No. _____

In The
Supreme Court of the United States

FREDDIE H. MATHIS,

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

Under 38 U.S.C. § 5103A (2000) and 38 C.F.R. § 3.159(c) (2000), the Secretary of Veterans Affairs ("the Secretary," "the VA" or "the Agency") has a duty to assist disabled veterans in obtaining evidence to substantiate their disability claims. To this end, the VA provides over one million medical examinations yearly to ensure complete and reliable adjudications. §§ 5103A(d)(1), 3.159(c)(4). Many of these evaluations require medical professionals with a proficiency in one or more medical specialties. To select *qualified/competent* medical personnel to evaluate the many diverse disabilities, the Agency has a vast contingent of VA and non-VA medical professionals from which to choose. Yet, whether the VA actually selects qualified evaluators is unknown, because, with few exceptions, the VA lacks clear and consistent standards or procedures for the selection of appropriately qualified medical personnel and does not routinely disclose the credentials of its medical evaluators.

The question presented is: Whether the Federal Circuit erred by creating a presumption of competency for all VA medical evaluators, (including physician assistants, nurses and other non-physician health practitioners) to provide an expert opinion on any medical issue, the so-called *presumption of competency*, thus placing the burden on disabled veteran claimants, most of whom are *pro se* and many suffering "from very significant psychiatric and physical disabilities,"[1] to

[1] *Dixon v. Shinseki*, 741 F.3d 1367, 1376 (Fed. Cir. 2014).

QUESTION PRESENTED – Continued

rebut the presumption by raising a competency objection, by ascertaining evidence of the evaluator's lack of qualifications and then by articulating specific reasons in support of the competency challenge.

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PETITION FOR A WRIT OF CERTIORARI

Freddie Mathis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in the case below.

OPINIONS BELOW

The precedential order denying en banc review of the Court of Appeals for the Federal Circuit (App. 70-101) is unreported, and can be found at 2016 U.S. App. LEXIS 15232. The opinion of the Federal Circuit's three-judge panel (App. 1-44) is unreported, and can be found at 2016 U.S. App. LEXIS 5968. The opinion of the United States Court of Appeals for Veterans Claims ("the Veterans Court") (App. 45-53) is unreported and can be found at 2015 U.S. App. Vet. Claims LEXIS 654.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on April 1, 2016. The petition for rehearing en banc was denied on August 19, 2016. App. 70-101. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions and relevant VA guidelines are reproduced in the appendix to this petition. App. 102-26.

STATEMENT

Out of respect and gratitude for the sacrifices made by disabled veterans, Congress created The VA Disability Benefits Program, a uniquely non-adversarial and paternalistic system, imbued with special statutes, regulations, rules and procedures in favor of disabled veterans. "Both the Supreme Court and [the Federal Circuit] have long recognized that the disputes that arise in this system are subject to procedural and other rules that are distinctly advantageous to the veteran claimant." *Bailey v. West*, 160 F.3d 1360, 1369 (Fed. Cir. 1998) (en banc) (Michel, J., concurring) (citations omitted).

Recently however, the Federal Circuit has inserted into this benevolent system a blanket presumption of competency for all VA medical evaluators, creating a high risk that countless disability evaluations are unreliable and inaccurate. There is a sad irony to this new development: The VA's uniquely pro-claimant system is the only forum in the American legal system with anything like the presumption of competency. This judicially-created behemoth greatly undermines the integrity of the medical evaluation and

decision-making process, insulting the values and principles basic to the VA system: "To care for him who shall have borne the battle and for his widow, and his orphan." Abraham Lincoln, 2nd Inaugural Address (March 1865).

1. Processing VA disability claims involves two organizations. The Veterans Benefits Administration ("VBA") is responsible for the VA's disability adjudication system. It has many regional offices throughout the country, each with several adjudicators who develop the record (including requesting medical evaluations), and decide claims. The Board of Veterans' Appeals ("the Board" or "the BVA") is the next level of adjudication, and it too may develop the record and decide claims. 38 U.S.C. §§ 5103A (duty to assist), 5104 (regional office adjudication), 7104 (Board adjudication).

The other organization, the Veterans Health Administration ("VHA"), manages the VA's health care system and, most importantly here, administers the program for procuring medical examinations and opinions to evaluate disability claims. App. 116.

Under its duty to assist, 38 U.S.C. § 5103A(d)(1), 38 C.F.R. § 3.159(c)(4), the VA frequently provides medical examinations and opinions to substantiate the claims of disabled veterans.[2] These medical evaluations are fundamental to the adjudication process.

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[2] Sections 5103A(d)(1) and 3.159(c)(4) speak of "providing a medical examination or obtaining an opinion." App. 102-03. The term *medical examination* denotes a disability evaluation, based

"Because of the immense importance of medical evidence in the VA claims process, whether or not a claimant receives a VA medical examination or opinion can bear significantly upon the outcome of the claim for VA benefits." *Washington v. Nicholson*, 21 Vet.App. 191, 197 (2007) (Hagel, J., concurring).

When a VA adjudicator determines that a medical evaluation is necessary, he or she sends a request to one of the VHA's local medical facilities. App. 106 (Veterans Administration Adjudication Procedural Manual M-21, Manual Rewrite) ("VA M-21 Manual").[3] In

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upon a personal examination and a record review, whereas the term *medical opinion* refers to an evaluation based solely upon a record review. By *evaluation*, petitioner refers generally to both medical examinations and opinions.

Before the Federal Circuit, the Secretary represented that, in addition to VA examinations, 2,899,593 disability benefits questionnaires ("DBQs") and/or disability examination templates are completed yearly. Govt's Response to pet. for reh'g en banc at 8; App. 82 (Hughes, J., concurring in the denial of the rehearing en banc) (relying upon government's representation). However, the Secretary failed to cite any support for this statistic and the Secretary now advises that none exists. This aside, the purported statistic does not mean that additional personnel are needed to complete the DBQs. That is, a single examiner or evaluator often prepares two or more DBQs for the same claimant. *See* Hearings before Committee of Veterans Affairs, U.S. House of Representatives, *VBA & VHA Interactions; Ordering & Conducting Medical Examinations*, 113th Cong., 2nd Sess., Serial No. 113-77 at 38 (June 12, 2014) (VHA representative testifying that a single examiner may prepare several DBQs).

