No. 19-5815

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

Re

FLORENCE PETITE,

Appellant,

versus

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee.

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Summary of Rebuttal Arguments

The Secretary's decision to terminate Ms. Petite's CHAMPVA benefits was not made in accordance with law. Ms. Petite identified five independent bases for why the Board's decision to terminate Ms. Petite's CHAMPVA benefits was not made in accordance with law. The Secretary's response was to assert that the Board's factual findings are not clearly erroneous. Ms. Petite does not challenge the Board's factual findings. Rather, her averments of error are all based in errors of law made by the Board in its legal determination that the Secretary's termination of Ms. Petite's CHAMPVA benefits was lawful. It was not.

I.

The Board's Order denying Ms. Petite's entitlement to continued CHAMPVA benefits as a child of the Veteran was not made in accordance with law.

The Secretary erroneously argues that this Court should affirm the August 15, 2019 Board decision, which denied Ms. Petite entitlement to continued CHAMPVA benefits as a child of a totally and permanently disabled veteran, because the Board's factual findings are not clearly erroneous and its decision is legally correct. Sec.Brf., p. 4. The Secretary's argument relies upon the assertion that the Board's factual findings are not clearly erroneous. However, Ms. Petite's appeal does not challenge the single finding of fact made by the Board that she "turned 18 on August 2, 2017." RBA 2-8 at

3. Additionally, the Board found that Ms. Petite was "not pursuing an approved VA full-time course of education or training." *Id.* This finding of fact is immaterial to the conclusion made by the Board that: "The criteria for entitlement to continued CHAMPVA benefits as a child of the Veteran have not been met." *Id.* This conclusion of law relies entirely upon the undisputed finding of fact that Ms. Petite turned 18 on August 2, 2017. Ms. Petite's appeal presents a question of law concerning whether the definition of "child" in either 38 U.S.C. § 101(4) or in 38 C.F.R. § 3.57 supports the Board's decision to terminate Ms. Petite's CHAMPVA benefits. This question of law does not depend on any question of fact.

Further, the Secretary's mere assertion that the Board's decision was "legally correct" is not a basis for this Court to affirm the Board's August 15, 2019 decision. To the contrary, it is the Secretary's obligation to demonstrate and not merely assert that the Board's decision was "legally correct," an obligation which the Secretary appears to concede he cannot do since his next sentence in his brief declares that Ms. Petite "has not demonstrated that the Board committed prejudicial error so as to warrant any action by the Court other than affirmance." Sec.Brf., p, 4. The Secretary's bold declaration is wrong. Ms. Petite has demonstrated that the Board committed prejudicial error by showing that the Board's order discontinuing her CHAMPVA benefits as a child of a totally disabled veteran was not make in accordance with law. When, as here, the Board's decision is contrary to the plain meaning of the applicable law, resulting in a

misapplication of 38 U.S.C. § 17.270, the Board made a prejudicial error because that error prevented Ms. Petite from effectively participating in the adjudicative process and affected the outcome of the matter at issue. *Simmons v. Wilkie*, 30 Vet.App. 267, 279 (2018).

The Secretary in his brief, from pages 4-6, provides context but nothing more. The Secretary then describes the uncontested action of the Board that it concluded that Ms. Petite was not eligible to continue to receive CHAMPVA benefits past the age of 18. Sec.Brf., p. 5. Again, the Secretary erroneously relies on the contention that: "The Board's factual findings are plausibly based on the evidence of record and are not clearly erroneous, and Appellant does not contest the operative facts." Sec.Brf., p. 6.

The Secretary then proffers to the Court that:

> Appellant's assertion that VA had no authority to terminate her CHAMPVA benefits when she no longer met the eligibility requirements is contrary to law and should be rejected. *See, e.g., OPM v. Richmond*, 496 U.S. 414, 424 (1990) (explaining that the Appropriations Clause of the U.S. Constitution provides an explicit rule of decision that "the payment of money from the Treasury must be authorized by a statute"); see also U.S. CONST. art I, § 9, cl. 7. VA could not continue paying for Appellant's healthcare pursuant to the CHAMPVA program when Appellant no longer satisfied the statutory eligibility requirements for such payments. *See* 38 U.S.C. § 1781 (setting forth the CHAMPVA eligibility requirements). Appellant's attempt to distinguish the requirements for CHAMPVA eligibility from Department action to terminate coverage when she no longer met those requirements is a distinction without difference and demonstrates no Board error. *See* [Br. at 4-5]; [R. at 1-8].

