No. 23-713

IN THE
Supreme Court of the United States

JOSHUA E. BUFKIN AND NORMAN F. THORNTON,
Petitioners,

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 DISABLED AMERICAN VETERANS SUPPORTING PETITIONERS

Megan Hall
DISABLED AMERICAN VETERANS
3725 Alexandria Pike
Cold Spring, KY 41076

Amy F. Odom,
Counsel of Record
Robert V. Chisholm
Zachary Stolz
CHISHOLM CHISHOLM & KILPATRICK LTD
321 S Main St #200
Providence, RI 02903
(401) 331-6300
aodom@cck-law.com

Counsel for Amicus Curiae

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

I. Congress intended that judicial review in the Veterans Court would "substantially ameliorate" unintended but avoidable injustices that are unique to VA benefits decisions......4

II. Unintentional but avoidable individual injustices continue to plague the VA benefits adjudication system, particularly in claims involving exposure to toxic chemicals. 6

III. Section 7261(b)(1) provides the Veterans Court with a mechanism for ensuring fair treatment for similarly situated veterans...... 13

CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases

Anderson v. City of Bessemer City,
105 S.Ct. 1504 (1985) 15
Brown v. Gardner,
115 S.Ct. 552 (1994) 4
Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.,
403 F.3d 771 (D.C. Cir. 2005)..... 5
Euzebio v. McDonough,
989 F.3d 1305 (Fed. Cir. 2021)..... 5, 7
Lynch v. McDonough,
21 F.4th 776 (Fed. Cir. 2021) 15

Statutes

36 U.S.C. § 50301 1
38 U.S.C. § 1116..... 10
38 U.S.C. § 1116(a)(3) 6
38 U.S.C. § 1116(d)(1)-(5)..... 7
38 U.S.C. § 1116A 7, 10
38 U.S.C. § 1116B 7, 10
38 U.S.C. § 1116B(a)(2)..... 11
38 U.S.C. § 5107(b)..... 5, 10
38 U.S.C. § 7261(a)..... 13
38 U.S.C. § 7261(a)(4) 5
38 U.S.C. § 7261(b)..... 13
38 U.S.C. § 7261(b)(1) 2, 5, 6, 13, 14
Agent Orange Act of 1991, Pub. L. No. 102-4,
105 Stat. 11 (1991)..... 7
Veterans Judicial Review Act, Pub. L. No. 100-687,
102 Stat. 4105 (1988)..... 4

Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820 (2002) 5

Regulations

38 C.F.R. § 3.102 (2024) 9, 10, 12, 14
38 C.F.R. § 3.307(a)(6) (2024) 10
38 C.F.R. § 3.307(a)(6)(i) (2024) 8
38 C.F.R. § 3.307(a)(6)(iv) (2024) 11
38 C.F.R. § 3.307(a)(6)(v) (2024) 7
Herbicide Exposure and Veterans With Covered Service in Korea, 74 Fed. Reg. 36640-02 (July 24, 2009) 11
Updating VA Adjudication Regulations for Disability or Death Benefit Claims Related to Exposure to Certain Herbicide Agents, 89 Fed. Reg. 9803 (proposed Feb. 12, 2024) 7, 10

Other Authorities

134 CONG. REC. 31465 ..... 4-5, 6, 11, 13, 14
Department of Veterans Affairs Budget Request for Fiscal Year 2002: Hearing before the H. Comm. on Veterans' Affairs, 107th Cong. 94-95 (2001) 2
H.R. REP. NO. 100-963 4
Implementation of the SFC Heath Robinson Honoring Our PACT Act: Hearing before the S. Comm. on Veterans' Affairs, 117 Cong. 2 (2022) 10
Pending Benefits Legislation: Hearing before the S. Comm. on Veterans' Affairs, 107th Cong. 61 (2001) 7
Pending Legislation: Hearing before the S. Comm. on Veterans' Affairs, 107 Cong. 47 (2002) 2
S. REP. NO. 107-234 5

