No. 16-677

In the Supreme Court of the United States

FREDDIE H. MATHIS, PETITIONER

v.

DAVID J. SHULKIN,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of an objection from the veteran involved, the Department of Veterans Affairs (VA) must affirmatively establish that a VA staff physician was qualified to render a medical opinion concerning a veteran's disability claim before relying on the opinion in its administrative adjudication of that claim.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 13
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 19
Comer v. *Peake*, 552 F.3d 1362 (Fed. Cir. 2009) 18
Cromer v. *Nicholson*, 455 F.3d 1346 (Fed. Cir. 2006), cert. denied, 550 U.S. 936 (2007) 3
FTC v. *Cement Inst.*, 333 U.S. 683 (1948) 14
Holton v. *Shinseki*, 557 F.3d 1362 (Fed. Cir. 2009) 3
National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 19
Parks v. *Shinseki*, 716 F.3d 581 (Fed. Cir. 2013), cert. denied, 134 S. Ct. 2661 (2014) 18
Pension Benefit Guar. Corp. v. *LTV Corp.*, 496 U.S. 633 (1990) 15
Perez v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) 15
Rizzo v. *Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009) 10, 14, 19
Robinson v. *Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) 18
USPS v. *Gregory*, 534 U.S. 1 (2001) 19, 20
United States v. *Armstrong*, 517 U.S. 456 (1996) 20
United States v. *Chemical Found., Inc.*, 272 U.S. 1 (1926) 19

Cases—Continued: Page

United States Dep't of Justice v. *Landano*, 508 U.S. 165 (1993) 19
United States Dep't of Labor v. *Triplett*, 494 U.S. 715 (1990) 20
Vermont Yankee Nuclear Power Corp. v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) 15

Statutes, regulations, and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 15
Freedom of Information Act, 5 U.S.C. 552(b)(7)(D)....20
38 U.S.C. 501(a)(1)....14, 21
38 U.S.C. 501(a)(3)....21
38 U.S.C. 502....21
38 U.S.C. 1110....3
38 U.S.C. 1112(a)(1)....3
38 U.S.C. 1131....3
38 U.S.C. 5103A....10, 18
38 U.S.C. 5103A(a)(1)....2, 4, 17, 18
38 U.S.C. 5103A(d)(1)....2, 4
38 U.S.C. 5103A(d)(2)....5
38 U.S.C. 5103A(d)(2)(C)....18
38 U.S.C. 5107(a)....3, 18
38 U.S.C. 5107(b)....3, 4, 10, 14, 19
38 U.S.C. 7104(a)....4
38 U.S.C. 7252(a)....8
38 U.S.C. 7252(b)....8
38 U.S.C. 7261(a)(3)(A)....8
38 U.S.C. 7261(a)(4)....8
38 U.S.C. 7292(a)....9
38 U.S.C. 7292(c)....9

Statutes, regulations, and rule—Continued: Page

38 U.S.C. 7292(d) 9
38 U.S.C. 7292(d)(1) 9
38 U.S.C. 7292(d)(2) 9, 17, 21
17 C.F.R. 240.10b-5 20
38 C.F.R.:
Section 3.100 4
Section 3.103(a) 4
Section 3.103(d) 4
Section 3.159(c) 4
Section 3.159(c)(4) 4, 5
Section 3.307 3
Section 3.309(a) 3
Section 3.2600(a) 4
Section 3.2600(c) 4
Section 19.5 5
Section 19.26(a) 4
Section 19.26(d) 4
Section 19.29 4
Section 20.200-202 4
Section 20.201 4
Section 20.700(c) 4, 14, 15
Section 20.800 4
Fed. R. Evid. 702 15

Miscellaneous:

Am. Med. Ass'n, *Code of Medical Ethics*, Opinion 9.7.1(h) (2016) 16
Nat'l Insts. of Health, *What Is Sarcoidosis?* (June 14, 2013), https://www.nhlbi.nih.gov/health/health-topics/topics/sarc 2

Miscellaneous—Continued: Page

U.S. Dep't of Veterans Affairs, *Adjudication Procedures Manual*, *M21-1*, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual (last visited May 9, 2017) 5, 6, 16

