Vet. App. No. 17-1551

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ANDRE MARTINEZ,
Appellant,

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE, ACTING SECRETARY OF VETERANS AFFAIRS

JAMES M. BYRNE
General Counsel

MARY ANN FLYNN
Chief Counsel

EDWARD V. CASSIDY, JR.
Deputy Chief Counsel

JESSICA K. GRUNBERG
Appellate Attorney
U.S. Department of Veterans Affairs
Office of General Counsel (027B)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6745

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Constitution

Cases

Statutes

Regulations

Other Authorities

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ANDRE MARTINEZ,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 17-1551
	)	
PETER O'ROURKE,	)	
Acting Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE,
ACTING SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the January 27, 2017, Board of Veterans' Appeals (Board) decision that denied a claim of entitlement to service connection for sleep apnea, to include as secondary to posttraumatic stress disorder (PTSD) with major depressive disorder (MDD).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

Under 38 U.S.C. § 7252(a), the U.S. Court of Appeals for Veterans Claims has exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Andre Martinez, appeals the Board's January 27, 2017, decision that denied a claim of entitlement to service connection for sleep apnea, to include as secondary to PTSD with MDD. [Record Before the Agency [R.] at 1-34].

Appellant does not appeal, or otherwise address, that portion of the Board decision that denied a claim of entitlement to an effective date earlier than March 31, 2011, for the grant of service connection for PTSD. Therefore, that claim is abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (stating that claims not address in Appellant's brief had been abandoned on appeal).

The Board also remanded claims of entitlement to (1) service connection for a joint disorder of the left hip, left knee, and left ankle; (2) an increased initial rating for status-post L3-L4 hemilaminectomy and microdiscectomy; (3) an increased initial rating for radiculopathy of the left lower extremity, associated with the back condition; (4) an increased rating for peripheral neuropathy of the right lower extremity associated with type II diabetes; (5) an increased initial rating for peripheral neuropathy of the left lower extremity associated with type II diabetes; (6) an increased rating for PTSD with MDD; (7) a compensable rating

for headaches to include migraine headaches; and (8) a total disability rating based upon individual unemployability. These remanded matters are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475 (2004) (per curiam order).

C. Statement of Relevant Facts

Appellant served on active duty from January 1969 to December 1970 and from September 1981 to April 1988. *See* [R. at 638, 640].

After service, Appellant obtained a Veterans Service Organization (VSO) representative and filed a claim for service connection for sleep apnea. [R. at 3379-80 (May 2005 claim)]; *see* [R. at 3363 (VA Form 21-22 appointing a VSO)]. The VA regional office (RO) denied the claim in November 2006. [R. at 2830-36]; *see* [R. at 2815-17, 2828-29]. Thereafter, Appellant filed a timely Notice of Disagreement (NOD), *see* [R. at 2689-90], the RO issued a statement of the case (SOC), [R. at 2333-52], and Appellant perfected his appeal to the Board, [R. at 2281]. *See also* [R. at 2148-57 (August 2009 supplemental SOC (SSOC))].

In February 2010, the Board remanded Appellant's claim to obtain additional service treatment records. [R. at 2094 (2080-99)]. After requesting the additional records, the Appeals Management Center (AMC) issued a November 2011 SSOC that continued the denial of service connection. [R. at 1730 (1716-34)]; *see* [R. at 2021]. Appellant's VSO representative submitted a brief in response, [R. at 1701-05], and the Board remanded the claim again in April 2012, [R. at 1686-1700]. In October 2013, the AMC issued an October 2013 SSOC continuing the denial. [R. at 1390-98].

In December 2013, Appellant retained private counsel. [R. at 1359-61]. Through his newly appointed representative, Stacey Penn Clark, Appellant submitted a disagreement with the October 2013 SSOC. [R. at 1346-50].

In January 2014, the Board remanded Appellant's sleep apnea claim to obtain a VA examination, [R. at 1342 (1324-45)], which the AMC obtained in March 2014. [R. at 1254-57].

In February 2015, Appellant filed with the Court a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus (Petition) alleging that VA had failed to respond to Ms. Clark's five written requests for a copy of his claims file.[1] [R. at 889-942]; *see Martinez v. McDonald*, No. 15-0685. Appellant attached to his Petition a copy of the five written requests. [R. at 921 (December 2013 letter), 927 (April 2014 letter), 935 (August 2014 letter), 937 (October 2014 letter), 939 (November 2014 letter)].[2]

---

[1] Appellant states that he first requested a copy of his file "in April 2013, [when] his VSO representative sought a copy of the C-File." Appellant's Brief (Br.) at 5 (citing [R. at 1603]). This is incorrect representation of the record. The record cited by Appellant contains emails between VA employees, and shows that a Veteran Service Representative (VSR) at the New York RO—a VA employee—requested Appellant's claims file in order to "track it." [R. at 1603 (VSR email)]. Thus, the record does not show that Appellant's VSO requested his claims file in April 2013. The Secretary also notes that VSOs have access to electronic claims files through the Veterans Benefits Management System (VBMS).

[2] The record shows that VA received at least two of these written requests and submitted responses to them. *See* [R. at 997 (April 2014 RO letter "in response to your recent request for copies of the veteran's records"), 871 (August 2014 RO letter recognizing the "request for records on August 21, 2014")].

