
In the Supreme Court of the United States

JOSHUA E. BUFKIN,

PETITIONER,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

NORMAN F. THORNTON,

PETITIONER,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

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

**BRIEF OF NATIONAL VETERANS LEGAL SERVICES
PROGRAM AND NATIONAL ORGANIZATION OF VETERANS'
ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF
PETITIONERS**

RENÉE A. BURBANK
ZACHARY R.M. OUTZEN
BARTON F. STICHMAN
NATIONAL VETERANS
LEGAL SERVICES PROGRAM
*1100 Wilson Blvd., Ste. 900
Arlington, VA 22209
Renee.Burbank@nvlsp.org*

Counsel for Amici Curiae

D. SHAYON GHOSH
Counsel of Record
F. GREG BOWMAN
LIAM J. MONTGOMERY
ANDREW G. BORRASSO
LUKE R. SÁNDOR
WILLIAMS & CONNOLLY LLP
*680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
SGhosh@wc.com*

Additional counsel listed on inside cover

DIANE BOYD RAUBER
NATIONAL ORGANIZATION OF
VETERANS' ADVOCATES
1775 Eye Street, N.W.
Ste. 1150
Washington, DC 20006
DRauber@vetadvocates.org

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. Congress enacted the “take due account” provision to aid veterans in the VA disability benefit process.	4
A. The VA disability benefit process was failing veterans before Congress enacted the “take due account” provision.	6
B. Congress enacted the “take due account” provision to ensure the benefit-of-the- doubt rule was properly applied and to streamline resolution.	8
C. When the “take due account” provision is applied properly, veterans promptly receive the disability benefits they have earned.	10
II. The agency and Federal Circuit misinterpret the “take due account” rule to give the benefit of the doubt to the Board rather than veterans.	12
A. The Veterans Court misused legislative history to rewrite the statute, and the Federal Circuit has acquiesced.	15
B. Veterans now endure <i>more</i> delay.	18
III. To “take due account” of a legal rule requires more than clear-error review, because questions of law are for the courts.	21
CONCLUSION	24

II

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Arellano v. McDonough</i> , 143 S. Ct. 543 (2023)	1
<i>Butts v. Brown</i> , 5 Vet. App. 532 (1993).....	6
<i>Donnellan v. Shinseki</i> , 24 Vet. App. 167 (2010).....	13, 14
<i>Gilbert v. Derwinski</i> , 1 Vet. App. 49 (1990)	6, 8, 15, 22
<i>Henderson v. Shinseki</i> , 562 U.S. 428 (2011).....	1
<i>Interstate Commerce Commission v. Louisville & Nashville Railroad Co.</i> , 227 U.S. 88 (2013).....	23
<i>Kingdomware Technologies, Inc. v. United States</i> , 579 U.S. 162 (2016)	1
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019)	1
<i>Loper Bright Enterprises v. Raimondo</i> , Nos. 22-451, 22-129, slip op. (June 28, 2024).....	24
<i>Padgett v. Nicholson</i> , 19 Vet. App. 133 (2005)	10, 11, 15
<i>Ramos-Rodriguez v. Principi</i> , No. 00-633, 2002 WL 1489434 (Vet. App. July 10, 2002)	4, 5
<i>Roane v. McDonough</i> , 64 F.4th 1306 (Fed. Cir. 2023)	17, 23
<i>Roberson v. Principi</i> , 17 Vet. App. 135 (2003) (per curiam)	15, 16, 17
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009).....	2, 4, 22
<i>Stanphill v. McDonough</i> , No. 22-2283, 2023 WL 6373807 (Vet. App. Sept. 29, 2023)	12
<i>Tadlock v. McDonough</i> , 5 F.4th 1327 (Fed. Cir. 2021) ..	23
<i>Turk v. Peake</i> , 21 Vet. App. 565 (2008).....	12
<i>Wells v. Principi</i> , 18 Vet. App. 33 (2004)	16

III

	Page
Statutes and Rule:	
5 U.S.C. § 706	23
38 U.S.C.	
§ 5107	2, 9, 17
§ 5902	1
§ 7252	16
§ 7261	3, 6, 9, 10, 16, 17, 23, 24
§ 7292	23
Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (2017)	18
Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820	2-6, 8-10, 12, 14-24
Federal Rule of Civil Procedure 50	22, 23
Other Authorities:	
148 Cong. Rec. (Nov. 14, 2002)	
H8925	9
H9006	9, 10
Board Annual Report FY 1999, http://tinyurl.com/529yjsx2z	6
Board Annual Report FY 2000, http://tinyurl.com/msephscv	6
Board Annual Report FY 2001, http://tinyurl.com/4zckm6	7
Board Annual Report FY 2021, http://tinyurl.com/3bz3ywwc	18
Board Annual Report FY 2022, http://tinyurl.com/4k7fbvuc	18
Board Annual Report FY 2023, https://tinyurl.com/5n7fyehj	18, 19, 20