Veterans Health Admin. Directive 1046 (Apr. 23, 2014) 6, 16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is not published in the Federal Reporter but is reprinted at 643 Fed. Appx. 968. The order of the court of appeals denying rehearing (Pet. App. 70-72), and opinions regarding the denial of rehearing (Pet. App. 72-101), are reported at 834 F.3d 1347. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 45-53) is not published in the Veterans Appeals Reporter but is available at 2015 WL 2415067. The decision of the Board of Veterans' Appeals (Pet. App. 54-69) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2016. A petition for rehearing was denied on August 19, 2016 (Pet. App. 70-72). The petition for a writ of certiorari was filed on November 15, 2016.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served in the United States Air Force from August 1980 to August 2002. Pet. App. 2. In September 2009, more than seven years after his discharge from military service, petitioner was diagnosed with sarcoidosis. *Id.* at 3. Sarcoidosis "is a disease of unknown cause that leads to inflammation" when "immune system cells cluster to form lumps * * * in various organs in [the] body." Nat'l Insts. of Health, *What Is Sarcoidosis?* (June 14, 2013), https://www.nhlbi.nih.gov/health/health-topics/topics/sarc. "Sarcoidosis can affect any organ," but it "usually starts in the lungs, skin, and/or lymph nodes." *Ibid.* The "[t]reatment for sarcoidosis [then] varies depending on which organs are affected." *Ibid.* One month after his diagnosis, petitioner filed a claim for veterans' disability benefits. Pet. App. 3.

This case implicates the statutory duty of the Department of Veterans Affairs (VA) to provide reasonable assistance to a veteran to obtain evidence to substantiate the veteran's claim, which can include providing a medical examination or medical opinion. See 38 U.S.C. 5103A(a)(1) and (d)(1). The question presented is whether the VA must provide affirmative evidence of the competence of the VA physician who gives such a medical opinion in the veteran's case, even if the veteran has not disputed the physician's qualifications, before the VA may consider that opinion in its adjudication of the benefits claim.

a. Congress has authorized awards of disability benefits to veterans whose disabilities "result[ed] from personal injury suffered or disease contracted in

line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty." 38 U.S.C. 1110 (wartime service), 1131 (non-wartime service). With limited exceptions not relevant here, a veteran seeking such benefits must carry the "evidentiary burden" of proving his or her entitlement to those benefits. *Cromer* v. *Nicholson*, 455 F.3d 1346, 1350 (Fed. Cir. 2006), cert. denied, 550 U.S. 936 (2007); see 38 U.S.C. 5107(a) (The "claimant has the responsibility to present and support a claim for benefits.").[1] "To establish a right to compensation for a present disability, a veteran must show: '(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service'—the so-called 'nexus' requirement." *Holton* v. *Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (citation omitted). In certain contexts, the VA will presume that a disability was caused by military service if the disability manifests itself to a sufficient degree to be compensable within one year after the veteran's separation from service. 38 U.S.C. 1112(a)(1); 38 C.F.R. 3.307, 3.309(a).

Two VA components—the Veterans Benefits Administration (VBA) and the Board of Veterans' Appeals (Board)—adjudicate veterans' benefit claims. The VBA, acting through VA regional offices, devel-

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[1] A veteran's burden of proof is less stringent than the traditional burden of proof in civil litigation. In a close case, where "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter," the VA must "give the benefit of the doubt to the claimant." 38 U.S.C. 5107(b).

ops an administrative record and makes an initial decision on such claims. See 38 C.F.R. 3.100. If a claim is denied, the veteran may file a notice of disagreement, which initiates a review within the VBA during which the agency may collect additional evidence and hold an evidentiary hearing before it either grants benefits or provides a written statement of the case explaining its adverse decision. 38 C.F.R. 19.26(a) and (d), 19.29; see 38 C.F.R. 3.2600(a) and (c), 20.201. If the veteran is still dissatisfied, he may file a substantive appeal to the Board, which may receive additional evidence from the veteran before rendering a "[f]inal decision[]" for the agency. 38 U.S.C. 7104(a); 38 C.F.R. 20.200-20.202; see 38 C.F.R. 20.800. Such agency proceedings are nonadversarial and are not "limited by legal rules of evidence." 38 C.F.R. 20.700(c); see 38 C.F.R. 3.103(a) and (d). Instead, the VA must "consider all information and lay and medical evidence of record in a case before [it]." 38 U.S.C. 5107(b).

