No. 19-5526

IN THE SUPREME COURT OF THE UNITED STATES

FRANCES W. LAKE, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Circuit correctly held that it lacked jurisdiction under 38 U.S.C. 7292(d)(2) to review petitioner's factual challenge to the determination that she was not entitled to receive survivor pension benefits.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (Veterans Claims):

Lake v. O'Rourke, No. 17-2625 (June 29, 2018)

United States Court of Appeals (Fed. Cir.):

Lake v. Wilkie, No. 18-2421 (Feb. 13, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 759 Fed. Appx. 972. The opinion of the United States Court of Appeals for Veterans Claims is not published in the Veterans Appeals Reporter, but is available at 2018 WL 3202989.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2019. The petition for a writ of certiorari was filed on May 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) "administer[s] the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans." 38 U.S.C. 301(b). The VA adjudicates benefits claims by resolving "all questions of law and fact necessary to a decision" whether benefits will be awarded. 38 U.S.C. 511(a).

As a general matter, "[t]he VA has a two-step process for the adjudication" of claims. Henderson v. Shinseki, 562 U.S. 428, 431 (2011) (discussing claims for benefits to veterans with service-connected disabilities). Claims for benefits are first received and processed by a VA regional office, which renders an initial decision. Ibid. A claimant who is dissatisfied with the regional office's decision may then seek de novo review by the Board of Veterans' Appeals (Board), a component of the VA that makes the agency's final decision. Ibid.; see 38 U.S.C. 7101 and 7104.

Judicial review of the VA's determinations regarding benefits is available only as specifically provided in Title 38 of the United States Code. See 38 U.S.C. 511 (precluding judicial review except for matters subject to enumerated provisions of Title 38). As relevant here, the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105, authorizes judicial review of the VA's final decisions on claims for benefits. See Henderson, 562 U.S. at 432 (noting that,

before the VJRA was enacted in 1988, "a veteran whose claim was rejected by the VA was generally unable to obtain further review"). A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court with exclusive jurisdiction to review the Board's decisions. 38 U.S.C. 7252(a) and 7266; see Henderson, 562 U.S. at 432. "Review in the [Veterans] Court shall be on the record of proceedings before the Secretary and the Board." 38 U.S.C. 7252(b).

A claimant who remains dissatisfied following the Veterans Court's decision may appeal to the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292(b)(1); see Blue Water Navy Vietnam Veterans Ass'n v. McDonald, 830 F.3d 570, 573-574 (D.C. Cir. 2016). In adjudicating benefits cases within its jurisdiction, the Federal Circuit shall "decide all relevant questions of law." 38 U.S.C. 7292(d)(1). But "[e]xcept to the extent that an appeal * * * presents a constitutional issue, the Court of Appeals 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." 38 U.S.C. 7292(d)(2).

2. If a deceased veteran had at least 90 days of service during a period of war, the veteran's surviving spouse is eligible for non-service-connected survivor pension benefits.

38 U.S.C. 1521(j) and 1541(a). A surviving spouse may receive benefit payments only if the spouse's countable annual income is less than the applicable Maximum Annual Pension Rate (MAPR). See 38 U.S.C. 1541(b) and (d). If the surviving spouse is "in need of regular aid and attendance," a higher MAPR applies. 38 U.S.C. 1541(d). Benefit payments are limited to the difference between the surviving spouse's annual income and the applicable MAPR. 38 U.S.C. 1541(b).

To determine a surviving spouse's countable "annual income," the VA considers "all payments of any kind or from any source," with certain enumerated exclusions. 38 U.S.C. 1503(a). As relevant here, those exclusions include amounts that the surviving spouse has paid for "unreimbursed medical expenses, to the extent that such amounts exceed 5 percent of the [MAPR] * * * payable to such * * * surviving spouse," without consideration of "any amount of pension payable because a person is in need of regular aid and attendance or because a person is permanently housebound." 38 U.S.C. 1503(a)(8); see 38 U.S.C. 1503(a)(3) (excluding amounts paid by a veteran's spouse for the veteran's "just debts," "the expenses of such veteran's last illness," and "the expenses of such veteran's burial," to the extent those expenses are not otherwise reimbursed).

3. a. Petitioner is the surviving spouse of Melvin E. Lake, a veteran who had active duty service between 1948 and 1953. Pet. App. 2. In 2010, petitioner sought non-service-

connected death pension benefits. See 2018 WL 3202989, at *1. The Montgomery, Alabama VA Regional Office (Regional Office) concluded that petitioner was the surviving spouse of a wartime veteran, and that she was significantly disabled, requiring the regular aid and attendance of another person. Ibid.; see Pet. App. 2. The Regional Office determined, however, that petitioner was not entitled to receive benefits because her income exceeded the higher MAPR for surviving spouses in need of regular aid and assistance. Pet. App. 2; see 2018 WL 3202989, at *1.

