No. 15-___

IN THE
Supreme Court of the United States

CURTIS SCOTT,
Petitioner,
v.
ROBERT MCDONALD,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was it error, and contrary to *Sims* v. *Apfel*, 530 U.S. 103 (2000), for the Federal Circuit to allow the Court of Appeals for Veterans Claims to refuse to address a veteran's argument that he was improperly deprived of a hearing during the adjudication of his benefits claim solely because the veteran did not expressly name that precise issue in non-adversarial proceedings before the Board of Veterans' Appeals?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Curtis Scott was the appellant before the Veterans Court and Federal Circuit, and the claimant before the VA.

Respondent Robert McDonald, Secretary of the Department of Veterans Affairs, was the appellee before the Federal Circuit. Respondent's predecessor, Eric K. Shinseki, was the respondent before the Veterans Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Curtis Scott respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App., *infra*, 1a-15a) is reported at 789 F.3d 1375 (Fed. Cir. 2015). The denial of Scott's petition for rehearing en banc (App., *infra*, 64a-65a) is unreported. The opinion of the United States Court of Appeals for Veterans Claims (*id.* at 16a-28a) is unreported, but available at 2014 WL 1089621. A prior

opinion of the United States Court of Appeals for Veterans Claims (App., *infra*, 48a-55a) is unreported, but available at 2010 WL 4126463. The decisions issued by the Board of Veterans' Appeals (App., *infra*, 29a-42a, 43a-47a, 56a-63a) are unreported.

STATEMENT OF JURISDICTION

The Federal Circuit entered its judgment (App., *infra*, 1a-15a) on June 18, 2015, and denied petitioner's timely petition for rehearing *en banc* on October 22, 2015 (*id.* at 64a-65a). On January 11, 2016, The Chief Justice extended the time for filing a petition for a writ of certiorari until February 19, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 7252(a) provides:

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

38 U.S.C. § 7105(d) provides in relevant part:

(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of

error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.

(5) The Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

38 C.F.R. § 20.202 provides:

A Substantive Appeal consists of a properly completed VA Form 9, "Appeal to the Board of Veterans' Appeals," or a correspondence containing the necessary information. If the Statement of the Case and any prior Supplemental Statements of the Case addressed several issues, the Substantive Appeal must either indicate that the appeal is being perfected as to all of those issues or must specifically identify the issues appealed. The Substantive Appeal should set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed. To the extent feasible, the argument should be related to specific items in the Statement of the Case and any prior Supplemental Statements of the Case. The Board will construe such arguments in a liberal manner for purposes

of determining whether they raise issues on appeal, but the Board may dismiss any appeal which fails to allege specific error of fact or law in the determination, or determinations, being appealed. The Board will not presume that an appellant agrees with any statement of fact contained in a Statement of the Case or a Supplemental Statement of the Case which is not specifically contested. Proper completion and filing of a Substantive Appeal are the last actions the appellant needs to take to perfect an appeal.

PRELIMINARY STATEMENT

This case presents the important and purely legal question of when, if ever, the United States Court of Appeals for Veterans Claims ("Veterans Court") may decline to address an issue properly within its jurisdiction solely because the veteran did not explicitly raise that issue during the non-adversarial proceedings before the Board of Veterans' Appeals ("Board").

At issue is the continuing authority of this Court's holding in *Sims* v. *Apfel* that it is "inappropriate" to impose a "judicially created issue-exhaustion requirement" in non-adversarial administrative-claims proceedings, there involving Social-Security benefits. 530 U.S. 103, 112 (2000) (plurality op.); see *id.* at 113 (O'Connor, J., concurring in part and concurring in judgment). Here, in the directly analogous context of veterans benefits, the Federal Circuit, although couching its decision as one of statutory and regulatory construction, imposed exactly the judicially created exhaustion requirements that *Sims* rejected. Indeed, it labeled as "appropriate" (App., *infra*, 11a) the very

type of requirement that this Court unambiguously rejected. *Sims*, 530 U.S. at 112.

To the extent that there are any relevant differences between Social Security and veterans benefits, those differences should make this case *easier* than *Sims*. For Congress has determined that veterans-benefits adjudication by the VA should always be non-adversarial and pro-veteran, but the Federal Circuit has created a rule that *never* assists veterans, and whose only effect on deserving veterans can be to force denial of benefits for injuries incurred in the service of the Nation.

No other court can address this pure question of law because the Federal Circuit has exclusive jurisdiction over appeals from the Veterans Court. Yet the judgment below departs from other circuits' application of *Sims* in comparable contexts. Had Congress directed review of veterans' cases in the regional circuits rather than exclusively in the Federal Circuit, this case would have been decided differently—other courts would have remanded the case to the Veterans Court with an order to address the merits. But because no other court can vindicate veterans' rights in these cases, only this Court's review can prevent an immediate, permanent, and nationwide harm to American veterans when seeking benefits that Congress intends them to have.

This case therefore warrants review by this Court either through a summary reversal to vindicate *Sims* v. *Apfel* or through plenary review to determine whether a judicially created issue-exhaustion requirement is appropriate in the non-adversarial adjudication of vet-

erans-benefits claims.

STATEMENT

I. BACKGROUND

The law entitles veterans to compensation for disabilities incurred in military service. 38 U.S.C. § 1110. The Department of Veterans Affairs ("VA"), which administers the veterans-benefits program, has taken an extraordinarily broad view of what it means for a disability to be incurred in military service, requiring only that the particular injury or disease resulting in disability "was incurred coincident with service." 38 C.F.R. § 3.303(a). But the standard for proving service connection is not the only pro-veteran aspect of the veterans-benefits scheme. As is appropriate for the veterans who have served and sacrificed for the Nation, Congress and the VA have created a uniquely pro-veteran, non-adversarial adjudicatory process that is intended to ensure that all veterans entitled to receive benefits actually receive them. VA proceedings are "non-adversarial, paternalistic," and "uniquely pro-claimant." *Jaquay* v. *Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (*en banc*), *overruled on other grounds by Henderson ex rel. Henderson* v. *Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009). The benefits program, in other words, is both substantively *and* procedurally pro-veteran.

First, a veteran seeking benefits for a service-connected disability begins by filing an application at one of over fifty regional offices of the VA. 38 U.S.C. § 5101(a). But

> [a] veteran faces no time limit for filing a claim, and once a claim is filed, the VA's process for adjudicating it at the regional office and the Board is *ex parte* and nonadversarial. The VA has a statutory duty to assist veterans in developing the evidence necessary to substantiate their claims. And when evaluating claims, the VA must give veterans the "benefit of the doubt" whenever positive and negative evidence on a material issue is roughly equal.

Henderson ex rel. Henderson v. *Shinseki*, 562 U.S. 428, 431-432 (2011) (citing, *inter alia*, 38 C.F.R. §§ 3.103(a), 20.700(c)); accord *Jaquay*, 304 F.3d at 1286. Thus, throughout the administrative process, the Secretary of Veterans Affairs ("Secretary") is obligated to assist veterans in developing their claims. *Henderson*, 562 U.S. at 431 (citing 38 U.S.C. § 5103A(a)); 38 C.F.R. § 3.103(a) ("[I]t is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government."). And unlike in ordinary litigation, the VA must afford the veteran the benefit of the doubt. *Henderson*, 562 U.S. at 432 (citing 38 U.S.C. § 5107(b)).

Second, a veteran may appeal an adverse regional-office decision to the Board of Veterans' Appeals ("Board"), which performs an ex-parte, non-adversarial review. 38 U.S.C. §§ 7101(a), 7104(a); 38 C.F.R. § 20.700(c). As this Court put it, "the adjudicatory process is not truly adversarial, and the veteran is often

unrepresented during the claims proceedings." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009).

This process begins with the filing of a Notice of Disagreement. See 38 C.F.R. §§ 20.200, 20.201. In response, the VA provides a statement of the case explaining in detail the reasons for denial. 38 U.S.C. § 7105(d)(1). Once the veteran receives a statement of the case, the veteran completes VA Form 9, which initiates a "Substantive Appeal." 38 C.F.R. §§ 20.200, 20.202.

Third, a veteran may appeal an adverse decision of the Board to the Veterans Court, which is when the process first becomes adversarial. 38 U.S.C. §§ 7251, 7252; *Forshey* v. *Principi*, 284 F.3d 1335, 1354-55 (Fed. Cir. 2002) *(en banc)* ("the Court of Appeals for Veterans Claims is a court and depends upon the adversarial parties to identify the issues for review"), *superseded by statute on other grounds*, Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 402(a), 116 Stat. 2820, 2832 (2002), *as recognized in Morgan* v. *Principi*, 327 F.3d 1357, 1359-1364 (Fed. Cir. 2003).

Finally, the Federal Circuit has exclusive jurisdiction to review Veterans Court decisions, but that jurisdiction is limited to "the validity of a decision of the Court on a rule of law or of any statute or regulation * * * or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." *Morgan*, 327 F.3d at 1359 (citing 38 U.S.C. § 7292(a)).

II. PROCEEDINGS BELOW

In 2005, petitioner Curtis Scott applied for disability benefits with the VA, contending that he contracted hepatitis C during his military service in the United States Marine Corps Reserve. App., *infra*, 2a. After the regional office denied Scott's claim, he appealed to the Board and requested a hearing. *Ibid.* Recognizing that petitioner was incarcerated at the time, the regional office sent him a letter requesting that he provide the VA with the date of his expected release so that his hearing could be scheduled accordingly. *Id.* at 2a-3a. Scott, who has since been released from prison, accordingly informed the Board that his "next parole review date is scheduled for March of 2009" and that his release date, if parole is not granted sooner, was in January 2017. *Id.* at 3a.

Nonetheless, the regional office notified Scott that his hearing was scheduled in Houston for March 14, 2008—a full year before his next parole review date. *Ibid.* Scott was unable to obtain transportation from the prison on that day, and therefore missed the hearing.[1] J.A. A-826, *Scott* v. *McDonald*, 789 F.3d 1375 (Fed. Cir. 2015) (No. 14-7095), ECF No. 36.

Shortly after the scheduled hearing and within the time period prescribed by regulation, Scott made a *pro se* request to reschedule the hearing, noting that his

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[1] Incarcerated veterans are sometimes allowed to leave prison for VA benefits appointments. See, *e.g.*, *Mercurio* v. *Nicholson*, No. 05-1299, 2006 WL 3200829, at *1 (Vet. App. Aug. 31, 2006) (non-precedential) (ordering the Board on remand to attempt to schedule an incarcerated veterans examination outside the prison).

inability to obtain transportation had precluded his appearance. *Ibid.* The Board summarily denied his request, finding that he had not shown good cause for failing to appear. App., *infra*, 3a. The Board then denied Scott's claim. *Ibid.*

Scott appealed to the Veterans Court, which vacated and remanded to the Board because the VA had provided Scott with an inadequate medical examination, in derogation of its duty to assist Scott with developing his claim. *Id.* at 3a-4a; see also 38 U.S.C. § 5103A(a)(1), (d)(1). The Board, in turn, remanded to the regional office for a new medical examination. App., *infra*, 45a-47a. The Board's opinion stated that re-appeal was automatic if the regional office again denied the claim and that "[n]o action" was required of Scott unless he was otherwise notified. *Id.* at 46a-47a.

The regional office in fact did again deny Scott's request for benefits, and the Board affirmed in a 2012 opinion. *Id.* at 29a-42a. The 2012 Board opinion states that Scott's request to reschedule his original hearing had been denied, incorrectly stating that he failed to appear and "*subsequently* informed the Board that he was incarcerated until 2017 with a parole hearing scheduled for 2009." *Id.* at 30a (emphasis added).

On appeal before the Veterans Court, Scott argued, among other issues, that the Board had failed to fulfill its duty to assist by depriving him of his requested hearing, or, alternatively, that it has failed to provide an adequate statement of reasons or bases for doing so. *Id.* at 17a-18a; see also 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include * * * a written

statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record * * * ."). The Veterans Court refused to address the argument, which it characterized as "an effort to engage in undesirable piecemeal litigation" and that Scott had "provide[d] no compelling basis to permit it." App., *infra*, 18a.

