In the

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

No. 20-3367

DANIEL D. BARRY

Appellant

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

Appellee

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Appellant's Reply Arguments

Mr. Barry stands by all arguments in the opening brief. This brief contains five replies to the Secretary's arguments.

I. The law requires this Court to apply the pro-veteran canon when determining the plain meaning of the regulation.

Mr. Barry argued, in his opening brief, that when interpreting the VA's regulation, the law requires the Court to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decision." Brief for the Appellant, at 10; *quoting Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting). In fact, the Federal Circuit recently reminded us that "'the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims,' is Congress' 'long standing' solicitude for veterans 'plainly reflected in the VJRA' and the 'long applied' canon of construction 'that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor' …." *See Taylor v. McDonough*, No. 2019-2211, 2021 WL 2672307, at 8 (Fed. Cir. June 30, 2021); *quoting Henderson v. Shinseki*, 562 U.S. 428, 440-441 (2011).

The Federal Circuit also held, in a separate panel decision, that "the [pro-veteran] canon does not apply unless 'interpretive doubt' is present." *See Kisor v. McDonough*, 995 F.3d 1316, 1325 (Fed. Cir. 2021). Although the panel ruling in *Kisor* held interpretive doubt is needed before the pro-veteran canon applies, the full Court could

not come to a consensus as to this issue. *See Kisor v. McDonough*, 995 F.3d 1347 (Fed. Cir. 2021).

Notwithstanding these competing panel decisions, Supreme Court case law is clear – Courts are "to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Therefore, the Secretary is wrong that the pro-veteran canon does not apply in this case. The Supreme Court cannot be more clear – regulation affording benefits to veterans are "**always** to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *See Boone v. Lightner*, 319 U.S. 561, 575 (1943) (emphasis added).

II. The Secretary misunderstands Mr. Barry's argument as to the plain meaning of 38 C.F.R. § 3.350(f)(3).

The Secretary reads Mr. Barry's argument as consisting of a single paragraph. Brief for the Appellee, at 10. However, the Secretary overlooks or misunderstands Mr. Barry's argument. For clarity, Mr. Barry restates his argument here.

First, Mr. Barry explained that in all cases "the Board is required to maximize benefits …." Brief for the Appellant, at 5; *citing Bradley v. Peake*, 22 Vet.App. 280 (2008) & 38 C.F.R. § 3.103(a). He next reminds the Court that Congress directed VA, in 38 U.S.C. § 1110, to pay compensation for all disability resulting from service. Brief for the Appellant, at 4 & 11.

He then broke down the language of the regulation, and explained that the Secretary "has determined that a single disability or combination of disabilities – that is at least 50% disabling – equates to a finding that the level of disability has exceeded the statutory or intermediate rate." Brief for the Appellant, at 11. This is the only reading that is pro-veteran and also "comports with the mandate of Congress … that VA 'will pay to any veteran thus disabled … compensation as provided in this subchapter ….'" *Id*, *quoting* § 1110.

Mr. Barry further explained

> the Secretary's regulation must be read in the context of 1) compensating veterans for **all** 'disability resulting from personal injury suffered;' 2) 'render[ing] a decision which grants every benefit that can be supported in law ;' and 3) the requirement to 'place a thumb on the scale in the veteran's favor.'

Brief for the Appellant, at 11. As the Secretary concedes "the Court [must] read 38 C.F.R. § 3.350(f) as a whole and adopt the plain reading of the regulation, as well as the reading that is consistent with its statutory authority as well as other SMC provisions." Brief for the Appellee, at 11. Mr. Barry's argument and reading of this regulation is the only one that does this.

Section 3.350(f)(3) requires "[a]dditional independent 50 percent disabilities … will afford entitlement to the next higher intermediate rate or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. 1114, but not above the (o) rate." Mr. Barry deftly pointed out that this language provides for a half-step increase when a veteran is already rated at an intermediate rate. Brief for the Appellant,

at 10 ("the regulation applies whenever a veteran is either at a statutory rate or at an intermediate rate").

Finally, Mr. Barry connected the statute and the regulation. Section 1114(p) gives the Secretary discretion to provide "the next higher … intermediate rate [in the event the veteran's service-connected disabilities exceed the requirements for any of the rates prescribed] …." The Secretary's regulation, Mr. Barry argued, "determined that a single disability or combination of disabilities – that is at least 50% disabling – **equates to** a finding that the level of disability has exceeded the statutory or intermediate rate." Brief for the Appellant, at 11. (Emphasis added).

Thus, it is clear that Mr. Barry did far more than the Secretary understood him to. An let's not forget, the Secretary's regulation explicitly mandates "additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more **will afford entitlement to** the next higher intermediate rate or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. 1114 …." *See* § 3.350(f)(3). (Emphasis added). There is no ambiguity in this regulation. The presence of an independent, 50% rating (either as a single disability or a combination of disabilities) "will afford entitlement" to a higher rating. This is the only reading that: 1) gives meaning to the words used by the Secretary; 2) compensates "for [all] disability resulting from personal injury suffered or disease incurred in line of duty;" and 3) "grants every benefit that can be supported in law."

