In the
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

KENNETH M. CARPENTER,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. 19-1136
	)	
DENIS MCDONOUGH,	)	
in his capacity as	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

MOTION FOR PANEL RECONSIDERATION OR FULL COURT REVIEW

The Appellant, Kenneth Carpenter ("Mr. Carpenter"), respectfully moves pursuant to U.S. Vet. App. R. 35(a)(1) for panel reconsideration or, in the alternative, full Court review. The Court's February 24, 2021, decision warrants panel reconsideration because it overlooks or misunderstands the distinction in this case between error and prejudice. *See infra* Part I. Alternatively, this case warrants full Court review to overturn an exceptionally important error in *Green v. McDonald*, 28 Vet. App. 281 (2016) (per curiam order). *See infra* Part II.

I. The February 24, 2021, Decision Warrants Panel Reconsideration Because It Overlooks Or Misunderstands the Distinction Between Error and Prejudice.

A decision warrants reconsideration when the Court has overlooked or misunderstood a point of law or fact, and an issue before the Court satisfies one or more of the *Frankel* factors. *See* U.S. Vet. App. R. 35(e)(1)–(2); *Frankel v. Derwinski*, 1 Vet. App. 23, 25–26 (1990). The Court submitted this appeal to a three-judge panel and issued a precedential decision. Plainly, one or more of the issues before the Court here satisfies *Frankel*. The key question for panel reconsideration is whether the Court has overlooked or misunderstood a point of law or fact.

It has. Principally, the Court overlooked or misunderstood the distinction in this case between Mr. Carpenter's burden to show (i) error in the October 31, 2018, Board of Veterans' Appeals ("Board") decision that upheld the Secretary's categorical bar against VA-accredited attorneys' unaccredited supervisees from receiving remote access to consenting clients' Veterans Benefits Management System ("VBMS") eFolders; and (ii) any error's prejudice.

To show error, an appellant must establish that the Board violated or misinterpreted a statute, regulation, or controlling rule of law; clearly erred on an issue of fact; or provided an inadequate statement of reasons or bases for its findings and conclusions. *See, e.g.*, *Gudinas v. McDonough*, __ Vet. App. ___, 2021 WL 1431672, at *6 (Apr. 16, 2021) (noting this Court's review for clear errors of fact and for inadequate statements of reasons or bases); *Hatfield v. McDonough*, __ Vet. App. ___, 2021 WL 855176, at *4 (Mar. 8, 2021) (review for errors of law).

Once the appellant has shown error, the burden to show prejudice is light. The appellant need only show that a Board error "(1) prevented the claimant from effectively participating in the adjudicative process, or (2) affected or could have affected the outcome." *Simmons v. Wilkie*, 30 Vet. App. 267, 279 (2018); *accord Sheppard v. McDonough*, __ Vet. App. ___, 2021 WL 958556, at *7 (Mar. 15, 2021) (citing *Simmons*; requiring, for prejudice, only that the appellant "identify … newly submitted evidence" to establish the point at issue or "argue that he has any such evidence to have provided the Board"); *see* Initial Br. at 15–20, 23, 24, 26–27, 29–30, Exs. 1–2 (filed Dec. 2, 2019); Reply Br. at 5–10, 12, 15 (filed May 13, 2020).

Here, the Court overlooked or misunderstood the distinction in this case between those two burdens. As background, the Board conceded when relying on *Green* that "[i]t is possible the assumptions and factual premises underl[y]ing … *Green* … have changed." Initial

Br. at 19 (quoting R. at 7 (1–13)). Mr. Carpenter contends that the Board erred because it "failed to address whether those assumptions and factual premises *had* changed." *Id.* (citing 38 U.S.C. § 7104(d)(1)). He contends that the error is prejudicial because the Board reasonably could conclude that *Green*'s assumptions and premises indeed have changed. *See id.* at 19–20 & Exs. 1–2; Reply Br. at 10. To help show this prejudice, Mr. Carpenter exhibited to the Initial Brief two relevant documents that were not in his claims file. It is largely from this background that the Court's decision warrants panel consideration for the following five reasons.