Petitioner appealed, and the Board remanded petitioner's claim to the Regional Office for further development. Pet. App. 2. The Board explained that "additional development [was] necessary to provide notice to [petitioner] of the evidence necessary to substantiate her assertions as to the incurrence of unreimbursed medical expenses, and to assist her in obtaining such evidence." Ibid. (citation omitted; first set of brackets in original); see 2018 WL 3202989, at *1.

b. On remand, the Regional Office provided petitioner with additional information as to the documentation requirements for her expenses. Pet. App. 3; see 2018 WL 3202989, at *2. Petitioner submitted additional documentation, but the Regional Office issued a Supplemental Statement of the Case (SSOC), which explained that her income still exceeded the pension limit. 2018 WL 3202989, at *2. Petitioner then submitted "more miscellaneous records documenting expenses, but did not provide

the information necessary for the [Regional Office] to determine whether the expenses were excludable." Ibid. The Regional Office then issued a final SSOC, concluding that petitioner's income still exceeded the pension income limit. Ibid.; see Pet. App. 3.

The Board affirmed. Pet. App. 3; see 2018 WL 3202989, at *2. It explained that petitioner had failed to "provide the detailed accounting . . . which is required" to determine whether her expenses were excludable. 2018 WL 3202989, at *2. The Board further stated that, even if petitioner's claimed expenses had been properly documented, her income would have exceeded the MAPR threshold "by substantial amounts." Pet. App. 3 (citation omitted).

4. The Veterans Court affirmed. 2018 WL 3202989, at *3; see Pet. App. 3. Petitioner argued that the Board had lacked a "complete picture" of her expenses, and she provided to the Veterans Court new documentation that she had not presented to the Board, including documentation regarding amounts paid to an assisted-living facility where she had resided since September 2017. 2018 WL 3202989, at *2-*3. The Veterans Court held that, based on the evidence submitted to the Regional Office and the Board, petitioner's income level exceeded the MAPR. Id. at *3. The court further explained that it could not review in the first instance the new evidence that petitioner had presented concerning her payments to the assisted-living facility. Ibid.;

see 38 U.S.C. 7252(b) (limiting Veterans Court's review to the "record of proceedings before the Secretary and the Board"). The Veterans Court subsequently denied petitioner's motion for reconsideration. Pet. App. 3.

5. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1-6. Petitioner's informal brief on appeal asserted that, if her payments to the assisted-living facility were taken into account, her income fell within the pension limit. She did not contend that the Veterans Court had committed any legal error in adjudicating her claim.

The court of appeals acknowledged petitioner's argument that, "if the $28,740 in payments she makes each year to [her assisted-living facility] are deducted from her annual gross income of approximately $43,000, her countable annual income will be below the applicable MAPR limit." Pet. App. 4. Although the court was "not unsympathetic" to that claim, it explained that its authority to review decisions of the Veterans Court is "limited by statute," and that "[a]bsent a constitutional issue," it "'may not review * * * a challenge to a factual determination.'" Id. at 4-5 (quoting 38 U.S.C. 7292(d)(2)). The court of appeals therefore concluded that it had "no jurisdiction to make factual determinations regarding eligibility for veterans' benefits," and thus could not "conduct the initial evaluation of [petitioner's] documentation" to determine whether her assisted-living expenses could be deducted from her annual

income to determine her eligibility for benefits. Id. at 5. The court suggested that petitioner should "provide the Regional Office with documentation substantiating" her assisted-living expenses, as well as any unreimbursed medical expenses. Ibid. The court also stated that, once petitioner had provided the necessary documentation, the Regional Office "should expeditiously determine whether her countable income is below the [MAPR]." Ibid.

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to resolve petitioner's challenge to the Veterans Court's factual determination that her income exceeded the limit for persons seeking survivor pension benefits. That holding does not conflict with any decision of this Court or of another court of appeals. The Court has previously denied petitions for writs of certiorari challenging various Federal Circuit determinations that it lacked jurisdiction to review particular factual challenges related to veterans' disability benefits.* The same result is warranted here.