In his brief, Appellant contends in a footnote that VA's responses "may be unlawful." Appellant's Br. at 6, n.2 (stating that VA re-characterized a Freedom of Information Act (FOIA) request to a Privacy Act request). He provides no support

The next month, a VA attorney contacted the New York RO and asked that the RO send a copy of the claims file to Appellant's attorney. [R. at 887 (887-88)]. On March 19, 2015, the five-volume claims file was mailed to Ms. Clark. [R. at 883]. Appellant withdrew his Petition on April 9, 2015. *See Martinez v. McDonald*, No. 15-0685 (April 9, 2015, Notice of Withdrawing Petition).

Notably, despite evidence showing that the entire five-volume claims file was sent to Ms. Clark in March 2015, *see* [R. at 883], Appellant states that "[t]he RBA includes no proof the Secretary ever produced a C-File." Appellant's Br. at 7. He concedes that VA "sent something to the attorney on March 19, 2015," but alleges that "nobody knows what that was." *Id.* Oddly, for support, Appellant attached to his brief a March, 19, 2015, letter from VA to Ms. Clark stating: "**We have enclosed a copy of the veteran's Claim Folder as requested**." *Id.*, n.3 & Appendix A. It is the Secretary's position that the record shows that VA mailed a copy of the claims folder to Appellant's former counsel in March 2015.[3] But to further clarify this factual matter for the Court, the Secretary has attached to this brief a copy of a March 31, 2015, email from Ms. Clark to VA stating "[**y**]**es, we did receive the claims file**." *See* Attachment A (emphasis added).

---

for this allegation of unlawfulness. Accordingly, and because Appellant correctly states that the "interplay between the Privacy Act and FOIA is outside this court's jurisdiction," the Secretary will not address this matter. *Id.*; *see* 38 U.S.C. § 7252.

[3] VA's response to Appellant's 2014 request for a copy of his claims file is not at issue on appeal because the parties agree that the January 2016 VA examination report at issue would not have been part of the claims file in 2015. *See* Appellant's Br. at 7, n.3.

After Appellant received the claims file and withdrew his Petition, the RO requested an additional VA medical opinion. [R. at 633 (632-37)]; *see* [R. at 12 (noting that the case was referred to clarify the March 2014 VA examination)]. The RO also sent a letter to Appellant informing him that it "asked the VA medical facility nearest you to perform a disability evaluation in connection with your remanded appeal." [R. at 630-31 ("If an in-person examination is necessary, the medical facility will notify you of the date, time, and place.")].

On January 14, 2016, Appellant underwent an in-person VA examination. [R. at 499-506]. The VA clinical neuropsychologist opined that it is less likely than not that Appellant's obstructive sleep apnea is aggravated by his service-connected PTSD. [R. at 505]. As to aggravation, the examiner noted that "obesity induced obstructive sleep apnea can be aggravated by . . . eating abnormalities with psychogenic causes." *Id.* The examiner explained that, "[i]n such cases, [an] individual's obstructive sleep apnea is worsened by the increased fat affecting airway opacity." *Id.* But he reasoned that "[i]n the veteran's case, this does not seem to be the case" in part because "[h]is weight is not extreme."[4] *Id.*

In May 2016, the RO issued an SSOC. [R. at 235-48]. The SSOC notified Appellant that VA examinations were conducted on January 14, 2016. [R. at 237]. The SSOC also described the January 2016 examination findings and the examiner's ultimate conclusion. [R. at 245].

[4] Appellant incorrectly states that the "neuropsychologist did add 'increasing fat' worsened Mr. Martinez's sleep apnea." Appellant's Br. at 4.

The next month, the RO informed Appellant that his claim was being returned to the Board and noted how to submit additional evidence or testimony. [R. at 168]. Shortly thereafter, the Board submitted a letter to Appellant informing him that he could submit additional argument or evidence. [R. at 162].

In July 2016, Appellant submitted a letter requesting that the Board hold the record open for 90 days. [R. at 146]. In response, the Board informed Appellant that its appellate review would resume when the requested time period expired or when additional evidence was received. [R. at 139]. In September 2016, Appellant requested an additional 30 days to submit any additional argument or evidence. [R. at 132]. In October 2016, the Board granted a 30-day extension. [R. at 131]. Thereafter, Appellant submitted additional argument and evidence. [R. at 35-60 (November 2016 argument and evidence)].

In January 2017, the Board issued its decision currently on appeal.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's January 27, 2017, decision. By statute, and pursuant to caselaw, VA is not required to provide copies of VA examination reports to claimants absent a written request. The plain language of 38 U.S.C. § 5103A does not require VA to give copies of evidence to claimants and, to the extent that the statute is ambiguous, the Court should defer to the Secretary's interpretation. Further, Appellant has not shown that his due process rights were violated or that he was harmed when VA did not sua sponte provide a copy of a VA examination report that he did not request.

