IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN A. COOPER, *Appellant,*	)	
v.	)	
DENIS McDONOUGH, Secretary of Veterans Affairs, *Appellee.*	)	Vet. App. No. 23-5693

MOTION TO JOIN JURISDICTIONAL QUESTIONS FOR DECISION

In two of this Court's appeals, the appellants share counsel. Both appeals present the question of what differences exist in the Board of Veterans Appeals' ("Board") jurisdiction and authority to remand in the Legacy appeals system and, on the other hand, its jurisdiction and authority to do so in light of the changes in law brought about by the Veterans Appeals Improvement and Modernization Act of 2017 ("VAIMA"), Pub. L. 115-55, and its implementing regulations. The particular facts on which they present that question range from identical to close permutations. The circumstances of these appeals present an opportunity to join both appeals for the purpose of deciding their jurisdictional questions as, or essentially as, companion cases. Doing so would promote efficiency by permitting the Court to resolve the jurisdictional disputes raised by these appeals before it in one fell swoop.

It also would have jurisprudential benefits. Factual variations such as those underlying both appeals will continue to arise. Deciding their jurisdictional questions together would permit the Court in a single decision to articulate not only what common legal principles govern those questions but also how the principles apply across factual variations. *Cf. Bove v. Shinseki*, 25 Vet. App. 136, 137, 140, 143–45 (2011) (per curiam), *overruled in part on other grounds,*

Dixon v. McDonald, 815 F.3d 799 (Fed. Cir. 2016) (consolidating four appeals to address "whether the 120-day filing period [for appeals] is subject to equitable tolling and, if so, whether the circumstances in each case warrant equitable tolling"). The result would be even more clarity, which would promote efficiency further by narrowing future disputes.

Veteran John A. Cooper ("Mr. Cooper") thus moves pursuant to U.S. Vet. App. Rules ("Rules") 2, 3(e), and 27, and this Court's inherent authority, to join this appeal and *Peter G. Fotopoulos v. Denis McDonough*, Vet. App. No. 23-3844. Peter G. Fotopoulos ("Mr. Fotopoulos") joins this motion. The motion is being filed here, with Mr. Cooper as movant, because the rule of law Mr. Cooper asked this Court consider is identical to the rule of law Mr. Fotopoulos asked this Court consider in his appeal.

The rule of law these appellants ask this Court to recognize, and to apply to each appeal's facts, is as follows. The VAIMA fundamentally changed (1) what constitutes a Board of Veterans' Appeals ("Board") decision and (2) the nature of what a Board order is, even one that issues a remand, under the VAIMA. Each appellant submits that the Court has jurisdiction over his appeal.

ARGUMENT

Mr. Cooper will address the law relevant to joining cases for the limited purpose of deciding together one or more questions within them. *See infra* Part I. He then will argue why the Court should join these appeals' jurisdictional questions for decision. *See infra* Part II.

I. The Law Provides the Court with Broad Discretion to Join Appeals for the Limited Purpose of Deciding Together One Or More Questions Within Them.

This Court may consolidate matters before it *sua sponte* or on motion of a party. U.S. Vet. App. R. 3(e). "Consolidation" is a term that speaks at two levels of breadth. On one level,

it speaks to joining appeals in their entirety and with the expectation that they will proceed together permanently. *See, e.g.*, *Carpenter v. McDonough*, 34 Vet. App. 261 (2021) (noting that the Court granted the appellants' motion to consolidate their appeals for all purposes; also addressing a later, initially unanticipated motion to deconsolidate the cases); *Jones v. Derwinski*, 2 Vet. App. 7 (1991) (*en banc* order) (consolidating appeals for all purposes). *Cf.* Fed. R. Civ. P. 42(a)(2). At a narrower level, it also articulates a rubric within which courts assess whether to join actions for more limited purposes. *See Molden v. Peake*, 22 Vet. App. 177, 177 (2008) ("Although the procedural posture of each case differs, the Court consolidated these cases … to resolve, by panel, [two common questions]."); *see also Bove*, 25 Vet. App. at 137, 140, 143–45. *Cf.* Fed. R. Civ. P. 42(a)(1) ("consolidation" rule permitting courts to "join for hearing or trial any or all matters at issue in the actions").

Thus, although Rule 3(e) does not specifically address consolidation in its narrower form of joining appeals for deciding together one or more questions within them, it permits the Court to do so when "appropriate." This kind of procedural action is appropriate when its expected benefits outweigh its expected costs—including by being in the interest of judicial efficiency. *Cf.* U.S. Vet. App. R. 5(a)(3). This Court has not articulated a comprehensive list of factors for determining when consolidation (either full or limited) promotes judicial efficiency.

Even so, when read together, this Court's decisions suggest that a key factor is simply whether the cases present at least one common issue of fact or law for which consolidated consideration would save time and resources or have other benefits. *See supra* at 3. Additionally, sharing appellate counsel favors consolidation. *See Allen v. Nicholson*, 21 Vet. App. 54, 55 (2007) ("Allen's and Key's appeals were consolidated because both underlying Board decisions are

based upon the same material facts and upon identical issues, and both parties are represented by the same counsel."). So do the jurisprudential benefits of, when opportunity arises, deciding common questions of law on varying fact patterns as companion cases. *See supra* at 1–2.

