IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

VICTOR MANUEL AVILES-RIVERA,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-5969
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S RESPONSE TO THE COURT'S
MAY 7, 2021, ORDER

Appellee, Denis McDonough, Secretary of Veterans Affairs, submits this response to the May 7, 2021, Order of the United States Court of Appeals for Veterans Claims (Court). The Court instructed the Secretary to provide a supplemental memorandum of law addressing: (1) the effect of the United States Court of Appeals for the Federal Circuit's (Federal Circuit) decision in *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021) (*Euzebio II)*; and (2) the effect, if any, of Appellant's election into the Rapid Appeals Modernization Program (RAMP) and the publication of the 11th National Academy of Sciences (NAS) Update[1] via the constructive possession doctrine.

In response, the Secretary acknowledges that the Federal Circuit's holding in *Euzebio II* overruled the Court's prior holding in *Euzebio v. Willkie*, 31 Vet.App. 394 (2019) (*Euzebio I*) because the Court had used an erroneous legal standard when it required a "direct relationship" for constructive possession of the 10th NAS Update and

[1] Also referred to in the Court's Order as the 2018 Update.

clarified that the standard for the constructive possession doctrine is centered on relevance and reasonableness. But the Secretary responds that the Federal Circuit's decision in *Euzebio II* does not control the outcome in the instant case because Appellant opted into RAMP, and thereby elected to have this appeal adjudicated under the framework of the Appeals Modernization Act (AMA). Thus, the controlling statutory authority for an AMA appeal meant that the 11th NAS Update could not be considered by the Board via the constructive possession doctrine because the AMA appeals framework is fundamentally different from the Legacy appeals framework in that it is built on a closed record and a closed duty to assist on appeal to the Board.

A. The Federal Circuit specified in *Euzebio II* that the Court had improperly narrowed the scope of the constructive possession doctrine, which it held is centered on relevance and reasonableness

In addressing the Court's first inquiry, the Secretary submits that the Federal Circuit's holding in *Euzebio II* clarified the standard for the constructive possession doctrine. In *Euzebio I*, the claimant sought entitlement to service connection for benign thyroid nodules, to include as due to Agent Orange exposure. His claim was processed under the Legacy appeals framework. After the Board denied his claim, the claimant filed an appeal with this Court, arguing that, *inter alia*, the Board failed to consider and discuss the 10th NAS Update, which the claimant argued was constructively before the Board. On appeal, this Court agreed with the Secretary's position that the 2014 Update had too tenuous of a relationship to the claim for the Board to have had constructive possession (as it was not specific to the claim), asserting that the "caselaw is clear that,

even if VA is aware of a report and the report contains general information about the type of disability on appeal, that is insufficient to trigger the constructive possession doctrine; there must also be a direct relationship to the claim on appeal." *Euzebio I*, 31 Vet.App. at 402. The Court further concluded that the Board correctly found that VA had satisfied its duty to assist regarding the need to provide him with a medical examination. *Id.* at 407. The Federal Circuit's decision effectively overturns this decision.

In particular, the Federal Circuit faulted the Court for requiring a "direct relationship" between the claim and the contested records (specifically, the 2014 NAS Update) before constructive possession could be established. *See Euzebio II*, 989 F.3d at 1319-20 (stating that the Court erred when it "relied on an erroneous legal standard when it required Mr. Euzebio establish a 'direct relationship' between the *NAS Update 2014* and his claim."). The Federal Circuit held that the Court had improperly narrowed the scope of the constructive possession doctrine "such that for evidence to be 'reasonably . . . expected to be part of the record,' it must have a 'specific,' 'direct relationship' to the veteran's claim—i.e., the document must have been created specifically for the veteran." *Id.* at 1319. Requiring a "direct relationship," the Federal Circuit explained, was the improper standard. *Id.* at 1319-20. Instead, the Federal Circuit declared that the "[t]he correct standard for constructive possession, as articulated in *Bell* and later *Lang*, and as applied throughout veterans benefit law, is relevance and reasonableness." *Id.* at 1321; *see also Lang v. Wilkie*, 972 F.3d 1348, 1353 (Fed. Cir. 2020); *Bell v. Derwinski*, 2 Vet.App. 611, 612-13 (1992). "Evidence that 'could reasonably be expected to be part of the record' is evidence that 'pre-date[s] the [Board]

opinion' and is relevant." *Id.* at 1319 (quoting *Bell*, 2 Vet. App. at 612-13); *see also Lang*, 971 F.3d at 1353-55 ("[I]n the context of records created prior to a decision, all relevant and reasonably connected VA-generated documents are part of the record and, therefore, constructively known by the VA adjudicator."). Thus, the Court could invoke the constructive possession doctrine when the Board has constructive or actual knowledge of the evidence and it is "relevant and reasonably connected to the claim." *Id.* at 1321 (stating that "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.'") (internal citations omitted). As a result, the Federal Circuit vacated and remanded the case to the Court to apply the correct legal standard.