Title Redacted by Agency,
Bd. Vet. App. 0517111, 2005 WL 3908032 9
Title Redacted by Agency,
Bd. Vet. App. 1502630, 2015 WL 1195279 ..... 9, 14
Title Redacted by Agency,
Bd. Vet. App. 1514828, 2015 WL 3527944 ..... 9, 14
Title Redacted by Agency,
Bd. Vet. App. 1541992, 2015 WL 6947779 12
Title Redacted by Agency,
Bd. Vet. App. 1543489, 2015 WL 7875376 12
Title Redacted by Agency,
Bd. Vet. App. 1713395, 2017 WL 2499887 12-13
Title Redacted by Agency,
Bd. Vet. App. 1722882, 2017 WL 3409393 12
Title Redacted by Agency,
Bd. Vet. App. 1739996, 2017 WL 5251829 9
Title Redacted by Agency,
Bd. Vet. App. 1746633, 2017 WL 6052096 .. 8, 9, 14
Title Redacted by Agency,
Bd. Vet. App. 18142532, 2018 WL 9711583 12
Title Redacted by Agency,
Bd. Vet. App. 19114906, 2019 WL 4655608 12
Title Redacted by Agency,
Bd. Vet. App. 20029813, 2020 WL 3559268 ... 11-12
Title Redacted by Agency,
Bd. Vet. App. 22060861, 2022 WL 17665858 11, 12

INTEREST OF AMICUS CURIAE[1]

Disabled American Veterans is a federally chartered veterans service organization, founded to serve the interests of the nation's disabled veterans. 36 U.S.C. § 50301 *et seq*. DAV has more than a million members, all of whom are service-connected disabled veterans. Although DAV operates several charitable programs that serve the interests of its constituency, its marquee program, and the one for which it is best known, is the National Service Program. Through that program, and from approximately 100 locations around the United States and Puerto Rico, DAV service officers provide free assistance to veterans and their families with their claims for benefits from the United States Department of Veterans Affairs. In 2023, DAV assisted veterans and their families in filing over 209,000 claims for benefits, and DAV-represented veterans received more than $28 billion in earned benefits.

This case presents a question that is important to the nation's disabled veterans and their families. In exchange for their sacrifices for this nation, the Government has promised to afford veterans the benefit of the doubt in deciding their VA benefits claims. And it gave the U.S. Court of Appeals for Veterans Claims the tools to enforce the Government's promise. However, instead of scrutinizing VA's application of the benefit of the doubt as Congress intended, the U.S

[1] 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 its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Court of Appeals for Veterans Claims—with the blessing of the U.S. Court of Appeals for the Federal Circuit—conducts an extraordinarily deferential review of VA's (often erroneous) decision.

DAV has long been troubled by the level of deference that the Veterans Court generally affords to the Board of Veterans' Appeals. *See*, *e.g.*, *Pending Legislation: Hearing before the S. Comm. on Veterans' Affairs*, 107 Cong. 47 (2002) (statement of Joseph A. Violante, National Legislative Director, Disabled American Veterans); *Department of Veterans Affairs Budget Request for Fiscal Year 2002: Hearing before the H. Comm. on Veterans' Affairs,* 107th Cong. 94-95 (2001) (statement of David W. Gorman, Executive Director, Disabled American Veterans). The Veterans Court's refusal to provide claimants with the robust review required under 38 U.S.C. § 7261(b)(1) has thwarted a main goal behind the availability of judicial review of VA benefits decision—to substantially ameliorate the unintended but avoidable individual injustices that occur in the VA claims adjudication process.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the same legislation that codified the long-standing doctrine that VA benefits claimants be given the benefit of the doubt, Congress created an institution aimed at ensuring fairness in VA's claims adjudication system—the Veterans Court. It was understood that unintentional individual injustices were bound to happen in an agency as vast as VA.

The Veterans Court, it was hoped, would substantially ameliorate these injustices.