The Federal Circuit affirmed. That court held that the Veterans Court could impose a strict issue-exhaustion requirement for *procedural* issues because the regulatory and statutory scheme requires issue exhaustion in "appropriate circumstances." *Id.* at 7a, 11a. The Court found a requirement that a veteran exhaust issues in two provisions[2]:

- First, the Federal Circuit held that 38 C.F.R. § 20.202, the regulation governing appeals to the Board, requires that a veteran exhaust issues on appeal from the regional office to the Board.
- Second, the Federal Circuit held that 38 U.S.C. § 7252, the Veterans Court's jurisdictional statute, requires issue exhaustion where the error was made by the Board.

App., *infra*, 7a-9a. Despite holding that the statutes

[2] The Federal Circuit also held that the statute conferring jurisdiction of appeals from the Veterans Court on the Federal Circuit, 38 U.S.C. § 7292(a), requires issue exhaustion at the Veterans Court level. App., *infra*, 10a-11a. There is no dispute that Scott raised the issue of his entitlement to a hearing before the Veterans Court. Therefore, whether Section 7292 requires issue exhaustion is not at issue.

and regulations require issue exhaustion, the Federal Circuit acknowledged that the nonadversarial nature of proceedings before the Board required that the Board and Veterans Court give a liberal construction to substantive arguments made before the Board, sometimes requiring them to address related claims that were not explicitly raised. *Id.* at 11a-13a ("[T]he requirement to liberally construe a veteran's arguments extended to arguments that were 'not explicitly raised' before the Board."). But in the Federal Circuit's view, this obligation to read arguments liberally only extends so far—the Veterans Court is only required to address so-called *procedural* issues if they were explicitly raised before the Board. *Id.* at 13a-14a.

REASONS FOR GRANTING THE PETITION

I. THE JUDGMENT BELOW CONFLICTS WITH THE HOLDINGS OF THIS COURT AND OTHER CIRCUITS

The Federal Circuit's decision directly conflicts with this Court's decision in *Sims*, which precluded the application of an issue-exhaustion requirement in nearly identical circumstances. The Federal Circuit's decision also conflicts with how other circuits have applied *Sims*.

A. The judgment below directly conflicts with *Sims*

The Court's analysis in *Sims* applies directly to this case. The governing statutes and regulations do not require issue exhaustion, and the Federal Circuit's decision to the contrary is unsupported by the plain language of those statutes and regulations. And the con-

siderations that led this Court to hold issue exhaustion inappropriate in the Social Security context apply with even greater force here, in the context of the expressly pro-claimant veterans-benefits system.

1. Sims *resolved the question of whether a judicially created issue-exhaustion requirement is appropriate where not required by statute or regulation*

In *Sims*, the Court held that a judicially created issue-exhaustion requirement was inappropriate in the administrative adjudication of Social-Security claims. A majority of the Court held that where there is no statute or regulation that requires issue exhaustion, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims*, 530 U.S. at 109. Four Justices concluded that the non-adversarial nature of Social-Security proceedings precludes an issue-exhaustion requirement in such proceedings. *Id.* at 110-112 (plurality op.). Justice O'Connor concluded that, because the claimant had done all that was asked of her by the Social Security Administration, nothing more should have been required, and that "[r]equiring issue exhaustion is particularly inappropriate here," given the statutory and regulatory background. *Id.* at 113 (O'Connor J, concurring in part and in the judgment).

2. The VA statutory and regulatory scheme is materially indistinguishable from that in Sims

a. Like the Social Security scheme, no statute or regulation imposes an issue-exhaustion requirement before the VA. The Federal Circuit's holding that the statutes and regulations governing veterans benefits impose issue exhaustion in "appropriate circumstances" finds no support in the plain language of those statutes and regulations and undermines what those provisions' plain text *does* unambiguously create—the non-adversarial and pro-claimant system for adjudicating veterans-benefits claims. Despite the Federal Circuit's implication to the contrary, no statute or regulation requires that a veteran specifically articulate all errors before the regional office or when appealing a decision of the regional office to the Board.

Rather, the controlling statute instead "provid[es] that a veteran 'should,' not 'must,' set out specific allegations of error of fact or law in his substantive appeal to the Board." *Maggitt* v. *West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000) (citing 38 U.S.C. § 7105(d)(3)). And while the corresponding regulation requires the veteran to "either indicate that the appeal is being perfected as to all of those issues or * * * specifically identify the issues appealed," a veteran may satisfy the obligation by simply checking a box on VA Form 9,[3] the form that

[3] Form 9 has a box that states "I want to appeal all of the issues * * * ." J.A. A-830, *Scott* v. *McDonald*, 789 F.3d 1375 (Fed. Cir. 2015) (No. 14-7095), ECF No. 36; see also VA Form 9, Appeal to the Board of Veterans' Appeals, http://www.va.gov/vaforms/va/

VA has promulgated for perfecting appeals, indicating that the veteran is appealing all issues.[4] See 38 C.F.R. §§ 20.200, 20.202. Based on the plain language of the statute and regulation, at no point is the veteran *required* to specifically identify any particular issue to be appealed to the Board.

Even less is required of the veteran after remand from the Board to the regional office, as re-appeal to the Board is automatic. 38 C.F.R. § 19.38. Indeed, the veteran is specifically instructed that "[n]o action is required of the appellant unless he is notified." App., *infra*, 46a-47a (directing the regional office to "[r]eadjudicate the claim on appeal" and if the claim remains denied, "[t]he case should * * * be returned to the Board for further appellate review" and "[n]o action is required of the appellant unless he is notified"). Thus, nothing in the regulations and Board opinions leads veterans to believe that anything more needs to be filed to preserve all issues on re-appeal to the Board.

Similarly, the plain language of the relevant statutes and regulations do not require issue exhaustion even where the error is made by the Board. The Federal Circuit held that the Veterans Court's jurisdictional statute, 38 U.S.C. § 7252(a), imposes a requirement that the veteran exhaust issues "in appropriate circum-

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pdf/VA9.pdf (last visited Feb. 17, 2016) (current version).

[4] It is undisputed that Scott checked the box to appeal all issues. J.A. A-830, *Scott* v. *McDonald*, 789 F.3d 1375 (Fed. Cir. 2015) (No. 14-7095), ECF No. 36.

stances" before appealing to the Veterans Court. App., *infra*, 8a-9a. But on its face that statute says nothing about issue exhaustion. It merely states: "The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals * * * . The Court shall have the power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 35 U.S.C. § 7252(a). This statute limits the Veteran's Court review to decisions of the Board and is therefore the entirely different requirement that a veteran exhaust all *administrative remedies* before appealing to the Veterans Court, not a requirement that a veteran exhaust all *issues* in support of the requested remedy. See *Ledford* v. *West*, 136 F.3d 776, 779-780 ("The [Veterans Court]'s jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed."); see also *Sims*, 530 U.S. at 107 (distinguishing between the requirement that a claimant exhaust all administrative remedies and the corollary requirement that a claimant exhaust all issues).

Other regulatory provisions governing veterans benefits reinforce the absence of an issue-exhaustion requirement in appeals of benefits claims. For example, issue exhaustion *is* required when a veteran files a motion for revision of a previous decision based on "clear and unmistakable error"—and that is because a regulation expressly requires that the motion "set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and why the result would have been manifestly different

but for the alleged error." 38 C.F.R. § 20.1404(b); *Andrews* v. *Nicholson*, 421 F.3d 1278, 1283-1284 (Fed. Cir. 2005). The VA therefore knows how to draft regulations that clearly require issue exhaustion. But neither the VA nor Congress did so in the statutes and regulations at issue here. The analysis of *Sims* therefore governs the disposition of this case.

b. Because the statutes and regulations governing veterans-benefits adjudication do not require issue exhaustion, whether a judicially created issue-exhaustion requirement is appropriate turns on the "degree to which the analogy to normal adversarial litigation applies" to VA proceedings. *Sims*, 530 U.S. at 109. Measured in that way, issue exhaustion is certainly no *more* appropriate—and perhaps far *less* appropriate—in veterans-benefits claims than in the Social Security context that *Sims* considered. See, *e.g.*, *Henderson*, 562 U.S. at 437 (recognizing the substantial similarities between the Social Security and veterans benefits systems, as both are "unusually protective of claimants"). If anything, Congress's particular regard for the needs of veterans makes judicially imposed issue-exhaustion requirements *especially* inappropriate. The judgment below and *Sims* cannot both be correct.

This Court in *Henderson* has already recognized the unusual informality and pro-claimant nature of VA procedures, stating that "[t]he VA's adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant," and under a long-standing canon of construction, "provisions for benefits to members of the Armed Services

are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 431, 441 (internal citations and quotation marks omitted). Congress's special solicitude for veterans is "plainly reflected" in "laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Id.* at 440. Veterans seeking benefits "need not file an initial claim within any fixed period," eventual "proceedings before the VA are informal and nonadversarial," the VA is "charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, the VA must give the veteran the benefit of any doubt." *Id.* at 440.

While the Federal Circuit's decision nominally pays tribute to the nonadversarial nature of VA procedures, it in reality contradicts this Court's holding in *Sims*. The Federal Circuit has created an issue-exhaustion requirement that will *never* work to the benefit of veterans. The Federal Circuit's new judicially created issue-exhaustion requirement will *only* be used to deny benefits to veterans to which they are entitled. Moreover, the Federal Circuit's decision imposes an issue-exhaustion requirement even where, as here, the veteran does all that is asked of him by indicating on the form provided *by the VA* that he is appealing all issues.

The judgment below cannot be squared with *Sims* or the nonadversarial, pro-claimant system that Congress has created. *Sims*, 530 U.S. at 110-111 (plurality op.) (holding that issue-exhaustion requirements are inappropriate in Social-Security proceedings because

"[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings"); *id.* at 114 (O'Connor, J., concurring in part and concurring in the judgment) ("[Petitioner] did everything that the agency asked of her. I would not impose any additional requirements * * * ."). The Court should therefore grant certiorari and, if nothing else, summarily reverse the Federal Circuit's judgment.

B. The judgment below conflicts with other circuits' understanding of *Sims*

The Federal Circuit's analysis of the statutes and regulations governing veterans benefits conflicts with the analysis employed not only by this Court but by other circuits when they must decide whether statutes and regulations require issue exhaustion.

1. Where this Court has held that a statute or regulation allows issue exhaustion, it is when the plain language of the statute or regulation precluded review of questions not presented to the agency. By contrast, where statutes or regulations require only exhaustion of administrative remedies, this Court and regional circuits have concluded that they do not require issue exhaustion. On their face, the statutes and regulations here only require exhaustion of remedies; the Federal Circuit's conclusion that they also require exhaustion of all issues conflicts with *Sims* and other circuits' application of *Sims*. This Court's plenary review would resolve the division among the circuits with respect to the legal standards that courts must apply in this context.

This limitation on imposing issue-exhaustion requirements is not a new principle. All of the cases not-

ed in *Sims* in which the Court held that a statute or regulation requires issue exhaustion involved language that explicitly required issue exhaustion. See 530 U.S. at 108. For example, the National Labor Relations Act, addressed by the Court in *Woelke & Romero Framing, Inc.* v. *NLRB*, states that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e); see also *Sims*, 530 U.S. at 108; *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 & n.6 (1952). Similarly, the Court in *Sims* highlighted a Department of Labor regulation that in the Court's view required issue exhaustion because the regulation expressly required that a "petition for review to Benefits Review Board must 'lis[t] *the specific issues* to be considered on appeal.'" *Sims*, 530 U.S. at 108 (emphasis added).[5]

2. Circuits other than the Federal Circuit have

[5] The other examples cited by the Court are in accord. See *Fed. Power Comm'n* v. *Colo. Interstate Gas Co.*, 348 U.S. 492, 497-498 (1955) (holding that the Natural Gas Act, which provides that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing" and that "[t]he application for rehearing shall set forth specifically the ground or grounds upon which such application is based," requires issue exhaustion (quoting 15 U.S.C. § 717r(a), (b)); *L. A. Tucker Truck Lines*, 344 U.S. at 36 n.6 (collecting other statutes requiring issue exhaustion).

properly followed this Court's lead. For example, the Sixth Circuit held that the judicial-review statute governing the Federal Aviation Administration, which provides that "the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator *only if the objection was made in the proceeding* conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding," requires issue exhaustion. *Wilson Air Ctr., LLC* v. *F.A.A.*, 372 F.3d 807, 813-814 (6th Cir. 2004) (quoting 49 U.S.C. § 46110(d) (emphasis added)). Similarly, the D.C. Circuit held that the FCC's regulations mandate issue exhaustion because they require applications to the Commission to "concisely and plainly state the questions presented for review." *Environmentel, LLC* v. *F.C.C.*, 661 F.3d 80, 84 (D.C. Cir. 2011) (quoting 47 C.F.R. § 1.115(b)(1)). The Ninth Circuit applied a similar analysis to ERISA, recognizing that a statute or regulation may require issue exhaustion if it "deprive[s] a court of jurisdiction to hear specific issues or objections not raised before the agency" or if it "provide[s] that a petition for review must 'list the specific issues to be considered on appeal.'" *Vaught* v. *Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 630 (9th Cir. 2008).