The VA must also "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim." 38 U.S.C. 5103A(a)(1); see 38 C.F.R. 3.159(c). In the disability-compensation context, that assistance "include[s] providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. 5103A(d)(1); see 38 C.F.R. 3.159(c)(4). A medical examination or opinion is necessary if "the evidence of record" both "contains competent evidence that the claimant has a current disability" and "indicates that the disability * * * may be associated with the claimant's active military, naval, or air service," but "does not contain sufficient

medical evidence for the Secretary [of Veterans Affairs (Secretary)] to make a decision on the claim." 38 U.S.C. 5103A(d)(2); see 38 C.F.R. 3.159(c)(4).

The VA's *Adjudication Procedures Manual, M21-1* (VA Manual), which provides guidance for the VBA's adjudication of veterans' benefits claims, addresses the process of obtaining medical examinations. Cf. 38 C.F.R. 19.5 (stating that the Board is not bound by VA manuals).[2] The manual states that "specialty examination[s]"—which "focus[] on the disabilities that are specifically at issue in the Veteran's claim"—"may be (and usually are) performed by non-specialist clinicians." VA Manual § III.iv.3.A(1)(g).[3] The manual further provides that "[a]ll vision, hearing, dental, and psychiatric examinations *must* be conducted by a specialist," and that, "in unusual cases" or when requested by the Board in a remand to the VBA, it may also be necessary for other "examination[s] to be performed by a specialist." *Id.* § III.iv.3.A(1)(g) and (h). The manual states that VBA personnel may request an examination by a specialist only "if it is considered essential for rating purposes," as when the "issue is unusually complex" or when "conflicting opinions or diagnoses" must be reconciled. *Id.* § III.iv.3.A(6)(c).

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[2] The current VA Manual is available at https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual (last visited May 9, 2017).

[3] The VA frequently revises the VA Manual. The appendix to the certiorari petition reproduces manual provisions that were in force in August 2009 and July 2010. See Pet. App. 104-115. This brief cites to the current manual provisions.

The VA Manual states, however, that the actual "choice of examiners" is "up to the VA medical facility conducting the examination," unless the Board specifies that an examination must be conducted by a Board-certified or qualified specialist. VA Manual § III.iv.3.A(6)(d). The VA medical facility—a component of the Veterans Health Administration (VHA)—is thus "responsible for ensuring that examiners are adequately qualified." *Id.* § III.iv.3.D(2)(b). The VHA has further instructed that, in every case, "[t]he examiner has the authority and responsibility to request a specialist examination * * * when deemed necessary." VHA Directive 1046 § 4.d(4)(g) (Apr. 23, 2014) (Pet. App. 124).

b. In March 2010, a VA regional office denied petitioner's disability claim. Pet. App. 55. Petitioner initiated an appeal and sought an evidentiary hearing. *Ibid.*; see C.A. App. 14-44 (hearing transcript). At the hearing, petitioner testified that he was first diagnosed with sarcoidosis in 2009, about seven years after his discharge from military service, when he visited an emergency room because his breathing had "got[ten] worse." C.A. App. 17-18, 31-32; see *id.* at 15. An x-ray revealed a growth on his lungs, which led to the diagnosis. *Id.* at 31-32, 40. Petitioner testified that the pulmonary specialist who treated him had "seemed to think" that sarcoidosis has "something to do with the environment," but that the physician "couldn't put pen-to-paper to that" because "there's really no data" supporting the view. *Id.* at 18-19. Petitioner explained that "studies [have been done] on it, but they don't know what causes it." *Id.* at 33.

