IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JOHN A. COOPER, *Appellant,*	)	
v.	)	Vet. App. No. 23-5963
DENIS McDONOUGH, Secretary of Veterans Affairs, *Appellee.*	)	

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APPELLANT'S RESPONSE TO THE MOTION TO DISMISS

The Secretary moves to dismiss Mr. Cooper's appeal arguing this Court lacks subject matter jurisdiction. "Because the Court's jurisdiction is limited by statute to review of Board decisions, the Court should dismiss Appellant's appeal for lack of jurisdiction." *Motion to Dismiss*, page 1. In doing so the Secretary fails to consider how the Veterans Appeals Improvement and Modernization Act of 2017 ("VAIMA"), Pub. L. 115-55, has transformed the nature of Board of Veterans' Appeals ("Board") remand orders. Under the prior ("Legacy") appeals system, Board remand orders were interlocutory. Now, they constitute a Board appeal's terminal event. Congress now requires the Board, at the threshold of determining whether to remand, to decide whether the record already before it permits the Board to grant the entitlement at issue. Moreover, Congress and the Secretary (through VAIMA's implementing regulations) now treat a Board remand order as an appeal's terminal event. These changes fundamentally alter the nature of Board remand orders, which now (1) occur only conceptually after the Board has made a denial (denying entitlement to a full grant) and (2) terminate the appeal, causing a claimant who desires post-remand Board review to file a brand-new appeal. So, fundamentally altering the nature of Board remand orders has

rendered "the well-established rule that a remand does not constitute a Board decision on an issue over which the Court has jurisdiction" inapposite to Board remands under VAIMA.

Congress has not defined, in so many words, what constitutes a Board "decision" or "final decision." *See* 38 U.S.C. § 101 (defining terms "[f]or the purposes of this title"; not defining "decision" or "final decision"); Id. §§ 7101–7113 ("Board of Veterans' Appeals"; same); id. § 7252 (setting out this Court's jurisdiction; same). Even so, ordinary meanings of what a "decision" means, 38 U.S.C. § 7252(a)'s context in the overall statutory scheme, traditional canons of construction, and case law all make plain that a Board denial is a "final decision" as to the item being denied. A "decision" is a "judicial determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced … when considering or disposing of a case." *Black's Law Dictionary* 414 (7th ed. 1999). A "denial" is a "refusal or rejection; esp., a court's refusal to grant a request presented in a motion … ." *Id.* at 445. A "final decision" is a "last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs." *Id.* at 847 (defining "final judgment," "[a]lso termed … final decision").

This response will proceed in four parts. First, Mr. Cooper will very briefly outline the relevant factual procedural history and posture of this appeal. Next, Mr. Cooper will address the state of the law prior to the implementation of the VAIMA, and how, were Mr. Cooper's appeal within the Legacy appeals system, as opposed to an appeal filed under VAIMA, the Secretary would be correct in his Motion to Dismiss and this Court would not have subject matter jurisdiction of the present Board decision. Third, Mr. Cooper will contrast, in light of the changes to the statutory and regulatory scheme of the adjudication of veterans' benefits

brought about by the VAIMA, why the Secretary is incorrect in arguing this Court lacks subject matter jurisdiction under VAIMA of Mr. Cooper's appeal. Finally, Mr. Cooper will address how his case's facts illustrate why Congress intends this Court to have subject matter jurisdiction to review VAIMA Board decisions to remand. In doing so he will also address his waiver before the Board of any further assistance by the Board which consideration only followed *after* the Board's decision the evidence in the record was insufficient to issue a grant.

Relevant procedural and factual history of the present appeal

On November 16, 2022 Mr. Cooper filed a Notice of Disagreement ("NOD") with an April 4, 2022 rating decision which had denied a higher, increased, rating evaluation of his service-connected prostate cancer as well as denied reconsideration under 38 C.F.R. § 3.156(c) of his prior claims for service connection of his prostate cancer, type two diabetes, and Special Monthly Compensation ("SMC") pursuant to 38 U.S.C. § 1114(k). *See* Exhibit A-1. He argued to the Board at that time the evidence was sufficient to grant him the maximum benefit sought, a higher, compensable rating of his prostate cancer and an earlier effective of his prior claims for service connection by operation of 38 C.F.R. § 3.156(c)(3). *Id.* The Board denied Mr. Cooper's appeal on January 27, 2023. Mr. Cooper in turn appealed the denial to this Court which resulted in a Joint Motion for Remand between the parties. *See* Exhibit B-1. The Board issued the present decision on appeal on September 11, 2023 remanding Mr. Cooper's entitlement to an initial rating in excess of ten percent for his prostate cancer as well as entitlement to an earlier effective date of his type two diabetes, prostate cancer, and SMC. Mr. Cooper appealed the Board's September 11, 2023 decision to this Court on October 2, 2023.

This Court lacked subject matter jurisdiction of Board remands in the Legacy appeals system

The Secretary currently adjudicates appeals in two different systems, with the procedure, regulation, and law applying to a particular appeal varying depending on whether that appeal is a Legacy appeal or whether it is a VAIMA appeal. *See e.g. Mattox v. McDonough*, 56 F.4th 1369 (Fed. Cir. 2023). The current decision by the Board on appeal was issued under the VAIMA system not the Legacy appeals system. Even so, with Mr. Cooper arguing to distinguish Legacy-system precedents, he first will address how and why Board remands in the Legacy appeals system were outside the scope of this Court's subject matter jurisdiction.

As the Secretary explained, this Court's jurisdiction is defined by statute. 38 U.S.C. § 7252(a) remains, in substance, unchanged from Congress's charge upon the creation of this Court by the Veterans Judicial Review Act (Pub. L. 100-687). *Compare* 38 U.S.C. § 7252(a) (2024) *with* Veterans Judicial Review Act (Pub. L. 100-687), 102 Stat. 4105, *codified at* 38 U.S.C. § 4052(a) (1988) ("The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. …"). So too has 38 U.S.C. § 7266(a) remained unchanged in substance since the passage of the Veterans Judicial Review Act. Thus, judicial analysis as to whether a Board remand order in the Legacy system constitutes a § 7252(a) "decision" interprets Legacy-system procedures against these two statutes. After all, § 7252(a) makes clear, any and all Board decisions are subject to this Court's subject matter jurisdiction otherwise those decisions evade judicial review in contravention of § 7252(a).

In Legacy, as under the VAIMA, the Board's jurisdiction includes "All questions in a matter which under section 511(a) of this title *is subject to one review on appeal* to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding". 38 U.S.C. § 7104(a) (emphasis added). Notably,

however, in Legacy, 38 U.S.C. § 5103A provided the Secretary, including the Board, had an ongoing, independent, statutory duty to assist veterans in the development of their claim(s) "the Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A(a)(1) (2016). Thus, notwithstanding the fact that many veterans waited years for a decision from the Board in the Legacy appeals system, if the Secretary, to include the Board, determined additional development might assist a veteran in obtaining the benefits they sought, the Board had no choice, *even if the Board was wrong* that additional development would assist a veteran, as a matter of law, the Board was required to remand a veteran's appeal for additional development. Once the development ordered by the Board had been accomplished the appeal would be returned to the Board if the Agency of Original Jurisdiction ("AOJ") could still not grant the benefit sought. Thus, notably and importantly, a remand from the Board in the Legacy system was not a terminal event of the appeal.

The law in Legacy outlining, and thus requiring, an appeal be returned to the Board for a final decision following a remand if the maximum benefit could not be granted on appeal was not statutory in nature, but regulatory, as the Secretary points to in the Motion to Dismiss. The AOJ had to "complete the additional development of the evidence or procedural development required. Following completion of the development, the case will be reviewed to determine whether the additional development, together with the evidence which was previously of record, supports the allowance of all benefits sought on appeal." 38 C.F.R. § 19.38 (2016). Notably, the regulation required "If any benefits sought on appeal remain denied following this review, the agency or original jurisdiction will issue a Supplemental Statement

of the Case concerning the additional development pertaining to those issues … the case will be returned to the Board". *Id.* 38 C.F.R. § 19.31(c) (2016) required

> The agency of original jurisdiction will issue a Supplemental Statement of the Case if, pursuant to a remand by the Board, it develops the evidence or cures a procedural defect, unless 1) the only purpose of the remand is to assemble records previously considered… or 2) the Board specifies in a the remand that a Supplemental Statement of the Case is not required.

Indeed, 38 C.F.R. §§ 19.31(c), 19.38 are identical in what they require today in the adjudication of a Legacy appeal and what they required prior to the passage of the VAIMA. *Compare* 38 C.F.R. §§ 19.31(c), 19.38 (2023). As the Secretary identified in the present Motion to Dismiss, remands, thus, in Legacy, were interlocutory, "codified by regulation and is affirmed by precedential case law." *See* Motion to Dismiss at 2. It was within this statutory and regulatory framework that each of the precedential decisions relied on by the Secretary in the present Motion to Dismiss were issued apart from, notably, *Clark v. McDonough*, 35 Vet. App. 317 (2022), however, for reasons that will be discussed later within this Response, *Clark* is, can, and should be distinguished from Mr. Cooper's situation.

It was in this context that the Federal Circuit issued its precedential decision in *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000) to which the Secretary points. Importantly, the Federal Circuit focused on this Court's jurisdiction under 38 U.S.C. § 7252 "implicit in section 7252 of title 38, which provides in relevant part that the court has the "power to affirm, modify, or reverse *a decision of the Board* or to remand the matter as appropriate. 38 U.S.C. § 7252(a)(1994) (emphasis added)." *Maggitt* F.3d, 1370, 1375. The Court went on to explain

> A "decision" of the Board, for purposes of the Veterans Court's jurisdiction under section 7252, is the decision with respect to the benefit sought by the veteran: those benefits are either granted (in which case the Secretary of

> Veterans Affairs (Secretary) is bound by the decision and, under section 7252, may not appeal to the Veterans Court), or they are denied.