IV. ARGUMENT

A. Standard of Review

The Court reviews the Board's findings of fact, including whether a claimant is entitled to service connection, under the clearly erroneous standard of review. 38 U.S.C. § 7261(a)(4). A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1984). Under this deferential standard, the Court must affirm the Board's factual findings if they are "plausible in light of the record." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

Generally, the Court reviews questions of law de novo. *Bradley v. Peake*, 22 Vet.App. 280, 290 (2008). When the Court "reviews an agency's construction of the statute which it administers," it must first determine whether Congress has spoken to the question at issue. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress's intent is clear, "that is the end of the matter" and the court must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But if Congress has not directly addressed the question at issue, "the court does not simply impose its own construction on the statute" and instead considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. As for regulatory interpretation, an agency's interpretation of its own regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v.*

Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); *see Auer v. Robbins*, 519 U.S. 452 (1997).

B. VA is not required to provide copies of examinations or opinions to claimants who do not submit a written request

Appellant argues that, under 38 U.S.C. § 5103A, VA must provide copies of VA examinations and opinions to claimants. The Secretary respectfully submits that Appellant's argument must fail because it overlooks, or disregards, relevant statutes and precedential decisions stating that a claimant must submit a written request to receive a medical report obtained by the RO. Section 5103A must be read in that context, and the plain language of the statute does not require VA to give copies of VA examinations and opinions to claimants sua sponte.

1. It is well settled that a records request must be in writing, and it is undisputed that Appellant failed to submit such a request

In *Anderson v. West*, this Court explained that "[t]he right to gain access to documents contained in VA claims files is limited by 38 U.S.C. § 5701." 12 Vet.App. 491, 493 (1999). The Court further stated that "the method that must be used . . . to obtain documents in VA custody" is governed by 38 U.S.C. § 5702, which provides that "[***a***]***ny person*** desiring a copy of any record . . . ***must submit to the Secretary an application in writing for such copy***." *Id.* at 494 (quoting 38 U.S.C. § 5702). The Court concluded that VA has a duty to provide copies of documents within VA custody to a claimant or his representative when, inter alia, there is "a 'written application' for such a document." *Id.*

Thereafter, in *Prickett v. Nicholson*, the Court considered and rejected the contention that "VA was required, pursuant to the principles of fair process or due process," to inform a claimant of a decision review officer's (DRO) request for a medical opinion "and to provide [the claimant] with a copy of those opinions and an opportunity to challenge those opinions." 20 Vet.App. 370, 373, 380 (2006) (noting Mrs. Prickett's argument that the pre-Board adjudicatory process was not fair because VA "failed to provide her with a copy of [VA] opinions"), *aff'd sub nom. Prickett v. Mansfield*, 257 F. App'x 288 (Fed. Cir. 2007). The Court noted that such a "duty-to-act" was limited to situations where the *Board* procured evidence following the most recent SOC or SSOC. *Id.* at 381 (citing *Anderson*, 12 Vet.App. at 487); *see Thurber v. Brown*, 5 Vet.App. 119 (1993) (holding that when the Board relies on evidence obtained after the most recent SOC or SSOC, it must provide a claimant with notice and an opportunity to respond); *see also Austin v. Brown*, 6 Vet.App. 547 (1994) (holding that the Board violated *Thurber* by failing to inform the claimant that he could submit additional evidence and information to rebut the medical opinion procured by the Board).

The *Prickett* Court determined that "[w]e are fully satisfied that the pre-Board adjudicatory process in this case was fair" because the DRO properly requested the opinion, an SSOC was mailed to the claimant and her representative, and "Mrs. Prickett and her representative *failed to make a written application for a copy of those medical opinions*." *Prickett*, 20 Vet.App. at 381 (emphasis added). The Court noted that a copy of the medical opinions "would

have been provided pursuant to VA statutes and regulations upon request," and cited §§ 5701 and 5702 for support. *Id.* The Court also rejected Mrs. Prickett's contention that the pre-Board adjudicatory process violated the due process clause of the U.S. Constitution. *Id.* at 382 (noting that, "at every stage in the development and processing of her claim . . . Mrs. Prickett was provided a meaningful opportunity to develop her claim and challenge VA's determination").

The U.S. Court of Appeals for the Federal Circuit later affirmed the *Prickett* decision, and noted that it "perceives full compliance with applicable due process and notification requirements." *Prickett*, 257 F. App'x at 293. Then, in *Sprinkle v. Shinseki*, the Federal Circuit rejected a veteran's contention that the "fair process doctrine requires the Board to provide him with a copy of the medical examiner's opinion." 733 F.3d 1180, 1186 (Fed. Cir. 2013). The Court reasoned that the veteran received adequate notice when the RO issued an SSOC summarizing the evidence it had obtained. *Id.* at 1183, 1186 (noting that the veteran received a copy of a medical opinion obtained by the RO because he submitted a written request for it).

The Appellant in this case, like the claimant in *Prickett*, had every opportunity to develop his claim and challenge VA's determination. Before obtaining the January 2016 medical opinion, the RO informed Appellant that it had "asked the VA medical facility nearest you to perform a disability evaluation in connection with your remanded appeal." [R. at 630 (November 2015 letter)]. Appellant then attended the January 2016 VA examination. [R. at 504 (noting

Appellant was "prompt in keeping his appointment for C&P examination")]. Thereafter, the RO issued a May 2016 SSOC notifying Appellant that the January 2016 VA examinations were conducted. [R. at 237]. The SSOC discussed the contents of the VA examination and stated that the examiner opined "that it is less likely than the alternative that your obstructive sleep apnea is aggravated or complicated by your PTSD."[5] [R. at 245].