Based on petitioner's belief that his sarcoidosis was caused by environmental factors during his service in

Italy, and on statements from petitioner's family and two of his former military colleagues, the VBA requested and obtained a medical opinion to evaluate petitioner's disability claim. Pet. App. 64-65. John K. Dudek, M.D., a staff physician at the VA Medical Center in Boise, Idaho (located near petitioner's home), prepared a report (C.A. App. 45-49) based on his review of petitioner's claims file, including the transcript of petitioner's hearing. *Id.* at 45-46, 49. Dr. Dudek opined that "less than [a] 50 percent probability" existed that petitioner's condition was "incurred in or caused by" his military service. *Id.* at 47. Dr. Dudek stated that, although petitioner "claim[ed] to have had some pulmonary symptoms while in service," the doctor had found "nothing" to support the view that those symptoms "were related to sarcoidosis" or that petitioner's sarcoidosis "existed within one year of service." *Ibid.* Dr. Dudek explained that petitioner had been diagnosed with sarcoidosis a full "7 years after service" and that, if "[petitioner] had [had] significant breathing issues post service, one can assume he would have sought medical care, and a simple [chest x-ray] would have been ordered." *Ibid.*; see Pet. App. 65. Given the "lack of documentation," Dr. Dudek stated that "it would be an extreme stretch, and unreasonable, to opine that [petitioner's] sarcoidosis existed within one year of service." C.A. App. 47. The VBA denied petitioner's claim, and petitioner appealed. See Pet. App. 55.

c. The Board concluded that petitioner had failed to establish that his sarcoidosis was connected to his military service. Pet. App. 54-69. The Board determined that petitioner had been "afforded a VA medical opinion" and that Dr. Dudek's opinion "was sup-

ported by sufficient rationale." *Id.* at 59; see *id.* at 65. The Board further found that no "objective medical information" refuted Dr. Dudek's opinion, adding that "none of the physicians who have had occasion to evaluate or examine [petitioner] * * * have attributed his current sarcoidosis to his active military service." *Id.* at 65-66. Although petitioner had provided lay evidence that he had "experienced fatigue and shortness of breath" during and after his military service, the Board found that those lay observations were insufficient to establish a "causal link between [such] symptoms and the sarcoidosis which became manifest several years post service." *Id.* at 68-69.

2. A veteran, but not the Secretary, may seek judicial review of a Board decision. 38 U.S.C. 7252(a). That agency-record-based review is "limited [in] scope" under standards for reviewing agency action, 38 U.S.C. 7252(b), that authorize the Court of Appeals for Veterans Claims (Veterans Court) to set aside a Board decision if it is, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if the Board's factual findings are clearly erroneous. 38 U.S.C. 7261(a)(3)(A) and (4).

Petitioner sought review in the Veterans Court, which affirmed the Board's ruling. Pet. App. 45-53. The court determined that the Board had not clearly erred in finding, based on Dr. Dudek's opinion and the lack of contrary medical evidence, that petitioner's sarcoidosis was not service-related. *Id.* at 47-51. The court further held that, in the absence of any objection to the examining physician's qualifications, the VA did not need to establish that Dr. Dudek "was qualified to offer an expert opinion" about petitioner's sarcoidosis. *Id.* at 51-52. The court explained that a rebuttable

presumption exists that the VA's physician was qualified to provide a medical opinion; that the first step in rebutting that presumption is to object; and that petitioner "appears to concede that he did not object at the Board." *Id.* at 52. The court therefore held that, "although [petitioner was] free to raise an objection as to the competency of the examiner below," the "mere fact that the examiner * * * was not a pulmonologist does not, by itself, render the opinion inadequate." *Ibid.*

3. The Federal Circuit has exclusive but limited jurisdiction over appeals from the Veterans Court. 38 U.S.C. 7292(a), (c), and (d). The court of appeals may decide "relevant questions of law" and review "any regulation or any interpretation thereof" under standards for judicial review of agency action. 38 U.S.C. 7292(d)(1). The Federal Circuit "may not review" any "challenge to a factual determination" or a "challenge to a law or regulation as applied to the facts of a particular case," "[e]xcept to the extent" that the appeal "presents a constitutional issue," 38 U.S.C. 7292(d)(2).

a. The Federal Circuit affirmed. Pet. App. 1-44. The court of appeals explained that it "lack[ed] jurisdiction to review factual determinations" outside of a constitutional challenge. *Id.* at 7. The court further explained that it therefore could not resolve any "debate" concerning the reliability of "the process by which the VA appoints examiners for a particular case" or concerning the VA's determination in this case about "the competency of the particular examiner employed." *Id.* at 15.

