No. 16-677

In The
Supreme Court of the United States

FREDDIE H. MATHIS,

Petitioner,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF

MARK R. LIPPMAN
Counsel of Record
THE VETERANS LAW GROUP
8070 La Jolla Shores Drive
Suite 437
La Jolla, CA 92037
888-811-0523
mlippman@veteranslaw.com

Counsel for Petitioner Freddie H. Mathis

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

ARGUMENT

I.

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE DISTINCTION BETWEEN THE PRESUMPTION OF ACCURACY OF OFFICIAL MINISTERIAL PROCEDURES AND THE PRESUMPTION OF GOOD FAITH OF PUBLIC OFFICIALS

Challenging the validity of the Federal Circuit's presumption of competency, petitioner argued – and all members of the three-judge panel of the Federal Circuit agreed – that the government had not satisfied the requirements of the underlying presumption of regularity (*i.e.*, presumption of *accuracy*) of official *ministerial* procedures. Pet. 8-9, 24-26, Pet. App. 11, 15, 18, 33. In so arguing, petitioner distinguished that presumption from the presumption of *good faith* of public officials. *Id.* 25 n.18. While these two presumptions often go by the same name – "the presumption of regularity" – they are vastly different, a distinction essential to an understanding of this petition and the Federal Circuit's opinions in this case.

In his Brief in Opposition, the Secretary rejects this distinction, insisting upon one broad unitary presumption of regularity/*accuracy* for all official procedures. This presumption, according to the Secretary, has no requirements; it automatically applies to all government agencies.

> Petitioner suggests . . . agencies must provide affirmative evidence that their procedures are reliable and fair. Petitioner is incorrect. [¶]

> [T]his 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." 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.

Br. in Opp. 19-20 (citations omitted).

Contrary to the Secretary's position, the law confirms two separate and distinct doctrines: 1) the presumption of *good faith* of public officials,[1] and 2) the presumption of regularity (hereafter "the presumption of *accuracy*") of official *ministerial* procedures.

The former is "less a rule of evidence than a general working principle," *Nat'l Archives & Records*

---

[1] See *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002) ("The presumption that government officials act in good faith is nothing new to our jurisprudence.") (citations omitted).

Admin. v. Favish, 541 U.S. 157, 174 (2004), one animated, in large part, by principles of separation of powers between the Executive and Judicial branches. *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996). This presumption covers the challenged motives of government officials, presuming their good faith in discharging discretionary executive functions.[2] *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

In *Armstrong*, for example, the criminal defendant contested the validity of his indictment on the ground of selective prosecution. Rejecting this challenge, the Supreme Court held that of necessity a prosecutor's discretionary decisions (*e.g.*, deciding whom and what to charge in an indictment), are presumed made in good faith and without improper animus. *Armstrong* emphasized the judiciary's relative incompetence to evaluate these discretionary law enforcement decisions:

> A selective-prosecution claim asks a court to exercise judicial power over a special province of the Executive. The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional

[2] The presumption of good faith of public officials is based upon policy. Such policy-based presumptions have been called presumptions of law. On the other hand, the presumption of accuracy of official ministerial procedures is grounded upon factual probability. These more common probability-based presumptions are referred to as presumptions of fact. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-15 (1990) (Scalia, J., dissenting).

> responsibility to take Care that the Laws be faithfully executed. As a result, the presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.
>
> * * *
>
> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function.

517 U.S. at 464-65 (citations and all quotation marks omitted).

While this presumption applies to the good faith intentions of public officials, it does not presume the accuracy of all procedures performed by them. First, judicial evaluation of the accuracy of official procedure does not pose the policy and separation of power concerns raised by judicial inquiry into the motives of public officials. Courts are well suited to evaluate these types of foundational facts. *Latif v. Obama*, 677 F.3d 1175, 1209 (D.C. Cir. 2012) (Tatel, J., dissenting) (noting that a government redacted report may be deemed

reliable "after careful scrutiny" by "district courts"); Pet. App. 14 (O'Malley, J.) ("Nowhere in the *Rizzo* line of cases, however, did either the Veterans Court or this court perform an analysis to verify that the procedures attending the selection and assignment of VA examiners are, in fact, regular, reliable, and consistent."); see generally Fed. R. Evid. 104(b) ("In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.").

Moreover, presuming the good faith of public officials has "tradition and experience" to recommend it, *Mezzanatto*, 513 U.S. at 210 (citation and internal quotations omitted); presuming the accuracy of all official performance does not. The reality is that public officials often err in the performance of their discretionary responsibilities. Compare *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974) ("Implicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they may err."); *Wood v. Strickland*, 420 U.S. 308, 319 (1975) (holding that allowing liability for every action later found unconstitutional "would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties"); *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) ("we must presume that official action was regular and, if erroneous, can best be corrected in other ways").