In June 2016, both the RO and the Board informed Appellant that he could submit additional argument or evidence. [R. at 162, 168]. In response, Appellant requested that the Board hold open the record for 90 days. [R. at 146]. The Board informed Appellant that it would resume appellate review after the requested 90-day period ended or when evidence was received. [R. at 139]. At the end of the 90-day period, Appellant requested an 30-day extension of time to submit additional argument or evidence. [R. at 132]. The Board granted the 30-day extension in October 2016. [R. at 131]. Then, in November 2016, Appellant submitted argument and evidence in support of his claim. [R. at 35-60].

Accordingly, Appellant was provided ample notice and opportunity during the appeals process. But, like the claimant in *Prickett*, Appellant did not submit a request for a copy of the medical report at issue. *See Prickett*, 20 Vet.App. at 381-82 (noting that the claimant and her representative "failed to make a written application" for a copy of medical opinions, which "would have been provided

[5] Appellant does not challenge the adequacy of the SSOC. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed").

pursuant to VA statutes and regulations upon request"). Appellant does not dispute that he failed to submit a written request for the January 2016 VA examination report, and does not dispute that § 5702 requires any person desiring a record to submit "an application in writing for such copy." 38 U.S.C. § 5702. In fact, Appellant does not cite to or discuss §§ 5701 and 5702, even though the Court in *Anderson* recognized that those statutes govern the disclosure of records contained in VA claims files and require persons desiring a record to submit "a 'written application' for such a document." *Anderson*, 12 Vet.App. 494. Appellant, therefore, fails to establish error. *See Prickett*, 20 Vet.App. at 381; *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (noting that the appellant bears the burden of demonstrating error on appeal).

Perhaps anticipating the Secretary's response, Appellant argues that *Prickett* does not apply because in *Prickett* "the Court interpreted 38 U.S.C. §[]7109" and held that the Board has no duty "to provide a copy of a medical opinion procured by the B[oard]." Appellant's Br. at 14-15, n.8 (stating that "[t]he Secretary framed his defense by relying in the CAVC precedential opinion in *Pricket* [sic]"). But this contention misrepresents *Prickett*.

The Court in *Prickett* did not cite 38 U.S.C. § 7109 and certainly did not interpret that statute, which pertains to the Board's procurement of an advisory medical opinion. *See* 38 U.S.C. § 7109. The *Prickett* Court did not need to consider § 7109 because, as discussed above, the medical opinion in *Prickett* was not obtained by the Board. *See Prickett*, 20 Vet.App. at 381 (noting that "this

Court has consistently limited a *Thurber*/*Austin* duty-to-act to situations in which evidence was procured *by the Board*"); *but see* Appellant's Br. at 14-15, n.8 (incorrectly asserting that the Court in *Prickett* held that the Board "has no *Thurber-Austin* duty to provide a copy of a medical opinion procured by the B[oard]"). And because the Board did *not* obtain the opinion at issue in *Prickett*, the Court focused on the "pre-Board adjudicatory process." *Prickett*, 20 Vet.App. at 381. Here, like in *Prickett*, the pre-Board adjudicatory process is at issue because the January 2016 VA examination was obtained prior to the most recent SSOC.

And although Appellant asserts that the Court should overrule *Prickett* to the extent that it is applicable to his case, he provides no compelling reason for the Court to overturn its decision. He appears to merely disagree with *Prickett*. *See* Appellant's Br. at 15, n.8. Moreover, Appellant does not explain why he asks the Court to overturn *Prickett* in light of the Federal Circuit's subsequent affirmance. *See Prickett v. Mansfield*, 257 F. App'x 288.

2. Section 5103A does not require VA to give copies of VA medical reports to claimants

In lieu of sufficiently addressing the relevant statutes and caselaw regarding requests for records, Appellant focuses solely on one other section within title 38 of the U.S. Code—38 U.S.C. § 5103A. Appellant contends that the phrase "assist a claimant in obtaining evidence" within § 5103A is plain on its face and requires VA to "give the evidence to the claimant." Appellant's Br. at 9

(emphasis omitted). Appellant's argument is unpersuasive because it ignores both the context of the statute and the statutory scheme, and relies on an attempt to read a portion of the statute in isolation.

It is well established that the "starting point in interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter." *Gardner v. Brown*, 5 F.3d 1456, 1458 (Fed. Cir. 1993) (internal quotation marks omitted), *aff'd*, 513 U.S. 115 (1994); *see Chevron*, 467 U.S. at 842. "The cardinal rule is to read the statute as a whole, because the meaning of statutory language, plain or not, depends on context." *Mason v. Shinseki*, 26 Vet.App. 1, 9 (2012); *see Holle v. McDonald*, 28 Vet.App. 112, 116 (2016). A statute should be construed to give effect to all its provisions, "'so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. U.S.*, 556 U.S. 303 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, *Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor."). And, generally, "identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992).

The words "obtain" and "obtaining" appear 19 times in 38 U.S.C. § 5103A. The statute does not define those terms, and in the absence of an express definition, such words should be given their ordinary meaning. *See Prokarym v. McDonald*, 27 Vet.App. 307, 310 (2015) ("In the absence of an express definition, words are given their ordinary meaning."); *see Nielson v. Shinseki*, 23 Vet.App.