Nevertheless, *Euzebio II* does not materially affect the outcome of this case. As explained below, the Board could not consider the 11th NAS Update via the constructive possession doctrine because of the AMA statutory framework, which prohibits consideration of evidence submitted after the underlying Agency decision and outside of certain delineated evidentiary windows.

B. The Board could not have constructive possession of the 11th NAS Update in this case because the AMA prohibits consideration of any evidence that was not part of the record at the time of Agency's underlying decision or otherwise submitted during an open evidentiary window

In addressing the Court's second inquiry, the Secretary submits that Appellant's RAMP election to have his appeal processed under the AMA had the effect of foreclosing

the Board's consideration of the 11th NAS Update via the constructive possession doctrine as a matter of law.

Specifically, the Board here is statutorily barred from considering such evidence. Under the AMA, the Board may only consider evidence that is already of record at the time of the underlying decision by the Agency of Original Jurisdiction (AOJ), with very narrow exceptions under the Hearing and Evidence Submission dockets.[2] *See* 38 U.S.C. § 7113. The 11th NAS Update was not of record or even in existence at the time of the underlying AOJ decision, and was not added during an open evidentiary window; thus, it could not be added to the record via the constructive possession doctrine in this case because the AMA dictated that the record was closed and there was no duty to assist. *See* 38 U.S.C. § 5104(e). While *Euzebio II* clarified the judicial doctrine of constructive possession, this was done under the Legacy appeals system that does not have the same limits on the scope of the record and the duty to assist. *See* 38 U.S.C. § 5103A, 7105(e) (2016). In contrast, the AMA has statutory provisions that delineate and proscribe the consideration of certain evidence. *Euzebio II* must yield to these definitive statutory

[2] Under the AMA, a claimant may select one of three "dockets" in which to pursue their appeal: (i) the Direct Docket; (ii) the Hearing Docket; and (iii) the Evidence Submission Docket. *See* 38 U.S.C. § 7113. As a default, the Board may only consider the evidence that is already of record at the time of the underlying AOJ decision. 38 U.S.C. § 7113. This is the only evidence that may be considered under the Direct Review Docket. 38 U.S.C. § 7113(a). The statute then allows for very narrow exceptions for the Hearing and Evidence Submission dockets, such that in addition to the evidence of record at the time of the AOJ decision, the Board may also consider, respectively, (i) any evidence submitted at the hearing (including testimony) and any evidence submitted within 90 days of the hearing, or (ii) any evidence submitted with the claimant's Notice of Disagreement (NOD) and any evidence submitted within 90 days following receipt of the NOD. *See* 38 U.S.C. § 7113(b), (c).

prohibitions laid out by Congress. Accordingly, the Board could not consider the 11th NAS Update via the constructive possession doctrine following Appellant's election into RAMP because it is statutorily barred from doing so.

Furthermore, if Appellant wished to have the Board consider the 11th NAS Update, he could have filed a supplemental claim under the AMA and submitted this evidence. As a supplemental claim would have preserved his effective date, and that process is still available to him, he would not be prejudiced by the Court's finding that the Board did not have constructive possession over the 11th NAS Update, in accordance with the law.

1. The Board could not have constructive possession of the 11th NAS Update in this case because AMA statutory provisions limit the scope of the reviewable evidence to evidence that is already of record at the time of the AOJ decision, or (under some narrow exceptions) evidence that is submitted during an open evidentiary window

In this case, the Board could not consider the 11th NAS Update via the constructive possession doctrine because the AMA statutory provisions prohibit it. On August 23, 2017, Congress enacted the AMA, which reformed the "rights and processes relating to appeals of decisions regarding claims for" VA benefits. 115 P.L. 55, 131 Stat. 1105, 2017 Enacted H.R. 2288, 115 Enacted H.R. 2288. Prior to February 19, 2019, VA allowed veterans to opt in to this modernized system via RAMP, as Appellant successfully did so here. 38 C.F.R. § 3.2400(a)(2), (c)(1); Record Before the Agency (R.) at 194 (194-96) (May 2018 RAMP Opt-In Election Form). The AMA amended various aspects of the VA adjudicatory scheme, which most significantly for the present case, includes the evidence that the Agency may consider in processing an appeal of a

claim. *See* 115 P.L. 55, 131 Stat. 1105, 2017 Enacted H.R. 2288, 115 Enacted H.R. 2288; *see also* 38 U.S.C. § 7113. The amended statutory scheme has a material impact on this case in two ways, foreclosing the Board's ability to have constructive possession of the 11th NAS Update.