Opportunities for unintentional but avoidable injustices abound in VA's adjudication of claims involving exposure to toxic chemicals. Though VA presumes that veterans who served at some locations were exposed to dangerous herbicides, veterans who served at other locations where herbicides were used, tested, or stored must prove exposure. These veterans include those who served at Eglin Air Force Base, where regular aerial herbicide agent testing is known to have occurred for a decade. They also include Vietnam Era veterans who worked with HAWK missiles in Korea, as those missiles were known to be in an area where the U.S. military used herbicide agents. These veterans—like all veterans—are entitled to the benefit of the doubt when seeking to prove that they were exposed to herbicide agents. But Board members apply the rule inconsistently, affording it to some veterans but not others, even when the evidence is largely the same.

Congress equipped the Veterans Court with the tools for ensuring that the Board affords the benefit of the doubt to *all* veterans. The Veterans Benefits Act of 2002 authorizes the Veterans Court to "take due account" of the benefit-of-the-doubt rule, independent of its review of Board fact-finding. This rule permits the Court to review whether the evidence before the Board as to a veteran's exposure to herbicide agents was in "approximate balance" without deference.

ARGUMENT

I. Congress intended that judicial review in the Veterans Court would "substantially ameliorate" unintended but avoidable injustices that are unique to VA benefits decisions.

Before 1988, judicial review of VA benefits decisions was unavailable, and VA lived in "splendid isolation." *Brown v. Gardner*, 115 S.Ct. 552, 557 (1994) (quoting H.R. REP. NO. 100-963, at 10 (1988)). That changed when Congress enacted the Veterans Judicial Review Act (VJRA). Pub. L. No. 100-687, 102 Stat. 4105 (1988). The VJRA bestowed upon the newly created Veterans Court exclusive jurisdiction to review benefits decisions of the Board of Veterans' Appeals. *Id.* § 301.

A key goal of the VJRA was ensuring "[f]airness to individual claimants before the VA." 134 CONG. REC. 31465 (1988) (statement of Sen. Alan Cranston). Lawmakers recognized that VA decisionmakers "are generally fair-minded, conscientious individuals who generally make a concerted effort to carry out their responsibilities in an evenhanded fashion." *Id.* However, they also understood that "VA is a very large and complex Federal agency" that handles a "tremendous volume of claims." *Id.* This "provides a significant opportunity for individual injustices." *Id.*

By allowing judicial review of the agency's individual decisions, the VJRA was meant to "substantially ameliorate" the "unintended unfair, but potentially avoidable, results." *Id.* In the end, the Veterans

Court's "determin[ation] whether governmental action . . . is fundamentally fair would benefit all parties involved." *Id.* In particular, when the Veterans Court held that VA's actions were "fundamentally unfair," VA could take steps "to improve the process so as to ensure that the agency is fulfilling its million [sic] to serve veterans in the best possible fashion." *Id.*

Thus, the VJRA authorizes the Veterans Court to review "whether the Board or VA . . . 'applie[d] different standards to similarly situated [individuals] and fail[ed] to support this disparate treatment with a reasoned explanation and substantial evidence.'" *Euzebio v. McDonough*, 989 F.3d 1305, 1322 (Fed. Cir. 2021) (alterations in original) (quoting *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005)). Additionally, the Veterans Court must "hold unlawful and set aside or reverse" clearly erroneous findings of material fact adverse to the claimant. 38 U.S.C. § 7261(a)(4).

The Veterans Benefits Act of 2002 added another layer to this review—the Veterans Court must "review the record of proceedings before the Secretary and the Board" and "take due account of" the benefit-of-the doubt rule under 38 U.S.C. § 5107(b). Pub. L. No. 107-330, § 401, 116 Stat. 2820 (2002) (codified at 38 U.S.C. § 7261(b)(1)). As the Senate Committee for Veterans Affairs explained, the benefit-of-the-doubt rule "provide[s] a unique bias in favor of the claimant when the evidence is balanced" and must be reflected in the Veterans Court's review of Board decisions. S. REP. NO. 107-234, at 17 (2002).