56, 59 (2009). The ordinary meaning of "obtain" is "to gain or attain usually by planned action or effort." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/obtain (last visited May 24, 2018).

Throughout § 5103A, obtain is used to describe the Secretary's duty to gain or attain various records. Subsection (d), which pertains to medical examinations for compensation claims such as the January 2016 examination at issue here, states that the assistance provided "by the Secretary under subsection (a)" includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." § 5103A(d)(1). Subsection (b) provides that the "Secretary shall make reasonable efforts to obtain relevant private records" that the claimant adequately identifies, and discusses the Secretary's notice obligation when "the *Secretary*, after making such reasonable efforts, *is unable to obtain* all the relevant records." *Id.* § 5103A(b)(1)-(2) (emphasis added). That subsection also explains that "obtaining relevant private records . . . may require the claimant to *authorize the Secretary to obtain* such records." *Id.* § 5103A(b)(4)(B) (emphasis added). Subsection (c), titled "[o]btaining records for compensation claims," explains that the "assistance provided by the Secretary under this section shall *include obtaining*" various records including those that "the claimant adequately identifies and *authorizes the Secretary to obtain*." *Id.* § 5103A(c)(1) (emphasis added).

In context, it is clear that the terms "obtain" and "obtaining" under § 5103A relate to the Secretary's duty to obtain records and evidence, including VA

medical examinations and opinions. The statute requires the Secretary to obtain such evidence for the purpose of "substantiat[ing] a claimant's claim for a benefit"—and not for the purpose of *giving* records to a claimant. 38 U.S.C. § 5103A(a); *see Mason*, 26 Vet.App. at 9 (explaining that statutes must be read as a whole because a statute's meaning depends on context). Therefore, the language in subsection (a) requiring the Secretary to "assist a claimant in obtaining evidence necessary to substantiate the claimant's claim" plainly means that the Secretary is required to obtain evidence necessary for the agency's adjudication of a claim for benefits. § 5103A(a); *see Estate of Cowart*, 505 U.S. at 479; *United Sav. Ass'n*, 484 U.S. at 371.

Appellant's argument to the contrary is guided by the single phrase "assist the claimant in obtaining evidence" in § 5103A(a), which he asserts "means the Secretary must give the evidence to the claimant." Appellant's Br. at 9 (emphasis omitted); *see id.* at 13-14 (arguing that the "Secretary never gave [VA opinions] to him" and alleging that the Secretary must "give" him a copy), 28 ("He cannot get that evidence—he cannot obtain it—unless the Secretary gives it to him). But the Court should not be guided by this single phrase within § 5103A or Appellant's interpretation of that phrase, which is inconsistent with the overall structure of the statute. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) ("We must not be guided by a single sentence or member of the sentence, but look to the provisions of the whole law."). Moreover, although Appellant uses the terms "obtain" and "give" interchangeably, the terms are not

synonymous. Unlike obtain, which means to gain or attain, "give" is defined as "to make a present of." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/give (last visited May 24, 2018). No portion of § 5103A instructs the Secretary to give, or make present of, any record that VA obtains in the course of adjudicating a claim for benefits.

Appellant's interpretation of § 5103A is also inconsistent with the statutory scheme. *See Cook v. Snyder*, 28 Vet.App. 330, 338 (2017) (explaining that the Court interprets statutes in context of the overall statutory scheme). 38 U.S.C. § 5103, which immediately precedes § 5103A, describes the Secretary's notice requirements and states that the Secretary shall notify the claimant of the evidence he must provide and the evidence "the Secretary, *in accordance with section 5103A of this title* . . . *will attempt to obtain on behalf of the claimant*." 38 U.S.C. § 5103(a) (emphasis added); *see* 38 C.F.R. § 3.159(b)(1). This statute makes clear that § 5103A requires the Secretary to obtain evidence "on behalf of the claimant" and does not require the Secretary to give evidence to claimants.

Further, at the time § 5103A was enacted, the statutory scheme included §§ 5701 and 5702. Those statutes appear under Part IV, Chapter 57, Subchapter I "Records" of title 38, and require VA to provide a claimant with copies of documents in VA custody when, inter alia, a 'written application' for such a document is made." *Anderson* 12, Vet.App. at 495; *see* § 5702. Appellant's contention that VA must provide copies of VA examinations to claimants under § 5103A is inconsistent with § 5702, and would render § 5702 superfluous.

Accordingly, the Court should reject his argument. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). And, because Appellant did not submit a written request for a copy of the January 2016 VA examination report as required by § 5702, there is no merit to his assertion that the Secretary "block[ed] him from seeing copies of the opinions necessary to decide his claim." Appellant's Br. at 14. VA did nothing to prevent Appellant from seeing the examination report, and would have provided a copy of the examination if Appellant had requested a copy.

