UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1561

EVANIE E. ATENCIO, APPELLANT,

V.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Argued April 26, 2018 Decided July 6, 2018)

Christian A. McTarnaghan and *Bradley W. Hennings*, with whom *Alexandra Lio* was on the brief, all of Providence, Rhode Island, for the appellant.

Catherine D. Vel and *Edward V. Cassidy, Jr.*, with whom *Meghan Flanz*, Interim General Counsel; and *Mary Ann Flynn*, Chief Counsel, were on the brief, all of Washington, D.C., for the appellee.

Before DAVIS, *Chief Judge*, and ALLEN and MEREDITH, *Judges*.

ALLEN, *Judge*, filed the opinion of the Court. MEREDITH, *Judge*, filed an opinion concurring in part and dissenting in part.

ALLEN, *Judge*: This case requires the Court principally to consider an important question concerning Persian Gulf War presumptive service connection. We are called on to address how veterans can establish a qualifying disability under that presumption, namely by having a medically unexplained chronic multisymptom illness (MUCMI). Specifically, this matter was submitted to a panel of the Court to address whether gastroesophageal reflux disease (GERD) is categorically excluded from consideration as a MUCMI because it is considered a "structural" (as opposed to a "functional") gastrointestinal disease that is prohibited from qualifying as a MUCMI under 38 C.F.R. § 3.317(a)(2)(i)(B)(3). As we explain, we hold that the plain language of § 3.317 specifically bars GERD from being considered as a MUCMI.

The Court must also consider whether a prior joint motion for remand (JMR) that addressed presumptive service connection, but not alternative theories of direct and secondary service connection, limits the appellant's ability to raise those alternative theories in this appeal. Based on the language of the JMR, we hold that the Court is not precluded from considering the appellant's

arguments pertaining to direct and secondary service connection. Finally, while we reject the appellant's arguments concerning the Board of Veterans' Appeals' (Board) treatment of direct service connection, we agree with the appellant that the Board erred in its assessment of secondary service connection. Therefore, the Court will set aside the March 28, 2016, Board decision as to that issue and remand this matter for further proceedings consistent with this decision.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

The appellant, Evanie E. Atencio, appeals through counsel a March 28, 2016, Board decision that denied service connection for GERD, including as secondary to service-connected sinusitis. She served in the U.S. Air Force from March 1988 to May 1988 and from January 1991 to July 1991, at which time she was part of Operations Desert Shield and Desert Storm. Record (R.) at 1701. Following service, in December 1998, she complained of a history of significant dyspepsia.[1] R. at 1642. She was diagnosed with significant GERD in January 1999, R. at 1648, and underwent a Nissen fundoplication procedure that same year in connection with that condition, R. at 1429.

In May 2000, a VA regional office (RO) denied her claim for service connection for GERD. R. at 1435-58. She failed to perfect an appeal of this issue. In February 2006, she requested that her GERD claim be reopened. R. at 1011. The Board eventually reopened her claim for service connection for GERD and remanded it for adjudication in a July 2013 decision. R. at 425-45.

In April 2014, the appellant underwent a VA examination for GERD. R. at 173-82. The examiner concluded that it was less likely than not that the appellant's GERD began in service or was due to or aggravated by her service-connected sinusitis. R. at 174. The examiner noted that service treatment records were silent as to symptoms of GERD. R. at 174. The examiner further noted that there was "[i]nsufficient [e]vidence to [d]etermine [w]hether an [a]ssociation [e]xists between . . . deployment to the Gulf War and [s]tructural gastrointestinal diseases." R. at 175. Finally, the examiner stated that asthma and sinusitis "are known to develop as a result of esophageal reflux" but that medical literature did not support a finding that sinusitis "commonly results in or aggravates" GERD. *Id.* The examiner commented that the appellant had sinusitis first

[1] "Dyspepsia" is the "impairment of the power or function of digestion." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 578 (32d ed. 2012).

and that "[s]he reports she did NOT have any improvement in her sinus or asthma symptoms following surgical treatment of the GERD cond[ition]." *Id.* (capitalization in original).

In March 2015, the Board denied service connection for GERD. R. at 94-104. The appellant appealed that decision to the Court, and the parties agreed to a JMR, agreeing that the Board erred by failing to consider whether presumptive service connection was warranted under § 3.317. R. at 38.

In the March 2016 decision presently on appeal, the Board found that the appellant's GERD "cannot be an undiagnosed or chronic multisymptom illness and cannot fall under the presumptive service connection provisions of 38 C.F.R. § 3.317" because, although the regulation provides for presumptive service connection for certain functional gastrointestinal disorders, it "specifically excludes gastrointestinal diseases explainable by endoscopic signs of injury or disease which is how GERD was diagnosed." R. at 6 (emphasis omitted). The Board noted that the appellant's GERD was "diagnosed based on, for example, endoscopy (1999) and an upper GI series (2010)." R. at 7.

The Board also addressed service connection on a direct basis, concluding that service records were silent as to symptoms related to GERD and that the appellant's statements made at the time of service that she was in good health and reports of no symptoms, outweighed her later statements that she had heartburn symptoms in service. Finally, the Board relied on the April 2014 VA examiner's opinion to conclude that the appellant's GERD was not the result of or aggravated by her service-connected sinusitis. This appeal followed.

II. PARTIES' ARGUMENTS

The appellant argues that the Board misinterpreted 38 C.F.R. § 3.317 in concluding that GERD, which is characterized as a structural gastrointestinal disease, is categorically precluded from the presumption of service connection afforded to MUCMIs. Appellant's Brief (Br.) at 6-9. She asserts that the Board should have considered whether her GERD qualified as a MUCMI under the definition provided in § 3.317(a)(2)(ii) in addition to considering whether it was captured under § 3.317(a)(2)(i). *Id.* at 7-8. The Secretary responds that the Board properly concluded that the appellant's GERD was precluded from qualifying as a MUCMI as a structural gastrointestinal disorder because it was categorically excluded from this classification under the plain language of the regulation. Secretary's Br. at 5-7.