The court of appeals further held that, although petitioner had asked it to "disavow the presumption of

competency as it applies to VA medical examiners," petitioner's argument was foreclosed by *Rizzo* v. *Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009). Pet. App. 7-8, 15. In *Rizzo*, the court of appeals held that the VA "has no obligation to present affirmative evidence of a VA physician's qualifications during Board proceedings, absent a challenge by the veteran." 580 F.3d at 1289. The *Rizzo* court explained that the veteran had "essentially ask[ed] th[e] court to impose a new standard requiring VA to affirmatively establish [such] qualifications" and that, "[a]bsent some challenge to the [physician's] expertise," there was "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." *Id.* at 1290-1291. The court explained that the VA must "consider[] all evidence that may bear upon a claim." *Id.* at 1291 (citing 38 U.S.C. 5107(b)). The court concluded that, because the "VA does not require a claimant" who seeks benefits "to provide any evidence that would establish the competence of a VA examiner in order to substantiate [the veteran's] claim for benefits," the "VA's statutory duty to assist" under 38 U.S.C. 5103A does not imply a duty on the agency's part to establish the examiner's qualifications. *Rizzo*, 580 F.3d at 1292. Finally, the *Rizzo* court reasoned that the "presumption of regularity" that attaches to the official actions of public officials supported the view that the VA need not "affirmatively establish [a VA physician's] competency" absent any objection by the veteran. *Ibid.*

The court of appeals in this case added that, although "there may be a fair basis to criticize the *Rizzo* line of cases," "a practical need [exists] for an admin-

istrable rule, given the volume of claims the VA is charged with processing." Pet. App. 15-16.

b. Judge Reyna concurred. Pet. App. 17-44. He recommended that the en banc court reconsider its *Rizzo*-based precedent "with the objective of eliminating it." *Id.* at 17. Judge Reyna concluded, *inter alia*, that "[u]nqualified examiners are less likely to provide accurate opinions," harming both veterans if "their claims are improperly rejected" and the "public fisc" if "claims are improperly granted." *Id.* at 32.

4. The court of appeals denied en banc rehearing by a seven-to-five vote. Pet. App. 70-72.

a. Judge Dyk concurred in the denial of rehearing. Pet. App. 72-73. He explained that the "presumption of competence of medical examiners is reasonable, as is placing the burden on the veteran to raise any issue as to competence." *Id.* at 72. Although Judge Dyk expressed the view that a "veteran should be able to secure information about the examiner's qualifications * * * upon request," he emphasized that "[t]his case involves no such request." *Ibid.*

b. Judge Hughes, joined by five other judges, also concurred in the denial of rehearing, Pet. App. 73-83, but wrote separately to emphasize "the limited nature of the rebuttable presumption" of competence and the VA's "obligations to develop the record and to assist the veteran." *Id.* at 73. Judge Hughes explained that the presumption merely allows the VA to assume that its "medical examiner is competent to conduct examinations." *Ibid.* The VA must still determine "the probative weight of the [examiner's] report," because the presumption does not suggest that "the examination report and the information contained therein is correct." *Ibid.*; see *id.* at 77-79 (rejecting dissent's

contrary view). Judge Hughes further explained that "a veteran may always request information to challenge an examiner's competency" in agency proceedings, *id.* at 73; that the Board had "frequently justified providing veterans with information regarding examiners' qualifications based on its duty to assist," *id.* at 74; that the Veterans Court had agreed, *ibid.*; and that the Federal Circuit had "not had occasion—and d[id] not here have occasion—to address how the VA must fulfill its duty to assist, or other legal duties, when questions of competency arise," *id.* at 77.