Moreover, the statutory scheme shows that Congress knows how to draft a statute that requires VA to provide copies of medical opinions to claimants. Section 7109, which provides that the Board "may secure an advisory medical opinion," explicitly requires the Board to "furnish[6] the claimant with a copy of such opinion when it is received by the Board." 38 U.S.C. § 7109. Similarly, 38 U.S.C. § 5109 permits the Secretary to secure an advisory medical opinion and instructs that the Secretary "shall furnish the claimant with a copy of such opinion." 38 U.S.C. § 5109(c). Because Congress did not adopt this type of clear language when drafting § 5103A, Congress did not intend to require VA to provide copies of VA examinations and opinions to claimants under § 5103A.

---

[6] "Furnish" means "to provide with what is needed" and "supply, give." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/furnish (last visited June 4, 2018). Thus, unlike the word "obtain," the word "furnish" is synonymous with the word "give" that is used throughout Appellant's brief. *See* Appellant's Br. at 9, 13-14, 28.

3. If the Court determines that § 5103A is ambiguous, it should defer to the Secretary's interpretation of the statute

For reasons addressed above, the Secretary submits that the plain language of § 5103A requires the Secretary to obtain records for adjudication purposes, and does not require the Secretary to "give" records to claimants. But if the Court determines that § 5103A is ambiguous, the Court should defer to the Secretary's interpretation. *See Chevron*, 467 U.S. at 843. The Secretary's interpretation will not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Breniser v. Shinseki*, 25 Vet.App. 64, 72 (2011) (noting that the Court defers to the Agency's interpretation of an ambiguous statute if the agency's answer is based on a permissible construction) (citing 38 U.S.C. § 7261(a)(3)(A)).

Section 5103A gives the Secretary authority to "prescribe regulations to carry out this section." § 5103A(e); *see also* 38 U.S.C. § 501(a). In accordance with this authority, the Secretary implemented § 5103A through amendments to 38 C.F.R. § 3.159. That regulation provides that, when a complete application for benefits is received, "VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim." 38 C.F.R. § 3.159(c). Although this phrase is similar to the language at issue in § 5103A, the regulation as a whole resolves any purported ambiguity because it describes the efforts VA must undertake to help a claimant obtain evidence that substantiates his claim. With regard to VA examinations and opinions, the regulation states that "*VA will*

provide a medical examination *or obtain* a medical opinion" when necessary to decide a claim. *Id.* § 3.159(c)(4) (emphasis added). Additional provisions address, inter alia, "VA's reasonable efforts to obtain relevant records" and "circumstances where VA will refrain from providing assistance in obtaining evidence for a claim." *id.* § 3.159(c)(1)(i), (2)(i), (d).

Because § 3.159 describes what VA must obtain to adjudicate a claim for benefits, and does not instruct VA to give evidence to claimants, the regulation shows that the Secretary has not interpreted § 5103A as requiring VA to give copies of evidence to claimants. *See also* Duty to Assist, 66 Fed. Reg. 45,620, 45,623 (Aug. 29, 2001) (final rule) (stating that § 5103A established "new duties for VA in the claims development and adjudication process" and noting that "[i]n our view, the regulatory language ensures that, with the claimant's cooperation, *VA will have all the evidence* relevant to the claim before it at the time a decision is made on the claim") (emphasis added). Further, the Secretary knows how to draft regulations that require VA to furnish copies of VA examinations to claimants absent a written request, and did not draft § 3.159 in such a manner. *See* 38 C.F.R. § 20.903 (stating that, when the Board obtains an opinion, "it will furnish a copy of the opinion to the appellant" subject to limitations in § 5701).

Alternatively, if the Court agrees with Appellant that § 3.159(c) parrots § 5103A and is not entitled to substantial deference, the Court should uphold the Secretary's persuasive interpretation. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also* Appellant's Br. at 15. The Secretary's interpretation

that § 5103A does not require the Secretary to give evidence to claimants is persuasive in light of the statutory language, overall statutory scheme, and other statutes including §§ 5103, 5701, 5702 and 7109, as discussed above.

Appellant contends that any ambiguity should be resolved in his favor for sympathetic reasons. *See* Appellant's Br. at 17-18 (arguing that an interpretation of § 5103A that "does not require the Secretary to *produce* the material relied upon . . . hogties Mr. Martinez's ability to even attempt a proof of his claim") (emphasis added). But this argument is not compelling because "[e]ven where the meaning of a statutory provision is ambiguous, [courts] must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case." *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003); *see also Disabled Am. Veterans*, 234 F.3d at 692.

Further, Appellant fails to support his sympathetic pleas, including his contention that he would not be able to "even attempt a proof of his claim" under another interpretation of § 5103A. Appellant's Br. at 18. As evidenced by the record, Appellant received ample notice and opportunity to prove his claim throughout the appeals process. *See* [R. at 237 (May 2016 SSOC), 168 (June 2016 RO letter informing Appellant how to submit additional argument and evidence), 162 (Board letter stating the same), 139 (Board letter stating that appellate review would resume after the 90-day period of time requested by Appellant), 131 (October 2016 Board letter granting a 30-day extension to submit

evidence)]. And Appellant provided argument and evidence, including various medical abstracts that the Board addressed in its decision. [R. at 14-16]; *see* [R. at 35-60 (November 2016 argument and evidence submitted by Appellant)].

But, despite the opportunity to request a copy of the January 2016 VA examination report including through his former experienced counsel, Appellant chose not to request it. *See* 38 U.S.C. § 5702; *Anderson*, 12 Vet.App. at 494. Appellant's apparent regret about this decision does not establish that he was unable to obtain or refute the examination report, or support his contention that § 5103A should be interpreted as requiring VA to provide copies of the evidence it obtains. *But see* Appellant's Br. at 17-18.

