No. 23-713

IN THE

Supreme Court of the United States

JOSHUA E. BUFKIN,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

NORMAN F. THORNTON,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Law School Veterans Clinic Consortium ("NLSVCC") submits this brief in support of the position of Petitioners Joshua E. Bufkin and Norman F. Thornton. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.

NLSVCC is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. Working with like-minded stakeholders, NLSVCC's mission is to gain support and advance common interests with the Department of Veterans Affairs ("VA"), U.S. Congress, state and local veterans service organizations, court systems, educators, and other entities for the benefit of veterans throughout the country.

NLSVCC exists to promote the fair treatment of veterans under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. NLSVCC is keenly interested in this case in light of the important disability benefits issue presented. It respectfully submits that this case presents the opportunity for the Court to reemphasize the importance of the benefit-of-the-doubt doctrine under 38 U.S.C. § 5107(b) and uphold Congress's intent that the Court of Appeals for Veterans Claims ("Veterans Court") play an active role in ensuring VA's compliance with that standard.

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1. In compliance with Rule 37.6, no counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

This case provides the opportunity to interpret 38 U.S.C. § 7261(b)(1) in a manner that provides meaningful and robust judicial review of the Secretary's application of the benefit-of-the-doubt rule in 38 U.S.C. § 5107(b), which is at the heart of the non-adversarial and pro-claimant VA claims adjudication process. The longstanding history and codification of the benefit-of-the-doubt rule, combined with Congress's mandate to the Veterans Court to "take due account" of VA's application of the benefit-of-the-doubt rule in 38 U.S.C. § 7261(b)(1), make it evident that vigorous judicial review of the application of the rule is required.

Upholding the Federal Circuit's decisions below would render toothless section 7261(b)(1)'s mandate to "take due account" of the benefit-of-the-doubt rule and deprive veterans of the process they are due. Under 38 U.S.C. § 7261(b)(2), the phrase "take due account" has been held to mean that the Veterans Court must review the full agency record to determine whether a VA error is prejudicial. *Tadlock v. McDonough*, 5 F.4th 1327, 1337 (Fed. Cir. 2021) (citing *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007)). Yet, the Veterans Court and Federal Circuit's interpretation of the statute's sister provision takes a far more passive role.

Applying accepted principles of statutory construction to the plain text of section 7261(b) would require the Veterans Court to analyze the rule of prejudicial error and the benefit-of-the-doubt rule in the same manner. Any analysis of the agency's application of the benefit-of-the-doubt rule that is less robust than the prejudicial-error analysis is contrary to the plain language and spirit of the

statute. Consequently, this Court should hold that section 7261(b)(1) requires the Veterans Court to actively consult the full agency record to determine whether the benefit-of-the-doubt rule in 38 U.S.C. § 5107(b) was properly applied.

ARGUMENT

I. The history and codification of the pro-claimant benefit-of-the-doubt rule supports the Veterans Court's meaningful and robust judicial review of its application.

The claimant-friendly VA benefits adjudication scheme is rooted in the government's longstanding recognition of the service and sacrifices of the nation's veterans.[2] One foundational aspect of this non-adversarial and pro-claimant adjudication system is the benefit-of-the-doubt rule. Articulated in 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102 (2023), it requires, "Where there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b); *see* C.F.R. § 3.102.

The benefit-of-the-doubt rule is a unique standard of proof that requires VA adjudicators to award benefits

2. "To care for him who shall have borne the battle and for his widow and orphan." President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), http://www.bartleby.com/124/pres32.html. The VA continues to honor this commitment to veterans by embodying President Lincoln's pledge into the Department's core mission, vision, and values. *See* "VA Mission, Vision, and Core Values," U.S. Dep't of Veterans Aff., https://www.va.gov/JOBS/VA_In_Depth/mission.asp.