Id. at 1376. *Maggitt* had not explicitly addressed the question of whether a remand by the Board was a "decision" of the Board for purposes of this Court's jurisdiction. This Court would take up that question a few years later in *Breeden v. Principi*, 17 Vet. App. 475 (2004). In *Breeden*, the veteran challenged whether aspects of the Board's remand were final, specifically, with respect to his combat status and exposure to stressors. This Court held the Board had not made a decision over which it had jurisdiction.

> Contrary to the appellant's assertions, however, the Board's remand did not finally determine either of those issues much less finally rule upon the benefits sought by the veteran. Upon further development by the RO, the Board still could conclude that the appellant did engage in combat and/or that there are other verified stressors upon which to base a diagnosis of PTSD.

Breeden, 17 Vet. App. 475, 478. What was *unsaid* by this Court in *Breeden*, of course, was if the AOJ didn't conclude the appellant had engaged in combat or experienced stressors that would lead to service-connected compensation of his PTSD, his case would have been returned to the Board for a final decision. The Court in *Breeden* ultimately pointed to, and relied upon, the Federal Circuit's holding in *Maggitt* in determining it lacked jurisdiction "Because the Board's remand here does not make a final determination with respect to the benefits sought by the veteran, i.e., service connection for PTSD, the Board's remand does not represent a final decision over which this Court has jurisdiction." *Breeden*, 17 Vet. App. 475, 477-478. Similarly, in *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005), the veteran challenged to the Federal Circuit this Court's own interpretation of its jurisdictional statutes, 38 U.S.C. §§ 7252 and 7266 and the interpretation articulated in *Breeden*. The Federal Circuit affirmed this Court's holding that remands at the time were not decisions of which this Court has jurisdiction.

> the Board's remand in this case was not a "decision" within the meaning of *Maggitt* and section 7104(d)(2). Section 7252(a) provides jurisdiction for the Veterans' Court to review "decisions of the Board of Veterans' Appeals." Our case law and section 7104(d)(2) define a Board decision as including an order granting appropriate relief or denying relief. The Board's remand in this case contains no order granting or denying relief.

Kirkpatrick, 417 F.3d 1361, 1364. *None* of these decisions however, while being well-established precedent in the Legacy system, contemplated Congress's significant changes to veterans appeals by the VAIMA because, of course, the changes brought about by VAIMA simply didn't exist. The Legacy system, and the Board's duty to assist veterans within that system, were entirely different.

Changes to the veterans appeals process brought about by the VAIMA

As this Court is all too aware, the VAIMA radically changed the process and nature of appeals if and when a veteran is dissatisfied on a claim decision that's been made by the Secretary. It was within the Legacy appeal system's dysfunctional process that, in 2017, Congress passed the VAIMA. The VAIMA's purpose included curbing the "'continuous evidence gathering and readjudication of the same matters' that caused appeals to 'churn' in the system." *Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, 7 F.4th 1110, 1118 (Fed. Cir. 2021) (citing S. Rep. 115-126, at 29 (2017) (Jennifer S. Lee, Deputy Under Secretary for Health and Policy Services) ("Veterans and VA adjudicators are . . . engaged in continuous evidence gathering and repeated readjudication of the same appeal. This cycle of evidence gathering and readjudication means that appeals often churn for years between the Board and the [AOJ] to meet complex legal requirements, with little to no benefit flowing to the Veteran.").

What is more, a key reason Congress replaced the Legacy appeals system with the VAIMA was to promote claimant choice. *See* H. Rpt. 115-135, at 2 (May 19, 2017) (noting, in

the VAIMA's purpose and summary, that the VAIMA would permit claimants to "choose" their appeal option). The Secretary, when promulgating regulations to implement the VAIMA, reinforced the importance of claimant choice. *See VA Claims and Appeals Modernization*, 84 Fed. Reg. 138, 138 (Jan. 18, 2019) ("The differentiated lane framework required by statute and implemented in these regulations has many advantages. It provides a streamlined process that allows for early resolution of a claimant's appeal and the lane options allow claimants to tailor the process to meet their individual needs and control their VA experience."). Under an amended 38 U.S.C. § 5108 a veteran could now, if their claim were denied by the Board because the veteran failed to meet their burden of persuasion, file a Supplemental Claim within one year after a Board decision with new and relevant evidence to continuously pursue the benefits to which they are entitled.

As part of the statutory changes of the VAIMA, the Board's own, independent, statutory duty to assist was eliminated while that duty remained intact for the AOJ. 38 U.S.C. § 5103A(e)(1). 38 U.S.C. § 5103A was also amended to include § 5103(f)(2)(A) which provides:

> If the Board of Veterans' Appeals, during review on appeal of an agency of original jurisdiction decision, identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision on appeal, *unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record*, the Board shall remand the claim to the agency of original jurisdiction for correction of such error and readjudication.

(emphasis added). Thus 38 U.S.C. § 5103A(f)(2)(A) requires the Board, at the threshold of determining whether to remand to correct an error on the part of the agency of original jurisdiction, to instead, first decide whether to issue the veteran a grant where the record permits the Board to do so. "*[U]nless the Secretary may award the maximum benefit in accordance with*

this title based on the evidence of record, the Board shall remand the claim to the agency of original jurisdiction for correction of such error and readjudication." 38 U.S.C. § 5103A(f)(2)(A) (emphasis added). Under VAIMA, gone was the process by which Mr. Cooper's appeal would be returned to the Board for further adjudication pursuant to Part 19 of Title 38 of the Code of Federal Regulations in the event the AOJ failed to grant the maximum benefit sought by the claimant on appeal. Instead, a remand by the Board terminates its jurisdiction over a veteran's appeal. 38 C.F.R. § 20.800(e) ("A case will not be returned to the Board following the agency of original jurisdiction's readjudication of an appeal previously remanded by the Board… unless the claimant files a new Notice of Disagreement."). "Such cases will be docketed" *not* according to the original VAIMA Board appeal's place on the docket but, instead, "in the order in which *the most recent* Notice of Disagreement was received." *Id.* (emphasis added). 38 C.F.R. § 3.2502 explicitly provides "Upon receipt of a returned claim from a higher-level adjudicator or remand by the Board of Veterans' Appeals... *The agency of original jurisdiction retains jurisdiction of the claim*." (emphasis added); *See also* 38 C.F.R. § 3.2500(a) (requiring the initiation of a new appeal). By contrast however, Congress kept intact and unchanged in VAIMA Mr. Cooper's statutory right to "one review on appeal to the Secretary" with that decision being the provenance of the Board pursuant to 38 U.S.C. § 7104(a). Additionally, Congress's new mandate in the VAIMA required the Board *and thus this Court* review, at the threshold of whether the Board *may* remand, to first determine the Board could not grant "the maximum benefit in accordance with this title based on the evidence of record". 38 U.S.C. § 5103A(f)(2)(A). That threshold decision by the Board here, that the evidence in the record is insufficient to permit it to issue a grant, is the decision on the very benefits Mr.

Cooper sought and received. This "is the decision with respect to the benefit sought by the veteran". *Maggitt*, F.3d, 1370, 1376. After all, Congress now, in VAIMA, requires the Board may *not* remand if "the Secretary may award the maximum benefit in accordance with this title based on the evidence of record". 38 U.S.C. § 5103A(f)(2)(A).

The Secretary, in his motion to dismiss points to the Secretary's regulation at 38 C.F.R. § 20.1100(b) which regulation, Mr. Cooper would note, has not been amended by the Secretary since 1996 carrying over, as it has, from Legacy to VAIMA. It provides "Final Board decisions are not subject to review except as provided in 38 U.S.C. 1975 and 1984 and 38 U.S.C. chapters 37 and 72. *A remand is in the nature of a preliminary order and does not constitute a final decision of the Board.*" (emphasis added). Mr. Cooper, to be clear, is not challenging the validity of 38 C.F.R. § 20.1100(b). As explained above, it is at the *threshold* of determining whether the Board *has jurisdiction* to remand in light of the evidentiary record that the consideration of 38 U.S.C. § 5103A(f)(2)(A) applies. When passing the VAIMA Congress contemplated there will be those cases where, despite the argument to the contrary by a veteran or the veteran's representative, there is *both* 1) an error by the AOJ in its duty to assist the veteran and 2) evidence in the record insufficient to grant the maximum benefit sought on appeal.

It is important to note here that the Secretary is *not* defending the Board's decision to remand on the merits. The Secretary *could* (and is required, Mr. Cooper would submit) under the VAIMA, to defend the Board's decision *to* remand because it could not (despite Mr. Cooper's argument to the contrary) grant him the maximum benefit he was seeking. *See* 38 U.S.C. § 5103A(f)(2)(A). Such a decision, Mr. Cooper believes, would either be clearly erroneous or lack adequate reasons or bases but, of course, that's not the Secretary's position

in his Motion to Dismiss. The Secretary's motion to dismiss for lack of jurisdiction is predicated on a misunderstanding of what decision the Board is making in VAIMA when it issues a remand. When the Board issues a VAIMA remand order, nothing of that Board appeal remains. The case's posture instead is that of supplemental-claim review with binding prior findings and instructions. The VAIMA remand order is, for these reasons, a "final decision."

As will be discussed below, Mr. Cooper believes, and argued to the Board, that were it the case with respect to his appeal, that there was both an error by the AOJ in its duty to assist *and* the Board determined the evidence was insufficient to issue a grant of the maximum benefit sought, he had the right, in light of his right to one review by the Secretary, following that (incorrect) decision, to waive any additional assistance from either the Board or the Secretary and thus the Board would *still* lack jurisdiction to remand his appeal. Thus, as to 38 C.F.R. § 20.1100(b), there is nothing incompatible as between the operation of 38 U.S.C. § 5103A(f)(2)(A), the right of a veteran to waive any further assistance from the Board or the Secretary following the Board's decision under 38 U.S.C. § 5103A(f)(2)(A), and 38 C.F.R. § 20.1100(b). Indeed, in the situation where the evidence in a veteran's case fails to meet the necessary burden of persuasion, there exists a duty to assist error by the AOJ, and the veteran *doesn't* waive additional assistance from the Board, the Board *must*, under 38 U.S.C. § 5103A in VAIMA, remand to fix the duty to assist error. In that way, it is Mr. Cooper's position there is nothing incompatible as between 38 C.F.R. § 20.1100(b) and the statutory framework of the VAIMA so the issue need not be reached or addressed. To the extent this Court finds otherwise, it must disregard 38 C.F.R. § 20.1100(b) to the extent it conflicts with Congress's statutory mandate of the VAIMA. *See e.g. Hall v. McDonough*, 34 Vet. App. 329, 333 (2021)

("[O]nly Congress may confer or withdraw jurisdiction".)

