No. 17-1551

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ANDRE MARTINEZ,
Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS APPEALS

REPLY BRIEF OF APPELLANT ANDRE MARTINEZ

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I. STATEMENT OF THE ISSUES

ISSUE #1

38 U.S.C. §5103A(a)(1) requires the Secretary "assist a claimant in obtaining evidence to substantiate the claim". The Secretary denied Mr. Martinez's claim for service connection of sleep apnea by relying on a VA medical opinion finding PTSD did not cause sleep apnea. The Secretary did not give Mr. Martinez a copy of the opinion before relying on it to deny the claim. Did the Secretary violate the duty to assist when it did not give Mr. Martinez a copy of a medical opinion before relying on it to adjudicate a benefits claim?

ISSUE #2

Determining how much process is due a veteran under the 5th Amendment requires consideration of the degree of potential deprivation, the fairness and reliability of existing procedures, and the public interest. Mr. Martinez was potentially deprived of over $100,000 in past-due compensation when the Secretary failed to give him a copy of a medical opinion he relied on in denying benefits. Before that denial, 6 written requests for the C-file, a petition for writ of mandamus to this Court, and two standing disclosure authorizations on the Secretary's own form failed to produce the opinion on which the Secretary relied in the denial. The Secretary's current process promotes an inefficient judiciary and affords veterans who stood against our nation's enemies less process than that due those accused of being her enemies. Does the Due Process clause of the 5th Amendment require the Secretary to give Mr. Martinez a copy of the material intended to be relied on to adjudicate a veteran's claim for benefits?

II. SUMMARY OF ARGUMENT IN REPLY

This appeal involves statutory interpretation and constitutional due process questions.

As to the statutory interpretation question, the only reasonable interpretation of §5103A(a)(1) is to require the Secretary to provide Mr. Martinez, without request, copies of medical opinion evidence upon which it relies to deny him benefits. While the Secretary asserts the requirement of a Request for Production of evidence is "well settled" law, he relies on cases that pre-date and do not interpret §5103A(a)(1). Moreover, a judicially created doctrine cannot overcome Congress's words in a statute. To interpret §5103A(a)(1) to require a Request for Production before the Secretary is required to provide a copy of medical opinions upon which it intends to rely is to read words into the statute that Congress did not use, and would yield a result that is not

consistent with what Congress has already said when it required the Secretary and BVA to provide medical opinions procured outside the VA without a request from the veteran. There is no logical reason why Congress would require Requests for Production of opinions if they are procured from inside the Agency, but not require such a request if procured outside the Agency. Finally, the Secretary's plea for *Skidmore* deference is only a "second bite" at the interpretive apple. He merely reasserts an interpretation that is not entitled to *Chevron* deference, and offers no evidence or argument that demonstrates the "thoroughness, logic, and expertness" of his proposed interpretation.

Turning to Mr. Martinez's due process argument, the Secretary asserts no executive branch interest strong enough to overcome Congress's recognition of a basic due process right, and the Court's zealous protection of that right. The Secretary provides an argument that relies on the undeveloped – and previously rejected – premise that the property interest at stake is the procedure denied Mr. Martinez. He proposes a process to protect Mr. Martinez's basic due process right that requires what Congress would never pass: a requirement that Mr. Martinez seek discovery in the non-adversarial process by filing a Request for Production to get a copy of the medical opinion evidence upon which the Secretary intends to rely. Finally, the *de minimis* cost of postage to one bureau within one agency of the whole federal government does not overcome the burden to the whole government resulting from the Secretary's proposed process. It does not overcome the legislative, judicial and public interest in ensuring that veterans obtain copies of the medical opinions upon which the Secretary intends to rely.

Mr. Martinez asks the Court to hold either that §5103A(a)(1) or the Constitution's Fifth Amendment requires the Secretary to produce, without request, copies of the medical opinions upon which the Secretary intends to rely in adjudicating his claim.