Additionally, the appellant argues that the Board erred in relying on the April 2014 examiner's opinion for denying direct and secondary service connection. Appellant's Br. at 9-19. She asserts that the examiner inappropriately relied on the lack of any GERD symptoms documented in service, failed to explain why a lack of a GERD diagnosis until 1998 was dispositive as to nexus, and provided no explanation of the significance of finding that her prior doctors had not provided a positive nexus opinion. *Id.* at 10-14. She also argues that the VA examiner failed to provide an adequate rationale for finding that her GERD was not aggravated by her service-connected sinusitis. *Id.* at 17-19.

The Secretary responds that the "law of the case" doctrine prevents the appellant from raising arguments related to direct and secondary service connection.[2] Secretary's Br. at 12-15. He argues that these matters were before the Court in November 2015 when the parties agreed to a JMR for the Board to consider the provisions of § 3.317. *Id.* He continues that the JMR made "no mention of entitlement on a direct basis or as secondary to service-connected sinusitis" and therefore the appellant cannot raise these issues on appeal now. *Id.* at 13. The appellant disagrees because the JMR requested remand of the entirety of the prior Board decision without addressing any of the arguments raised at that time. Appellant's Reply Br. at 7-10. Thus, she argues, the law of the case doctrine does not apply and the JMR did not limit the Board's review on remand or her ability to raise these issues now. *Id.*

Alternatively, the Secretary responds to the appellant's assertions regarding the April 2014 opinion, arguing that it was adequate and the appellant merely disagrees with the examiner's medical judgment, which is not sufficient to demonstrate inadequacy. Secretary's Br. at 15-24. The Secretary argues that the VA examiner appropriately relied on medical literature and considered the record as a whole, including the appellant's statements about her medical history. *Id.*

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[2] At oral argument, counsel for the Secretary stated for the first time that she wished to clarify that the more appropriate doctrine was not the law of the case but rather issue exhaustion. Oral Argument (O.A.) at 43:50-44:32, *Atencio v. O'Rourke*, U.S. Vet. App. No. 16-1561 (oral argument held Apr. 26, 2018), http://www.uscourts.cavc.gov/oral_arguments_audio.php. The Secretary failed to raise this argument in his brief or in any request to supplement his brief. As we discuss below in connection with an argument the appellant's counsel raised for the first time at oral argument, *see infra* at 12, this conduct is unacceptable. The Court will only address the Secretary's issue exhaustion argument to the extent that it implicates *Carter v. Shinseki*, 26 Vet.App. 534, 540 (2014), as argued in his brief.

III. ANALYSIS

We begin our discussion by laying out the law governing presumptive service connection for those who served in the Persian Gulf and how GERD fits into that presumption. We then address the Secretary's argument regarding the law of the case doctrine and the November 2015 JMR. Next, we address the appellant's arguments related to direct service connection. Finally, we conclude by discussing secondary service connection.

A. Persian Gulf War Presumptive Service Connection

1. The Text and Structure of § 3.317

Generally speaking, a veteran of the Persian Gulf War may be entitled to VA benefits on a presumptive basis if she exhibits a "qualifying chronic disability" that manifests to a certain degree before December 31, 2021, and that cannot be attributed to any known clinical diagnosis.[3] 38 U.S.C. § 1117; 38 C.F.R. § 3.317(a)(1)(i)-(ii) (2018). Section 1117(a)(2) notes that a qualifying chronic disability means "a chronic disability resulting from any of the following": (A) an undiagnosed illness; (B) a MUCMI "(such as chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome) that is defined by a cluster of signs or symptoms"; or (C) any "diagnosed illness that the Secretary determines in regulations prescribed under subsection (d) warrants a presumption of service-connection." The statute provides that the "Secretary shall prescribe regulations to carry out this section," including "[a] description of the illnesses for which compensation under this section may be paid." 38 U.S.C. § 1117(d)(1)-(2)(B).

The Secretary implemented Congress's directive via 38 C.F.R. § 3.317. This implementing regulation is complex. Understanding both the structure and content of § 3.317 is critical to resolving this appeal. Accordingly, we describe the regulation in some detail.

Section 3.317(a)(1) sets the overarching framework for the veterans who may qualify for presumptive service connection regarding service in the Persian Gulf. This paragraph essentially mimics 38 U.S.C. § 1117(a) in that it sets the basic requirements that a veteran must "exhibit[] objective indications of a qualifying chronic disability," 38 C.F.R. § 3.317(a)(1), have that disability manifest during service in the Persian Gulf "or to a degree of 10 percent or more not later than December 31, 2021," 38 C.F.R. § 3.317(a)(1)(i), and "[b]y history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis," 38 C.F.R.

[3] The parties agree that the appellant served in Operations Desert Shield and Desert Storm and therefore qualifies as a Persian Gulf veteran pursuant to 38 C.F.R. § 3.317(e).

§ 3.311(a)(1)(ii). For purposes of this appeal, § 3.317(a)(1) merely provides a gateway for the truly contested portion of the regulation: § 3.317(a)(2) and its definition of "qualifying chronic disability."