However, as discussed further in Section III, the courts have interpreted section 7261(b)(1) as requiring the Veterans Court to review VA's application of the benefit of the doubt under a highly deferential standard. In the meantime, the volume of claims processed by VA has dramatically increased, and, in turn, so has the opportunity for the same unintentional but avoidable individual injustices that prompted the VJRA.[2] *See* 134 CONG. REC. 31465.

II. Unintentional but avoidable individual injustices plague the VA benefits adjudication system, particularly in claims involving exposure to toxic chemicals.

Unintentional but avoidable injustices occur with relative frequency in the adjudication of disability claims based on exposure to herbicide agents.[3] The Government has long recognized that the herbicides used for defoliation and crop destruction in support of

---

[2] In fiscal year 1989 (the year Congress passed the VJRA), the Board received 44,229 appeals. *Annual Report of the Chairman, Board of Veterans' Appeals*, p. 7, U.S. Dep't of Veterans Affs., *available at* https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA1991AR.pdf (last accessed June 24, 2024). By fiscal year 2023, that number had increased to 101,865. *Annual Report Fiscal Year (FY) 2023*, U.S. Dep't of Veterans Affs., Board of Veteran's Appeals, *available at* https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/bva2023ar.pdf (last accessed June 24, 2024).

[3] As used herein, "herbicide agent" refers to "a chemical in an herbicide used in support of the United Stats and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." *See* 38 U.S.C. § 1116(a)(3).

U.S. operations in Vietnam have adverse (and sometimes deadly) health consequences. *See* Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991); *see also Euzebio*, 989 F.3d at 1310-14 (discussing the history of the Agent Orange Act). Because of the difficulty of proving exposure to those chemicals, Congress has directed VA to presume that veterans who served in some geographical locations were exposed. *See* 38 U.S.C. §§ 1116(d)(1)-(5), 1116A, 1116B.

VA acknowledges that herbicide agent exposure also could have occurred in other geographical areas within and outside the United States. 38 C.F.R. § 3.307(a)(6)(v) (2024); Updating VA Adjudication Regulations for Disability or Death Benefit Claims Related to Exposure to Certain Herbicide Agents, 89 Fed. Reg. 9803, 9805 (Feb. 12, 2024) (proposing to amend section 3.307). Nonetheless, many veterans seeking to prove exposure in the locations where VA concedes dangerous herbicides were used face an uphill battle. *See Pending Benefits Legislation: Hearing before the S. Comm. on Veterans' Affairs*, 107th Cong. 61 (2001) (statement of Rick Surratt, Deputy National Legislative Director, Disabled American Veterans).

Take veterans who served at Eglin Air Force Base in the Florida panhandle between 1962 and 1970, for example. The government has publicly acknowledged that it conducted multiple tests involving the aerial dissemination of herbicide agents at Eglin during that period. *See Herbicide Tests and Storage in the U.S.*, U.S. Dep't of Veterans Affs., *available at*

https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/usa.asp (last accessed June 24, 2024). These tests included "spray flights" during which "[m]ultiple passes were done . . . at varying altitudes and flow rates." *Id.*; *see also* Young, A., *Long overlooked historical information on Agent Orange and TCDD following massive applications of 2,4,5-T-containing herbicides, Eglin Air Force Base, Florida*, 2004, *available at* https://pubmed.ncbi.nlm.nih.gov/15341310/ (last accessed June 24, 2024). According to experts, "each hectare on the Eglin test grid received at least 1,300 times more TCDD[4] than a hectare sprayed with Agent Orange in Vietnam." *Id.* Unlike in Vietnam, where the tree canopy intercepted most of the chemicals, the vegetation had been largely removed from the test area in Eglin. *Id.* All told, the military dumped more than 150,000 kilograms of 2,4,5-T and 2,4-D—the main ingredients in Agent Orange[5]—on Eglin. *Id.*

Based on this information alone, the Board has invoked the benefit-of-the-doubt rule and conceded that veterans who served on Eglin AFB between 1962 and 1970 were exposed to herbicide agents. *See Title Redacted by Agency*, Bd. Vet. App. 1746633, 2017 WL 6052096, No. 15-02 336, at *3 (Oct. 19, 2017); *Title*

---

[4] VA regulations identify "2,4,5-T and its contaminant TCDD" as an herbicide agent "used in support of the United States and allied military operations in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(i) (2024).

