IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-0226

ROBERT E. CREWS,

Appellant,

v.

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S SUPPLEMENTAL MEMORANDUM OF LAW

Glenn R. Bergmann, Esq.
Bryan Andersen, Esq.
Bergmann & Moore, LLC
25 W. Middle Lane
Rockville, MD 20850

Counsel for Appellant

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APPELLANT'S SUPPLEMENTAL MEMORANDUM OF LAW

In its May 16, 2022, Order, the Court ordered the parties to file supplemental memoranda of law addressing the effective date provisions of the Blue Water Navy Vietnam Veterans Act of 2019 (Blue Water Act). *See Crews v. McDonough*, No. 21-0226 (Vet. App. May 16, 2022) (Order). The Court's questions and Appellant's answers are as follows:

1. **Based on the text, structure, and purpose of the statute, as well as any other applicable canons of statutory interpretation, how should the Court interpret the following portion of the Blue Water Act: "The veteran . . . submitted a claim for disability compensation . . . and the claim was denied by reason of the claim not establishing that the disease was incurred or aggravated by the service of the veteran."**

The Court should interpret the relevant effective date portion of the Blue Water Act, 38 U.S.C. § 1116A(c)(2)(B)(i), as requiring the prior denial to be based, in part but not necessarily exclusively on, the second element of service-connection.

In conducting its de novo review of an interpretation of a statute, "the first question is always 'whether Congress has directly spoken to the precise question at issue.'" *Gomez v. Principi*, 17 Vet. App. 369, 372 (2003) (quoting *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). If the statute is clear on its face, the analysis ends, and the court will not afford any deference to VA's interpretation of the statute if it is not in accordance with the plain language thereof. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Trafter v. Shinseki*, 26 Vet. App. 267, 272 (2013) ("The matter of statutory construction is at an end if the

intent of Congress is unambiguously expressed.").

In determining the meaning of a statutory provision, the Court should "'look first to its language, giving the words used their ordinary meaning.'" *Artis v. District of Columbia*, 138 S. Ct. 594, 603 (2018) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Statutory interpretation begins with the language of the statute, the plain meaning of which is derived from its text and its structure. *Myore v. Nicholson*, 489 F.3d 1207, 1211 (Fed. Cir. 2007).

Pursuant to 38 U.S.C. § 1116A(c)(2), an individual may be entitled to the favorable effective date provisions of § 1116A(c)(2)(A) if that individual is a veteran, or survivor of a veteran, that submitted "a claim for disability compensation on or after September 25, 1985, and before January 1, 2020, for a disease covered by this section, and the claim was denied by reason of the claim not establishing that *the disease was incurred or aggravated by the service of the veteran*." § 1116A(c)(2)(B)(i) (emphasis added). Examining the plain language of this statute, the phrase "disease", "incurred or aggravated", and "by the service" must be read *together* as a complete sentence. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)). Moreover, each word must take on their ordinary dictionary meaning. *See Nielson v. Shinseki*, 23 Vet. App. 56, 59 (2009) (noting that it is "commonplace to consult dictionaries to ascertain a term's ordinary meaning"). The "disease" is the illness at issue which is narrowed to only the

illnesses covered by 38 U.S.C. § 1116.[1] That disease must be "incurred" or otherwise experienced by the individual, which speaks to the presence of experiencing a current illness.[2] Thus, the first two phrases speak to the presence of a "current disability," or the first element of service-connection. However, the experience of a current disability must come about "by the service", which establishes an element of causation between the illness that is being experienced and, by implication, an in-service disease, injury, or event that created the illness.[3] Thus, the final phrase speaks to the second and third elements of service-connection. Accordingly, the text dictates that *all* elements of service-connection are encompassed by the phrase "the disease was incurred or aggravated by the service of the veteran."

Particularly relevant, that general phrase is used elsewhere in title 38, and its ordinary meaning has previously been interpreted by the Federal Circuit. Where Congress includes the same phrase in separate, but related statutes, the Court presumes that the phrase is to be given a consistent meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *see Voracek v. Nicholson*, 421 F.3d 1299, 1304 (Fed. Cir. 2005) ("We note that similar terms used in different parts of the same statute or regulation presumptively have the same meaning."); *Donnellan v. Shinseki*, 24 Vet. App. 167, 173 (2010) ("following the well-

[1] A "disease" is an "illness of people, animals, plants, etc., cause by infection or a failure of health rather than by accident." *See* Cambridge Online Dictionary, *available at* https://dictionary.cambridge.org/us/dictionary/english (June 15, 2022).
[2] To "incur" is to "experience something, usually something unpleasant, as a result of actions you have taken." *See* Cambridge Online Dictionary, *supra.*
[3] "By" is a preposition that is "used to show the person or thing that does something." *See* Cambridge Online Dictionary, *supra.*

established rule of statutory construction that terms in a statute have the same meaning to identical language used in related parts of the same statutory scheme").