[3] The VA M-21 Manual "is an internal manual used to convey guidance to VA adjudicators." 72 Fed. Reg. 66,218, 66,219 (Nov. 27, 2007).

nearly all cases, the medical facility alone is then responsible for selecting an adequately *qualified* medical professional to perform the evaluation. App. 113. However, with few exceptions, neither the VBA nor the VHA has any standards or guidelines for determining the appropriate qualifications (education, training or experience) needed for a competent evaluation. What is more, when VA adjudicators do make requests for medical evaluators with specific qualifications, these requests are frequently ignored. App. 37-38 (Reyna, J., concurring) ("The Board sometimes requests examiners with specific expertise, although the VA considers itself free to disregard such requests unless they specifically require a board-certified or 'board qualified' examiner.").

Equally problematic, the VBA and the VHA admit to a strong preference for requesting/selecting general medical health practitioners over specialists to perform most disability evaluations. App. 108-09, 115 (VBA Fast Letter 10-32 (September 1, 2010))[4] ("For example, an office may order a cardiac examination, but it should not generally request that a cardiologist (a specialist) conduct it."); *see also* Hearings before Committee of Veterans Affairs, U.S. House of Representatives, *VBA & VHA Interactions; Ordering & Conducting Medical Examinations*, 113th Cong., 2nd Sess., Serial

[4] VA Fast Letters are directives issued from time to time to make current adjustments to VA procedure. *See* VA Trainee Handouts, Chap. 3 at 10, *available at* http://www.nd.gov/veterans/files/resource/Chapter%203%20-%20Reference%20Materials.pdf (website last viewed on November 3, 2016).

No. 113-77 at 38 (June 12, 2014) (VHA representative testifying that generalists are used whenever possible).

Nonetheless, VA adjudicators are not expected to request and review the credentials of VA medical evaluators. App. 113. Ironically, the VA's own Chief Counsel for Policy and Procedure of the Board of Veterans' Appeals recommends the routine disclosure of the credentials of VA medical evaluators to assist adjudicators in assessing the probative value of their medical opinions. James D. Ridgeway,[5] *Mind Reading and the Art of Drafting Medical Opinions in Veterans Benefits Claims*, Psychol. Inj. and Law (2011) 4:171-186 at 177.

Despite this confused, disjointed and largely random selection process, in *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009), and its line of cases,[6] the Federal Circuit has carved out an exception to the general affirmative proof requirement, creating a presumption of competency for all VA medical evaluators. Under the presumption, any VA medical professional is deemed competent to opine on any medical issue, unless the disabled veteran: 1) objects to the evaluator's competency, 2) then, requests the VA to provide information about his/her qualifications, and 3) finally, based upon

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[5] Mr. Ridgeway is Chief Counsel for Policy and Procedure for the Board of Veterans' Appeals. *See* https://www.law.gwu.edu/james-d-ridgway (website last viewed on October 22, 2016) (giving background of Mr. Ridgeway).

[6] *See Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010); *Sickels v. Shinseki*, 643 F.3d 1362, 1365 (Fed. Cir. 2011); *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013).

this information, articulates specific reasons why the evaluator is not competent to perform the evaluation.

2. a. Petitioner Freddie Mathis filed a claim to entitlement to service-connection for pulmonary sarcoidosis.[7] Throughout the Agency proceedings, the claimant was assisted by a representative of a veterans service organization, a non-lawyer representative. App. 54. Under its duty to assist, the VA procured a medical opinion from a VA physician to address the issue of service-connection: namely, whether the claimant's sarcoidosis began during, or, was caused by, military service. No information was disclosed about the physician's qualifications. In his report, the VA physician opined against service-connection and, based in large part upon this medical opinion, the Board denied the claim. App. 65, 68.

b. Before the Veterans Court, petitioner, now represented by legal counsel, argued that the VA erred by failing to show the VA physician's qualifications to provide a competent opinion in the field of pulmonology. Affirming the Board's decision, the Veterans Court noted petitioner's failure to raise a competency challenge before the Agency and, therefore held that the competency challenge had been waived. App. 51-52.

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[7] Dorland's Illustrated Medical Dictionary 1668 (32d ed. 2012) (Sarcoidosis ("a chronic, progressive, systemic granulomatous reticulosis of unknown etiology, characterized by hard tubercles.")).

c. Petitioner appealed to the Federal Circuit Court of Appeals. A three-judge panel affirmed the Veterans Court's decision, explaining: "Because we are bound by this court's controlling precedent establishing a presumption of competency of VA examiners, we affirm." App. 2. However, Judges O'Malley and Reyna wrote lengthy majority and concurring opinions, respectively. App. 2-16, 16-44.

Judge O'Malley agreed with petitioner's argument that, under the presumption of regularity, the VA failed to show routine, non-discretionary and reliable procedures to ensure the selection of qualified evaluators:

> Mathis's presumption of regularity argument in particular presents some legitimate concerns. Rizzo invoked three cases in support of its holding: Cox, 20 Vet. App. at 568, Miley v. Principi, 366 F.3d 1343, 1347 (Fed. Cir. 2004), and Butler v. Principi, 244 F.3d 1337, 1338 (Fed. Cir. 2001). None of these cases, however, provides a solid foundation for the broad application of the presumption of regularity to medical examiners.
>
> * * *
>
> The government attempts to reassure us that the veteran may obtain a specialist's opinion where the government determines that such an opinion is "necessary to make a decision on the claim," 38 U.S.C. § 5103A(d). But the process by which the VA appoints examiners for a particular case remains unclear. Without this information, we cannot tell whether the

> procedures in question are, in fact, regular, reliable, and consistent.

App. 11, 15.

Judge Reyna urged the elimination of the presumption of competency for essentially the same reason:

> The presumption of competence was created based on the presumption of regularity, and it was unprecedented to apply the presumption of regularity to a process such as determining whether a nurse is qualified to provide an opinion on a particular issue. . . . Applying the presumption of regularity requires evidence that a process is regular, and such evidence has not been presented.