First, the AMA revised the nature of the evidence that the Board (and Agency in general) may consider on appeal, thereby creating a system that is built generally on a closed record. The AMA limits the evidence that the Board may consider to only the evidence that is already of record at the time of the underlying AOJ decision, with very narrow exceptions under the Hearing and Evidence Submission dockets, as explained above in footnote two. *See* 38 U.S.C. § 7113. The default is a closed record that only considers the evidence of record at the time of the underlying AOJ decision, as reflected in the Direct Review Docket, which is the docket Appellant selected in this case. 38 U.S.C. § 7113(a).[3] The Secretary's regulations implementing these statutory provisions were enacted on February 19, 2019. *See* 38 C.F.R. §§ 20.301, 20.302, 20.303. While the Secretary acknowledges that the regulations were enacted after Appellant's June 2018 decision RAMP opt-in, no prejudice results from this because the relevant statutory provisions, 38 U.S.C. §§ 5103A, 7113 were already in effect at the time.

As the Court recently noted in *Andrews v. McDonough*, it "must give effect to the unambiguously expressed intent of Congress" and there is no ambiguity that 38 U.S.C.

[3] Even if Appellant had selected one of the other two dockets, the Board would have been statutorily precluded from considering the 11th NAS Update, which was not of record at the time of AOJ Decision or submitted during one of these potential evidentiary windows. *See* 38 U.S.C. § 7113 (b, (c) (providing the limited exceptions for when Appellant or his or her representative may *submit* additional evidence) (emphasis added).

§ 7113(a) limits the evidence of record, specifically to prohibit the Board from considering new evidence or seeking out new evidence when the Direct Review docket is selected. *Andrews v. McDonough*, 2021 U.S. App.Vet. Claims LEXIS 972, *13 (May 28, 2021). Indeed, the Court also recognized that the AMA initiated a "whole new world" in the VA benefits adjudication system. *Id*. at *10.

In this case, when Appellant opted into RAMP in June 2018, he selected the Higher Level Review Lane, and VA subsequently issued a new decision under RAMP denying entitlement to service connection for hypertension in September 2018. R. at 50-81, 194. Then, in his February 2019 NOD to the Board, he selected the Direct Review Docket (i.e., the first docket). R. at 33-34. Thus, as reflected in the NOD itself, which Appellant voluntarily completed and submitted, the Board's review would be "limited to the evidence of record at the time of the decision of the [AOJ] on appeal." 38 U.S.C. 7113(a); R. at 34. As noted above, this appeal would be on a strictly closed record. *Id.* Because § 7113(a) prohibits consideration of any evidence that was not already of record at the time of the September 2018 Rating Decision, *see* R. at 50 (50-81), the Board could not consider the 11th NAS Update, which was issued in November 2018,[4] via the constructive possession doctrine. The statute forbids it. *See Andrews*, *supra*, at *13. Similarly, 38 C.F.R. § 3.103(c)(2), specifically speaks to treatment of evidence received after notice of a decision, stating that "[t]he agency of original jurisdiction will not

[4] *See* Health and Medicine Division Reports on Agent Orange, https://www.publichealth.va.gov/exposures/agentorange/publications/health-and-medicine-division.asp (last accessed June 1, 2021).

consider, or take any other action on evidence that is submitted by a claimant, associated with the claims file, or constructively received by VA as described in paragraph (c)(2)(iii) of this section, after notice of decision on a claim, and such evidence will not be considered part of the record at the time of any decision by the agency of original jurisdiction . . . ." The circumstance described in § 3.103(c)(2)(iii) only speaks to constructive receipt of VA treatment records that existed prior to the issuance of the AOJ decision on appeal, and which the Veterans Benefits Administration had knowledge of through information furnished by the claimant sufficient to locate those records. *See* 38 C.F.R. § 3.103(c)(2), (c)(2)(iii) *citing* 38 U.S.C. § 5103A(c); *see also VA Claims and Appeals Modernization*, 84 Fed. Reg. 138, 141 (Jan. 18, 2019). Thus, VA's regulations also explicitly prohibit constructive possession of additional evidence after notice of the decision by the AOJ.