Because it plays such a significant role in this appeal, we reproduce § 3.317(a)(2) in its entirety (including a "note" adopted with the regulation):

> (2)
>
> (i) For purposes of this section, a *qualifying chronic disability* means a chronic disability resulting from any of the following (or any combination of the following):
>
> (A) An undiagnosed illness;
>
> (B) A medically unexplained chronic multisymptom illness that is defined by a cluster of signs or symptoms, such as:
>
> *(1)* Chronic fatigue syndrome;
>
> *(2)* Fibromyalgia;
>
> *(3)* Functional gastrointestinal disorders (excluding structural gastrointestinal diseases).
>
> NOTE TO PARAGRAPH (a)(2)(i)(B)(*3*):
> Functional gastrointestinal disorders are a group of conditions characterized by chronic or recurrent symptoms that are unexplained by any structural, endoscopic, laboratory, or other objective signs of injury or disease and may be related to any part of the gastrointestinal tract. Specific functional gastrointestinal disorders include, but are not limited to, irritable bowel syndrome, functional dyspepsia, functional vomiting, functional constipation, functional bloating, functional abdominal pain syndrome, and functional dysphagia. These disorders are commonly characterized by symptoms including abdominal pain, substernal burning or pain, nausea, vomiting, altered bowel habits (including diarrhea, constipation), indigestion, bloating, postprandial fullness, and painful or difficult swallowing. Diagnosis of specific functional gastrointestinal disorders is made in accordance with established medical principles, which generally require symptom onset at least 6 months prior to diagnosis and the presence of symptoms sufficient to diagnose the specific disorder at least 3 months prior to diagnosis.
>
> (ii) For purposes of this section, the term *medically unexplained chronic multisymptom illness* means a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities. Chronic multisymptom illnesses of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, will not be considered medically unexplained.

Subparagraph 3.317(a)(2)(i) enumerates what constitutes a "qualifying chronic disability" for purposes of the Persian Gulf presumption. It lists two, and only two, conditions that can be

such a disability: an "undiagnosed illness," 38 C.F.R. § 3.317(a)(2)(i)(A), and a "[MUCMI] that is defined by a cluster of signs or symptoms," 38 C.F.R. § 3.317(a)(2)(i)(B). The regulation also provides a nonexhaustive list of conditions that automatically qualify as a MUCMI: chronic fatigue syndrome, fibromyalgia, and "functional gastrointestinal disorders (excluding structural gastrointestinal diseases)." 38 C.F.R. § 3.317(a)(2)(i)(B)(1)-(3). A note in the regulation defines functional gastrointestinal disorders as characterized by "chronic or recurrent symptoms that are unexplained by any structural, endoscopic, laboratory, or other objective signs of injury or disease and may be related to any part of the gastrointestinal tract." 38 C.F.R. § 3.317(a)(2)(i)(B)(3), Note.[4]

Although § 3.317(a)(2)(i)(B)(1)-(3) lists three conditions that qualify per se as MUCMIs, that list is not a finite set.[5] Additional disabilities may be deemed MUCMIs. The regulation provides a definition of a MUCMI in the next part of paragraph (a)(2) to augment the per se list. In relevant part, MUCMI "means a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.317(a)(2)(ii).

The appellant does not assert that her GERD is a qualifying chronic disability because it is an "undiagnosed illness" under § 3.317(a)(2)(i)(A). Rather, the dispute here trains on whether GERD may be a MUCMI, the only other basis on which to qualify under paragraph (a)(2). The appellant agrees that the note to § 3.317(a)(2)(i)(B)(3) precludes GERD as qualifying as a per se MUCMI because it is a structural gastrointestinal disease.[6] Appellant's Br. at 6-9. Instead, she argues that her GERD can qualify as a MUCMI independent of subparagraph (a)(2)(i) solely

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[4] The fact that this information comes in the form of a "note" contained in a validly adopted regulation does not diminish its legitimacy. "Notes" contained in statutes are deemed authoritative. *See Conyers v. MSPB*, 388 F.3d 1380, 1382 n.2 (Fed. Cir. 2004). We see no principled distinction between a "note" codified in a statute or one contained in a regulation. *See Goodman v. Shulkin*, 870 F.3d 1383, 1386 (Fed. Cir. 2017) ("It is well established that '[t]he rules of statutory construction apply when interpreting an agency regulation.'" (quoting with citation omitted *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006))).

[5] It is clear that the Secretary intended the conditions set forth in subparagraph (a)(2)(i)(B) to be a non-exhaustive list. *See* 75 Fed. Reg. 61,995, 61,995 (Oct. 7, 2010) ("It is evident from Congress' use of the phrase 'such as' in section 1117(a)(2)(B) that Congress intended [the listed conditions] to be examples of [MUCMIs], rather than an exclusive list.").

[6] The appellant does not dispute that GERD is, in fact, a structural gastrointestinal disorder.

through the definition of MUCMI under subparagraph (a)(2)(ii) and despite its specific exclusion in (a)(2)(i). *Id.* Put another way, the appellant sees two paths in the regulation leading to a MUCMI designation for GERD. The Secretary argues that GERD is precluded by the note in § 3.317(a)(2)(i) and that is the end of the matter—there is only one path, and for GERD, it is blocked.[7]

"Regulatory interpretation begins with the language of the regulation, the plain meaning of which is derived from its text and its structure." *Petitti v. McDonald*, 27 Vet.App. 415, 422 (2015); *see Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute [or regulation] is its language."). If the plain meaning of § 3.317 is clear from its text and structure, then that meaning controls and that is the end of the matter. *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006). When assessing the meaning of a regulation, words should not be taken in isolation but rather read in the context of the regulatory structure and scheme. *King v. Shinseki*, 26 Vet.App. 484, 488 (2014). The Court reviews the interpretation of regulations de novo. *See Tropf*, 20 Vet.App. at 320; *see also Kent v. Principi*, 389 F.3d 1380, 1384 (Fed. Cir. 2004).