IV

	Page
Other Authorities—continued:	
<i>Examining the VA Appeals Process; Ensuring High-Quality Decision-Making for Veterans’ Claims on Appeal</i> , Statement from Bergmann & Moore, LLC to the Subcomm. on Disability Assistance and Mem’l Affs. of the H. Comm. on Veterans Affs. (Nov. 27, 2023), http://tinyurl.com/yhare63z	20, 21
<i>Pending Legislation: Hearing Before the S. Comm. on Veterans’ Affairs</i> , 107th Cong. 60 (2002)	10
S. Rep. No. 107-234 (2002).....	8
Statement of Kerry Baker, Disabled Veterans of America, United States Senate Committee on Veterans’ Affairs (Feb. 13, 2008), http://tinyurl.com/76kj4fcx	9
Veterans Court Annual Reports FYs 1998–2007, http://tinyurl.com/4pu5uwau	7
Veterans Court FY 2021 Annual Report, http://tinyurl.com/2t49kzc9	19
Veterans Court FY 2022 Annual Report, http://tinyurl.com/2xhpx4b8	19
Veterans Court FY 2023 Annual Report, https://tinyurl.com/4xjanm3u	19
Wright & Miller 9B Fed. Prac. & Proc. Civ. (3d ed. 2023) § 2524	23
§ 2536	23

INTEREST OF *AMICI CURIAE*¹

Amici curiae are two national veterans organizations. Founded in 1981, the National Veterans Legal Services Program (“NVLSP”) is a nonprofit organization that works to ensure that the Nation’s 18 million veterans and active-duty service members have access to federal veterans benefits. NVLSP does so in part by serving as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans’ advocates. For over two decades, NVLSP has published the 2,400-page *Veterans Benefits Manual*, the leading practice guide on the subject.

The Secretary of Veterans Affairs has recognized NVLSP as a veterans’ service organization authorized to assist veterans in the preparation, presentation, and prosecution of veterans’ benefits claims. *See* 38 U.S.C. § 5902. NVLSP has represented thousands of veterans in proceedings before the Department of Veterans Affairs (“VA”), the Board of Veterans’ Appeals (“Board”), and the Court of Appeals for Veterans Claims (“Veterans Court”). NVLSP also has filed numerous amicus briefs in this Court (and others) in cases that present issues of broad importance to veterans and the VA benefits system. *See, e.g., Arellano v. McDonough*, 143 S. Ct. 543 (2023); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016); *Henderson v.*

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

Shinseki, 562 U.S. 428 (2011); *Shinseki v. Sanders*, 556 U.S. 396 (2009).

The National Organization of Veterans' Advocates (NOVA) is a not-for-profit educational membership organization that was incorporated in 1993. NOVA has more than 850 individual attorneys, agents, and qualified members who represent our Nation's military veterans, their families, and their survivors before the VA and federal courts. NOVA is committed to developing veterans' law and procedure through research, discussion, education, and participation as an amicus before this Court.

Amici appear in support of petitioners to explain the deep-seated problems with the veterans disability benefit process that Congress—at the urging of NVLSP and others—attempted to remedy through the Veterans Benefits Act (“VBA” or “Act”). The Federal Circuit's misinterpretation of the Act ignores the additional duties Congress imposed on the Veterans Court to ensure that veterans get the benefit of the doubt to which they have long been entitled but that too often they have not received.

SUMMARY OF THE ARGUMENT

The veterans disability benefit process is intended to facilitate access to benefits for veterans disabled while serving in the military. This system is uniquely pro-claimant. For example, among other such features, “[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of the matter, the Secretary [of Veterans Affairs] shall give the benefit of the doubt to the claimant.” 38 U.S.C. § 5107(b). Yet in practice, veterans often have not received the benefit of the doubt from the

VA. Worse, until 1988, VA benefit decisions were not judicially reviewed, and between 1988 and 2002, the Veterans Court undertook APA-style review under which substantial deference was afforded the agency. Not only was this review ineffective in enforcing the benefit-of-the-doubt rule, but it also contributed to lengthy delays in processing claims as the Veterans Court tended to remand to the agency, and cases often bounced between the Veterans Court and the Board.

Congress addressed these issues in the VBA, enacted in 2002, by requiring the Veterans Court additionally to more broadly “review the record of proceedings before the Secretary and the Board,” and “take due account of the Secretary’s application of” the benefit-of-the-doubt rule. 38 U.S.C. § 7261(b), (b)(1). As the text and structure of the statute indicate, the “take due account” provision requires the Veterans Court to separately consider the Secretary’s application of the benefit-of-the-doubt rule, which should improve outcomes for veterans and—because the Veterans Court is empowered to reverse and not merely remand—reduce delays in the benefits application and review process.

Rather than ensure that veterans are given the benefit of the doubt, as Congress required, the Veterans Court has deferentially reviewed the agency’s application of the rule only for clear error. Case backlogs have increased as remands from the Veterans Court congest the Board’s docket, and veterans are forced to wait even longer for resolution. This Brief draws on the experiences of several veterans’ decades-long battles with the benefits system to highlight the problems that Congress sought to solve, and how the Veterans Court has largely ignored Congress’s command.

The Veterans Court’s justification has been that the Board’s application of the rule is a factual finding. But that conclusion is incorrect and contradicts the Veterans Court’s own precedent, not to mention this Court’s instruction to apply well-established standards “that courts ordinarily apply in civil cases.” *Sanders*, 556 U.S. at 406. Those standards show the way here: the Veterans Court should review the Board’s application of the benefit-of-the-doubt rule as a conclusion of law, based on findings of fact. It is essential that the Veterans Court enforce the benefit-of-the-doubt rule as Congress mandated to ensure that veterans timely receive benefits that they have earned through their service.

ARGUMENT

I. Congress enacted the “take due account” provision to aid veterans in the VA disability benefit process.

The pre-VBA case of Edwin Ramos-Rodriguez illustrates the problem that Congress intended to address in enacting the VBA. Mr. Ramos-Rodriguez’s case was one of many subjected to unnecessary remand and unreasonable delay—a *full decade* in his case—before urgently-needed benefits were awarded. The later-enacted Veterans Benefits Act, properly applied, would help veterans like him obtain appropriate and timely relief.