to the claimant where the positive and negative evidence is in approximate balance. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53–54 (1990). Put another way, if the evidence is in approximate balance, then "the tie goes to the runner" and benefits must be granted. *Id.* at 55. This low standard of proof keeps "with the high esteem in which our nation holds those who have served in the Armed Services. It is in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error." *Id.* at 54. Thus, "[b]y tradition and by statute, the benefit of the doubt belongs to the veteran." *Id.*

A. Origins of the benefit-of-the-doubt rule.

The origins of the benefit-of-the-doubt rule trace back to the post-Civil War era. *Gilbert*, 1 Vet. App. at 55; *see also* Adjudication of Claims Based on Exposure in Dioxin or Ionizing Radiation, 50 Fed. Reg. 34,452-02 (Aug. 26, 1985) ((to be codified as 38 C.F.R. pt. 1 & 3) (discussing an 1899 Bureau of Pension Report requiring that "so far as permissible under the laws as they exist and the established practice of the Bureau, the benefit of any doubt has been resolved in favor of the claimant.")).

The principle of giving veterans the benefit of the doubt continued to develop after World War I. *Gilbert*, 1 Vet. App. at 55. The end of the war brought the promulgation of the first rating schedules which included a statement of commitment to the benefit-of-the-doubt doctrine in their preface. *Id.*; *see also* 50 Fed. Reg. 34,452-02 (Aug. 26, 1985) ("The law must be administered by its broadest interpretation and ratings of disability should be made as generous as possible in consistency with the facts. Wherever a question of doubt arises the benefit of such

doubt must be given to the claimant."). Further, a 1924 opinion of the Veterans Bureau General Counsel laid the foundation for the text of VA's reasonable doubt standard in 38 C.F.R. § 3.102.[3] *See Gilbert*, 1 Vet. App. at 55.

Following World War II, VA reaffirmed its commitment to the benefit-of-the-doubt rule in its 1949 regulations. *See*, *e.g.*, 38 C.F.R. § 2.1075 (1938) (noting the "general policy of resolving all reasonable doubts in favor of the claimant"); 38 C.F.R. § 3.31(d) (1949) (providing that the "benefit of every reasonable doubt will be resolved in favor of such veterans").

The benefit-of-the-doubt rule has been foundational to our nation's process for providing benefits to veterans since the nation first began providing benefits to veterans.

B. Codification of the benefit-of-the-doubt rule.

In the same piece of legislation that created the Veterans Court, Congress affirmed its intent for judicial review of the agency's application of the benefit-of-the-doubt rule.[4] The legislative history of that statute traces back to 1979.

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3. The Veterans Bureau General Counsel's opinion concerned a claim for disability benefits submitted by a World War I veteran. There was credible evidence in favor and against his claim. The opinion "outlined the 'benefit of the doubt' policy and explained it was not to be applied if the truth could be established by a preponderance of the evidence; on the other hand, proof 'beyond a reasonable doubt' was never required." Adjudication of Claims Based on Exposure in Dioxin or Ionizing Radiation, 50 Fed. Reg. 34,452-02 (Aug. 26, 1985) (to be codified as 38 C.F.R. pt. 1 & 3).

4. Pub. L. No. 100-687, 102 Stat. 4105 (1988).

Throughout the legislative process, Congress clarified that it intended to codify the benefit-of-the-doubt doctrine to guarantee that VA's policy of "construing the evidence liberally in favor of the claimant" was not lost in reaction to the judicial review provisions of the Veterans' Judicial Review Act ("VJRA"). *See* 125 Cong. Rec. 24,756 (1979). In codifying the standard in 38 C.F.R. § 3.102, known as the benefit-of-the-doubt rule, Congress intended to secure VA's commitment to "making every effort to award a benefit to a claimant." *Id.*