On the other hand, like this Court, other circuits have consistently held that statutes and regulations that require only a final agency decision do not contain an issue-exhaustion requirement, but only a requirement that a claimant exhaust administrative remedies. That was a key point of *Sims*, where the Court ex-

plained that the Social Security Act, which provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action," requires exhaustion of administrative remedies but does not require issue exhaustion. 530 U.S. at 106-108 (quoting 42 U.S.C. § 405(g)). Accordingly, the Second and Eighth Circuits have held that 8 U.S.C. § 1252(d)(1), governing review of immigration appeals, "does not expressly proscribe judicial review of issues *not raised in the course of exhausting all administrative remedies*." *Zhong* v. *U.S. Dep't of Justice*, 480 F.3d 104, 120-121 (2d Cir. 2007) (emphasis added) (citing *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 581-582 (8th Cir. 2005)). And the Eighth and Eleventh Circuits both have held that certain statutes governing the Department of Agriculture do not require issue exhaustion. See *Mahon* v. *U.S. Dep't of Agric.*, 485 F.3d 1247, 1255-1256 (11th Cir. 2007); *Ballanger* v. *Johanns*, 495 F.3d 866, 869 (8th Cir. 2007). The Eleventh Circuit concisely explained that, while the "regulations do require claimants to exhaust the [USDA's National Appeals Division's] administrative appeal procedures prior to seeking judicial review" and also "require claimants to state the reasons why the adverse decision was incorrect at several stages of the litigation," the statutes and regulations do *not* require issue exhaustion because "there is no express requirement in the regulations that a party must list the specific issues that the reviewing court will consider." *Mahon*, 485 F.3d at 1255-1256.

The Federal Circuit's analysis in this case conflicts

with this Court's and the other circuit's prevailing view that statutes and regulations require issue exhaustion only if they explicitly do so. Whether all of those cases were ultimately correct in finding that the *particular* statute or regulation at issue required issue exhaustion is immaterial; the point is that the cases share a common understanding of when imposing issue exhaustion is "appropriate." Moreover, the veterans-benefits statutes and regulations here have a fundamentally different textual predicate than those that courts have understood to require issue exhaustion. That is because the statutes and regulations at issue here neither restrict appeals to specific issues raised before the agency nor require that a veteran list all issues being appealed.[6] In stark contrast with their silence about issue exhaustion, the very same statutes and regulations at issue here expressly distinguish the mandatory requirements by using the word "must" in adjacent sentences. 38 U.S.C. § 7105(d)(3); 38 C.F.R. § 20.202.

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[6] Instead, both the statute and regulation include the word "should," key precatory language that does not give rise to a mandatory requirement. See 38 U.S.C. § 7105(d)(3) ("The appeal *should* set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal *must* be clearly identified." (emphasis added)); 38 C.F.R. § 20.202 ("If the Statement of the Case and any prior Supplemental Statements of the Case addressed several issues, the Substantive Appeal *must* either indicate that the appeal is being perfected as to all of those issues or *must* specifically identify the issues appealed. The Substantive Appeal *should* set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed." (emphasis added)).

This Court's intervention is therefore needed to ensure proper and consistent application of *Sims* among the circuit courts.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE AN IMPORTANT, RECURRING, AND OTHERWISE NON-REVERSIBLE ISSUE

The Federal Circuit's decision creates a significant new rule that will affect many veterans.[7] A substantial percentage of veterans proceed through the VA *pro se* or only with the assistance of non-lawyer veterans-assistance programs. Procedural issues of the sort involved in this case are exactly the type of issues upon which *pro se* veterans are most likely to stumble.

A. The Federal Circuit's decision immediately affects veterans nationwide

The Federal Circuit's erroneous decision affects *all* veterans applying for benefits nationwide; their claims can be redressed by no other court. The Veterans Court has exclusive jurisdiction over veterans-benefits appeals from the Board. 38 U.S.C. § 7252. The Federal Circuit, in turn, has exclusive jurisdiction to review decisions of the Veterans Court. 38 U.S.C. § 7292(a), (c). The Federal Circuit has declined to reconsider *en*

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[7] Indeed, the Veterans Court has already imposed an issue-exhaustion requirement on veterans in three cases, relying on the Federal Circuit's decision in this case for support. *Dunham* v. *McDonald*, No. 14-1467, 2015 WL 3961161, at *4 (Vet. App. June 30, 2015) (non-precedential); *Waters* v. *McDonald*, No. 14-2619, 2015 WL 3952694, at *2 (Vet. App. June 30, 2015) (non-precedential); *Piehl* v. *McDonald*, No. 14-2683, 2015 WL 4111341, at *6 (Vet. App. July 8, 2015) (non-precedential).

banc its decision in this case, despite being given the opportunity to do so and taking the unusual step of requesting a response from the Respondent, the Secretary of Veterans Affairs. The only lower courts that could possibly consider the question presented in the veterans context, therefore, have done so already.

Unlike most other types of cases, therefore, veterans-benefits cases cannot benefit from the thoughtful consideration and views of other circuits. When the Federal Circuit reaches an incorrect decision in this context (as with others, such as patent law), its error is accordingly of outsized significance. This Court has repeatedly granted review to cases that are within the exclusive jurisdiction of the Federal Circuit. *E.g.*, *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 356 (2015); *Kingdomware Techs., Inc.* v. *United States*, 135 S. Ct. 2857 (2015); *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428 (2010). And while the protection of the Nation's veterans is important enough, given Congress's unambiguous determination that the adjudication of veterans benefits must be pro-veteran and non-adversarial, the Federal Circuit's direct contravention of this Court's precedent makes the reasons for granting review all the more compelling.

B. The Federal Circuit's decision affects thousands of veterans every year, many of whom are unrepresented

"The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett* v. *Nicholson*, 466 F.3d 1038, 1044 (Fed.

Cir. 2006). The Federal Circuit's decision in the present case stands in stark contrast to this interest. Under the Federal Circuit's decision, the Veterans Court can avoid correcting an error by the Board, even an obvious one, merely because the veteran did not inform the Board of its own error. Despite Congress's stated pro-veteran policy, the Federal Circuit's rule will *never* work in favor of any veteran. It will always work against veterans, causing at least some of them not to receive the benefits to which they are entitled.

The Federal Circuit's decision is particularly troubling because it erects procedural barriers for the significant number of veterans that proceed through the veterans-benefits process without a lawyer. Currently, there are 21.6 million veterans in the United States, and in 2013, about 6.5 million of them used at least one benefit provided by the VA.[8] In 2014 alone, nearly 50,000 cases were formally appealed to the Board, and less than 11% of the veterans in cases decided by the Board were represented by an attorney.[9] A significant number of veterans remain unrepresented before the Veterans Court. In 2014, 3,745 appeals were filed with

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[8] U.S. Dep't of Veterans Affairs, FY 2017 Budget Submission, Vol. 1: Supplemental Information and Appendices at 5 (2016), http://www.va.gov/budget/docs/summary/Fy2017-VolumeI-SupplementalInformationAndAppendices.pdf; U.S. Dep't of Veterans Affairs, *FY 2013 Unique Veteran Users Report* at 4(2015), http://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Unique_Veteran_Users.pdf.

[9] U.S. Dep't of Veterans Affairs, *Annual Report Fiscal Year 2014* at 18 (2015), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf; *Id.* at 27.

the Veterans Court, and 33% of those veterans proceeded without an attorney.[10] The number of veterans cases is, unsurprisingly, expected to increase substantially in coming years.[11] These unrepresented veterans are ill-suited to know about, or recognize the significance of, arcane administrative-procedure concepts like issue exhaustion.

The harm to veterans is magnified by the Federal Circuit's application of a strict issue-exhaustion requirement to procedural errors by the Board, as it is precisely these procedural minutiae that veterans are likely to miss. An issue is not inconsequential merely because it is arbitrarily labeled as a "procedural" issue. Indeed, the VA will concede a denial of due process and vacate its own decision if there was a prejudicial failure to afford the appellant a hearing. 38 C.F.R. § 20.904(a)(3). This Court has cautioned against interpreting statutes in a way that would impose rigid procedural hurdles on veterans applying for benefits. See *Henderson*, 562 U.S. at 441 (holding that the 120-day deadline to file a notice of appeal with the Veterans Court is not jurisdictional because such an interpretation "would clash sharply with [the veterans benefits]

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[10] Court of Appeals for Veterans Claims, *Annual Reports* at 1 (2015), https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf.

[11] There will be an estimated 74,072 cases docketed upon receipt at the Board by the end of FY 2015 and an estimated 81,640 cases docketed by the close of FY 2016. See U.S. Dep't of Veterans Affairs, *Annual Report Fiscal Year 2014* at 23 (2015), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf.

scheme"). But that is exactly what the Federal Circuit has done—it has created a procedural trap for all veterans across the Nation, most being unwary and unrepresented. Cf. *Slack* v. *McDaniel*, 529 U.S. 473, 487 (2000) (holding that the exhaustion rule in the context of habeas corpus "is not to 'trap the unwary *pro se* prisoner.'" (quoting *Rose* v. *Lundy*, 455 U.S. 509, 520 (1982))). The Court's review is needed to correct this far-reaching problem.

Even in cases in which unrepresented veterans can adequately traverse the procedural morass of the veterans benefits system, the Federal Circuit's decision is troubling because it punishes veterans for complying with the law. The Federal Circuit effectively held that, even when a veteran does all that is asked, a court can still impose an issue-exhaustion requirement in an undefined set of "appropriate circumstances." For example, there is no dispute that petitioner complied with 38 C.F.R. § 20.202: he appropriately completed VA Form 9 (the form needed to file a Substantive Appeal) indicating that he wished to appeal all issues, and no contention was ever made that Scott failed to allege an error of fact or law. J.A. A-830, *Scott* v. *McDonald*, 789 F.3d 1375 (Fed. Cir. 2015) (No. 14-7095), ECF No. 36. The regulation itself confirms that no more was required of Scott: "Proper completion and filing of a Substantive Appeal are the last actions the appellant needs to take to perfect an appeal." 38 C.F.R. § 20.202. But the Federal Circuit has effectively held that his compliance with VA regulations was not enough. That holding is inconsistent with the non-adversarial nature of veterans-benefits adjudication and inappropriately

punishes veterans for following the letter of the law. See *Sims*, 530 U.S. at 114 (O'Connor, J., concurring in part and in the judgment) ("[Appellant] did everything that the agency asked of her. I would not impose any additional requirements * * * ."). The Court should correct the departure from the statutory scheme created by the Federal Circuit's decision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2014-7095

CURTIS SCOTT,

Claimant-Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

(June 18, 2015)

Appeal from the United States Court of Appeals for Veterans Claims in No. 12-1972, Chief Judge Bruce E. Kasold.

JENNIFER LIBRACH NALL, Baker Botts, LLP, Austin, TX, argued for claimant-appellant. Also represented by CHRISTOPHER GRANAGHAN, DAVID B. WEAVER, JEFFREY S. GRITTON, Vinson & Elkins LLP, Austin, TX.

WILLIAM JAMES GRIMALDI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-

appellee. Also represented by JOYCE R. BRANDA, ROBERT E. KIRSCHMAN, JR., CLAUDIA BURKE; Y. KEN LEE, AMANDA R. BLACKMON, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before DYK, MAYER, and REYNA, *Circuit Judges.*

DYK, *Circuit Judge.*

Curtis Scott appeals from the decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") denying his claim for service connection for hepatitis C. We affirm.

