UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JESUS G. ATILANO, **Appellant** **v.** **DENIS MCDONOUGH,** **Secretary of Veterans Affairs,** **Appellee**	**17-1428 EAJA**

APPELLANT'S EAJA REPLY

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THE UNITED STATES COURT OF APPEALS FOR VETERAN CLAIMS

JESUS G. ATILANO,	)	
Appellant,	)	
	)	
v.	)	**No. 17-1428 EAJA**
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLANT'S EAJA REPLY

Court Rule 39(a)(2) Reply

Per Court Rule 39(a)(2), Jesus G. Atilano ("appellant") respectfully submits his reply to the Secretary's response to appellant's application for attorney fees and expenses under the Equal Access to Justice Act ("EAJA"). *See* 28 U.S.C. § 2412(d)(2)(F). EAJA at 1.

Nature of the Case

Mr. Atilano appealed an April 18, 2017, decision of the Board of Veterans' Appeals ("Board") which denied entitlement to a disability rating greater than 50 percent for post-traumatic stress disorder ("PTSD") prior to December 17, 2010, and denied entitlement to an effective date earlier than March 16, 2009, for a total disability rating based on individual unemployability. Record[1] ("R.") at 72-73 (1-79).

The U.S. Court of Appeals for Veterans Claims ("Court") has jurisdiction pursuant to 38 U.S.C. §§ 7252, 7266.

This matter was fully litigated. Mr. Atilano filed an opening brief, the Secretary filed a

[1] All citations to the record refer to the 3,374-page Record Before the Agency (record) served on Appellant in this matter.

responsive brief, and Mr. Atilano filed a reply brief. The Court granted Mr. Atilano's motion for oral argument, and in January 2019, the parties argued before the Court sitting in Washington DC.

In a July 2019 decision, the Court affirmed the Board's decision. *Atilano v. Wilkie* (*Atilano* I), 31 Vet.App. 272 (2019). Mr. Atilano appealed to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). The Federal Circuit had jurisdiction pursuant to 38 U.S.C. § 7292.

This matter was fully litigated before the Federal Circuit. Mr. Atilano filed an opening brief, the Secretary filed a responsive brief, and Mr. Atilano filed a reply brief. Due to procedures set in place because of the Covid 19 Pandemic, oral argument was held telephonically with the Federal Circuit sitting in Washington DC.

In a September 2021 decision, the Federal Circuit vacated and remanded the Court's decision for further consideration of the relevant statute and the agency's related regulations. *Atilano v. McDonough* (*Atilano* II), 12 F.4th 1375 (Fed. Cir. 2021).

In November 2022, after supplemental briefing by the parties, the Court set aside and remanded the Board's decision and held that under 38 U.S.C. § 7107, the Secretary of Veterans Affairs cannot condition the right to a hearing, specifically a veterans' benefits claimant's right to elicit testimony from witnesses before the Board, on the claimant's attendance. *Atilano v. McDonough (Atilano III)*, 35 Vet.App. 490 (2022).

Judgment and mandate were entered on December 1, 2022. Within 30 days of final judgment, Mr. Atilano filed an application for attorney fees and expenses.

In the EAJA application, Mr. Atilano averred that he was a prevailing party, that the

government's position was not substantially justified, and that a detailed itemized list of hours billed was appended to the application. EAJA at 1-17. Mr. Atilano asked that the Court grant $54,987 in attorney fees and waived all costs, including airfare, hotel lodging, and electronic legal research charges associated with the appeal. EAJA at 9.

In February 2023, the Secretary filed a response challenging the EAJA on the grounds that the government's position was substantially justified, and in the alternative that the amount billed was unreasonable. Secretary's Response ("Response") at 1.

The Secretary's Contentions

As an initial matter, the Secretary conceded that Mr. Atilano's EAJA application satisfied the jurisdictional requirements of 28 U.S.C. § 2412, that Mr. Atilano was a prevailing party, that there are no special circumstances that would make an award unjust, and that the Secretary does not challenge the attorneys' rate.

Thereafter, the Secretary argued that Mr. Atilano's EAJA application should nonetheless be denied because the Secretary's position was substantially justified. Response at 6-11.

In support of this contention, the Secretary argued that three factors weighed in favor of concluding that the government's position was substantially justified. Id. First, "a unanimous panel of this Court initially agreed with the Board's administration and the Secretary's litigation position.", second, the "Federal Circuit's decision results in an evolution of VA benefits law that will result in a new and more stringent requirement for adjudication", and third, "the Federal Circuit's holding was one of first impression."

Response at 8-11.

Alternatively, the Secretary argued for a reduction of attorney fees on the basis that the hours billed were unreasonable. Response at 12-19. Specifically, the Secretary challenged hours billed for record review before the Court and the Federal Circuit, hours billed for legal research, and hours billed for travel to Washington DC. Response at 12-19.

Appellant's Reply to the Secretary's Contentions

As a preliminary matter, Mr. Atilano concedes that his EAJA application should be reduced. As noted by the Secretary, appellant's itemized bill includes a charge for 0.5 hours for Mr. Carpenter to prepare and file his appearance. This entry is erroneous, should not have been included in the billing, and should be eliminated.

With regard to the remainder of the Secretary's response, there is no merit to the Secretary's argument that his position was substantially justified or to his argument that the hours billed were unreasonable or excessive. The Court should find the Secretary's arguments unconvincing, and with the exception of a reduction of 0.5 hours for attorney time, award nearly the full amount sought by Mr. Atilano.

The Secretary's position was not substantially justified.

As discussed below, the Secretary's administrative and litigation positions were not substantially justified because they clearly conflict with the plain language of the statute and the Secretary's own implementing regulation. In short, the government's administrative and litigation positions have neither a reasonable basis in law nor fact. *Pierce v. Underwood*, 487 U.S. 552, 556 (1988).

For the government's position to be substantially justified, the Secretary must demonstrate the reasonableness in law and fact of his position before the Court and before the agency based upon the totality of the circumstances, including merits, conduct, reasons given, and consistency with judicial precedent and the Secretary's policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filing of the parties before the Court. *Stilwell v. Brown*, 6 Vet.App. 291, 302 (1994); *see also Patrick v. Shinseki,* 668 F.3d 1325 (Fed. Cir. 2011) and *Smith v. Principi*, 343 F.3d 1358 (Fed. Cir. 2003).

In his response, the Secretary attempted to demonstrate that, taking into consideration the totality of the circumstances, his administrative and litigation positions had a reasonable basis in law and fact. Response at 6-11. In particular, the Secretary advanced three arguments to demonstrate that his position was substantially justified, to include the Court's unanimous panel decision in *Atilano I*, the notion that the "Federal Circuit's decision" results in an "evolution of the law" and would require a "new and more stringent requirement for adjudication", and third that, "the Federal Circuit's holding was one of first impression." Response at 6-11.

Stated differently, the Secretary argued that his position had a reasonable basis in law and fact because a panel of the Court unanimously agreed with his position in *Atilano I*, the Federal Circuit's decision (*Atilano II*), which unanimously did not agree with his position, would require "new and more stringent requirements for adjudication", and the Federal Circuit's decision (*Atilano II*) was one of first impression.

While this was clearly a matter of first impression before both this Court and the Federal Circuit, this fact does not by itself or in combination with any other factor render

the Secretary's administrative or litigation positions substantially justified. Critically, the government's administrative and litigation positions have neither a reasonable basis in law nor fact merely because a court of competent jurisdiction has never issued a precedential decision on the issue raised.