In much more limited scope, the law recognizes a presumption of accuracy in the execution of routine,

ministerial[3] official duties – the second type of presumption[4] and the focus of this petition. *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004) ("We perceive no legal basis for holding that the presumption of regularity may not be employed to establish, in the absence of evidence to the contrary, that certain ministerial steps were taken in accordance with the requirements of law."); *Morrow v. District of Columbia*, 417 F.2d 728, 744 (D.C. Cir. 1969) ("the presumption of the correctness of government ministerial action should require that the defendant make some showing to the contrary"); *United States v. Ahrens*, 530 F.2d 781, 786-87 (8th Cir. 1976) (applying the presumption to an Internal Revenue Employee's "ministerial function of properly recording the assessed amount and the taxable year involved").

Even this modest presumption calls for more than the imprimatur of official duty. *Latif*, 677 F.3d at 1208-09 (Tatel, J., dissenting) ("Reliability, not whether an official duty was performed . . . is the touchstone inquiry."). It requires a showing of near-certain factual probability: namely, proof of the consistency and reliability of a given ministerial procedure sufficient to satisfy courts of the high probability of an accurate outcome. *Atteberry v. United States*, 267 F.Supp.2d 1364, 1368 n.4 (Ct. Int'l Trade 2003) ("It is the historic

---

[3] A public official's duty is ministerial when "it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts." Blacks Law Dictionary 996 (6th ed. 1990).

[4] *Supra* at 2 (setting forth the two separate presumptions).

efficiency and reliability of the Postal Service that are the foundation of the presumption of delivery (arrival) and receipt of mail in due course which is often invoked, in tandem with the presumption of regularity, in notice cases such as this.") (citations, brackets and internal quotations marks omitted); *McCormick on Evidence* § 343 (John W. Strong ed. 5th ed. 1999) ("Most presumptions have come into existence primarily because judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it."); Pet. 23-26 (discussing the importance of probability under the *Basic Inc.* and *Landano* analytical framework for judicially-created presumptions); *Latif*, 677 F.3d at 1207 (Tatel, J., dissenting) ("These cases – in fact every case applying the presumption of regularity – have something in common: actions taken or documents produced within a process that is generally reliable because it is, for example, transparent, accessible, and often familiar. As a result, courts have no reason to question the output of such processes in any given case absent specific evidence of error.").

In this case, the Secretary has not made (and cannot make) even a colorable showing, much less the required showing, of the accuracy and reliability of its process for selecting qualified/competent VA medical evaluators. See Pet. 4-6, 25-26. And yet, the VA's duty to provide medical examinations and opinions is the heart and soul of the adjudicatory process, Pet. 18-23 – as the Secretary has put it, "part of VA's central

mission." Govt's Response to pet. for reh'g en banc at 13.

II.

THE COURT SHOULD GRANT CERTIORARI TO PREVENT AGENCIES, LIKE THE VA, FROM BECOMING ARBITRARY AND UNRELIABLE ADJUDICATORY FORUMS

The Secretary contends that VA statutes and regulations authorize the agency to "'*consider* all information and lay and medical evidence of record before it.'" (Br. in Opp. 14, quoting 38 U.S.C. § 5107(b), citing also 38 C.F.R. § 20.700(c) (italics added)). This argument necessarily assumes that the agency may *rely*[5] upon all relevant evidence, including unreliable and undeveloped evidence, to support its decisions.

---

[5] In denying petitioner's claim, the Board of Veterans' Appeals relied in substantial part upon the challenged medical examination. Pet. App. 65-66. The Secretary asserts that, even if this examination were improperly considered, there would have been "insufficient record evidence to prevail on that claim." Br. in Opp. 19. But "once the Secretary undertakes the effort to provide an examination . . . he must provide an adequate one. . . ." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). In other words, the VA must fully develop the record before adjudicating the claim on its merits.

Separately, the Secretary points out petitioner's testimony, indicating that his treating pulmonary specialist could not provide an opinion of a *causal* relationship between in-service environmental exposure and his sarcoidosis. Br. in Opp. 16-17. However, a finding of service-connection may be based upon "a simple temporal relationship between the incurrence of the disability and the period of active duty," irrespective of causation.

This proposition, however, cannot be reconciled with the VA's inquisitorial mission. As a uniquely pro-claimant, inquisitorial system, the VA has clear sequential responsibilities: first, to develop the record and, second, to adjudicate the claim(s). Pet. 11-14. More specifically, the VA must fully and properly develop the record (including obtaining qualified expert medical opinion evidence), before considering any evidence in its adjudicatory capacity. H.R. Rep. No. 963, 100th Cong., 2d Sess. 13 ("Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.").