Mr. Ramos-Rodriguez “attempted suicide by cutting his wrists with a razor” while serving in the United States Air Force in 1986. *Ramos-Rodriguez v. Principi*, No. 00-633, 2002 WL 1489434, at *1 (Vet. App. July 10, 2002). A contemporaneous examiner diagnosed him with an “adjustment disorder with mixed emotional features” and recognized he would “need considerable supervision and support.” *Id.* Mr. Ramos-Rodriguez was hospitalized after discharge from the military, and was declared

mentally disabled by the Social Security Administration in October 1993. That same year he applied to the VA for disability benefits. *Id.* Yet it took 10 years for this veteran to receive the benefits he was so obviously due.

The VA took four years to rule on the veteran's application, only to erroneously deny it. *Id.* In his appeal to the Board, Mr. Ramos-Rodriguez pointed to evidence from the psychiatrist who had treated him on a monthly basis for more than four years and had concluded that he suffered from a schizoaffective disorder, was depressed, and should have been diagnosed with a "serious emotional disorder" while he was in the Air Force. *Id.* at *2. Two years later, the Board denied his appeal, incomprehensibly rejecting as not probative the professional opinion of a treating psychiatrist with years of direct clinical experience with the veteran. *Id.*

In June 2000, the Secretary acknowledged in the Veterans Court that the Board had committed errors, and the Secretary moved to remand. *Id.* The veteran argued for *reversal* instead. Even though everyone agreed the Board's decision was unupportable, the Veterans Court believed it could reverse under pre-VBA law solely if "the only permissible view of the evidence of record supports the appellant's position." *Id.* at *3. It therefore remanded to the Board to do the obvious: explain how it could be that the evidence was not at least in equipoise, entitling the veteran to the benefit of the doubt. *Id.* at *5. Remanding (rather than reversing) cost the veteran an additional three years before he was awarded benefits.

Congress enacted the VBA in 2002 in part to empower the Veterans Court to do what it did not in Mr. Ramos-Rodriguez's case: directly review the Secretary's application of the benefit-of-the-doubt rule and, when

warranted, reverse and award appropriate and timely relief.

A. The VA disability benefit process was failing veterans before Congress enacted the “take due account” provision.

The Veterans Court has long recognized that the benefit-of-the-doubt rule is a “unique standard of proof.” *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). The standard is less demanding than even the “fair preponderance” standard which applies in civil trials. *Id.* at 54. That is both “in keeping with the high esteem in which our Nation holds those who have served in the Armed Services” and “in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error.” *Id.*

But before the VBA was enacted, the Veterans Court reviewed the Board’s application of the benefit-of-the-doubt rule under the “clearly erroneous” standard applicable to the Board’s findings of fact. 38 U.S.C. § 7261(a)(4), (b)(1). The court’s review thus was “significantly deferential,” *Butts v. Brown*, 5 Vet. App. 532, 544 (1993) (Steinberg, J., concurring), largely leaving unchecked the Board’s application of the rule. Even when the Veterans Court did find error, the Veterans Court typically remanded for further adjudication. *See id.* at 547 (“Indeed, the remand approach is the one the Court has invariably followed in connection with the . . . application of the benefit-of-the-doubt doctrine.” (citations omitted)).

The Board and Veterans Court’s own statistics show the hurdles veterans faced when appealing to the Board. In 1999 to 2001, the Board’s average response time from receipt of appeal to issuance of decision ranged from 140

to 182 days. Board Annual Report FY 1999, at 40;² Board Annual Report FY 2000, at 42;³ Board Annual Report FY 2001 (“2001 BVA Report”), at 44.^{4,5} When the Board finally issued its decisions, the outcomes for veterans were poor. In 1999 to 2001, the Board affirmed the VA’s denial of benefits 39.8%, 41.4%, and 27% of the time, respectively. 2001 BVA Report, at 37. The Board issued remands, prolonging cases and adding to the VA’s backlog, 36.3%, 29.9%, and 48.8% of the time. *Id.* Outright reversals awarding benefits were rare, only occurring about a quarter of the time. *Id.* Veterans were rarely represented by counsel before the Board. *Id.* at 36 (only 8.4% of the time in 2001).

Veterans did not fare much better when they appealed a Board decision denying benefits to the Veterans Court. Between 1999 to 2001 it took the Veterans Court between 340 and 386 days on average to resolve each case. Veterans Court Annual Reports FYs 1998–2007.⁶ After those lengthy delays, hamstrung by the deferential nature of its review, the Veterans Court simply remanded cases back to the Board over 60% of the time in 1999 and 2000.⁷ *Id.* Those remands further prolonged cases and added to the Board’s own substantial backlog.

² <http://tinyurl.com/529yjsx2z>.

³ <http://tinyurl.com/msephscv>.

⁴ <http://tinyurl.com/4zckm6s>.

⁵ Getting to the Board took even longer. In 2001, for example, it took 466 days on average for VA field stations to certify an appeal to the Board after the veteran requested one. 2001 BVA Report, at 44.

⁶ <http://tinyurl.com/4pu5uwau>.

⁷ The figures for 2001 are not useful due to a legislative change in November 2000.