Sec.Brf., p. 7. The Secretary is not able to demonstrate that: "The Board was legally correct in concluding that, based on the uncontested facts, the outcome was determined as a matter of law. [R. at 6 (1-8)]." *Id.*

The Secretary claims that Ms. Petite's:

> . . . allegations of legal error by the Board find no support in the plain language of the applicable statutes and regulations, the supporting legislative history, or the stated purpose of the laws at issue.

Sec.Brf., p. 8. The Secretary's claim is followed by a string of citations on statutory interpretation, all of which correctly state the controlling law, but the Secretary fails to explain why or how the cases he has cited support the Board's decision to discontinue Ms. Petite's CHAMPVA benefits.

The Secretary incorrectly states that Ms. Petite failed to identify any provision of the Patient Protection and Affordable Care Act of 2010 (ACA) that supports her argument that, as a matter of law, CHAMPVA must extend dependent coverage until the age of 26. Sec.Brf., pp. 8-9. And the Secretary proceeds to cite to the precise provision of the ACA. Sec.Brf., p. 9.

The Secretary then offers his *post hoc* rationalization that: "CHAMPVA does not fall within the definition of 'group health plan.'" *Id.* This is obviously an interpretation made by the Secretary of the Public Health Service Act [(PHSA)]. Pub. L. No. 111-148, § 1301(b)(3), 124 Stat. 119, 163 (2010). It is not an interpretation of the ACA Pub. L.

No. 111-148, § 2714, 124 Stat. 119, 132 (2010). Nor is it an interpretation relied upon by the Board in its decision. *See Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 156 (1991) (litigating positions are not entitled to judicial deference when such are merely appellate counsel's *post hoc* rationalizations for agency action and are advanced for the first time on appeal).

Furthermore, the Secretary's *post hoc* rationalization overlooks the fact, as asserted by Ms. Petite in her opening brief, that the same government which operates CHAMPVA operates TRICARE. Pursuant to section 1110b(b)(1)–(2), TRICARE coverage now continues for any individual who "would be a dependent under section 1072(2) of this title but for exceeding an age limit under such section" and "has not attained the age of 26." Furthermore, entitlement to CHAMPVA implicates 38 U.S.C. § 1781. *See, e.g., Braan v. McDonald*, 28 Vet. App. 232, 234 (2016) ("[E]ntitlement to CHAMPVA is provided under [§ 1781]."). As the statute says, "the Secretary shall provide for medical care **in the same or similar manner and subject to the same or similar limitations as medical care is furnished to certain dependents and survivors of active duty and retired members of the Armed Forces under chapter 55 of title 10**." *See* 38 U.S.C. § 1781(b). (emphasis added). Chapter 55 of Title 10 comprises medical and dental care, which in turn comprises the TRICARE programs. 10 U.S.C. § 1071 *et seq*. *Ipso jure*, CHAMPVA should include a similar extension. The Secretary's group heath care argument based on PSHA and ERISA is a red herring and

should be rejected by this Court.

Ms. Petite's argument is about the intent of Congress. The Secretary's argument is about how to evade his obligation to extend CHAMPVA in order to defend the Board's unlawful termination of Ms. Petite's CHAMPVA benefits. The Secretary's argument that Congress clearly understood that the CHAMPVA program was not subject to the provisions of the ACA is the same and, if accepted, has an absurd result in which TRICARE programs extend the age limit but CHAMPVA does not. The "plain meaning must be given effect unless a 'literal application of [the] statute will produce a result demonstrably at odds with the intention of its drafters.' " *Gardner v. Derwinski*, 1 Vet.App. 584, 586-587 (1991)(quoting *Griffin v. Oceanic Contractors*, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)); *see Roper v. Nicholson*, 20 Vet.App. 173, 180 (2006), aff'd, 240 F. App'x 422 (Fed. Cir. 2007).