First, Mr. Carpenter did not exhibit the two documents to the Initial Brief merely to ask this Court to factor them in to its own, first-instance analysis as to whether *Green* has self-abrogated (or whether the Secretary's categorical bar of access violates the U.S. Constitution). Mr. Carpenter repeatedly has requested the remedy of setting aside the Board's decision and remanding for the Board to address that in the first instance. *See* Initial Br. at 19, 29–30; Reply Br. at 9, 15. Yet the Court focused exclusively inward, assessing only whether Mr. Carpenter had "persuaded us how we can consider anything but the plain language of the regulations and *Green*'s controlling analysis." __ Vet. App. ___, 2021 WL 710979, at *7 (Feb. 24, 2021).

In so doing, the Court overlooked or misunderstood that the pertinent issue is not how *Green*'s self-abrogation should be decided by it in the first instance. Instead, in this particular case, given the Board's particular analysis (and lack thereof), the issue is whether Mr. Carpenter has shown a reasonable possibility that *Green* would be determined to have self-abrogated by the Board in the first instance. *See supra* at 2. Panel reconsideration is warranted for the Court to address whether, but for any or all of the Board's errors, the Board would have or at least could have concluded that *Green* has self-abrogated.

Second, this Court, writing on February 24, 2021, articulated that it "is limited in what material it may review, *see* 38 U.S.C. §§ 7252(b), 7261(c)." 2021 WL 710979, at *6; *see also id.* at *7 (determining Mr. Carpenter's argument to be underdeveloped when evaluated against what an appellant must show to demonstrate *error* as opposed to an error's *prejudice*, and noting that the Court would not examine *Green* based on "extra-record evidence annexed to the … brief"). The Court cabined its discussion to only the set of the documents that VA had chosen to include in Mr. Carpenter's claims file. *See id.* at *6–*7. The Court's opinion does not address the Initial Brief's exhibits. *See id.* This is so despite that the Secretary possessed the exhibited documents at the relevant time and that, given what documents the Secretary apparently chose to add to the administrative record here, Mr. Carpenter would have expected the Secretary would have added the exhibited documents as well. *See* Initial Br., 19–20; Reply Br. at 7–10.

An intervening, precedential Federal Circuit decision warrants reconsideration of this part of the Court's decision. On March 3, 2021, in *Euzebio v. McDonough*, the Federal Circuit altered this Court's legal landscape regarding section 7252(b) by overturning as overly restrictive a line of this Court's precedents regarding the standard for constructive possession. *See* 989 F.3d 1305, 1309, 1319–20, 1321 (Fed. Cir. 2021). Rejecting this Court's more restrictive standards, the Federal Circuit held, "[t]he correct standard for constructive possession … is relevance and reasonableness." *Id.* at 1321. As it elaborated,

> where the Board has constructive or actual knowledge of evidence that is relevant and reasonably connected to the veteran's claim, but nonetheless fails to consider that evidence, the Veterans Court must ensure that Board and VA decisions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and remand for further consideration or explanation where appropriate.

Id. (internal quotation marks and citations removed).

Here, for essentially the reasons that Mr. Carpenter has addressed, the Initial Brief's exhibits meet that standard. *See* Initial Br. at 19–20, 26–30; Reply Br. at 7–10, 14–15. They were within the Board's constructive or actual possession, and they relate to *Green*'s self-abrogation because they speak to pertinent technologies that have developed since *Green*. They also help to show the prejudice in VA's mishandling of Mr. Carpenter's claims file.