Congress has long recognized that the benefit-of-the-doubt rule is "one of the fundamental principles in the adjudication of a claim for VA benefits." 134 Cong. Rec. 17,458 (1988). During Congressional hearings before the enactment of the VJRA, veterans' groups expressed frustration with VA's frequent failure to properly invoke this rule and supported codifying the benefit-of-the-doubt rule, rather than maintaining its status as a "mere regulation." *See*, *e.g.*, *Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings Before the Sen. Comm. on Veterans' Affairs*, 96th Cong. 135, 225 (1979) (statements of William Lawson, Chairman, Board of Directors, American Association of Minority Veterans Program Administrators, and Carlos Soler-Calderon, National Congress of Puerto Rican Veterans); *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Special Investigations of the H. Comm. on Veterans' Affairs*, 96th Cong. 253, 257 (1980) (statements of Arthur A. Bressi, Special Projects Officer, American Defenders of Bataan and Corregidor, Inc., and Stuart A. Steinberg, Clinical Supervisor, Administrative Advocacy Clinic, Georgetown University Law Center); *H.R. 585 and Other Bills Relating to Judicial Review*

of Veterans' Claims: Hearings Before the H. Comm. on Veterans' Affairs, 99th Cong. 169, 302 (1986) (statements of Allen J. Lynch, Chief of Veterans Advocacy, Office of the Attorney General, State of Illinois, and Kenneth T. Blaylock, President, American Federation of Government Employees).

In 1988, Congress moved forward with codification without altering the existing VA rule, 38 C.F.R. § 3.102.[5] H.R. Rep. No. 100-963, at 38 (1988).

Thus, the longstanding tradition and codification of the benefit-of-the-doubt rule, coupled with the 1988 VJRA that created the Veterans Court and mandated that it "take due account" of VA's application of that rule, demonstrate Congress's ongoing support for meaningful and robust judicial review of the Secretary's application of the benefit-of-the-doubt rule.

C. Title 38, section 5107(b) reflects Congress's mandate for VA to adjudicate veterans' claims in a pro-claimant manner, and its express inclusion of that provision in section 7261(b) indicates that Congress envisioned meaningful judicial review of VA's application of the benefit-of-the-doubt rule.

In the "strongly and uniquely pro-claimant" VA adjudication scheme, Congress has repeatedly demonstrated its intent to "place a thumb on the scale

5. While the source refers to 38 C.F.R. § 3.101, the existing VA rule that addressed the benefit-of-the-doubt standard is 38 C.F.R. § 3.102.

in the veteran's favor." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). Congress expressly cited the benefit-of-the-doubt rule when it defined the Veterans Court's scope of review in 38 U.S.C. § 7261(b)(1), stating that the Court "*shall* . . . take due account of the Secretary's application of section 5107(b)." In so doing, Congress affirmed the crucial role of judicial review in ensuring that VA properly and consistently applies this doctrine.

The statutory requirement to "take due account of the Secretary's application" of the benefit-of-the-doubt rule demonstrates Congress's intent that the Veterans Court meaningfully review the Secretary's application of this rule, not simply rubber-stamp the Secretary's determinations. Indeed, the benefit-of-the-doubt rule is invoked by the Board in thousands of decisions every year: A search for "benefit of the doubt" in Board decisions from 2023 yielded 25,747 results. *See* Board of Veterans' Appeals, *U.S. Department of Veterans Affairs search results*, available online at https://search.usa.gov/search/docs?affiliate=bvadecisions&sort_by=&dc=9692&query=%22benefit+of+the+doubt%22 (last accessed June 25, 2024). In the cases at hand, this Court has the opportunity to ensure consistent adjudication of this low evidentiary burden through judicial review.

Further, in 2009, the Federal Circuit held, for the first time, that veterans have a "due process right to fair adjudication" of their claims for service-connected disability benefits. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). The statutory protections at 38 U.S.C. §§ 5107(b) and 7261(b)(1) ensure that this due process

right is upheld. Given the pro-claimant nature of the veterans' benefits system and the due process rights at stake, claimants would face a procedural disadvantage without meaningful judicial review of the VA's application of section 5107.

In sum, upholding the Federal Circuit's decisions below would render toothless Congress's mandate in section 7261(b)(1) for the Veterans Court to "take due account" of the benefit-of-the-doubt rule. It also deprives veterans of the process they are due.

