following issues: (1) whether the service-connected back disability caused the veteran to become obese; (2) if so, whether the obesity as a result of the service-connected disability was a substantial factor in causing hypertension; and (3) whether the hypertension would not have occurred but for obesity caused by the service-

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connected back disability. If these questions are answered in the affirmative, the hypertension may be service connected on a secondary basis.[6]

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[6] In VAOPGCPREC 6-2003, the VA General Counsel held that 38 U.S.C. § 1103(a), which prohibits service connection for disability resulting from injury or disease attributable to the use of tobacco products during service, does not bar service connection on a secondary basis for a disability related to use of tobacco after service if the disability is proximately due to a service-connected disability that is not service connected on the basis that is attributable to the veteran's use of tobacco during service.