III. The Secretary's interpretation is inconsistent with the language used by him in his regulation.

The Secretary attempts to convince this Court that he should be allowed to only pay for a portion of a veteran's disability resulting from service injuries or disease despite the clear mandate of Congress and his own regulation. First, he asserts that since 1947 the law only allowed for a single half step increase. Brief for the Appellee, at 13; *citing* 12 Fed.Reg. 1596 (March 8, 1947). Unfortunately, this argument ignores that the language used in 1947 differs significantly from that used today. *Compare* 38 C.F.R. § 3.1236(c)(4) (1947) (allowing a half step increase **to the "half-way" point** for a single disability rated 50% or more) *with* § 3.350(f)(3) (providing multiple half step increases when rated at either a statutory or intermediate rate and also having a single disability or a combination of disabilities rated 50% or more).

Next, the Secretary asserts the use of the word "the" in § 1114(p) means Congress only authorized a single half-step increase. Brief for the Appellee, at 13-14. But the use of the word "the" does not such thing. All this word does is direct the Secretary to award a half-step increase to "the next higher rate or an intermediate rate" whenever "the veteran's service-connected disabilities exceed the requirements for any of the rates prescribed in this section …." *See* § 1114(p).

The Secretary argues "Congress limited the Secretary's discretion to permit only a single intermediate or rate increase …." Brief for the Appellee, at 14. However, the Secretary does not explain why Congress would direct the United States to "pay to any

veteran" compensation for **all** disability resulting from an in-service injury or disease, but then later limit payment of compensation for only a portion of all disability. The Secretary's interpretation violates the mandate of Congress to pay for all disability when, as here, a veteran is already compensated at an intermediate rate, but also has additional disability rated as 50% or more. This position by the Secretary is especially troublesome because the Secretary defined disability that "exceed the requirements for any of the rates prescribed" as equivalent to a single disability or a combination of disabilities rates 50% or more.

Either Congress wanted to pay Mr. Barry for all of his disability or it did not. Congress left to the Secretary's discretion to allow for intermediate rates. Although not required to do so, once he did he must follow the words used in his regulation. And these words clearly require that when a veteran is rated at an intermediate rate, and also has a single disability or combination of disabilities rated 50% or more he gets a half-step increase. The regulation also clearly requires that he gets another half-step increase if he also has another single disability or combination of disabilities rated 50% or more.

IV. Morgan v. Wilkie and *Long v. Wilkie* did not consider that the import of the Secretary's amendments to 38 C.F.R. § 3.321(b).

The Secretary urges this Court to ignore Mr. Barry's argument as to the meaning of his amendments to 38 C.F.R. § 3.321(b). Instead, he argues, the Court should continue to adhere to the rule announced in *Thun v. Peake* that interpreted the prior

version of § 3.321(b). Unfortunately, words have meaning and the law requires that we apply § 3.321(b) as written.

The version of § 3.321(b) interpreted in *Thun* is not the same as the language in the amended version that applies to this case. Therefore, any interpretation of this regulation prior to the Secretary's amendment is irrelevant to this appeal. Instead, the Board must apply the law as it is written. *See* 38 U.S.C. § 7104(a).

V. An extraschedular rating was explicitly raised by the record because one of the only methods to achieve an additional rating under 38 C.F.R. § 3.350(f)(4) is with a total rating 38 C.F.R. § 3.321(b).

The Secretary argues "[t]he record here does not reasonably raise the question of whether Appellant's disability picture presents with symptoms that are incapable of evaluation under the rating schedule …." Brief for the Appellee, at 28. However, this misses the point of Mr. Barry's argument and the law on the Board's obligation to maximize benefits. First, Mr. Barry never argued the record reasonably raised the question of whether the schedule is capable of compensating him for his disability. Rather, he argued, in the alternative, that because he asked for a rating under §3.350(f)(4), and an additional rating under §3.350(f)(4) is only available for a total rating, this necessarily requires the Board to apply § 3.321(b) to achieve a total rating. Brief for the Appellant, at 15-16.

He further argued that the amended version of § 3.321(b) removed from the Board's authority, the determination whether "application of the regular schedular

standards is impractical …." Brief for the Appellant, at 16. Lastly, he argued that the Board only has the authority to refer to the Director the question of whether § 3.321(b) entitles Mr. Barry to a total rating for any of his disabilities.

Contrary to the Secretary's assertions, there is no legal requirement that Mr. Barry do more than ask for a total rating in order to raise entitlement to a rating under § 3.321(b). *See* Brief for the Appellee, at 29 ("Appellant presents absolutely no evidence of exceptional symptoms incapable of evaluation under the rating schedule"). To reiterate, the amended version of § 3.321(b) requires "a finding **by the Director of Compensation Services** or his delegate that application of the regular rating schedule standards is impractical because the disability picture is so exception or unusual due to such related factors as …. " (Emphasis added).

The amended § 3.321(b) does not leave any room for the Board or the RO to make this determination. So all Mr. Barry has to do is ask for a total rating when the schedule does not provide for one, and he explicitly raises application of this regulation. *See* § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation"); *see also* § 3.103(a) ("it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law").

Conclusion

For the reasons set forth above, and in the opening brief, Mr. Barry respectfully requests that this Court provide relief by reversing the Board's decision, and further order the Board to assign a rating of SMC(o) pursuant to 38 U.S.C. § 1114(p) and 38 C.F.R. § 3.350(f)(3).

Respectfully submitted,

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