Other federal courts approach consolidation with these principles. *See Wright & Miller*, 9A Fed. Prac. & Proc. Civ. § 2381 (3d ed.) (describing consolidation's purpose as being to provide "broad discretion" in ordering dockets "so that the business of the court may be dispatched with expedition and economy while providing justice to the parties"); *Huene v. United States*, 743 F.2d 703, 704 (9th Cir.), *on reh'g*, 753 F.2d 1081 (9th Cir. 1984) (noting that a lower court, "in exercising its broad discretion to order consolidation … , weighs the savings of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause"); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (noting that consolidation is favored, at least absent the concern, applicable in jury settings, of potential prejudice and confusion); *In re EMC Corp.*, 677 F.3d 1351, 1360 (Fed. Cir. 2012) ("'[T]he existence of a common question by itself is enough to permit consolidation … , even if the claims arise out of independent transactions.'" (quoting *Wright & Miller*, 9A Fed. Prac. & Proc. Civ. § 2382) (alteration in *EMC*)). Mr. Cooper respectfully submits that the Court continue to do so, and acknowledge that it has discretion to join these two appeals under its Rule 3(e) (or, in the alternative, Rule 2; or, further in the alternative, its inherent authority, *see, e.g.*, *Monk v. Shulkin*, 855 F.3d 1312, 1320–21 (Fed. Cir. 2017).

Accordingly, this Court has broad discretion to join appeals for the limited purpose of deciding together one or more questions within them. Fairness and efficiency should guide it.

II. The Court Should Join These Appeals for the Limited Purpose of Deciding Together the Jurisdictional Questions Within Them.

Fairness and efficiency favor joining these appeals for the limited purpose of deciding together the jurisdictional questions within them. As to fairness, deciding these appeals' jurisdictional questions together would help to ensure that like claimants receive like treatment. It also would permit the Court to address transparently, in the same decision, why any claimant whose circumstances the Court determines to differ from the others, differs meaningfully. The limited nature of the joinder also would permit greater flexibility for the parties in proceeding with the appeals after the Court's decision.

As to efficiency, Mr. Cooper has addressed what in principle should be gained. *See supra* at 1–2. He now addresses the details of why these appeals present the same jurisdictional questions on close permutations of or materially the same underlying facts—and thus, why those theoretical efficiency benefits should come to fruition here.

Both Mr. Fotopoulos and Mr. Cooper received Board decisions issued under the VAIMA system not the Legacy appeals system. In both appeals the Board, determined it could not grant either veteran the benefits they were seeking on appeal. In both appeals the Board remanded their appeals, contrary to the express argument and wishes of both veterans. Mr. Fotopoulos argued the Board could grant the maximum benefit he was seeking in his appeal based on the evidence of record.

> Here, Mr. Fotopoulos has reached an informed conclusion that further development of this claim will be harmful to his claim. Therefore, Mr. Fotopoulos 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. § 5 103A. Since the record already substantiates the claim, it is not reasonable, or necessary to provide any additional assistance.

See Appellant's Response to the Motion to Dismiss of Peter G. Fotopoulos, February 9, 2024, Exhibit A, page 10.

Similarly, Mr. Cooper argued the Board could grant him the maximum benefit he sought on 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 Appellant's Response to the Motion to Dismiss of John A. Cooper, January 29, 2024, Exhibit A, pages A9-A10.

Both veterans went on to argue that, even if they were incorrect, that the evidence was *not* sufficient for the Board to grant them the maximum benefit sought a denial was better than remand. Mr. Cooper argued to the Board

> 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.

Mr. Fotopoulos made the exact same argument

> Mr. Fotopoulos 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.

See Appellant's Response to the Motion to Dismiss of Peter G. Fotopoulos, February 9, 2024, Exhibit A, page 10.

Both veteran's reasoned their evidentiary record would never be the same following a remand by the Board. Their cases will either not be as strong or they will not be as weak. However, both Mr. Cooper and Mr. Fotopoulos wanted, and were entitled, to a decision on the merits and, notably, they got one- the Board denied them the benefit they sought and remanded their cases for additional development. This Court has, in Mr. Cooper's appeal, recognized a three-judge panel is appropriate to consider important questions of first impression for this Court which implicate significant legal issues on the differences in the both the Board's jurisdiction and authority to remand in VAIMA when contrasted with the Legacy appeals system as well as this Court's jurisdiction to review that decision. Deciding Mr. Fotopoulos and Mr. Cooper's jurisdictional questions together would promote efficiency and would be good for the law.

CONCLUSION

For all of these reasons, Mr. Cooper respectfully requests that this Court join for the limited purpose of deciding together the appeals' related jurisdictional questions. The Secretary, through counsel, has advised Mr. Cooper, through counsel, that the Secretary takes no position on this Motion and reserves the right to respond in writing.

Dated: April 10, 2024

Respectfully submitted,

/s/ Kent A. Eiler

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

Counsel for Appellant