III. ARGUMENT IN REPLY

In his opening brief, Mr. Martinez's attorney wrote, in footnote 8, that "[i]n *Pricket,* the Court interpreted 38 U.S.C. §7109, which predates §5103A, and held the BVA has no *Thurber-Austin* duty to provide a copy of a medical opinion procured by the BVA. *Thurber v. Brown,* 5 Vet. App. 119 (1993); *Austin v. Brown,* 6 Vet. App. 547 (1994); *contradistinguish,* 38 U.S.C. §5103A, Pub. L. 106-475, §3(a), 114 Stat. 2097 (November 9, 2000)." *Appellant's Opening Brief,* at page 14 – 15, footnote 8. This is not a correct interpretation of *Prickett.* In his affidavit in *Appendix A* to this reply, Mr. Martinez's counsel explains the human mistake that led to this regrettable typographical error, and explains the steps his firm is taking in the future to prevent its recurrence. *Appendix A.* He apologizes to the Court and the Secretary for his error. If the Court is not satisfied by the explanation in Mr. Attig's affidavit, Mr. Attig respectfully asks the Court not to hold Mr. Attig's mistake against his client, or his client's argument on appeal, but instead to hold it against Mr. Attig.

1. The only reasonable interpretation of §5103A(a)(1) is to require the Secretary give Mr. Martinez a copy of the medical opinion on which he relied, without request.

1.1. The Secretary's desire that claimants first file Requests for Production of evidence is not "well-settled" law.

It is *not* "well settled that a records request must be in writing." *Contra,* Secretary's Response Brief at 9 – 13, *citing Anderson v. West,* 12 Vet. App. 491 (1999); *Prickett v. Nicholson,* 20 Vet. App. 370 (2006), *affirmed sub nom. Prickett v. Mansfield,* 257 F. Appx. 288 (Fed. Cir. 2007); *Sprinkle v. Shinseki,* 733 F.3d 1180 (Fed. Cir. 2013).

First, *Prickett* does not interpret the statute at issue here. It relies on *Anderson* to find a claimant, who did not request a copy of a medical opinion before a ratings decision issued, was not harmed. *Prickett,* at 381,

citing to Anderson, at 494 - 495. In *Anderson*, the Court relied on a now deleted regulation and §5702[1] to find a request for production of documents was required before the Secretary had a duty to disclose evidence in a claims file. *Anderson,* 12 Vet. App. at 494 – 495, *citing to* 38 U.S.C. §5702(a), and 38 C.F.R. §14.629(c)(1)(1999), *relevant language deleted and replaced by* 73 Fed. Reg. 29852 (May 22, 2008). *Anderson* was decided before passage of §5103A(a)(1) into law: the law cannot be "well-settled" when it does not consider a statute that affects or supersedes the Court's decision.

Second, *Thurber* and *Austin* created the judicial doctrine of "fair-process." *Thurber,* 5 Vet. App. at 126 (BVA must provide reasonable notice of evidence after issuance of the most recent SOC or SSOC); *Austin,* 6 Vet. App. at 552 ("basic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner."). Neither *Thurber* nor *Austin* interpret §5103A(a)(1): both were decided in the decade before its passage. A judicial doctrine cannot trump Congress's words in a superseding statute: even if the "fair-process" doctrine applied to this case, it must yield to Congress's words in §5103A(a)(1).

The law cannot be "well-settled" when it is founded on cases that were decided before (and that do not interpret) §5103A(a)(1). Congress's words have primacy over any judicial doctrine: *Thurber, Austin, Anderson,* and *Prickett,* do not inform the interpretation of §5103A(a)(1), and in fact are superseded by it.

1.2. Ambiguity cannot be manufactured by misreading Congress's words or ignoring the grammatical structure of the sentence in which the words appear.

Mr. Martinez asks the Court to interpret §5103A(a)(1) to require the Secretary "assist a claimant in obtaining evidence necessary to substantiate the claimant's claim" by producing, without request, a copy of any medical opinion upon which it intends to rely. The parties agree the word "obtain" has a plain meaning to "gain

[1] All statutory references are to Title 38, or 38 U.S.C. unless otherwise indicated.

or attain usually by planned action or effort." *Accord, Appellant's Opening Brief,* at page 11 – 12; *Secretary's Response Brief,* at page 16. Where we diverge is in how we read the sentence in which "obtain" appears.