[5] U.S. Dep't of Veterans Affs., War Related Illness and Injury Center, *Agent Orange*, *available at* https://www.warrelatedillness.va.gov/education/exposures/agent-orange.asp (last accessed July 3, 2024).

Redacted by Agency, Bd. Vet. App. 1514828, 2015 WL 3527944, No. 11-10 810, at *2 (Apr. 7, 2015); *Title Redacted by Agency*, Bd. Vet. App. 1502630, 2015 WL 1195279, No. 12-22 324, at *2 (Jan. 20, 2015). In those cases, the Board correctly concluded that the evidence of repeated herbicide testing at Eglin AFB did not "satisfactorily prove or disprove the claim." 38 C.F.R. § 3.102 (2024); *see* 2017 WL 6052096, No. 15-02 336, at *3; 2015 WL 3527944, No. 11-10 810, at *2; 2015 WL 1195279, No. 12-22 324, at *2. It therefore resolved "reasonable doubt"—a doubt "within the range of probability"—in the veterans' favor. *See* 38 C.F.R. § 3.102. In these cases, the benefit-of-the-doubt doctrine worked as intended.

But the Board has refused to invoke the rule for other, similarly situated veterans based on virtually the same evidence. Some Board members demand evidence that the veteran was physically present in the test areas. *See*, *e.g.*, *Title Redacted by Agency*, Bd. Vet. App. 1739996, 2017 WL 5251829, No. 14-32 278, at *6 (Sept. 18, 2017); *Title Redacted by Agency*, Bd. Vet. App. 0517111, 2005 WL 3908032, No. 03-28 101, at *6 (June 23, 2005).

As the Board decisions conceding exposure show, however, evidence that a veteran served at Eglin AFB while the military aerially disseminated 1,300 times more TCDD per hectare than it did in Vietnam does not, on its own, "satisfactorily prove or disprove the claim" of herbicide agent exposure. 38 C.F.R. § 3.102. That veteran is entitled to the benefit of reasonable doubt because exposure under these circumstances is "within the range of probability." *See id.*

This is not to say that all veterans who served at Eglin between 1962 and 1970 are entitled to a legal presumption that they were exposed to herbicide agents at Eglin. Current statutes and regulations do not include Eglin as a location where herbicide agent exposure is presumed.[6] *See* 38 U.S.C. §§ 1116, 1116A, 1116B; 38 C.F.R. § 3.307(a)(6). But the process for creating statutory and regulatory presumptions of toxic exposure has historically been long and arduous.[7] The benefit-of-the-doubt rule assists veterans in proving exposure when the law does not yet presume it. And all veterans who served at Eglin are entitled to resolution of reasonable doubt in their favor. 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102.

---

[6] In 2024, VA proposed a rule creating a presumption of herbicide agent exposure based on a list of sites created by the Department of Defense in 2019. 89 Fed. Reg. at 9805-06. That list includes sites at Eglin between 1962 and 1970. *See Herbicide Tests and Storage in the U.S.*, U.S. Dep't of Veterans Affairs, *available at* https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/usa.asp#Florida (last accessed July 1, 2024).

[7] Members of Congress and VA officials agree on this point. *See*, *e.g.*, *Implementation of the SFC Heath Robinson Honoring Our PACT Act: Hearing before the S. Comm. on Veterans' Affairs*, 117 Cong. 2 (2022) (statement of Sen. Jon Tester, Chairman) (stating that "it took far too long to pass the PACT Act," legislation which created new presumptions of toxic exposures); *Implementation of the SFC Heath Robinson Honoring our PACT Act: Hearing before the S. Comm. on Veterans' Affairs*, 117 Cong. 5 (2022) (statement of Joshua Jacobs, Under Sec'y for Benefits, Dept. of Veterans Affairs) ("Historically, the process for VA to establish a new disability as a presumptive condition has taken too long and been too complex.").

