No. 24A___

IN THE

Supreme Court of the United States

LOUIS FRANTZIS,
Petitioner,
v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Counsel for Applicant

August 20, 2024

APPLICATION

To the Honorable John G. Roberts, Chief Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Louis Frantzis respectfully requests a 45-day extension of time, to and including October 18, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit this case.

1. The Federal Circuit issued its decision on June 4, 2024. *See Louis Frantzis* v. *Dennis McDonough*, 104 F.4th 262 (Appendix A). Unless extended, the time to file a petition for a writ of certiorari will expire on September 3, 2024. This application is being filed more than ten days before the petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Applicant Louis Frantzis is a veteran who served honorably in the United States Army. App. 2a. In October 2009, Mr. Frantzis sought service connection for several conditions, including headaches caused by a head injury he sustained during his service. *Id.* The Department of Veterans Affairs initially denied his claims. However, after a series of appeals, in May 2019, Mr. Frantzis ultimately secured a hearing from the Board of Veterans' Appeals. *Id.* At the hearing, Mr. Frantzis and his wife both testified regarding the experience and effects of Mr.

Frantzis's service-connected headaches. *Id.* Board Member James Reinhart conducted the hearing and received the Frantzis' testimony. *Id.* Board Member Theresa Catino issued the resulting decision that September. *Id*. at 3a. The decision denied Mr. Frantzis's requests for an increased rating and an earlier effective date for his service-connected injury. *Id.*

3. Despite the fact that a different Board Member had presided over the hearing, Board Member Catino grounded her decision in a credibility determination. *See Frantzis* v. *McDonough*, 35 Vet. App. 354, 359 (2022). Board Member Catino purported to assess the hearing testimony and concluded that the live testimony was inconsistent with treatment records and other documentary evidence. *Id*. In particular, Board Member Catino acknowledged the testimony that "the severity of [appellant's] headaches [have] been characteristic of prostrating attacks since 2009," but found that "the evidence does not show that [Mr. Frantzis's] headaches were productive of prostrating attacks *** or resulted in extreme exhaustion or powerlessness," because other evidence "indicated that his headaches were of less severity and contemporaneously documented his symptoms and the severity of his headaches." *Id*. (internal quotation marks omitted).

4. Mr. Frantzis appealed to the Veterans Court, arguing that the same Board member who conducts a hearing must also issue the resulting decision. A divided panel of that court affirmed the Board's decision. *See id*. at 362-364 (2022); *see also id*. at 368 (Jaquith, J., dissenting). Mr. Frantzis then sought full court review. The Veterans Court denied that request, although two judges noted that they would

have granted the request. *Frantzis* v. *McDonough*, No. 20-5236, 2022 WL 2980978, at *1 (Vet. App. July 28, 2022); *but see id*. at 1 (Bartley, C.J., dissenting). Mr. Frantzis appealed to the Federal Circuit. The Federal Circuit affirmed.

5. The Federal Circuit's decision relied on the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (2017), also known as the Appeals Modernization Act (AMA), a new statute that was enacted while Mr. Frantzis's appeal was pending at the Board. App. 4a-5a. Prior to the AMA, there was an explicit statutory requirement that the Board member who conducted the hearing must participate in the final determination of the claim. *See* 38 U.S.C. § 7107(c) (1994) ("Such member or members designated by the Chairman to conduct the hearing shall, except in the case of a reconsideration of a decision * * *, participate in making the final determination of the claim."). The AMA amended 38 U.S.C. § 7107(c) and removed the language that required the same judge for both the hearing and final determination. AMA § 2(t), 131 Stat. at 1112–13; *see also* 38 U.S.C. § 7107(c) (2017). The Federal Circuit reasoned that, because of this change to the "statutory scheme and its history * * * the same judge is not required to both conduct the hearing and author the final determination under the AMA." App. 6a.