Although it is certainly complex, we hold that § 3.317(a)(2) is not ambiguous. After all, complexity and ambiguity are distinct concepts. We conclude that the regulation excludes GERD from consideration as a MUCMI and does not provide two paths to the presumption as the appellant claims. As we have described, the regulation provides that a "qualifying chronic disability" is "a chronic disability resulting from any of the following" and then lists undiagnosed illnesses and MUCMIs as the only two types of conditions that can be entitled to presumptive service connection. 38 C.F.R. § 3.317(a)(2)(i). Under MUCMI, the regulation lists three conditions that qualify per se, including functional gastrointestinal disorders. 38 C.F.R. § 3.317(a)(2)(i)(B)(3). That same provision specifically excludes structural gastrointestinal diseases, which all agree include GERD. *Id.* After laying out what constitutes a qualifying chronic disability, the regulation then provides a definition of MUCMI, so that one may determine what

[7] The Court notes that the Secretary agreed to a JMR in November 2015 for the Board to consider GERD under 38 C.F.R. § 3.317, despite his position now that GERD is categorically precluded. Although that position appears to be inconsistent with the Secretary's arguments in this appeal, the Court interprets the Secretary's position in the JMR as deferring to the Board to address the matter in the first instance, rather than taking a definitive position concerning the meaning of the regulation at the time of the JMR.

conditions may be termed a MUCMI in addition to those specifically listed in the previous subparagraph. *See* 38 C.F.R. § 3.317(a)(2)(ii).

The Court holds that § 3.317(a)(2)(ii) provides a definition of a MUCMI and not an alternative means to § 3.317(a)(2)(i) for establishing what is a qualifying chronic disability. The appellant's argument that GERD may be considered as a MUCMI under § 3.317(a)(2)(ii), notwithstanding its exclusion under § 3.317(a)(2)(i), is inconsistent with the very text and structure of the regulation. For the appellant's argument to be correct, the definition in subparagraph (a)(2)(ii) should instead be included in § 3.317(a)(2)(i) as a new subsection "(C)," suggesting it as an alternative to an undiagnosed illness or MUCMI under parts (A) and (B). After all, this is functionally what the appellant argues. She basically says: I don't fall under (A) and I don't fall under (B), yet my condition still qualifies even though there is not a (C). For the appellant's argument to succeed, the Court would need to rewrite the regulation. That is not what courts do. *See Nat'l Ass'n of Mfr's v. Dep't of Def.*, 138 S.Ct. 617, 629 (2018); *Mudge v. United States*, 308 F.3d 1220, 1231-32 (Fed. Cir. 2002).

Additionally, the Court notes that § 3.317(a)(2)(i) begins with the phrase "[f]or purposes of this section," indicating that what follows applies to all of the regulation. Therefore, the exclusion of GERD that follows that phrase should apply to all of paragraph (a)(2). If the Court were to adopt the appellant's approach, it would mean that GERD was specifically *excluded* from all of paragraph (a)(2) yet could somehow be read *back into* the regulation under § 3.317(a)(2)(ii). This is an absurd result, something courts should avoid in statutory and regulatory interpretation.[8] *See, e.g.*, *McNeill v. United States*, 563 U.S. 816, 822 (2011) (adopting an interpretation that "avoids the absurd results that would follow" from an alternate interpretation); *United States v. Wilson*, 503 U.S. 329, 334 (1992) ("[A]bsurd results are to be avoided."); *Timex V.I., Inc. v. United*

[8] The appellant argues that there would be an absurd result if the Secretary's reading of the regulation were adopted. *See* Appellant's Reply Br. at 4. The appellant is incorrect, and the reason for her error speaks to her misreading of the regulation. The appellant posits a person who has fibromyalgia. She argues that if the Secretary's interpretation (the one the Court essentially adopts today) were correct, he or she "would have to prove [that fibromyalgia was a MUCMI] twice before service connection was warranted under the regulation." *Id.* The reason, according to the appellant, is that the person would need to show the condition fit within subparagraph (a)(2)(i) and then again do so under (a)(2)(ii). *Id.* But that simply is not the case. Fibromyalgia is one of the conditions that are MUCMIs per se. 38 C.F.R. § 3.317(a)(2)(B)(i)(2). Thus, the person would have no need to proceed to subparagraph (ii) because subparagraph (i) answers the question. There is nothing absurd about that result. Indeed, the appellant's situation is similar (although in a converse way) to the situation she posits about the person with fibromyalgia. The appellant also does not get beyond subparagraph (i)—not because GERD is included in (i), but because it is excluded. Just as the person with fibromyalgia never gets to subparagraph (a)(2)(ii), the person with GERD does not either.

States, 157 F.3d 879, 886 (Fed. Cir. 1998) (applying "the canon that a statutory construction that causes absurd results is to be avoided if at all possible").

In sum, the text and structure of § 3.317(a)(2) make clear that GERD cannot be a "qualifying chronic disability." Subparagraph (a)(2)(i) provides only two bases on which a disability can qualify for presumptive service connection. GERD does not fit under either. It is clearly not an "undiagnosed illness." It can't be a MUCMI (even without a definition) because it is specifically excluded. The fact that there is a definition of MUCMI in subparagraph (a)(2)(ii) simply is not relevant here. That definition cannot be used to write out the exclusion in subparagraph (a)(2)(i). The text and structure of the regulation are clear and that ends the matter. *See Goodman*, 870 F.3d at 1386 ("If the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning."); *Tropf*, 20 Vet.App. at 320 (same).