Accordingly, though this Court concluded on February 24 that its then-controlling precedents barred it from considering the Mr. Carpenter's exhibits, the Federal Circuit's *Euzebio* decision now requires that it consider them. *See Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992). This development further warrants panel reconsideration. *See Frazier v. Tran*, Vet. App. No. 19-7587, Order Denying Full Court Review, at 2 (Feb. 2, 2021) (Toth, J., concurring) (unpublished; cited only for persuasive value) (agreeing with denial of initial en banc review because "[a] panel is fully capable of determining whether intervening higher authority has vitiated the continuing validity of one of this Court's precedents." (citing *Ward v. Wilkie*, 31 Vet. App. 233, 241 (2019); *Noah v. McDonald*, 28 Vet. App. 120, 128 (2016); *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014))).

Third, the Court overlooked or misunderstood Mr. Carpenter's argument that it must deem the Board's failure to address *Green*'s self-abrogation to be prejudicial due to the *Chenery* doctrine. *See* Initial Br. at 19 (quoting this Court's articulation of the *Chenery* doctrine in *Ray v. Wilkie*, 31 Vet. App. 58, 74 (2019)). *Chenery* requires the agency to provide its contemporaneous reasons for its actions. *See Ray*, 31 Vet. App. at 74 (quoting *Pub. Media Ctr. v. FCC*, 587 F.2d 1322, 1332 (D.C. Cir. 1978); citing *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 764 (1973) *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80, 95

(1943)). No *post hoc* rationalization before a reviewing court may support affirmance. *See, e.g.*, *id.*; *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1909 (2020). Accordingly, under *Chenery* as well as 38 U.S.C. § 7104(d)(1), whether technological developments have caused *Green* to self-abrogate is an issue that the Board must address in the first instance.

Fourth, in addressing the Secretary's violation of 38 U.S.C. § 5904, the Court either overlooked or misunderstood the nature of Mr. Carpenter's assertions of harm. *See* 2021 WL 710979, at *9. The Court described the asserted harm as "hypotheticals and speculative harms" when Mr. Carpenter has asserted the real, concrete harms of (1) diminished capacity to accept representations, (2) delay, and (3) increased risk of missing clients' deadlines. *See* Initial Br. at 22–23; Reply Br. at 11–12.[1] In this regard, the Court's analysis hearkens more to the concrete, particularized harm requirements of standing rather than to the distinct standards, applicable here, for establishing an error's prejudice. *Compare, e.g.*, *Rosinski v. Wilkie*, 31 Vet. App. 1, 6 (2019) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)), *with, e.g.*, *Simmons*, 30

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[1] The Court also found that Mr. Carpenter's and his former co-party's "argument that the Board applied an erroneous standard to establish prejudice is undeveloped." 2021 WL 710979, at *9. "In essence," the Court continued, "they criticize the Board for noting that they have not shown a specific instance of harm. But they do not dispute that their arguments reflect potential harm and, although they contend that '[t]hat severity of harm is not necessary to establish prejudice,' they do not proffer what standard should apply, nor elaborate any further on their assertion." *Id.*

This finding reflects a misunderstanding of Mr. Carpenter's argument. To repeat, he has asserted actual diminishment in capacity to represent our country's veterans, actual delay, and actual risk of missing client deadlines. The Secretary has injected an additional consideration on top of that, misconstruing Mr. Carpenter's argument and blithely suggesting that, in speaking against the Secretary's harmful bar of access, perhaps Mr. Carpenter ought to be the subject of an ethics inquiry. *See* Reply at 11 & n.1 (responding to this incautious argument). Meanwhile, as Mr. Carpenter has addressed further above, he has asserted and applied this Court's permissive standard for showing an error's prejudice. This part of the Court's decision, in short, also warrants panel reconsideration.

Vet. App. at 279–85. And, even if the requirements for standing were what controlled the question here, Mr. Carpenter plainly meets them. *See, e.g.*, *Rosinski*, 31 Vet. App. at 6–10.