BACKGROUND

Scott served on active duty for training in the United States Marine Corps Reserve from January to July 1972. On November 18, 1999, Scott tested positive for hepatitis C. He applied for disability benefits on February 4, 2005, alleging that he contracted hepatitis C in service. His primary theory was that he was infected with hepatitis C when he received air-gun inoculations during his military service. The Department of Veterans Affairs ("VA") regional office ("RO") denied Scott's claim for service connection on September 20, 2005.

On April 24, 2006, Scott appealed to the Board of Veterans' Appeals ("Board") and requested an evidentiary hearing before the Board. *See* 38 C.F.R. § 20.700(a) (right to a hearing). Scott was incarcerated at the time of his appeal to the Board. On December 6, 2007, the RO sent a letter to Scott, "acknowledg[ing]

[his] request for a Video Conference hearing before the Board," and "request[ing] that [Scott] provide us with the date [Scott is] expected to be released from [his] incarceration so we may schedule [his] video conference hearing accordingly." J.A. 575. Scott responded to the RO on December 13, 2007, reiterating his request for a hearing and informing the Board that his "minimum expiration parole date for release is January 13, 2017," and his "next parole review date is scheduled for March of 2009." J.A. 573. On January 14, 2008, the RO notified Scott that his hearing had been scheduled for March 14, 2008, in Houston, Texas. Scott, who was still incarcerated on the scheduled hearing date, failed to appear for the hearing.

On March 23, 2008, Scott requested a rescheduled hearing because he "could not appear for [his] hearing because of [his] incarceration." J.A. 826. The Board denied Scott's request, finding that Scott had "not shown good cause for failing to appear for [his] hearing," but made no mention of Scott's incarceration. J.A. 683. The Board subsequently denied Scott's claim for service connection, noting that Scott "failed to report for his scheduled hearing in March 2008" and that the Board denied his request to reschedule it. J.A. 677.

On appeal to the Veterans Court, Scott, who by this time was represented by counsel, did not raise the hearing issue. The Veterans Court vacated and remanded to the Board due to an inadequate medical examination, without mentioning the hearing issue. In remanding to the RO, the Board noted the hearing is-

sue but that Scott "has not renewed his request" for a hearing. J.A. 221. On November 18, 2011, the RO continued the service connection denial without mentioning the hearing issue. Scott again appealed to the Board via a re-certification of appeal form which checked "YES" in answer to "WAS HEARING REQUESTED?", but Scott did not raise the hearing issue with the Board. J.A. 183. The Board affirmed, again noting that Scott "has not renewed his request" for a hearing. J.A. 16.

On appeal to the Veterans Court, on July 26, 2013, Scott raised the hearing issue for the first time since his March 23, 2008, request for a rescheduled hearing. The Veterans Court affirmed, holding that Scott "did not raise this [hearing] issue in either proceeding," referring to Scott's prior appeal to the Veterans Court and his current appeal before the Board. J.A. 1–2. The Veterans Court held that raising the hearing issue at this late stage "amounts to an effort to engage in undesirable piecemeal litigation, and [Scott] provides no compelling basis to permit it." J.A. 2. Scott appeals. We have jurisdiction pursuant to 38 U.S.C. § 7292(a). We review legal determinations of the Veterans Court de novo. *Moffitt v. McDonald*, 776 F.3d 1359, 1364 (Fed. Cir. 2015).

DISCUSSION

I

The Supreme Court has recognized the importance of issue exhaustion with respect to administrative tribunals. In *United States v. L. A. Trucker Truck Lines,*

Inc., 344 U.S. 33 (1952), the Court held that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while [the agency] has opportunity for correction in order to raise issues reviewable by the courts," such that "as a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* at 37.[1] But Scott argues that the Supreme Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000), precludes application of the issue exhaustion doctrine in the context of veterans benefits because proceedings before the VA are non-adversarial in nature.

We addressed this issue even before the Supreme Court's decision in *Sims*, in *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000). We articulated a case-by-case balancing test for issue exhaustion in the VA system: "The test is whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve." *Id.* at 1377 (citing *McCarthy*

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[1] *See also Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below. . . . And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding.").

v. Madigan, 503 U.S. 140, 146 (1992)). We remanded to the Veterans Court to determine, *inter alia*, "whether invocation of the exhaustion doctrine [was] appropriate" with respect to the veteran's request to reopen his claim for service connection based on constitutional and statutory arguments that he had not raised before the Board. *Id.* at 1378–79.

Thereafter, in *Sims*, the Supreme Court addressed issue exhaustion in the context of Social Security Administration ("SSA") benefits. The Court noted that "SSA regulations do not require issue exhaustion." 530 U.S. at 108. When that is so, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. A plurality of the Court concluded that "[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings," such that "a judicially created issue-exhaustion requirement is inappropriate." *Id.* at 110, 112. But the majority also recognized that "it is common for an agency's regulations to require issue exhaustion in administrative appeals. And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Id.* at 108 (citations omitted). Justice O'Connor's concurrence also made clear that *Sims* does not apply, and exhaustion is required, where applicable statutes or regulations impose an exhaustion requirement. *See id.* at 113 (O'Connor, J., concurring). Thus, in light of *Sims*, we

must determine the extent to which statutes or agency regulations require issue exhaustion in the veterans benefits context.

In previous veterans' cases we have considered issue exhaustion in three specific contexts and have held that the statutes and regulations require issue exhaustion in appropriate circumstances. First, in an appeal from the RO to the Board, 38 C.F.R. § 20.202 specifically requires that the errors by the RO be identified either by stating that all issues in the statements of the case are being appealed or by specifically identifying the issues being appealed.[2] *See Robinson v. Shinseki*, 557 F.3d

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[2] Section 20.202 provides, in relevant part:

> If the Statement of the Case and any prior Supplemental Statements of the Case addressed several issues, the Substantive Appeal must either indicate that the appeal is being perfected as to all of those issues or must specifically identify the issues appealed. The Substantive Appeal should set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed. To the extent feasible, the argument should be related to specific items in the Statement of the Case and any prior Supplemental Statements of the Case. The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal, but the Board may dismiss any appeal which fails to allege specific error of fact

1355, 1361 (Fed. Cir. 2009) ("We . . . do not suggest that under the regulations the veteran is entirely relieved of his or her obligation to raise issues in the first instance before the VA where the record is being made. The regulations quite clearly impose such an obligation even in direct appeals . . . ." (citing 38 C.F.R. § 20.202)).

Second, where the alleged error was made by the *Board*, we have held that the statute, 38 U.S.C. § 7252(a), requires issue exhaustion before the Board in appropriate circumstances.[3] *See Ledford v. West*, 136 F.3d 776, 779–80 (Fed. Cir. 1998) (Under § 7252, "the [Veterans C]ourt's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed," and "while the doctrine of exhaustion of administrative remedies is not jurisdictional," exhaustion is normally required.). Thereafter, in *Maggitt*, we held that exhaustion was not required in all

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> or law in the determination, or determinations, being appealed.

38 C.F.R. § 20.202; *see also* 38 U.S.C. § 7105(d)(3) ("The appeal [to the Board] should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified.").

[3] Section 7252(a) provides: "The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. . . . The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252(a).

cases, distinguished *Ledford*, and concluded that "[n]othing in the statutory scheme providing benefits for veterans mandates a jurisdictional requirement of exhaustion of remedies which would require the Veterans Court to disregard every legal argument not previously made before the Board." *See* 202 F.3d at 1376–77. As noted above, "the test is whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve." *Id.* at 1377 (citing *McCarthy*, 503 U.S. at 146).

In *Bernklau v. Principi*, 291 F.3d 795 (Fed. Cir. 2002), decided after *Sims*, we upheld the Veterans Court's application of issue exhaustion to arguments that the veteran had failed to raise before the Board, holding that *Maggitt* did not require an explicit balancing of interests in the individual case. *See id.* at 799, 801–02. We held that new arguments for an earlier effective date based on past events allegedly supporting an informal claim for individual unemployability "TDIU" were properly rejected as not raised before the Board. *See id.* at 800–02.[4]

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[4] Scott relies on cases from other circuits which held that issue exhaustion did not apply to various agency proceedings. But none of these cases involved a statute or regulation that specifically imposed an issue exhaustion requirement. *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1081 (9th Cir. 2013) (declining to apply issue exhaustion to an appeal from the Surface Transportation Board because the "administrative process lacks an adversarial

Third, in an appeal from the Veterans Court to this court we have held that 38 U.S.C. § 7292(a) requires issue exhaustion at the Veterans Court level.[5] In *Belcher v. West*, 214 F.3d 1335 (Fed. Cir. 2000), we explained that "38 U.S.C. § 7292(a) speaks directly to the requirement of issue exhaustion." *Id.* at 1337 (citing *Sims*, 530 U.S. at 106–09). In *Belcher*, the veteran raised an argument for the first time on appeal to this court that the Veterans Court failed to follow a VA regulation relating to service connection. *Id.* at 1336.

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component" with no mention of a statute or regulation requiring otherwise); *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 630 (9th Cir. 2008) ("No ERISA statute precludes courts from hearing objections not previously raised . . . nor does any ERISA statute or regulation require claimants to identify all issues they wish to have considered on appeal."); *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 463 (6th Cir. 2004) ("In considering whether the district court properly imposed an issue exhaustion requirement in the case *sub judice*, we initially observe that such a requirement exists in neither [the agency's] organic statute nor its regulations.").

[5] Section 7292(a) provides, in relevant part:

> After a decision of the [Veterans Court] is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision.

38 U.S.C. § 7292(a).

We declined to consider the argument, holding that we lacked jurisdiction to hear it because it was not addressed by or presented to the Veterans Court. *Id.* at 1337.

The statutes and regulations thus impose a requirement of issue exhaustion in appropriate circumstances. While the requirement of exhaustion is relatively strict in proceedings before the Veterans Court, we have concluded that the non-adversarial nature of proceedings before the VA mandates a less strict requirement, as we now discuss.

II

In view of the non-adversarial nature of proceedings before the Board, it is appropriate in the first and second situations listed above that the Board and the Veterans Court give a liberal construction to arguments made by the veteran before the Board, as is specifically required by § 20.202 of the regulations in the case of appeals from the RO to the Board. "In various decisions we have made clear that the Board has a special obligation to read pro se filings liberally." *Robinson*, 557 F.3d at 1358–59. In *Robinson*, we held that this obligation extends to cases in which the veteran is represented by counsel. *See* 557 F.3d at 1359–60. This obligation extends to all proceedings before the Board. It follows from the test articulated in *Maggitt*. *See* 202 F.3d at 1377.

Our prior cases have illuminated what is required by a liberal construction. In *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001), the Veterans Court af-

firmed the Board's service-connection denial because the veteran had failed to allege TDIU. *Id.* at 1382. We held, in the context of clear and unmistakable error ("CUE") claims, that the VA must "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Id.* at 1384 (quoting *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998)). Thus, "[o]nce a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the 'identify the benefit sought' requirement of 38 C.F.R. § 3.155(a) is met and the VA must consider TDIU." *Id.*

In *Comer v. Peake*, 552 F.3d 1362 (Fed. Cir. 2009), we held that where the veteran made a claim for service connection and record evidence supported total disability based on TDIU benefits, the Board was required to con- sider that evidence as a TDIU claim even though the veteran had not specifically raised a TDIU claim. *See id.* at 1366–69. *Comer* held that the requirement to liberally construe a veteran's arguments extended to arguments that were "not explicitly raised" before the Board. *Id.* at 1366.

Similarly, in *Robinson*, we held that where the veteran made a claim for service connection and record evidence supported secondary service connection, the Board was required to consider that evidence as a claim for secondary service connection even though the veteran had not specifically raised secondary service connection. *See Robinson*, 557 F.3d at 1361–62; *see also*

Rivera v. Shinseki, 654 F.3d 1377, 1382 (Fed. Cir. 2011) ("In light of the Board's obligations to read veterans' submissions liberally and to consider the full context within which those submissions are made, we conclude that section 7105(d)(3) does not impose such a[n explicit statement] requirement, at least in the context of a case involving the single factual question of the sufficiency of the veteran's evidence to reopen a claim.").