Indeed, the distinction between the Legacy and AMA systems is critical here. In *Bell*, the Court introduced the doctrine of constructive possession and held that the Secretary in certain cases would be deemed to have constructive knowledge of documents generated by or submitted to the Agency but otherwise not included in the record of proceedings before the Secretary and the Board. 2 Vet.App. at 612. The Court held that "where the documents proffered by the appellant are within the Secretary's control and could reasonably be expected to be a part of the 'record before the Secretary and the Board,' such documents are, in contemplation of law, before the Secretary and the Board and should be included in the record." *Id.* at 613. The Court further clarified the *Bell* doctrine in ensuing case law, as explained in *Monzingo v. Shinseki*, 26 Vet.App.

97, 101-02 (2012). After noting the case law on the matter, the Federal Circuit in *Euzebio II* specified that the correct standard for application of the constructive possession doctrine is relevance and reasonableness. *See* 989 F.3d at 1321. But, critically, the constructive possession doctrine's applicability in the Legacy system does not uniformly transfer over into the AMA system.

The Federal Circuit's decision in *Euzebio II* clarifies a judicial doctrine that the judiciary created and fleshed out in the Legacy system, where there was no overarching statute limiting the scope of the record. But for the statutory prohibition on this Court's consideration of evidence that is not in the "record of proceedings before the Secretary and the Board," *see* 38 U.S.C. § 7252(b), the Legacy system allowed for evidence to be added to the claims file up until the Board rendered a decision. But as noted above, this is not so under the AMA system, which Congress built on a generally closed record, especially the Direct Review Docket, which limits the scope of reviewable evidence to only that which is already of record at the time of the AOJ's decision on appeal. *See* 38 U.S.C. § 7713(a). Thus, the 11th NAS Update, which was issued in November 2018, could not be constructively before the Board because it is statutorily prohibited, as it was not part of the record at the time of the September 2018 AOJ decision. *Id.* Thus, even considering the Federal Circuit's holding in *Euzebio II*, the 11th NAS Update could not reasonably be expected to be part of the record because the statute forbids it. *See Andrews*, *supra*, at *8-11 (explaining that the AMA was constructed, at least in part, to remedy the problems and delays connected to evidence gathering that plagued the Legacy system).

The second way that the AMA's statutory framework impacts this case relates to the statutory limitation on the duty to assist before the Board. Under the AMA–in a change from the Legacy system–the duty to assist only applies to a claim (or a supplemental claim) up until the claimant is provided notice of the AOJ's decision. 38 U.S.C. § 5103A(e)(1). The duty to assist no longer applies to higher level review by the AOJ or review on appeal by the Board, other than to remedy an error that took place prior to the AOJ's decision. 38 U.S.C. § 5103A(e)(2). This is significant because, in *Euzebio II*, the Federal Circuit explained that the constructive possession doctrine is a remedy for when VA breaches its duty to assist by omitting documents from within its control that could reasonably be expected to be a part of the claim. *See* 989 F.3d at 1321. But per the AMA statutory provisions, the duty to assist does not apply to the Board. 38 U.S.C. § 5103A(e). The constructive possession doctrine therefore cannot be used to obtain such records. In order for evidence to have been constructively before the Agency, it must have existed at the time of the AOJ decision, when the duty to assist applied. But as noted above, the 11th NAS Update was not published until *after* Appellant opted into RAMP and the RO issued its decision. Accordingly, the Board could not have constructive possession of the 11th NAS Update because the duty to assist no longer applied to it once Appellant opted into the AMA.

For these two reasons, Appellant's election into RAMP had the effect of foreclosing the Board's ability to consider the 11th NAS Update via the constructive possession doctrine. First, § 7113 establishes a closed record, limiting consideration of evidence only to that which was before the Agency at the time of the AOJ decision on

appeal, particularly in the Direct Review Docket. And second, § 5103A declares that the duty to assist no longer applies to the Board, so the constructive possession doctrine cannot be used as a means to obligate the Board to obtain the 11th NAS Update. The distinction between the AMA and Legacy systems is critical here. *Euzebio II* clarifies a judicial doctrine that applies in a Legacy appeals system where there is no overarching statute limiting the record or the duty to assist. In contrast, the AMA has statutory provisions through which Congress intended to explicitly limit the consideration of certain evidence and the duty to assist. *Andrews*, *supra*, at *14-15 (explaining Congress decided that the record at the Board for claimants in the direct review docket would be fixed at the time of the AOJ decision and that the Board would have no duty to assist). In this case, application of the relevant AMA statutes prohibits consideration of the 11th NAS Update via the constructive possession doctrine. *Euzebio II* must be read in context of the differences between the Legacy and AMA systems, and the Court must follow these definitive statutory prohibitions.