In the Secretary's Motion to Dismiss the Secretary pointed exclusively to caselaw pertaining to the Legacy appeal system apart from this Court's recent decision in *Clark v. McDonough*, 35 Vet. App. 317 (2022). A decision, as this Court noted in its December 22, 2023 Order in this case, where the issue of the differences in Legacy and AMA were not addressed as they are here. *See* December 22, 2023 Order ("*Clark* reiterated in an AMA case the rule that Board remands are not appealable, neither that decision nor the briefing in the appeal before the Federal Circuit addresses whether the AMA altered the non-appealability rule.") In *Clark* this Court noted, "Mrs. Clark does not argue that the Board rendered a final decision on her DIC claim. See Opp. at 1-10; see also Dec. at 1 (remanding the DIC claim). Instead, she asserts that the Board denied her motion for waiver and that this was the Board decision that she appealed to the Court. Opp. at 1, 4-9; Oral Argument at 27:45-28:25… After all, she asserts, a motion denial is an adverse final decision on the motion. Opp. at 4-9." *Clark*, 35 Vet. App. 317, 322-323. Mr. Cooper does not waive the same argument with respect to his *own* waiver of any further assistance from the Board or the Secretary, and would preserve that argument for consideration by a higher tribunal in light of this Court's binding, precedential decision in *Clark* and the Federal Circuit's pending decision in that case, but, in recognition of this Court's settled precedent in this regard, his argument here in this appeal, is, indeed, slightly different.

Here, in contrast to *Clark*, Mr. Cooper believes and argues there *was* a decision on Mr. Cooper's entitlement to a higher, initial rating of his prostate cancer as well as his entitlement to earlier effective dates by operation of 38 C.F.R. § 3.156(c), specifically, as Mr. Cooper explained, by operation of § 3.156(c)(3). *See* Exhibit A. The Board decided Mr. Cooper's appeal

unfavorably. Contrary to Mr. Cooper's argument, and the evidence in the record, the Board found there was insufficient evidence to trigger its duty under 38 U.S.C. § 5103A(f)(2)(A) to grant Mr. Cooper the maximum benefit he sought on appeal: a higher initial rating of his prostate cancer and earlier effective dates of his prostate cancer, type two diabetes, and SMC. Having done so, rather than *deny* Mr. Cooper the benefits he sought as Mr. Cooper requested, the Board instead identified and ordered additional development it identified would assist Mr. Cooper in establishing entitlement to the benefit sought rejecting Mr. Cooper's express waiver of any such assistance. This scenario is how and why Mr. Cooper's present appeal differs from that of the claimant in *Clark*. The Board decided Mr. Cooper had failed to meet his burden of persuasion and, having done so, ordered a remand in violation of Mr. Cooper's express wish to the contrary.

How Mr. Cooper's case illustrates why the Court has jurisdiction of this Board decision

Mr. Cooper, sought to enforce, on facts common to him and thousands of his fellow Vietnam-era U.S. military veterans who served in Thailand, VA's promise, pursuant to 38 C.F.R. § 3.156(c), to reconsider prior denials of service connection when, at any time after the denials, VA received or associated with the claims file new and relevant official service department records- such as the long-classified, now-declassified Department of Defense Project CHECO: Thailand Base Defense (1968-1972). While Congress last year afforded Mr. Cooper and other similarly situated veterans partial relief under the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, known as "the PACT Act" (Pub. L. 117-168) that new law did not displace the greater relief that would be afforded Mr. Cooper and other similarly situated veterans under § 3.156(c). As Mr. Cooper

argued to the Board in November 2022, the Board could grant him the maximum benefit he was seeking in his appeal based on the evidence of record.

> Here, Mr. Cooper has reached an informed conclusion that further development of this claim will be harmful to his claim. Therefore, Mr. Cooper waives any further assistance by the VA to obtain medical evidence to include a medical opinion on this matter. Finally, the record already contains sufficient positive evidence to substantiate her[sic] claim. The VA's duty to assist is limited to "reasonable efforts" to obtain evidence "necessary to substantiate the claim." 38 U.S.C. § 5103A. Since the record already substantiates the claim, it is not reasonable, or necessary to provide any additional assistance.

See Exhibit A, page A-9-A-10. Mr. Cooper went on to say that, even if he were incorrect, that the evidence in the record was *not* sufficient for the Board to grant him the maximum benefit sought, he wished to waive any further assistance from the Board or the Secretary.

> Mr. Cooper unequivocally moves to waive his/her right under the duty to assist to any additional assistance by the Secretary to obtain medical evidence or a medical opinion. He/she also moves to waive any other statutory to regulatory duty overlooked by the AOJ. The law permits a claimant to waive a statutory right. *See Janssen v. Principi*, 15, Vet. App. 370 (2001). Citing US Supreme Court precedent, the *Janssen* Court ruled "unless there is a specific preclusion to [waiving a statutory provision] parties are generally permitted to waive application of statutes intended for their benefit." *Janssen*, at 374.

Id. at A-9. A denial, Mr. Cooper reasoned, was better than a remand because, he believed, either a denial would be predicated upon clearly erroneous findings by the Board or the Board would be unable to provide adequate reasons or bases for its decision denying Mr. Cooper the maximum benefit he sought. Either way, Mr. Cooper wanted a decision on the merits. He certainly would have preferred a grant however, he would take a denial.

With either an express grant or a denial he would be able to seek relief from this Court and not be trapped in an endless cycle of continuing development by the Secretary. At the foundation of the Secretary's pending Motion to Dismiss is a question or, arguably, a series of

questions. Is this Mr. Cooper's appeal, where he is empowered to make a strategic decision about what is in the best interest of his appeal, or is it really the Secretary's? Notwithstanding VAIMA's attempt to address the deficiencies of the Legacy appeal system, is Mr. Cooper, beyond his control and his wish, still stuck in a continuous cycle of endless, ongoing development ordered by the Board? Does the Board *still*, in VAIMA, have unfettered discretion to remand for additional development notwithstanding a veteran's informed, willful, voluntary, plea to the contrary? Despite Mr. Cooper's plea, that the Board grant him the maximum benefit sought because the evidence in the record was sufficient to trigger the Board's requirement to do so pursuant to 38 U.S.C. § 5103A(f)(2)(A) under the VAIMA, the Board refused, failing to do so, and remanded Mr. Cooper's appeal for further adjudication by the AOJ. *See also Bean v. McDonough*, 66 F. 4th 979, 989 (2023) ("[W]hen a claim is adequately presented to the Board but not addressed by the Board, the Board's disposition of the appeal constitutes a decision of the Board on that claim that may be appealed to the Veterans Court.")

Mr. Cooper's evidentiary record would never be the same following a remand from the Board. It will either not be as strong of a case or it will not be as weak of a case. The Board's decision then, that remand is necessary notwithstanding the Board's requirement to grant under the revised 38 U.S.C. § 5103A(f)(2)(A) is a final decision on the evidentiary record that would, forever, go un-reviewed. Thus, consistent with the Federal Circuit's decision in *Maggitt*, this Board's decision on appeal *is* a final decision, the terminal event, as to Mr. Cooper's entitlement to benefits - that the evidence in the record in his appeal to the Board is insufficient to allow the Board to grant. The Board here wrongfully denied Mr. Cooper of his "one review on appeal to the Secretary" of the record the Board had before it, which record required it to

grant Mr. Cooper the maximum benefits he sought on appeal pursuant to 38 U.S.C. § 7104(a). In Legacy, a remand from the Board was not a final decision as to a benefit being sought, either granting or denying that benefit. *See e.g. Maggitt*, 202 F.3d at 1366. That is not true in VAIMA where the Board, in remanding a case for further adjudication, *is* making a final decision, that decision being the evidence of record before it is insufficient to trigger its duty to grant the veteran the maximum benefit the veteran seeks. 38 U.S.C. § 5103A(f)(2)(A). Mr. Cooper maintains this scenario is precisely why Congress changed and modified the language of 38 U.S.C. § 5103A addressing the Board's unfettered ability to remand in Legacy.

For Congress's changes to 38 U.S.C. § 5103A to have not been a nullity, this Court must be able to review a Board's decision with respect to the Board's authority to act under 38 U.S.C. § 5103A(f)(2)(A) otherwise that decision by the Board, that the evidentiary record on the benefit sought was insufficient to grant, escapes judicial review. Mr. Cooper humbly submits such a holding would be inconsistent with what the Federal Circuit determined a Board decision to be under § 7252(a) in *Maggitt*, namely, a final decision with respect to the benefit being sought. To hold as the Board did here, that veterans have no say in whether their appeal should be adjudicated based on the record as it exists would be antithetical to the VAIMA's purposes, which includes curbing the "'continuous evidence gathering and readjudication of the same matters' that caused appeals to 'churn' in the system." *Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, 7 F.4th at 1118. Here, Mr. Cooper argued to the Board he had reached an informed conclusion that further development of his appeal would offer no benefit in light of the conclusion presently required by the evidence of record. Moreover, Mr. Cooper argued he had reached an informed conclusion that further

development of this claim would be *unhelpful* to him, concluding that the additional delay would be affirmatively harmful to him.

> Mr. Cooper and other U.S. military veterans who served at NKP during the Vietnam Era are running out of time. They are aging, and they are sick. Far too many of them are dying with VA still having not reconsidered its initial denial of their claims as required by § 3.156(c). Meanwhile, VA has received new and relevant official service department records that warrant reconsideration of each of its denials described above.