Based on the plain meaning of "obtain," Mr. Martinez reasons that to "fulfill the Secretary's duty to assist a veteran in obtaining evidence, he must assist a veteran in getting evidence: a veteran cannot obtain that which he does not get." *Appellant's Opening Brief,* at page 12. The Secretary argues Congress meant to "require the Secretary to obtain such evidence for the purpose of substantiating a claimant's claim for a benefit and not for the purpose of giving records to a claimant." *Secretary's Response Brief,* at page 17. The Secretary's reading does not come from Congress's words.

First, Congress did not require the Secretary to "assist a claimant *by* obtaining evidence" to substantiate the claim, but rather to assist the claimant "*in* obtaining" evidence. Congress's words demonstrate the Secretary is doing the "assisting" and the claimant is doing the "obtaining". When a person assists another *in obtaining* something, the person assisted "gets" the object obtained. This principle applies to physical objects: if a realtor successfully assists a family *in obtaining* a home, the family gets the home. It applies to services: if an insurance agent successfully assists a consumer *in obtaining* a life insurance policy, the consumer gets a copy of the policy and the coverage. It applies to legal constructs: when a lawyer successfully assists a client *in obtaining* a name change, his client gets the new name and papers documenting the change. It applies to concepts: if a mentor successfully assists a student *in obtaining* excellence in a field of study, the student "gets" the excellence. Congress's grammar works the same way here: for the Secretary to successfully assist Mr. Martinez in obtaining evidence necessary to substantiate his claim, Mr. Martinez must get copies of medical opinion evidence.

Second, Congress did not direct the Secretary "*to obtain* evidence necessary to substantiate the claim." It directed the Secretary *to assist*. Throughout §5103A, Congress used the word "obtain." In each instance, the party who "gets" the thing "obtained" turns on the grammatical use of the word. For example, a claimant must "authorize the Secretary *to obtain* [certain] records" and the Secretary must make reasonable efforts "*to obtain* relevant private records." §5103A(b)(4)(B); §5013A(b) (emphasis added in both). In both scenarios, the Secretary obtains – and gets – the records. Likewise, the Secretary's assistance extends to "*obtaining* a medical opinion" when necessary. §5103A(d)(1). The Secretary does the "obtaining" – he provides the exam and gets the opinion. In contrast, Congress used grammar in §5103A(a)(1) directing the Secretary *to assist* the claimant in the act of *obtaining* evidence necessary to substantiate a claim. §5103A(a)(1). If that evidence is a medical opinion the Secretary first obtained under §5103A(d), he has a duty *to assist* a claimant *in obtaining* – in getting – a copy of that evidence.

This interpretation makes sense in the statutory scheme. Congress intended veterans to keep the burden of proving their claims. §5107(a). It did not intend to require that veterans ask for claim file and the evidence in them before the Secretary had a duty to disclose the information. *Accord,* §5107(b)(1); §552a(b); §5109; *and* §7109. It did not intend to require veterans serve written discovery requests, such as Request for Production, on the Secretary to simply get the evidence he stores in a veteran's claim file. *Nohr v. McDonald,* 27 Vet. App. 124, 131 (2014), *citing* H.R. Rep. No. 100-963 at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-5795 (even the "VA must proceed with caution so as not to unravel Congress's desire to preserve and maintain the unique character and structure of the paternalistic, nonadversarial veterans' benefits system."). The Secretary suggests a concept of the duty to assist – wherein he gets and keeps all evidence on behalf of the claimant – that has not found favor in the Court. *Gobber v. Derwinski,* 2 Vet. App. 470, 472 (1992) (duty to assist

is "not a duty to prove a claim with the claimant only in a passive role"); *Wood v. Derwinski,* 1 Vet. App. 190, 193 (1991) (the "duty to assist is not a one-way street").