Veterans raised alarms about these issues, specifically emphasizing the vital role that the Veterans Court should play in enforcing the benefit-of-the-doubt rule, and the harmful trickle-down effects that occurred when it abdicated that responsibility. Veterans service organizations, including NVLSP, testified to Congress that the Veterans Court's deference "may result in failure to consider the 'benefit of the doubt' rule." S. Rep. No. 107-234 at 17 (2002). Veterans "voiced frustrations with the perceived lack of searching appellate review of [Board] decisions," and made clear "that the large measure of deference that [the Veterans Court] affords [Board] fact-finding is detrimental to claimants." *Id.*⁸

In short, veterans organizations like NVLSP explained to Congress that the Veterans Court's toothless review of the benefit-of-the-doubt rule regularly resulted in misapplication of that rule and unnecessary remands that cost veterans valuable time.

B. Congress enacted the "take due account" provision to ensure the benefit-of-the-doubt rule was properly applied and to streamline resolution.

Congress enacted the Veterans Benefits Act in 2002 to strengthen the Veterans Court's review and to reduce delays in the system. Understanding the harm caused to

⁸ A judge of the Veterans Court itself raised concerns about its overly deferential review of the Secretary's application of the benefit-of-the-doubt rule. *See Gilbert*, 1 Vet App. at 61 (Kramer, K., concurring) ("If this Nation's veterans are truly to have the benefit of independent judicial review . . . it must be real judicial review, not just the appearance thereof. To adopt a framework which is too deferential to the [Board] will be contrary to the congressional intent . . . as it will leave the [Board], not the judiciary, as the final arbiter of 'benefit of the doubt' determinations.").

veterans by time-consuming remands, Congress provided that the Veterans Court may reverse “clearly erroneous” factual findings, instead of merely remanding back to the Board after finding those errors. *See* Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832 (VBA); 38 U.S.C. § 7261(a)(4). Moreover, the Act included a separate, stronger provision requiring the Veterans Court to review the Secretary’s application of the benefit-of-the-doubt rule of 38 U.S.C. § 5107(b). Specifically, the VBA mandated that the Veterans Court “*take due account of the Secretary’s application of section 5107(b).*” VBA § 401 (emphasis added); 38 U.S.C. § 7261(b)(1). Thus, recognizing the critical importance of the benefit-of-the-doubt rule, Congress required the Veterans Court to ensure that the Secretary applied it properly.

The Senate and House Committees on Veterans’ Affairs noted in a joint statement that the VBA required the Veterans Court to place “special emphasis . . . on the benefit of the doubt provisions of section 5107(b) as it makes findings of fact in reviewing [Board] decisions.” 148 Cong. Rec. H8925, H9006 (Nov. 14, 2002). The law was “intended to provide for more searching appellate review of [Board] decisions, and thus give full force to the ‘benefit of the doubt’ provision.” *Id.* As veterans’ advocates have stated, if full effect is not given to the “take due account” provision, the Veterans Court’s power to review the Board’s application of the benefit-of-the-doubt rule will remain “nothing more than meaningless rhetoric.”⁹

⁹ Statement of Kerry Baker, Disabled Veterans of America, United States Senate Committee on Veterans’ Affairs (Feb. 13, 2008), <http://tinyurl.com/76kj4fex>.

Further, Congress explicitly sought to “modify the requirements of the review the [Veterans] Court must perform when it is making determinations under section 7261(a),” and “expect[ed] the [Veterans] Court to reverse clearly erroneous findings when appropriate, rather than remand the case.” 148 Cong. Rec. at H9006. In hearings leading up to the enactment of the VBA, representatives of veterans organizations had urged that such a provision would “address[] a long-standing concern . . . about the years it often takes for a claimant to get their case finally before the Court only to have it remanded back to the Board, which means further frustration, hardship, and delay.” *Pending Legislation: Hearing Before the S. Comm. on Veterans’ Affairs*, 107th Cong. 60, 66 (2002) (statement of James Fischl, Director of The American Legion).

The VBA thus, first, required the Veterans Court to review the Secretary’s benefit-of-the-doubt analysis, and, second, empowered the Veterans Court to reverse the Board when it errs. Under the VBA, Congress expected the Veterans Court to ensure that veterans like Mr. Ramos-Rodriguez received the benefit of the doubt, and to award benefits where warranted rather than force veterans to slog through years of further litigation.

C. When the “take due account” provision is applied properly, veterans promptly receive the disability benefits they have earned.

In some early cases after the VBA’s enactment, the “take due account” provision spurred the Veterans Court to conduct an appropriately non-deferential review of the Board’s decision, regardless of the labels used to describe it. For example, in *Padgett v. Nicholson*, the Veterans Court reviewed the Secretary’s benefit-of-the-doubt analysis and reversed the Board’s benefit-of-the-doubt

determination and denial of benefits. 19 Vet. App. 133 (2005) (subsequent history related to other grounds omitted). *Padgett* demonstrates the manner in which the Veterans Court should apply the “take due account” provision to reverse the Board in appropriate circumstances.

Barney O. Padgett was a World War II combat veteran who served tours of duty in Europe, Africa, and the Middle East, and injured his knee “during combat when he jumped into a ditch seeking cover from shell fire.” *Id.* at 135. The VA awarded Mr. Padgett disability benefits for his knee injury, and eventually his knee disability necessitated a hip replacement. *Id.* Mr. Padgett filed another disability claim for his hip, but the VA denied that claim, finding that his knee disability did not cause his hip disorder. *Id.* Mr. Padgett appealed to the Board and submitted evidence from two doctors who supported his claim, but the Board rejected those opinions and sided with two VA doctors who asserted that the disorders were unrelated. *Id.* at 136–37.