Exhibit A, page A-9. Therefore, Mr. Cooper waived any further assistance by the Board to obtain or develop evidence in this case. Mr. Cooper noted the Board is permitted under 38 C.F.R. § 20.802(a) to remand an appeal to either correct a duty to assist error or to correct "any other error by the agency of original jurisdiction in satisfying a regulatory or statutory duty" but, Mr. Cooper explained, that is only the case in VAIMA when the Board cannot grant the benefit in full based on the existing record as required by 38 U.S.C. § 5103A(f)(2)(A). Such was not the case here, he argued and explained to the Board, as the Board could grant the benefit in full based on the existing record. Even were he wrong, and the Board could not grant the maximum benefit sought because the evidence in the record did not permit the Board to do so, Congress, in the VAIMA, anticipated this and permitted Mr. Cooper to still obtain relief by submitting sufficient evidence and submitting that evidence in a Supplemental Claim as required by 38 U.S.C. § 5108 following a Board denial in continuous pursuit of the benefits to which he is entitled.

Mr. Cooper respectfully submits this Court, in determining whether VAIMA changed the legal landscape with respect to what a decision is by the Board, and a veteran's ability to obtain judicial review of that decision, "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). It first must

determine whether Congress' intent is unambiguous. To do so, it must examine the statutory language at issue, that language's ordinary meaning, the language's context in the statute and the overall statutory scheme, the traditional canons that guide how to construe statutes to discern Congress' intent, and any pertinent legislative history. *See, e.g.*, *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1326 (Fed. Cir. 2020).

If only one reasonable conclusion emerges from this analysis as to what Congress intends, then Congress' intent is unambiguous; and "that is the end of the matter." *Chevron*, 467 U.S. at 842. If at least two reasonable conclusions emerge as to what Congress intends, then there is interpretive doubt to resolve. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423–24 (2019). When agency deference is not at issue (possibly, even when it is), "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). That, then, becomes the end of the matter. Mr. Cooper maintains the VAIMA unambiguously changed the scope of how and why a Board remand is a decision at the point the Board concludes it cannot grant. However, Mr. Cooper would respectfully submit the pro-veteran canon here also leads to the conclusion the Board makes a decision with respect to the benefit sought on appeal at the threshold of deciding whether to remand a case under 38 U.S.C. § 5103A(f)(2)(A). Such an interpretation would favor Mr. Cooper because it would mean the Board's decision that the evidentiary record *didn't* support entitlement wouldn't escape judicial review. Such an interpretation would also favor Mr. Cooper in preserving his right to one review on appeal provided for by 38 U.S.C. § 7104(a). Such an interpretation would also favor Mr. Cooper because it would mean that his request for a waiver in this circumstance would come only *after* the Board's decision at the threshold of whether to remand under 38 U.S.C. § 5103A(f)(2)(A).

In *Janssen*, in arriving at its conclusion that a veteran represented by counsel could waive statutory provisions before this Court designed to protect a claimant, this Court recounted the Supreme Court's clear guidance that, in *an adversarial process*, with non-favored litigants, a party has the right to waive a statutory protection designed for their benefit. *Janssen*, 15, Vet. App. 370, 374 ("the appellant must first possess a right, he must have knowledge of that right, and he must intend, voluntarily and freely, to relinquish or surrender that right. *See United States v. Olano*, 507 U.S. 725, 732–33, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)"). Mr. Cooper was represented by counsel when he knowingly, voluntarily, and freely waived any additional assistance from either the Board or the Secretary. Mr. Cooper humbly submits that it cannot be the case that veterans, a class of favored litigants, a class to whom the pro-veteran canon of construction applies, are afforded *less* ability to waive a statutory provision designed for their protection than non-favored litigants when that waiver occurs in time *after* the Board has made a decision the veteran has failed to meet their evidentiary burden of persuasion.

Mr. Cooper does not believe the VAIMA continued to leave veterans at the mercy of the Secretary and the Board as the sole arbitrator of when, and if, the development of their appeal is at its conclusion. Congress intended VAIMA to address the never-ending, Kafkaesque, nature of the prior Legacy appeals system. This Court has jurisdiction either because the Board erred in its decision, at the threshold of deciding whether to remand, that the evidence did not permit it to grant Mr. Cooper the maximum benefit he sought on appeal *or*, in the alternative, in the face of, and following that decision, the Board lacked jurisdiction to remand because Mr. Cooper affirmatively waived further assistance from the Board or the Secretary as was Mr. Cooper's right. *See e.g. Janssen*, 15 Vet. App. 370, 374.

Dated: January 29, 2024

Respectfully submitted,

/s/ Kent A. Eiler

Kent A. Eiler, Esq.
John D. Niles
Carpenter Chartered
P.O. Box 2099
Topeka, KS 66601
785-357-5251
kent@carpenterchartered.com
john@carpenterchartered.com

Counsel for Appellant

EXHIBIT

November 16, 2022
Page 1 of 21
RE: Cooper, John A.
C-File: 23 395 690

ARGUMENT ATTACHMENT TO VA FORM 10182
DECISION REVIEW REQUEST: BOARD APPEAL
(NOTICE OF DISAGREEMENT)
with the Notice dated April 7, 2022 of the Rating Decision dated April 4, 2022 and the Letter Decision dated September 2, 2022

BENEFITS SOUGHT:

1. **Advancement on the docket;**

2. **Effective date for service-connected compensation for prostate cancer of June 24, 1996;**

3. **Effective date for special monthly compensation based on loss of use of a creative organ (SMC(k)) of June 24, 1996;**

4. **Effective date for service-connected compensation for diabetes mellitus (type II) (DMII) of no later than October 19, 2016; and**

5. **Higher increased rating evaluation exceeding 10 percent for service-connected prostate cancer.**

INTRODUCTION

I represent Mr. Cooper. I previously have filed a properly executed VA Form 22a, *Appointment of Individual As Claimant's Representative*, appointing me as such. My power of attorney code is 7W5.

I write in support of Mr. Cooper's VA Form 10182, *Decision Review Request: Board Appeal (Notice of Disagreement)*, with VA's April 4, 2022 rating decision, of which VA provided notice, on April 7, 2022 and its Letter Decision of September 2, 2022. In the April 2022 rating decision, VA granted service connection for Mr. Cooper's DMII and prostate cancer. Additionally, the Regional Office (RO) granted service connection for

erectile dysfunction and SMC based on loss of use of a creative organ. Each of these grants however failed to grant the correct effective date. On August 29, 2022 Mr. Cooper submitted a Supplemental Claim addressing each of these issues along with Mr. Cooper's entitlement to service connection for his bladder cancer condition, hypertension condition, and additional compensation for his dependent, which issues the RO has not yet addressed following the August 29, 2022 Supplemental Claim. On September 2, 2022, the RO issued a decision as to the present issues addressed in this Notice of Disagreement (NOD) in which it stated:

> "We received your claim for an earlier effective date. We notified you of our prior decision for Prostate Cancer, Special Monthly Compensation, and Diabetes Mellitus Type II, on April 7, 2022.
>
> You continue to have until April 7, 2023 to pursue one of the review options outlined in that decision notice. You may also request revision based on clear and unmistakable error (CUE) with respect to the assignment of the effective date."

The present appeal follows. Mr. Cooper respectfully requests that the Board correct each and every effective date VA assigned in its April 4, 2022 rating decision as the rating officer overlooked 38 C.F.R. § 3.156(c). Additionally, Mr. Cooper is entitled to a rating in excess of 10 percent rating for his service-connected prostate cancer assigned in the decision on appeal. I will begin with a motion to advance this appeal on the Board's docket and a motion to waive further pre-decisional VA assistance. I then will address Mr. Cooper's entitlement to the correct effective date of the conditions at issue in this appeal and his entitlement to a rating in excess of 10 percent for his prostate cancer.

MOTION FOR ADVANCEMENT ON THE DOCKET

Advancing an appeal on the Board's docket is warranted when the appellant is of advanced age. 38 C.F.R. § 20.800(c)(1). The Board defines "advanced age" as being "75 or more years of age." *Id.* Here, Mr. Cooper was born in June 1943. He is 79 years old.

He therefore respectfully requests that the Board advance this appeal on its docket.

Advancing an appeal on the Board's docket also is warranted when the appeal "involves interpretation of law of general application affecting other claims." *Id.* This appeal involves the interpretation of 38 C.F.R. § 3.156(c)(1) and the application of binding case law to require VA to reconsider pursuant to § 3.156(c), automatically and with no action by the claimant, *all* denials: (1) that VA made before 2009, (2) of service connection, (3) for any disability for which 38 C.F.R. § 3.309(e) recognizes presumptive service connection due to exposure to an herbicide agent during active service, (4) on the basis that the claimant had failed to establish the veteran's in-service exposure to herbicide agents, (5) even though the veteran had served during between January 9, 1962, and May 7, 1975 ("the Vietnam Era"), at the Nakhon Phanom Royal Thai Air Force Base (NKP), and (6) for which VA has not already reconsidered on the basis of the new and relevant official service department records noted below in a decision that has become final.

Section 3.156(c) and the binding case law that Mr. Cooper will address below is of general application. This appeal also affects other claims for reasons that Mr. Cooper intends to seek class certification and a class action on behalf of the above group of claimants, to require VA automatically and with no action by the claimant, to reconsider its above-described denials for the entire group of individuals if the Board's decision in this case were to warrant appeal on its merits issues to the U.S. Court of Appeals for Veterans Claims ("Veterans Court").

For all of these reasons, then, the advancement on the Board's docket for which Mr. Cooper moves plainly is warranted. Mr. Cooper respectfully requests that the Board grant it.

MOTION FOR WAIVER OF ANY PRE-DECISIONAL VA ASSISTANCE

In light of the clear evidence contained in the record, that Mr. Cooper is entitled to an earlier effective date for each and every condition identified in the present decision

on appeal by operation of 38 C.F.R. § 3.156(c) and in light of the clear evidence in the record that Mr. Cooper is entitled to a higher increased rating for his service connected prostate cancer, the Board can and must grant the maximum benefit in this appeal: the correct effective date of his DMII, prostate cancer, and SMC(k) along with the correct, higher increased rating of his prostate cancer. *See* 38 U.S.C. § 5103A(f)(2)(A) (providing the Board may remand unless the Secretary may, as in this case, grant the maximum benefit based on the evidence of record).