In *Shedden v. Principi*, the Federal Circuit determined that the phrase "service-connected" means the same thing as "incurred in the line of duty." 381 F.3d 1163, 1166 (Fed. Cir. 2004) (citing 38 U.S.C. § 101(16)). The Federal Circuit was interpreting Sections 1110 and 1131 of Title 38 of the United States Code that provides compensation to veterans for personal injury or disease and for aggravation of a preexisting injury or disease, if they are contracted or "incurred" "in line of duty" and are service-connected. *Id.* (citing 38 U.S.C. §§ 1110, 1131). The Federal Circuit went on to reaffirm that this Court correctly noted that in order to establish "service connection" for a present disability the veteran must show: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Id.* at 1166-67 (citing *Hansen v. Principi*, 16 Vet. App. 110, 111 (2002); *Caluza v. Brown*, 7 Vet. App. 498, 505 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (table)). Therefore, once again, *all* elements of service-connection are encompassed by the phrases injuries or diseases incurred in line of duty or, similarly, incurred by the service. This phrase, which speaks to the foundation of service-connection and the establishment of benefits, is used commonly throughout the statute, and has the same meaning each time it is used. *See* 38 U.S.C. §§ 1110 (providing compensation "[f]or disability resulting from . . . disease contracted in line of duty[] or for aggravation of a preexisting . . . disease"), 1116 (providing that certain listed conditions "shall be considered to have been incurred in or aggravated by . . . service"), 1116A (providing that

certain listed diseases "shall be considered to have been incurred in or aggravated by . . . service").

This broad reading should be accepted even though the three elements of service-connection are not *explicitly* enumerated in the subsection. For example, the Federal Circuit has interpreted Section 1110 to contain a current disability requirement, even though the statute does not clearly state that one is required. *See Gilpin v. West*, 155 F.3d 1353, 1355 (Fed. Cir. 1998) ("While it is clear that allegations of a future disability are not sufficient for an award of compensation, the statute does not clearly and on its face say whether past disabilities support an award of compensation."); *see also Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997) (holding the requirement of a current disability at the time of application was not an impermissible interpretation of section 1311). In this case, the phrases "the disease" and "incurred" speaks to the presence of a current disability even though there is no explicit statement one is required. After all, "[a] current disability cannot exist without some evidence of its existence." *Gilpin*, 155 F.3d at 1356.

The use of the word "claim" is also relevant in understanding the context of § 1116A(c). VA defines "claim" as "a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary." 38 C.F.R. § 3.1(p). Caselaw has provided the essential requirements of a claim. "[A]ny claim, whether formal or informal" must include: "(1) an intent to apply for benefits, (2) an indication of the benefits sought, and (3) a communication in writing." *Brokowski v. Shinseki*, 23 Vet. App. 79, 84 (2009).

These known definitions of a claim apply to the use of the same word in § 1116A(c)(2)(B)(i). The language in the subsection that requires that the veteran must have "*submitted a claim* for disability compensation . . . *for a disease covered* by this section" and that the claim must have been denied "by reason of *the claim not establishing that the disease* was incurred or aggravated by the service of the veteran" suggests only that the prior claim must have been premised on a covered condition. As noted above, a claim is merely the expressed intent to apply for benefits and a request for a determination of entitlement, which the subsection further caveats that benefit and subsequent determination to also now be the same disease as previously applied for and covered by the statute. The claimant always has the burden to support all three elements of service-connection as part of any single claim. *See* 38 U.S.C. § 5107; *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990). The language says nothing about a requirement that the first element of service-connection in particular *must have been* previously satisfied. Rather, it speaks to the fact that the veteran was not previously able to satisfy his burden and substantiate his claimed request for service-connection *in its totality*. To read the subsection in a way that the prior claim must have established a current disability (a disease) ignores the remaining part of the sentence. The reason for the prior denial is not narrowly focused on the presence of "the disease" but rather the failure to establish that "the disease was incurred or aggravated by the service of the veteran." *See Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1564 (Fed. Cir. 1995) (holding that all parts of a statute must be construed together without according undue importance to a single or isolated portion); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) ("We must not be guided

by a single sentence or member of a sentence, but look to the provisions of the whole law.").