Likewise, that a decision of a court of competent jurisdiction will result in an evolution of the law or require an agency to change its procedures in order to be in compliance with the law does not by itself or in combination with any other factor render the Secretary's administrative or litigation positions substantially justified. Further, that this Court unanimously agreed with the Secretary's position in its prior decision does not by itself or in combination with any other factor render the Secretary's administrative or litigation positions substantially justified.

In determining whether the government's position was substantially justified, the Court should consider whether the government's position was directly contrary to the plain language of the controlling statute. A decision from the U.S. Court of Appeals for the Seventh Circuit is persuasive authority that where the government's position was directly contrary to the plain language of the controlling statute, the position was not substantially justified even though other courts had accepted it. *Marcus v. Shalala*, 17 F.3d 1033 (1994).

Before answering the question of whether the government's position was directly contrary to the plain language of the controlling statute, it is necessary to first identify the government's position, the controlling statute, and the Secretary's implementing regulations. The statutory provision at the heart of this matter has been 38 U.S.C. § 7107, and the Secretary's implementing regulations at 38 C.F.R. §§ 20.700-.716 (2018).

It is a more difficult task to identify the Secretary's administrative and litigation positions because as demonstrated below, the Secretary has never had a consistent position, and this in and of itself demonstrates that the government's position was not substantially justified. Where the Secretary's position is inconsistent or where the Secretary concedes that its position is contrary to its own implementing regulations, the Court should conclude that the government's position was not substantially justified.

The Secretary's administrative position can be found in the Board's April 2017 decision. R. 12-13 (1-77). There, the Board did not interpret § 7107, but instead held that pursuant to the Secretary's regulations, it was within a Board member's **discretion** to allow for a hearing to proceed to elicit witness testimony if there was good cause shown for the absence of the veteran. R. 12-13 (1-77). Here, the Board wrote, in pertinent part:

> Under 38 C.F.R. § 20. 702 (d), if an appellant fails to appear for a scheduled hearing and a request for postponement has not been received and granted, the case will be processed as though the request for a hearing had been withdrawn. The provision further reflects that "no further request for a hearing will be granted in the same appeal unless such failure to appear was with good cause and the cause for the failure to appear arose under such circumstances that a timely request for postponement could not have been submitted prior to the scheduled hearing." **If the Veteran, either on his own or by way of his attorney, had provided good cause for his failure to appear at the hearing, then the presiding Board member can allow for testimony from the Veteran's witnesses.**

R. 12-13 (1-77). (**Bold** emphasis added).

Thereafter, before the Court, the Secretary's litigation position interpreted § 7107(b) consistent with the Board's decision. Secretary's Brief (Secretary.Br.) at 8-12. The two principal arguments advanced by the Secretary before the Court were that "VA's regulations affording a Board judge the discretion to decline to hold a hearing without the appellant

present are reasonable, consistent with the statutory scheme, and entitled to deference", and "the Board's conclusion that appellant failed to show good cause to hold a hearing without appellant was plausible, consistent with VA regulations, and accompanied by adequate reasons or bases. Secretary.Br. at 8-16.

After the Court issued its decision in *Atilano I,* the Secretary's litigation position changed. In *Atilano I*, the Court held that correctly interpreted, § 7107 did **not** grant Board members discretion to hold hearings to allow testimony of witnesses in the absence of the appellant. *Atilano*, 31 Vet.App. at 280. Here, the Court wrote, in pertinent part:

> In short, the overall statutory structure of section 7107 confirms that an appellant exercising the right to a Board hearing must participate in that hearing. The appellant has the choice whether to do so by appearing personally in the presence of the Board member or by participating remotely via video conference or other electronic means, **but there is no provision allowing an appellant to invoke the right to a hearing but decline to participate.**

Atilano, 31 Vet.App. at 280. (**Bold** emphasis added).

Although the Court had interpreted § 7107 in a manner that was inconsistent with the Secretary's administrative and litigation positions before the Court, the Secretary did not seek reconsideration, en banc consideration, or file an appeal to the Federal Circuit. In *Atilano I,* the Court stripped the Board of its discretionary authority to hear testimony in hearings whenever the appellant failed to appear for good cause.

Mr. Atilano appealed to the Federal Circuit, and it was at the Federal Circuit that the Secretary adopted a new litigation position consistent with the Court's decision in *Atilano I*, but later conceded at oral argument that this position was inconsistent with the Secretary's implementing regulations.

In the government's brief before the Federal Circuit, the Secretary adopted the Court's *Atilano I* position as its litigation position. Government's Brief (DOJ Brief) at 13-27. *See* Appendix. Here, the Secretary summarized his argument and wrote, in pertinent part:

> The Veterans Court correctly interpreted 38 U.S.C. § 7107(b) to require an appellant's participation at a board hearing requested by that appellant. The plain language of the statute supports this interpretation.

DOJ Brief at 13.

Thereafter, in oral argument before the Federal Circuit, the Secretary conceded that his litigation position in his brief was contrary to the Secretary's implementing regulations. *Atilano*, 12 F.4th at 1379. In noting the Secretary's concession, the Federal Circuit wrote, in pertinent part:

> The government contends that the language of the statute unambiguously requires that the veteran be present for the hearing unless good cause is shown for his absence. Assuming the statute is ambiguous, however, the government concedes that 38 C.F.R. § 20.700(b) does not require the appellant to personally appear, but rather that it merely contemplates the person appearing for the hearing.

Atilano, 12 F.4th at 1379.

In and of itself, the shifting litigation position and concession noted by the Federal Circuit demonstrate that the government's position was not substantially justified. Alternatively, the Court should also conclude that the government's position was not substantially justified because its position was directly contrary to the plain language of the controlling statute.

The Federal Circuit held that the Court erred as a matter of law and wrote, in pertinent part:

> We hold that the Veterans Court erred as a matter of law when it held that "the plain meaning of § 7107(b) requires an appellant's in-person or electronic participation." *See Atilano*, 31 Vet.App. at 281. Rather, the language of § 7107 does not unambiguously require a veteran to be present at his hearing for his legal representation to elicit sworn testimony from witnesses before the Board.

Atilano, 12 F.4th at 1380-81. As noted by the Federal Circuit, the relevant statute does not unambiguously require a veteran's personal participation at a hearing as a prerequisite to eliciting testimony from witnesses. For this reason, the Secretary's litigation position that the veteran's presence was a prerequisite to holding a hearing was not substantially justified.

Time billed for record review was reasonable.

As noted above, the Secretary contends in the alternative that the time billed for record review before the Court and the Federal Circuit is unreasonable. Response at 12-19. Initially, the Secretary conceded that the time billed to review a 3,374-page record "may not be facially unreasonable", but that owing to counsel's "familiarity" with the matter, the time billed for record review was excessive. Response at 12-13.

In support of his assertion that the time billed for record review before the Federal Circuit was unreasonable, the Secretary argued that 2 hours reviewing a 323-page record before drafting an initial brief, and 2 hours reviewing the same 323-page record five months later before drafting the reply brief was excessive. Response at 18. Elaborating further, the Secretary argued again that owing to counsel's "familiarity" with the matter, the time billed for record review before the Federal Circuit was excessive. In lieu of the time billed, the Secretary suggested that one hour would be appropriate to review a 323-page record to write both briefs, "because the legal issues presented to the Federal Circuit hinged on the law, rather than the facts." Response at 18.

This matter was extensively litigated before two courts over a span of years. In light of the enormity of the work completed and the results achieved, the time billed for record review, legal research, and travel is reasonable, and the Secretary has not persuasively argued otherwise. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *Ussery v. Brown*, 10 Vet.App. 51 (1997).

