REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

18-6798

MARVIN H. JOHNSON,

Appellant

v.

ROBERT L. WILKIE
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Secretary is incorrect that the National Academy of Sciences' (NAS) Updates do not have a "direct relationship" to Mr. Johnson's claim.

In his initial brief, Mr. Johnson argued that, because the Board had actual knowledge of the NAS Updates finding limited or suggestive evidence of an association between hypertension and herbicide exposure, it violated the duty to assist when it failed to obtain a medical opinion as to whether *Mr. Johnson's* hypertension in particular was caused by his in-service herbicide exposure. *See* Appellant's Br. at 15-18. The Secretary responds that the Board's actual knowledge of the NAS Updates is of no importance, because the Updates "were not in the record." Secretary's Br. at 6. He argues that, not only are the Updates physically absent from the claims file, they cannot even be considered constructively in the record under *Bell v. Derwinski* because they do not have a "direct relationship" to Mr. Johnson's claim. *Id.* at 7-13; *see also Bell,* 2 Vet.App. 611, 613 (1992); *Monzingo v. Shinseki*, 26 Vet.App. 97, 102 (2012). The Secretary is mistaken. The NAS Updates indeed have a direct relationship to Mr. Johnson's claim, and they are constructively in the record under the test articulated in *Monzingo*. *See* 26 Vet.App. at 102.

This Court recently revisited the *Monzingo* test in *Euzebio v. Wilkie*, -- Vet.App. --, No. 17-2879, 2019 WL 3955208, at *4-7 (Aug. 22, 2019). The majority held that, to show that a document was constructively before the Board, "an appellant must show that there is a *direct relationship* between the document and his or her claim . . . , even if the document was generated for and received by VA under a statutory mandate." *Id.* at *5 (emphasis in original) (citing *Monzingo*, 26 Vet.App. at 101-03; *Goodwin v. West*, 11 Vet.App. 494, 496 (1998); *Bowey v. West*, 11 Vet.App. 106, 108-09 (1998)). The majority concluded that Mr.

Euzebio had failed to demonstrate a direct relationship between the NAS Update and his claim because the Update at issue only "contains general information about the type of disability on appeal . . . ." *Id.* at *5. In so finding, the majority was careful to note that Mr. Euzebio had not argued that hypothyroidism—the disability discussed in the Update at issue—was the same condition as benign thyroid nodules—Mr. Euzebio's claimed disability. *See id.* at *5 n.4.

However, here, the NAS Updates do not simply "contain[ ] general information about the type of disability on appeal." *Euzebio*, 2019 WL 3955208, at *5. They specifically address the *same* disability on appeal—hypertension—and discuss epidemiological studies demonstrating a link between that *specific* disability and herbicide exposure. *See, e.g., Veterans and Agent Orange: Update 2006*; Health Effects Not Associated With Exposure to Certain Herbicide Agents, 75 Fed. Reg. 32,540, 32,549 (June 8, 2010). And there is no dispute that Mr. Johnson suffers from hypertension and was exposed to herbicides in service. *See* R-7; R-9; R-109; R-578; R-662; *see also* 38 U.S.C. § 1116(f); 38 C.F.R. § 3.307(a)(6)(iii) (2019). Therefore, the Updates at issue in this case have a direct relationship to Mr. Johnson's claim.

In this respect, the NAS Updates differ materially from the Update at issue in *Euzebio*, which did not discuss a link between herbicide exposure and the disability on appeal. *See* 2019 WL 3955208, at *5 n.4. And they differ materially from the reports at issue in *Monzingo*, which did not discuss a specific link between the claimed disabilities and service. *See* 26 Vet.App. at 101. Like the Updates in *Euzebio*, the reports in *Monzingo* "generally discusse[d] hearing loss as it relates to military service . . . ." *Id.* at 103. But, here, the Updates provide more than a "general discussion" of hypertension as it relates to military

service. They provide a *specific* discussion of hypertension as it relates to *herbicide* exposure in service—the precise disability and exposure Mr. Johnson has alleged. *See, e.g., Veterans and Agent Orange: Update 2006*, 75 Fed. Reg. at 32,549. Therefore, unlike the reports at issue in *Euzebio* and *Monzingo*, the Updates at issue here have a direct relationship to Mr. Johnson's claim.