II. A consistent reading of "take due account" in 38 U.S.C. § 7261 requires the Veterans Court to consider the rules of prejudicial error and the benefit of the doubt in the same robust manner.

A. The plain text of section 7261(b) requires the Veterans Court to review the full agency record to ensure that the Board properly applied the benefit-of-the-doubt rule.

Section 7261(b)(1) and (b)(2) both mandate the Veterans Court to "take due account." The statute states that "the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals . . . and shall—(1) *take due account* of the Secretary's application of [the benefit-of-the-doubt rule]; and (2) *take due account* of the rule of prejudicial error." 38 U.S.C. § 7261(b) (emphasis added).

"[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treasury*, 489 U.S.

803, 809 (1989). Indeed, identical words and phrases within the same statute are given the same meaning, "especially when they appear in the same statutory sentence." *Roane v. McDonough*, 64 F.4th 1306, 1310 (Fed. Cir. 2023).

The Federal Circuit has previously held that in the context of prejudicial error, the phrase "take due account" requires the Veterans Court to review the full agency record to determine whether a VA error is prejudicial. *Tadlock*, 5 F.4th at 1335 (citing *Newhouse II*, 497 F.3d at 1301); 38 U.S.C. § 7261(b)(2). Such assessment requires the Veterans Court to "consult the full agency record, including facts and determinations that would support an alternative ground for affirmance." *Tadlock*, 5 F.4th at 1334 (citing *Newhouse II*, 497 F.3d at 1302).

The Veterans Court routinely performs this review as a matter of course, including in non-precedential, single-judge cases. For example, since this Court granted certiorari of this case on April 29, 2024, the Veterans Court has issued at least fifteen non-precedential memorandum decisions in which it reviewed cases for harmless error. *See*, *e.g.*, *Bishop v. McDonough*, No. 23-3154, 2024 WL 2931070, at *1-3, *3 (Vet.App. June 11, 2024) (J. Allen, affirm); *Green v. McDonough*, No. 22-6282, 2024 WL 2811637, at *1-4, *3 (Vet.App. June 3, 2024) (J. Moorman, remand); *Corral v. McDonough*, No. 23-1301, 2024 WL 2795234, at *1-7, *7 (Vet.App. May 31, 2024) (J. Jaquith, remand); *Pearce v. McDonough*, No. 23-1879, 2024 WL 2139403, at *1-6, *4 (Vet.App. May 14, 2024) (J. Meredith, affirm); *Mendez v. McDonough*, No. 23-2764, 2024 WL 2880736, at *1-4, *2, *3 (Vet.App. June 7, 2024) (J. Allen, affirm); *Pollan v. McDonough*, No. 23-3835,

2024 WL 2768353, at *1-7, *6 (Vet.App. May 30, 2024) (J. Meredith, affirm). The result of this analysis is outcome determinative.

The benefit-of-the-doubt rule is, by its nature, similarly dispositive. It mandates that a veteran should receive the benefit of the doubt when there is an "approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." 38 U.S.C. § 5107(b); *see also* 38 C.F.R. § 3.102. Put another way, in cases involving close evidence, application of the benefit-of-the-doubt can mean the difference between prevailing or losing at all stages of the VA adjudication process.

However, when directed to similarly "take due account" of VA's application of the benefit-of-the-doubt rule, the Veterans Court and the Federal Circuit balk. Unlike its routine and often rigorous analysis for prejudicial error, the Veterans Court here deferred to the Board's weighing of a June 2015 negative medical opinion against positive opinions, limited its assessment to that of clear error, and concluded that the benefit of the doubt did not apply. *Bufkin v. McDonough*, No. 20-3886, 2021 WL 3163657, *1-5, *5 (Vet.App. July 27, 2021). The Federal Circuit affirmed; it agreed that the Veterans Court applied the appropriate standard of review and properly took account of the Board's application of the benefit-of-the-doubt rule. *Bufkin v. McDonough*, 75 F.4th 1368, 1373 (Fed. Cir. 2023).

These interpretations are contrary to the rules of statutory construction, the pro-veteran nature of the VA adjudication scheme, and common sense.