To the extent that Appellant asserts that he had no ability to rebut the VA examiner's qualifications without a copy of the medical report, *id.* at 17, the Secretary notes that Appellant waived his ability to challenge the presumed competence of the January 2016 VA clinical neuropsychologist. *See Parks v. Shinseki*, 716 F.3d 581, 586 (Fed. Cir. 2013) (holding that a veteran waived the right to rebut the presumption that a nurse practitioner selected by VA was competent because the veteran never suggested to VA that the examiner was not competent); *Cox v. Nicholson*, 20 Vet.App. 563, 569 (2007). And although Appellant contends that he could have challenged the examiner's clinical methodology or medical research, Appellant's Br. at 17-18, the Secretary notes that "[A]ppellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence." *See Kern v. Brown*, 4 Vet.App. 350, 353

(1993); *see also* [R. at 13 ("Neither the Veteran nor his representative has been shown to have the medical training and knowledge necessary to render opinions as to medical matters.")]. Appellant's arguments, therefore, are not persuasive.[7]

C. Appellant fails to present a viable due process challenge

Appellant asserts that a VA disability benefits claimant has a Fifth Amendment due process right to receive, without requesting, a copy of a VA examination or opinion obtained by VA. The Secretary disputes this contention.

The Due Process Clause of the Fifth Amendment of the United States Constitution guarantees that a person will not be deprived of life, liberty, or property without being accorded due process of law. U.S. Const. Amend. V. "Procedural due process thus determines both whether the litigant has a protected property interest and, if so, what process is due." *Edwards v. Shinseki*, 582 F.3d 1351, 1355 (Fed. Cir. 2009).

To establish a violation of the Due Process Clause, first "the claimant must demonstrate a property interest entitled to such protections." *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009). Disability benefits are a protected property interest. *Id.* The Federal Circuit has also held that due process protections "apply to proceedings in which [VA] decides whether veteran-applicants are eligible for disability benefits." *Gambill v. Shinseki*, 576 F.3d 1307, 1310-11 (Fed. Cir. 2009); *see also Clennan v. Shinseki*, 26 Vet.App.

[7] On appeal, Appellant does not actually challenge the adequacy of the January 2016 VA examiner's opinion, which is part of the Record Before the Agency. This issue, therefore, is waived. *See Disabled Am. Veterans*, 234 F.3d at 688 n.3.

144, 154 (2013); *but see Edwards*, 582 F.3d at 1356-58 (Rader, J., additional views) (questioning the conclusion that an applicant has a protected property interest in claimed benefits).

The second step in determining whether there was a violation of a claimant's right to due process is to determine "what, if any process . . . was due." *Edwards*, 582 F.3d at 1355. To determine the process due, the Supreme Court has articulated three factors for consideration:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In applying the *Mathews* factors, "the Court is guided by the general principle that 'due process' is a flexible concept, such that the process necessary to ensure fundamental fairness does not require that 'the procedures used to guard against an erroneous deprivation . . . be so comprehensive to preclude any possibility of error." *Noah v. McDonald*, 28 Vet.App. 120, 130 (2016) (citing *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)).

Here, Appellant asserts that his private interest is a payment of past-due benefits "between $105,000 and $110,000." Appellant's Br. at 20. But this is not the private interest at dispute. The private interest at issue, and the process that Appellant seeks, is the ability to review a copy of a VA medical report obtained by the RO. Although Appellant fails to sufficiently identify the private interest at

issue, the Secretary recognizes that claimants have an interest in receiving and reviewing VA medical opinions and examinations relied on by VA.

Under current procedures and safeguards, however, the risk of deprivation of that private interest is low. If a claimant wants to receive evidence relied on by VA, he or she can simply request a copy. *See* 38 U.S.C. § 5702; *see also* Appellant's Br. at 21-22 (recognizing that the veteran and his attorney "might, upon noticing mention of a medical opinion in a VA Rating[] Decision, SOC, or SSOC, request a copy of that information from the VA"). And if the claimant obtains a VSO or other representative who has access to VBMS, the claimant would have access to his entire claims file through his representative.

Appellant argues that VA's procedures for requesting copies of evidence are futile because he submitted requests for his claims folder in 2014, and did not obtain a copy of it until filing his 2015 Petition. *See* Appellant's Br. at 22. But the procedural history in this case, including any delay by VA in responding to Appellant's records request, does not show that VA procedures *deprived* him of the ability to obtain his records. Further, because VA must provide evidence to claimants upon request, it is not clear why Appellant asserts that one procedure at issue includes "su[ing] the VA in Federal District Court to seek production of documents." Appellant's Br. at 22 (arguing that this option is unrealistic because it would "take years to resolve, and require paying thousands of dollars in hourly attorney fees"). Appellant's district court lawsuit discussion is a non-sequitur

because VA's administrative procedures under review do not provide that a claimant must sue the government to obtain copies of records.