This Court is required to look to the plain meaning of statutes and regulations and, when the plain meaning is determined, it is this Court's job simply to apply it. *Frederick v. Shinseki*, 684 F.3d 1263, 1269 (Fed. Cir. 2012) (statutes); *see also Kisor v. Wilkie*, __ U.S. ___, ___, 139 S. Ct. 2400, 2415 (2019); *Artis v. District of Columbia*, __ U.S. __, __, 138 S. Ct. 594, 603 (2018) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Statutes "must be considered as a whole and in the context of the surrounding statutory scheme." *Gazelle v. McDonald*, 27 Vet.App. 461, 464 (2016) (citing *King v. St. Vincent's Hosp.*, 502

U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991)). *See also McCarroll v. McDonald*, 28 Vet.App. 267, 271 (2016) (*en banc*). In this case, that includes TRICARE.

The Secretary's reliance on legislation which was not enacted is misplaced. While this appears to reflect the intent of Congress, it does not for purposes of interpreting existing statutes. As the Supreme Court has explained, "even the most formidable" policy arguments cannot "overcome" a clear statutory directive. *Kloeckner v. Solis*, 568 U.S. 41, 56, n. 4 (2012). When called on to interpret a statute, the Supreme Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption. *Niz-Chavez v. Garland*, 593 U. S. ___, ___ (2021) (slip op., at 4). Here Ms. Petite asks that this Court interpret first whether the definition of "child" in 38 U.S.C. § 101(4) or in 38 C.F.R. § 3.57 supports the Board's decision to terminate Ms. Petite's CHAMPVA benefits. Next, Ms. Petite asks that this Court interpret whether anything in the plain language of 38 U.S.C. § 1781 required the termination of Ms. Petite's CHAMPVA benefits. Then, Ms. Petite asks that this Court interpret whether the mandate of the Affordable Care Act and its application by the service departments to TRICARE military retirement benefits controls the disposition of Ms. Petite's appeal. And, finally, Ms. Petite asks that this Court determine whether the Board erred by failing to consider or apply the provisions of 38 U.S.C. § 101(4)(A)(iii). The best the Secretary has to offer in response is that the Court should view an action not taken by Congress to expand CHAMPVA eligibility as deliberate. This Court does not interpret the intent

of Congress based on what it did not do, but rather interprets what they did do which became law.

The Secretary also argues in a footnote that Congress also expressly granted the Secretary the authority "to determine and define with respect to an eligible veteran and eligible person "[p]ursuit of a course or program of education or training" based on 38 U.S.C. § 3680(g)(1). Sec.Brf., p. 17. This argument is simply without merit because Congress spoke unambiguously in 38 U.S.C. § 101(4)(A)(iii) where it states:

> The term "child" means . . . a person who is unmarried and— . . . who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years), **is pursuing a course of instruction at an approved educational institution**."

(emphasis added). Congress may well have intended to grant the Secretary the authority "to determine and define with respect to an eligible veteran and eligible person "[p]ursuit of a course or program of education or training" based on 38 U.S.C. § 3680(g)(1). But Congress's intent to do so cannot be interpreted, as urged by the Secretary, to mean the Secretary could do so in contravention of the provisions of § 101(4)(A)(iii).

The Secretary's reliance on the provisions of 38 U.S.C. § 1781 to support his assertion that the Board need not have considered Congress's definition of child at § 101(4)(A)(iii) is unwarranted because of the scope of § 1781. Overlooked by the Secretary is the purpose of § 1781, which is limited to VA's obligation to provide medical

care for survivors and dependents of certain veterans. This statute authorizes the Secretary **to provide medical care**. And this statute does require that a child between the ages of 18 and 23 must be "pursuing a full-time course of instruction at an educational institution approved under chapter 36 of [title 38]" to avoid losing eligibility **for medical care**. This statute does not require a full-time course of instruction to avoid losing eligibility **for CHAMPVA benefits**. The plain language of the applicable statute, § 101(4)(A)(iii), supports and does not contradict Ms. Petite's position that part-time enrollment in a course of education or training satisfies the eligibility requirements of the CHAMPVA program. Therefore, there is no basis for this Court to affirm the Board's decision.

Conclusion

Ms. Petite has identified five errors of law made by the Board in its decision to terminate her continued right to CHAMPVA benefits as a child of her totally and permanently disabled father, a Veteran. The Secretary has not shown that any of Ms. Petite's averments of error by the Board are not correct. This Court should find as a matter of law the Board's order to deny Ms. Petite entitlement to continue CHAMPVA benefits as a child of the Veteran was not made in accordance with law and must therefore be reversed. This Court should order the Board to direct the Secretary restore Ms. Petite's CHAMPVA benefits.

Respectfully submitted by,

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Electronically filed on July 1, 2021