With regard to the importance of record review, the Federal Circuit recently wrote, in pertinent part:

> Time spent reviewing the record is indispensable to pursuing any appeal, regardless of how many issues are ultimately appealed and regardless of the degree of success. Indeed, before this court and the Veterans Court, the Government admitted that an attorney must always review the entire record at the outset in *any* appeal. …

Smith v. McDonough, 995 F.3d 1338, 1345 (2021).

Counsel is ethically obligated to be intimately familiar with the details of the record on appeal. *See* Model Rules of Professional Conduct: Preamble & Scope, A Lawyer's Responsibilities, American Bar Association. From a practical standpoint, and in light of the ever-changing nature of the law, it is necessary to review an entire record to identify facts or issues that were either previously discarded or which are now relevant to the issue or issues on appeal. An attorney who does not know the facts in the record on appeal does a disservice to his or her client and to the court.

There simply is no basis in law to support the Secretary's argument that an attorney's "familiarity" with a matter makes it unreasonable to review the entire record on appeal. Whether an attorney has never represented a client or represented that client for years should make no difference to that attorney's obligation to review the entire record.

Mr. Ravin represented Mr. Atilano before the Court and the Federal Circuit, and in both instances, it was essential for Mr. Ravin to review the record. Mr. Ravin wrote the briefs before both courts and participated in arguments before panels of both courts. Mr. Carpenter participated in oral argument on behalf of Mr. Atilano before the Court, and it was equally essential that he understand the facts of this matter.

For these reasons, the Secretary has not persuasively argued that the time billed for record review is either unreasonable or excessive, and the Court should find the time billed for record review to be reasonable.

The time billed for legal research was reasonable.

The Secretary argued further that the time billed for legal research was excessive and unreasonable. Response at 15-16. In support of this assertion, the Secretary argued that counsel was familiar with the issues presented, the issues presented were not complex, and the briefs filed by Mr. Atilano were unimpressive both in number of pages and number of cases cited. Response at 15. Here, the Secretary wrote, in pertinent part:

> It should have been apparent early on in the litigation (if not before) that no case law governed the issue and that the case would hinge on the proper interpretation of the statute and its implementing regulations, the resolution of which would require little in the way of legal research.

Response at 15-16.

Implicit in the Secretary's response is the unwritten argument that the Court should find that the issues presented were not complex and did not require any great amount of legal research. Since the issue presented was one of first impression, the Secretary implied that there should have been little to research.

Further, the Secretary's response implies that had the issues presented been complex and required extensive legal research, appellant's briefs would have been longer and would have contained significantly more citations, but what the Secretary seems to misunderstand is that appeals are not won based on comparing the number of pages in briefs or the number of cases each party cites in their brief.

Ironically, the Secretary has not cited to any controlling or persuasive authority to support his contentions, and indeed it does not appear that courts have ever found that a case of first impression requires little legal research or that courts should measure the lengths of briefs or count the number of citations listed to determine the amount of legal research that is reasonable to litigate an appeal.

Contrary to the Secretary's characterization, this appeal involved complex litigation of an issue of first impression that spanned multiple courts over multiple years to include fully briefing the matter in both courts, participating in oral argument in both courts, and completing supplemental briefing after the matter had been remanded from the Federal Circuit.

For these reasons, the Secretary has not persuasively argued that the time billed for legal research is either unreasonable or excessive, and the Court should find the time billed for legal research to be reasonable.

The time billed for travel to Washington DC was reasonable.

The Secretary argued further that the time billed for travel to Washington DC for attorneys Ravin and Carpenter was excessive and unreasonable. Response at 17-18. In support of his assertion, the Secretary argued that appellant did not meet his burden of

"showing that 8 hours was reasonably spent for any of the four legs of the trip" or that appellant attempted to minimize the taxpayer's burden for travel time by performing such tasks as reviewing case law while on the plane. Response at 17-18.

Mr. Atilano clearly indicated that as an exercise of billing discretion certain costs were being waived to include airfare for the two attorneys and one legal assistant. EAJA at 8-9. In the itemized list of hours expended, Mr. Atilano indicated that 8.0 hours were billed for travel time for attorneys Ravin and Carpenter for each travel day. Attorney Ravin travelled roundtrip from Miami, Florida to Washington DC, and attorney Carpenter travelled roundtrip from Topeka, Kansas to Washington DC. The travel time for both attorneys was billed at 8 hours because both attorneys spent a minimum of 8 hours traveling in each direction to and from Washington DC to participate in oral argument.

As for the Secretary's contention that Mr. Atilano did not show that it was reasonable to bill for 8 hours for each leg of travel to and from Washington DC for both attorneys, the Secretary has not persuasively demonstrated that it was unreasonable or unnecessary for the attorneys to fly to Washington DC to participate in oral argument or that commercial air travel between the respective cities would take less time.

Further, the Court should decline the Secretary's invitation to establish a new rule of law that would require counsel to document an attempt to minimize the taxpayer's burden for travel time by performing such tasks such as reviewing case law while traveling. Traveling to and from Washington DC on business is not akin to vacation or luxury travel. With all due respect, the Court should not expect attorneys to review their cases in an Uber, at an airport, aboard an airplane, inside a Metro station, or while riding the Metro. The Court

should encourage attorneys traveling to Washington DC to travel safely and to stay alert to their surroundings and those around them.

For these reasons, the Secretary has not persuasively argued that the time billed for travel time for both attorneys is either unreasonable or excessive, and the Court should find the time billed to be reasonable.

The application demonstrates the exercise of sound billing judgment.

As identified in his EAJA application, appellant exercised reasonable billing discretion and either reduced or eliminated time where noted. EAJA at 8-9. Further, the EAJA application reflects that all costs associate with the appeal were waived, to include commercial airfare for roundtrip travel for two attorneys and a legal assistant, as well as all lodging for the attorneys and legal assistant within Washington DC.

Prayer

With the exception of 0.5 hours as indicated above, appellant prays that the Court grant his application for reasonable attorney fees and expenses in full.

Respectfully submitted,

/s/ Sean A. Ravin

Sean A. Ravin, Esq.
1550 Madruga Ave., Suite 414
Coral Gables, FL 33146

Phone/fax: (202) 607-5731
info@seanravin.com

Date: May 11, 2023

2020-1579

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JESUS G. ATILANO,
Claimant-Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellee.

United States Court of Appeals for Veterans Claims No. 17-1428,
Judges Pietsch, Meredith, and Toth

BRIEF FOR RESPONDENT-APPELLEE

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

OF COUNSEL:

ROBERT E. KIRSCHMAN, JR.
Director

Y. KEN LEE
Deputy Chief Counsel

CLAUDIA BURKE
Assistant Director

MARTIE ADELMAN
Attorney
Department of Veterans Affairs
810 Vermont Ave., N.W.
Washington, D.C. 20420

SOSUN BAE
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
Department of Justice
PO Box 480, Ben Franklin Station
Washington, DC 20044
Tele: (202) 305-7568

October 5, 2020

Attorneys for Respondent-Appellee

STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that there are no appeals in or from this action that were previously before this Court. Respondent-appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

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BRIEF FOR RESPONDENT-APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1579

JESUS G. ATILANO,
Claimant-Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellee.