Rather than defer to the Board’s evaluation of the medical opinions, the Veterans Court applied the “take due account” provision and examined the Board’s application of the benefit-of-the-doubt rule. *Id.* at 146–47. The court explained that “the existence of some controverting evidence . . . d[id] not preclude” it from applying the “take due account” provision to the Secretary’s benefit-of-the-doubt analysis. *Id.* at 147. The court found that, given the medical evidence in support of his claim, the benefit-of-the-doubt rule required the VA to conclude that sufficient evidence established his hip disability was aggravated by his knee injury and to decide in Mr. Padgett’s favor. *Id.* at 150. Accordingly, instead of

remanding this issue back to the Board, the court issued an outright reversal. *Id.*

When the Veterans Court “take[s] due account” of the Secretary’s application of the rule as in *Padgett*, veterans with meritorious claims more promptly receive the benefits that they have earned.

II. The agency and Federal Circuit misinterpret the “take due account” rule to give the benefit of the doubt to the Board rather than veterans.

Over time, the Veterans Court and the Federal Circuit strayed from the proper application of the VBA’s “take due account” provision by concluding that the Veterans Court should review the Board’s application of the benefit-of-the-doubt rule for clear error. This conflates the court’s review of *facts*, which is subject to clear error review, with the *application* of the benefit-of-the-doubt rule, which is not. The misguided importation of the “clearly erroneous” standard into the Veterans Court’s review of whether the Secretary gave the benefit of the doubt to the veteran turns on its head that longstanding rule, guaranteeing that the Board, rather than the veteran, actually receives the benefit of the doubt on appeal. This renders the “take due account” provision a dead letter.

Today’s veterans thus find themselves in no better position than Mr. Ramos-Rodriguez and his peers were before the VBA. Rather than having the Veterans Court apply the benefit of the doubt to their cases, veterans are often subjected to lengthy remands and additional unnecessary factual development that serves only to bolster the agency’s original denial—a phenomenon

veterans and advocates caustically describe as “develop to deny.”¹⁰

One example is veteran Kevin Donnellan, who served in the Army National Guard for more than thirty years—during which he had a battle with cancer. *Donnellan v. Shinseki*, 24 Vet. App. 167, 169 (2010). After his cancer diagnosis in 1996, and related treatment through April 1998, Mr. Donnellan went on active duty for training in May 1998. *Id.* During training, “he was hospitalized with fever, chills,” and “severe” abdominal pain before undergoing emergency surgery that removed some four feet of his small intestine. *Id.* Mr. Donnellan left the service in February 2000. *Id.* In October 2001, he filed a disability “claim for service connection for a perforated small intestine.” *Id.* He submitted in support a 1998 letter from his examining physician opining that the perforation was unrelated to his cancer treatment, since his previous injuries had “healed” before he reentered active duty. *Id.* at 170.

Some six years after Mr. Donnellan applied for benefits, the Board denied his claim. *Id.* In addition to the letter from his treating physician, the Board had before it two additional medical opinions. *Id.* at 169–70. A VA physician had concluded in 2005 that Mr. Donnellan’s injuries “resulted from complications of the preservice colon cancer surgeries,” *id.* at 169, while an independent physician found in 2006 that “he could have had a setback during his active duty” that aggravated his condition. *Id.*

¹⁰ *Cf. Stanphill v. McDonough*, No. 22-2283, 2023 WL 6373807, at *4 (Vet. App. Sept. 29, 2023) (“[T]he Board may not ‘develop to deny’ the veteran’s claim—meaning that the Board ‘may not order additional development for the sole purpose of obtaining evidence unfavorable to a claimant.’” (quoting *Turk v. Peake*, 21 Vet. App. 565, 568 (2008))).

at 170. Despite the evidence on both sides of the ledger—which should have entitled Mr. Donnellan to the benefit of the doubt—the Board concluded that there was “clear and unmistakable evidence that his active duty for training did not aggravate his preexisting condition.” *Id.*

The Veterans Court held that the benefit-of-the-doubt rule provided the applicable “standard of proof” in the case. *Id.* at 175. But, unwilling to reverse the Board’s benefit-of-the-doubt determination, it remanded—despite a half-decade of record development, including at least three medical opinions of which two supported Mr. Donnellan’s claim. *Id.* at 176. After an appeal to the Federal Circuit, resolved against him in 2012, he returned to the Board. There, Mr. Donnellan submitted to two more medical examinations—15 and 18 years after his original injury—before the Board finally decided the preponderance of evidence weighed against him, and concluded the benefit-of-the-doubt rule did not apply. So ended Mr. Donnellan’s 15-year battle for benefits—following thirty years’ service to his country—all without ever receiving the benefit of the doubt that Congress promised.

Mr. Donnellan’s story highlights the problems exacerbated by the Veterans Court’s deferential benefit-of-the-doubt analysis. Neither court has articulated credible reasoning justifying the Veterans Court deferring to the Board’s benefit-of-the-doubt analysis. Instead, the deferential approach of applying the court’s “clearly erroneous” standard of review to its required benefit-of-the-doubt analysis flouts Congress’s commands and is incongruous with other well-established standards of appellate review. Worse, these errors have contributed to an increase in the delay that drove Congress to enact the VBA in the first place.