Fifth, this Court's February 24, 2021, decision also heightened the showing necessary from Mr. Carpenter as to this case's Due Process issues from being the permissive standard for demonstrating an error's prejudice to, instead, that for demonstrating error. *See* 2021 WL 710979, at *10–*12. It is not in dispute that "the Board did not discuss these [Due Process] assertions." *Id.* at *10. Even so, the Court held that "remand is not required … because (1) the Court reviews constitutional questions de novo; (2) their arguments were not developed; and (3) as set forth above, they have not established error in the Board's determination that VA's categorical bar does not preclude effective representation." *Id.* (citations omitted).

But Mr. Carpenter did not raise purely a Constitutional argument. He stated that "[t]he Board failed to address Due Process, erring under 38 U.S.C. § 7104(d)(1)." Initial Br. at 24. The fact of the Board's failure to address the issue, combined with the Board's statutory duty under 38 U.S.C. § 7104(d)(1), establishes error. *See* Initial Br. at 27, 30 (citing *Tucker v. West*, 11 Vet. App. 369, 374 (1998), and *Allday v. Brown*, 7 Vet. App. 517, 527 (1995)). Mr. Carpenter did not, to be sure, devote pages and pages of analysis to belaboring this point; but it is both straightforward and one that this Court unfortunately sees all of the time. Mr. Carpenter respectfully requests that the panel reconsider this part of its decision as well.

II. This Case Warrants Full Court Review to Overturn *Green*.

Mr. Carpenter alternatively requests full Court review because the Court's decision in *Green v. McDonald* is, with the greatest of respect, wrong. This appeal illustrates the error's exceptional importance.

The Secretary has chosen to elevate VBMS eFolders to become the official copy of the administrative record. *See* Initial Br. at 4. The Secretary in turn has chosen to maintain eFolders' only copy on the same computer system that houses VA's internal informational technology system. *See* Initial Br. 19–20 & Exs. 1–2; Reply Br. at 10. Because that is where the Secretary has chosen to lock away the eFolders, and also out of a misplaced and overreaching concern about claimants' privacy, the Secretary has restricted access to the administrative record to only those individuals who have completed the lengthy, arduous, and—for many—what otherwise would be unnecessary process of securing VA accreditation to prepare, present, and prosecute claims before VA. *See* Initial Br. at 5–6; Reply Br. at 10. That is so even when the claimant has consented to his or her representative delegating to supervisees such administrative tasks as reviewing the administrative record for updates.

The result swamps VA-accredited representatives with such otherwise delegable tasks, undermining their ability to do what our country's military veterans, dependents, and survivors have retained them to do—apply their more substantive expertise to assist the claimants competently and diligently before the agency. *See* Initial Br. at 6–8, 20–23; Reply Br. at 10, 11, 12. That has far-reaching consequences. It undermines claimants' ability to find and retain a representative by reducing how many clients any single representative can accept. The reduction in capacity also makes it more difficult for existing representatives to keep the lights on, and increases significantly the barrier to entry in representing VA claimants at all. *See* Initial Br. at 1, 7–8, 22–23; Reply Br. at 1–2; Appellants' Resp. to Court Order of July 16, 2020, at 1–2, 4–6 (filed July 30, 2020). For claimants who are fortunate enough to secure a representative, the Secretary's unilateral prohibition of delegating these time-consuming but administrative

tasks causes delay—bad both of itself and because it increases the risk of missing VA claims deadlines. *See* Initial Br. at 7, 22–23; Reply Br. at 12.

These are major concerns. As noted, they undermine accredited representatives' ability to help claimants in VA proceedings competently and diligently. They undermine claimants' ability to exercise their rights to competent representation in VA proceedings, by (1) reducing current representatives' capacity to offer representations, (2) increasing the barrier to entry for potential new representatives, and (3) adding to the kinds of delay and costs that ultimately force many representatives to exit this vocation. Meanwhile, the categorical nature of VA's bar to access means that it affects thousands upon thousands of stakeholders. The harms reach beyond private representatives and the claimants who retain them—also affecting, for example, law school clinics. *See* Br. of Amicus Curiae NLSVCC, at 7–10 (filed Dec. 9, 2019) (regarding merits); Br. of Amicus Curiae NLSVCC, at 3 (filed Aug. 19, 2020) (opposing stay).