App. 18.

Judge Reyna added that requiring VA evaluators to provide affirmative evidence of their qualifications would not create a significant administrative burden:

> Because the VA usually selects generalist examiners, an examiner's CV usually will not show that the examiner has any expertise in the subject of her report. If a CV reveals that an examiner lacks such expertise, she can also explain in her report why she is qualified. Including such a statement would not be difficult for examiners. If an examiner prepares a statement describing why she is qualified to opine on cardiac issues, for example, she can

> likely reuse it the next time she opines on cardiac issues.

App. 30-31.

d. Petitioner filed a petition for rehearing en banc. The Federal Circuit denied the petition by an 8-5 vote in a precedential order. App. 70-101. The order included four opinions: two concurrences and two dissents. Judge Dyk wrote a lone concurring opinion (App. 72-73); Judge Hughes wrote a concurrence, joined by Chief Judge Prost and Judges Lourie, O'Malley, Taranto and Chen. App. 73-83. Two separate dissenting opinions were written, one by Judge Reyna, joined by Judges Newman and Wallach (App. 83-99), and the other by Judge Stoll, joined by Judges Newman, Moore and Wallach. App. 100-01.

"[A]lthough sympathetic to the concerns raised regarding the presumption of competency, and its potential for misuse by the VA," Judge Hughes saw no reason to eliminate the presumption of competency. App. 82.

In his dissent, Judge Reyna underscored the absence of any support for the presumption of competency and its incompatibility with the VA's non-adversarial, claimant-friendly structure:

> The presumption, that the Veterans Administration ordinarily and routinely selects competent medical examiners as a matter of due course, was created void of any evidentiary basis. Its application has resulted in a process that is inconsistent with the Congressional

> imperative that the veterans' disability process be non-adversarial, and that the VA bears an affirmative duty to assist the veteran.

App. 83.

Judge Reyna further explained that removing the presumption of competency would improve the development of the record for the benefit of the Board and VA claimants. App. 99.

In a separate dissent, Judge Stoll "question[ed] the propriety of such a presumption in a uniquely pro-claimant and non-adversarial system." App. 100.

REASONS FOR GRANTING THE PETITION

A) The Presumption of Competency Subverts the VA's Inquisitorial Role of Raising and Fully Developing All Issues On Behalf of Claimants

1) The VA's Inquisitorial System

Similar to the Social Security Disability System, as described in *Sims v. Apfel*, 530 U.S. 103 (2000), but unlike nearly all other adjudicatory forums, the VA Disability Benefits System is based upon a non-adversarial, inquisitorial model. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) ("The contrast between ordinary civil litigation – which provided the context of our decision in Bowles – and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic. In ordinary civil

litigation, . . . the litigation is adversarial. Plaintiffs must gather the evidence that supports their claims and generally bear the burden of production and persuasion. [¶] [P]roceedings before the VA are informal and nonadversarial. The VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims. . . .").

In passing the Veterans Judicial Review Act of 1988, Congress wrote the now iconic passage affirming the non-adversarial nature of the VA adjudicatory system:

> Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> *Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.* Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best

> evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.

H.R. Rep. No. 963, 100th Cong., 2d Sess. 13, reprinted in 1988 U.S. Code Cong. & Admin. News 5782, 5795 (italics added).

This means that, like the adjudicators of the Social Security Disability Benefits system, VA adjudicators are responsible for raising and developing issues. In *Sims*, 530 U.S. 103, the High Court made clear that the Social Security Disability Administration, as a non-adversarial forum, carries the burden of raising and developing all issues on behalf of claimants:

> Thus, the *Hormel*[8] analogy to judicial proceedings is at its weakest in this area. The adversarial development of issues by the parties – the "coming to issue," 312 U.S. at 556 – on which that analogy depends simply does not exist. *The Council, not the claimant, has primary responsibility for identifying and developing the issues*. We therefore agree with the Eighth Circuit that "the general rule [of issue exhaustion] makes little sense in this particular context."

530 U.S. at 112 (citation omitted) (italics added); *Henderson*, 562 U.S. at 437 (noting the strong similarities between the Social Security and VA disability benefit systems); *McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008) ("Taken together, the passage of Veteran's Judicial Review Act §§ 103(a) and 203(a) create a statutory

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[8] *Hormel v. Helvering*, 312 U.S. 552 (1941).

context in which the VA is required to assist the veteran claimant with fully developing a record before making a decision on the veteran's claim. This fully developed record then forms the basis of a Board decision."); *see Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc) (Mayer, J., dissenting) ("Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus. It is entirely inquisitorial in the regional offices and at the Board of Veterans' Appeals where facts are developed and reviewed. The purpose is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.").

2) The Presumption of Competency

In 2009, the Federal Circuit created an unprecedented exception to the VA's inquisitorial, non-adversarial format. In *Rizzo*, 580 F.3d 1288, the Federal Circuit first held that all VA medical evaluators are presumed competent to provide an opinion on any medical issue and, in the absence of a veteran's competency challenge, the VA is not required to disclose their qualifications or to otherwise prove their competency:

> 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. Indeed, where as here, the veteran does

> not challenge a VA medical expert's competence or qualifications before the Board, this court holds that VA need not affirmatively establish that expert's competency.

Id. at 1291.

In subsequent cases, the Federal Circuit read *Rizzo* to impose three procedural requirements to mount a valid competency challenge: the veteran must 1) raise a general objection when he or she "suspects a fault with the medical examiner's qualifications,"[9] 2) then "request [from the VA] information about [the] expert's qualifications,"[10] and 3) based upon this information, "set forth specific reasons why" the examiner "is not qualified to give an opinion."[11] Remarkably, these procedural requirements apply to *pro se* claimants.[12]

Thus, evaluated even in the most favorable light, the presumption's protocol of procedures is wholly

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[9] *Sickels v. Shinseki*, 643 F.3d 1362, 1365 (Fed. Cir. 2011); *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) ("the first step to overcoming the presumption is to object"). The first step of a competency challenge requires exceptional intuition, as the record rarely contains information about an evaluator's education, training or experience.