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* See, e.g., Melvin v. O'Rourke, 139 S. Ct. 239 (2018) (No. 18-80) (Federal Circuit's jurisdiction to consider whether record supported request for sanctions); Bonner v. Peake, 553 U.S. 1005 (2008) (No. 07-1108) (Federal Circuit's jurisdiction to consider Veterans Court's interpretation of widow's dependency and indemnity compensation claim); see also Counts v. Brown, 516 U.S. 1158 (1996) (No. 95-875) (Federal Circuit's jurisdiction to decide mixed questions of statutory interpretation and the application of law to facts).

1. The court of appeals correctly held that it lacked jurisdiction to consider petitioner's factual challenge to the Veterans Court's decision. As the court recognized, its authority to review decisions of the Veterans Court is limited by statute. See Pet. App. 4 (citing Burris v. Wilkie, 888 F.3d 1352, 1356 (Fed. Cir. 2018)). In particular, 38 U.S.C. 7292(d)(2) states that, in appeals from the Veterans Court, "[e]xcept to the extent that an appeal * * * presents a constitutional issue, the Court of Appeals 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."

Consistent with Section 7292(d)(2)'s plain text, for at least the last quarter-century, the Federal Circuit has recognized that it lacks jurisdiction to review factual questions regarding veterans-benefits decisions where no constitutional question has been raised. Albun v. Brown, 9 F.3d 1528, 1530 (Fed. Cir. 1993). And the court repeatedly has held that "the interpretation of the contents of a claim for benefits is a factual issue" over which it lacks jurisdiction. Kernea v. Shinseki, 724 F.3d 1374, 1382 (Fed. Cir. 2013); see also Garcia v. Wilkie, 908 F.3d 728, 737-738 (Fed. Cir. 2018), cert. denied, 139 S. Ct. 1353 (2019); Ellington v. Peake, 541 F.3d 1364, 1371-1372 (Fed. Cir. 2008); Bonner v. Nicholson, 497 F.3d 1323, 1327-1328 (Fed. Cir. 2007), cert. denied, 553 U.S. 1005 (2008).

2. Petitioner does not appear to take issue with the Federal Circuit's determination that it lacked jurisdiction to consider her factual challenge. See Pet. 1-6. Nor does she contend (ibid.) that the decision below conflicts with any decision of this Court or of another court of appeals. Indeed, every court of appeals that has considered the question has recognized that Section 7292(d)(2) forecloses the Federal Circuit from considering factual challenges in the absence of a constitutional challenge. See, e.g., Wu Lin v. Lynch, 813 F.3d 122, 129 (2d Cir. 2016) ("[T]he Court of Appeals for the Federal Circuit, which reviews rulings of the Court of Appeals for Veterans' Claims, is explicitly precluded from reviewing a challenge to a factual determination.") (citing 28 U.S.C. 7292(d)(2)); Toole v. Obama, 609 Fed. Appx. 245, 245 (5th Cir. 2015) (per curiam) (noting that the Federal Circuit had "dismissed [an] appeal as it was required to do under 38 U.S.C. § 7292(d)(2) after finding that [the appellant] raised only factual challenges to the decision below"); Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1022 (9th Cir. 2012) (noting that, under Section 7292(d)(2), "the Federal Circuit may not review factual determinations"), cert. denied, 568 U.S. 1086 (2013).

3. Even if the Federal Circuit had jurisdiction to review the factual determinations that underlay the Veterans Court's decision, any challenge to those determinations would lack merit.

Petitioner has argued that, if her payments to the assisted-living facility are taken into account, her income falls within the pension limit. But because no information concerning those payments had been submitted to the Board or the Regional Office, and the Veterans Court's review is limited to "the record of proceedings before the Secretary and the Board," 38 U.S.C. 7252(b), the Veterans Court was not authorized to consider those payments in the first instance. Petitioner does not contend that the Veterans Court made any error, factual or legal, in applying the pension limit to the record evidence that was properly before it.

4. Petitioner asserts (e.g., Pet. 4) that the Regional Office has not timely reviewed the additional documentation that she submitted following the court of appeals' decision. But because petitioner's prior claim has been finally decided by the Board (and not remanded by either the Veterans Court or the Federal Circuit), the VA can reacquire jurisdiction only if petitioner submits a new claim. See Jackson v. Nicholson, 449 F.3d 1204, 1208 (Fed. Cir. 2006) ("Once the VA action has become final by the issuance of a Board decision, and the matter has been appealed to the Veterans Court, the VA loses jurisdiction over [a] request to reopen."). This Office has been informed that, since receipt of petitioner's additional documentation following the court of appeals' decision, the Regional Office has communicated with petitioner regarding the documentation

necessary to open a new claim and to calculate her countable income.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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