For all that, as seven members of last Congress's Senate Committee on Veterans' Affairs identified, the Secretary's articulated concerns regarding proposed, related VBMS access restrictions do not hold water. *See* Apr. 17, 2020, *Solze* Notice [Regarding SCVA Letter], Att. at 1 ("Limiting access in the name of efficiency or privacy is unnecessary in a veteran-friendly system, especially when it is the veteran who grants access to their case file to these specific individuals for assistance."); *see also* Cmts. of Am. Bar Ass'n to Proposed Rule, at 2–3 (Apr. 20, 2020) (arguing that such prohibition is "unnecessary given the many other legal and ethical protections that exist to protect a client's private information … and would harm veterans" and that, "if an attorney must spend her time on administrative tasks such as these, her time spent performing the actual practice of law is thereby limited. This results in less

available legal services for veterans … ."); Cmts. of NLSVCC to Proposed Rule, at 2 (Apr. 20, 2020) (noting pre-1988 history of administrative record access, including that "it was the VA who stood up for … nonlawyers by correctly countering [against a complaint of 'inadequate controls' on nonlawyer assistance] that such staff members are an administrative extension of the attorney"); Cmts. of Paralyzed Veterans of Am. to Proposed Rule, at 2 (Apr. 20, 2020) ("Simply put, representatives cannot do their jobs without access to their clients' records. If representatives cannot access information that VA controls to serve their clients, VA has failed veterans and only hurts itself …"; yet, "[i]nstead of ensuring all representatives have the tools to provide veterans the best advice and meet their professional obligations, VA seems to be asserting that its own IT limitations somehow trump a veteran's statutory right to a representative or that representative's obligations to their client.").

Meanwhile, on the correct understanding, VBMS eFolders constitute "pertinent Veterans Benefits Administration automated claims records" for which the Secretary by regulation has promised that persons working under the supervision of a claimant's designated representative "may qualify" for read-only access. 38 C.F.R. § 14.629 (Note); *see Recognition of Organizations and Accreditation of Representatives, Attorneys, and Agents*, 68 Fed. Reg. 8,541, 8,543 (Feb. 24, 2003) ("[W]e are adding a note at the end of § 14.629 to clarify that persons working under the supervision of a claimant's designated representative may qualify for read-only access to the claimant's Veterans Benefits Administration automated claims records.").

The access that § 14.629 (Note) addresses is to VBA automated claims records "as described in §§ 1.600 through 1.603." Sections 1.600 through 1.603 do not define the term "automated claims records." *See* 38 C.F.R. §§ 1.600–.603; *Green*, 28 Vet. App. at 290 ("Standing

alone §§ 1.600-.603 do not define 'automated VBA claims records' or 'automated claimants' claims records.'"). Despite the litigation positions that the Secretary's attorneys have advanced here and in *Green*, the Secretary has made plain since *Green* that the Secretary understands the term "VBA automated claims records" to encompass VBMS.

The Secretary has done so including as follows. The Secretary, in submissions to Congress, has been floating legislation "to collect a reasonable fee necessary to offset the costs of performing background and other investigations needed for credentialing accredited attorneys and claims agents before they can access the automated VBA records of claimants whom they represent." VA Ann. Budget Submission, FY2020, Vol. I, at LegSum-17; VA Ann. Budget Submission, FY2019, Vol. I, at LegSum-20. VA performs those investigations to credential accredited representatives to access VBMS, making plain that the Secretary now interprets "automated VBA records" to embrace VBMS. *See* R. at 51–56. And when VA grants access to VBA automated claims records, that access may be remote. *See* 38 C.F.R. § 1.600(b).