In addition, there is no dispute that the Updates are in VA's possession, as the agency is required by statute to receive and review the reports, and provides links to the reports on its own website. *See* Agent Orange Act of 1991, Pub. L. No. 102-4 § 3(g)(1), 105 Stat. 11 (codified as amended at 38 U.S.C. § 1116); *Health and Medicine Division Reports on Agent Orange,* VA Public Health (last updated Mar. 27, 2019), https://www.publichealth.va.gov/exposures/agentorange/publications/health-and-medicine-division.asp. "It is undisputed," furthermore, "that VA generally knew of the existence of the 2014 Update" by July 2017, more than a year before the Board's decision here. *Euzebio*, 2019 WL 3955208, at *5. Therefore, all criteria of the constructive possession doctrine, as it has been applied in the VA context, are met. *See Monzingo*, 26 Vet.App. at 102. Accordingly, the Court should reject the Secretary's argument that the NAS Updates are not part of the record, and hold that they were constructively in the record before the Board at the time of its decision in this case.

The Secretary raises several procedural concerns that he believes militate against a finding that the NAS Updates were constructively in the record. *See* Secretary's Br. at 10-13. First, he contends that, in holding that the NAS Updates were constructively in the record in Mr. Johnson's case, the Court would be inviting "unforeseeable consequence[s]" because it "would be determining whether the Veteran's herbicide exposure may have caused his

hypertension in the first instance and based on evidence that the Board did not review or consider when deciding Appellant's case." Secretary's Br. at 11. But a holding that the NAS Updates were before the Board does not require the Court to make any specific findings as to the likelihood that herbicide exposure *caused* Mr. Johnson's hypertension.

Rather, at most, such a holding would require the Court to determine whether, based on facts already found by the Board, the NAS Updates have a "direct relationship" to the claim. *Euzebio*, 2019 WL 3955208, at *5; *Monzingo*, 26 Vet.App. at 102. This is a *legal* determination that the Court reviews de novo, while giving deferential treatment to the Board's underlying factual findings. *Cf. Horn v. Shinseki*, 25 Vet.App. 231, 236 (2012) ("The Court reviews de novo a Board decision concerning the adequacy of the evidence offered to rebut the presumption of soundness, while giving deferential treatment to the Board's underlying factual findings and determinations of credibility."). The Secretary's concern that the Court will be forced to make factual findings in the first instance if it holds that the NAS Updates were constructively in the record is therefore unfounded. Indeed, as early as 1992, the Court has found records to be constructively before the Board without adjudicating the merits. *See, e.g., Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992).

The Court should also reject Secretary's suggestion that a holding that the NAS Updates were constructively in *Mr. Johnson's* record would require the agency to "impart knowledge of every single sentence in every internal Board manual or training document to a particular Board member in any given case." Secretary's Br. at 21. As explained above, the NAS Updates have a direct relationship to *Mr. Johnson's* particular case. It does not follow that they have a direct relationship to other veterans' cases, or that other publications or

Board manuals or training documents have *any* relationship to Mr. Johnson's case. Nor has Mr. Johnson suggested that the Court impute knowledge of "every single sentence" of any manual or document to each member of the Board. The Secretary must receive the NAS Updates and "shall take" them into account in deciding whether conditions are related to Agent Orange exposure. 38 U.S.C. § 1116(b)(2). Therefore, this, too, is an unfounded concern.

Finally, the Secretary suggests that, if the Court finds that the NAS Updates were constructively in Mr. Johnson's record, "the Board would be *required* to review this extra-record evidence for the purpose of determining whether a theory was raised by the record, but would be *prohibited* from relying on that same evidence to resolve issues, particularly if that evidence tended to support a finding adverse to the client." Secretary's Br. at 12 (emphases in original). But the Secretary ignores that, when the Board supplements to record with a medical treatise, it must provide the claimant with notice of the evidence and a sixty-day period to respond. *See* 38 C.F.R. § 20.908(b) (2019); 38 C.F.R. § 20.903(b) (2019). In other words, the Secretary has already built in a regulatory safeguard for when claimants have not previously had the opportunity to respond to evidence that the Board intends to rely on to make unfavorable findings. The Court should therefore reject his argument that a holding that the NAS Updates were constructively before the Board in Mr. Johnson's case would prejudice claimants.

II. The Court should reject the Secretary's view that the Board is never required to take official notice of facts not of record, and hold that, if the NAS Updates were not constructively in the record here, the Board erred in refusing to take official notice of them.