STATEMENT OF THE ISSUE

Whether the United States Court of Appeals for Veterans Claims (Veterans Court) misinterpreted 38 U.S.C. § 7107(b),[1] which requires the Board of Veterans' Appeals (board) to provide appellants with an opportunity for a hearing

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[1] As explained in the Veterans Court decision, the court interpreted the statutes and regulations in effect at the time of the board's April 2017 decision. Appx2 n.1. This appeal does not arise from a claim initially decided on or after February 19, 2019, nor did Mr. Atilano elect to participate in the new appeals system enacted by the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 2(x)(1) and (5), 131 Stat. 1105, 115. Accordingly, the relevant statutes and regulations referenced in this brief, unless otherwise stated, refer to those versions in effect at the time of the board's April 2017 decision.

before deciding an appeal, when it held that the board is not required to conduct a hearing if the appellant declines to personally participate in the hearing that he requested.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Nature Of The Case

Claimant-appellant Jesus G. Atilano appeals the decision of the Veterans Court in *Jesus G. Atilano v. Robert L. Wilkie, Secretary of Veterans Affairs*, No. 17-1428 (Vet. App. July 3, 2019). The court affirmed an April 18, 2017 board decision, in which the board treated Mr. Atilano's hearing request as if it had been withdrawn and denied an effective date prior to March 16, 2009, for a rating of total disability based upon individual unemployability (TDIU).

II. Statement Of Facts And Course Of Proceedings Below

A. Mr. Atilano's Military Service And Initial Proceedings

Mr. Atilano served in the Army between 1964 and 1967. Appx3.[2] Almost 30 years later, he filed a claim for service connection for post-traumatic stress disorder (PTSD). Appx3. The Department of Veterans Affairs (VA) granted the claim in 2010 and assigned a 50% rating for service-connected PTSD, effective July 31, 1995. Appx3. Mr. Atilano then sought a TDIU rating, alleging that his

[2] "Appx_" refers to the joint appendix Mr. Atilano has prepared for this appeal.

PTSD prevented him from working. Appx3-4. In December 2014, VA increased the PTSD rating to 70 percent, effective December 17, 2010, and awarded him TDIU, effective August 31, 2010. Appx4.

With the assistance of legal counsel, Mr. Atilano appealed the decision to the board, seeking an effective date prior to August 31, 2010, for the TDIU rating.

B. Proceedings Before The Board

When initially appealing to the board, Mr. Atilano indicated on his appeal form that he did not want a hearing. Appx159. However, in October 2015, Mr. Atilano's counsel requested a hearing before the board's central office in Washington, DC, so that Mr. Atilano could present testimony from a licensed psychologist and certified rehabilitation counselor. Appx157. Mr. Atilano's counsel also requested a 60-day extension of the deadline to submit new argument and evidence. Appx156. The board granted both requests. Appx4, Appx155. A few months later, Mr. Atilano's counsel requested that the hearing be scheduled on a date that the psychologist would be testifying in other claimants' hearings because the "cost of presenting expert testimony to the board would be significantly reduced if appellants could share costs related to the expert's testimony." Appx154.

The board initially scheduled the hearing for May 2, 2016. But Mr. Atilano's counsel asked for a postponement until June 13, 2016, again, to facilitate the psychologist's testimony. Appx4, Appx146. The board granted this request, scheduling the hearing for June 13th. Appx4. In its correspondence, the board clearly demonstrated its expectation that Mr. Atilano would himself attend; for example, it provided information about public transportation and security procedures in the board's offices, and direction that Mr. Atilano's representative would be notified when Mr. Atilano arrived. Appx141. Indeed, the board specifically differentiated between Mr. Atilano's attendance at the hearing and his counsel's. Appx143 ("Your client must first sign in with security personnel"), Appx144 ("If your client fails to appear for the scheduled hearing . . ."). The board also warned Mr. Atilano that, if he was unable to attend the hearing, he would need to request a postponement in writing, and that failure to appear without a request for postponement would cause his case to "be processed as though [his] request for a hearing had been withdrawn." Appx141-142. Mr. Atilano's counsel never asked for a postponement and did not reveal to the board Mr. Atilano's intention not to participate.

On the day of the hearing, Mr. Atilano's counsel and the psychologist appeared at the board's office, but Mr. Atilano did not. Appx4, Appx37-38. The

board member declined to hold the hearing without Mr. Atilano, stating that the claimant's participation was required. Appx4, Appx38. The board, however, held the record open for 60 additional days so that Mr. Atilano could have his counsel and psychologist submit additional evidence and argument, which they did. *Id*. The psychologist's written report stated that Mr. Atilano was, by reason of his PTSD, unable to hold substantially gainful employment between 1995 and 2010. Appx4, Appx127-133. The psychologist also stated that, if permitted to testify, she would have defended any challenged conclusions and answered any relevant questions asked by the board member. Appx4, Appx119.

In subsequent correspondence to the board, Mr. Atilano's counsel stated that Mr. Atilano had been unable to attend the scheduled hearing due to his disabilities and that he believed VA was required to hold the hearing despite Mr. Atilano's absence. Appx120. Mr. Atilano's counsel also informed the board that, although Mr. Atilano did not want to reschedule a board hearing contingent on his participation, he would not withdraw his request for a hearing so he could preserve the hearing issue for appeal. Appx5, Appx105.

On April 18, 2017, the board issued a decision on the merits of Mr. Atilano's claims, but also addressed in detail the issue regarding the hearing. Appx5, Appx37-44. In doing so, the board cited 38 C.F.R. §§ 20.700(b) and

20.702(d) for the proposition that a board hearing will generally not occur when an appellant does not participate and fails to timely show good cause for his absence. *Id*. The board further found that no good cause was proffered for why Mr. Atilano did not attend the hearing and questioned why his counsel did not request an accommodation so that he could participate (such as videoconferencing from a regional office (RO)). *Id*. Accordingly, the board treated the hearing request as if it had been withdrawn. Appx5. The board also discussed several policy reasons for requiring an appellant's participation in a hearing. Appx41-43. For example, the board has limited resources and a backlog of appeals waiting for adjudication. Instead of reserving one of the limited slots for a veteran to provide hearing testimony, expert testimony could have been provided in a more appropriate and effective manner, such as through a written document or file. As the board explained, "[u]ltimately, allowing an expert witness to provide testimony before a [board member] without the appellant subverts the purpose of a Board hearing, expends limited resources, and prevents another veteran or appellant from the opportunity to provide hearing testimony and thus have the merits of his or her case adjudicated in a timely and efficient manner." *Id.*

The board considered the psychologist's written report in addressing Mr. Atilano's merits claims. Appx71, Appx75-77, Appx91. Based on the report and

other record evidence, the board granted an earlie effective date of March 16, 2009 for the TDIU award[3] but denied a PTSD rating higher than 50% between July 1995 and December 2010. Appx5.

C. Veterans Court Decision

Mr. Atilano appealed the board's decision to the Veterans Court. Appx1. On July 3, 2019, the Veterans Court issued a decision affirming the board decision. Appx1. The Veterans Court first noted all that Mr. Atilano did not challenge: 1) the board's findings that he failed to provide timely notice or good cause for not attending his scheduled hearing; 2) the board's assessment of the psychologist's written report; or 3) how the board weighed any other evidence before it.[4] Appx6.

Turning to the sole issue before it – whether the board correctly treated Mr. Atilano's hearing request as withdrawn – the court held that, pursuant to the plain language of the relevant statute, 38 U.S.C. § 7107, an appellant's own participation

[3] Because the board granted earlier effective dates of March 16, 2009, for service-connected coronary artery disease and surgical scar residuals, the board found that Mr. Atilano satisfied the requirements of 38 C.F.R. § 4.16(a) on that date. Appx90-91.

