20-7251

IN THE
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

WILLIAM E. TERRY,

Appellant,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Appellee.

AMICUS CURIAE BRIEF OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF APPELLANT WILLIAM E. TERRY

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INTRODUCTION AND RELEVANT FACTS

The Appellant, William E. Terry (Mr. Terry or the Veteran), filed a claim of service connection for sleep apnea in August 2016. *See* July 18, 2022, Court Order at 1. The Department of Veterans Affairs (VA) Agency of Original Jurisdiction (AOJ) denied Mr. Terry service connection by a June 2017 rating decision. *Id*. Mr. Terry initiated an appeal of the June 2017 Rating Decision by submitting a timely Notice of Disagreement (NOD) in June 2018. *Id*.

In February 2019, Mr. Terry opted in to the Rapid Appeals Modernization Program (RAMP), and requested higher-level review (HLR). *Id*. The AOJ continued to deny service connection for sleep apnea in an April 16, 2019, HLR decision. *Id.* at 2. Mr. Terry then filed a supplemental claim in June 2019 and, in September 2019, the AOJ issued a decision on the supplemental claim in which it determined that no new and relevant evidence (NRE) had been submitted to warrant readjudication of the claim of service connection for sleep apnea. *Id*.

Mr. Terry filed an NOD (VA Form 10182) on April 14, 2020, requesting direct review by the Board of Veterans' Appeals (Board) of the April 16, 2019, HLR decision. *Id*. In the June 2020 decision on appeal, the Board found that the April 2020 NOD could not be an NOD to the April 2019 HLR decision because it was "'not the most recent decision on appeal'" and, therefore, construed the April 2020 NOD as an NOD with the September 2019 supplemental claim decision. *Id*. The Board also found that, because the April 2019 HLR decision had not been appealed to the Board, it is final. *Id.* The Board ultimately denied Mr. Terry's appeal without reaching the merits of his underlying

claim, finding that no NRE had been submitted sufficient to warrant readjudication of the claim of service connection for sleep apnea. *Id*.

In its July 2022 Order, the Court invited *amicus curiae* to assist in answering whether the Board had jurisdiction to address Mr. Terry's claim of service connection for sleep apnea on the merits. *Id*. For the reasons discussed below, *amicus curiae* respectfully submits that the Board did have jurisdiction to review Mr. Terry's service connection claim on the merits.

SUMMARY OF THE ARGUMENT

In 2017, Congress enacted the Veterans Appeals Improvement and Modernization Act (AMA) to reform VA's administrative appeals system. *See* Pub. L. No. 115-55, 131 Stat. 1105 (2017) (codified at scattered sections of 38 U.S.C.). Under the AMA, claimants may choose between three procedural options in response to an unfavorable initial decision, within one year of that decision: (1) filing a supplemental claim based on additional evidence; (2) requesting higher-level review within the VA based on the same evidentiary record; and (3) filing an NOD to directly appeal to the Board of Veterans Appeals (Board). 38 U.S.C. § 5104C(a)(1). While a claimant may not take multiple decision review actions concurrently, *see* 38 U.S.C. § 5104C(2)(A), Congress also provided in 38 U.S.C. § 5104C(2)(B) that "[n]othing in this subsection shall prohibit a claimant from taking any of the actions set forth in paragraph (1) in succession with respect to a claim or an issue contained within the claim."

The plain language of the statute clearly and unambiguously permits a claimant to take multiple decision review actions within one year of an AOJ decision, provided that

no more than one review action is undertaken at any given time. Nothing in the statute suggests that Congress intended to limit claimants to only one review option per AOJ decision, or that a decision review request can apply only to the most recent AOJ decision, regardless of the timing of the request. This Court should reject the Secretary's litigation position that it does.

ARGUMENT

I. 38 U.S.C. Section 5104C(a) Unambiguously Permits a Claimant to Pursue Multiple Decision Review Options With Respect to an AOJ Decision Within One Year of That Decision.

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Statutory construction begins with the text of the statute. *Id*. If the statutory language is unambiguous and "'the statutory scheme is coherent and consistent,'" the inquiry must cease. *Id*. (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)). Deference to an agency's statutory interpretation is "not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612, 1630 (2018) (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843, n. 9 (1984)). Even then, deference is warranted only when the "character and context of the agency interpretation entitles it to controlling weight." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2406 (2019) (citing *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012)).

The Secretary attempts to inject ambiguity into the statute where there is none. Specifically, the Secretary argues that "[n]either section 5104C nor any other statute enacted or amended as part of the AMA states that a claimant may take multiple actions in response to the same decision made on their claim," and that the statute "is, at best, facially ambiguous on that point." *See* Secretary's Supplemental Brief (Sec. Supp. Br.) at 11. This is not accurate.