The Board's refusal to apply the benefit-of-the-doubt rule in some Eglin veterans' claims is exactly the type of "individual injustices" that the VJRA sought to correct. *See* 134 CONG. REC. 31465. The rule reflects a legislative policy decision that the government, not the veteran, will bear the risk of error. *See* Petitioners' Br. at 6-7. But unlike similarly situated Eglin veterans, the veterans who were denied application of the rule were forced to bear that risk.

Some veterans who worked on HAWK missiles[8] in Korea during the Vietnam Era face a similar injustice. During that period, the military dispensed herbicide agents on a 155-mile strip of land near the Korean Demilitarized Zone. *See* Herbicide Exposure and Veterans With Covered Service in Korea, 74 Fed. Reg. 36640-02, 36641 (July 24, 2009). VA therefore presumes that veterans who served "in or near" the DMZ during a specified period were exposed to herbicide agents. 38 U.S.C. § 1116B(a)(2); *see also* 38 C.F.R. § 3.307(a)(6)(iv).

As the Board has found many times over, veterans who worked on HAWK missiles in Korea often travelled to sites near the DMZ. *See*, *e.g.*, *Title Redacted by Agency*, Bd. Vet. App. 22060861, 2022 WL 17665858, No. 16-40 793, at *4 (Oct. 31, 2022); *Title Redacted by Agency*, Bd. Vet. App. 20029813,

[8] HAWK missiles are medium range, surface-to-air guided missiles that were deployed to Korea during the Vietnam Conflict. *See HAWK*, U.S. Army Aviation and Missile Life Cycle Management Command, https://history.redstone.army.mil/miss-hawk.html (last accessed July 1, 2024).

2020 WL 3559268, No. 16-52 381, at *2 (Apr. 28, 2020); *Title Redacted by Agency*, Bd. Vet. App. 18142532, 2018 WL 9711583, No. 16-22 088, at *2 (Oct. 16, 2018); *Title Redacted by Agency*, Bd. Vet. App. 19114906, 2019 WL 4655608, No. 17-33 715, at *3 (Feb. 28, 2018); *Title Redacted by Agency*, Bd. Vet. App. 1543489, 2015 WL 7875376, No. 14-07 326, at *1-2 (Oct. 9, 2015); *Title Redacted by Agency*, Bd. Vet. App. 1541992, 2015 WL 6947779, No. 08-20 942, at *2-3 (Sept. 28, 2015). In some of those decisions, the Board even cited the "known" or "confirmed" presence of HAWK missiles along the DMZ. *Title Redacted by Agency*, 2022 WL 17665858, Bd. Vet. App. 22060861, No. 16-40 793, at *4; *Title Redacted by Agency*, Bd. Vet. App. 1543489, 2015 WL 7875376, No. 14-07 326, at*1.

In these cases, though travel to the DMZ was not documented in the available official service records, the Board found that a military occupational specialty involving HAWK missiles and lay reports of travelling to the DMZ did "not satisfactorily prove or disprove the claim." 38 C.F.R. § 3.102. The Board therefore—correctly—resolved reasonable doubt in the veterans' favor.

Other similarly situated veterans, however, have been wrongly denied the benefit of the doubt based on virtually the same evidence. In some cases, the Board has demanded documentation of travel to the DMZ in the official service records. *See Title Redacted by Agency*, Bd. Vet. App. 1722882, 2017 WL 3409393, No. 11-08 849A, *6-7 (June 20, 2017); *Title Redacted by Agency*, Bd. Vet. App. 1713395, 2017 WL 2499887,

No. 12-08 472, at *4-5 (Apr. 25, 2017). As the many decisions granting benefits show, evidence of HAWK missile duties in Korea during the Vietnam Era, coupled with self-reported travel to the DMZ, triggers the benefit-of-the-doubt rule, notwithstanding the absence of documentation.