[10] *Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010); *Parks*, 716 F.3d at 585 ("If an objection is raised it may be necessary for the veteran to provide information to overcome the presumption.").

[11] *Bastien*, 599 F.3d at 1307.

[12] *Parks*, 716 F.3d at 585 (explaining that "[t]he first step to overcoming the presumption [of competency] is to object, even where . . . the veteran is acting pro se").

out-of-place with "a process designed to function with a high degree of informality and solicitude for the claimant." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985).

B) The VA System Serves Mainly *Pro Se* Claimants; Imposing Stringent Procedural Requirements Against Disabled Veterans Who Have No Training or Experience in Legal Proceedings Is Inherently Unjust

Because of its paternalistic structure, "the veterans benefits program is unusually protective of claimants." *Henderson v. Shinseki*, 562 U.S. 428, 437 (2011) (citation and interior quotations omitted). This special protection is heightened for *pro se* claimants because they lack a basic understanding of procedural and substantive law. *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007) ("The duty to sympathetically read exists because a pro se claimant is not presumed to know the contents of title 38 or to be able to identify the specific legal provisions that would entitle him to compensation.").

In the VA system, the vast majority of claimants are not represented by attorneys. (2015 BVA Annual Report at 35, *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf (showing 13% of the claimants before the Board were represented by counsel); James D. Ridgeway, *The Veterans Judicial Review Act*, NYU, Annual Survey of American Law, Vol. 66:251 at 262 (Oct. 2010) ("claimants without

attorney representation dominate the landscape of veterans law"). Claimants are mostly assisted by veteran service officers, lay representatives with no legal education. 38 C.F.R. § 14.629(a) (setting forth the requirements for VA accreditation of service organization representatives). Thus, in no way is "the assistance provided by [a veteran service officer] . . . the equivalent of legal representation. . . ." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009). As such, claimants represented by veteran service officers are considered *pro se* claimants. *Id.* ("This sort of legal assistance is insufficient to disqualify [a claimant] as a pro se claimant.").

Under these circumstances, invoking a presumption of competency, especially against *pro se* claimants – many suffering "from very significant psychiatric and physical disabilities"[13] – makes a mockery of the VA's non-adversarial, paternalistic system. *Pro se* claimants have no concept of the legal requirements imposed by the presumption, lacking the simple awareness – let alone the sophistication – to raise a timely objection, to request information about the examiners' qualifications and then to articulate specific reasons for their lack of competency. These procedural demands are foreign to the VA's inquisitorial model and oppressive to those special individuals who have sacrificed so much for our country. *Percy v. Shinseki*, 23 Vet.App. 37, 47 (2009) ("It is inconsistent with that congressional intent for VA to treat its procedures as a

[13] *Dixon v. Shinseki*, 741 F.3d 1367, 1376 (Fed. Cir. 2014).

minefield that the veteran must successfully negotiate in order to obtain the benefits that Congress intended to bestow on behalf of a grateful nation.").

C) The Importance of Qualified VA Medical Evaluations

To disabled veterans, VA medical evaluations are the lifeblood of the adjudication process. Without them, they have little chance of succeeding on their claims:

> Whether or not a veteran receives a VA medical examination can have a significant bearing on the outcome of a veteran's claim for disability compensation. If provided with an examination, a veteran, although certainly not entitled to benefits automatically, is afforded an opportunity to obtain the expert medical evidence that is often necessary to support a claim for benefits. If denied an examination by VA, however, a veteran may be ill suited to acquire that evidence on his or her own. The veteran is faced with the somewhat-daunting task of obtaining and likely paying for a specialized opinion from an expert who may be unfamiliar with the contents of the service medical and other treatment records and who is uninformed regarding the importance of certain standards peculiar to the needs of the VA adjudication system.

Duenas v. Principi, 18 Vet.App. 512, 521 (2004) (Hagel, J., concurring).

With so much riding on VA medical evaluations, selecting appropriately *qualified* medical professionals to evaluate the many different types of disabilities is essential. This undeniable proposition begs the ultimate question: Who should bear responsibility for developing an adequate record to determine whether qualified medical professionals in fact are performing disability evaluations – *pro se* claimants or VA staff? To ask this question is to answer it. Obviously, the VA knows best the credentials of its medical professionals and has the best access to this information.[14] *Compare Campbell v. United States*, 365 U.S. 85, 96 (1961) ("the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary").

It goes without saying that not all physicians – and surely not all medical health practitioners – are qualified to offer an expert opinion on every medical issue. At the very least, the practitioner needs some education, training or experience in the relevant medical field. *See Gayton v. McCoy*, 593 F.3d 610, 617 (7th Cir. 2010) ("simply because a doctor has a medical degree does not make him qualified to opine on all medical subjects"); *Whiting v. Boston Edison Company*, 891 F.Supp. 12, 24 (D. Mass. 1995) ("Just as a lawyer is not

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[14] *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (holding that the government has special access to information about its medical staff and similar relevant data and therefore has the burden to produce evidence on issues requiring this information).

by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have knowledge about every conceivable scientific principle or disease."); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001) ("merely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue"); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1113 (5th Cir. 1991) (per curiam) ("M.D. degree. . . . alone is not enough to qualify [a putative expert] to give an opinion on every conceivable medical question").

For civil and criminal law, Rule 702 of the Federal Rules of Evidence provides the standard for determining the qualifications of an expert witness: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Fed.R.Evid. 702 (2014).

While the Federal Rules of Evidence are not binding on VA adjudication, Rule 702 has been held to be a useful guide for evaluating VA medical opinion evidence.[15] *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295,

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[15] The Veterans Court has relied upon many Federal Rules of Evidence to ensure the reliability and integrity of VA proceedings. *See, e.g.*, *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (citing Federal Rule of Evidence 803(7)); *Rucker v. Brown*, 10 Vet.App. 67, 73 (1997) ("[R]ecourse to the [Federal] Rules [of Evidence] is appropriate where they will assist in the articulation of the Board's reasons."); *Posey v. Shinseki*, 23 Vet.App. 406, 410 (2010) (citing as a useful guide Federal Rule of Evidence 803(6)); *Hampton v. Nicholson*, 20 Vet.App. 459, 462 n.1 (2006) (referring to Federal

302 (2008) ("Both VA medical examiners and private physicians offering medical opinions in veterans benefits cases are nothing more or less than expert witnesses. While the Federal Rules of Evidence are not binding in this Court, nor on the Board, the rules on expert witness testimony provide useful guidance that has been exhaustively vetted by both the Rules Advisory Committee and by the U.S. Congress.").