The Secretary agrees that "the Board can employ th[e] legal doctrine" of official notice, rendering it aware of the Updates. Secretary's Br. at 21; *see also* Appellant's Br. at 14-15; 38 U.S.C. § 7104(a); 38 U.S.C. § 5103A(d); 38 U.S.C. § 5107(b); 5 U.S.C. § 556(e). However, he suggests that the Board is *never* required to sua sponte take official notice of information, regardless of the circumstances in the individual case. *See* Secretary's Br. at 22. The Court should reject that argument, and hold that in some cases—including Mr. Johnson's—the Board is obligated to take official notice of relevant information, and that its failure to do so here constitutes prejudicial error.

The Ninth Circuit has adopted a similar approach in the Social Security context. *See Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981). The statute controlling SSA adjudication procedures "require[d] that the Secretary's decision be based on evidence adduced at the hearing . . . ." *Id.* at 640 (citing 42 U.S.C. § 1383(c)(1) (1981)). And SSA's claims adjudication system involves "a huge volume of case and the [SSA] ALJ has the affirmative duty in such cases for developing the facts fairly." *Id.* at 640-41. In light of the affirmative duty to develop the facts fairly, the Ninth Circuit held that "the [SSA] ALJ should take notice of adjudicative facts, whenever, 'the ALJ at the hearing knows of information that will be useful in making the decision.'" *Id.* at 641 (citing 3 K. Davis, *Administrative Law Treatise* § 15:18, at 200 (2d ed. 1980)).

Similarly, 38 U.S.C. § 7104(a) provides that the Board's decision "shall be based on the entire record in the proceeding and upon consideration of all evidence and material of

record." The statute does not on its face prohibit the Board from taking official notice of facts outside the record. In that respect, it is similar to the statute and regulation controlling SSA adjudication procedures. *See Banks*, 654 F.2d at 641. Indeed, the Secretary *concedes* that the Board is permitted to take official notice of facts outside the record. *See* Secretary's Br. at 21. And, like the SSA claims adjudication system, VA handles a huge volume of claims and has an affirmative duty to assist a claimant in obtaining evidence necessary to substantiate the claim. *See* 38 U.S.C. § 5103A; *see also Claims Inventory*, Veterans Benefits Administration Reports (last updated Sept. 16, 2019), https://www.benefits.va.gov/reports/mmwr_va_claims_inventory.asp. Therefore, just like an SSA ALJ, a veterans law judge "should take notice of adjudicative facts, whenever, 'the ALJ at the hearing knows of information that will be useful in making the decision.'" *Banks*, 654 F.2d at 641.

Official notice is especially useful and important in the VA benefits context. As the Ninth Circuit has explained, "[a] case before an administrative agency, unlike one before a court, 'is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases[,] . . . [which] often involve fact questions which have frequently been explored by the same tribunal.'" *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992) (quoting Walter Gelhorn, *Official Notice in Administrative Adjudication*, 20 Tex. L. Rev. 131, 136 (1941)). The Board, as an administrative tribunal "learns from its cases." *See id.* at 1026-27.

Indeed, the very same veterans law judge who denied Mr. Johnson's claim has acknowledged the NAS Updates in many other decisions involving other veterans.[1] There is no indication in those decisions that the reports were made part of the claims file. *See supra* note 1. But, when addressing Mr. Johnson's claim, he acted as if he had never heard of the report. This is absurd and cannot be the result that Congress intended when it enacted 38 U.S.C. § 7104(a) and "'place[d] a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions.'" *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (quoting *Shinseki v. Sanders*, 556 U.S. 396, 416 (Souter, J., dissenting)).

Nonetheless, according to the Secretary, Mr. Johnson has no recourse because "the Board can *never err* by not taking official notice of an extra-record fact sua sponte." Secretary's Br. at 22 (emphasis added). The Secretary's position is inconsistent with Congress's solicitude for veterans, as reflected in the statutory scheme for disability claims adjudication, and should be rejected accordingly. *See id.*