A. The Veterans Court misused legislative history to rewrite the statute, and the Federal Circuit has acquiesced.

Long before the enactment of the VBA, the Veterans Court properly treated the application of the benefit-of-the-doubt rule as a question of law. Under this construct, the Veterans Court could find error in the Board's application of the benefit-of-the-doubt rule even if the Board's factual findings were not clearly erroneous. *Gilbert*, 1 Vet. App at 57–58.¹¹

Soon after Congress enacted the VBA, which strengthened this review, the Veterans Court erroneously weakened it by concluding that the Board's application of the benefit-of-the-doubt rule was a finding of fact subject only to clear error review. *See Roberson v. Principi*, 17 Vet. App. 135, 146 (2003) (per curiam).¹² Without explaining this departure from its own longstanding view, not to mention Congress's then-recent command in the VBA, the Veterans Court simply asserted that it was “not authorized” to “apply the benefit of the doubt doctrine”; it

¹¹ In *Gilbert*, for example, the Veterans Court remanded for the Board to explain *both* its “factual findings *and* its *conclusion*”—*i.e.*, its conclusion of law—“that the veteran is not entitled to the ‘benefit of the doubt.’” 1 Vet. App. at 59 (emphases added). A concurring judge elaborated that the Veterans Court's review “as to whether this standard of proof has been correctly applied by the [Board] does not constitute review of a finding of material fact,” but rather was “a *separate* review.” *Id.* at 60 (Kramer, J., concurring) (emphasis in original).

¹² *Padgett* repeated that standard of review, 19 Vet. App. at 146 (citing *Roberson*, 17 Vet. App. at 146), but nevertheless reversed because the “only plausible resolution of the key factual issue on the record” meant “the Board's decision that the evidence preponderated against this claim must” be “reversed,” *id.* at 150.

was “empowered only to ensure that the Secretary’s determination in that regard is not clearly erroneous.” *Id.*

Appellate courts routinely review—*de novo*—trial courts’ application of legal tests concerning evidence. By asserting that review of the application of the benefit-of-the-doubt rule entailed a finding of fact, the Veterans Court gave itself a shortcut, and short shrift to the VBA.

To reach this erroneous conclusion, the Veterans Court wrote off the statutory text and misused legislative history. The court seized on the language in § 7252 that the “extent of the [Veterans Court’s] review shall be limited to the scope provided in section 7261.” *Roberson*, 17 Vet. App. at 140. And the court also focused on the fact that “section 7261 states that the Court shall review the record of proceedings pursuant to section 7252(b).” *Id.* Because the jurisdictional provision and scope of review provisions referenced each other, the court concluded its “review [was] thus trapped between these two mutually referential provisions,” and “there is no clear reading of this provision.” *Id.* That (supposed) lack of clarity meant that the court “must turn to the legislative history” to find the statute’s meaning. *Id.*

But those two statutory provisions do not create the ambiguity conjured by the Veterans Court.¹³ Section 7252 confers “exclusive jurisdiction to review decisions of the Board of Veterans’ Appeals,” § 7252(a), and sets the scope of review to be “on the record of proceedings before the Secretary and the Board” to the extent “provided in section 7261,” § 7252(b).

¹³ As one Veterans Court judge put it, “I must confess not to find any such wrapping around or trapping of review.” *Wells v. Principi*, 18 Vet. App. 33, 40 n.10 (2004) (per curiam) (Steinberg, J., dissenting) (cleaned up).

Section 7261 directs *how* that jurisdiction is to be exercised. Section 7261(a) states the Court “shall” “decide all relevant questions of law” under an APA-style review, while reviewing “finding[s] of material fact adverse to the claimant” under a “clearly erroneous” standard. Subsection 7261(b) then further provides that when the court “review[s] the record of proceedings” to “mak[e] the determinations under subsection (a),” the court “shall” (1) “take due account of the Secretary’s application of section 5107(b) [the benefit-of-the-doubt provision],” and (2) “take due account of the rule of prejudicial error.” Congress said exactly what the court “shall” do: “take due account of” the benefit-of-the-doubt rule while reviewing the “record of proceedings” before the Board.

In *Roberson*, however, the Veterans Court cast aside that unambiguous text and explicitly relied on the legislative history to rewrite the law. 17 Vet. App. at 140. Based on cherry-picked portions of the legislative record, the Veterans Court concluded that “changing this Court’s standard of review while doing nothing to enhance the record would compound rather than correct any problems.” *Id.* at 140–47. Assuming—again without explanation—that de novo review of the application of the benefit-of-the-doubt rule would entail the finding of facts, the court concluded “deferential, as opposed to de novo, review” was appropriate. *Id.* at 147.

Unfortunately, the Federal Circuit has followed suit, also assuming that “non-deferential review of . . . the Board’s application of the benefit of the doubt rule” impermissibly would necessitate “de novo fact-finding.” *Roane v. McDonough*, 64 F.4th 1306, 1310–11 (Fed. Cir. 2023). That assumption went unexamined and is incorrect. *See infra* pp. 21–24.

In sum, the Veterans Court invented uncertainty in the text that is not there and used legislative history to conclude that the text must mean the opposite of what it says, and the Federal Circuit has gone along with it. The Veterans Court’s analysis does not withstand scrutiny.

B. Veterans now endure *more* delay.

As explained above, the VBA was intended to and should have had the effect of reducing delay in the veterans benefit system. But in light of the courts’ erroneous interpretation of the VBA, delays actually have gotten worse. For instance, the Board’s average time from receiving a so-called “legacy” appeal¹⁴ to issuing a decision is now 735 days—nearly two years. Board Annual Report FY 2023 (“2023 BVA Report”), at 43.¹⁵ That is far from a recent outlier. In 2022 the time was 743 days. Board Annual Report FY 2022, at 41.¹⁶ And in the 2021 report, the tally was 618 days. Board Annual Report FY 2021, at 33.¹⁷ In other words, compared to the three years before the VBA’s enactment, delays are now a whopping 3.5 to 4 *times* longer.