Yet, under the Federal Circuit's presumption of competency, every VA medical health practitioner is presumed qualified to provide an expert opinion on any medical issue, no matter how complex or specialized. Thus, the presumption creates a substantial risk that unqualified medical opinions will decide disability claims, resulting in a random, arbitrary and flawed method for adjudicating claims. To a non-attorney VA adjudicator[16] with only a lay understanding of medical concepts and terminology, an unqualified medical health practitioner could easily pass as a compelling expert by parroting medical literature or by throwing in technical medical jargon.

In his concurring opinion, Judge Reyna discussed this problem:

Rules of Evidence 801(d)(2), 803(6), and 805 as useful guides in determining the Court's jurisdiction); *Counts v. Brown*, 6 Vet.App. 473, 476 (1994) (citing Federal Rule of Evidence 401).

[16] *See* Ridgeway, *Mind Reading and the Art of Drafting Medical Opinions in Veterans Benefits Claims*, Psychol. Inj. and Law 4:171-186 at 172-173 (2011) (explaining that adjudicators at the regional offices are not attorneys).

> Determining whether an opinion is adequate and weighing its probative value solely on its analysis without knowledge of its author's qualifications can lead to absurd results. Because the analysis turns on the author's skill in opinion-writing rather than skill in medicine, a skilled opinion writer could write persuasive opinions about issues she is entirely unqualified to opine about.

App. 26-27.

There is no reason for this. As the Chief Counsel for Policy and Procedure for the Board of Veterans' Appeals insightfully points out, the presumption of competency creates a sense that the skills, training and experience of VA medical evaluators are fungible, and for this reason, having evaluators routinely show their credentials would greatly assist VA adjudicators in evaluating their opinions:

> One traditional component of the foundation for expert courtroom testimony that is not generally emphasized in the veterans claims system is the [doctor's][17] credentials. *The BVA "is entitled to assume the competence of a VA Examiner." As a result, the credentials of [doctors] are nearly universally unstated, which creates a general sense in the claims adjudication system that doctors are largely fungible*. The only issues that tend to arise occur when

[17] The author refers specifically to psychiatrists and psychologists, but his discussion applies universally to all VA evaluators. *Id*. at 171 n.2.

> an opinion from a specialist is sought or recommended, but not obtained. Nonetheless, the CAVC has held that credentials are a factor that lay adjudicators can consider in weighing conflicting medical opinions, and *there is no reason that physicians could not include a summary of their credentials in an opinion to help provide greater clarity in how the opinion should be weighed against conflicting medical or lay opinions*.

Ridgeway, Psychol. Inj. and Law (2011) 4:171-186 at 177 (footnotes & citations omitted) (italics added).

D) Supreme Court Authority Weighs Against the Presumption of Competency

In two cases, this Court set forth the analytical framework for determining the propriety of judicial presumptions. In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Court discussed several factors to guide courts in deciding whether to create an evidentiary presumption: namely, "considerations of fairness, public policy, and probability, as well as judicial economy. . . ." *Id.* at 245.

Applying these considerations, the High Court in *United States DOJ v. Landano*, 508 U.S. 165 (1993) rejected the Department of Justice's (DOJ) bid for a presumption of confidentiality of all information sources cooperating with the government during the course of a criminal investigation. *Landano* observed that the government receives information from a variety of sources, some (arguably most) are sensitive and others

routine. *Id.* at 176. However, the DOJ failed to establish a strong probability that nearly all of these sources were confidential. For this reason, *Landano* held that a presumption of confidentiality was unwarranted:

> It may be true that many, or even most, individual sources will expect confidentiality. But the Government offers no explanation, other than ease of administration, why that expectation *always* should be presumed. The justifications offered for presuming the confidentiality of all institutional sources are less persuasive.

Id. (italics added); *compare Basic Inc.*, 485 U.S. at 246-47 (holding that the presumption of reliance upon the integrity of the market is based upon the extremely high probability that nearly every buyer or seller in the market relies upon market integrity).

1. No Evidence of Regularity of Procedure

Concerning the probability factor for judicial presumptions, the Federal Circuit has relied upon the presumption of regularity to justify imposing the presumption of competency. *Rizzo*, 580 F.3d at 1292; *Parks*, 716 F.3d at 584. However, as Judge O'Malley observed in her concurring opinion, the presumption of regularity is based upon the consistency of a standard ministerial procedure, resulting in a high probability of an accurate and reliable outcome, a showing absent in the presumption of competency:

> The presumption of regularity,[18] like the hearsay exception in the Federal Rules of Evidence, has "at [its] root a showing that the [result] was a product of a consistent, reliable procedure." Thus, the presumption should be predicated on evidence that gives us confidence that a particular procedure is carried out properly and yields reliable results in the ordinary course.
>
> * * *
>
> Nowhere in the *Rizzo* lines 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.

App. 12, 14.

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[18] This reference to the presumption of regularity, based upon a showing of the consistency and reliability of agency procedures, should not be confused with the presumption of regularity attaching to public officials, sometimes labeled the presumption of good faith. *T & M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999) ("Government officials are presumed to act in good faith. . . ."). The later presumption assumes the good faith of governmental officials who must exercise substantial discretion in the performance of their duties. It rests entirely upon policy, not upon factual probability. That policy is to keep the judiciary from micromanaging "core executive constitutional function[s]." *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (citing the leading case, *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926); *Armstrong*, 517 U.S. at 465 ("Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts.").