Judge Hughes also explained that, although Judge Reyna's "dissent [from the denial of rehearing] suggests that the VA periodically engages unqualified examiners," that suggestion is "not supported by any evidence" and "overlooks the fact that a veteran can get access to information about his examiner's qualifications." Pet. App. 79-80. Judge Hughes stated that he did "not believe [the dissent] is correct" in asserting that "the VA will not provide [an examiner's qualifications] unless it is ordered to do so by the Board" or a reviewing court. *Id.* at 81 (citation omitted). He explained that "the dissent's single citation to a Veteran's Court decision" remedying a single failure to provide such qualifications did not establish any systematic deficiency in VA practices and instead reflects that "the system is equipped to remedy [such] denials." *Ibid.* Finally, Judge Hughes observed that in some veterans' benefit cases, the medical evidence "may be decades old," yet the dissent would require proof of "the competency of doctors" who had provided such evidence "before the VA may rely on it to make a decision on the claim." *Id.* at 81-82. Judge Hughes stated that the dissenters had failed to show

how their position would be "work[able] with regard to the millions of disability evaluations that have already been provided and form the basis for continuing evaluation of the millions of pending claims for benefits." *Id.* at 82.

c. Judge Stoll, joined by three judges, dissented from the denial of rehearing. Pet. App. 100-101. She characterized the court of appeals' precedent as "question[able]," but she did not conclude that the precedent was incorrect. *Ibid.*

d. Judge Reyna, joined by two judges, also dissented. Pet. App. 83-99. He expressed the view that *Rizzo* was wrongly decided and should be overturned by the en banc court. *Id.* at 83, 88.

ARGUMENT

Petitioner contends (Pet. 11-37) that, before the VA may rely on a doctor's medical opinion in adjudicating a veteran's claim for disability benefits, the VA should be required to prove the physician's competence to give that opinion. That argument is inconsistent with the statutory and regulatory provisions that govern the VA's administrative adjudication of such claims, and with well-established legal principles governing agency adjudicative procedures. The court of appeals correctly rejected petitioner's contentions, and they do not warrant this Court's review.

1. The question in this case is whether the VA must always establish with affirmative evidence that a VA staff physician is competent to provide a medical opinion concerning a veteran's disability claim—even if the veteran has not questioned the physician's qualifications—before the VA may consider the opinion in its administrative adjudication of the claim. The Federal Circuit has correctly held that, "[a]bsent

some challenge to the [physician's] expertise," "no statutory or other requirement" requires the VA to "present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion," *Rizzo* v. *Shinseki*, 580 F.3d 1288, 1291 (2009). See Pet. App. 2, 7-8 (following *Rizzo*).

a. "[A]dministrative agencies * * * have never been restricted by the rigid rules of evidence" that apply in court proceedings. *FTC* v. *Cement Inst.*, 333 U.S. 683, 705-706 (1948). Consistent with that understanding, Congress has directed the VA to "consider all information and lay and medical evidence of record in a case before [it]" when adjudicating veterans' benefits claims. 38 U.S.C. 5107(b). Congress has also authorized the VA to promulgate "regulations with respect to the nature and extent of proof and evidence * * * to establish the right to [such] benefits." 38 U.S.C. 501(a)(1). The VA's regulations state that proceedings before the Board are not "limited by legal rules of evidence" and instead will incorporate "reasonable bounds of relevancy and materiality." 38 C.F.R. 20.700(c).

Those statutory and regulatory provisions foreclose petitioner's contention that the agency is prohibited from considering the medical opinion of one of its own physicians if it fails to demonstrate affirmatively that the physician is qualified to provide that opinion. Section 5107(b) itself requires that the "VA consider[] all evidence that may bear upon a claim." *Rizzo*, 580 F.3d at 1291. Petitioner does not address Section 5107(b) or the VA's regulations authorizing the agency to consider all relevant and material information submitted in its own proceedings.

Petitioner's focus (Pet. 20-21) on requirements for the admission of expert testimony under Rule 702 of the Federal Rules of Evidence is misplaced. Those rules govern the type of information that a court and jury may consider; they do not restrict the authority of administrative agencies to consider all evidence they deem relevant to their inquiry. See, *e.g.*, 38 C.F.R. 20.700(c). And by inviting the courts to devise judge-made evidentiary rules for the VA's administrative proceedings, petitioner disregards "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978) (*Vermont Yankee*)). Reviewing courts "are not free to impose upon agencies specific procedural requirements that have no basis in the [Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*,]" or an agency's governing statute. *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654-655 (1990); see *Vermont Yankee*, 435 U.S. at 549 (explaining that a reviewing court lacks authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").