6. Mr. Frantzis's petition will seek this Court's review of the Federal Circuit's interpretation of the AMA. The Federal Circuit relied upon a negative inference to conclude that Congress abrogated the same-judge requirement. "The force of any negative implication, however, depends on context." *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 381 (2013). Other indicia of Congressional intent,

including the remaining text of the statute, and the background principles against which Congress legislates, may point in another direction. *See, e.g.*, *id*. (rejecting negative implication when contrary to background legal principles). Here, both of those indicators suggest that Congress did *not* abrogate the same-judge requirement. First, a different statutory provision that Congress did not alter in the AMA supports the same-judge requirement. That provision states that "[a] proceeding instituted before the Board may be assigned to an individual member of the Board" and then requires the "member or panel assigned a proceeding" to "make a determination thereon, including any motion filed in connection therewith." 38 U.S.C. § 7102(a). And second, elimination of the same-judge requirement would violate core due process and fair notice principles that animate American adjudicatory systems. *See, e.g.*, *U.S.* v. *Thomas*, 684 F.3d 893, 903 (9th Cir. 2012) (The need to "hear live testimony so as to further the accuracy and integrity of the factfinding process are not mere platitudes. Rather, live testimony is the bedrock of the search for truth in our judicial system.")

7. Over the next several weeks, undersigned counsel are occupied with briefing deadlines for a variety of matters, including: (1) a reply in support of a motion to stay discovery in *Lacks* v. *Ultragenyx Pharmaceutical*, No. 23-cv-2171 (D.Md.), due on September 6, 2024; (2) an opening brief on the merits in *Duffey* v. *United States*, No. 23-1002 (U.S.), due on September 16, 2024; (3) a brief in opposition in *Cox Communications* v. *Sony Music Entertainment*, No. 24-171 (U.S.), due on September 16, 2024; (4) a petition for certiorari from *Bader Farms* v. *BASF*, No. 23-1134 (CA8),

due September 18, 2024; (5) oral argument in *Jenkins* v. *Howard University and Howard University Board of Trustees*, No. 23-7093 (CADC), scheduled to take place on September 19, 2024; and (6) a brief in opposition in *Coalition Life* v. *City of Carbondale, Illinois*, No. 24-57 (U.S.), due on October 3, 2024. Applicant requests this extension of time to permit counsel to research the relevant issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

8. Undersigned counsel has conferred with opposing counsel regarding the extension. Respondent does not object to the proposed extension.

9. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including October 18, 2024.

Respectfully Submitted,

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August 20, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 2022-2210

LOUIS FRANTZIS,

Claimant-Appellant,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

Decided: June 4, 2024

On Appeal from the United States Court of Appeals for Veterans Claims
in No. 20-5236.
Judge Grant Jaquith, Judge Joseph L. Falvey, Jr., Judge Michael P. Allen.

Attorneys and Law Firms

Robert C. Brown, Jr., Tommy Klepper & Associates, PLLC, Norman, OK, argued for claimant-appellant.

Borislav Kushnir, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Brian M. Boynton, Eric P. Bruskin, Patricia M. McCarthy; Y. Ken Lee, Derek Scadden, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Mark Ryan Lippman, The Veterans Law Group, Poway, CA, argued for amicus curiae Vietnam Veterans of America.

Mark Ryan Lippman, The Veterans Law Group, Poway, CA, for amicus curiae National Law School Veterans Clinic Consortium. Also represented by Brent Filbert, Veterans Clinic, University of Missouri School of Law, Columbia, MO; Morgan MacIsaac-Bykowski, Veterans Law Institute, Stetson University College of Law, Gulfport, FL.

Before Moore, Chief Judge, Clevenger and Chen, Circuit Judges.

MOORE, Chief Judge:

Mr. Louis Frantzis appeals from a decision of the United States Court of Appeals for Veterans Claims (Veterans Court) affirming a decision of the Board of Veterans' Appeals (Board) and holding the Board member who conducts a hearing is not statutorily required to make the final determination. For the following reasons, we affirm.