2. Legislative and Regulatory History[9]

As we have explained and as our dissenting colleague emphasizes, there is no need to consider anything other than the text and structure of § 3.317(a)(2) to resolve this appeal as it relates to presumptive service connection because we hold that the language of the regulation is unambiguous. However, although it is true that legislative and regulatory history cannot "trump[] clear text," *Henry E. & Nancy Horton Bartels Trust ex rel. Cornell Univ. v. United States*, 617 F.3d 1357, 1361 (Fed. Cir. 2010), a court may appropriately consider such history to assess "whether there is [a] 'clearly expressed legislative intention' contrary to that language, which would require [a court] to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12 (1987) (citing *United States v. James*, 478 U.S. 597, 606 (1986)); *see also Glaxo Operations U.K. Ltd. v. Quigg*, 894 F.2d 392, 395 (Fed. Cir. 1990) ("[E]ven when the plain meaning of the statutory language in question would resolve the issue before the Court, the legislative history should usually be examined at least 'to determine whether there is a *clearly expressed* legislative intention contrary to the statutory language.'" (quoting *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629 (Fed. Cir. 1989) (emphasis added in *Glaxo*)). Thus, we proceed with a brief discussion of the legislative and regulatory history.

[9] Judge Meredith does not join in this part of the Court's opinion.

Here, when one goes beyond the regulation itself, extrinsic evidence supports our conclusion. The legislative and regulatory history concerning the Persian Gulf War presumption is sparse as it concerns the matter at hand. However, what there is aligns with our interpretation of the regulation.

First, the background to the enactment of 38 U.S.C. § 1117, the authorizing statute for 38 C.F.R. § 3.317, makes it clear that Congress intended to delegate significant authority to the Secretary to determine how to implement the Persian Gulf presumption and specifically to decide which diseases qualified for that presumption as MUCMIs. For example, the legislative history surrounding the Veterans Benefits Improvement Act of 1994 indicates that Congress granted authority to the Secretary to determine the disabilities for which compensation could be paid. 140 Cong. Rec. E2299-02 (Oct. 7, 1994). Congress further emphasized its intent to leave the decision about what illnesses would warrant a presumption of service connection to the Secretary in the Veterans Education and Benefits Expansion Act of 2001. 147 Cong. Rec. S13227-01 (Dec. 13, 2001). Congress's delegation of authority to the Secretary in this area would allow the Secretary to exclude GERD as a structural gastrointestinal disease from consideration as a MUCMI. In essence, the Secretary is doing precisely what Congress envisioned.

The regulatory history of § 3.317 also supports the Court's reading of the regulation. In an October 7, 2010, amendment, § 3.317 was revised to make it clear that the listed conditions were examples and not an exclusive list. 75 Fed. Reg. at 61,995. That amendment also emphasized that § 3.317(a)(2)(ii) provided a definition of a MUCMI, not a separate method for obtaining the presumption. More significantly, a July 2011 amendment dealt with gastrointestinal disorders directly. 76 Fed. Reg. 41,696 (July 15, 2011). It cites an April 2010 National Academy of Sciences (NAS) report that found certain gastrointestinal disorders, like GERD, "are considered to be 'organic' or structural diseases characterized by abnormalities seen on x-ray, endoscopy, or through laboratory tests." *Id.* Thus, the report concluded, there was "inadequate/insufficient evidence to determine whether an association exists" between service in Southwest Asia during the Gulf War and the development of such structural gastrointestinal diseases. *Id.* Of course, standing alone, the citation to this report would not mean that GERD could never be a MUCMI on a case-by-case basis. *See cf. Goodman*, 870 F.3d at 1386-87 (recognizing that medical professionals may determine that a condition qualifies as a MUCMI under subparagraph (a)(2)(ii)). The key is that the Secretary did more in response to the report: he categorically excluded structural

gastrointestinal disorders including GERD, as was within his authority to do.[10] Given the clarity of the Secretary's exclusion based on the regulatory history concerning this section, GERD cannot qualify as a MUCMI.

3. One Final Matter Concerning § 3.317[11]

Finally, the Court notes that the appellant suggested at oral argument that VA did not have the authority to categorically exclude any condition, including GERD, as a MUCMI in § 3.317. *See* O.A. at 49:30-50:05. Specifically, the appellant argued that in 38 U.S.C. § 1117 Congress gave the Secretary the power to *include* disabilities that automatically are entitled to the presumption but did not give him the power to *exclude* disabilities.

First, this argument appears nowhere in the appellant's briefing in this matter. The appellant's counsel raised the argument for the first time at oral argument. This is not appropriate. Raising arguments for the first time at oral argument does not assist the Court and is unfair to opposing counsel. This Court has "repeatedly discouraged parties from raising arguments that were not presented in an initial brief to the Court." *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008); *see McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1263 (11th Cir. 2004) ("A party is not allowed to raise at oral argument a new issue for review."); *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001) ("It is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief."); *Tarpley v. Greene*, 684 F.2d 1, 7 n.17 (D.C. Cir. 1982) ("Clearly, oral argument on appeal is not the proper time to advance new arguments or legal theories."). We could simply decline to address this argument entirely on this basis alone. However, we will exercise our discretion to consider it on the merits.[12] Despite our dissenting colleague's disagreement with this exercise of discretion, we proceed to address the argument because, if Congress had not allowed the Secretary to exclude a disability such as GERD, the result

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[10] The appellant does not argue that the Secretary's decision to categorically exclude structural gastrointestinal disorders such as GERD in subparagraph (a)(2)(i)(B)(3) was not supported by sufficient evidence. As such, the Court need not, and does not, reach the issue of whether the Secretary's reliance on the NAS study's conclusion of "inadequate/insufficient evidence" appropriately supports a complete exclusion of structural gastrointestinal diseases as MUCMIs in the regulation. We leave that issue for another day in an appropriate case.

[11] Judge Meredith does not join in this part of the Court's opinion.