The Secretary cannot manufacture ambiguity by misreading Congress's words, or ignoring the grammatical structure of the sentence in which a word appears. *See Furniture by Thurston v. United States,* 103 Fed. Cl. 505, 512 n. 11 (2012) (government interpretation is unreasonable when it "contravenes elementary rules of grammar"). There is one reasonable interpretation of §5103A(a)(1): the Secretary's duty to assist Mr. Martinez in obtaining a copy of a medical opinion is fulfilled only when Mr. Martinez gets a copy of the opinion.

1.3. Read as a "harmonious whole," Title 38 requires the Secretary to give medical opinion evidence to claimants without a Request for Production.

The Court must interpret the phrase "assist a claimant in obtaining evidence" in §5103A(a)(1) so that it fits into a "harmonious whole" with §§5701 – 5702, §5109 and §7109. *FDA v. Brown & Williamson Tobacco Corp,* 529 U.S. 120, 133 (2000); *accord, Cottle v. Principi,* 14 Vet. App. 329 (2001) (Court is required to interpret and apply statutes as part of a "symmetrical and coherent regulatory scheme," so all parts fit into a harmonious whole). Those statutory sections reinforce Mr. Martinez's reasoning: Congress imposed on the Secretary a duty to provide copies of medical opinions, without need of a request.

For example, §5701 and §5702 demonstrate Congress did not intend for claimants to first file a Request for Production of medical opinion evidence in an ongoing claim. In §5701(a), Congress made veteran's claims files confidential and privileged. Next, it identified certain mandatory disclosure requirements. §5701(b), (c). One such mandatory disclosure applied to "[a]ll files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Secretary"… "[t]o a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone." §5701(a),

§5701(b)(1). Then, in §5701(d) through (i) Congress identified scenarios where those record disclosures would be permissive or discretionary. §5701(d) – (i). Congress required a specific written request, before disclosure, only in the case of the permissive disclosures:

> "(a) Any person desiring a copy of any record, paper, and so forth, in the custody of the Secretary *that may be disclosed under section 5701* of this title [38 USCS § 5701] must submit to the Secretary an application in writing for such copy." 38 U.S.C. §5702(a) (emphasis added), *accord,* 38 U.S.C. §5701(j) (disclosure under §5701 shall be made in accordance with the provisions of 5 U.S.C. §552a); 38 U.S.C. §552a(b)(written request not required with prior written consent of the individual to whom the record pertains).

This reading fits with common sense: in an ongoing claim in a non-adversarial claim process, a veteran and his representative should not have to send written Requests for Production every time the Secretary develops new evidence. *Accord,* 38 C.F.R. §1.525(d) (attorneys or representatives "shall be supplied with a copy of each notice to the claimant respecting the adjudication of the claim). A harmonious reading of §5103A(a)(1), §5701, and §5702 requires the Secretary provide veterans, without request, evidence it develops in an ongoing claim for benefits. If, however, the veteran seeks evidence covered by a permissive disclosure in §5701(d) – (i) (e.g., medical treatment records, evidence from other VA systems of records, evidence from other federal agencies) he must specifically request it.

This "harmonious" reading yields a result consistent with what Congress has required elsewhere in Title 38. In certain scenarios, the Secretary and BVA may request advisory medical opinions from independent experts "who are not employees of the Department." §7109(a); *accord,* §5109(a).[2] When they did so, Congress

[2] §7109 has been repealed. §7107(u)(1)(August 23, 2017); *accord,* Pub. L. 115-55 (August 23, 2017). This repeal is not effective until the latter of February 14, 2019, and the date that is 30 days after the Secretary certifies to certain Congressional committees that he is able to carry out the new appeals system while timely addressing both new and legacy appeals. §7113 (2017).

required they provide – without request – not just the opinion, but also notice of the request for an opinion. §7109(c); *accord,* §5109(c).

