AMICUS CURIAE BRIEF OF MARVIN LOYD

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

20-7251

WILLIAM E. TERRY,

Appellant

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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INTEREST OF *AMICUS CURIAE*

Pursuant to the Court's order of July 18, 2022, and U.S. Vet. App. R. 29, Marvin Loyd offers this brief in support of Appellant. Mr. Loyd has an interest in this case because, like Appellant, the Board refused to adjudicate the merits of his continuously prosecuted claim for service connection because he did not submit new and relevant evidence. *See* Exhibit A. Mr. Loyd is preparing an appeal of the Board's decision to this Court, and the resolution of the instant appeal may have a direct effect on the outcome of his appeal. Therefore, he offers this *amicus* brief to assist the Court in resolving Question 1 in the July 18, 2022, Order.

ARGUMENT

The Board erred in failing to adjudicate the merits of Mr. Terry's sleep apnea claim because the September 2019 supplemental claim decision did not break the chain of continuous prosecution of the 2016 initial service connection claim.

Congress made plain in 38 U.S.C. § 5104C that when filed within a year of any decision on a claim, a supplemental claim is a request for RO review of that claim. *See Chevron v. Natural Resources Def. Counc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter.") "Statutory analysis always begins with the text of the statute itself." *Lacey v. Wilkie*, 32 Vet.App. 71, 75 (2019). And the language of § 5104C is plain that regardless of whether the claimant seeks RO review via a supplemental claim, higher level review, or review by the Board, it is the first claim in the chain of prosecution that is under review. 38 U.S.C. § 5104C(a)(1).

The statute makes clear that the first event in the chain is "a decision on a claim," and that the requested review option is made "with respect to *that* claim." 38 U.S.C. § 5104C(a)(1) (emphasis added). Congress emphasized throughout the provision that subsequent review requests under § 5104C(a)(1) relate to the claim that was addressed in that first decision. In subsection (a)(2)(A), Congress prohibited claimants from "tak[ing] another action . . . with respect to the *same claim* or same issue contained within the claim until" the first review request under (a)(1) is resolved. (emphasis added). "The claim" is also the focus in subsection (a)(2)(B), which allows claimants to make successive review requests "with respect *a claim* or an issue contained within the claim." (emphasis added). And in subsection (a)(2)(C), Congress permitted claimants to take "different actions . . . with respect to different *claims* or different issues contained with a claim." (emphasis added).

This language makes clear that when submitted within a year of a decision on "a claim," a supplemental claim is a mechanism for seeking review of "that claim." *See* 38 U.S.C. § 5104C(a)(1); *Lacey*, 32 Vet.App. at 75 (holding that the Court looks to "the specific context in which th[e] language is used" to determine its meaning). It is not a request for a review of the "decision on a claim." 38 U.S.C. § 5104C(a). Had Congress intended that a review option listed under § 5104C(a)(1) relate to the "decision on a claim," it would have used that phrase instead of "that claim" or "the same claim" or "a claim" in the subsections discussed above. Instead, it deliberately chose to relate the review requests to the "claim." 38 U.S.C. § 5104C(a)(2). And it "is

well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purportedly in the disparate inclusion or exclusion.'" *Heino v. Shinseki*, 683 F.3d 1372, 1379 (Fed. Cir. 2012) (alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The result is that when, pursuant to § 5104C(a)(1), a claimant files a supplemental claim in the chain of continuous prosecution of an initial claim, the RO's decision on the supplemental claim does not restart the chain of continuous prosecution. As the Secretary put it, "The fact that VA did not ultimately readjudicate [Appellant's] claim [upon receiving his supplemental claim] does not somehow transform Appellant's filing of his supplemental claim into something other than a continuous pursuit filing under §[] . . . 5104C." Secretary's Supp. Br. at 9-10. Here, because the claim that was the subject of the "continuous pursuit filing" related to the initial claim for service connection for sleep apnea, the Board was required to adjudicate the merits of that claim.

Indeed, VA's own regulation identifies a supplemental claim as a "[r]eview[] available" after VA issues a decision on a claim. 38 C.F.R. § 3.2500(a) (2022). Whereas a claimant has a right to review by the HLR authority or the Board without having to submit additional evidence, the RO will not actually review the initial claim unless the claimant submits new and relevant evidence. *See* 38 U.S.C. § 5108(a) (providing that the Secretary will "readjudicate the claim" only "[i]f new and relevant

evidence is presented or secured"). If the claimant fails to satisfy this threshold requirement, the RO will not readjudicate the initial claim. *Id.* But the RO's decision will still be on the initial claim—the claim that began the chain of prosecution. *See* 38 U.S.C. § 5104C. And because any subsequent action taken under § 5104C(a)(1) within a year of that decision relates to the initial claim, the RO's refusal to readjudicate the claim does not break the chain of continuous prosecution.