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[1] *See* Title Redacted By Agency, No. 10-20 361, 2016 WL 5850220, at *3 (Aug. 19, 2016); Title Redacted By Agency, No. 12-24 590, 2016 WL 8192744, at *2 (Dec. 29, 2016); Title Redacted By Agency, No. 14-34 641, 2018 WL 2681727, at *2 (Apr. 24, 2018); Title Redacted By Agency, No. 13-16 808, 2017 WL 3920621, at *1 (July 21, 2017); Title Redacted By Agency, No. 12-06 678, 2017 WL 6053732, at *1 (Oct. 26, 2017); Title Redacted By Agency, No. 13-28 615, 2017 WL 6878180, at *2 (Nov. 17, 2017); Title Redacted by Agency, No. 13-00 368, 2015 WL 4690951, at *6 (June 24, 2015); Title Redacted By Agency, No. 12-19 153, 2018 WL 1688592, at *14 (Feb. 12, 2018); Title Redacted by Agency, No. 14-09 128A, 2018 WL 1688669, at *13 (Feb. 13, 2018); Title Redacted by Agency, No.14-20 054, 2018 WL 1200739, at *8 (Jan. 24, 2018); Title Redacted by Agency, No. 06-10 049, 2018 WL 1688983, at *16 (Feb. 13, 2018); Title Redacted by Agency, No. 11-03 757, 2016 WL 7659105, at *5 (Nov. 30, 2016); Tile Redacted by Agency, No. 10-41 915, 2017 WL 3411005, at *12 (June 28, 2017); Title Redacted by Agency, No. 13-32 820, 2017 WL 2908388, at *7 (May 30, 2017). The Court can and should take judicial notice of these decisions. *See Hudgens v. McDonald*, 823 F.3d 630, 637 (Fed. Cir. 2016) (considering Board decisions in other cases); *Correia v. McDonald*, 28 Vet.App. 158, 167 n.5 (2016) (same).

The Secretary contends that the Board's failure to take official notice of the NAS Updates should be reviewed under the "abuse of discretion" standard. Secretary's Br. at 21 (citing *Castillo-Villagra v. INS*, 972 F.2d 1017, 1028 (9th Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962, 966 (5th Cir. 1991)). He is mistaken. As explained above, the Board's duty to take official notice of adjudicative facts known to the veterans law judge is not wholly discretionary. As a result, the Court should review the matter under 38 U.S.C. §7261(a)(3)(D) and determine whether the Board's decision was made "without observance of procedure required by law"—the required procedure being the duty to take official notice of relevant information.

This Court employs this standard of review in determining whether the VA complied with a statutory mandate. *See Wilson v. Derwinski*, 2 Vet.App. 16, 21 (1991) (reviewing whether VA obtained an adequate medical opinion, as required by statute, under §7261(a)(3)(D)); *see also Goodsell v. Brown*, 5 Vet.App. 36, 42-44 (1993) (reviewing whether the Board provided an adequate statement of reasons or bases, as required under 38 U.S.C. §7104(d)(1), under §7261(a)(3)(D)). So, too, here, the Board's failure to comply with a statutory mandate–the requirement inherent in 5 U.S.C. § 556(c) and 38 U.S.C. §§ 5103A, 7104 that it take official notice of a fact that is known to the Board, and as the Secretary concedes the Board is permitted to do–should also be reviewed under this standard. Because this is a purely legal inquiry, the Court should review the matter de novo. *See Faust v. West*, 13 Vet.App. 342, 348 (2000) (holding that whether the Board applied pertinent VA regulations is reviewed de novo).

Accordingly, the Court should conclude on de novo review that the Board was required in this case to take official notice of the NAS Updates. First, as explained in Mr. Johnson's initial brief, there can be no dispute that the Board "knows of" the NAS Updates, and that these updates are "useful in making the decision" in Mr. Johnson's case. Appellant's Br. at 8-9, 15-18; *see also Banks*, 654 F.2d at 641. In its internal procedural manual, the Board explicitly stated that VA is on notice of the information in the NAS Updates, and the Secretary has conceded as much before this Court. *See* Board of Veterans' Appeals, *The Purplebook* at 115 (1.0.2 version Sept. 2018); *Euzebio*, 2019 WL 3955208, at *5. And, as explained in the initial brief and more below, the Updates provide information that is helpful to the Board in decided Mr. Johnson's claim, because they establish that the NAS has found limited or suggestive evidence of an association between hypertension and herbicide exposure. *See* Appellant's Br. at 15-18; *see also McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006).