Roberson, *Robinson*, and *Comer* thus require the Veterans Court to look at all of the evidence in the record to determine whether it supports related claims for service-connected disability even though the specific claim was not raised by the veteran. They also require that veterans' procedural arguments be construed liberally, but those cases do not go so far as to require the Veterans Court to consider procedural objections that were not raised, even under a liberal construction of the pleadings.

There is a significant difference between considering closely-related theories and evidence that could support a veteran's claim for disability benefits and considering procedural issues that are collateral to the merits. As to the former, the veteran's interest is always served by examining the record for evidence that would support closely related claims that were not specifically raised. As to procedural issues, that is not always the case. A veteran's interest may be better served by prompt resolution of his claims rather than by further remands to cure procedural errors that, at

the end of the day, may be irrelevant to final resolution and may indeed merely delay resolution. Under such circumstances, the failure to raise an issue may as easily reflect a deliberate decision to forgo the issue as an oversight. Having initially failed to raise the procedural issue, the veteran should not be able to resurrect it months or even years later when, based on new circumstances, the veteran decides that raising the issue is now advantageous. For this reason, absent extraordinary circumstances not apparent here, we think it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran, though at the same time giving the veteran's pleadings a liberal construction.

In short, we hold that the Board's obligation to read filings in a liberal manner does not require the Board or the Veterans Court to search the record and address procedural arguments when the veteran fails to raise them before the Board. Under the balancing test articulated in *Maggitt*, the VA's institutional interests in addressing the hearing issue early in the case outweigh Scott's interests in the Veterans Court's adjudication of the issue.

A review of Scott's pleadings to the Board confirms that Scott did not raise the hearing issue in his current appeal to the Board. The regulations do not require that the Board or the Veterans Court address the veteran's argument that the Board erred in not providing him with a hearing.

AFFIRMED

COSTS

No costs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 12-1972

CURTIS SCOTT,

Appellant

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Appellee

(March 20, 2014)

MEMORANDUM DECISION

Designated for electronic publication only

Note: Pursuant to U.S. Vet. App. R. 30(a),this action may not be cited as precedent.

Before KASOLD, Chief *Judge*.

KASOLD, *Chief Judge*: Veteran Curtis Scott appeals through counsel a March 19, 2012, decision of the Board of Veterans' Appeals (Board) that denied benefits for hepatitis C because it was not related to service. Mr. Scott argues that the Board (1) provided inadequate reasons or bases for finding that the duty to assist was

satisfied when, he alleges, he was denied a hearing, (2) relied on an inadequate medical opinion, (3) clearly erred in finding that Mr. Scott did not acquire his tattoos during service, and (4) clearly erred in finding that the evidence preponderated against his hepatitis C being related to service. The Secretary disputes Mr. Scott's arguments. Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons stated below, the Board decision on appeal will be affirmed.

I. Inadequate Reasons or Bases: Opportunity To Be Heard

In support of his first argument, Mr. Scott notes that he could not attend his Board hearing because it was scheduled when he was incarcerated, and he contends that he was not given the opportunity of a hearing following his incarceration. However, the record of proceedings (ROP) reflects that, although Mr. Scott was incarcerated at the time of a March 2008 scheduled hearing, he was represented by counsel in his appeal of a May 2008 Board decision and in the Board decision now on appeal, and he did not raise this issue in either proceeding. Counsel is presumed to know the facts and law associated with his case and to render adequate assistance, and Mr. Scott does not allege ineffective representation. *See Janssen v. Principi*, 15 Vet.App. 370, 374 (2001) (Court presumes a claimant's counsel to know and understand the law as it relates to the facts of the claimant's case); *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("[C]ounsel is

strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). Under the circumstances, Mr. Scott's first argument amounts to an effort to engage in undesirable piecemeal litigation, and he provides no compelling basis to permit it. *See Chastain v. West*, 13 Vet.App. 296, 299 (2000) (stating that the Court "disfavors piecemeal litigation"), *aff'd sub nom. Chastain v. Principi*, 6 F. App'x 854 (Fed. Cir. 2001) (per curiam); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) ("Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation."); *see also Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000) (Court may refuse to entertain new arguments where appellant did not exhaust his administrative remedies prior to appealing to the Court).

II. Inadequate Medical Opinion

In support of his second argument, Mr. Scott contends that a September 2011 examination report was inadequate because the examiner (1) failed to consider whether Mr. Scott was exposed to blood during unprotected sex in service, (2) did not address whether the air gun and skin were cleaned with alcohol during Mr. Scott's air-gun vaccination, and whether an unclean air gun with minor bleeding during vaccination can transmit hepatitis C, (3) speculated on a nonmedical issue when stating that single use of tattoo needles and

ink pots was not emphasized during the time Mr. Scott acquired his tattoos, and (4) improperly rendered a credibility determination by questioning Mr. Scott's assertion that his tattoos were acquired during service.

With regard to this argument in general, it is first noted that medical examiners are presumed competent in the absence of evidence to the contrary. *See Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (VA medical examiners are presumed competent in the absence of clear evidence to the contrary); *Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009) ("Absent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion."); *Cox v. Nicholson*, 20 Vet.App. 563, 569 (2007) ("[T]he Board is entitled to assume the competence of a VA medical examiner . . . who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." (internal quotation marks omitted)).

A. Exposure to Blood

As to Mr. Scott's first contention, the September 2011 medical report reflects the examiner's understanding that Mr. Scott had unprotected sex and contracted gonorrhea while in service, as well as the examiner's opinion that these factors would not cause hepatitis C absent exposure to blood. Although the examiner did not further address possible exposure to blood, Mr. Scott

points to no record evidence or allegation below that he was exposed to blood or that having gonorrhea – which was noted by the examiner – means that he was exposed to blood. Otherwise stated, Mr. Scott fails to demonstrate any basis why the examiner should have addressed a speculative fact not raised by Mr. Scott or the record. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal). In sum, he does not demonstrate that the examiner failed to consider possible exposure to blood, or that the September 2011 VA examination report was inadequate on this basis. *See id.*

B. Air Gun

Contrary to Mr. Scott's contention that the September 2011 examiner did not address whether the air gun and his skin were cleaned with alcohol before Mr. Scott's specific vaccination, the examiner noted that the practice at the time Mr. Scott received his vaccination was to clean both. Notably, Mr. Scott does not allege, and points to no record evidence, that the normal practice was not followed before his specific vaccination. Similarly, contrary to Mr. Scott's contention that the examiner did not address whether an unclean air gun with minor bleeding during vaccination could transmit hepatitis C, the examiner acknowledged that the site of vaccination could evidence minor bleeding, but concluded that it would be uncommon for the air gun to be contaminated by blood. Implicit within this comment is the understanding that, when Mr. Scott was vaccinated, it was common practice that the air gun was

cleaned with alcohol. In sum, Mr. Scott's argument fails to demonstrate inadequacy in the September 2011 medical examination report. *See Hilkert*, *supra*.

C. Medical Expertise

Although Mr. Scott contends that the examiner was acting outside his medical expertise in stating that single use of tattoo needles and ink pots was not emphasized during the time period Mr. Scott acquired his tattoos, he fails to demonstrate that such an opinion was not based on the doctor's knowledge or insight gained from education and experience in the medical field. *See Hilkert*, *supra*; *see also Sickles*, *Rizzo*, and *Cox*, all *supra*.

D. Improper Credibility Determination

In support of his fourth contention, Mr. Scott correctly notes that the examiner questioned whether Mr. Scott could have found the time and money during his six months of service to get seven large and detailed tattoos. Mr. Scott's contention that the examiner's comment somehow renders the medical report inadequate for Board decision, however, is not supported by the law. Read as a whole, and as the Board noted, the medical examiner's report reflects that his questioning was predicated on the number of tattoo sittings and needle piercings that would be needed to create such large and detailed tattoos, and Mr. Scott does not demonstrate that such information was beyond the knowledge and expertise of the examiner. *See Acevedo v. Shinseki*, 25 Vet.App. 286, 294 (2012) (noting that medical reports "must be read as a whole" in determina-

tions of adequacy); *Hilkert*, *supra*; *see also Sickles*, *Rizzo*, and *Cox*, all *supra*.

Moreover, there is no indication that the Board merely deferred to the examiner's doubt regarding Mr. Scott's tattoos being acquired in service. *Cf. Sizemore v. Principi*, 18 Vet.App. 264, 275 (2004) (finding that an examiner was "overreaching" when opining on "a matter for determination by the Board and not a medical matter"). Rather, in finding Mr. Scott not credible on this issue, the Board noted not only the examiner's comment and basis therefor, but also noted that Mr. Scott's separation medical examination report did not note any tattoos, despite instructions that tattoos were to be noted. In sum, Mr. Scott fails to demonstrate that the medical examiner's questioning rendered his report inadequate for Board decision. *See Hilkert*, *supra*.

III. Clear Error: Tatoos Not Acquired While in Service

Mr. Scott asserts that the Board clearly erred in finding that his tattoos were not acquired during service because it (1) relied on an ambiguous separation examination report, and (2) rendered inconsistent findings on the issue of Mr. Scott's credibility.

With regard to the first assertion, the Board noted that Mr. Scott's entrance examination and separation examination reports both mentioned his vaccination scar, but neither mentioned tattoos, despite instruction that tattoos should be reported and described. The Board also acknowledged Mr. Scott's argument that, in

his separation report in a space for marks, scars, and tattoos, the typed numbers 1, 2, 3, and 4, with empty spaces thereafter – which were not present in his entrance report – indicate the presence of tattoos, but the Board found that the numbers and spaces were part of the standard form, rather than specifically added for Mr. Scott's condition, and that it strained credulity to believe that an examiner typed the numbers to represent the tattoos but then only noted the vaccination scar and failed to describe the tattoos in the space thereafter. Regardless of whether the typed numbers 1, 2, 3, and 4, were part of the standard form or not, it is not disputed that the notations specifically reflect only Mr. Scott's vaccination scar. In sum, the Board's finding that the presence of tattoos was not noted on Mr. Scott's separation medical examination report is plausible and not clearly erroneous. *See Hilkert*, *supra*; *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (Board finding of fact is not "clearly erroneous" unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

In support of Mr. Scott's second assertion, he contends that the Board's rejection of his statement that he acquired his seven tattoos in service is mutually exclusive of the Board's acceptance of the examiner's comment on tattoo practices "[d]uring the timeframe the veteran states he received his tattoos." Record (R.) at 46; Appellant's Brief at 19. Mr. Scott's assertion is predicated on multiple faulty bases. First, the examiner was simply noting the timeframe put forth by Mr.

Scott, not opining that Mr. Scott actually obtained his tattoos during that time period. Second, although the timeframe referred to by the examiner specifically covered the time Mr. Scott was in service, there is no indication that the tattoo practices mentioned (specifically, the lack of emphasis on single use tattoo needles and ink pots) occurred only during the six months Mr. Scott was in service, as opposed to the general time period encompassing his service, the early 1970s. Third, there is no inconsistency in the Board accepting the examiner's view that acquiring tattoos was the most likely cause of Mr. Scott's hepatitis C, and yet also finding that Mr. Scott did not acquire all seven of his tattoos while service. Overall, Mr. Scott fails to demonstrate clear error in the Board's finding that he did not acquire his tattoos in service. *See Hilkert* and *Gilbert*, both *supra*.

IV. Clear Error: Preponderance of the Evidence Against the Claim

Mr. Scott contends that the Board clearly erred in finding that the evidence preponderated against a relationship between his hepatitis C and service because (1) VA Fast Letter 04-13 acknowledges that hepatitis C can be transmitted through sex, and there is no evidence that Mr. Scott was *not* exposed to blood during his unprotected sex in service, (2) VA Fast Letter 04-13 acknowledges the biological plausibility of transmitting hepatitis C through air guns, Mr. Scott stated that he was exposed to blood on his skin during the air-gun vaccination, and there is no evidence that the

air guns *were* cleaned, and (3) the Board relied on the September 2011 VA examiner's statement regarding tattoo practices that was outside the examiner's expertise.