Section 5104C(a) is titled "Within One Year of Decision." 38 U.S.C. § 5104C. Thus, it is clear that Congress intended for each provision of this subsection to apply to the one-year period after the AOJ issues a decision on a claim. As the Federal Circuit noted:

> Within one year of an AOJ decision, a claimant may generally pursue "any" one of three lanes of administrative review by filing: a request for higher-level review, a supplemental claim, or a NOD for Board review. *See* § 5104C(a)(1). This general rule, however, is not without limits, as a claimant cannot simultaneously pursue two or more administrative review options for the same claim or issue. *See* § 5104C(a)(2)(A). *But nothing can prohibit that claimant from pursuing each administrative review option in succession*. *See* § 5104C(a)(2)(B).

Military-Veterans Advocacy v. Sec'y of Veterans Affairs, 7 F.4th 1110, 1134 (Fed. Cir. 2021) (emphasis added).

Although the Secretary acknowledges that section 5104C(a)(2)(B) explicitly provides that a claimant may take multiple actions in succession with respect to a claim or an issue contained within the claim, he argues that "it does not state that a claimant can take these successive actions in response to the *same* decision rendered with respect to that claim or issue contained within that claim." Sec. Supp. Br. at 12 (emphasis in

original). The Secretary doubles down on this proposition, arguing that "subparagraph (2)(B) says nothing about how or when a claimant can take successive action in continuous pursuit of a claim." *Id*.

Yet again, the Secretary's interpretation ignores the fact that the provisions of subparagraph (2)(B) are contained within the subsection titled "Within One Year of Decision." *See* 38 U.S.C. § 5104C(a). With that title, Congress specified its intention to allow a claimant to take any (or as many) of the decision review actions in succession *within one year of the AOJ's decision*.

Second, even if, for the sake of argument, this Court determines that section 5104C(a) is silent on whether a claimant can take more than one decision review action with respect to the same AOJ decision, any such silence does not permit the Secretary to adopt the veteran-unfriendly policy that filing a supplemental claim after an AOJ decision forecloses a claimant's opportunity to appeal that same decision to the Board on the merits in light of the purposes of veterans law generally and the AMA specifically. *See, e.g.,* Secretary's Responsive Brief (Sec. Br.) at 11, n. 14 ("where a claimant declines to seek review of a decision by filing either a request for higher-level review or a notice of disagreement and, instead, elects to file a supplemental claim based on additional evidence, the decision on the original claim based on the original evidence necessarily becomes final."); *Shinseki v. Sanders*, 556 U.S. 396, 416, 129 S.Ct. 1696, 1709 (Souter, J., dissenting) (explaining "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions"). Under *Chevron*, mere statutory silence does not automatically confer gap-

filling power on agencies.[1] Here, the text and structure of section 5104C(a) show that Congress has left no gap to fill. The statute was drafted as part of a "strongly and uniquely pro-claimant" statutory scheme. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1988) ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."). Section 5104C(a)'s language—that "[n]othing in this subsection shall prohibit a claimant from taking any of the [decision review] actions…in succession with respect to a claim" within one year of an AOJ decision—was intended to guarantee that a claimant may take any, or as many, of the decision review options they wish with respect to a particular AOJ decision, within one year of that decision, with the caveat that the different review actions cannot run concurrently with respect to the same issue.

Third, to the extent there is any "interpretive doubt" as to whether section 5104C(a) permits a claimant to take more than one decision review option within one year of an AOJ decision, the Secretary entirely fails to address the pro-veteran cannon, which requires that "provisions for benefits to members of the Armed Services are to be

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[1] *See, e.g., FAG Italia S.p.A. v. United States*, 291 F.3d 806, 817 (Fed. Cir. 2002) ("[T]he statutory silence as to Commerce's power to initiate duty absorption inquiries for transition orders does not give Commerce authority to conduct such inquiries."); *Ry. Lab. Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) ("To suggest, as the [Commission] effectively does, that *Chevron* step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power... is both flatly unfaithful to the principles of administrative law...and refuted by precedent."); *Lin-Zheng v. Att'y Gen.*, 557 F.3d 147, 156 (3d Cir. 2009) (en banc) ("[A] statute's silence on a given issue does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute.").

construed in the beneficiaries' favor." *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011); *see also Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) ("interpretive doubt is to be resolved in the veteran's favor"). Congress made clear that, under the AMA, a claimant may take "any of the [decision review] actions…in succession with respect to a claim or an issue contained within a claim" within one year of an AOJ decision. 38 U.S.C. § 5104C(a)(2)(B).