BACKGROUND

Mr. Frantzis served in the U.S. Army from October 1979 to October 1982. In October 2009, he sought service connection for several conditions, including headaches. The Department of Veterans Affairs (VA) initially denied his claims in a November 2009 rating decision. Mr. Frantzis appealed, and the Board eventually remanded his claim regarding headaches for further development. In August 2014, the VA granted service connection for his headaches and assigned a noncompensable disability rating. Mr. Frantzis timely appealed. While Mr. Frantzis' appeal was pending at the Board, the Veterans Appeals Improvement and Modernization Act of 2017, also known as the Appeals Modernization Act (AMA), was enacted. Pub. L. No. 115-55, 131 Stat. 1105 (2017). In June 2018, Mr. Frantzis elected to have his claim adjudicated under the AMA.

In May 2019, Mr. Frantzis and his wife testified at a Board hearing conducted by Board member James Reinhart. About four months later, on September 11, 2019,

Board member Theresa Catino issued a decision denying an increased rating and an earlier effective date for Mr. Frantzis' service-connected headaches.

Mr. Frantzis appealed to the Veterans Court, arguing 38 U.S.C. § 7102 requires the same Board member who conducts a hearing to also issue the resulting decision. After briefing and before oral argument, the Veterans Court issued an order directing the parties to "be prepared to discuss how the principle of fair process applies here." *Frantzis* v. *McDonough*, No. 20-5236 (Vet. App. Apr. 5, 2022).

In June 2022, a divided panel affirmed the Board's decision. *Frantzis* v. *McDonough*, 35 Vet. App. 354 (2022). The majority concluded the AMA does not require the Board member conducting the hearing to also decide the appeal. *Id*. at 357, 360–65. Specifically, the majority relied on the removal of pre-AMA language in 38 U.S.C. § 7107(c) requiring the same judge conducting the hearing to issue a final determination. *Id*. at 362. The majority also rejected the argument that 38 U.S.C. § 7102 supports the same judge requirement because its language did not change with enactment of the AMA. *Id*. at 363–64. The majority declined to consider the fair process doctrine because Mr. Frantzis did not raise the argument himself. *Id*. at 366–67.

Judge Jaquith dissented because he believed the Board denied Mr. Frantzis fair process in adjudicating his claim. *Id*. at 368 (Jaquith, J., dissenting). He reasoned that remand was required because, by issuing a final determination from a Board member who did not conduct Mr. Frantzis' hearing, the Board failed to provide Mr. Frantzis notice and a meaningful opportunity to participate in the appellate process.

Id. at 371– 75. The Veterans Court denied Mr. Frantzis' motion for full court review. *Frantzis* v. *McDonough*, No. 20-5236, 2022 WL 2980978, at *1 (Vet. App. July 28, 2022). Chief Judge Bartley dissented from denial of full court review to express disagreement with the majority's decision not to consider the fair process doctrine. *Id*. (Bartley, C.J., dissenting).

Mr. Frantzis appeals. We have jurisdiction under 38 U.S.C. § 7292(a), (c).

DISCUSSION

In reviewing Veterans Court decisions, we "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1). We review the Veterans Court's legal interpretations de novo. *Monk* v. *Shulkin*, 855 F.3d 1312, 1316 (Fed. Cir. 2017).

Mr. Frantzis argues the Veterans Court erred because the AMA does not authorize the Board to issue an opinion authored by a different member than the member who conducted the hearing. Appellant Br. at 10–14. The Secretary of Veterans Affairs (Secretary) argues the AMA eliminated the same judge requirement because it removed the language expressly requiring the same judge for the hearing and final determination. Appellee Br. at 10–16. We agree with the Secretary.

The AMA established a new system for adjudicating appeals. *Mattox* v. *McDonough*, 56 F.4th 1369, 1373 (Fed. Cir. 2023). The existing appeal system, referred to as the "legacy" system, remained intact and by default applies to all claims initially decided before February 19, 2019. *Id*. The AMA allows claimants with legacy

claims to elect the new appeals system over the legacy system. AMA § 2(x)(3), (5), 131 Stat. at 1115. Mr. Frantzis elected to participate in the AMA system. J.A. 303.