It is true that the Secretary has by regulation limited access within one of VA's several systems that contain VBA automated claims records: the Benefits Delivery Network ("BDN"). *See* 38 C.F.R. § 1.600(c). The BDN predates VBMS. *See* Initial Br. at 2. It holds basic, summary claims information such as "name, social security number, gender, date of birth, and military service information"; and "folder location, claims status, establishment date, processing and history." Initial Br. at 2 (citing *Green*, Vet. App. No. 16-740, Sec'y's Suppl. Mem. of Law, at 4 (July 19, 2016)). Section 1.600(c) does not prevent access *to* that system but, instead, merely *within* it. It limits representatives' and supervisees' access within BDN to certain "inquiry

commands" and data, which § 1.600(c)(1) and (2) specify. Aside from those specific BDN access limitations, though, § 1.600(c) does not affect access to VBA automated claims records.

The specificity and narrowness of § 1.600(c)'s limitations make sense. By contrast, interpreting § 1.600(c)'s carve-out to restrict *all* automated claims records access to *only* the specified inquiry commands and data within the one particular system, BDN, that § 1.600(c) identifies would swallow nearly the entire provision of VBA automated claims records access, in whatever form automated claims records developed over time, without any consideration of precisely what § 1.600(c) would be barring. Such a sweeping exclusion, in turn, would undermine the purpose for which the Secretary has provided access to VBA automated claims records in the first place: "assisting the individual claimant whose records are accessed in a claim for benefits administered by VA." 38 C.F.R. § 1.600(b)(3); *accord id.* § 1.602(a)(5).

Additionally, the Secretary attaches severe penalties, up to and including "access privileges … to all claimants' records in the VBA automated claims benefits systems," for infractions including accessing or attempting to access "data other than the data specified in these regulations." *Id.* § 1.603(b), (b)(3). The reference here to "VBA automated claims benefits *systems*," by comparison to § 1.600(c)'s reference to only a single *system*, the BDN, also shows the Secretary's intent to cabin § 1.600(c)'s limitations to just that one *system*.

Section 1.600 thus, quite sensibly, use the following structure. First, paragraph (a) sets out a broad scope of VBA automated claims records systems access that a veterans' advocate may receive. The breadth provides flexibility, permitting access to VBA automated claims records systems without the need for a new regulation each time that they change or develop. Second, paragraph (b) addresses when this access may be remote. Third, paragraph (c)

delineates specific exceptions regarding access for particular records in particular, known, existing systems. There also is a paragraph (d), which recites that "[s]ections 1.600 through 14.603 are not intended to, and do not" waive sovereign immunity or create any enforceable rights or benefits. Even by its own terms, the paragraph does not stretch to section 14.629.[2]

Within the structure that the Secretary chose for § 1.600, then, if the Secretary had wanted categorically to restrict VBMS records access for VA-accredited representatives or their unaccredited supervisees, the way to accomplish that would have been to promulgate new regulatory restrictions, following the format of § 1.600(c)'s restrictions regarding BDN, to specify the particular restrictions for VBMS. The Secretary has not done so, which in turn indicates an intentional choice not to. *Cf. Yonek v. Shinseki*, 722 F.3d 1355, 1359 (Fed. Cir. 2013) ("Where [an agency] includes particular language in one section of a regulation but omits it in another …, it is generally presumed that [the agency] acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (alterations in *Yonek*)).

In short, nothing in §§ 1.600 through 1.603 suggests that VBMS, or any other system in which VBA maintains electronic records,[3] falls beyond what these access regulations

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[2] This Court appears to have interpreted § 1.600(d)(2)'s reference to §§ 1.600 "through 14.603" to reflect a scrivener's error, characterizing the paragraph to "provide[] that §§ 1.600-.603" do not create rights. 2021 WL 710979, at *2. Mr. Carpenter agrees; § 1.600(d)(2) cannot possibly have been intended to sweep the entire span of §§ 1.600 "through 14.603."