[4] The court also noted that the issue of the right to have an expert witness testify at a board hearing was not before it, and that the record did not demonstrate that the psychologist would have been barred from testifying if Mr. Atilano had attended the hearing. Appx6.

in a hearing was required. The court first interpreted the language of subsection 7107(b), which provides that the board "shall decide any appeal only after affording the appellant an opportunity for a hearing," and consulted dictionary definitions of the term "hearing." Appx7. The court explained that the term "hearing" has been defined as the "opportunity to be heard, to present one's side of a case, or to be generally known or appreciated," and that *Black's Law Dictionary* 721 (6th ed. 1990), provides that, "in the administrative context, the term 'consists of any confrontation, oral or otherwise, between an affected individual and an agency decision-maker sufficient to allow [the] individual to present his case in a meaningful manner.'" *Id*.

The court then explained that, construing the term "hearing" in the context of the surrounding statutory language, other parts of section 7107 also support the conclusion that the hearing right must be exercised by an appellant through the appellant's personal participation. Appx7. The court noted that the statute authorizes the board to provide a hearing at one of various locations, and either in person or via video teleconference.[5] *Id*. The court also pointed to subsection

[5] Section 2(a) of the VA Tele-Hearing Modernization Act, Pub. L. No. 116-137, 134 Stat. 616 (2020), recently amended 38 U.S.C. § 7107(c)(2) to authorize board hearings at a location selected by the appellant via a secure VA internet platform (*i.e.*, "tele-hearings").

7107(d)(1)(A)(ii), which states that the board must determine whether to provide a hearing through the use of the facilities and equipment described in subsection 7107(e) or "by *the appellant personally appearing* before a Board member." *Id.* (emphasis added by court). The court found that, in this context, "personally appearing" "means 'to come formally before an authoritative body' and to do so 'in person' and 'for oneself.'" *Id.* (quoting *Webster's Ninth New Collegiate Dictionary* at 96, 878). The court thus determined that an appellant "requesting a hearing before a Board member in Washington is expected to be physically present." *Id.*

The court noted that, although the statute provides alternate locations and means for holding a hearing, it also states that a hearing provided through alternative locations or means shall be considered the equivalent of a personal hearing. Appx8. Accordingly, the court held that, "[f]or such hearings to be conducted in the same way and considered equivalent to in-person hearings, they must require the participation of the appellant," *i.e.*, the "alternative permitted in section 7107 isn't between whether an appellant will participate in the hearing or not, but whether the appellant will appear in person or participate remotely via electronic means." *Id.* The Veterans Court concluded its plain language analysis by confirming that the overall structure of section 7107 requires an appellant

exercising the right to a board hearing to participate in that hearing, and that no provision allows an appellant to invoke the right to a hearing but decline to participate. Appx8.

The court then considered, and rejected, Mr. Atilano's argument that Congress did not intend to limit hearings to appellants who are able to travel to Washington, DC, or to regional offices having the requisite equipment. Appx8. Among other reasons, the court found that Mr. Atilano had not offered good cause for failing to attend and his counsel had not requested any accommodation that could have allowed him to participate remotely. *Id*.

Although the Veterans Court primarily rested its decision on the unambiguous language of the statute, it also found that, even if section 7107 is ambiguous as to the requirement of an appellant's participation in a board hearing, VA's implementing regulations, 38 C.F.R. §§ 20.700(b) and 20.702(d),[6] permissibly construed the statute and supported the board's conclusion. Appx10. Section 20.700(b) explicitly states that "[i]t is contemplated that the appellant and witnesses, if any, will be present" and provides that "[a] hearing will not normally be scheduled solely for the purpose of receiving argument by a representative."

[6] VA promulgated revised regulations to implement the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105, but, as noted above, the revised regulations are not applicable to this appeal.

Section 20.702(d) states that, if an appellant fails to appear for a scheduled hearing without adequate notice, "the case will be processed as though the request for a hearing had been withdrawn." The court found that nothing in the regulations stood in tension with the text of section 7107, but, rather, the regulations were consistent with the statutory framework.[7] Appx10.

The court also considered, but rejected, Mr. Atilano's argument that, because 38 C.F.R. § 20.700(a) states that a "hearing on appeal will be granted if an appellant, or an appellant's representative acting on his or her behalf, expresses a desire to appear in person," the appellant has the right to a hearing if an appellant's *representative* expresses the desire to appear in person. Appx12. The court determined that the phrase "on behalf of" is well understood to mean "as the agent or representative of," and, therefore, the "desire to appear in person" expressed by a representative can only be understood as the *appellant's* desire, not the representative's, and that any other interpretation would read out the "his or

[7] Mr. Atilano argued before the Veterans Court that 38 C.F.R. §§ 20.700(b) and 20.702(d) were not entitled to deference under *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984) because they preexisted 38 U.S.C. § 7107, which was enacted in 1988. Appx12-13. The court rejected this argument, pointing out that VA added the relevant language of the regulations in 1992 specifically to implement section 7107 and, therefore, Mr. Atilano's argument had no merit. Appx13 (citing 57 Fed. Reg. 4,088, 4,119-20 (Feb. 3, 1992)).

her behalf" language. *Id.* (quoting *Garner's Modern American Usage* 94 (3d ed. 2009)).

The court addressed its own understanding of the purpose of a right to a board hearing, finding that VA's expectation that appellants will participate in their hearings is consistent with case law recognizing that a hearing is the appellant's opportunity to personally address the factfinder who will make credibility determinations and render VA's final decision on the claim, and that a key motivating factor for Congress's decision to afford opportunities for hearings was that an appellant's personal appearance before the board increased the likelihood of a favorable resolution of a claim. Appx11 (citing *Arneson v. Shinseki*, 24 Vet. App. 379, 382 (2011); *Cook v. Snyder*, 28 Vet. App. 330, 337 (2017), *aff'd sub nom. Cook v. Wilkie*, 908 F.3d 813 (Fed. Cir. 2018)).

The court concluded its analysis by noting the well-established rule that agencies should be free to fashion their own rules of procedure and that, absent a congressional command to the contrary, courts generally accord agencies broad discretion in fashioning hearing procedures. Appx11. The court found that, given Congress's silence as to whether the board must hold a hearing if an appellant does not participate and VA's concomitant duty to provide board hearings on "the earliest possible date," there was no legal basis for altering the "reasonable choice

of declining to hold board hearings for appellants who request but then refuse to participate in them." *Id.*

Mr. Atilano filed a motion for *en banc* review. Appx14-19. The Veterans Court denied the motion and entered judgment on January 6, 2020. Appx20-21. Mr. Atilano then timely appealed to this Court.

SUMMARY OF THE ARGUMENT

The Veterans Court correctly interpreted 38 U.S.C. § 7107(b) to require an appellant's participation at a board hearing requested by that appellant. The plain language of the statute supports this interpretation. First, the term "appellant" in section 7107(b) refers to a claimant who has appealed an adverse decision to the board, and not to the appellant's attorney. Second, section 7107(d)(1)(A) facilitates an appellant's participation at a hearing by authorizing various locations and means, confirming that the statute assumes the veteran will be present, and accommodates a scenario where live presence is not feasible. Mr. Atilano's argument is not supported by VA regulations, which reasonably interpret the statute to require attendance in some form.

Even if the Veterans Court erred in upholding the board's determination to treat the hearing request as withdrawn, Mr. Atilano does not establish that this error was prejudicial. The board thoroughly considered and analyzed the

psychologist's report, as well as the other record evidence, and Mr. Atilano does not demonstrate that he would have been entitled to an earlier effective date if the board had held a hearing to allow the psychologist to testify.