Moreover, the information contained in the NAS Updates is precisely the type of information of which agencies may take official notice. "[O]fficial notice is broader than judicial notice insofar as it allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise." *Sykes v. Apfel*, 228 F.3d 259, 271 (3d Cir. 2000). "The logic behind this expanded scope of official notice is that since 'administrative agencies necessarily acquire special knowledges in their sphere of activity,' certain highly technical facts 'may be come, to the administrators, as obvious and notorious facts as facts susceptible of judicial notice are to judges." *Union Electric v. F.E.R.C.*, 890 F.2d 1193, 1202-03 (D.C. Cir. 1989).

This characterization of the type of facts of which agencies are expected to take official notice aptly describes the information contained in the NAS Updates. Congress directed the NAS to prepare these studies exclusively for VA's use in determining whether to create a presumption of service connection for certain diseases, and VA is required to receive them on a regular basis. *See* Agent Orange Act of 1991, Pub. L. No. 102-4 § 3(g)(1), 105 Stat. 11. And, as explained above, the contents of the report are no secret to the Board; they are instead facts that are "obvious and notorious to the Board." *Union Electric*, 890 F.2d at 1202-03. The reports also contain highly technical scientific facts about epidemiologic relationships between the chemicals found in Agent Orange and certain diseases. *See, e.g., Veterans and Agent Orange: Update 2006*, 75 Fed. Reg. at 32,549. Therefore, official notice of the facts contained in the NAS Updates is appropriate.

The Secretary argues that the Board may not take official notice of the fact that Mr. Johnson's hypertension might be related to his in-service herbicide exposure. *See* Secretary's Br. at 22-23. But the Veteran has not suggested that the Board was required to take official notice that *his* hypertension might be related to his herbicide exposure. Rather, he argued that the Board was required to take official notice only "of the information contained in the NAS reports"—namely, that there is limited or suggestive evidence of an association between hypertension and herbicide exposure. Appellant's Br. at 7, 14. As explained above, this is precisely the type of information of which courts *expect* agencies to take official notice. *See Sykes*, 228 F.3d at 271; *Union Electric*, 890 F.2d 1202-03. The Secretary's argument conflates Mr. Johnson's argument about the information of which the Board should have taken official notice with his arguments as to the *merits* of the claim (namely, whether the

McLendon elements have been met). *Compare* Appellant's Br. at 14, *with id.* at 15-18. It should be rejected accordingly.

Therefore, even if the Court were to agree with the Secretary that the Board has unfettered discretion to decide whether to take official notice of the NAS Updates, and that the Court may review only whether the Board abused that discretion, it should still find that error occurred here. *See* 38 U.S.C. § 7261(a)(3)(A). There is no dispute that the Board had actual notice of the information in the NAS Updates. *See The Purplebook* at 115; *Euzebio*, 2019 WL 3955208, at *5. Nor is there any dispute that the NAS concluded in the Updates that there is limited or suggestive evidence of an association between herbicide exposure and hypertension. *See, e.g., Veterans and Agent Orange: Update 2006*, 75 Fed. Reg. at 32,549. Indeed, the very same veterans law judge who decided Mr. Johnson's claim has repeatedly demonstrated actual knowledge that the NAS Updates have found limited or suggestive evidence of such an association. *See supra* note 1. Yet the Board inexplicably refused to do so in Mr. Johnson's case, and the Secretary has not offered any rationale as to why it was proper for the Board to do so in other cases but not this one. Therefore, even assuming the Board has wide discretion in deciding whether to take official notice of the NAS Updates, it abused that discretion here.

Finally, the Secretary suggests that, regardless of whether the Board takes official notice of the NAS Updates, the Court does not have jurisdiction to review the Updates. *See* Secretary's Br. at 6, 24-25. But the law is well settled that this Court has authority to take judicial notice of facts not subject to reasonable dispute. *See, e.g., Smith v. Derwinski*, 1 Vet.App. 235, 238 (1991). That the Updates demonstrate that the NAS has found limited

or suggestive evidence of an association between herbicide exposure and hypertension is not subject to reasonable dispute. *See The Purplebook* at 115; *Veterans and Agent Orange: Update 2006*, 75 Fed. Reg. at 32,549; Health Outcomes Not Associated With Exposure to Certain Herbicide Agents, Veterans and Agent Orange: Update 2008, 75 Fed. Reg. 81,332, 81,334 (Dec. 27, 2010); Determinations Concerning Illnesses Discussed in National Academy of Sciences Report: Veterans and Agent Orange: Update 2010, 77 Fed. Reg. 47,924, 47,927 (Aug. 10, 2012); Determinations Concerning Illnesses Discussed in National Academy of Sciences Report: Veterans and Agent Orange: Update 2012, 79 Fed. Reg. 20,308, 20,310 (Apr. 11, 2014).