The Secretary argues that Congress's requirement in §§5109 and 7109 that the Secretary produce copies of medical opinions he procures from outside the agency demonstrates that "Congress did not intend to require VA to provide copies of VA examinations and opinions under §5103A" procured from inside the Agency. *See Secretary's Response,* at page 19. There is nothing to support this theory. When Congress passed the notice and production requirement of §7109 as part of the Veterans Benefits Improvement Act of 1988, its purpose was, in part, to "provide claimants with increased statutory opportunity to influence the development of the record before the Board. 38 U.S.C. §4009(c)(1988), Pub. L. No. 100-687, 102 Stat. 4107; *accord,* S. Rep. No. 100-418, at *43 – 44 (July 7, 1988) (attached as Exhibit B, hereto). The Senate Committee noted the BVA's practice of relying on the medical opinion of BVA physician members, and although such reliance may at times be appropriate, "such consultation on an *ex parte* basis without informing the claimant of existence and content of such an opinion and allowing a response to that opinion deprives the claimant of a basic due process right.") (italics in original). *Id.* There is no reason Congressional desire to avoid a deprivation of a "basic due process right" by "informing the claimant of existence and content" of medical opinions would have changed before passage of §5103A twelve years later. *See Ambassador Div. of Florsheim Shoe v. United States,* 748 F.2d 1560, 1565 (Fed. Cir. 1984) (common legislative intent is "very much to be inferred" to statutes enacted *in pari materia*). The Secretary has offered no reason Congress might require affirmative production of medical opinions to claimants when procured from outside the agency, but require a Request for Production for opinions procured internally. *See Macwhorter v. Derwinski,* 2 Vet. App. 133 (1992) (where Secretary does not provide his views on the law, the Court should deem the Secretary to have conceded an appellant's legally plausible

position). Congress's intent to protect veterans' basic due process right to obtain copies of medical opinions upon which the Secretary intends to rely, without first filing a Request for Production, is just as much a part of §5103A(a)(1) as it is a part of §7109.

Reading §5103A(a)(1) as a "harmonious whole" with §5701(a), §5701(b)(1), §5702, §5109, and §7109, and more, the Secretary has a duty "to assist [Mr. Martinez] in obtaining evidence necessary to substantiate [his] claim" by providing a copy of any medical opinion upon which the Secretary intended to rely in deciding his claim for benefits, without the need to seek discovery through Requests for Production.

1.4. *Skidmore* deference requires persuasion: it is not a "second-bite" at the interpretive apple.

The Court cannot defer to the government, under *Skidmore*, when a statute is unambiguous. *See Aqua Prods. v. Matal,* 872 F.3d 1290, 1318 (Fed. Cir. 2017), *quoting Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 218 n.4 (2009) ("if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."). Even if §5103A(a)(1) were ambiguous, application of *Chevron, Auer* or *Skidmore* deference cannot occur before consideration of the pro-veteran canon. *Gardner,* 513 U.S. at 117 – 118; *accord, Kisor v. Shulkin,* 880 F.3d 1378, 1381 (Fed. Cir. 2018) (O'Malley, J. dissenting) ("A regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible."), *petition for cert. filed,* (U.S. Jun. 29, 2018) (No. 18-15). Even if the Court considers *Skidmore*, the Secretary's plea for deference merely redirects the Court to his interpretation argument, relying only on "the statutory language, overall statutory scheme, and other statutes, including §§5103, 5701, 5702, and 7109". *Secretary's Response Brief,* at page 21 – 22. The focus of *Skidmore* deference is not on the propriety of the proposed statutory interpretation; in fact, if the Court considers *Skidmore* deference, the Secretary's

interpretative argument must already have failed at or before *Chevron* step one. The focus is instead on the Secretary's "power to persuade" the Court of the reasonableness of his interpretation, through a demonstration of his "thoroughness, logic, and expertness." *U.S. v. Mead Corp,* 533 U.S. 218, 221 (2001). The Secretary's interpretation of §5103A(a)(1) is not logical, because it rests on a judicial doctrine and case-law pre-dating the statute at issue; creates what Congress would forbid (i.e., adversarial requests for production in a non-adversarial system) and lacks internal consistency. *Compare, Secretary's Response Brief,* at page 18 ("claimants have an interest in receiving and reviewing VA medical opinions and examinations relied on by VA"); *with Secretary's Response Brief,* at page 26 ("the Secretary is "not require[d]…to give evidence to claimants."); *and see,* 38 C.F.R. §1.525(d) (Secretary required to provide claimants with a copy of every adjudicatory notice in a claim). His interpretation is not thorough because he does not reason why Congress would require affirmative production of opinions procured from independent sources (as in §5109 and §7109) but allow withholding of opinions gathered from inside the VA.