ARGUMENT

I. Jurisdiction And Standard Of Review

Pursuant to 38 U.S.C. § 7292(a), this Court has jurisdiction to review a Veterans Court's decision with respect to the validity of a decision on a rule of law or to the validity or interpretation of any statute or regulation relied on by that court in making that decision. This Court has jurisdiction to "decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). In reviewing a Veterans Court's decision, this Court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1). However, section 7292(d)(2) of title 38, United States Code, provides that, except to the extent that an appeal from a Veterans Court's decision presents a constitutional issue, this Court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a

particular case." The Court reviews questions of statutory and regulatory interpretation *de novo*. *See Smith v. Brown*, 35 F.3d 1516, 1517 (Fed. Cir. 1994).

Pursuant to the framework set forth in *Chevron*, if the text of a statute speaks directly "to the precise question at issue," the Court's inquiry ends. *Chevron*, 467 U.S. at 842-43. Only if a statute is silent or ambiguous does the Court proceed to the step of considering whether an agency has permissibly interpreted the statute. *Id.*; *see also Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012).

II. The Veterans Court Correctly Affirmed The Board's Determination To Not Hold The Hearing Without Mr. Atilano And To Treat The Hearing Request As Withdrawn

Mr. Atilano raises three narrow arguments in support of his contention that the Veterans Court misinterpreted 38 U.S.C. § 7107(b). First, he contends that the Veterans Court erred in finding that the term "appellant" in section 7107(b) means that the board is obligated to provide a hearing only if the appellant himself is present and participates in the hearing. App. Br. at 16-17, 21. Second, he contends that section 7107(d)(1)(A) conflicts with the Veterans Court's finding that provisions in section 7107 outside of subsection 7107(b) support the conclusion that an appellant must personally appear at a board hearing. App. Br. at 18-21. Third, he suggests that, pursuant to 38 C.F.R. § 20.700(c), a hearing

officer is not a party to a board hearing and not permitted to cross-examine witnesses; therefore, according to Mr. Atilano, an appellant cannot be compelled to participate in the board hearing. Appx. 22-23. But the plain language of the statute belies Mr. Atilano's contentions, and his reliance on the regulation does not rescue him.

A. "Appellant" In Section 7107(b) Refers To The Veteran

It is bedrock principle that statutory interpretation begins with the text of the statute itself. *See, e.g., Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 450 (2002); *Bazalo v. West*, 150 F.3d 1380, 1382 (Fed. Cir. 1998). In other words, the first step "'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart*, 534 U.S. at 450 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The plain language of section 7107(b), read alone, and in the context of the rest of the relevant provisions, makes clear that appellants be present in some way at hearings.

Section 7107(b) provides that the "Board shall decide any appeal only after affording the appellant an opportunity for a hearing." As Mr. Atilano states, *Black's Law Dictionary* defines "appellant" as "a party who appeals a lower court's decision usu[ally] seeking reversal of that decision." App. Br. at 17. In

general, "[a] 'party' to litigation is '[o]ne by or against whom a lawsuit is brought.'" *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 933 (2009) (quoting *Black's Law Dictionary* 1154 (8th ed. 2004)). But Mr. Atilano then goes on to reach the unfounded conclusion that section 7107(b) requires the board to provide a hearing only if the appellant appears at and participates in the hearing. App. Br. at 17. He contends that the "term 'appellant' [in section 7107(b)] simply means that the board must offer a hearing to 'the party' that has filed an appeal," rather than to the actual appellant himself. *Id*.. Thus, according to Mr. Atilano, an appellant's counsel may request a hearing before the board solely to elicit testimony from witnesses other than the appellant, and the appellant is not required to personally attend the hearing. App. Br. at 21. This interpretation is contrary to the plain language of the statute.

Furthermore, Mr. Atilano's interpretation ignores the veterans benefits statutory framework as a whole, in which the "party" is the claimant, *i.e*., an "individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary." 38 U.S.C. § 5100. A claimant may appeal a decision by an agency of original jurisdiction (AOJ) to the board. 38 U.S.C. § 7104(a) (all questions in a matter which was subject to decision by the Secretary under 38 U.S.C. § 511(a) are subject to one review on appeal to the board) and

7105(a). An appeal is generally available only to persons who were parties to the case below. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988). With a board appeal, the person who was a party before the AOJ i*s the claimant for VA benefits* – here, Mr. Atilano. *See e.g., Nisus Corp. v. Perma-Chink Sys*., 497 F.3d 1316, 1319 (Fed. Cir. 2007) (stating that ordinarily nonparties may not appeal from actions of district court and referring to attorney as "nonparty").

Even assuming the statutory language does not clearly preclude a claimant's attorney from qualifying as an "appellant" or "party," it certainly comes nowhere close to confirming Mr. Atilano's argument; at best, the language can be construed as ambiguous.

As stated earlier, and as the Veterans Court addressed, when statutory language is ambiguous, the Court will uphold an agency regulation implementing the statute so long as the regulation is based on a permissible construction of that statute. Appx9 (citing *Chevron*, 467 U.S. at 843). VA has the authority to prescribe regulations governing hearing and representation rights before the board, 38 U.S.C. § 7105(a), and, as the Veterans Court explained, has done so.[8] Indeed, in 1992, VA amended its regulations to add the following sentence to 38 C.F.R.

[8] Where Congress makes an express delegation of authority, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

§ 20.700(b), captioned "Purpose of hearing": "It is contemplated that *the appellant* and witnesses, if any, will be present." 57 Fed. Reg. 4088, 4119 (Feb. 3, 1992); 54 Fed. Reg. 34,334, 34,337, 34,354 (Aug. 18, 1989) (emphasis added). The regulation thus explicitly states that the appellant is expected to personally attend a board hearing. Furthermore, 38 C.F.R. § 20.702(d) states that, "[i]f an appellant . . . fails to appear for a scheduled hearing . . . , the case will be processed as though the request for a hearing had been withdrawn." 57 Fed. Reg. at 4120; 54 Fed. Reg. at 34,337, 34,355. Nothing in these regulations runs contrary to the statutory language; rather, the regulations constitute a reasonable interpretation of a statutory scheme that allows the board to structure its hearings, and requires an appellant's presence at those hearings.

B. Section 7107(d)(1)(A) Supports The Veterans Court's Interpretation Of Section 7107(b)

Mr. Atilano next argues that the Veterans Court erred in holding that 38 U.S.C. § 7107(d)(1)(A) supports the conclusion that the right to a hearing "'must be exercised by an appellant through his personal participation.'" App. Br. at 18 (quoting Appx7). He asserts that section 7107(d)(1)(A) differentiates only between in-person and remote hearings using electronic means and does not require that the appellant attend a board hearing. App. Br. at 19-20.

The version of section 7107(d)(1)(A) in effect at the time of the board decision states:[9]

> (i) Upon request for a hearing, the Board shall determine, for purposes of scheduling the hearing for the earliest possible date, whether a hearing before the Board will be held at its principal location or at a facility of the Department or other appropriate Federal facility located within the area served by a regional office of the Department.
>
> (ii) The Board shall also determine whether to provide a hearing through the use of the facilities and equipment described in subsection (e)(1) or by the appellant personally appearing before a Board member or panel.[10]

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[9] The Veterans Court applied the version of the statute (enacted on December 16, 2016) in effect when the board issued its April 2017 decision, rather than the version in effect in June 2016 when the board declined to hold a hearing without Mr. Atilano. Appx2 n.1, 4; Jeff Miller & Richard Blumenthal Veterans Health Care & Benefits Improvement Act of 2016, Pub. L. No. 114-315, § 102, 130 Stat. 1536, 1540. The court did not err in applying the amended section 7107(d)(1)(A). *See Landgraf v. USI Film Prods*., 511 U.S. 244, 280 (1994). Moreover, Mr. Atilano does not contest the court's choice of versions, and there is no indication that the version of the statute in effect in June 2016 would aid Mr. Atilano's argument.