Lastly, the government has a substantial interest in avoiding the fiscal and administrative burden of mailing a copy of every single document it obtains to every single claimant. *See Beverly Enters. v. Herman*, 130 F.Supp.2d 1, 20 (D.C. Cir. 2000) ("It is widely recognized that a drain on the government's limited resources in terms of time and cost of enforcement is a major factor in the *Mathews* test."). VBA estimates that in fiscal year 2017, the Veterans Health Administration completed approximately 592,827 examinations and VA contractors completed approximately 740,012 examinations, for a total of over 1.3 million examinations. Even assuming that a copy of each 2017 VA examination were light enough to mail with a single postage stamp as Appellant suggests, *see* Appellant's Br. at 21, the mailings would have cost VA approximately $653,091 in fiscal year 2017. And that financial burden accounts *only* for VA examinations obtained in 2017, and not the hundreds or thousands of additional records VA obtained for each claim pursuant to the duty to assist. Contrary to Appellant's contention, the cost to mail millions of such documents would not be "negligible." *Id.* at 24.

Appellant, however, argues that the government has an interest in requiring VA to give evidence to claimants because he "has found no other federal government benefits system where due process does not require the government to produce copies of the material it relies upon in denying a

constitutionally protected interest." Appellant's Br. at 25-27. This argument should fail for two reasons.

First, the veterans benefits system is informal and nonadversarial and thus "does not require the same kinds of procedures that would be required in a more conventional adversarial proceeding." *Gambill*, 576 F.3d at 1314-15 (Bryson, C.J., concurring) (citing *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305 (1985)). And comparisons to other federal agency proceedings are unpersuasive because VA is not bound by regulations or findings pertaining to other agencies. *See* 38 U.S.C. § 7104(c) ("The Board shall be bound in its decisions by the regulations of the Department, instructions of the secretary, and the precedent opinions of the chief legal officer of the Department"); 38 C.F.R. § 19.5; *see also Beaty v. Brown*, 6 Vet.App. 532, 538 (1994) (noting that there is no authority for applying Social Security regulations to VA claims).

Second, much of the authority cited by Appellant pertains to notice and not to the production of copies of evidence. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2006) (holding that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive *notice* of the factual basis for his classification") (emphasis added); *but see* Appellant's Br. at 25 (arguing that the Supreme Court in *Hamdi* held that a citizen accused of being a Taliban agent is "entitled to have the evidence relied on in reaching its conclusion"). Here, it is undisputed that Appellant received an SSOC notifying him that VA obtained the January 2016 VA examination and summarizing the results of that examination.

Accordingly, based on the *Mathews* factors, the Court should conclude that VA's procedures adequately protect Appellant's due process rights. Such a determination comports with the Court's prior determination that VA is not required, "pursuant to the principles of fair process or due process" to provide a claimant with a copy of medical opinions obtained by the AOJ. *Prickett*, 20 Vet.App. at 380, 382 (rejecting the appellant's argument that the pre-Board adjudicatory process violated the due process clause); *see also Sprinkle*, 733 F.3d at 1186 (rejecting a veteran's argument that fair process principles require the Board to provide him with a copy of a VA medical opinion).

D. Appellant does not sufficiently allege harm

Appellant contends that he could have challenged the January 2016 VA examination report if he received a copy of it, but does not assert that the examination report is inadequate or otherwise articulate prejudicial error. Thus, he fails to meet his burden of persuasion on appeal. *See Hilkert*, 12 Vet.App. at 151; *see also Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010).

Notably, Appellant contends that harmless error "does not apply" here because the "right of access to government evidence supporting deprivation of a protected property is so basic, its violation can never be treated as harmless error." Appellant's Br. at 9, 29 (citing *Chapman v. California*, 386 U.S. 18 (1967)). This assertion is legally incorrect. In *Chapman*, which pertains to alleged constitutional errors in a criminal law context, the Supreme Court rejected the contention that constitutional errors are never harmless. The Court explained that

"some constitutional rights so basic *to a fair trial* that their infraction can never be treated as harmless error," but explained that reversal is not required in every case where a trial error violates the constitution. 386 U.S. at 23 (emphasis added). Further, "[h]armless error is fully applicable to veterans' claims cases," including when due process errors are alleged. *See Gambill*, 576 F.3d at 1311 (declining to address an alleged due process violation because, the denial of the alleged right "was not prejudicial in this case").

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that the Board's January 27, 2017, decision should be affirmed.

Respectfully submitted,

JAMES M. BYRNE
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Edward V. Cassidy, Jr.
EDWARD V. CASSIDY, JR.
Deputy Chief Counsel

/s/ Jessica K. Grunberg
JESSICA K. GRUNBERG
Appellate Attorney
Office of General Counsel (027B)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6745

Attorneys for Appellee Secretary of Veterans Affairs

Attachment A

From: Stacey Clark
To: Chase, Catherine
Subject: [EXTERNAL] Re: 15-0685 Writ
Date: Tuesday, March 31, 2015 5:30:25 PM

Good afternoon. Yes, we did receive the claims file. Thank you.

Stacey Clark

I'm handling this writ for the Secretary. The RO advised that a copy of the claims file was sent to you on 3/19. Have you received it? Thanks.

Catherine A. Chase, Esq.
Senior Appellate Litigation Attorney
Office of General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Ave., N.W.
Washington, D.C. 20420
Phone (202) 632-6914
Fax (202) 632-7120