Under the pre-AMA system, the Board member who conducted the hearing must participate in the final determination of the claim. 38 U.S.C. § 7107(c) (1994) ("Such member or members designated by the Chairman to conduct the hearing shall, except in the case of a reconsideration of a decision ..., participate in making the final determination of the claim."). The AMA amended 38 U.S.C. § 7107(c) and removed the language that required the same judge for both the hearing and final determination. AMA § 2(t), 131 Stat. at 1112–13; *see also* 38 U.S.C. § 7107(c) (2017). The express language for the same member requirement no longer exists.

Mr. Frantzis argues 38 U.S.C. § 7102 supplies a same Board member requirement. Section 7102(a) governs the assignment of cases to Board members and does not mention requirements for hearings and final determinations. 38 U.S.C. § 7102(a) ("A member or panel assigned a proceeding shall make a determination thereon, including any motion filed in connection therewith."). The language of § 7102 remained the same before and after enactment of the AMA. Mr. Frantzis argues, as Judge Jaquith asserted in his dissent, the language of § 7102 broadly creates a same Board member requirement which remained in place after the more specific language of § 7107(c) was removed. Based on the plain language of the statute, we do not agree.

The source of the same member requirement for the legacy appeals system was pre-AMA 38 U.S.C. § 7107(c). The unchanged language of § 7102 cannot be the basis for the same member requirement in the AMA system. A statutory interpretation

otherwise would violate the presumption against surplusage. *See Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 583 U.S. 109, 128–29, 138 S.Ct. 617, 199 L.Ed.2d 501 (2018) (rejecting interpretation that would render a portion of the statute meaningless without clear evidence of Congress' intent). Nor can we agree with Mr. Frantzis' argument that, through enactment of the AMA, Congress intended to embed § 7102 with a same Board member requirement. Mr. Frantzis offers no support for the argument that Congress intended to impliedly amend § 7102 by leaving its text unchanged. The statutory scheme and its history are clear—the same judge is not required to both conduct the hearing and author the final determination under the AMA.

Mr. Frantzis and amici argue the Veterans Court erred by declining to address the fair process doctrine.[1] Appellant Br. at 19–22. There is uncertainty surrounding this doctrine and how it is applied. The fair process doctrine is a recognition that due process applies in the claimant process. *Sprinkle* v. *Shinseki*, 733 F.3d 1180, 1185 (Fed. Cir. 2013) ("[T]his court has held the Due Process Clause of the Constitution applies to proceedings in which the VA decides whether claimants are eligible for veterans' benefits."). For example, we explained the fair process doctrine requires the Board to "provide a claimant with reasonable notice of [new] evidence ... and a reasonable opportunity for the claimant to respond to it." *Id*. (omission in original)

[1] Judge Jaquith's dissent and the amici brief discuss *Arneson* v. *Shinseki*, 24 Vet. App. 379 (2011) in support of their fair process argument. But Arneson expressly declined to reach the question of whether the fair process doctrine creates a procedural right to a hearing before every Board member who decided a case and, instead, determined that 38 U.S.C. § 7102, pre-AMA 38 U.S.C. § 7107, and 38 C.F.R. § 20.707 provide this right. 24 Vet. App. at 386–89.

(quoting *Thurber* v. *Brown*, 5 Vet. App. 119, 126 (1993)). To the extent Mr. Frantzis argues the fair process doctrine creates a procedural right, the argument was not presented below and is thus forfeited.

For these reasons, we affirm the Veterans Court's decision holding the AMA does not require the same Board member conduct the hearing and make a final determination.

CONCLUSION

We have considered Mr. Frantzis' remaining arguments and find them unpersuasive. For the reasons given above, we affirm the decision of the Veterans Court.

AFFIRMED.

No. 24A___

IN THE

Supreme Court of the United States

LOUIS FRANTZIS,
Petitioner,
v.
DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rules 29.3 and 29.5(b), I, Jo-Ann Tamila Sagar, a member of the Bar of this Court, hereby certify that on August 20, 2024, a copy of the foregoing Application for an Extension of Time To File a Petition for a Writ of Certiorari was served by e-mail and first-class U.S. mail, postage prepaid, to the following counsel:

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I further certify that all parties required to be served have been served.

Date: August 20, 2024 /s/ Jo-Ann Tamila Sagar
Jo-Ann Tamila Sagar