[10] Section 7107(e)(1) states:

> At the request of the Chairman, the Secretary may provide suitable facilities and equipment to the Board or other components of the Department to enable an appellant located at a facility within the area served by a regional office to participate, through voice transmission or through picture and voice transmission, by electronic or other means, in a hearing with a Board member or members sitting at the Board's principal location.

As the Veterans Court noted, and the parties agree, this section of the statute authorizes the board to provide a hearing either at its central office, a regional office, or Federal facility, and allows for either in person or video teleconference hearings. Appx7. But section 7101(d)(1)(A)(ii) also states that the board must determine whether to provide a hearing through the use of the facilities and equipment described in section 7107(e), or "by *the appellant personally appearing* before a Board member." 38 U.S.C. § 7101(d)(1)(A)(ii) (emphasis added). Relying on dictionary definitions, the Veterans Court correctly determined that the phrase "appellant personally appearing" means "'to come formally before an authoritative body' and to do so 'in person' and 'for oneself,'" and that an appellant "requesting a hearing before a Board member in Washington is expected to be physically present." Appx7 (quoting *Webster's Ninth New Collegiate Dictionary* at 96, 878). As the court recognized, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); Appx7. And, here, even assuming the language of section 7107(b) itself is not dispositive, other sections of the statute clearly indicate that an appellant is to personally participate in hearings before the board.

Rather than directly challenging the Veterans Court's findings regarding the "appellant personally appearing" language, and, notwithstanding that subsection 7107(d)(1)(A)(ii) explicitly states that an appellant appear personally before the board, Mr. Atilano argues that it should only "be interpreted as meaning that the Board must determine whether to provide a hearing remotely through the use of VA facilities or at its central office in Washington, DC" in order to promote the goal of scheduling a hearing at the earliest possible date. App. Br. at 20-21. In doing so, Mr. Atilano relies on the Veterans Court's statement that, "[a]s part of its logistical management, the Board is generally obliged to schedule a hearing 'for the earliest possible date.'"[11] App. Br. at 20 (quoting Appx2).

But it is readily apparent that subsection 7107(d)(1)(A) was intended to facilitate an *appellant's* attendance at a board hearing by authorizing various alternatives for location and equipment. This intention is also supported by subsection 7107(d)(3)(B) of the statute, which authorizes the board to advance a case on the hearing docket for cause, such as when an appellant is seriously ill. Advancement on the docket is to address an appellant's exigent circumstances, not those of counsel; similarly, the facilitation of logistics is to afford the appellant

[11] Notably, this statement is included in a paragraph quoted in *Mr. Atilano's brief* in the background section of the Veterans Court's decision. Appx2.

options, rather than the attorney. And, here, the board put forth considerable logistical effort to accommodate Mr. Atilano, even re-scheduling his hearing to the exact day of Mr. Atilano's choosing in order to facilitate his psychologist's ability to testify at multiple hearings on the same day.[12] Appx143-146.

Finally, as the Veterans Court found, subsection 7107(e)(2) states that "a hearing provided through use of one of these alternative locations or means "shall be conducted in the same manner as, and shall be considered the equivalent of, a personal hearing." Appx8. The court stated that, "[f]or such hearings to be conducted in the same way and considered equivalent to in-person hearings, they must require the participation of the appellant," *i.e.*, the "alternative permitted in section 7107 isn't between whether an appellant will participate in the hearing or not, but whether the appellant will appear in person or participate remotely via electronic means." *Id*. This Court should reject the argument that the Veterans Court erred in finding that other sections of the statute support the conclusion that an appellant participate in his own board hearing.

[12] Again, at no point in the correspondence to the board from Mr. Atilano's counsel did he indicate that Mr. Atilano did not intend to attend, or that he had any good cause for not appearing.

C. 38 C.F.R. § 20.700(c) Does Not Support Mr. Atilano's Argument

Mr. Atilano's final substantive argument is that a "hearing officer is not a 'party' to the proceedings since hearings are ex parte in nature[,]" and therefore, an appellant cannot be compelled to participate or testify at his or her own hearing." App. Br. at 22. In making this argument, he relies on 38 C.F.R. § 20.700(c), which states that board hearings are ex parte and non-adversarial and that "[p]arties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted."[13] *Id*.

Although it is not entirely clear, presumably Mr. Atilano raises this argument to imply that, because a board member is not a party to the hearing and cannot examine an appellant, the appellant need not even appear at the hearing. This argument lacks a plausible basis. First, Mr. Atilano misunderstands the regulation and the role of a board member at a hearing. While subsection 20.700(c) prohibits cross-examination, the regulation does not preclude a board

[13] Mr. Atilano raised 38 C.F.R. § 20.700(c) for the first time in his reply brief to the Veterans Court. *Compare* Appx324-328 *with* Appx352-358. The court did not address this regulation in its decision. *Cf. Carbino v. Gober,* 10 Vet. App. 507, 511 (1997) (declining to review argument first raised in appellant's reply brief), *aff'd sub nom. Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999); *Tubianosa v. Derwinski,* 3 Vet. App. 181, 184 (1992) (appellant "should have developed and presented all of his arguments in his initial pleading").

member from questioning a claimant at all. Rather, the board "reviews matters de novo and 'functions as a factfinder in a manner similar to that of a trial court.'" *Arneson*, 24 Vet. App. at 382 (quoting *Gilbert v. Derwinski,* 1 Vet. App. 49, 52 (1990)); *see also DeLoach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); 38 U.S.C. § 7104(a). In this capacity, a board member may ask questions, explore relevant issues, and clarify witness statements. *Cook*, 28 Vet. App. at 337. Thus, the role of the board member at a hearing supports the Veterans Court's conclusion that an appellant appear at a hearing so the board member may fulfill his or her function and speak to the appellant directly about his claim.

Furthermore, as with statutory interpretation, in construing regulatory language, the disputed language must be read "in the context of the entire regulation as well as other related regulatory sections in order to determine the language's plain meaning." *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir. 2010); *see also Sullivan v. McDonald*, 815 F.3d 786, 792 (Fed. Cir. 2016). The related section 20.700(a) states that a "hearing on appeal will be granted if an appellant, or an appellant'' representative acting on his or her behalf, expresses a desire to appear

in person." As the Veterans Court correctly noted, the desire to appear applies to the appellant, not his representative.[14] Appx12.

In addition, 38 C.F.R. § 20.700(b) states that "[i]t is contemplated that the appellant and witnesses, if any, will be present" at a hearing and that a "hearing will not normally be scheduled solely for the purpose of receiving argument by a representative." Instead, section 20.700(d) provides for "informal hearings" where the "appellant cannot, or does not wish to, appear," and "[i]n the absence of the appellant, the authorized representative may present oral arguments." Appx10 n.7. However, such informal hearings are not to be "construed to satisfy an appellant's request to appear in person." 38 C.F.R. § 20.700(d). Thus, VA's regulations differentiate between hearings at which an appellant must appear and those in which counsel may present argument without the appellant's presence.