Ironically, with the selection of VA medical evaluators, not only is there no proof of the reliability of the VA's procedures, but the VA's own published guidelines suggest they are wholly unreliable. The VA M-21 Manual instructs its staff to choose general practitioners over specialists to perform most disability evaluations. App. 109 (apart from vision, hearing, dental, and psychiatric examinations, "[o]n rare occasions, it may be necessary to request a specialist examination for other types of disabilities"); App. 115 ("For all other types of examinations, a generalist clinician may perform the examination. For example, an office may order a cardiac examination, but it should not generally request that a cardiologist (a specialist) conduct it.").

As Judge Reyna explained, the VA's strong preference for selecting general practitioners carries a high risk of producing unqualified opinions on new, complex or specialized medical issues:

> The VA's emphasis on using generalist examiners is concerning. While a generalist healthcare provider may have experience treating patients with a wide variety of ailments, and may be similarly qualified to treat patients as a specialist is, the opinions examiners are asked to provide are often more complicated than mere diagnosis or treatment. For example, the questions the examiner needed to answer in this case included whether Mr. Mathis's sarcoidosis occurred as a result of his military service, if it began while he was in service, or if symptoms of it had occurred within one year of his service.

> Particularly when an examiner is presented with issues such as what caused a disease or when it began, the examiner's opinions are necessarily somewhat speculative, even when the examiner is an expert on that disease. Specialist doctors exist because the body of medical knowledge is larger than any individual doctor can learn, and it continues to grow as new research is conducted. No doctor can read every journal in every specialty.

App. 36-37.

2. Presumption is Virtually Impossible to Rebut

Turning to considerations of fairness, *Landano* held that the level of difficulty in rebutting a presumption should figure prominently in deciding whether to impose a judicial presumption. 508 U.S. at 178 (declining to impose presumption of confidentiality in part because it would be virtually impossible to rebut). In his dissent from denial of the rehearing en banc, Judge Reyna argued that the difficulty, if not virtual impossibility, for claimants to rebut the presumption of competency unfairly compromises due process principles. App. 91-97. However, the same concerns apply to *Landano*'s more specific calculus for judicial presumptions.

For *pro se* claimants in particular, rebutting an examiner's presumed qualifications is an unrealistic, if not unimaginable, burden. Without an inkling of the legal and medical standards governing competency

determinations, and without VA notice or assistance of any kind as to the type of evidence needed to rebut the presumption or how to obtain it, *pro se* claimants, many struggling with psychiatric disabilities, would not know where or how to begin a competency challenge.[19] *Compare Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) ("The VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him.") (citation and interior quotation marks omitted).

E) The Presumption of Competency Undermines the Legislative Goal of Transparency & Accountability in VA Adjudication

The presumption of competency undermines "the Congressional policy embodied" in the Veterans Judicial Review Act (VJRA) of 1988. *Basic Inc.*, 485 U.S. at 246 (observing that the general intent of a legislative act should inform the decision whether to create a judicial presumption).

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[19] Given this stark reality, little cold comfort can be found in Judge Hughes's assurance that "a veteran may always request information to challenge an examiner's competency from the regional office or the Board." App. 73. Along similar lines, Judge Hughes cites five cases, four Board decisions and one Veterans Court opinion in which, at the claimant's request, the VA was ordered to produce the examiner's CV. App. 75. However, Judge Hughes omits the fact that, in each of the cited cases, an attorney represented the claimant.

To end the VA's long history of "splendid isolation"[20] from judicial review, Congress enacted the VJRA. Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). Among other things, the VJRA added 38 U.S.C. §§ 7261 and 7292, creating two levels of judicial review of VA determinations, the first at the Veterans Court, followed by more limited review at the Federal Circuit. *Prinkey v. Shinseki*, 735 F.3d 1375, 1382 (2013) ("After extensive debate about the kind of judicial review that should be afforded to veterans, Congress settled on creation of the Veterans Court and on limited review by the [Federal Circuit] of decisions of the Veterans Court.").

By instituting judicial review, Congress strived for transparency, accountability and ultimately greater accuracy in the VA adjudication process. *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007) ("The VJRA established the Veterans Court and provided for review by that tribunal of certain Board decisions. As the legislative history to the VJRA makes clear, section 7104(d)(1) [of Title 38] was designed to promote the development of a record of the agency proceedings that would permit a reviewing court to understand and evaluate the proceedings as part of its review.") (citation and interior quotation marks omitted); *Spencer v. Brown*, 17 F.3d 368, 372 (Fed. Cir. 1994) ("the reforms

[20] *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (noting the VA's "splendid isolation" from judicial review prior to 1988, quoting H.R. Rep. No. 100-963, pt. 1, p. 10 (1988)).

implemented by the VJRA were directed to improving the adjudicative process").

Yet, by cloaking all VA medical professionals with the presumption of competency, the Federal Circuit effectively removes from judicial oversight the VA's actual method (or lack thereof) for selecting its putative medical experts.[21] *Rizzo* is therefore a giant step backwards towards the VA's dark ages, before judicial review could ensure the VA's minimum level of compliance with basic procedure.[22]

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[21] Judge Hughes notes that the alleged problem of selecting unqualified examiners is "not supported by any evidence." App. 80. This paradoxical statement deserves a line in *Catch-22* – the presumption is the very reason such evidence is hidden from judicial review.

[22] Judge Hughes downplays the effect of the presumption, emphasizing its limited applicability to the qualifications of VA medical evaluators. App. 73-74. Judge Hughes's terse reasoning is not persuasive. For one, Judge Hughes fails to cite any statute, regulation or legal principle justifying the creation of the presumption of competency; and, he does not explain why a similar presumption should not apply to "the Secretary's other legal obligations, including the duty to assist and to develop the record. . . ." App. 74. For another, in determining the probative value of medical opinion evidence, Judge Hughes overlooks the interrelationship between the examiners' qualifications and the adequacy of their reports. *See Guerrieri v. Brown*, 4 Vet.App. 467, 470-71 (1993) ("The probative value of medical opinion evidence is based on the medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion that the physician reaches."); *compare* App. 28 (Reyna, J., concurring) ("[T]he Board still weighs the probative value of competing reports on the basis of credentials."). Finally, Judge Hughes undervalues the importance of ensuring the expert qualifications of VA examiners. Qualified experts are

In his concurrence, Judge Hughes cites various VA measures as sufficient assurance of the integrity and accuracy of its selection process for qualified medical evaluators:

> [T]he dissent suggests that the VA periodically engages unqualified examiners, and that the presumption insulates these examiners from any review. . . . However, VA regulations require that "competent medical evidence" be "provided by a person who is qualified by education, training or experience to offer medical diagnoses, statements or opinions." 38 C.F.R. § 3.159(a)(1). Examinations provided by the VA are generally conducted "by VA staff, VA contractor providers, or non VA-care providers." VHA Directive 1046 at 1 (Apr. 23, 2014). The VA Manual provides that "VA medical facilities (or the medical examination contractor) are responsible for ensuring that the examiners are adequately qualified." M21-1MR § III.iv.3.D.2.b. Every examination report or Disability Benefits Questionnaire (DBQ) must contain "the signature, printed name and credentials, phone number and preferably a fax number, medical license number, and address" of the examiner as well as his or her specialty, if a specialist examination is requested. *Id.* Although the Veterans Service Center employees "are not to routinely review

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no less important to the VA system than they are to other legal forums. Proof – not a presumption – of competency ensures a baseline level of expert knowledge in the relevant medical field and guarantees a substantial measure of reliability in the adjudication of VA disability claims.

> the credentials of clinical personnel to determine the acceptability of their reports," they must do so "if there is contradictory evidence of record." *Id.*

App. 79-80.

Judge Hughes's analysis is not persuasive. Except for specialist examinations, these provisions are much too general to justify a categorical presumption of competency for all VA medical evaluators. And, even if these provisions were more definitive, there is little reason to assume that they would be properly followed. To say the least, the VA has a well-documented history of procedural errors and inaccurate decision-making:

> Ultimately, the best measure of how well the [VA] system is performing is the accuracy of the decisionmaking. One commentator cautioned that "in any large scale benefit program that must make complex factual and legal determinations for a large number of cases, [i]t is easy to focus on the relatively small percentage of cases that are problematic and overlook the majority of cases in which the system works relatively well." However, the small sample of cases appealed to the CAVC suggests agency errors are frequent, as the CAVC fully affirms fewer than 35% of the BVA decisions that it addresses on the merits. On a wider scale, VA's Office of Inspector General released [OIG] a report in March 2009 concluding that VA's internal quality control system was under-reporting errors, and estimated that 203,000 of the 882,000 (24%)

> compensation claims decided over a one-year period contained non-technical errors that affected the amount of benefits paid. This report followed a previous one that found disturbing variances in the treatment of claims between different ROs, and a 2000 GAO [Government Accounting Office] report stating that stricter quality review measures implemented in 1999 showed that initial RO decisions were correct only 68% of the time. Thus, there is ample reason to be concerned about how well the current VA adjudication process works.

Ridgeway, *The Veterans Judicial Review Act*, Annual Survey of the Law, Vol. 66:251 at 270 (footnote citations omitted); *see* App. 89-90 (Reyna, J., dissenting from denial of the rehearing en banc) ("It is unclear why this court or the Veterans Court would assume that the VA's process for adjudicating benefits yields reliable results in the ordinary course, given that the Board remands almost half (47% in 2015) of disability compensation appeals back to the regional offices," citing U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals Annual Report Fiscal Year 2015 26 (2016), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf.).

In short, the VA's procedural obligations and guidelines remain just theory if compliance cannot be properly evaluated under judicial review; and, effective judicial review can only be accomplished with a fully developed record. 38 C.F.R. § 19.9 (1992) ("If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a

proper appellate decision, a Veterans Law Judge or panel of Veterans Law Judges shall remand the case to the agency of original jurisdiction, specifying the action to be undertaken."). Thus, full and proper record development is a first principle of VA adjudication. As a realistic matter, the presumption defeats this essential proposition by charging unknowledgeable and unwary *pro se* claimants (as opposed to trained VA personnel), with the responsibility of developing competency issues.

F) Administrative Efficiency Alone Cannot Justify the Presumption

In the final analysis, the presumption's only virtue is administrative economy. By exploiting uninformed and unsuspecting disabled veterans through its waiver scheme, the presumption surely expedites the VA's medical evaluation and decision-making process. But administrative efficiency alone is no reason for presuming (as opposed to showing) the reliability of the VA's selection process for qualified medical evaluators, especially in light of its dismal track record of erroneous adjudication. *See Landano*, 508 U.S. at 176 (holding that "ease of administration" was insufficient to justify applying a presumption of confidentiality for all cooperating law enforcement sources).

In his concurrence, Judge Hughes argues the necessity of the presumption to avoid an intolerable burden on VA adjudication, such as, requiring VA medical evaluators to prepare affidavits to prove

their competency or requiring VHA staff to procure medical specialists for each of the veteran's ailments. App. 82.

Judge Hughes overstates the administrative burden. As to proving competency, the Secretary conceded during oral argument at the Federal Circuit that VA medical professionals would have no difficulty in submitting their CVs, and, if necessary, "writing a couple of sentences" about their qualifications.[23] Oral Argument at 23:08-24:20, *Mathis v. McDonald*, 15-7094, *available at* http://www.cafc.uscourts.gov/oral-argument-recordings/search/audio.html; *see also* App. 30-31 (Reyna, J., concurring). Such a showing would be sufficient. There is no need for the formality of affidavits.

And, contrary to Judge Hughes's suggestion, removing the presumption will not create a dramatic need for medical specialists. As a general matter, the standard of competency for expert witnesses is a liberal one. *In Re Paoli R.R. Yard pcb Litig.*, 35 F.3d 717, 741 (3d Cir. 1994) ("Rule 702's liberal policy of admissibility extends to the substantive as well as the formal qualification of experts.").

Competent medical evidence is not limited to specialists, even on matters requiring specialized

[23] Indeed, throughout this appeal, the Secretary has never argued a lack of sufficiently qualified medical personnel to properly administer its medical disability evaluation program. Rather, the Secretary maintains that requiring the VA to show an evaluator's qualifications would "unnecessarily expand[] the record" and "have a deleterious effect on an already overburdened system." Govt's Response to pet. for reh'g en banc at 13.

medical knowledge. *See Gaydar v. Sociedad Instituto Gineco-Quirurgico y Planificacion*, 345 F.3d 15, 24 (1st Cir. 2003) ("The proffered physician need not be a specialist in the particular medical discipline to render expert testimony relating to that discipline."). Quite the contrary, standards of competency are both reasonable and accommodating, requiring only an adequate level of education, training or experience in the relevant field. *See Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir. 1996) ("it is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate").