Section "5104C establishes two types of supplemental claims based on when the claim is filed: § 5104C(a) supplemental claims filed within a year of an [RO] decision, and § 5104C(b) supplemental claims filed more than a year after an [RO] decision." *Military-Veterans Advocacy v. Sec'y of Veterans Affs.*, 7 F.4th 1110, 1134 (Fed. Cir. 2021). The former keeps a continuously pursued claim live, regardless of whether the Secretary readjudicates the claim based on new and relevant evidence. *See* 38 U.S.C. §§ 5104C(a)(1), 7105(c)(2). The latter is the "only [] option for administrative review," *MVA*, 7 F.4th at 1134, if more than a year has passed since the latest decision on the claim and begins a new chain of continuous prosecution, *see* 38 U.S.C. § 5104C(a). In that case "the claim" referred to in § 5104C(a) is the supplemental claim, and new and relevant evidence is required element of that claim. *See* 38 U.S.C. § 5108(a).

In Mr. Terry's case, the claim that began the chain of continuous prosecution was the August 2016 claim for service connection for sleep apnea, not a supplemental claim that was filed more than a year after a final denial of sleep apnea. *See* July 18,

2022, Order at 1. It is the initial service connection claim that was denied in the June 2017 rating decision, and it is that claim that was reviewed by the HLR authority in April 2019. *See id.* at 1-2. Because Mr. Terry filed the June 2019 supplemental claim within a year of the HLR decision, the August 2016 claim for service connection was also the subject of the September 2019 supplemental claim decision. *See* 38 U.S.C. § 5104C(a)(1), (a)(2)(C).

The Secretary agrees with this understanding of the procedural history to this point. *See* Secretary's Supp. Br. at 9. As he explained, "[T]he September 2019 decision on Appellant's supplemental claim was a decision with respect to the 'same' claim decided in the April 2019 higher-level review decision." *Id.*

However, the Secretary is incorrect that "the September 2019 [supplemental claim] decision [] denied the supplemental claim and thus, but for the Board's review of that decision on appeal, ended Appellant's pursuit of benefits based on this initial claim." Secretary's Supp. Br. at 9. Section 5104C makes clear that Mr. Terry was permitted to again request review of the initial claim with a supplemental claim, an HLR request, or an NOD. 38 U.S.C. § 5104C(a)(1), (a)(2)(A); *accord* 38 C.F.R. § 3.2500(c)(1). And Mr. Terry did just that when he filed an NOD within a year of the supplemental claim decision, and jurisdiction over the initial claim—the sleep apnea claim—was conferred upon the Board. *See* 38 U.S.C. § 5104C(a)(1)(C); 38 U.S.C. § 7105(a).

This reading of § 5104C(a) is consistent with 38 U.S.C. § 7105(c). Together, these statutes provide that a decision on a claim becomes final only when the claimant breaks the chain of continuous prosecution by not filing a § 5104C(a)(1) option within a year of the most recent decision. Under § 7105(c), a decision on a claim becomes final, and the claim may not thereafter be "readjudicated or allowed," unless the claimant takes one of the actions listed in § 5104C(a)(1). 38 U.S.C. § 7105(a), (c).

Applied here, that means that the June 2017 decision on the initial sleep apnea claim never became final and the chain of continuous prosecution of that claim was not broken. In the time permitted under the law, Mr. Terry requested HLR review of his initial sleep apnea claim, prompting the HLR to readjudicate the claim. This prevented the June 2017 decision on the initial claim from becoming final. *See* 38 U.S.C. § 7105(c)(1). Then, within one year of the HLR decision, he requested supplemental claim review, prompting the RO to issue another decision "pursuant to 5108," 38 U.S.C. § 7105(b)(1)(A). This action prevented the April 2019 HLR decision from becoming final. *See* 38 U.S.C. § 7105(c)(2). And he filed an NOD within a year of the section 5108 decision, conferring jurisdiction over the initial claim upon the Board. *See* 38 U.S.C. § 7105(a); 38 U.S.C. § 5104C(a).

Contrary to the Board's finding, then, there has been no "prior final denial of his claim for service connection" that would break the chain of continuous prosecution. *Board Dec.* at 3. The Board, therefore, mischaracterized the issue before it when it stated, "[t]he question [sic] in this case are whether the Veteran submitted

evidence after the prior final denial of his claim for service connection (after April 2019), and if so, whether that evidence is new and relevant to this claim." *Board Dec.* at 3. The Secretary makes a similar error in arguing that "because the April 2020 NOD effectively sought review of the September 2019 supplemental claim decision, the only matter before the Board was whether [new and relevant evidence] had been submitted." Secretary's Supp. Br. at 3. Both the Secretary and the Board misunderstand that the April 2019 decision was not a final denial of the initial claim for sleep apnea that broke the chain of prosecution of the initial service connection claim, and that the submission of new and relevant evidence is not required for Board review of that claim.