To the extent the Board identifies an error by the RO under its Duty to Assist under 38 U.S.C. § 5103A, Mr. Cooper unequivocally waives his right to any additional assistance by the Secretary to obtain additional evidence. He also moves to waive any other statutory or regulatory duty overlooked by the RO inconsequential, as it is, to the conclusion required at this point by the evidence in the record of Mr. Cooper's entitlement to a correct, earlier effective date by application of § 3.156(c) and to a higher, increased rating of his prostate cancer. *See Janssen v. Principi*, 15 Vet. App. 370 (2001) citing U.S. Supreme Court precedent, the Janssen Court ruled "unless there is a specific preclusion to [waiving a statutory provision] parties are generally permitted to waive application of statutes intended for their benefit." *Janssen* at 374.

The RO's September 2, 2022 notice letter of its rejection of Mr. Cooper's August 29, 2022 Supplemental Claim here is such an error, inconsequential as it is to Mr. Cooper's entitlement to a correct, earlier effective date by application of § 3.156(c) which the April 4, 2022 ratings decision presently on appeal failed to implement. For starters the September 2, 2022 Letter Decision of the RO's rejection conflated Mr. Cooper's August 29, 2022 claim to an earlier effective date as a CUE claim as opposed to a claim for an earlier effective date by operation of § 3.156(c). This distinction is significant as 3.156(c) sets a lower threshold for obtaining reconsideration, and provides for greater relief for an award based in any part on the newly associated service department record, than does 38 C.F.R. § 3.156(a). *Compare* 38 C.F.R. § 3.156(a) (requiring "new and material" evidence) *and id.* § 3.400(q)(2) (prohibiting an effective date under a § 3.156(a) reopening from predating date of receipt of the application to reopen) *with id.* § 3.156(c)(1) (requiring merely "relevant" evidence) *and id.* § 3.156(c)(3) (permitting the effective date of an award based in any part on the newly associated

service department record under a § 3.156(c) reconsideration to be as early as the *initially decided* claim's filing). Section 3.156(c) also sets a lower threshold for establishing the claimant's entitlement than do CUE proceedings. *Compare id.* § 3.156(c)(1), (3) *with id.* § 3.105(a)(1)(i) ("A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error.").

Accordingly, VA must address a claimant's entitlement to reconsideration of an original claim under section 3.156(c) and, if possible, grant the entitlement on that basis, before addressing whether the claimant is entitled to reopening under section 3.156(a) or to revision of the prior decision for CUE. *Cf. Lang v. Wilkie*, 971 F.3d 1348 (Fed. Cir. 2020); *see generally Mason v. Shinseki*, 25 Vet. App. 83, 94 (2011) ("[A]ntecedent ... and ultimately dispositive" questions "must be decided to avoid committing a legal error.").

The jurisdiction with which Congress has vested the Board is broad. It extends to "[a]ll questions in a matter which under section 511(a) of this title [38 of the U.S. Code] is subject to decision by the Secretary." 38 U.S.C. § 7104(a) (2022). Section 511(a) subjects to decision by the Secretary any matter "under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." The phrase "under a law that affects the provision of benefits by the Secretary," in turn, is broad. *See, e.g., Chisholm v. McDonald*, 28 Vet. App. 240, 242 (2016) (per curiam order) (holding that even "[t]he action of authorizing or denying access to electronic records for counsel seeking benefits on behalf of clients, and for staff assisting such counsel, … pursuant to regulation," 38 C.F.R. § 14.629, "that was promulgated pursuant to 38 U.S.C. §§ 501(a) and 5904" is under a law affecting the provision of benefits); *see also Rosinski v. Shulkin*, 29 Vet. App. 183, 189 (2018) (per curiam order) (holding that Pub. L. No. 85-857, 72 Stat. 1105 (1958), is a "law that affects the provision of benefits"; quoting *Bates v. Nicholson*, 398 F.3d 1355, 1361 (Fed. Cir. 2005)).

Meanwhile, Congress has done more than merely vest the Board with jurisdiction over all such questions. It has guaranteed our military veterans and their dependents and survivors with "one review on appeal to the Secretary" over those questions. 38 U.S.C.

§ 7104(a) (2022). Congress has assigned the responsibility for providing that review on appeal to the Board. *Id.* ("Final decisions on such appeals shall be made by the Board."); *accord id.* § 7102(a) (instructing that any Board member or panel assigned to a "proceeding instituted before the Board … shall make a determination thereon" and "shall make a report under section 7104(d) … on any such determination, which report shall constitute the final disposition of the proceeding"). To receive that review, Congress requires as relevant only that a claimant timely file a notice of disagreement that "shall be in writing," in the "form prescribed by the Secretary," and that "shall identify the specific determination with which the claimant disagrees." *Id.* § 7105(a),(b)(2)(A).

These principles apply to Board review of a decision that the RO issues in response to a VA Form 20-0995, Decision Review Request: Supplemental Claim, just as they apply to Board review of an AOJ adjudication of an initial claim. Since the earliest days of the Veterans Court, its jurisprudence has recognized the readjudication of a claim as an issue contained within the claim. *Bernard v. Brown*, 4 Vet. App. 384, 392 (1993). That is because "[i]t is axiomatic that claimants do not submit claims merely for the reopening of their previously and finally denied claims. Rather, they submit claims for VA benefits…" *Id.* Indeed, in *Bernard*, the Veterans Court held that the threshold question for a legacy claim's reopening and entitlement to service connection present two "questions" within the same "matter." *Id.* That "matter" is "the veteran's claim of entitlement to VA benefits … under section 1110." *Id.* The Board's jurisdiction thus is "not limited to the specific" threshold question "actually decided" by the RO but instead also encompasses the question of the veteran's entitlement to service connection. *See id.* at 392.

As further explanation, in *Bernard*, the threshold question that the AOJ denied was whether the veteran had presented new and material evidence to reopen a claim in "legacy" proceedings. *See id.* The Court held that, on appeal, the Board had jurisdiction to decide not only that threshold question but also the veteran's entitlement to service connection. *See id.* That analysis is conceptually no different than when, in the AMA, the AOJ denies that a veteran presented new and relevant evidence to support supplemental-claim review. The particular threshold question has changed, that is, but Section 7104(a)'s "[a]ll questions in a matter" language and its embrace of threshold and

service-connected "questions" within the same "matter" remain the same. Under the principles of *Bernard*, the Board's jurisdiction is not limited to threshold questions such as whether the AOJ erred in rejecting the VA Form 20-0995, Decision Review Request: Supplemental Claim but instead also encompasses the question of the veteran's entitlement to service connection.

To hold otherwise would be antithetical to the AMA's purposes, which include to curb the "'continuous evidence gathering and readjudication of the same matters' that caused appeals to 'churn' in the system." *Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, 7 F.4th 1110, 1118 (Fed. Cir. 2021) (citing S. Rep. 115-126, at 29 (2017) (Jennifer S. Lee, Deputy Under Secretary for Health and Policy Services) ("Veterans and VA adjudicators are . . . engaged in continuous evidence gathering and repeated readjudication of the same appeal. This cycle of evidence gathering and readjudication means that appeals often churn for years between the Board and the [AOJ] to meet complex legal requirements, with little to no benefit flowing to the Veteran.").

Indeed, AMA is called "Veterans Appeals Improvement and Modernization Act of 2017." The very name suggests Congress's intention to "improve" the appeals system. According to the Board's website:

> On July 28, 1933, President Franklin D. Roosevelt created the Board of Veterans' Appeals (Board) by Executive Order 6230, Veterans Regulation No. 2(a). The Board was delegated the authority to **render the final decisions on appeal** for the Administrator (now Secretary) and was directly responsible to the Administrator (Secretary). **The Board was charged "to provide every possible assistance" to claimants and to take final action that would "be fair to the veteran as well as the Government."**

Emphasis added.

What is more, a key reason why Congress replaced the "legacy" appeals system with the AMA was to promote claimant choice. *See* H. Rpt. 115-135, at 2 (May 19, 2017)

(noting, in the AMA's purpose and summary, that the AMA would permit claimants to "choose" their appeal option). The Secretary, when promulgating regulations to implement the AMA, reinforced the importance of claimant choice. *See VA Claims and Appeals Modernization*, 84 Fed. Reg. 138, 138 (Jan. 18, 2019) ("The differentiated lane framework required by statute and implemented in these regulations has many advantages. It provides a streamlined process that allows for early resolution of a claimant's appeal and the lane options allow claimants to tailor the process to meet their individual needs and control their VA experience.").

Mr. Cooper and other U.S. military veterans who served at NKP during the Vietnam Era are running out of time. They are aging, and they are sick. Far too many of them are dying with VA still having not reconsidered its initial denial of their claims as required by § 3.156(c). Meanwhile, VA has received new and relevant official service department records that warrant reconsideration of *each* of its denials described above. VA simply has been sitting on those new and relevant official service department records with respect to all of these claimants except for the relatively few who have been fortunate enough to have become aware of them and have had the resources, either themselves or through a representative, to seek § 3.156(c)(1) reconsideration affirmatively.

Section 3.156(c) imposes no requirement on a claimant to have that good fortune in order to receive reconsideration. It instead unequivocally requires that VA "will reconsider" any claim when, "at any time after VA issues a decision" on the claim, "VA receives or associates ... relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim."

VA has delayed for far too long—more than a decade now, even while these veterans and their survivors have grown older, sicker, and in far too many cases have died—in making right its prior denials of service connection that new and relevant official service department records such as those described below show, or at least help to show, to have been erroneous.