While § 1116A(c)(2)(B)(i) speaks to all the elements of service-connection, taking into account the overall statutory scheme, the provision does require that the prior claim must have been previously denied, at least in part, due to the failure to satisfy the second element of service-connection. This Court "'follow[s] the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context.'" *Fritz v. Nicholson*, 20 Vet. App. 507, 509 (2006) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). "[T]he statutory scheme as a whole, the specific context in which [a] word or provision at issue is used, and the broader context of the statute as a whole" all inform any statutory provision's plain meaning. *Hornick v. Shinseki*, 24 Vet. App. 50, 52 (2010); *see also Holloway v. United States*, 526 U.S. 1, 6 (1999) (noting that interpreting a statute requires consideration not only of bare meaning of the critical word or phrase "but also its placement and purpose in the statutory scheme").

One purpose of the statutory scheme is to lessen the evidentiary burden on claimants vis-à-vis the use of presumptions. The statutory presumptions assist claimants in establishing in-service exposure to herbicides, without direct evidence of such, if they served on land in the Republic of Vietnam, *see* § 1116(f), or within 12 nautical miles off-shore, § 1116A(b). The purpose of the statutory scheme is also to assist claimants in establishing a medical nexus between select diseases and herbicide exposure, even without direct medical evidence of such. *See* §§ 1116(a)(1), 1116A(a). The effective date provision is deliberately placed within the same statute establishing an offshore presumption, which

indicates a close relationship in substance between the two. The Court cannot therefore consider § 1116A(c)(2)(B)(i) in isolation from the rest of the statute. *See Chevron*, 467 U.S. at 843-46; *Myore*, 489 F.3d at 1211. Considering the placement and purpose in the statutory scheme, § 1116A(c)(2)(B)(i) then serves to compensate veterans who did not receive the benefit of the evidentiary presumptions related to offshore herbicide exposure since they did not exist at the time of their earlier claims. Accordingly, one basis of the prior denial must have been the failure to satisfy the second element of service-connection either because (1) in-service exposure to herbicides had not been presumed or proven, (2) service in Vietnam had not been established, or (3) the veteran was found to have served only in the offshore waters of Vietnam. Had the claimant been able to establish the in-service herbicide exposure in his or her prior claim, then there would have been no need for him or her to use the presumptions thereby defeating the purpose provided by § 1116A(c)(2)(B)(i).

Notwithstanding the requirement that the prior claim must have been previously denied due to the failure to satisfy the second element of service-connection, there is no language in the statute that requires the previous denial to be based *solely* on the failure to satisfy the second element of service-connection. If Congress sought the second element of service-connection to be the *only* reason for the prior denial, the language of § 1116A(c)(2)(B)(i) would have referenced and restricted it, *just like it did* when it referenced another restriction in the same section - a disease "covered by" this section. Had Congress intended to restrict the statute in this manner, it presumably would have done so. *See Barrett v. United States*, 423 U.S. 212, 217 (1976) ("Congress knew the significance

and meaning of the language it employed. . . . Had Congress intended to confine [the statute], it would have so provided, just as it did in other sections."); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))). The Court must "resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).

Reading such a narrow restriction into the statute also ignores the structure of the surrounding effective date provisions and creates a redundancy. Congress has already accounted for the fact that a disease may not be established at the filing of the claim and has already provided to a solution to that scenario. As to the assignment of effective dates, the primary instruction at the outset remains that "the effective date of an award under this section shall be determined in accordance with section 5110 of this title." § 1116A(c)(1). As interpreted by VA, the effective date of an evaluation and award of pension, compensation, or dependency and indemnity compensation based on an initial claim or supplemental claim will be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400. The date entitlement arose is commonly accepted as the date the disability manifested itself, which could be later than the date of claim. *See McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007). Section 1116A(c)(2)(A) provides a new way to calculate the date of claim, if the criteria in section 1116A(c)(2)(B) are satisfied, but it does not eradicate the restriction in section 1116A(c)(1) where the date

could still conceivably be the date entitlement arose. Section 1116A(c)(2)(A) does not direct that an effective date must be assigned on the date of the prior claim; rather, the section simply instructs that the Secretary "treat[]" the date of claim option as the date of the earlier claim instead of the current claim when considering the proper effective date.