As to the first contention, the Board noted that hepatitis C can be transmitted through sex, but ultimately relied on the September 2011 examiner's statement that it would be transmitted only upon exposure to blood, and found no evidence that Mr. Scott was exposed to blood during his unprotected sex in service. Although Mr. Scott notes on appeal that there also is no evidence that he was *not* exposed to blood, and that an approximate balance of positive and negative evidence requires a finding in favor of the veteran, 38 U.S.C. § 5107(b), Mr. Scott has not even alleged that he was exposed to blood during his unprotected sex in service, such that awarding benefits in this case would be based on pure speculation of a service connection. *See Chotta v. Peake*, 22 Vet.App. 80, 86 (2008) (noting that speculation generally will not satisfy the equipoise standard, and citing 38 C.F.R. § 3.102 for the proposition that the "Board may not award benefits when the award would be based upon pure speculation"); *see also Fagan v. Shinseki*, 573 F.3d 1282, 1287 (Fed. Cir. 2009) (acknowledging that the benefit of the doubt rule does not apply to "pure speculation"). Moreover, to the extent Mr. Scott's argument implies that he would have expressly stated that he was exposed to blood during unprotected sex in service had he been aware that such exposure was a key factor in this case, Mr. Scott had the opportunity to make such a statement between the

September 2011 report and the March 2012 Board decision, and again in his current briefing, but he has failed to do so despite being represented by counsel. *See Strickland* and *Janssen*, both *supra*.

As to Mr. Scott's contention regarding the air gun, the Board noted that air-gun transmission of hepatitis C was biologically plausible, but ultimately relied on the September 2011 medical examiner's opinion that such transmission was not likely the cause of Mr. Scott's hepatitis C. Although Mr. Scott alleges that blood was on his skin after the vaccination, the Board noted that the examiner acknowledged that the site of vaccination can evidence minor bleeding, and further noted that Mr. Scott never reported seeing blood on the air gun. The Board also noted the examiner's statement of the common practice to clean the skin and air gun with alcohol before vaccination, and the Board found no evidence and noted no allegation by Mr. Scott that the common practice was not followed. Although Mr. Scott notes on appeal that there also is no evidence that the common practice *was* followed, his speculation that his case might have departed from common practice is insufficient to establish an award. *See Fagan* and *Chotta*, both *supra*.

Finally, Mr. Scott's contention regarding the examiner's expertise on tattoo practices has been addressed above. In sum, Mr. Scott fails to demonstrate that the Board clearly erred in finding that the evidence preponderated against a relationship between his hepatitis C and service. *See Hilkert*, *supra*; *Coghill v. Brown*, 8

Vet.App. 342, 345 (1995) (Board's denial of relationship between current disability and service is reviewed under the "clearly erroneous" standard); *Gilbert*, *supra*.

V. Conclusion

Accordingly, the March 19, 2012, Board decision on appeal is AFFIRMED.

DATED: March 20, 2014

Copies to:
Christopher G. Granaghan, Esq.
VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 12-1972

CURTIS SCOTT, APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered and effective this date.

Dated: April 11, 2014

FOR THE COURT:
GREGORY O. BLOCK
Clerk of the Court
By: /s/
Deputy Clerk

Copies to:
Christopher Granaghan, Esq.
VA General Counsel (027)

APPENDIX C

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

Docket No. 05-33 957

IN THE APPEAL OF CURTIS SCOTT

(March 19, 2012)

On appeal from the Department of Veterans Affairs Regional Office in Houston, Texas.

THE ISSUE

Entitlement to service connection for hepatitis C.

REPRESENTATION

Appellant represented by: Virginia Girard-Brady, Attorney-At-Law

ATTORNEY FOR THE BOARD

W.H. Donnelly, Counsel

INTRODUCTION

The Veteran had a period of active duty for training (ACDUTRA) with the United States Marine Corps Reserve from January 1972 to July 1972.

This matter comes before the Board of Veterans'

Appeals (Board) on appeal from a July 2005 rating decision by the Houston, Texas, Regional Office (RO) of the United States Department of Veterans Affairs (VA) which denied entitlement to the benefit sought.

The Veteran requested a hearing before a Veterans Law Judge, and such was scheduled for March 2008. The Veteran failed to report; he subsequently informed the Board that he was incarcerated until 2017, with a parole hearing scheduled for 2009. He requested scheduling of a videoconference hearing prior to his release. The Board denied the motion for rescheduling in May 2008, finding that good cause for the failure to report was not shown. The Veteran has not renewed his request.

In May 2008, the Board issued a decision denying service connection for hepatitis C. The Veteran appealed the denial to the Court of Appeals for Veterans Claims (Court or CAVC), which in October 2010 issued a memorandum decision vacating the Board decision and remanding the matter for further consideration. The Board in turn remanded the appeal to the RO in August 2011 for additional development.

FINDINGS OF FACT

1. The Veteran did not receive any tattoos during his period of qualifying active military service.

2. The Veteran did receive inoculations via air gun upon enlistment.

3. The Veteran was diagnosed with a sexually transmitted disease in service.

4. There is no evidence or indication of hepatitis C during active military service, and the preponderance of the evidence is against a finding that hepatitis C is related to military service.

CONCLUSION OF LAW

The criteria for service connection for hepatitis C have not been met. 38 U.S.C.A. §§ 1110, 5107 (West 2002 & Supp. 2011); 38 C.F.R. §§ 3.102, 3.303 (2011).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

VA's Duties to Notify and Assist

VA has met all statutory and regulatory notice and duty to assist provisions. *See* 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2011); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326 (2011). March 2005 and March 2006 letters satisfied the duty to notify provisions. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b)(1); *Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002). The March 2006 letter also notified the Veteran of regulations pertinent to the establishment of an effective date and of the disability rating. *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006).

The Veteran's service treatment records and private treatment records have been obtained; he did not identify any VA treatment records pertinent to the appeal. 38 U.S.C.A. § 5103A, 38 C.F.R. § 3.159. The Veteran has not indicated, and the record does not contain evidence, that he is in receipt of disability benefits from the Social Security Administration. 38 C.F.R. § 3.159

(c) (2). VA examinations were conducted in October 2006 and September 2011. The September 2011 examination fully addressed the inadequacies of the earlier examination, and complied with the Board's August 2011 remand directives. 38 C.F.R. § 3.159(c) (4); *Barr v. Nicholson*, 21 Vet. App. 303, 307 (2007). The examiner made all required clinical findings, reviewed the claims folder, and offered the requested nexus opinion with a complete rationale.

There is no indication in the record that any additional evidence, relevant to the issue decided, is available and not part of the claims file. *See Pelegrini v. Principi*, 18 Vet. App. 112 (2004). As there is no indication that any failure on the part of VA to provide additional notice or assistance reasonably affects the outcome of the case, the Board finds that any such failure is harmless. *See Mayfield v. Nicholson*, 20 Vet. App. 537 (2006); *see also Dingess/Hartman*, 19 Vet. App. at 486; *Shinseki v. Sanders/Simmons*, 129 S. Ct. 1696 (2009).

Analysis

Service connection will be granted if it is shown that the veteran suffers from a disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a preexisting injury suffered or disease contracted in the line of duty, during active military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. Disorders diagnosed after discharge will still be service connected if all the evidence, including that pertinent to service, establishes that the disease

was incurred in service. 38 C.F.R. § 3.303(d); *see also Combee v. Brown*, 34 F.3d 1039, 1043 (Fed. Cir. 1994).

To establish service connection, there must be a competent diagnosis of a current disability; medical or, in certain cases, lay evidence of in-service occurrence or aggravation of a disease or injury; and competent evidence of a nexus between an in-service injury or disease and the current disability. *Hickson v. West*, 12 Vet. App. 247, 252 (1999); *see Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). The nexus between service and the current disability can be satisfied by competent evidence of continuity of symptomatology and evidence of a nexus between the present disability and the symptomatology. *See Voerth v. West*, 13 Vet. App. 117 (1999); *Savage v. Gober*, 10 Vet. App. 488, 495 (1997).

Competent medical evidence is evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also include statements conveying sound medical principles found in medical treatises. It also includes statements contained in authoritative writings, such as medical and scientific articles and research reports or analyses. 38 C.F.R. § 3.159(a)(1). Competent lay evidence is any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay per-

son. 38 C.F.R. § 3.159(a)(2). This may include some medical matters, such as describing symptoms or relating a contemporaneous medical diagnosis. *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007).

In determining whether service connection is warranted for a disability, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim is denied. 38 U.S.C.A. § 5107; *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). When there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the benefit of the doubt is afforded the claimant.

Private medical records establish that infection with hepatitis C was first diagnosed in November 1999. The diagnosis has been confirmed in subsequent testing. Current records include those for the Huntsville Unit, the prison where the Veteran is incarcerated. It appears the diagnosis was made by prison officials, using the University of Texas laboratory. The Veteran continues to be incarcerated; hepatitis C is carried as a current, active problem, but no ongoing treatment is indicated.

The Veteran alleges that such infection stems from military service; he has cited several risk factors associated with hepatitis C from his period of active military service. Primarily, he argues that he was infected when receiving inoculations via air gun upon his entry into

service. He also reports that he was tattooed during service and engaged in unsafe sexual practices. Finally, he argues that his service during the Vietnam era is itself a risk factor.

Service treatment records reveal that, on examination for enlistment in December 1971, flat feet and a vaccination scar on the left upper arm were noted. No tattoos were present. In July 1972, the Veteran complained of urethral discharge and was diagnosed with neisseria gonorrhea. The Veteran was examined for separation from service in July 1972. Subjectively, he complained of headaches and foot problems. Foot fungus was diagnosed; headaches were not reported as a chronic condition. Objective examination revealed a report of a vaccination scar on the left upper arm (VSULA). A typed addition to the form provided numbered spaces for up to four entries of marks, scars, and tattoos, but only one is noted. At no time was hepatitis of any strain or type identified.

A VA examination was conducted in October 2006. The doctor reviewed the claims file in conjunction with the examination. He noted the Veteran's contentions regarding air gun injection, and noted that the Veteran had been incarcerated since 1978. The Veteran reported that he had received tattoos during and after service. However, the examiner noted that service treatment records showed no documentation of tattoos in service, including on the separation examination. The gonorrhea infection in service was noted. No ongoing treatment or symptomatology related to hepatitis

was documented in prison treatment records, despite the Veteran's reports of liver and kidney pain and vomiting. The examiner stated he could not opine as to the etiology of hepatitis C without resort to speculation. There was no test to show how long a person had been infected. He did comment that he knew of no documented instances of transmission of hepatitis C by air gun, and such was not a transmission mode listed by the American Hepatitis Society.

In May 2008, the Board denied entitlement to service connection for hepatitis C. The Board found that the Veteran's tattoos were received post-service, and that the evidence of record was against a finding that infection was due to air gun exposure.

In an October 2010 memorandum decision, the CAVC vacated the Board's denial and remanded the appeal for further consideration, finding that while the VA examination and Board discussion of the risk factors of air gun infection, tattoos and Vietnam era service were adequate, the omission of discussion or findings regarding the potential role of an in-service gonorrhea infection was error. The VA examination relied upon by the Board was not adequate for adjudication, as the examiner had not considered all risk factors of record. The Court also noted the recent submission of argument regarding a link between elevated alkaline phosphate levels in the blood and hepatitis infection; while this newly raised argument was not before CAVC, it could be raised before the Board on remand.

The Board, in turn, remanded the claim to the RO

for a new VA examination which specifically addressed all risk factors for hepatitis C as identified by the Veteran or in the record.

An internet article from WebMD indicates that "very high levels" of alkaline phosphate could be caused by liver problems to include hepatitis. It also indicated that "high levels" can be caused by bone disease; even normal healing of a fracture could raise alkaline phosphate levels.

A VA examination was conducted in September 2011. The claims file was reviewed in conjunction with the examination. The Veteran alleged he contracted hepatitis C from air gun injections in service. He was diagnosed with hepatitis C in 1999. He denied a history of IV drug use, but did endorse unprotected sexual intercourse. He had contracted gonorrhea in service in 1972. He reported receiving 7 tattoos during his ACDUTRA period, and he had been incarcerated since September 1978. A "mildly elevated" alkaline phosphate level was noted in 1978 during hospitalization for a spine issue, but liver enzymes were normal. He had back surgery in 1977.

The examiner addressed all identified risk factors. The examiner noted that a commercial test for hepatitis C was not available until the early 1990's. With regard to the possible role of unsafe sex practices, the examiner stated that hepatitis C, unlike other strains of hepatitis, is not secreted in saliva or vaginal secretions, unless contaminated by blood. "It is generally felt to be a blood borne illness only." Sexual transmission is un-

common in the absence of a showing of blood from open skin or mucous membranes. The Veteran had denied any blood transfusions, and so that was not a transmission vector.