Mr. Cooper has reached an informed conclusion that further development of his

appeal for a correct effective date and a higher increased rating of his prostate cancer will offer no benefit in light of the conclusion presently required by the evidence of record. Moreover, Mr. Cooper has reached an informed conclusion that further pre-decisional development of this claim will be unhelpful to him, concluding that the additional pre-decisional delay would be affirmatively harmful to him and, should the Board's decision warrant an appeal, to the likely thousands of his fellow U.S. military veterans who were exposed to herbicide agents while serving at NKP during the Vietnam Era and whose claims VA denied before it received the preexisting relevant official service department records described below. Therefore, Mr. Cooper waives any further assistance by the VA to obtain or develop evidence in this case. While Mr. Cooper notes the Board is permitted under 38 C.F.R. § 20.802(a) to remand an appeal to either correct a duty to assist error or to correct "any other error by the agency of original jurisdiction in satisfying a regulatory or statutory duty" this is only the case when the Board cannot grant the benefit in full based on the existing record. That is not the case here, where the Board can grant the benefit in full based on the existing record. Moreover, since Mr. Cooper has waived these duties, there is no legal basis for the Board to remand. The purpose of this waiver is to receive a decision immediately. Mr. Cooper will consider his motion explicitly or implicitly denied should the Board order a remand. *See Miller v. Wilkie*, 32 Vet. App. 249 (2020).

ISSUE I: ARGUMENT IN SUPPORT OF THE CORRECT EFFECTIVE DATE BY APPLICATION OF 3.156(c) FOR THOSE VETERANS WHOSE CLAIMS WERE NOT REAJUDICATED DESPITE VA'S RECEIPT OF THE CHECO THAILAND DEFENSE REPORT

1. **Effective date for service-connected compensation for prostate cancer of June 24, 1996;**

2. **Effective date for special monthly compensation based on loss of use of a creative organ (SMC(k)) of June 24, 1996;**

3. **Effective date for service-connected compensation for diabetes mellitus (type II) (DMII) of no later than October 19, 2016; and**

Each one of the effective dates that VA assigned in its April 4, 2022, rating decision is wrong. The rating officer appears to have overlooked 38 C.F.R. § 3.156(c).

Pursuant to 38 C.F.R. § 3.156(c)(1), "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim." 38 C.F.R. § 3.156(c)(1). "Such records include, but are not limited to, ... [d]eclassified records that could not have been obtained because the records were classified when VA decided the claim." *Id.* § 3.156(c)(1)(iii); *see* 70 Fed. Reg. 35,388 (June 30, 2005) (identifying declassified records as an "example of service department records that may have been unavailable at the time of the prior decision," elaborating that they "may provide evidence of injuries, *exposures*, or other events in service that may support a claim for VA benefits" (emphasis added)).

The provisions of 38 C.F.R. § 3.156(c)(1) constitute an exception to finality, requiring a new adjudication of the original claim that had been decided by VA without all of a veteran's relevant service department records. *See, e.g.*, *Emerson v. McDonald*, 28 Vet. App. 200, 206–07 (2016). The regulation's purpose, put simply, is to place the claimant in the position that he or she would have occupied had VA considered the since-acquired records before initially deciding the claim. *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014); *Emerson*, 28 Vet. App. at 206.

Additionally, noted previously, § 3.156(c) sets a lower threshold for obtaining reconsideration, and provides for greater relief for an award based in any part on the newly associated service department record, than does 38 C.F.R. § 3.156(a). *See Supra* at 4-5. Section 3.156(c) also sets a lower threshold for establishing the claimant's entitlement than do CUE proceedings. *Ia.*

Accordingly, VA must address a claimant's entitlement to reconsideration of an original claim under section 3.156(c) and, if possible, grant the entitlement on that basis, before addressing whether the claimant is entitled to reopening under section 3.156(a) or to revision of the prior decision for CUE. *Cf. Lang v. Wilkie*, 971 F.3d 1348 (Fed. Cir. 2020); *see generally Mason v. Shinseki*, 25 Vet. App. 83, 94 (2011) ("[A]ntecedent ... and

ultimately dispositive" questions "must be decided to avoid committing a legal error."). ***No prior adjudication has done so***, so the Board must do so here.

Here, section 3.156(c)(1) entitles Mr. Cooper to reconsideration of his original claim for service connected compensation for DMII, prostate cancer, and erectile dysfunction. With respect to the DMII and prostate cancer, the Board found as much, which bound the RO. This is so for the following reasons.

DMII and prostate cancer are among the diseases for which VA must presume service connection provided that the veteran was exposed during active service to herbicide agents. *See* 38 U.S.C. § 1116(a)(1)(A), (a)(1)(B), (2)(H); 38 C.F.R. §§ 3.307(a)(6), 3.309(e). "Herbicide agent" means "a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975," 38 U.S.C. § 1116(a)(3), "specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram." 38 C.F.R. § 3.307(a)(6)(I).

In 1973, Department of Defense officials authored a report entitled *Project CHECO Southeast Asia Report: Base Defense in Thailand* (the "CHECO Thailand Base Defense Report"). For many years, the CHECO Thailand Base Defense Report remained classified. Mr. Cooper is unaware of VA having received even a partial copy of it until 2007 and is unaware of VA having received a complete copy of it until 2009.

The CHECO Thailand Base Defense Report established the Vietnam Era presence of herbicide agents in Thailand, including at NKP. It notes that NKP "was considered to be a 'high threat' area because of its proximity to Laos (14km) and the high level of CT [Communist Terrorist] activity in nearby villages." *Id.* at 41. "NKP also had the usual rainy season vegetation problems," the CHECO Report describes, "but heavy use of herbicides kept the growth under control in the fenced areas." *Id.* at 69. "The extent to which vegetation has been cleared," it also stated, "is graphically illustrated in the case of NKP." *Id.* at 66. A photograph of NKP in the CHECO Report "shows the extent of vegetation inside the base perimeters in the early days of construction when the airfield was carved out of virgin jungle." *Id.* (photograph is Figure 6, page 65 of the

report). Thus, "[a]n interesting comparison between NKP 1966 and NKP 1972 can be made ... ." *Id.*

Before VA received the CHECO Thailand Base Defense Report, VA almost always denied claims based on Vietnam-era exposure to herbicides in Thailand. VA grew more permissive of such claims when it received the partially declassified and then the fully declassified CHECO Thailand Base Defense Report.

In particular, VA received a partially declassified version of the CHECO Thailand Base Defense Report in or about 2007. The Board reached mixed, often still negative decisions on whether and, if so, how that document affected claims based on Vietnam-era exposure to herbicides in Thailand. When VA received the full CHECO Thailand Base Defense Report, by contrast, it became much more permissive of Vietnam-era Thailand herbicide claims. VA received that version in 2009.

Soon after receiving the full CHECO Thailand Base Defense Report, VA's Director, C&P Service, provided all VA Regional Offices and Centers with a document entitled, "Memorandum for the Record: Herbicide Use in Thailand During the Vietnam Era." The Director reiterated that, pursuant to VA policy, "claims based on herbicide exposure outside Vietnam require sending an e-mail inquiry to the Agent Orange Mailbox for review of the Department of Defense (DoD) inventory listing the herbicide use, testing, and storage sites."

The Director then instructed that, "[i]f the Agent Orange Mailbox inquiry cannot provide probative evidence, the next step is sending an inquiry to the Army and Joint Services Records Research Center (JSRRC)."'"To facilitate a timely resolution of claims from veterans with Thailand service, the Compensation and Pension Service, in conjunction with DoD, has developed a document for inclusion in the claims file that will substitute for an individual response from the Agent Orange Mailbox."'"When developing herbicide-related disability claims from veterans with Thailand service during the Vietnam era," the Director continued, "a copy of the enclosed response document is placed in the veteran's file."(Enclosing Memorandum for the Record: Herbicide Use in Thailand During the Vietnam Era). "If the herbicide exposure issue can be resolved

based on this document, then no further development action is necessary. If not, and sufficient information has been obtained from the veteran," the Director instructed VA personnel to "send an inquiry directly to JSRRC" for further development.

C&P Service followed up Fast Letter 09-20 by noting, in its August 2009 *Compensation & Pension Service Bulletin*, that the Fast Letter's Memorandum for the Record "acknowledges that an official 1973 report of military base defense in Thailand, known as the CHECO Report, provides evidence that herbicides were used within the fenced perimeters of airbases throughout Thailand."

Then, in May 2010, C&P Service acknowledged that, "[a]fter reviewing documents related to herbicide use in … Thailand, C&P Service has determined that there was significant use of herbicides on the fenced in perimeters of military bases in Thailand intended to eliminate vegetation and ground cover for base security purposes." Comp. & Pension Serv. Bull., at 3 (May 2010) ("May 2010 Bulletin") (emphasis added). "Evidence of this," the May 2010 Bulletin continues, "can be found in a declassified Vietnam era Department of Defense (DoD) document titled Project CHECO Southeast Asia Report: Base Defense in Thailand."

"Therefore," the May 2010 Bulletin continued, "when herbicide related claims from Veterans with Thailand service are received, RO personnel should now evaluate the treatment and personnel records to determine whether the Veteran's service activities involved duty on or near the perimeter of the military base where the Veteran was stationed." "If a US Air Force Veteran" served at the Royal Thai Air Force Bases of U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat, or Don Muang "near the air base perimeter …, then herbicide exposure should be acknowledged on a facts found or direct basis." *Id.* Finally, the May 2010 Bulletin instructed, these instructions applied for "the Vietnam era, from February 28, 1961 to May 7, 1975."

In December 2011, C&P Service addressed the applicability of § 3.156(c) to claims based on exposure to herbicides during Vietnam-era service in Thailand ("December 2011 Bulletin"). "Our obligation," it acknowledged, "is to apply this regulation from this point forward to any claim a Veteran reopens or any previous relevant denial we discover

when reviewing the Veteran's claims file." Additionally, it conceded, § 3.156(c)(1)-qualifying "service records" include "information from a declassified 1973 Department of Defense document titled *Project CHECO Southeast Asia Report: Base Defense in Thailand*." "Within this 91-page report are several references to significant herbicide use on the fenced-in perimeters of Thailand airbases.""The report was acquired after some of these Veterans were denied service connection based on the lack of evidence of tactical herbicide exposure, in accordance with the policy in effect at that time."