Yet, under the Secretary's interpretation, if a claimant selects the decision review options in the successive order as they appear in subparagraph (a)(1), as did Mr. Terry here, once a supplemental claim is filed and denied by the AOJ, that claimant is barred from taking the next successive review option to have the initial claim reviewed on the merits, filing an NOD to appeal to the Board. *See* Sec. Supp. Br. at 10–21. Instead, as the Secretary argues, should a claimant avail himself of the right to file a supplemental claim, he must accept the additional burden of submitting new and relevant evidence in order to obtain a Board review of the AOJ's decision on the merits. *Id*.; *see* 38 C.F.R. § 3.156(c). It runs counter to the pro-veteran cannon to construe section 5104C(a), which is designed to afford claimants multiple options to request an AOJ decision be reviewed within one year of that decision, to instead require a claimant to select one, and only one, decision review option, even if still within the year after the AOJ's decision.

Last, the Secretary's interpretation does not even follow the VA's own guidance provided when implementing the AMA. In the Final Rule, VA noted that "statutory requirements…provide a claimant who is not fully satisfied with the result of *any* review lane additional options to seek *further review* while preserving an effective date for

benefits based upon the original filing date of the claim." 84 Fed. Reg. 138 (Jan. 18, 2019). Under the Secretary's interpretation, contrary to VA's guidance in the Final Rule, a claimant who is unhappy with a supplemental claim decision cannot then seek further review of the initial AOJ decision on the merits, even within one year of that initial AOJ decision.

The Federal Circuit noted that under the AMA, "[s]hould one lane of review prove unsuccessful, claimants may sequentially pursue another lane of review…by selecting an appropriate alternative lane within one year of an unsatisfactory AOJ, Board, or Veterans Court decision." *Military-Veterans Advocacy*, 7 F.4th at 1119. Consistent with the Federal Circuit's reading and the plain and unambiguous statutory language of section 5104C(a), this Court should hold that a claimant may take as many decision review actions as they wish, with respect to the same AOJ decision, within one year of that decision.

II. Even if section 5104C(a) is Ambiguous, the Secretary's Interpretation Is Unreasonable

Even if section 5104C(a) is ambiguous as to whether a claimant may take multiple decision review actions with respect to the same AOJ decision, under *Chevron*, this Court should not defer to the Secretary's interpretation both because the interpretation is a litigation position rather than an "authoritative or official position," *Kisor*, 139 S.Ct. at 2406, and because the interpretation is unreasonable. *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001) (citing *Chevron*, 467 U.S. 837).

Under the Secretary's interpretation of 5104C(a), when a claimant chooses to submit a supplemental claim following an AOJ decision on a claim on the merits, he is "declin[ing] to seek review of [that] decision by filing…a notice of disagreement…." Sec. Br. at 11; *see also* Sec. Supp. Br. at 19. Essentially, the Secretary argues that when a claimant files a supplemental claim, he is accepting the AOJ's decision on his initial claim on the merits, allowing it to become final, and affirmatively waiving his right to appeal that decision on the merits to the Board. As the Federal Circuit has explained, "even if the government's asserted interpretation…is plausible, it would be appropriate under *Brown* only if the statutory language unambiguously permitted" it. *Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (citing *Brown*, 513 U.S. at 118). Here, the language of 5104C(a) does not unambiguously permit the Secretary's interpretation.

In order for a claimant to waive the right to have an AOJ decision reviewed by the Board on the merits, he "must first possess a right, he must have knowledge of that right, and he must intend, voluntarily and freely, to relinquish or surrender that right." *Janssen v. Principi*, 15 Vet. App. 370, 374 (2001) (citing *United States v. Olano*, 507 U.S. 725, 732–33 (1993) (holding waiver is the "intentional relinquishment or abandonment of a known right.")). VA Form 20-0998, which notifies claimants of their options to seek review of an AOJ decision, does not even suggest, much less notify, a claimant that choosing to file a supplemental claim precludes a subsequent request to have the Board review the decision on the merits. In fact, the notice informs claimants that they "may not request review of the same issue using more than one option *at the same time*." This is consistent with guidance VA provides claimants on its website, which informs

claimants that "[i]f you aren't satisfied with the results of the first option you choose, you can try another eligible option." *See* https://www.va.gov/decision-reviews/ (last accessed September 15, 2022).