Although Mr. Martinez believes the Court cannot reach the question of *Skidmore* deference, he respectfully requests the Court decline to defer to a superficial, incomplete and illogical interpretation.

2. The executive branch asserts no interest strong enough to overcome Congress's recognition of a basic due process right and the Court's zealous protection of that right.

2.1. Beyond attempts to redefine "property interest", there is no genuine dispute that Mr. Martinez has a property interest in $105,000 in past-due disability compensation.

The Secretary's rejection of a due process violation rests on the major premise that "Appellant fails to sufficiently identify the private interest at stake" because "[t]he private interest at issue, and the process that Appellant seeks, is the ability to review a copy of a VA medical report obtained by the RO." *Secretary's Response* at page 25 – 26. He does not develop this premise. Nor does he provide precedential support for it. *See Coker v.*

Nicholson, 19 Vet. App. 439, 442 (2006) (per curiam), *vacated on other grounds sub nom. Coker v. Peake*, 310 Fed. Appx. 371 (Fed. Cir. 2008) (per curiam order); *see also Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006) (Court need not address undeveloped arguments). His premise is not clear: if the Secretary argues Mr. Martinez's property interest is really the process denied (i.e., a copy of evidence relied upon to deny benefits), the U.S. Supreme Court has rejected that argument. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541 (1985) ("The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."); *see Mathews v. Eldridge,* 424 U.S. at 340 (social security claimant's "sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim"); *Goldberg v. Kelly,* 397 U.S. 254, 261 – 263 (1970) (welfare applicant has interest in receipt of public assistance benefits); *Arnett v. Kennedy,* 416 U.S. 134, 166 – 167 (1974)(non-probationary federal employee has property interest in continuation of public employment); *Sniadach v. Family Fin. Corp.,* 395 U.S. 337, 339 – 340 (1969) (wage earner has private interest in receipt of his wages).

Outside his attempt to redefine the property interest at issue, the Secretary does not raise a genuine dispute that Mr. Martinez has a protected property interest in disability compensation. *But see*, *Secretary's Response Brief,* at page 26 ("claimants have an interest in receiving and reviewing VA medical opinions and examinations relied on by VA."). The Secretary was silent regarding the harm Mr. Martinez pleads: the potential deprivation of approximately $100,000 in compensation, owing to the Secretary's failure to give him a copy of the medical opinion upon which he relied, thus denying him a meaningful opportunity to substantiate his claim.

2.2. Mr. Martinez need not seek discovery – by filing Requests for Production – in order to obtain evidence used to deny his claim.

The facts of this case disprove the Secretary's assertion that the "risk of deprivation…is low" because "[i]f a claimant wants to receive evidence relied on by VA, he or she can simply request a copy." *Secretary's Response Brief,* at page 26.

Mr. Martinez gave the Secretary an ongoing authorization to disclose claim information to his attorney and a separate standing disclosure authorization on VA Form 21-22a in December 2013; a standing disclosure authorization in September 2015, requested his C-File five times between December 2013 and November 2014, and filed a petition for writ of mandamus with this Court. R. at 782, 876, 889 – 907, 921 – 926, 927 – 934, 935 – 936, 937 – 938, 939 – 942, 997, 1352 – 1353, 1359 -1360. The request that the Secretary describes as "simple," required 7 requests, 1 year and 4 months, and the filing of a writ before the Secretary sent something in March 2015.[3] R. at 889 – 907; *Exhibit A to Appellant's Opening Brief*. What the Secretary really seeks is a requirement that claimants seek discovery of information to be relied upon by filing Requests for Production. Congress did not intend for veterans to have to engage in an adversarial process of discovery with the Secretary in order to substantiate their claims.

2.3. A *de minimis* postage cost is not a burden to the government sufficient to overcome a strong public interest in giving veterans the evidence relied upon to deny benefits.