Finally, the December 2011 Bulletin illustrated when VA must apply § 3.156(c)—with its earlier effective date provision—using as its example a veteran for whom VA had denied service connection in 2006:

> For example, a Veteran with Thailand perimeter duty was denied service connection for type 2 DMII in 2006 and reopens his claim in 2011. The effective date will go back to the date [VA] received the previously denied claim in 2006, as long as the disease was present at that time.

Also in December 2011, VA incorporated much of these bulletins' guidance into its M21-1 Adjudication Procedures Manual ("M21-1"). M21-1 § IV.ii.2.C.10.q, r (eff. Dec. 16, 2011). Those M21-1 provisions, although now in a different chapter, remain substantively much the same as relevant to this appeal. *See* M21-1 § VIII.i.1.A.4 (last rev. Dec. 31, 2019).

Since December 2011, the Board has considered numerous claims implicating these M21-1 provisions and C&P Service Bulletins. Appellants to the Board have found success far more frequently in such claims compared to when the Board had not yet received the full CHECO Thailand Base Defense Report, but even so the Board has not achieved consistency.

Indeed, even among only those U.S. military veterans who served at NKP during the Vietnam Era, a brief search of the Board's website reveals many instances in which, after VA received the CHECO Thailand Base Defense Report, it granted service connection for an herbicide agent-related disease. But many Vietnam Era NKP

veterans, including Mr. Cooper, remained without relief.

What is more, until at least January 2019, VA provided the following guidance on a website that it maintained for veterans of Vietnam-era service in Thailand:

> A Department of Defense (DoD) Report [hyperlinked] written in 1973, Project CHECO Southeast Asia Report: Base Defense in Thailand 1968-1972, contains evidence that there was a significant use of herbicides on the fenced-in perimeters of military bases in Thailand to remove foliage that provided cover for enemy forces.
>
> VA determined that herbicides used on the Thailand base perimeters may have been tactical and procured from Vietnam, or a strong, commercial type resembling tactical herbicides.

Mr. Cooper provided yet further information regarding these developments, with exhibits, to VA in submissions dated November 13, 2020, and December 8, 2021.

§ 3.156(c)(3) requires that, once new and relevant military service department records are associated with a claims file and the veteran's claim reconsidered, if VA makes an award based in any part on such new and relevant official service department records, the effective date to which the claimant is entitled goes back as far on a facts-found basis to when the claimant made the claim application that was the subject of VA's original denial. This effective date provision is more favorable than that which attaches to the reopening of claims under 38 C.F.R. § 3.156(a). *Compare* 38 C.F.R. § 3.156(c)(3) *with id.* § 3.400(q)(2).

VA, meanwhile, has a duty to maximize the award of legally permissible service connected compensation. *See, e.g.*, 38 C.F.R. § 3.103(a); *Morgan v. Wilkie*, 31 Vet. App. 162, 164, 167 (2019). Because proceeding under § 3.156(c) permits an earlier effective date than does § 3.156(a), VA's duty to maximize the award of legally permissible service connected compensation requires VA to base its award of service-connected compensation at least in part on new and relevant official service department records so

long as those records contain sufficient evidence to permit VA to do so.

Here, as Mr. Cooper previously has described, he is a U.S. Air Force veteran. He served in Thailand during the Vietnam Era—including at NKP from April 1966 to April 1967. The CHECO Report confirms the Vietnam-era presence of herbicide agents at NKP while Mr. Cooper was there. Mr. Cooper was diagnosed with prostate cancer in 1994. He also developed impotence, incontinence, and hypertension; and a 1994 surgery that he received for his prostate cancer left him with abdominal scarring. On June 16, 1993, he filed a formal application for service-connected compensation for hypertension. On June 24, 1996, he filed a Statement in Support of Claim asserting entitlement to disability compensation for additional disabilities. VA accepted his filings as applications for service-connected compensation for hypertension, and prostate cancer secondary to herbicide exposure.

Mr. Cooper's intent was and at all times since has been to claim all disability compensation to which the law entitles him–including for all disabilities that his claim documents do not expressly articulate but that they and/or the evidence since developed reasonably have raised. An August 1996 VA Compensation & Pension Examination ordered in connection with his contemporaneous express claims, for example, noted and reasonably raised entitlement as to impotence. And, as VA noted in a December 2018 compensation and pension examination for DMII, Mr. Cooper has had a formal diagnosis of DMII since October 2016, reasonably raising that entitlement as well.

What is more, in May 1997, VA issued a rating decision that expressly denied service connection for, as relevant, "prostate cancer as a result of exposure to herbicides." It denied service connection because it found that there was no "evidence of exposure to herbicides in any ... period of service." "Service records show service in Thailand," the rating decision elaborated, "but no service in Vietnam."

Later, in August 2017, Mr. Cooper filed a formal Intent to File, VA Form 21-0966. And, in July 2018, Mr. Cooper filed a VA Form 21-526EZ formally claiming entitlement to service connection for prostate cancer and DMII. VA denied service connection for both diseases in a rating decision dated January 11, 2019, on the basis that "there is no

basis in the available evidence of record to establish service connection" for the disease and that it "did not happen in military service, nor was it aggravated or caused by service." It noted that it was denying service connection on the theory of exposure to herbicide agents. However, *the CHECO Report had not been associated with the claims file at the time.*

Mr. Cooper timely filed a legacy Notice of Disagreement in April 2019. VA issued a Statement of the Case again denying service connection on February 18, 2020.

Mr. Cooper then timely opted in to the procedures of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), on April 7, 2020 seeking higher-level review of the February 18, 2020, Statement of the Case. On August 24, 2020, VA issued notice of a rating decision that identified a duty-to-assist error in VA's prior adjudication of his entitlement to service connection for DMII and prostate cancer.

While VA's proceedings on return from the higher-level review remained ongoing, on November 13, 2020, Mr. Cooper filed a submission demanding that VA reconsider its original denials of service connection for DMII and prostate cancer pursuant to the provisions of 38 C.F.R. § 3.156(c). In the November 13, 2020, submission, Mr. Cooper provided a copy of the CHECO Thailand Base Defense Report, which VA then associated with Mr. Cooper's claims file.

On May 26, 2021, VA issued notice of a rating decision yet *again* denying service connection for DMII and prostate cancer. Mr. Cooper appealed to the Board. Mr. Cooper argued to the Board that, plainly, the CHECO Thailand Base Defense Report at the very least tends to prove to a claim element that, although VA should have conceded it long ago, remains unestablished: Mr. Cooper was exposed to herbicide agents while serving at NKP. It therefore is relevant. The CHECO Thailand Base Defense Report is an official service department record, having been authored by Department of Defense officers in an official capacity. Having been authored in 1973, it existed when VA denied Mr. Cooper's formal claims in 1997. It was not then associated with the claims file, and it continued not to be associated with the claims file until November 2020.

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What is more, although it is Mr. Cooper's position that establishing service or otherwise a physical presence near the perimeter of a Thailand military base is unnecessary for establishing entitlement to service connection, on July 31, 2018, he submitted an affidavit in which he stated under oath to VA that his barracks at the base were near the perimeter, that the base was small and "we were often near the perimeter," and that "I liked to watch the planes take off so I spent time near the air strip as well." The air strip was near the perimeter.

"One night," Mr. Cooper further stated under oath, "a siren went off and we left our barracks and were told to line up. I was put on a big truck and we rode around the perimeter and were dropped off at spots along the perimeter. We had to guard the perimeter for the rest of the night."

Additionally, on July 31, 2018, Mr. Cooper submitted an affidavit in which a fellow service member stated under oath that he served at NKP with Mr. Cooper, that they "lived in the same barracks," that when he had arrived at NKP "the hooch we stayed in was still right in the jungle" and that they "were told not to go outside at night because the vegetation hid snakes." "At first," he continued, "there was vegetation right by the barracks," but "then the vegetation all magically disappeared." "Still, even though the base was cleared, the barracks were near the perimeter." The affiant, Mr. Parker, further stated that they were "all over the" base, which was "small," including that "Bob Hope came to the amphitheater on base and we were around the amphitheater quite a bit which was right on the perimeter of the base" while they were there."

In its previous April 1, 2022 board decision, the Board granted service connection for DMII and prostate cancer at least partly on the basis of the CHECO Thailand Base Defense Report, citing it as evidence supporting that Mr. Cooper was exposed during his military service to herbicide agents. Then, on July 26, 2022, VA issued a rating decision favorably finding that "You were exposed to herbicides during military service. Your military personnel records confirm service in or near the perimeter of the Nakhon Phanom RTAF base in Thailand, from April 1966 to April 1967." That favorable finding was binding. *See* 38 U.S.C. § 5104A; 38 C.F.R. § 3.104(c). Additionally, it derives at least in part from the official service department records, which VA first received and first

associated with Mr. Cooper's claims file only well after its initial denial, establishing how herbicide agents were present at NKP while Mr. Cooper was there.

Accordingly, pursuant to 38 C.F.R. § 3.156(c)(3), the law entitles Mr. Cooper to service-connected compensation for prostate cancer—as well as SMC(k)—on a facts-found basis effective from June 24, 1996. *See* 38 C.F.R. § 3.156(c)(3) ("An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received *the previously decided* claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to *the previously decided* claim." (Emphases added.)) Making Mr. Cooper whole from the VA administrative errors underlying its denials of Mr. Cooper's formal claims, particularly in the light of Mr. Cooper's plain desire to claim all service-connected compensation to which the law entitles him, also requires concluding that, during those formal claims' pendency, the evidence reasonably raised Mr. Cooper's entitlement to service-connected compensation for DMII effective no later than October 19, 2016, when his blood sugar level scored in the diabetic range. *See* 38 C.F.R. § 3.156(c)(3), (4).