The abnormal alkaline phosphate level was only "mildly elevated" in the examiner's opinion. The examiner described this as a minor abnormality.

With regard to air gun injections, the examiner opined that it was less likely than not that such caused the hepatitis C infection. Air guns force vaccine through the skin. Contamination by blood would be uncommon, even though the site of the vaccination may have minor bleeding. The possibility that air guns could be a vector for blood borne illnesses was speculative; it has not been proven that such is possible. Finally, the examiner noted that the air gun and the skin where the injection is to take place are both routinely cleaned with alcohol before inoculation.

The examiner opined that the greatest risk factor for the Veteran in contracting hepatitis C was his tattoos. "Unclean tattoo needles can pass on blood borne illnesses." The examiner observed the tattoos and opined that, given the number and extent of them, it was unlikely the Veteran would have had the opportunity or funds to obtain the seven tattoos he reported during his active duty service. The tattoos he displayed would have required a "great number" of sessions and an "extreme number of tattoo needle piercings." The examiner noted that, during the time frame when the Veteran reported getting his tattoos, reuse of needles and ink

pots was practiced.

Hepatitis C is not shown to be related to any in-service risk factor. As was noted by the Court, mere service during the Vietnam era, with no showing the Veteran's particular service was affected thereby, has no impact on the development of hepatitis.

Air guns have never been shown to be more than a speculative transmission vector. There are no studies or instances showing that such infection actually occurs. Further, even if it is accepted that air guns are a plausible transmission vector generally, in this case the predicate circumstances are not shown. Hepatitis is a blood borne disease, and there is no showing or allegation of blood contamination on the air guns used on the Veteran. He merely describes their use, and has not reported seeing blood. He has also not alleged that the standard practices described by the September 2011 VA examiner (who signs himself as a retired Army Colonel) regarding use of alcohol to decontaminate between injections was not used.

The examiner also stressed that merely having a sexually transmitted disease was not indicative of added risk for hepatitis. While unsafe sex could cause exposure, the dangerous exposure was to blood from open sores or membranes. No such is shown or alleged here. Service treatment records noting the diagnosis and treatment for gonorrhea report the only symptom as painful discharge. No sores, cuts, or bleeding are noted. Normal, even though unprotected, sex is not a common mode of transmission for blood borne disease.

This is contrasted with other forms of hepatitis, which manifest in fluids other than blood and can therefore be transmitted through exposure to those fluids, such as saliva or vaginal secretions.

The sole likely risk factor cited by the VA examiners in 2006 and 2011 is tattooing. The Veteran currently has a number of tattoos he alleges he received during service. However, the evidence of record establishes that he did not in fact have any tattoos in service; neither on entry or upon discharge. The risk factor is not service related.

The Veteran's entry and separation examinations pointedly identify only a single identifying skin condition: a vaccination scar on the upper left arm. No tattoos are noted, although the item on the examination checklist specifically indicates tattoos should be reported and described. The absence of any notation of such at the July 1972 separation examination is compelling evidence that the Veteran was not tattooed during active duty. Further supporting this conclusion are the first-hand observations of the September 2011 VA examiner. He noted the complexity, extent, and nature of the tattoos and opined that it was unlikely they could have been accomplished during the short period of time the Veteran was actually in service. Importantly, the Veteran has repeatedly alleged that he received all seven of his tattoos at that time, not merely one or two.

The Veteran has questioned whether the blank entry points on the July 1972 discharge examination report may indicate that there were tattoos present which

were merely not specifically described, and asks that reasonable doubt be resolved in his favor. The Board rejects this logic. The empty slots are part of the typed form; they were not added specifically for this Veteran. Further, tattoos were specifically identified as being one of the items to be particularly described with regard to the skin. That the examiner would type in blanks for such after identifying them, and then fail to actually (handwrite) information on them to the form strains credulity.

The Veteran has argued in essence that even if the particular risk factor is not identified, there is evidence of record indicating that a hepatitis infection was present in close temporal proximity to service. Specifically, he cites the elevated alkaline phosphate levels present in 1978. The September 2011 VA examiner noted these, but said the abnormality was minor, and levels were only mildly elevated. It had no clinical significance. This is supported by the WebMD articles supplied by the Veteran, which report that only "very high," not "mildly elevated" levels are indicative of liver disease which may signal the presence of hepatitis. The VA examiner also pointed out that contemporaneous liver testing was normal; the connecting step between elevated alkaline phosphate levels and hepatitis was specifically excluded. Interestingly, bone problems could cause such mild elevations; the increase was noted during a hospitalization following back surgery involving the bones of the spine.

The preponderance of the evidence is against the

claim. There is no doubt to be resolved. Hepatitis C did not first arise during active military service, and the greatest risk factors for such occurred after service. Risk factors present during service, such as unsafe sex and inoculations, are shown to be unlikely transmission vectors in this case. Service connection for hepatitis C is not warranted.

ORDER

Service connection for hepatitis C is denied.

_____

RONALD W. SCHOLZ

Veterans Law Judge, Board of Veterans' Appeals

APPENDIX D

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

Docket No. 05-33 957

IN THE APPEAL OF CURTIS SCOTT

(August 9, 2011)

On appeal from the Department of Veterans Affairs Regional Office in Houston, Texas

THE ISSUE

Entitlement to service connection for hepatitis C.

REPRESENTATION

Appellant represented by: Virginia Girard-Brady, Attorney-At-Law

ATTORNEY FOR THE BOARD

W.H. Donnelly, Counsel

INTRODUCTION

The Veteran had a period of active duty for training (ACDUTRA) with the United States Marine Corps Reserve from January 1972 to July 1972.

This matter comes before the Board of Veterans'

Appeals (Board) on appeal from a July 2005 rating decision by the Houston, Texas, Regional Office (RO) of the United States Department of Veterans Affairs (VA) which denied entitlement to the benefit sought.

The Veteran requested a hearing before a Veterans Law Judge, and such was scheduled for March 2008. The Veteran failed to report; he subsequently informed the Board that he was incarcerated until 2017, with a parole hearing scheduled for 2009. He requested scheduling of a videoconference hearing prior to his release.

The Board denied the motion for rescheduling in May 2008, finding that good cause for the failure to report was not shown. The Veteran has not renewed his request.

In May 2008, the Board issued a decision denying service connection for hepatitis C. The Veteran appealed the denial to the Court of Appeals for Veterans Claims (the Court), which in October 2010 issued a memorandum decision vacating the Board decision and remanding the matter for further consideration.

The appeal is REMANDED to the Department of Veterans Affairs Regional Office. VA will notify the appellant if further action is required.

REMAND

The Court determined that the October 2006 VA examination relied upon in denying the Veteran's claim was not adequate. The examiner had not fully considered all identified potential risk factors in rendering an

opinion regarding a nexus between service and current diagnosis.

The Court found that the examiner's discussions of tattoos and air gun inoculations as risk factors was sufficient. However, the examiner did not address the potential of nexus based on high risk sexual activity, as evidenced by the Veteran's treatment for gonorrhea during ACDUTRA.

Further, the Veteran has submitted additional evidence, not previously considered by VA, that evidence of abnormal levels of alkaline phosphatase may indicate the presence of hepatitis.

On remand, a new VA examination is required. The examiner must discuss with specificity each risk factor which is present in opining whether it is at least as likely as not that the currently diagnosed hepatitis C is related to active military service.

Accordingly, the case is REMANDED for the following action:

1. Schedule the Veteran for an appropriate VA examination. The claims folder must be reviewed in conjunction with the examination. The examiner must opine as to whether currently diagnosed hepatitis C is at least as likely as not related to active military service. All risk factors must be identified and discussed with specificity. To that end, the examiner should be informed of the following, and such must be addressed:

    a) Air gun inoculation in service was likely; in

this regard, CAVC has already determined that the discussion in the first Board decision was adequate.

b) The Veteran did not have any tattoos at entry into service or at separation; in this regard, CAVC has already determined that the discussion in the first Board decision was adequate.

c) The Veteran was diagnosed with gonorrhea in service; the Veteran should be asked to explain the circumstances of the in-service infection.

d) The Veteran demonstrated elevated alkaline phosphatase levels in March 1978, six years after separation. The significance, if any, of the passage of time from discharge must be specifically addressed.

If the examiner feels that the requested opinion cannot be rendered without resorting to speculation, the examiner should state whether the need to speculate is caused by a deficiency in the state of general medical knowledge (i.e. no one could respond given medical science and the known facts) or by a deficiency in the record or the examiner (i.e. additional facts are required, or the examiner does not have the needed knowledge or training).

2. Review the claims file to ensure that all of the foregoing requested development is completed, and arrange for any additional development indicated. Then readjudicate the claim on appeal. If the bene-

fit sought remains denied, issue an appropriate supplemental statement of the case and provide the Veteran and his representative the requisite period of time to respond. The case should then be returned to the Board for further appellate review, if otherwise in order. No action is required of the appellant unless he is notified.

The appellant has the right to submit additional evidence and argument on the matter the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2010).

/s/

RONALD W. SCHOLZ

Veterans Law Judge, Board of Veterans' Appeals

Under 38 U.S.C.A. § 7252 (West 2002), only a decision of the Board of Veterans' Appeals is appealable to the United States Court of Appeals for Veterans Claims. This remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal. 38 C.F.R. § 20.1100(b) (2010).

APPENDIX E

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 08-2092

CURTIS SCOTT,

Appellant

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Appellee

(October 21, 2010)

MEMORANDUM DECISION

Designated for electronic publication only

Note*: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.*

Before GREENE, *Judge*.

GREENE, *Judge*: Curtis Scott appeals, through counsel, a May 12, 2008, decision of the Board of Veterans' Appeals (Board) that denied service connection for hepatitis C. Mr. Scott argues that the October 2006 VA examiner's opinion failed to discuss the significance of

his treatment for a sexually transmitted disease during service as indicative of high risk sexual activity and failed to consider a 1978 laboratory result showing an abnormal level of alkaline phosphatase, which might have been an early indicator of hepatitis C. Mr. Scott also asserts that the examiner and the Board erred in determining that his service discharge examination failed to denote any tattoos. Further, Mr. Scott argues that the examiner and the Board erred in rejecting his statements that his inoculations by air guns while in basic training caused his hepatitis C. In addition, Mr. Scott asserts that the Board erred in failing to discuss the significance of his service during the Vietnam era because a VA publication notes that such service is an additional risk factor for hepatitis C. Mr. Scott also argues that the Board's finding that the benefit of the doubt rule under 38 U.S.C. § 5107(b) does not apply is clearly erroneous. For the reasons that follow, the Court will vacate the May 2008 Board decision and remand the matter.

I. ANALYSIS

A. Service Connection

Establishing service connection on a direct basis generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson*

v. West, 12 Vet. App. 247, 253 (1999). Here, the nexus prong for establishing service connection is the primary concern.

Mr. Scott asserts that the examiner and the Board erred in rejecting his statements that he was inoculated by airgun, which in turn led to his hepatitis C. Even if Mr. Scott had been inoculated by airgun, the medical examiner noted that he "did not know of any evidence[] based scientific studies that have documented transmission of [hepatitis C] via airgun; nor is it listed a[s] a mode of transmission by the American Hepatitis Society." Record (R.) at 69. As a result, there was a plausible basis in the record for the Board's finding that the appellant's statements were insufficient to constitute medical evidence of a nexus to service.

B. Reasons or Bases

The Board must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to

the claimant. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert, supra.*

Here, Mr. Scott argues that the Board failed to provide adequate reasons or bases by not discussing the significance of his service during the Vietnam era since a VA publication notes that this is an additional risk factor for hepatitis C. The record shows, however, that both the Board and the examiner noted that Mr. Scott was a Vietnam era veteran. Absent evidence showing that his particular service had such an effect, the Board was not required to address it further. Accordingly, the Board's statement of reasons or bases in this regard is adequate.