Despite Board members' "concerted effort to carry out their responsibilities in an evenhanded fashion," the HAWK missile veterans whose claims were denied based on the similar evidence suffered "unintended unfair, but potentially avoidable, results." 134 CONG. REC. 31465

As discussed further in Section III, Congress created the Veterans Court to "substantially ameliorate" these results, and it equipped the court with the tools to do so. *See id.*; *see also* 38 U.S.C. § 7261(a), (b). In holding that the Veterans Court must defer to VA in applying the benefit of the doubt, the Federal Circuit severely undercut the effectiveness of these tools. DAV agrees with the Petitioners that the Federal Circuit's judgment should be reversed.

III. Section 7261(b)(1) provides the Veterans Court with a mechanism for ensuring fair treatment for similarly situated veterans.

When properly construed, section 7261(b)(1) requires the Veterans Court to (1) accept the facts as found by VA (unless clearly erroneous), (2) determine whether the evidence on one or more material issues stands in approximate balance, and (3) review

whether the claimant received the benefit of the doubt on those issues. *See* Petitioners' Br. at 22.

Taking "due account" of the benefit-of-the-doubt rule requires the Veterans Court to do more than simply assess whether the Board committed error. *See* Petitioners' Br. at 32. The Court must also determine whether the evidence "satisfactorily prove[s] or disprove[s] the claim," even if there is a plausible basis for the Board's underlying factual findings.

Thus, even if the lack of direct evidence of exposure could be a plausible basis for denying an Eglin veteran's claim, the Veterans Court must still assess whether the evidence "satisfactorily prove[s] or disprove[s] the claim." 38 C.F.R. § 3.102. And as the Board decisions finding exposure prove, it does not, so the veteran is entitled to the benefit of the doubt. Bd. Vet. App. 1746633, 2017 WL 6052096, No. 15-02 336, at *3; Bd. Vet. App. 1514828, 2015 WL 3527944, No. 11-10 810, at *2; Bd. Vet. App. 1502630, 2015 WL 1195279, No. 12-22 324, at *2. By requiring the Veterans Court to take due account of the benefit-of-the-doubt rule based on review of the record before the Board and Secretary, Congress equipped the court with the tools necessary to ensure that similarly situated Eglin veterans are treated fairly. *See* 38 U.S.C. § 7261(b)(1); 134 CONG. REC. 31465.

The Federal Circuit, however, does not recognize this second step. It merely asks whether there is a plausible basis for the Board's finding that the "persuasive evidence" is not in approximate balance.

Lynch v. McDonough, 21 F.4th 776, 781-82 (Fed. Cir. 2021) (en banc).

Under this "persuasive evidence" standard, the Veterans Court affords an extraordinary degree of deference to the agency. Application of the benefit-of-the-doubt-rule hinges on whether there is a plausible basis for the Board's conclusion that it was unpersuaded by the evidence. *Id.* at 782. But the persuasiveness of evidence is a highly subjective matter, making it nearly impossible to prove there are not "two permissible views of the evidence," *Anderson v. City of Bessemer City*, 105 S.Ct. 1504, 1511 (1985)—persuasive and unpersuasive.

This highly deferential approach to taking "due account" of the benefit-of-the-doubt rule cannot be what Congress envisioned in enacting the VBA. *See* Petitioner's Br. at 40-41 ("Congress could not have been clearer that it acted in 2002 to provide for more searching appellate review of [Board] decisions, and thus give full force to the benefit of the doubt provision." (quotations omitted)). The Court should therefore reverse the Federal Circuit's decisions.

CONCLUSION

The availability of judicial review of VA benefits decisions and VA claimants' right to the benefit of the doubt work together to promote fairness in a system for compensating veterans' physical and mental sacrifices to our nation. The Federal Circuit's interpretation of the law is wholly divorced from this legislative objective and this Court should reject it accordingly.

Respectfully submitted,

Amy F. Odom
Counsel of Record
Robert V. Chisholm
Zachary Stolz
CHISHOLM CHISHOLM & KILPATRICK LTD
321 S Main St #200
Providence, RI 02903
(401) 331-6300
aodom@cck-law.com

July 9, 2024