Adoption of petitioner's approach would also jeopardize veterans' ability to secure benefits. The provisions requiring the VA to consider "all" relevant and material information benefit veterans by allowing consideration of an extremely wide range of information relevant to veterans' claims. If the VA were required to disregard all medical opinions offered by physicians who had not been proved qualified, veter-

ans would face a new obstacle in satisfying their burden of proof, because any such rule would logically apply to medical opinions that support a claim as well as to those that cast doubt upon it.

b. The agency's adjudicative practice of considering medical opinions of VA physicians in the absence of any objection by the veteran is neither arbitrary nor capricious. The VHA medical facilities that provide medical examinations and opinions regarding veterans' disability claims are "responsible for ensuring that examiners are adequately qualified." VA Manual § III.iv.3.D(2)(b). Each "examiner has the authority and responsibility to request a specialist examination * * * when deemed necessary." VHA Directive 1046 § 4.d(4)(g) (Apr. 23, 2014) (Pet. App. 124). A VA physician can reasonably be expected to exercise professional judgment in determining when to seek a specialist's opinion on matters lying outside his own medical knowledge. Cf. Am. Med. Ass'n, *Code of Medical Ethics*, Opinion 9.7.1(h) (2016) (advising that physicians who testify as expert witnesses should "[t]estify only in areas in which they have appropriate training and recent, substantive experience and knowledge"). When no objection or question is raised about a particular physician's competence to offer a medical opinion, the VA can reasonably rely on that opinion in evaluating a disability claim.

Although petitioner now appears to suggest that Dr. Dudek may not have been sufficiently qualified to render an opinion about his sarcoidosis, petitioner testified that his own "pulmonary specialist" would not provide an opinion that his sarcoidosis was caused by environmental exposure (let alone his military service) because "there's really no data" supporting

the view and the studies that have been performed did not reveal "what causes it." C.A. App. 18-19, 33. Sarcoidosis, moreover, is a disease involving immune-system cells that can affect numerous organs, not just the lungs. See p. 2, *supra*. In this context, where petitioner did not question Dr. Dudek's qualifications during the agency proceedings, even after Dr. Dudek had completed his report, it was neither arbitrary nor capricious for the VA to consider that report in its adjudicative process.[4]

2. a. Additional considerations would be implicated if a veteran contested before the agency a VA physician's competence or qualifications to provide a medical opinion in the veteran's case. As Judge Hughes explained below, decisions by the Board have concluded that the agency's duty to "make reasonable efforts to assist [the veteran] in obtaining evidence necessary to substantiate the [veteran's] claim," 38 U.S.C. 5103A(a)(1), can include an obligation to provide evidence of a physician's qualifications when the veteran calls those qualifications into question. Pet. App. 74-75. In this case, however, petitioner never disputed Dr. Dudek's qualifications during the administrative proceedings. See *id.* at 72 (Dyk, J., concurring in the denial of rehearing); *id.* at 75 (Hughes, J., concurring in the denial of rehearing).

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[4] The VA's related factual finding that petitioner had failed to establish a service connection to his sarcoidosis, which was based both on Dr. Dudek's opinion and on the absence of any contrary medical evidence, is not before this Court. Because petitioner did not allege a constitutional violation, the Federal Circuit lacked jurisdiction to review any factual determination in this case. See Pet. App. 7, 15 (citing 38 U.S.C. 7292(d)(2)).

b. Petitioner contends (Pet. 11-18) that requiring a veteran to raise the issue of a physician's competence to provide an opinion is inconsistent with the non-adversarial nature of the VA's adjudicatory process and unfair to veterans who lack legal training and seek benefits pro se. Petitioner does not address Congress's directive that the "claimant has the responsibility to present and support a claim for benefits." 38 U.S.C. 5107(a). Although the VA must "make reasonable efforts to assist [the veteran] in obtaining evidence," 38 U.S.C. 5103A(a)(1), the claimant remains responsible for proving his disability claim. When the agency record "does not contain sufficient medical evidence" to substantiate the veteran's claim, 38 U.S.C. 5103A(d)(2)(C), and the VA provides a medical opinion by a VA physician in accordance with its duty to assist under Section 5103A, the veteran may reasonably be required at least to question the physician's qualifications during the agency proceedings.