2. Appellant will not be prejudiced if the Court holds that the Board did not have constructive possession of the 11th NAS Update as a matter of law under the AMA because he can still file a supplemental claim within a year of the Court's decision and preserve his original effective date

For the reasons discussed above, the Board could not consider the 11th NAS Update via the constructive possession doctrine. And as argued in the Secretary's Brief, the proper remedy is to affirm the Board's decision here. If Appellant wished for VA to consider the 11th NAS Update, which was published after Appellant's RAMP opt-in and the RO's issuance of the September 2018 Rating Decision, then the proper remedy was

for Appellant to file a supplemental claim and submit the 11th NAS Update for the AOJ's consideration. In fact, he may still do so.

Under the AMA, in any case in which VA has issued a decision, a claimant may, in addition to filing a higher level review or an NOD, file a supplemental claim within one year of the AOJ's decision. *See* 38 U.S.C. § 5104C(a)(1)(B). As codified in VA's implementing regulation, a claimant may continuously pursue a claim or an issue by timely and properly filing an administrative review option, including filing a supplemental claim. *See* 38 C.F.R. § 3.2500(c). A continuously pursued claim will preserve the effective date in accordance with the date of receipt of the initial claim or date entitlement arose, whichever is later. 38 C.F.R. § 3.2500(h)(1). Thus, Appellant could have withdrawn his Higher Level Review request or NOD requesting Direct Review to the Board within one year, filed a supplemental claim instead, including the 11th NAS Update for consideration, and preserved his effective date in the process. 38 C.F.R. § 3.2500(e)(1) (permitting a claimant to change the review option previously selected by withdrawing the request as prescribed in § 3.2500(d) and filing the appropriate application for the requested review option within one year from the date on which VA issued notice of a decision on an issue). Notably, once a claimant takes on a VA decision, he may not take any further action on the same claim until the higher level review, supplemental claim, or NOD are adjudicated or withdrawn. *See* 38 U.S.C. § 5104C(a)(2)(A). Thus, once Appellant sought higher level review and then filed an NOD, he would have to withdraw those actions before he could file a supplemental claim. R. at 194; 34; *see also* 38 C.F.R. § 3.2500(e)(1).

Following the Board's issuance of its decision, Appellant again had one year to choose to file a supplemental claim, at which point he could have again submitted the 11th NAS Update for consideration. 38 C.F.R. § 3.2500(c)(3). But he instead chose to appeal to the Court. An adjudication of his appeal is still pending this Court's decision and thus, he cannot file a supplemental claim at this time. Under § 5104C, once the Court adjudicates his claim, he may still file a supplemental claim within a year for the AOJ to consider the 11th NAS Update. *See also* 38 C.F.R. § 3.2500(c)(4). This is the proper remedy because the duty to assist applies to supplemental claims, allowing the Agency to consider new evidence. "If new and relevant evidence is presented or secured with respect to a supplemental claim, the Secretary shall readjudicate the claim taking into consideration all of the evidence of record." 38 U.S.C. § 5108(a). "If a claimant, in connection with a supplemental claim, reasonably identifies existing records, whether or not in the custody of a Federal department or agency, the Secretary shall assist the claimant in obtaining the records . . . ." 38 U.S.C. § 5108(b). Accordingly, the proper remedy is for the Court to affirm the Board's decision, noting that the Board was statutorily barred under the AMA from considering the 11th NAS Update via the constructive possession doctrine, and that Appellant may still file a supplemental claim for VA to consider the 11th NAS Update if he should so choose. He would not be prejudiced or barred from doing so, particularly given that filing a supplemental claim within one year of the decision notice would preserve his effective date. 38 C.F.R. § 3.2500(c)(4), (h)(1).

Therefore, the Secretary submits that the AMA statutory provisions barred the Board decision on appeal from considering the 11th NAS Update via the constructive possession doctrine and the Court must abide by the statutory limitations set forth by Congress. Appellant had the choice at various stages of his appeal to file a supplemental claim and submit the 11th NAS Update for consideration but chose not to do so. *See Andrews*, *supra*, at *13-14 (recognizing that Congress empowered the Secretary to choose when and how a claimant can change his or her docket). Thus, as a matter of law, the Court must affirm the Board's decision. *See Andrews*, *supra*, at *15-16 (recognizing that the Court could not flout Congress's instruction in § 7113(a) nor VA's regulations). The Secretary again notes that the proper remedy was for Appellant to file a supplemental claim for VA and submit the 11th NAS Update for VA's consideration, which he may still do within one year of the Court's decision if he should so choose, meaning that he would not be prejudiced by an affirmance.

WHEREFORE, Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully responds to the Court's May 7, 2021, Order.

Respectfully submitted,

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