Thus, Congress has accounted for the situation where a prior denial was *also* based on a lack of a current disability by assigning the effective date of that claim to instead be the date entitlement arose. Accordingly, by inserting a requirement into section 1116A(c)(2)(B)(i) that the current disability requirement must have been satisfied in the prior denial renders null portions of the effective date rules in section 5110. As a general matter, a court should avoid adopting an interpretation of a statute that renders other statutory provisions a nullity. *See Roper v. Nicholson*, 20 Vet. App. 173, 178 (2006).

The statute's legislative history supports Appellant's interpretation. "Where ambiguity persists after application of the standard tools of statutory construction, legislative history may be used to resolve any such ambiguity." *Frederick v. Shinseki*, 684 F.3d 1263, 1269 (Fed. Cir. 2012). A court will consider "preenactment history to determine the circumstances under which the enactment was passed and the problem it was intended to remedy." *Camarena v. Brown*, 6 Vet. App. 565, 567 (1994). Considering the purposes behind a statutory scheme is a useful check on a court's interpretation of a specific statutory provision. *See Hughes v. United States*, 138 S. Ct. 1765, 1774 (2018). The House Veterans' Affairs Committee recognized that Blue Water Navy veterans have "generally been unable to successfully apply for benefits for conditions that may have been caused by service in Vietnam due to the lack of a presumption of exposure" and the statute "would provide

retroactive benefits for veterans who were denied benefits between September 1, 1985, and January 1, 2020, if the individual veteran or survivor beneficiary of a deceased veteran re-files a claim for benefits." H.R. Rep. 116-58, at 12. The Committed explained that the Blue Water Act's effective date provision "is consistent with special effective date rules given to Vietnam veterans who served on land or on inland waterways under *Nehmer v. United States Department of Veterans Affairs*, to the extent that decision contemplated retroactive awards for benefits." *Id.* The Committee expressed its intent to "ensure[] parity for BWN veterans and their survivors." *Id.*[4]

Accordingly, the Committee's intent was to provide retroactive compensation for *all* Blue Water Navy veterans who were affected by the lack of a presumption of exposure. That class of veterans would be entitled to an effective date on parity with the *Nehmer* class of veterans. 38 C.F.R. § 3.816(c)(1) explains that the effective date for *Nehmer* class members will be the later of the date VA received the claim on which the prior denial was based or the date the disability arose. Congress intended no restriction that the current disability requirement must have also been satisfied in the prior denial; rather, if the requirement was not satisfied, then the remedy is to determine the date the disability arose. Similar to Section 1116A(c)(2)(B), and in line with Congress' intent to establish parity between the class members, the requirements in 38 C.F.R. § 3.816(c)(1) only focus on broadly ensuring that the "prior decision denied compensation for the same covered

[4] VA never promulgated any regulations constituting an official agency interpretation subsequent to this Act and so there is no position to which to defer. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding deference is only warranted to agency interpretations promulgated pursuant to delegated authority).

herbicide disease" and not narrowly ensuring that the current disability element was also satisfied at the time of the prior denial.

If the language in section 1116A(c) is interpreted as requiring the prior denial based *solely* on the failure to satisfy the second element, then it would also lead to absurd results. If the claimant was not able to satisfy the second element, then he or she by default would also not be able to satisfy the third element of service-connection. As explained above, the drafters clearly intended to provide immediate retroactive service-connection relief to these Blue Water Navy veterans, but in this situation the claim would never be eligible for the effective date relief because the denial is not solely based on lack of in-service exposure.

The Secretary's interpretation of 1116A(c)(2)(B)(i) cannot be sustained because it would lead to arbitrary outcomes depending on the words chosen for the earlier denial rating in any given case. There was no regulation requiring VA to state every basis for denial in 2014. In this case, had the Regional Office in its prior denial chosen to state only that the denial was based on lack of exposure, which it could have, then Appellant would have easily been successful in his appeal. Instead, the Regional Office used vague boilerplate text covering multiple service-connection elements, thus obscuring the primary reason for the denial.[5] Congress could not have meant the effective dates in these cases to

[5] If anything, the rating decision indicates the primary reason for the denial was the lack of in-service exposure to herbicides. **R. at 2344 (2342-45).** In 2014, the Regional Office would have had to send Appellant for VA medical examination to determine whether he had ischemic heart disease, if the Regional Office had conceded his presumed herbicide exposure, which it did not do. In other words, the fact that no VA examination was performed meant that the Regional Office was also resting the denial on a lack on an in-service event, injury, or disease to implicitly find that no examination was required. Indeed, Appellant understood the lack of in-service exposure – not the lack of a current disability

turn on an arbitrary choice of words in previous denial notices. The outcome certainly cannot depend on whether the Regional Office explicitly stated there was no nexus in addition to no event. This is an absurd result, something courts should avoid in statutory interpretation. *See 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.").