[12] Although the Court chose not to address the Secretary's issue exhaustion argument raised at oral argument but uses its discretion to address the appellant's argument regarding the Secretary's power to exclude conditions, the Court's exercise of discretion should not be viewed as an endorsement of the appellant's decision to raise new arguments for the first time at oral argument. On the contrary, "[a]dvancing different arguments at successive stages of the appellate process . . . hinders the decision-making process and raises the undesirable specter of piecemeal litigation." *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992).

in this case would have been different. In other words, although the appellant should certainly have been more direct in making this specific argument, the exclusion/inclusion issue is bound up as a practical matter with the issue certainly at play.

Section 1117(a)(2)(C) provides that a "qualifying chronic disability" results from, in relevant part, "[a]ny diagnosed illness that the Secretary determines in regulations prescribed under subsection (d) warrants a presumption of service connection." Subsection 1117(d)(1) notes that the Secretary "shall prescribe regulations to carry out this section" including in subsection 1117(d)(2)(B), "a description of the illnesses for which compensation under this section may be paid."

The Court rejects the appellant's argument that Congress did not give the Secretary the power to exclude disabilities from the presumption. The language of the statute does not address the Secretary's authority in terms of including or excluding disabilities, *see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (statutory interpretation begins by asking "whether Congress has directly spoken to the precise question at issue"). However, the statute is best read to allow VA to exclude disabilities as well as to include them. *Id.* at 843 (when the Court reviews a regulation implementing a statute it must determine whether it is "based on a permissible construction of the statute"). As discussed above, Congress intended to give the Secretary broad authority to determine which disabilities were to be compensated. We read this authority to include the power to determine which disabilities are not to be compensated as well. We need not, and do not, hold that every grant of authority to include something also subsumes the power of exclusion. Rather, we hold that this particular statutory construct provides that authority.[13]

Most tellingly, 38 C.F.R. § 3.317(a)(2)(ii) states that "[c]hronic multisymptom illnesses of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, will not be considered medically unexplained." Congress explicitly highlighted these two disabilities in legislative history as excluded from qualification as MUCMIs. *See* 68 Fed. Reg. 34,540 (June 20, 2003) (quoting Joint Explanatory Statement for H.R. 1291, the Veterans Education and

[13] Our dissenting colleague notes that the appellant also raises an argument about the interplay between sections 1117 and 1118, which requires that VA obtain scientific evidence to establish associations between disorders and service in the Gulf War. As discussed above, *supra* at FN 10, the appellant makes no argument about the scientific evidence the Secretary used to exclude GERD, and it is beyond the scope of our decision here. We leave for another day the scope of the Secretary's obligation to obtain scientific evidence to support his regulatory exclusions under either Title 38 or the Administrative Procedure Act.

Benefits Expansion Act of 2001, Dec. 13, 2001, 147 CR 13,235 at 13, 238). However, Congress did not include this exclusion in section 1117 and the regulation's exclusion of these two disabilities was an exercise of authority by the Secretary, which the appellant accepts. There is no principled way to conclude that the Secretary has the power to exclude these two disabilities but not others. Nor does it make sense that the Secretary may exclude a condition if he does so in subparagraph (a)(2)(ii) but he cannot do so in subparagraph (a)(2)(i).[14] That would be exalting form over substance. We also note that the U.S. Court of Appeals for the Federal Circuit has, at a minimum, implicitly reached the same conclusion. *See Goodman*, 870 F.3d at 1387 ("The current version of § 3.317 specifies what does (and provides examples of what does not) constitute a MUCMI.").

4. Conclusion Concerning Presumptive Service Connection

The Court holds that GERD is excluded from consideration as a MUCMI as a matter of law, as provided in § 3.317(a)(2)(i)(B)(3). The Court rejects the appellant's contention that the Board erred in not also considering whether GERD was a MUCMI under § 3.317(a)(2)(ii), as it was not required to do so. That section defines MUCMI to allow consideration of disabilities not explicitly included or excluded in § 3.317(a)(2)(i). Thus, the Court holds that the Board did not err in its discussion of the Persian Gulf War presumption and we will affirm that portion of the Board's decision.

B. Direct and Secondary Service Connection

We will now turn to the appellant's arguments centered on direct and secondary service connection. Before doing so, however, we first must address the threshold matter of the Secretary's argument concerning the law of the case doctrine.

The Secretary argues that the law of the case doctrine limits the appellant's appeal to only the issue of presumptive service connection pursuant to § 3.317 for GERD based on a November 2015 JMR. Therefore, he asserts that the Court may not consider the appellant's arguments concerning direct and secondary service connection. The Court rejects this argument.

To begin, it is not clear whether the traditional law of the case doctrine applies to a JMR and we need not reach that question here. The Court has held that a JMR "effectively moots the case or controversy" before the Court. *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per

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[14] The Secretary also interprets the statute as granting him authority to exclude disabilities. *See* 75 Fed. Reg. at 61,995.

curiam). More specifically, the Court also has held that an order granting a joint motion for remand premised on the agreement of the parties, and not incorporated by reference into the order, "does not evaluate and adjudicate the arguments or positions of the parties prior to disposition on the merits, but merely dismisses the appeal." *Breeden v. Principi*, 17 Vet.App. 475, 479 (2004) (per curiam order). One could view the Clerk's order here as "administrative rather than adjudicatory." *Id.*; *see* R. at 34. Because the law of the case doctrine applies only to judicial decisions, not administrative determinations, *Pepper v. United States*, 562 U.S. 476, 506 (2011) (holding that the law of the case doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'" (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983))), it may be that the doctrine does not apply at all in this case. The Court need not resolve this question today, however, because even if the doctrine applies, the Court finds that the terms of the JMR did not limit the issues before the Board on remand and, therefore, the Court is not precluded from addressing direct and secondary service connection.