Making matters worse, those times are only to a decision—not necessarily a final resolution of the veteran’s case. For instance, among the legacy appeals “returned to the Board after remand, 53% of them have

¹⁴ A “legacy” appeal is an appeal not subject to the new appeals system outlined in the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (2017). Statistics about legacy appeals are used throughout herein so that they are comparable with the pre-VBA statistics discussed above. *Supra* pp. 6–7.

¹⁵ <https://tinyurl.com/5n7fyehj>.

¹⁶ <http://tinyurl.com/4k7fbvuc>.

¹⁷ <http://tinyurl.com/3bz3ywwc>.

been remanded at least twice, 27% have been remanded 3 times or more, 15% have been remanded at least 4 times, and 8% have been remanded 5 times or more.” 2023 BVA Report, at 38. That sort of ping-ponging does no favors for veterans. And it may help explain why over one-third of veterans who have received a remand decision “report they do not ‘trust’ the appeals system ‘to fulfill our country’s commitment to Veterans and their families.’” *Id.*

Delays for veterans do not stop at the Board. The Veterans Court now also takes far longer to resolve appeals. In 2023, the average time from filing an appeal to a disposition was either 443 days (single judge) or 749 days (multi-judge panel). Veterans Court FY 2023 Annual Report, at 5.¹⁸ Those numbers in 2022 were 456 days and 672 days, respectively. Veterans Court FY 2022 Annual Report, at 5.¹⁹ And in 2021: 459 days and 767 days. Veterans Court FY 2021 Annual Report, at 5.²⁰ Compare the recent delays to those that prompted the enactment in 2002 of the Veterans Benefits Act:

Board of Veterans Appeals Disposition Delay

Pre-VBA (2002)		Recent	
Year	Delay (days)	Year	Delay (days)
1999	140	2021	618
2000	172	2022	743
2001	182	2023	735

¹⁸ <https://tinyurl.com/4xjanm3u>.

¹⁹ <http://tinyurl.com/2xhpx4b8>.

²⁰ <http://tinyurl.com/2t49kzc9>.

Veterans Court Disposition Delay (Days)

Pre-VBA		Recent		
Year	Court	Year	Single-Judge	Multi-Judge
1999	364	2021	459	767
2000	386	2022	456	672
2001	340	2023	443	749

The lower courts' reading of the VBA exacerbates these demoralizing delays. That is because the deference paid to the Board serves to increase the number of remands and decrease the number of reversals. According to the 2023 Report, less than 5% of appeals are reversed by the Veterans Court. 2023 BVA Report, at 11. "Court remands" exacerbate docket pressure: the Board noted that "priority cases"—mostly remands—"are clearly impacting the pace of" clearing its backlog of appeals, and that they "have also delayed [judges] from evaluating even higher numbers of more recently filed" appeals. *Id.* at 10–11.

Delays do not stop there. According to a study of a sample of cases the Veterans Court remanded in 2020, the median time that it took the VA to reach a final decision after remand was 352 days. *See Examining the VA Appeals Process; Ensuring High-Quality Decision-Making for Veterans' Claims on Appeal*, Statement from Bergmann & Moore, LLC to the Subcomm. on Disability Assistance and Mem'l Affs. of the H. Comm. on Veterans Affs. at 4 (Nov. 27, 2023).²¹ Although the Board's median time to decision was 199 days, oftentimes the Board remanded the case further, causing months of further delays. *Id.* Many of those cases were *still* not resolved on

²¹ <http://tinyurl.com/yhare63z>.

remand and returned back to the Board, taking on average 554 days from Veterans Court remand to final Board decision. *Id.* Eight percent of cases remanded by the Veterans Court still did not have a final determination after three years. *Id.* at 3.

If the Veterans Court heeded the VBA's command and took "due account" of the benefit-of-the-doubt rule, far fewer veterans would be forced to endure years-long delays for the Board and VA to award benefits on remand, or waiting for the Veterans Court to decide on their appeals. With more meaningful oversight, the Board would likely apply the benefit-of-the-doubt rule more consistently and correctly. This would lead to better outcomes for veterans at the Board, drastically reduce the number of veterans appealing to the Veterans Court, and decrease delays for all veterans who apply for the benefits they have earned.

III. To "take due account" of a legal rule requires more than clear-error review, because questions of law are for the courts.

The VBA requires the Veterans Court to review the Board's application of the benefit-of-the-doubt rule as a conclusion of law by the Board, which is based on the Board's underlying findings of fact. The Veterans Court and the Federal Circuit held to the contrary below, erroneously concluding that "clear error" factual review applies to the Veterans Court's requirement to "take due account of the Secretary's application" of the benefit-of-the-doubt rule.

The Federal Circuit was not writing on a blank slate in interpreting the VBA's "take due account" provision. As Petitioners note, *see* Pet. Br. 28, 32, this Court has interpreted a parallel "take due account provision"

previously enacted by Congress. In interpreting that provision, this Court found it instructive to analogize to well-established standards “that courts ordinarily apply in civil cases.” *Sanders*, 556 U.S at 406.

The Veterans Court and Federal Circuit should have followed this Court’s lead in interpreting the “take due account” provision at issue in this case. Had it done so, it would have found several instructive analogs, including in the Federal Rules of Civil Procedure.