2. In light of that statutory interpretation analysis, did the Board err in finding that "the exception to the general effective date rules provided for by the [Blue Water] Act do not apply" because the VA regional office's "July 2014 denial was not based on a prior more restrictive definition of service in the Republic of Vietnam"?

Yes, the Board erred in three aspects. First, the VA regional office's July 2014 denial was based, at least in part, on the failure to establish in-service herbicide exposure. The transmittal letter prefacing the decision states only that IHD was "not related to your military service," **R. 2335-36 (2334-39)**, not that it did not exist. The July 2014 decision itself makes no acknowledgement that herbicide exposure was conceded in any way. Rather, the decision stated, "The evidence *does not show an event*, disease or injury in service." **R. at 2344 (2342-45)** (emphasis added). Here, the requisite event or injury would be herbicide exposure, and thus the denial was presumably based, at least in primary part, on the lack of herbicide exposure in service. Second, the relevant inquiry is not necessarily whether the denial was based upon a restrictive "definition of service in the Republic of

– to be the basis of the prior denial, **R. at 523 (523-24)**, because he already conveyed his diagnosis and onset, **R. at 3241 (3241-46).**

Vietnam" but rather the lack of herbicide exposure generally. Third, and to the extent the Board strictly required that the current disability element must have also been previously satisfied, as argued above, nothing in the statutory plain language, text, scheme, or purpose establishes such a deliberate exclusionary rule.

3. Assuming that the Court finds that the Board applied a standard not required by the Blue Water Act, what is the appropriate remedy?

Remand is appropriate when the Board has misapplied the law. *Tucker v. West*, 11 Vet. App. 369, 374 (1998). The Court should conclude that the errors in this case were prejudicial. In *Shinseki v. Sanders*, the Supreme Court explained that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination" but that this is not "a particularly onerous requirement." 556 U.S. 396, 409-10 (2009); *see also Slaughter v. McDonough*, __ F.4th __, __, slip op. at 4, No. 21-1367 (Fed. Cir. Mar. 30, 2022). The Supreme Court explained that an appellant may point to an allegedly erroneous ruling and "[o]ften the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said." *Id.* If the record contains no VA findings to support affirmance, the Court will affirm only when "the entire record makes evident that the Board could not have reached any other decision." *Tadlock v. McDonough*, 5 F.4th 1327, 1337 (Fed. Cir. 2021). And when "additional findings of fact are necessary regarding matters open to debate," it is the Board, and not the Court, which must weigh those facts in the first instance. *Id.*

Here, the circumstances of the case reflect an open debate as to whether the July 2014 rating decision was based on the failure to establish in-service herbicide exposure.

The Board's failure to clearly explain whether the prior denial was based on the failure to meet elements of service connection other than a current disability compounds that error. The Board, not the Court, must make additional findings of fact in the first instance as to whether the second element was satisfied at the time of the previous denial, and the Court cannot be absolutely certain the Board would clearly find the element already satisfied based on a fair reading of the prior denial. To the extent a March 2020 VA memorandum finds Appellant had both blue and brown water service, this finding occurred after the July 2014 rating decision and thus cannot speak as to how to read that decision, but even if it does, such is a matter for the Board to reconcile. **R. at 964.** Appellant is remains eligible under the Blue Water Act because his new claim was still awarded based on his blue water service and the presumption due to Agent Orange exposure. **R. at 960 (959-62).**

To determine whether Appellant was prejudiced, the Court would need to address the Secretary's argument. This is so because the record, to include the July 2014 rating decision, makes evident that the lack of a current disability also constituted a basis for denial, albeit not the primary basis. If such a finding is alone fatal to the applicability of the effective date exception, then additional findings of fact are not necessary, and the matter is no longer open to reasonable debate.

Respectfully submitted,

June 15, 2022

/s/ Glenn R. Bergmann
GLENN R. BERGMANN

/s/ Bryan Andersen
BRYAN ANDERSEN
Bergmann & Moore, LLC
25 W. Middle Lane
Rockville, MD 20850
(301) 290-3114
Counsel for Appellant