In *Carter v. Shinseki*, the Court held that "the terms of [a JMR] can be considered a factor when determining the scope of the Board's duty to search the record for other issues that are reasonably raised by it." 26 Vet.App. 534, 536 (2014), *vacated on other grounds*, 794 F.3d 1342 (Fed. Cir. 2015). The Court noted that it was up to the parties to "'enumerate[] clear and specific instructions'" in drafting a JMR. *Id.* at 541 (quoting *Forcier v. Nicholson*, 19 Vet.App. 414, 426 (2006)). In *Carter*, the Court relied on the fact that the JMR included a citation to *Fletcher v. Derwinski*, 1 Vet.App. 394 (1991), and provided that "'the Board should fully assist [Mr. Carter] with his claim by *reexamining the evidence of record* and seeking any other evidence that is necessary to support its decision.'" *Id.* at 543 (quoting and adding emphasis to the JMR). Based on these facts, the Court concluded that the parties had not limited the Board's duties. *Id.*

The same is true here. First, the language of the JMR notes that "the parties respectfully move the Court to vacate *the Board decision*." R. at 39 (emphasis added). The parties did not limit the vacatur of the Board's decision in any respect. As such, the Court's order could not realistically be read to restrict the scope of the remand.

Furthermore, the parties did not specifically limit the Board's duties on remand in the November 2015 JMR. In fact, the JMR contained the same citation to *Fletcher* that was found in the JMR at issue in *Carter*. R. at 38. Thus, the Court holds that the language of the November 2015 JMR did not limit the issues before the Board on remand and the appellant may raise any arguments

related to her GERD, including direct and secondary service connection, in this appeal. Having rejected the Secretary's argument, the Court will next consider the appellant's arguments as to direct and secondary service connection, which focus on the adequacy of the April 2014 VA examination.

C. Adequacy of April 2014 Examination Regarding Direct Service Connection

The appellant argues that the Board erred in finding the April 2014 VA examination adequate with respect to direct service connection for her GERD. She asserts that the VA examiner improperly relied on a lack of treatment or symptoms in service, a lack of diagnosis until 1998, and a lack of positive nexus opinions from prior treating physicians. Appellant's Br. at 9-14. The Court holds that the Board did not clearly err in finding the examination adequate.

The Secretary's duty to assist 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." 38 U.S.C. § 5103A(d). When the Secretary elects to provide a medical examination in a service-connection claim, the examination must be adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311-12 (2007); *Stegall v. West*, 11 Vet.App. 268, 270-71 (1998) (remanding where a VA medical examination was "inadequate for evaluation purposes"); *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) ("The Board must be able to conclude that a medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion."). A medical examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). Whether a medical examination is adequate is a question of fact, which the Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam). "A factual 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.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Court is not persuaded that the Board erred in finding that the April 2014 examination was adequate with respect to direct service connection. As the Board noted, R. at 10, the examiner

specifically addressed the appellant's service treatment records and her reporting of other symptoms and conditions at that time without mentioning GERD. R. at 174. As the Board further noted, R. at 10, the examiner also considered the lengthy period of time from service to when she first reported GERD symptoms. R. at 174-75; *see Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (Board may consider "evidence of a prolonged period without medical complaint . . . , along with other factors"). It is clear from the Board's summary of the examination report that the examiner discussed relevant evidence of record and provided a sufficient rationale to support her conclusions. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (per curiam) (stating that medical opinions must be read as a whole); *see also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[T]here is no reasons or bases requirement imposed on examiners.").

The appellant's other arguments regarding a lack of findings by prior doctors amount to nothing more than a mere disagreement with how the Board weighed the evidence. *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (it is the "duty [of] the Board to analyze the credibility and probative value of evidence"); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (it is the province of the Board to weigh and assess the evidence of record). Therefore, the Court holds that the Board did not clearly err in relying on the April 2014 examination in denying direct service connection for GERD. *See D'Aries*, 22 Vet.App. at 104.

D. Adequacy of April 2014 Examination Regarding Secondary Service Connection

Although the Court holds that the Board did not err in relying on the April 2014 examiner's opinion about direct service connection, the same cannot be said for the Board's explanation for relying on the opinion as to secondary service connection.

A claimant is entitled to secondary service connection if a disability is proximately due to or the result of a service-connected disease or injury or aggravated by a service-connected disease or injury. *See Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc); 38 C.F.R. § 3.310 (2018). Additional disability resulting from the aggravation of a non-service-connected condition by a service-connected condition is also compensable. *Id.* In *El-Amin v. Shinseki*, the Court emphasized that a specific inquiry directly addressing aggravation in a case raising that theory, separate from whether a service-connected disability caused the disability at issue, is necessary when an examiner addresses secondary service connection. 26 Vet.App. 136, 140-41 (2013). As with all of its material findings of fact and conclusions of law, "[t]he Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and

law presented in the record." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1). This "statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday*, 7 Vet.App. at 527.

In the present case, the Board found the examiner's opinion adequate. R. at 12. As the Board decision reflects, R. at 10, the examiner noted support in the medical literature for GERD causing asthma and sinusitis but not the other way around. R. at 175. As the Board decision further reflects, R. at 10-11, the examiner relied on this to conclude that the appellant had sinusitis first, which did not improve with surgical treatment for GERD, and, thus, there was no causation or aggravation. *Id.*

The Court holds that the Board failed to provide an adequate statement of reasons or bases for its reliance on the April 2014 examiner's opinion as to aggravation. The examiner's opinion seems to rely on a reversed chronology of the appellant's symptoms, and the Board failed to address the adequacy of this rationale.[15] Furthermore, it is unclear how and why the same rationale was applied to both the causation and aggravation elements of secondary service connection. As *El-Amin* made clear, examiners must address both in cases raising both theories. 26 Vet.App. at 140-41. However, the Board did not address the significance of the April 2014 examiner appearing to provide no such distinction between causation and aggravation.