Therefore, the Court can and should take judicial notice of the contents of the NAS Updates. As explained in Mr. Johnson's opening brief, the Secretary himself has offered a similar report for the Court's consideration, even though the report was not in the claims file, and the Court took judicial notice of it. *See Gray v. McDonald*, 27 Vet.App. 313, 322 n.7 (2015). The Secretary concedes that it was appropriate for the Court to do so in that case, but does not offer any reason it would be inappropriate to do so here. *See* Secretary's Br. at 24-25. Therefore, Court should reject the Secretary's inconsistent position.

III. The Court should remand the claim for the Board to obtain a medical opinion addressing the relationship between Mr. Johnson's hypertension and herbicide exposure or, at the very least, for the Board to apply 38 U.S.C. § 5103A(d)(2) in the first instance.

Mr. Johnson argued in his initial brief that the NAS Updates reasonably raise the theory of entitlement to service connection for hypertension based on herbicide exposure. *See* Appellant's Br. at 17. The Secretary disputes this, but based solely on the mistaken premise that the Updates were not constructively in the record and the Board had no duty to

take official notice of them. *See* Secretary's Br. at 25-26. The Secretary does not and cannot argue that the theory is not raised if the Court agrees that the Board was required to consider the Updates. *See id.* As a result, the Court should hold that the theory was reasonably raised.

The Veteran further argued that, because there can be no legitimate dispute that the NAS Updates provide an "indication" that his hypertension "may be" related to service, and that all other elements of 38 U.S.C. § 5103A(d)(2) are met, the Court should order the Board to obtain a medical opinion. Appellant's Br. at 16-17. The Secretary responds that "the Board committed no error because a generalized statement in the Federal Register does not satisfy the specific standard [of 38 U.S.C. § 5103A(d)(2)]." Secretary's Br. at 28. The Secretary's interpretation of § 5103A(d)(2) is directly contradicted by this Court's holding in *McLendon* that "[t]he types of evidence that 'indicate' that a current disability 'may be associated' with military service include . . . medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits . . . ." 20 Vet.App. at 83. Therefore, the Secretary's argument that only information or evidence *specific* to Mr. Johnson can satisfy § 5103A(d)(2) should be rejected.

Further, under the standard articulated in *McLendon*, there is no reasonable possibility that the Board could, as the Secretary suggests, "review the [NAS Updates] and find that they were too weak to indicate that Appellant's hypertension may be associated with his herbicide exposure." *Contra* Secretary's Br. at 28. The Court should therefore vacate the Board's decision and remand for the Board to obtain a medical opinion addressing the relationship between Mr. Johnson's hypertension and herbicide exposure. At the very least, Mr. Johnson agrees with the Secretary that the Court should remand for the Board to

address the elements of 38 U.S.C. § 5103A(d)(2) in the first instance. *See* Secretary's Br. at 28.

CONCLUSION

The Board—indeed, even the particular veterans law judge who decided Mr. Johnson's claim—is well aware that the NAS Updates provide limited or suggestive evidence of a link between the specific disability claimed by Mr. Johnson and the specific herbicides to which he is presumed to have been exposed during his combat service in Vietnam. The existence of this information is no secret to either the Secretary or this Court; indeed, the only populations involved in the VA claims processing system that are likely to be *un*aware of the NAS Updates are the disabled veterans and their families who seek assistance from VA. Yet the Secretary maintains that the Board had no obligation to consider this information in processing Mr. Johnson's claim, despite its direct relationship to his claim and the Board's affirmative duty to take official notice of the information in this case.

The Court should reject the Secretary's position as inconsistent with the solicitude that Congress meant to bestow onto veterans and their families in the course of processing their claims for benefits. Instead, the Court should vacate the Board's decision and remand Mr. Johnson's hypertension claim for VA to obtain a medical opinion as to the relationship between his disability and his in-service herbicide exposure or, at the very least, to provide an adequate statement of reasons or bases as to whether a medical opinion is required.

Respectfully submitted,

/s/ Amy F. Odom

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