A reasonable claimant, after having received an adverse AOJ decision, who reviews the notice provided in VA Form 20-0998 and turns to VA's website for additional information, would interpret VA's notice and other guidance in a way that allows pursuit of multiple review actions of an AOJ decision, provided that the review request is received by VA within one year of the AOJ decision and no more than one review can be conducted at any given time. At the very least, nowhere does VA inform claimants that choosing to file a supplemental claim affirmatively waives their right to appeal the AOJ decision on the merits to the Board. As such, even if the language of 5104C(a) is ambiguous, this Court should reject the Secretary's interpretation that a claimant may choose only one decision review option with respect to a specific AOJ decision as unreasonable.

In the alternative, if the Court agrees with the Secretary's interpretation that a claimant may choose only one decision review option with respect to a specific AOJ decision, and any decision review request is tied to the most recent AOJ decision, *amicus curiae* respectfully requests that the Court hold that any post-decisional notice must inform claimants that filing a supplemental claim renders that decision final, and prevents the claimant from further appealing that same decision on the merits to the Board.

III. CONCLUSION

For the reasons noted above, *amicus curiae* respectfully submits that the Court should reject the Secretary's interpretation and instead find that a claimant may take multiple decision review actions with respect to a single AOJ decision within one year of that decision.

Respectfully submitted,

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APPENDIX

Attachment 1

Department of Veterans Affairs

YOUR RIGHT TO SEEK REVIEW OF OUR DECISION

This document outlines your right to seek review of our decision on any issue with which you disagree. You may generally select one of three different review options for each issue decided by VA. However, you may not request review of the same issue using more than one option at the same time. Below is information on the three different review options.

	Supplemental Claim	Higher-Level Review	Board Appeal
What Is This?	A reviewer will determine whether new and relevant evidence changes the prior decision.	An experienced claims adjudicator will review your decision using the same evidence VA considered in the prior decision.	A Veterans Law Judge at the Board of Veterans' Appeals (Board) will review your decision.
By Selecting This Option	You are adding or identifying new and relevant evidence to support your claim that we did not previously consider. VA will assist you in gathering new and relevant evidence that you identify to support your claim.	You have no additional evidence to submit to support your claim, but you believe there was an error in the prior decision. You can request an optional, one-time, informal conference with a Higher-Level Reviewer to identify specific errors in the case, although requesting this conference may delay the review.	You must choose a docket: **Direct Review** - You do not want to submit evidence or have a hearing. **Evidence Submission** - You choose to submit additional evidence without a hearing. **Hearing** - You choose to have a hearing with a Veterans Law Judge.
Goal To Complete	**125 days** on average	**125 days** on average	**365 days** on average for Direct Review (longer for the other options)
Form To File To Select This Option*	**VA Form 20-0995,** *Decision Review Request: Supplemental Claim*	**VA Form 20-0996,** *Decision Review Request: Higher-Level Review*	**VA Form 10182,** *Decision Review Request: Board Appeal (Notice of Disagreement)*
Further Options After This Decision Review	You may request another Supplemental Claim, a Higher-Level Review, or a Board Appeal.	You may request a Supplemental Claim or a Board Appeal.	You may request a Supplemental Claim or appeal to the U.S. Court of Appeals for Veterans Claims.

* All forms listed above are available at www.va.gov/vaforms/.

For most VA benefits, **you have 1 year from the date on your decision notice to request a decision review to ensure the earliest possible effective date.** Consult your decision notice for specific limitations.

If you do not submit a decision review request within the required time, you may only seek review through the following:

- A request to revise the decision based on a clear and unmistakable error, or
- A Supplemental Claim. If you file a Supplemental Claim after the **1-year** time limit, the effective date for any resulting award of benefits generally will be tied to the date VA receives the Supplemental Claim.

While most decision review options are available to you, there are limitations based on the type of decision you received.

- If you are a party to a **contested claim** - such as claims for apportionment, attorney fee disagreement, or multiple parties filing for survivor's benefits - your *only* option for disagreeing with your decision is to file a Board Appeal within **60 days** of the date on your decision notice.
- If you are seeking review of an **insurance decision** you have an *additional* option to challenge VA's decision by filing a complaint with a United States district court in the jurisdiction in which you reside within 6 years from when the right of action first accrues. Consult your decision notice for details on what options are available and where to send the request.

Get Help with Your Review Request:

For more information on all the available review options, contact us at 1-800-827-1000 or visit www.va.gov/decision-reviews/. If you need help filing a decision review, you may want to work with an accredited attorney, claims agent, or a Veterans Service Organization (VSO) representative. Additional information about working with an accredited attorney, claims agent, or VSO representative is available at www.va.gov/decision-reviews/get-help-with-review-request/. You may also find a directory of accredited representatives at www.va.gov/vso.