[3] *See Privacy Act of 1974; System of Records*, 77 Fed. Reg. 42,594, at 42,594–95 (July 19, 2012) (identifying VBMS, BDN, and the Veterans Service Network as belonging within the same VBA system of records); *Privacy Act of 1974; System of Records*, 84 Fed. Reg. 4,138, at 4,140 (Feb. 14, 2019) (same); *see also Green*, 28 Vet. App. at 290 n.8 ("[T]he Court finds the Secretary's assertions on appeal that there are no regulations governing access to VBMS incompatible

contemplate as "automated VBA claims records" for which access may be granted. VBMS, in turn, is within the scope of "automated VBA claims records" for which 38 C.F.R. § 14.629 (Note) promises that a supervisee may qualify for access.

Green conflates § 1.600(c)'s narrow exception with the broad general rule. "By limiting access to categories of data and information enumerated in § 1.600(c)(1)," *Green* states, "the regulation provides some context in which to understand the meaning of 'VBA automated claims records.'" 28 Vet. App. at 290. "Here," *Green* continues, "the categories of accessible data do not include VBMS files or a claimant's electronic claims file. To the contrary, § 1.600(c)(1)(ii) specifies that the BDN will provide the '[c]laims history and processing data *such as folder location*.'" *Id.* "Thus, the Court discern[ed] no merit in Mr. Green's argument that the regulations should be interpreted to authorize access to his VBMS file." *Id.* This analysis errs because it misunderstands that, for the reasons described above, § 1.600(c) provides only BDN-specific exceptions from the general grant of the permissible scope of access. Its silence as to VBMS (and other VBA electronic record systems) reflects the Secretary's intent to provide *broader*, not *narrower*, access rights. VBMS eFolders are automated VBA claims records.

This Court's three-judge panel in this case lacked the power to overrule *Green*. *See Bethea*, 2 Vet. App. at 254. The full Court, though, should do exactly that. *Green* was wrongly decided. If this Motion reaches the full Court, it will be because the error of *Green* is causing harm both here and to a great many of our country's veterans and their advocates. Mr. Carpenter therefore respectfully requests that, if the panel does not provide relief upon reconsideration,

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with VA's earlier statements indicating that access to VBMS by a claimant's representative or attorney will be approved in accordance with VA regulations." (citing 77 Fed. Reg. at 42,600)).

the full Court grant review of this case, overturn *Green*, set aside the Board's decision, and remand this matter for Board readjudication in the light of the full Court's ruling.

CONCLUSION

Many of our country's military veterans and their survivors and dependents desire competent, diligent representation from a VA-accredited representative who practices as part of a team. They consent to, and indeed expect, the representative to delegate to supervised team members such ministerial tasks as checking the administrative record for updates.

The Secretary, meanwhile, has chosen to enshrine VBMS eFolders as the official—and, soon, possibly the *only*—VA copy of the administrative record. In upholding the Secretary's unlawful, harmful categorical bar of an accredited VA attorney's supervised employees remote access to consenting clients' VBMS eFolders, the Board committed numerous errors.

This Court's February 24, 2021, decision overlooks or misunderstands several of Mr. Carpenter's arguments as to why the Board's various errors are prejudicial. It also overlooks or misunderstands the nature of his request for relief, which includes setting aside the Board's decision and remanding for *the Board* to readjudicate this matter and provide, in the first instance, an adequate statement of its reasons or bases as to all material issues.

Green does, of course, loom large over this appeal. If the three-judge panel maintains its determination that it cannot provide the requested relief, *Green* likely will be a substantial reason why. But, again with the greatest of respect, *Green* is wrong. With the Secretary relying on *Green* to justify the categorical bar of supervised-employee remote VBMS access, *Green*'s error is causing significant harm to many of our country's veterans and their representatives. Mr. Carpenter respectfully requests that the full Court grant review and overturn *Green*.

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Respectfully submitted,

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