First, sections 7261(b)(1) and (b)(2) mandate that the Veterans Court "*shall* . . . take due account of" the benefit-of-the-doubt rule and prejudicial error. As these two requirements are part of the same statutory sentence, the phrase "take due account of" must be read in the same way. *Roane*, 64 F.4th at 1310. Certainly, the word "shall" applies with equal force to subsection (b)(1) as it does to (b)(2). Given this clear statutory language, it is illogical to interpret "shall . . . take due account of" in section 7261(b)(1) (benefit of the doubt) as permissive—while interpretating "shall . . . take due account of" in section 7261(b)(2) (prejudicial error) as mandatory. Thus, section 7261(b)(1) requires the Veterans Court to review the full record, assess if there are any material issues with evidence in approximate balance, ensure that they were resolved in the veteran's favor, and render a decision on the appeal.

Second, as addressed in detail under the first section, the Veterans Court's ability to take due account of the benefit of the doubt must be understood as consistent within the pro-veteran statutory scheme that Congress created. In the "strongly and uniquely pro-claimant" VA benefits scheme, Congress has repeatedly demonstrated its intent to "place a thumb on the scale in the veteran's favor." *Henderson ex rel. Henderson*, 562 U.S. at 440; *Hodge*, 155 F.3d at 1362. An atrophied ability to review whether the benefit of the doubt was properly afforded to a veteran on close evidence is inconsistent with that pro-veteran adjudication scheme.

Finally, it is nonsensical to believe that the same language that permits the Veterans Court to review the facts and circumstances of a veteran's case for prejudicial

error, on the one hand, requires it to throw up its hands in deference to the Board for the benefit of the doubt, on the other. Consistent statutory language requires a consistent and rigorous review.

In sum, as with the prejudicial error rule, the Veterans Court must review the entire agency record to ensure that the benefit-of-the-doubt rule was properly applied as required by the plain language of section 7261(b).

B. Whether the Secretary properly applied the benefit-of-the-doubt rule is based on the facts and circumstances of the case.

The Veterans Court and Federal Circuit similarly misconstrued the statutory mandate to "take due account" of the application of the benefit-of-the-doubt rule when it failed to consider the facts and circumstances of Mr. Bufkin's and Mr. Thornton's cases. The Federal Circuit stated that the Veterans Court *may* consider the facts and circumstances of the case when it reviews the Board's application of the benefit-of-the-doubt rule, but it has no statutory duty to do so "if no issue that touches upon the benefit of the doubt rule is raised on appeal." *Bufkin*, 75 F.4th at 1372-73. Even then, according to the Federal Circuit, the Veterans Court's review is limited to assessing whether the Board's application of the rule was clear error. *Id.* at 1373. The Court held that section 7261(b)(1) does not require the Veterans Court "to *sua sponte* review the underlying facts and address the benefit-of-the-doubt rule." *Id.*

Yet, as this Court held in *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009), what a reviewing court might

consider harmless in some circumstances may be harmful in a veteran's case. The Veterans Court's review of the circumstances of the case is fundamental to its statutory mandate to "take due account" of the rule of prejudicial error—just as it is to "take due account" of the Secretary's application of the benefit-of-the-doubt rule. *Id.*

Accordingly, like the prejudicial-error rule, the Veterans Court should review the Board's application of the benefit-the-doubt rule in every case based on the facts and circumstances of the case.

CONCLUSION

Requiring the Veterans Court to review the record to ensure compliance with the benefit-of-the-doubt rule is consistent with the history and codification of the doctrine in the non-adversarial and pro-claimant VA claims adjudication process. Such a requirement, as with the prejudicial-error rule, is proper and consistent with the plain language and framework of 38 U.S.C § 7261(b). *Amici* respectfully urges this Court to reverse the Federal Circuit's decision and hold that "shall . . . take due account" in 38 U.S.C § 7261(b) has the same meaning for both subsections (1) and (2) and, thus, requires the same robust review.

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