Consider but one example.²² Rule 50 empowers a court—including after a jury trial—to find “that a reasonable jury would not have a legally sufficient evidentiary basis” to find for a party on an issue, and to enter judgment for the other party. Rule 50 thus requires district courts to determine—as a matter of law—whether the evidence meets the applicable evidentiary standard.²³

Similarly, the requirement to “take due account” includes a guarantee that the Veterans Court will determine—as a matter of law—whether the evidence underlying the Board’s determination of an issue meets the applicable standard, which in this case comes from the benefit-of-the-doubt rule. The Federal Circuit erred in conflating the Veterans Court’s evaluation of the sufficiency of evidence in light of the benefit-of-the-doubt standard, on the one hand, with the Veterans Court’s limited review of the Board’s underlying factual findings, on the other.

²² For more on this example and others, *see* Pet. Br. 43–50.

²³ At least one Veterans Court judge thought this is how benefit-of-the-doubt review should work, even before the VBA. *Gilbert*, 1 Vet. App. at 61 (Kramer, J., concurring). For other commonplace examples, *see* Pet. Br. 44–47.

It is clear that the sufficiency of evidence determination by courts under Rule 50 is “solely a question of law” requiring an “independent assessment of the sufficiency” of the evidence. Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2524 (3d ed. 2023); *see also* Pet. Br. 44. Indeed, federal courts of appeal review district courts’ judgment-as-a-matter-of-law decisions *de novo*. Wright & Miller, *supra*, § 2536.

The Veterans Court’s review should work the same way: analyzing whether the Board, in applying the benefit-of-the-doubt rule, had *legally* sufficient evidence to grant the veteran’s claim. Such a review would not require the Veterans Court “to make *de novo* findings of fact or otherwise resolve matters that are open to debate.” *Roane*, 64 F.4th at 1310 (quoting *Tadlock v. McDonough*, 5 F.4th 1327, 1337 (Fed. Cir. 2021)). Instead, the review would determine questions of law. *See* Wright & Miller, *supra*, §§ 2524, 2536; *cf. also Interstate Com. Comm’n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 92 (1913) (“[T]he legal effect of evidence is a question of law.”).

After all, that is the review Congress told the Veterans Court—and the Federal Circuit—to conduct. As Petitioners explain in their Brief, the Veterans Court engages in an “APA-*plus*” review of benefits decisions, expressly “modeled on the APA.” Pet. Br. 24–28. Thus, Congress instructed that the Veterans Court “shall . . . decide all relevant questions of law” when reviewing Board determinations. 38 U.S.C. § 7261(a)(1). Congress gave the Federal Circuit the same command: to “decide all relevant questions of law.” *Id.* § 7292(d)(1); *see also* § 7292(d) (paralleling APA’s 5 U.S.C. § 706). That standard of review mirrors the familiar standard of the APA. *See* Pet. Br. 24–25.

Thus, just as in the APA context, when Congress specifies that courts “shall decide all relevant questions of law,” deferential review of such questions is off the table. As the Court recently confirmed, by using *the same* “shall decide all relevant questions of law” command, the APA “codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. . . . And it prescribes no deferential standard for courts to employ in answering those legal questions.” *Loper Bright Enters. v. Raimondo*, Nos. 22-451, 22-1219, slip op. 14 (June 28, 2024). If that language in the APA was clear enough for the Court to overrule *Chevron*, *id.* at 21–23, the same language in the VBA must be enough to secure the Nation’s veterans non-deferential review of the Secretary’s application of the benefit-of-the-doubt rule.

In short, to “take due account of” the benefit-of-the-doubt rule requires a *de novo* review of whether the Board correctly applied the right rule—not a clear-error review of the Board’s findings of material fact. This Court should not let this error plague our Nation’s veterans any longer.

CONCLUSION

Congress enacted the Veterans Benefits Act of 2002 to “make improvements in procedures relating to judicial review of veterans’ claims for benefits.” Pub. L. No. 107-330. One of those improvements commanded the Veterans Court to “take due account” that the benefit of the doubt was given to veterans. The Veterans Court and the Federal Circuit have in effect reversed that directive. By interpreting § 7261(b)(1) to require only “clear error” review, they have ensured that it is the agency that gets the benefit of the doubt—not veterans. That interpretation of the VBA is incorrect, abdicates the

courts' role to decide questions of law, and it exacerbates the very problems Congress sought to solve through its enactment. Such a result heaps insult on top of veterans' injuries.

The Court should find for Petitioners and reverse the Federal Circuit.

JULY 9, 2024

Respectfully submitted,

RENÉE A. BURBANK
ZACHARY R.M. OUTZEN
BARTON F. STICHMAN
NATIONAL VETERANS
LEGAL SERVICES PROGRAM
*1100 Wilson Blvd.,
Ste. 900
Arlington, VA 22209
Renee.Burbank@nvlsp.org*

DIANE BOYD RAUBER
NATIONAL ORGANIZATION
OF VETERANS' ADVOCATES
*1775 Eye Street, N.W.
Ste. 1150
Washington, DC 20006
DRauber@vetadvocates.org*

D. SHAYON GHOSH
Counsel of Record
F. GREG BOWMAN
LIAM J. MONTGOMERY
ANDREW G. BORRASSO
LUKE R. SÁNDOR
WILLIAMS & CONNOLLY LLP
*680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
SGhosh@wc.com*

Counsel for Amici Curiae