Although pro se claimants are similarly responsible for "present[ing] and support[ing]" their benefits claims, see 38 U.S.C. 5107(a), the Federal Circuit has directed the VA to liberally construe filings of pro se claimants, see, *e.g.*, *Robinson* v. *Shinseki*, 557 F.3d 1355, 1358-1359 (Fed. Cir. 2009); *Comer* v. *Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009), including those that may fairly be viewed as objecting to "the selection of a particular medical professional" to provide an opinion in the veteran's case. *Parks* v. *Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) (concluding that such a pro se objection must "be read sympathetically"), cert. denied, 134 S. Ct. 2661 (2014). But petitioner, who was represented by a non-attorney practitioner, C.A. App. 14-15, does not suggest that he questioned Dr.

Dudek's qualifications during the agency proceedings. And the certiorari petition does not appear to argue that the VA violated its statutory duty to assist petitioner in this case.

3. Petitioner suggests (Pet. 23-28) that, under *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245-247 (1988), and *United States Department of Justice* v. *Landano*, 508 U.S. 165, 176 (1993), agencies must provide affirmative evidence that their procedures are reliable and fair. Petitioner is incorrect.

First, the import of petitioner's position for his case is unclear. The Federal Circuit in *Rizzo* concluded that, in the absence of any challenge to the physician's credentials, the VA may properly consider the opinion of a VA physician when adjudicating a benefits claim because 38 U.S.C. 5107(b) requires the VA to "consider[] all evidence that may bear upon a claim." 580 F.3d at 1291. The court further held that considering such information did not conflict with the VA's statutory duty to assist, and that the "presumption of regularity" supported its ruling. *Id.* at 1292. Unlike the claimant in *Rizzo*, however, petitioner presented no scientific evidence to support his disability claim. Even if Dr. Dudek's opinion were not properly considered, petitioner therefore would have insufficient record evidence to prevail on that claim.

In any event, this Court has long held that "[t]he presumption of regularity supports the official acts of public officers" and that, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); see, *e.g.*, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *USPS* v. *Gregory*,

534 U.S. 1, 10 (2001); *United States* v. *Armstrong*, 517 U.S. 456, 464-465 (1996); see also *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 723 (1990) (explaining that "anecdotal evidence will not overcome the presumption of regularity"). Petitioner asserts (Pet. 24) that this presumption applies only after the government establishes that the particular administrative context in question reflects "the consistency of a standard ministerial procedure, resulting in a high probability of an accurate and reliable outcome." Petitioner cites no decision, and we are aware of none, holding that such an evidentiary showing is required before the presumption of regularity is applied. Such a requirement would effectively eliminate the utility of the presumption by forcing the government to prove in each particular context that the relevant agency is properly discharging its duties.

Basic and *Landano* are not to the contrary. Neither decision addressed the presumption of regularity for official acts of government officials, nor do they support petitioner's views about the limited application of that presumption. Rather, those decisions addressed the propriety of using other, highly specific presumptions in very different legal contexts (Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, and Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(D), respectively). Petitioner also contends (Pet. 27-28) that it would be difficult for a claimant to show that a VA physician was not competent to give a medical opinion in his case. But the Federal Circuit had no occasion here to address the scope of the VA's duty to assist the veteran by providing requested information about the phy-

sician's qualifications because petitioner never made such a request.

4. If petitioner or advocacy organizations wish to alter the VA's administrative adjudicatory process, the proper course is to petition the agency for rulemaking and to seek APA review if the VA's response is deemed insufficient. See 38 U.S.C. 502. That approach would appropriately reflect the Secretary's broad rulemaking authority to specify the "nature and extent of proof and evidence" required to establish benefits claims, 38 U.S.C. 501(a)(1), and "the methods of making investigations and medical examinations," 38 U.S.C. 501(a)(3). It would also permit a proper development of factual contentions in the rulemaking record to support any policy arguments and would avoid the limitations on the Federal Circuit's authority to review relevant factual determinations, 38 U.S.C. 7292(d)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2017