Here, the newly-created presumption of competency for all VA evaluators allows the agency to avoid its first obligation: namely, to establish the evaluators' knowledge, training or experience related to the field of the evaluations. The Secretary does not dispute *that this showing could be easily made* by having evaluators either submit their CVs or a brief statement of their qualifications. Pet. 22-23, 35; Pet. App. 31. Thus, administrative necessity does not support "the [VA's] luxury of not having to produce specific evidence" of their qualifications. *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998). On the other hand, the presumption compromises the integrity of the system, rendering opaque and unreviewable a process performed by an agency much in need of transparency. Pet. 28-30 (discussing the Congressional intent of the VJRA to

---

H.R. Rep. No. 963, 100th Cong., 2d Sess. 13; 38 C.F.R. § 3.303(a) ("injury or disease resulting in disability was incurred coincident with service").

ensure transparency in VA adjudication); *id.* 32-33 (noting the VA's well-documented history of procedural errors).

The Secretary's heavy reliance upon the VA's liberal rules of evidence is misplaced for another reason. These rules, similar to most governing agency procedure, do not override principles of fairness and reliability implied in every adjudicatory forum. Whether federal or state, administrative agencies must evaluate evidence under a baseline standard of fairness and reliability.[6] *Williams v. New Amsterdam Casualty Co*., 319 P.2d 1078 (Colo. 1958) (noting that a statute eschewing strict rules of evidence and procedure, "cannot be so construed as to wipe out basic and fundamental rules governing the competency of evidence required to establish a fact in all judicial or quasi judicial proceedings"); *Cunningham v. Jerry Spears Co*., 197 N.E.2d 810, 814 (Ohio Ct. App. 1963) (referring to a non-adversary hearing: "The fact that the board is not 'bound by common law or statutory *rules* of evidence' does not and could not mean that the Legislature abrogated any requirement for *evidence* itself. [¶] The basic philosophy of judicial procedure revolves around the principles of fairness, relevance, reliability and public policy. . . . The principles remain even though their formulation as technical court rules may be inappropriate to the operation of this agency.") (italics in original).

---

[6] The opinion of an unqualified VA physician, physician's assistant or nurse can never meet this minimum standard.

In short, the VA's informal and relaxed rules of evidence are not a license for a free-for-all. Bedrock principles of reliability and fairness are essential in any legal proceeding, especially "in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight." *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998). "To the extent that Congress has relaxed evidentiary requirements in the VA context, it did so to *benefit*, not penalize, claimants." *AZ v. Shinseki*, 731 F.3d 1303, 1322 (Fed. Cir. 2013) (italics in original, citation omitted). No wonder then that the Veterans Court has relied upon many Federal Rules of Evidence to ensure the reliability, integrity and pro-claimant structure of VA proceedings. Pet. 20 n.15.

III.

THE COURT SHOULD GRANT CERTIORARI TO PREVENT THE FEDERAL CIRCUIT'S PRESUMPTION OF COMPETENCY FROM SUBVERTING THE VA'S INQUISITORIAL FORUM WHICH SERVES MOSTLY *PRO SE* CLAIMANTS

Petitioner argued at length – and the Secretary does not dispute – that the VA system follows a non-adversarial, inquisitorial model. Pet. 11-14. This paradigm, the Court said in *Sims v. Apfel*, 530 U.S. 103 (2000), places upon "[the agency], not the claimant, [the] primary responsibility for identifying and developing the issues." *Id.* at 112.

As such, the hallmark of an inquisitorial system is the absence of a waiver principle. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006) ("What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties. In an inquisitorial system, the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves.") (citation and internal quotation marks omitted); see *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered . . . distinguishes our adversary system of justice from the inquisitorial one.").

Yet, by virtue of the Federal Circuit's presumption of competency, VA claimants face a daunting three-fold waiver regime: they must 1) raise a general objection with no information about the examiner's qualifications, 2) request the VA to provide such information or somehow obtain this information on their own, and 3) then, with this information, set forth specific reasons why the examiner is unqualified to provide an expert opinion. *See* Pet. 15. Needless to say, these procedural requirements are the quintessential trappings of an adversarial system. This waiver scheme would be a formidable challenge to any claimant in any legal system. But applying it against *pro se* disabled veterans, many

struggling with severe mental illnesses, makes "a mockery of the VA's non-adversarial, paternalistic system." Pet. 17, 27-28.

CONCLUSION

For the reasons stated, petitioner respectfully asks that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

MARK R. LIPPMAN
Counsel of Record
THE VETERANS LAW GROUP
8070 La Jolla Shores Drive
Suite 437
La Jolla, CA 92037
888-811-0523
mlippman@veteranslaw.com

Counsel for Petitioner Freddie H. Mathis