C. Inadequate Medical Opinion

When assessing the credibility and probative value of a medical nexus opinion, the Board must consider whether the medical opinion contains "such sufficient information that it does not require the Board to exercise independent medical judgment." *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007). Further, the Board must determine whether a medical opinion "support[s] its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id.* The Board may not rely on a medical examiner's conclusory statements if they lack supporting analysis. *Id.* at 125 (stating that Board may not assess probative value of "a mere conclusion by a medical doctor"). Instead, a

medical opinion must be "based upon consideration of the veteran's prior medical history and examinations and also describe[] the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Id.* at 123 (quoting *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994)); *see* 38 C.F.R. § 4.2 (2010). However, a medical opinion that concludes that an opinion cannot be given without resort to speculation can still be considered a sufficient medical opinion so long as the examiner sufficiently explains his position. *Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010).

Here, the October 2006 VA medical examiner indicated that he was unable to give the etiology of Mr. Scott's hepatitis C without resorting to speculation and conjecture. R. at 69. Although the examiner mentions that service medical records show that Mr. Scott was treated for gonorrhea during service, the examiner failed to discuss that this treatment was a risk factor to be considered. R. at 67. Instead, the examiner focused on Mr. Scott's allegation that he contracted hepatitis C from airgun inoculations or tattoos, both of which Mr. Scott claimed he received during service. R. at 67, 69. Remand is warranted in this situation. The opinion is conclusory, as the medical examiner admitted that he could not give a precise etiology of Mr. Scott's hepatitis C without speculation. The medical examiner failed to sufficiently explain his position; he simply notes several risk factors and says that he is not sure which one caused Mr. Scott's hepatitis C. R. at 69. The only con-

crete aspect of the explanation is the lack of medical literature linking airgun injections and hepatitis C exposure. *Id.* The reasoning for dismissing Mr. Scott's claimed blood transfusion and tattoos is almost, if not totally, absent. *Id.* The examiner also notes that there is no known test for determining how a person contracted hepatitis C or for how long that person has had the disease. *Id.* As a result, the medical examiner could only have offered a sufficient explanation if he had been more thorough in evaluating Mr. Scott's non-air gun risk factors. Furthermore, the examiner neglected to consider the significance of Mr. Scott's diagnosis of gonorrhea (a sign of high risk sexual behavior) during service, preventing the Board from making a fully informed evaluation of the claim. Although he noted that Mr. Scott had been diagnosed with gonorrhea during service, the medical examiner did not discuss the possible link between high-risk sexual behavior and hepatitis C infection.

Mr. Scott cites to treatise evidence for the proposition that abnormal levels of alkaline phosphatase maybe indicative of hepatitis. This evidence was not before the Board when the Board made its decision, and, therefore, the Court will not now take judicial notice of this information. *See* 38 U.S.C. § 7252(b); *Redding v. West*, 13 Vet. App. 513, 515 (2000) ("The Court is precluded by statute from considering any material that was not contained in the 'record of proceedings before the Secretary and the Board.'" (internal citations omitted)). On remand, Mr. Scott may present this evidence and will

have the opportunity to argue its relevance to the Board.

Remand is not warranted based on Mr. Scott's argument that the Board erred in determining that his service discharge examination failed to denote any tattoos. The report by the medical examiner clearly notes that, after a review of Mr. Scott's claims file, only a vaccination scar on Mr. Scott's left arm was recorded in military medical records; there was no evidence that he had any tattoos.

D. Benefit of the Doubt

Under 38 U.S.C. § 5107(b), the Secretary is required to give the benefit of the doubt to the claimant when there is an approximate balance of positive and negative evidence regarding any issue material to the determination of the matter. Mr. Scott argues that the Board's finding that the benefit of the doubt rule does not apply is clearly erroneous. The Board, however, did not find any evidence in equipoise because there is no medical opinion that links Mr. Scott's hepatitis C to service; there is only evidence of no link to service. On remand, the Board may again address this doctrine.

II. CONCLUSION

Upon consideration of the foregoing analysis, the record on appeal, and the parties' pleadings, the May 21, 2008, Board decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: October 21, 2010

Copies to:

Virginia A. Girard-Brady, Esq.

VA General Counsel (027)

APPENDIX F

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

Docket No. 05-33 957

IN THE APPEAL OF CURTIS SCOTT

(May 21, 2008)

On appeal from the Department of Veterans Affairs Regional Office in Houston, Texas.

THE ISSUE

Entitlement to service connection for hepatitis C.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

L.J. Bakke, Counsel

INTRODUCTION

The veteran served on active duty for training from January 1972 to July 1972.

This appeal arises before the Board of Veterans' Appeals (Board) from a rating decision rendered in Ju-

ly 2005 by the Department of Veterans Affairs (VA) Regional Office (RO) in Houston, Texas in which service connection for hepatitis C was denied.

The veteran was scheduled for a hearing before a Veterans Law Judge, pursuant to his request to testify before the Board, in March 2008. The veteran failed to report. He subsequently wrote to the Board and explained he was not able to report for his scheduled hearing because he is incarcerated. He requested that he be allowed to reschedule a video teleconference hearing. He advised that he was scheduled for a parole hearing in 2009, and that his release dated was scheduled in 2017.

In a May 2008 motion, the Board ruled that the veteran had not shown good cause for failing to appear for his March 2008 hearing, and denied the veteran's request to reschedule it.

FINDING OF FACT

The preponderance of the medical evidence is against a finding that the diagnosed hepatitis C is the result of active service.

CONCLUSION OF LAW

The criteria of entitlement to service connection for hepatitis C have not been met.

38 U.S.C.A. §§ 1110, 1131, 5103, 5103A, 5107 (West 2002 & Supp. 2007); 38 C.F.R. § 3.303 (2007).

REASONS AND BASES FOR FINDING AND CONCLUSION

I. Notice and Assistance

Upon receipt of a complete or substantially complete application, VA must notify the claimant of the information and evidence not of record that is necessary to substantiate a claim, which information and evidence VA will obtain, and which information and evidence the claimant is expected to provide. 38 U.S.C.A. § 5103(a). VA must request that the claimant provide any evidence in the claimant's possession that pertains to a claim. 38 C.F.R. § 3.159.

The notice requirements apply to all five elements of a service connection claim: 1) veteran status; 2) existence of a disability; (3) a connection between the veteran's service and the disability; 4) degree of disability; and 5) effective date of the disability. *Dingess v. Nicholson*, 19 Vet. App. 473 (2006).

The notice must be provided to a claimant before the initial unfavorable adjudication by the RO. Pelegrini v. Principi, 18 Vet. App. 112 (2004).

The notice requirements may be satisfied if any errors in the timing or content of such notice are not prejudicial to the claimant. *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F 3d 1328 (Fed. Cir. 2006).

The RO provided the appellant pre-adjudication notice concerning the issue of service connection in March

2005. Subsequent additional notice was provided in March 2006 including that concerning the laws regarding degrees of disability. The notification substantially complied with the requirements of *Quartuccio v. Principi*, 16 Vet. App. 183 (2002), identifying the evidence necessary to substantiate a claim and the relative duties of VA and the claimant to obtain evidence; and *Pelegrini v. Principi*, 18 Vet. App. 112 (2004), requesting the claimant to provide evidence in his or her possession that pertains to the claims. The claim was readjudicated in a supplemental statement of the case issued in June 2007.

VA has obtained service medical records, assisted the veteran in obtaining evidence including private medical records, has accorded the veteran VA examinations, and has afforded the veteran the opportunity to give testimony before the Board. The veteran failed to report for his scheduled hearing in March 2008, as noted above.

All other known and available records relevant to the issue of service connection have been obtained and associated with the veteran's claims file; and the veteran has not contended otherwise.

VA has substantially complied with the notice and assistance requirements and the veteran is not prejudiced by a decision on the claim at this time.

II. Service Connection

Service connection may be established for disability

resulting from injury or disease incurred in service. 38 U.S.C.A. § 1110. Service connection connotes many factors, but basically, it means that the facts, as shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service. A determination of service connection requires a finding of the existence of a current disability and a determination of a relationship between that disability and an injury or disease in service. *See Pond v. West*, 12 Vet. App. 341 (1999); *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

The standard of proof to be applied in decisions on claims for veterans' benefits is set forth in 38 U.S.C.A. § 5107. A veteran is entitled to the benefit of the doubt when there is an approximate balance of positive and negative evidence. *See also*, 38 C.F.R. § 3.102. When a veteran seeks benefits and the evidence is in relative equipoise, the veteran prevails. *See Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). The preponderance of the evidence must be against the claim for benefits to be denied. *See Alemany v. Brown*, 9 Vet. App. 518 (1996).

The veteran avers that he contracted hepatitis C from the use of an air gun to immunize him and other recruits when he reported for basic training in 1972.

Service medical records show the veteran was vaccinated, but they do not disclose the method. Service medical records reflect no complaints or findings of any liver or blood abnormalities, and his condition at entrance to and discharge from active duty for training

showed no liver or blood abnormalities. These records further document no observations of tattoos or treatment with blood transfusions either prior to or during his active duty for training.

Private medical records dated in 1978 reflect no complaints, findings, or diagnoses of any liver or blood abnormalities. In 1999, private medical records show the veteran tested positive for hepatitis C.

In October 2006, the veteran underwent VA examination. The veteran reported having received tattoos during active service and having back surgery post-service in 1977, at which time he thought he may have had a transfusion with his own blood.

The examiner reviewed the claims file and noted that service medical records show no findings of any tattoos. Post-service private medical evidence also showed no findings of any tattoos. Hepatitis C was diagnosed in 1999 private medical records, but the veteran has not had a liver biopsy, nor has he required treatment for the condition. The examiner observed that there was no evidence in the record to support the veteran's contention he had been administered immunizations during his active duty for training by air gun. Other risk factors reported by the veteran included receiving tattoos at an unknown time and post-service blood transfusion.

The examiner further explained that there was no known test to reliably tell when or how a person contacted hepatitis C, or for how long it has been present.

Moreover, the examiner stated he knew of no evidence-based scientific studies which documented the transmission of hepatitis C by air gun, and that the American Hepatitis Society did not list the air gun as a mode of transmission.

Given the foregoing, the examiner summarized, he was unable to provide an opinion as to the etiology of the veteran's hepatitis C.

The veteran has provided a newspaper article dated in 2003 showing that VA had granted a claim for hepatitis C based on immunization by air gun. This article referenced a study by VA concerning transmission of hepatitis C by VA. However, the article did not contain information specific to the veteran.

The veteran has listed several risk factors for contracting hepatitis C, including getting tattoos and receiving blood transfusion post-service. He has averred he received the tattoos in service, but service medical records do not document any tattoos. He has not provided any medical evidence linking his currently diagnosed hepatitis C to immunizations received during active duty for training.

Even assuming, without finding, that the veteran's immunizations were administered by an air gun that was not properly treated after each application, there is no medical evidence linking the veteran's diagnosed hepatitis C to this risk factor alone, to the exclusion of other risk factors.

There are no opinions or findings establishing that the currently diagnosed hepatitic C is the result of the veteran's active duty for training.

Where as here, the determinative issue involves medical diagnosis and medical opinion of etiology, competent medical evidence is required to support the claim. The veteran is not competent to offer an opinion as to medical diagnosis or causation, consequently his statements that his currently diagnosed hepatitis C is the result of immunizations received by air gun during basic training or tattoos received during his active service cannot constitute medical evidence of a nexus between his current disability and active service. *Grottveit v. Brown*, 5 Vet. App. 91, 93 (1993).

The preponderance of the evidence is against the claim for service connection for hepatitis C; there is no doubt to be resolved; and service connection is not warranted.

ORDER

Service connection for hepatitis C is denied.

/s/

RONALD W. SCHOLZ

Veterans Law Judge, Board of Veterans' Appeals

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2014-7095

CURTIS SCOTT,

Claimant-Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

(October 22, 2015)

ON PETITION FOR REHEARING EN BANC

NOTE: This order is nonprecedential.

Appeal from the United States Court of Appeals for Veterans Claims in No. 12-1972, Chief Judge Bruce E. Kasold.

Before PROST, *Chief Judge*, NEWMAN, MAYER[1], LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

[1] Circuit Judge Mayer participated only in the decision on the petition for panel rehearing.

PER CURIAM.

ORDER

Appellant Curtis Scott filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by appellee Robert A. McDonald. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on October 29, 2015.

FOR THE COURT

October 22, 2015
Date

/s/
Daniel E. O'Toole
Clerk of Court