Against Mr. Martinez's argument that both the government and the public have an interest in ensuring veterans receive evidence to be relied on in their claims, the Secretary offers speculation about the cost of stamps. First, the Secretary offers no evidence to support the speculative cost that it will cost $653,091 to mail

[3] The Secretary's *Attachment A* does not appear in the RBA. Nor does it indicate whether all, or some, of the file was sent to Mr. Martinez's attorney.

opinions to veterans. Second, $653,091 is *de minimis*: the speculative cost is a mere 0.00033% of the VA's proposed $198.6 billion budget for FY 2019. *President's Budget Request for Fiscal Year 2019,* found at https://www.va.gov/budget/products.asp (last visited August 13, 2018). The so-called financial burden of postage is the equivalent of asking a GS-15, step 1, employee[4] of the federal government to spend 35¢ each year. Third, an expense of $653,091 is not a burden to the Secretary: he is willing to spend sums far greater when it helps veterans. For example, since art in VA buildings "create[s] a healing environment for our nation's Veterans," seven different VA Secretaries have not hesitated to buy $20 million dollars of artwork between 2004 and 2014. *See,* Elizabeth McLaughlin, *"VA Spent Millions on Costly Art as Veterans Waited For Care",* ABC News (July 29, 2016), *found at https://abcnews.go.com/US/report-va-spent-millions-costly-art-veterans-waited/story?id=40970667* (last visited August 2, 2018). Fourth, the amount is not a burden to the whole federal government, and does not consider the loss of time and productivity while VA employees respond to Requests for Production every time there is a new medical opinion in a case. Nor does he consider the costs expended by this Court or its clerks and staff to maintain, manage, and adjudicate petitions for writ of mandamus seeking production of evidence, or the cost to the taxpayer in EAJA fees for appeals to the Court due to inadequate opinions, or opinions where the Secretary failed to respond to a request for evidence.

Instead, the Secretary attempts to undercut an "immutable" principle of U.S. Supreme Court jurisprudence, by arguing the cases cited by Mr. Martinez "pertain[ ] to notice and not to the production of copies of evidence." *Secretary's Response Brief,* at page 28; *contra e.g., Hamdi v. Rumsfeld,* 542 U.S. 507, 513 – 516 (2006) (After government's objection to court-ordered disclosure of evidence, the question certified on appeal

[4] The base pay for a GS-15, step 1, without consideration for locality pay, is $105,123. *See,* https://www.federalpay.org/gs/2018 (last visited, August 2, 2018).

required the court to address whether *production* of a single declaration, "standing alone, is sufficient as a matter of law to allow a meaningful judicial review"); *ASSE Int'l, Inc. v. Kerry,* 803 F.3d 1059, 1075 - 1076 (9th Cir. 2015) (Government denied "immutable" principal of due process when it *failed to give ASSE evidence* and afford it a meaningful opportunity to respond to it).

In passing §5103A(a)(1), Congress recognized that deciding claims "on an *ex parte* basis without informing the claimant of existence and content of such an opinion and allowing a response to that opinion deprives the claimant of a basic due process right." S. Rep. No. 100-418, at *43 – 44 (July 7, 1988) (attached as Exhibit B, hereto). The Courts zealously protect this right. *Greene,* 360 U.S. at 496 – 497. Nothing in the Secretary's response proves an executive branch interest strong enough to deny Mr. Martinez copies of the medical opinions relied on to deprive him over $105,000 in disability compensation.

CONCLUSION

Mr. Martinez asks for a panel decision of this Court holding that the Secretary's duty to "assist [him] in obtaining evidence", and/or the due process clause of the 5th Amendment require the Secretary to proactively give to him a copy of any medical opinions which the Secretary develops in his claims and appeals. He asks the Court to vacate the BVA's denial of service connection for his sleep apnea, and remand it to the BVA with instructions to produce copies of any such exams prior to the adjudication of any appeal.

Respectfully Submitted,
ATTIG | STEEL, PLLC

By: */s/ Chris Attig*
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on August 13, 2018, I caused this motion to be served on the VA's secretary by and through the Court's E-Filing system.

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