The Secretary is correct that it was the September 2019 supplemental claim decision that Mr. Terry appealed to the Board. Secretary's Supp. Br. at 3. The supplemental claim was the latest in the § 5104C(a)(1) actions taken "in succession with respect to [the sleep apnea] claim," 38 U.S.C. § 5104C(a)(2)(B). And Mr. Terry filed his NOD within a year of the notice of decision on that most recent successive action.[1] 38 U.S.C. § 7105(b). The Secretary acknowledges that "[t]he fact that VA did not ultimately readjudicate that claim does not somehow transform Appellant's filing of his supplemental claim into something other than a continuous pursuit filing,"

[1] As a result, the record before the Board included all evidence actually or constructively in the record on the date of the September 2019 supplemental claim decision—the "decision of the agency of original jurisdiction on appeal," 38 U.S.C. § 7113(a).

Secretary's Supp. Br. at 9. But he fails to appreciate that the NOD conferred jurisdiction on the Board of that initial claim, not a supplemental claim filed more than a year after the latest decision that the Board could not review without new and relevant evidence. *See id.*; 38 U.S.C. § 5104C(a)(1).

This Court applied a similar analysis in *Dobbs v. McDonough*, Vet.App. No. 21-0031, 2022 WL 3009595 (July 29, 2022). In that case, the veteran submitted a supplemental claim under 38 U.S.C. § 5104C(a) within a year of a decision on his initial claim. *Id.* at *1. The RO determined that the veteran had not submitted new and relevant evidence and declined to readjudicate the claim. *Id.* Within a year of *that* decision, the veteran submitted an NOD and argued that he was entitled to VA assistance in the form of a medical examination. *Id.* *2. The Board, however, reviewed only whether new and relevant evidence had been submitted with the supplemental claim. *Id.*

The Court held that the Board incorrectly "treat[ed] the supplemental claim as the beginning of the claim stream on appeal, suggesting that, once it was filed, the 2019 rating decision on the initial service-connected claim became final." *Dobbs*, 2022 WL 3009595, at *3. "[T]hat cannot be the case," the Court held, "and section 5104C demonstrates this." *Id.*

Likewise, here, the June 2019 supplemental claim was not the beginning of the claim stream. Mr. Terry's submission of the supplemental claim did not render the June 2017 rating decision final. To the contrary, it kept the initial claim decided in

that decision alive. Therefore, the Board was required to adjudicate *that* initial claim in its decision, not a stand-alone supplemental claim.

If there had been a prior final denial of the sleep apnea claim, and the claim that initiated the chain of continuous prosecution was a supplemental claim filed more than a year after the most recent decision, the Board's focus on whether new and relevant evidence had been presented would be correct. *See* 38 U.S.C. § 5108(a). But even the Secretary agrees that here, Mr. Terry's initial claim for service connection initiated the chain of continuous prosecution. Secretary's Supp. Br. at 9. Therefore, Mr. Terry was not required to submit new and relevant evidence to get Board review of the claim, and the Board erred when it failed to review the merits of the claim.

Accordingly, the Court should hold that the plain language of §§ 5104C and 7105 provide that when a claimant continuously prosecutes an initial claim by taking an action identified in section 5104C(a)(1) within a year of the initial decision, the initial claim remains pending. And the initial claim remains pending until the claimant fails to continue to prosecute the claim by not filing a section 5104C(a) option within a year of the most recent decision on the initial claim. *See* 38 U.S.C. § 7105(c).

Section 7104(b) provides a limiting principle— "when a claim is disallowed by the Board, the claim may not thereafter be readjudicated and allowed and a claim based upon the same factual basis may not be considered," "[e]xcept as provided in section 5108 of this title." This means that when a claimant continuously prosecutes an initial claim up to the Board and the Board denies it, the Board cannot thereafter

review the initial claim unless and until there is new and relevant evidence. *See* 38 U.S.C. §§ 5108, 7104(b). Without new and relevant evidence, the Board would have no choice but to dismiss the appeal for lack of jurisdiction. *See* 38 U.S.C. § 7104(b). But, if the claimant submits a supplemental claim within a year of the Board's dismissal, the chain of continuous prosecution continues, and it is still the initial claim under review. The only thing that can break the chain of continuous prosecution and finalize a denial of the initial claim is the claimant's failure to take one of the actions available under § 5104C(a) within a year of the most recent decision.