Finally, 38 C.F.R. § 20.702(d) states that, if an appellant does not appear for a scheduled hearing and there is no request for postponement, "the case will be processed as though the request for a hearing had been withdrawn." Appx10. It is clear that, when the various related regulations are read in concert, they support

[14] Again, Mr. Atilano does not challenge this finding by the Veterans Court on appeal and is proscribed from doing so on reply.

the conclusion that an appellant must participate in his own board hearing, and Mr. Atilano's citation to section 20.700(c) does not detract from this conclusion.[15]

III. Mr. Atilano Has Not Established That Any Error Was Prejudicial

Even if Mr. Atilano can establish that the Veterans Court erred in its interpretation of 38 U.S.C. § 7107(b), he fails to establish *prejudicial* error. As this Court has recognized, the "correction of an error must yield a different result in order for that error to have been harmful and thus prejudice a substantial right of a party." *Munoz v. Strahm Farms, Inc.*, 69 F.3d 501, 504 (Fed. Cir. 1995); *see also Francway v. Wilkie*, 940 F.3d 1304, 1308 (2019). "[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Parsons Evergreene, LLC v. Sec'y of the Air Force*, 968 F.3d 1359, 1370 (Fed. Cir. 2020). Determination of prejudice constitutes case-specific applications of judgment, based on examination of the record. *See Sanders*, 556 U.S. at 407-10.

Mr. Atilano argues that the Veterans Court's alleged error was prejudicial, but does not delineate how the outcome of his case would have been affected if

[15] Mr. Atilano has not challenged the Veterans Court's conclusion that 38 C.F.R. §§ 20.700(b) and 20.702(d) permissibly construe the statute. Appx10-11.

the psychologist had been allowed to testify rather than submit a report. [16] As is clear from the board decision, the board considered, in extensive detail, the evidence relevant to whether Mr. Atilano was entitled to a rating higher than 50 percent for his PTSD for the period prior to December 17, 2010,[17] and therefore whether he was entitled to an earlier effective date for TDIU.[18] [19] The board considered VA medical records and examinations, Mr. Atilano's statements to medical personnel, an Army chaplain's letter, a 1997 social work assessment, his testimony at a 2002 hearing, and the psychologist's report. Appx59-71.

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[16] Although we address Mr. Atilano's prejudicial error argument, we note that determining whether any alleged error by the Veterans Court prejudiced Mr. Atilano would entail a factual analysis, and thus falls outside this Court's purview.

[17] The VA rating schedule for mental disorders was amended in 1996, after Mr. Atilano filed his PTSD claim. 61 Fed. Reg. 52,700 (Nov. 7, 1996). The board considered his claim for an increased rating for PTSD for the period between July 31, 1995, and December 17, 2010, under the pre-1996 rating criteria and under the criteria as amended in 1996. *See* Appx55-57.

[18] Pursuant to 38 C.F.R. § 4.16(a), a veteran who has not been rated 100 percent disabled under the VA rating schedule may be entitled to a total disability rating if the veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities, provided that at least one service-connected disability is rated at 60 percent or higher, or the combined service-connected disabilities are rated at least 70 percent with at least one service-connected disability rated at 40 percent or higher.

[19] Indeed, the board granted an earlier effective date for TDIU. Appx4-5.

Simply because the board found that the psychologist's findings were not in concert with the other medical evidence on the record does not indicate that the board would have found the psychologist's findings to accord with, or outweigh, the rest of the record evidence if she had spoken at the hearing. The board analyzed her written report, but determined that the psychologist's opinion that Mr. Atilano had moderately severe to severe symptoms prior to August 2010 was not supported by the objective findings reviewed by the board and referenced in the psychologist's report. Appx75. For example, the board pointed out that, although Mr. Atilano described his marriage as strained, he continued to reside with and be married to his spouse, and that he had good relationships with his family, as well as other patients and staff during hospitalizations. *Id*. The board also found that the majority of treatment records for the period prior to December 2010 had Global Assessment of Functioning (GAF) scores ranging from 50 to 65, which reflects moderate rather than severe symptoms. *Id*. The board acknowledged evidence favoring Mr. Atilano's claim, such as him being assigned lower GAF scores during a February 1997 hospitalization and a March 1998 psychiatric evaluation, but found that the "majority of his GAF scores for this period denote moderate symptoms or impairment in social, occupational or school functioning." *Id.* The board concluded that Mr. Atilano's "ability to establish and

maintain effective or favorable relationships with people is moderately, but not severely impaired." *Id.*

To further underscore the board's consideration of the record, including the psychologist's findings, the board decision notes that, although the psychologist stated that Mr. Atilano's service-connected disabilities prevented him from securing and maintaining substantially gainful employment as of 1995, the objective medical findings, including VA treatment records and examination reports and records from the William Beaumont Army Medical Center, "do not paint a picture of someone whose PTSD symptoms were so weakening in nature[] that they resulted in severe impairment with respect to his ability to maintain employment." Appx76. The board also stated, correctly, that the VA examination and treatment reports were entitled to more probative weight "because, collectively, they provide an accurate description, and are better reflective of the Veteran's psychiatric symptoms and how these symptoms affect . . . his social and occupational functioning post-service and for the period prior to December 17, 2010." Appx77.

Specifically addressing the psychologist's findings, the board found that sections in the psychologist's report were contradicted by objective medical findings. Appx95. The board noted that the psychologist stated that Mr. Atilano

was working for his brother from 1990 to 1995 and was fired in 1995, but he described himself as self-employed at a February 1996 VA psychiatric examination and in his December 2010 TDIU application, he stated he became too disabled to work in 1997, not 1995. Appx95. The board also found that evidence referenced in the psychologist's report did not support the conclusion that Mr. Atilano was unemployable due to PTSD, as a January 2011 VA examination report noted that Mr. Atilano's functional status was within normal limits in areas such as employment and social interaction and that his inability to work was more likely due to his physical strength and endurance and minimally attributable to his PTSD. *Id*. Also, Mr. Atilano worked steadily and continuously post-service and had been self-employed for at least 18 years when he retired in 1997. *Id.*

In sum, an examination of the board decision makes evident that Mr. Atilano cannot demonstrate that any error by the Veterans Court was prejudicial. Notably, Mr. Atilano does not seriously attempt to make any concrete arguments about how the psychologist's testimony during a hearing would have caused the board to determine that he was entitled to an earlier effective date for the TDIU rating, nor does he contend with any specificity that the board's findings with regard to the psychologist's report would have been different if the psychologist had testified. There is also no indication from the psychologist's letter to the

board that she would not testified consistently with her written report. Appx119. Rather, Mr. Atilano appears to argue that the Veterans Court's conclusion that an appellant must appear at a board hearing is per se prejudicial. The Supreme Court has rejected such a presumption of prejudicial error. *Sanders*, 556 U.S. at 407.

CONCLUSION

For these reasons, this Court should affirm the Veterans Court's decision.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/Claudia Burke
CLAUDIA BURKE
Assistant Director

/s/Sosun Bae
SOSUN BAE
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
Department of Justice
PO Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 305-7568

Attorneys for Respondent-Appellee

OF COUNSEL:

Y. KEN LEE
Deputy Chief Counsel

MARTIE ADELMAN
Attorney
Department of Veterans Affairs
810 Vermont Ave., NW
Washington, DC 20420

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 32(b), the undersigned certifies that the word processing software used to prepare this brief indicates there are a total of 7,169 words, excluding the portions of the brief identified in the rules. The brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

/s/Sosun Bae
SOSUN BAE

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 5th day of October, 2020, a copy of the foregoing "BRIEF FOR RESPONDENT-APPELLEE" was filed electronically.

X This filing was served electronically on all parties by operation of the Court's electronic filing system.

/s/Sosun Bae
SOSUN BAE