And, as Mr. Cooper previously argued to the Board, VA's November 2010 denial of reopening pursuant to 38 C.F.R. § 3.156(a) does not alter Mr. Cooper's current entitlement reconsideration pursuant to 38 C.F.R. § 3.156(c). The CHECO Thailand Base Defense Report had not been associated with the claims file when VA issued that denial of reopening. Accordingly, VA did not pass upon the CHECO Thailand Base Defense Report directly or any of its contents, including its above statements regarding the presence of herbicide agents at NKP while Mr. Cooper was there. VA also assessed only whether new and "material" evidence warranted section 3.156(a) reopening, bypassing whether new and "relevant" evidence warranted section 3.156(c) reconsideration. It is the long overdue grant of service connection and compensation on reconsideration that Mr. Cooper requests here, effective from June 24, 1996, for the prostate cancer and SMC(k) and no later than October 19, 2016, for the DMII.

If all that were not enough, on August 10, 2022, the President of the United States signed into law the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act ("PACT Act"). Mr. Cooper added to the present

record in August how the House Committee on Veterans' Affairs highlighted how VA's historically narrow approach to recognizing that our country's military veterans who served in Thailand during the Vietnam Era "arbitrarily disqualifies many veterans from receiving the benefits they have earned and need." *See* H. Rept. 117-249, excerpt (Pt. I, pages 1 and 10). Congress's highlighting of VA's "arbitrar[]y" denials to veterans such as Mr. Cooper underscores how reconsidering his claim under 38 C.F.R. § 3.156(c) would help to set right the longstanding wrong that VA's denials beginning before it possessed the CHECO Thailand Base Defense Report and continuing since have caused here.

ISSUE II: HIGHER INCREASED RATING EVALUATION EXCEEDING 10 PERCENT FOR SERVICE-CONNECTED PROSTATE CANCER

VA assigned a rating evaluation of 10 percent, effective from August 3, 2016, for prostate cancer. It did so on the basis of a finding that Mr. Cooper awakens twice at night and has daytime voiding intervals of between two and three hours. The record clearly demonstrates Mr. Cooper's symptoms are and have been more severe than this. In particular, a side effect of Mr. Cooper's radical prostatectomy has been urinary incontinence. As Mr. Cooper stated in his August 27, 2022 VA Form 21-4138, *Statement in Support of Claim*:

> I have had to buy and use absorbent pads that fit inside my underwear everyday since the surgery. Sometimes I have a pressing urge to go and practically have to run to a bathroom. Sometimes I have leakage and worry there may be an odor. I have been walking in the city and have a strong urge to pee. I see a restaurant and ask them if I can use the restroom. "Sorry customers only," is the sometimes reply. I then scream, "I am a man over 65 and I really have to go, Please."
>
> I haven't slept through the night since the surgery. I always wake up two, three, or four times a night to pee. This has been going on

since 1994.

That severity of symptoms warrants a rating evaluation in excess of 10 percent pursuant to 38 C.F.R. § 4.115a.

CONCLUSION

Mr. Cooper is entitled to adjudication pursuant to 38 C.F.R. § 3.156(c), or as initial decision on otherwise pending claims, of his entitlement to service connected compensation for his prostate cancer, DMII, impotence, incontinence, and all other disabilities for which he expressly has asserted a claim or reasonably have been raised to VA. He requests in all cases the maximum rating evaluation, over the maximum retroactive period, that the law permits.

Thank you for your attention to these matters.

John D. Niles (7W5)
CARPENTER, CHARTERED
1525 SW Topeka Blvd, P.O. Box 2099
Topeka, Kansas 66601-2099
(785) 357-5251

JDN/KAE/KH/tm

cc: John A. Cooper

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EXHIBIT

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN A. COOPER,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 23-1092
	)	
DENIS MCDONOUGH, Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g)(2), the parties respectfully move the Court to issue an order vacating and remanding the January 27, 2023, Board of Veterans' Appeals (Board) decision on appeal, which denied entitlement to (1) an effective date prior to August 3, 2017, for the grant of service connection for type 2 diabetes mellitus, (2) an effective date prior to August 3, 2016, for the grants of service connection for prostate cancer and special monthly compensation (SMC) based on loss of use of a creative organ and, (3) an initial rating in excess of 10% for residuals of prostate cancer status post radical prostatectomy.

BASES FOR REMAND

The parties agree that remand is warranted because the Board erred by providing an inadequate statement of reasons or bases, thereby violating 38 U.S.C. § 7104(d)(1).

Earlier Effective Date Issues

Before the Board, Appellant argued that he is entitled to earlier effective dates by application of 38 C.F.R. § 3.156(c) because service department records were associated with his claims file after VA issued its original decision on his claim for service connection for prostate cancer in May 1997. This argument pertains to the submission of a portion of the Project Contemporary Historical Examination of Current Operations (CHECO) Report [R. at 1015-19] in November 2020. Project CHECO was established in 1962 to document and analyze U.S. Air Force experiences in Thailand during the Vietnam War.

Pursuant to 38 C.F.R. § 3.156(c), at any time after VA issues a decision on a claim, if "VA receives or associates with the claims file relevant service department records that existed and had not been associated with the clams file when VA first decided the claim, VA will reconsider the claim." Notably, when 38 section 3.156(c) was amended to read as it does currently, examples of the types of records encompassed by the regulation provided in the Federal Register included declassified records. *See* 70 Fed. Reg. 35388 (June 20, 2005) (Proposed § 3.156(c)(1)(iii), adds "declassified records that could not have been obtained because the records were classified when VA decided the claim" as an example of service department records that may have been unavailable at the time of the prior decision. Declassified records may provide evidence of injuries, exposures, or other events in service that may support a claim for VA benefits. Classified service department records are similar to misplaced records and subsequently

corrected records in that they were unavailable at the time of VA's initial adjudication of the claim. Therefore, it is reasonable to include declassified service department records within the scope of the proposed rule.).

The parties agree that remand of Appellant's earlier effective date issues is warranted because the Board did not sufficiently analyze the applicability of section 3.156(c). Specifically, the Board did not adequately address whether the Project CHECHO report constitutes "relevant service department records that existed and had not been associated with the clams file when VA first decided the claim." 38 C.F.R. § 3.156(c). In this regard, the parties note that the Project CHECO report was initially classified, but was eventually declassified and released to the public.

On remand, the Board shall address adequately Appellant's entitlement to the earlier effective dates on appeal, to include whether the Project CHECO report is a service department record and, if so, whether it existed and had not been associated with Appellant's claims file at the time VA first decided his claims. In doing so the Board must address in its decision, the Board's prior April 2022 decision in which it granted service connection of Appellant's prostate cancer and type two diabetes stating "Given the publicly available information about use of herbicide agents at Nakhon Phanom RTAFB, particularly that contained in Project CHECO, and the competent and credible lay statements submitted in this case, the Board finds the evidence is in approximate balance regarding whether the Veteran was exposed to herbicides in service." [R. 512 (509-513)]. This inquiry shall also include a determination as to whether the Project CHECO report was

classified or declassified at the time of the original May 1997 rating decision that denied Appellant's claim of entitlement to service connection for prostate cancer.

Increased Rating Issue

Prostate cancer residuals are evaluated based on residuals of voiding dysfunction or renal disfunction. 38 C.F.R. § 4.115b, Diagnostic Code (DC) 7528. Appellant's evaluation is based on voiding dysfunction; he is in receipt of a 10% rating, which accounts for daytime voiding intervals between two and three hours or awakening to void two times per night. *See* 38 C.F.R. § 4.15a. A 20 percent rating is warranted for either daytime voiding intervals between one and two hours, awakening to void three to four times per night, or urine leakage that requires the wearing of absorbent materials that must be changed less than two times per day. *Id.*

In the decision on appeal, the Board, relying on a December 2018 examination report, determined that a rating in excess of 10% was not warranted because the evidence did not indicate that Appellant's prostate cancer residuals caused urine leakage or required him to wear an absorbent pad. (BVA Decision at 15). However, the Board did not attempt to reconcile what appear to be inconsistent findings reported on the December 2018 examination report. Specifically, the December 2018 VA examiner indicated that Appellant did not report urinary dysfunction following the 1994 prostatectomy, but also noted that Appellant stated that his "urinary symptoms" started after his prostatectomy and have remained the same with no improvement since that time. *See* [R. at 1341

(1335-44)]. On remand, the Board must reconcile these findings with the evidence contained in the record as to the severity of the veteran's prostate cancer residuals.

CONCLUSION

The parties agree that this joint motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded except that, pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and any right to appeal to the U.S. Court of Appeals for the Federal Circuit of the Court's order on this Joint Motion. The parties respectfully ask that the Court enter mandate upon the granting of this motion.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, Appellant may submit additional argument to the Board consistent with a notice letter that will be sent by the Board. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Board shall provide this appeal expeditious treatment as required by 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully move the Court to vacate and remand the January 27, 2023, Board decision for action consistent with the foregoing discussion.

Respectfully submitted,

FOR THE APPELLANT:

/s/ Ken A. Eiler
KENT A. EILER
JOHN D. NILES
Carpenter Chartered
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

FOR THE APPELLEE:

RICHARD J. HIPOLIT
Deputy General Counsel,
Veterans Programs

MARY ANN FLYNN
Chief Counsel

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

/s/ Debra L. Bernal
DEBRA L. BERNAL
Senior Appellate Counsel (027B)
Office of the General Counsel
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-4305

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 23-1092

JOHN A. COOPER, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

O R D E R

The parties have filed a joint motion to remand this appeal to the Board of Veterans' Appeals. As part of their motion, the parties have affirmatively waived any right to appeal in this matter.

Upon consideration of the foregoing, it is

ORDERED that the motion is granted. The matter is remanded, pursuant to 38 U.S.C. § 7252(a), for action consistent with the terms of the joint motion. *See Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006); *Stegall v. West*, 11 Vet.App. 268, 271 (1998). This order is the mandate of the Court. An application pursuant to 28 U.S.C. § 2412(d), the Equal Access to Justice Act (EAJA), for award of attorney fees and other expenses shall be submitted for filing with the Clerk not later than 30 days from the date of this order.

DATED: July 6, 2023

FOR THE COURT:

/s/ Gregory O. Block
GREGORY O. BLOCK
Clerk of the Court

Copies to:

Kent A. Eiler, Esq.

VA General Counsel (027)

Clerk: KS