In this regard, the Court notes that the very structure of her opinion appears to indicate that the two may have been considered together. The examiner was presented with three questions arranged in an alphabetical listing as to whether the appellant's GERD "(A) began during service, (B) is proximately due to or the result of recurrent sinusitis, or (C) is aggravated (worsened) by recurrent sinusitis." R. at 174. In providing responses, the examiner used the same lettering to address each question. *Id.* Significantly, however, in the section of the report labeled "Rationale," the examiner provided her explanation and references to the medical literature regarding sinusitis and GERD in a paragraph labeled "(B) and (C)." R. at 175. This appears to mix causation and aggravation, and without a more detailed explanation, it is unclear how the Board interpreted this

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[15] At oral argument, the Secretary's counsel defended the April 2014 VA examiner's opinion by emphasizing the medical literature used to support it. O.A. at 47:31-48:42. The difficulty is that this was not offered by the Board. The Secretary cannot relieve the Board of its obligation to provide an adequate statement of reasons or bases for its decision. *See Martin v. Occupational Safety Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court.").

opinion and whether the examiner clearly provided a rationale that dealt with causation and aggravation as independent concepts.

The Board's consideration of the examiner's report concerning aggravation raises the question of whether aggravation, as opposed to causation, is being treated in an almost slapdash manner by both examiners and the Board. We reiterate that aggravation of a condition by a service-connected disability is independent of direct causation. The Board must ensure that medical examinations are adequate on that question and explain the bases for its conclusion concerning aggravation. It did not do so here.

Accordingly, remand is warranted for the Board to explain its reliance on the April 2014 medical opinion addressing secondary service connection for GERD or obtain a new medical opinion or clarification. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is warranted "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in the briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted, *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, per 38 U.S.C. §§ 5109B and 7112.

IV. CONCLUSION

After consideration of the parties' briefs, oral arguments, the record on appeal, and the governing law, the Court AFFIRMS the March 28, 2016, Board decision as to presumptive service connection under 38 C.F.R. § 3.317 and its decision concerning direct service connection for GERD. It SETS ASIDE the March 28, 2016, Board decision concerning secondary service connection for GERD and REMANDS the matter for further proceedings consistent with this opinion.

MEREDITH, *Judge*, concurring in part and dissenting in part: I join in the majority opinion except for parts III.A.2. and III.A.3.

As for part III.A.2., the majority opinion acknowledges that, after concluding that gastroesophageal reflux disease (GERD) is categorically excluded from being considered a

medically unexplained chronic multisymptom illness (MUCMI) based on the unambiguous text and structure of 38 C.F.R. § 3.317(a)(2), that "ends the matter." *Ante* at 10. The majority opinion then proceeds to explore the legislative and regulatory history related to § 3.317. This, of course, is dicta, as the majority opinion appears to acknowledge. *See id.* ("[T]here is no need to consider anything other than the text and structure of § 3.317(a)(2) to resolve this appeal as it relates to presumptive service connection."); *see also Lasovick v. Brown*, 6 Vet.App. 141, 153 (1994) (Ivers, J., concurring in part and dissenting in part) (cautioning that, "although theoretically and technically not binding, practically, [dicta] give[s] the appearance of carrying the cloak of judicial acceptance").

In addition, the majority's examination of the legislative and regulatory history does not in fact shed light on the question the Court was called on to answer. Indeed, the majority does not (and perhaps cannot) correlate how VA having statutory *authority* to determine which diseases may qualify as MUCMIs or how regulatory history discussing a study showing a *lack of evidence* as to whether structural gastrointestinal diseases, such as GERD, could be related to Gulf War service, inform the majority's decision as to whether VA, by the words it promulgated in § 3.317(a)(2), intended to categorically exclude GERD as a MUCMI.

As for part III.A.3., the majority addresses the question of whether VA is statutorily authorized to *preclude* disabilities from qualifying as a MUCMI, as opposed to being authorized only to identify conditions that *do* qualify. This issue was not raised in any written pleadings submitted to the Court. Rather, as the majority acknowledges, it was raised for the first time by the appellant's counsel at oral argument, a practice this and other courts have traditionally and properly discouraged. *See ante* at 12. Even if the majority wishes to depart from tradition to address this late-raised argument because of its potential effect on the outcome here, I do not agree with resolving a matter of this significance—to the veterans community and VA—without any briefing from either party. The majority compounds this by deciding the statutory interpretation question without addressing what, in my view, was the entirety of the argument presented—that 38 U.S.C. §§ 1117 and 1118, read together, do not authorize VA to categorically *exclude* disorders from qualifying for Persian Gulf War presumptive service connection. *Compare* Oral Argument at 6:25-7:33, 8:19-11:02, *Atencio v. O'Rourke*, U.S. Vet. App. No. 16-1561 (oral argument held Apr. 26, 2018), http://www.uscourts.cavc.gov/oral_arguments_audio.php (appellant's counsel appearing to argue that the interplay between sections 1117 and 1118 leads to the conclusion that

the Secretary is precluded from categorically excluding a disability by name from Gulf War presumptive service connection), *with ante* at 12-14 (concluding, without addressing the interplay with section 1118, that section 1117 grants VA "broad authority," including the power to exclude diseases from the Persian Gulf War service connection presumption).

For these reasons, I respectfully dissent in the majority's analyses in parts III.A.2. and III.A.3.