Here, though, there is no indication that the Board previously denied Mr. Terry service connection for his sleep apnea. So he did not need to submit new and relevant evidence for the Board to adjudicate the merits of the claim. Accordingly, the Court should hold that the Board erred in limiting its focus to whether new and relevant evidence has been submitted.

CONCLUSION

When read together, §§ 5104C and 7104 make plain that a decision on a supplemental claim filed within a year of another decision on a claim does not break the chain of continuous prosecution of an initial claim for service connection. Rather, it is simply a request for the RO to review the claim that began the chain of continuous prosecution. Therefore, amicus curaie Martin Loyd urges the Court to hold that the Board erred when it found that the April 2019 HLR decision was a final denial of the Veteran's initial sleep connection and demanded new and relevant evidence.

Respectfully submitted,

/s/ Amy F. Odom

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EXHIBIT A

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: August 11, 2022

[redacted]

MARVIN LOYD
[redacted]

Dear Appellant:

A Veterans Law Judge at the Board of Veterans' Appeals made a decision on your appeal.

If you're satisfied with the decision, you don't have to do anything.

What's in the Board decision?

Your Board decision tells you which issue(s) were decided in your appeal. It explains the evidence, laws, and regulations the Veterans Law Judge considered when making their decision and identifies any findings that are favorable to you.

If your decision letter includes a "Remand" section, this means the judge is sending one or more issues in your appeal to your local VA office to correct an error the judge identified while reviewing your case. If an issue is remanded, it hasn't been decided and it can't be appealed yet. You'll receive a decision from the local VA office after they review the issue again.

What if I disagree with the decision?

If you disagree with the judge's decision, you can continue your appeal. See the letter included after your Board decision to learn more about the decision review options available to you.

What if I have questions?

If you have any questions or would like more information, please contact your representative (if you have one) or visit va.gov/decision-reviews/get-help. To track the status of your appeal, visit va.gov/claim-or-appeal-status/.

Sincerely yours,

Decision Management Branch
Office of Appellate Support

Enclosures (2)
CC: ROBERT V CHISHOLM, Attorney

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
MARVIN LYNN LOYD
Represented by
Robert V. Chisholm, Attorney

[redacted]
Docket No. 211129-200772
Advanced on the Docket

DATE: August 11, 2022

ORDER

New and relevant evidence having not been presented, readjudication of the claim for service connection for a left eye disability is denied.

REMANDED

Entitlement to service connection for a left foot disability is remanded.

Entitlement to service connection for a right foot disability is remanded.

Entitlement to service connection for chronic fatigue is remanded.

Entitlement to an earlier effective date for the 100 percent disability rating for posttraumatic stress disorder (PTSD), to include consideration of entitlement to a total disability rating based on individual unemployability (TDIU) prior to April 17, 2019, is remanded.

Entitlement to a disability rating in excess of 10 percent for right eye scotoma, to include consideration of entitlement to a TDIU rating is remanded.

Entitlement to an initial disability rating in excess of 20 percent for residual weakness, right lower extremity, to include consideration of entitlement to a TDIU rating is remanded.

Entitlement to a higher rate of special monthly compensation (SMC) is remanded.

[redacted]

Entitlement to an effective date prior to April 17, 2019, for the grant of SMC based on housebound status is remanded.

Entitlement to an effective date prior to August 12, 2019, for the grant of basic eligibility to Dependents' Educational Assistance (DEA) benefits under 38 U.S.C. Chapter 35 is remanded.

INTRODUCTION

The Veteran served on active duty from January 1971 to January 1973, November 1990 to July 1991, and January 1997 to September 1997.

He submitted a VA Form 10182 in November 2021, wherein he elected to have his claims reviewed under the Appeals Modernization Act (AMA). He elected to have the above-noted claims reviewed in the Evidence Submission lane, and as such, had 90 days from the date his appeal was received to submit additional evidence in support of his claims.

The Veteran previously submitted a claim for entitlement to service connection for a left eye disability which was denied in a November 2019 rating decision. His claim was denied on the basis that the disability was neither incurred in service nor caused by a service-connected disability. The Veteran then sought readjudication of this claim in November 2020. In connection with the Veteran's claim for readjudication, he has not provided any additional evidence, argument, or alternative theory of entitlement to establish his left eye disability was either incurred in service or caused by a service-connected disability. As such, new and relevant evidence has not been received to warrant readjudication of that claim.

REASONS FOR REMAND

Pursuant to 38 C.F.R. § 20.802, unless an issue on appeal can be granted in full, the Board shall remand the appeal to the agency of original jurisdiction for correction of an error on the part of the agency of original jurisdiction to satisfy its duties under 38 U.S.C. § 5103A, if the error occurred prior to the date of the agency of original jurisdiction decision on appeal.