For routine and uncomplicated disabilities, any physician (possibly any nurse) would have sufficient medical knowledge to provide a competent opinion – "knowledge that any competent physician would typically possess." *Gayton*, 593 F.3d at 618. But for the more complex or specialized medical issues, a doctor must show some professional education, training or experience in the relevant field, and if "the doctor strays from such professional knowledge, his or her testimony becomes less reliable, and more likely to be excluded under Rule 702." *Gass v. Marriott Hotel Servs.*, 558 F.3d 419, 427-28 (6th Cir. 2009).

As to the level of education, training or experience required of VA evaluators, the Veterans Court is well-suited to determine competency standards on a case-by-case basis, assessing the relative complexity and specificity of the medical issue(s) involved. *See*

Shinseki v. Sanders, 556 U.S. 396, 411-12 (2009) (observing that the Veterans Court reviews many more veterans disability cases than does the Federal Circuit, and therefore is in a better position to set forth a framework for evaluating harmless error determinations); *see also Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000) ("We think the Veterans Court is uniquely positioned to balance and decide the considerations regarding exhaustion in a particular case, and that, over time, it will develop a body of law in its unique setting that will permit comparable certainty in outcome that has occurred in other fields of law.").

And, if the Secretary deems those competency standards too burdensome, he may at any time write his own in a new or existing regulation. *Savage v. Shinseki*, 24 Vet.App. 259, 266 (2011) ("The Secretary is, of course, free to amend his regulations to accord with his desired interpretation").

CONCLUSION

For the stated reasons, petitioner respectfully asks that the petition for a writ of certiorari be granted.

Respectfully submitted,

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NOTE: This disposition is nonprecedential

United States Court of Appeals for the Federal Circuit

FREDDIE H. MATHIS,
Claimant-Appellant

v.

ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

2015-7094

Appeal from the United States Court of Appeals for Veterans Claims in No. 13-3410, Judge Alan G. Lance, Sr.

Decided: April 1, 2016

MARK RYAN LIPPMAN, The Veterans Law Group, La Jolla, CA, argued for claimant-appellant.

WILLIAM JAMES GRIMALDI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., MARTIN F. HOCKEY, JR.; Y. KEN

LEE, SAMANTHA ANN SYVERSON, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before O'MALLEY, REYNA, and CHEN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* O'MALLEY.

Concurring opinion filed by *Circuit Judge* REYNA.

O'MALLEY, *Circuit Judge*.

Appellant Freddie H. Mathis ("Mathis") appeals from a decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") affirming a Board of Veterans' Appeals ("Board") decision denying service connection for sarcoidosis, a pulmonary condition. *Mathis v. McDonald*, No. 13-3410, 2015 U.S. App. Vet. Claims LEXIS 654 (Vet. App. May 21, 2015). Because we are bound by this court's controlling precedent establishing a presumption of competency for VA medical examiners, we affirm.

BACKGROUND

Mathis served on active duty in the U.S. Air Force from August 1980 to August 2002. According to private

treatment records, Mathis was diagnosed with sarcoidosis in September 2009.[1] He filed a claim for service connection the following month. After a VA regional office ("RO") denied his claim in March 2010, Mathis appealed his case to the Board.

The RO had determined that certain of Mathis's service treatment records ("STRs") had become unavailable. In March 2011, in order to compensate for his missing STRs, Mathis and his ex-wife testified at a Decision Review Officer (DRO) hearing. During the hearing, Mathis testified that his sarcoidosis began during the late 1990s (i.e., the last few years of his active duty) and that, during his active military service, he experienced weakness, fatigue, and shortness of breath. He stated that he was treated for these symptoms while in active service. He also testified that his sarcoidosis may be the result of environmental exposures while he was stationed in Italy. Mathis's ex-wife testified that his health declined during their marriage while he was on active duty. Finally, Mathis submitted two statements from veterans who were in the Air Force with him and described his shortness of breath during his active service and since that time.

Based on these lay assertions, the VA obtained the medical opinion of VA medical examiner John K. Dudek in February 2012. Dr. Dudek reviewed Mathis's claims file, including the hearing transcript and lay

[1] Sarcoidosis is "a chronic, progressive, systemic granulomatous reticulosis of unknown etiology, characterized by hard tubercles." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1668 (32d ed. 2012).

statements, but did not examine Mathis or perform any tests. Dr. Dudek concluded that Mathis's sarcoidosis was less likely than not incurred in or caused by Mathis's service. The examiner found that there was no evidence to support the conclusion that Mathis's pulmonary symptoms while in service were related to sarcoidosis. The examiner stated that while he was "not doubting the validity" of the lay statements, the sarcoidosis was diagnosed seven years after service and nothing indicated the sarcoidosis existed within one year of service. Joint Appendix ("J.A.") 47. Moreover, he suggested that, if Mathis had significant breathing issues post service, "one can assume he would have sought medical care." *Id.*

In June 2013, the Board issued a decision on Mathis's claim. The Board made factual findings that Mathis's sarcoidosis "was not manifested during his military service, is not shown to be causally or etiologically related to his active military service, and is not shown to have manifested to a degree of 10 percent or more within one year from the date of separation from the military." J.A. 51. The Board recognized that the VA has a duty to assist, which includes providing a medical examination or obtaining a medical opinion when necessary to make a decision on a claim. Here, the Board noted that only a VA medical opinion, rather than a medical examination, had been afforded to Mathis, but, nevertheless, found that the VA had met its duty by making all reasonable efforts to obtain evidence necessary to substantiate Mathis's claim.

The Board then stated that entitlement to service connection for a particular disorder requires (1) evidence of the existence of a current disorder, and (2) evidence that the disorder resulted from a disease or injury incurred in or aggravated during service. 38 U.S.C. §§ 1110, 1131. The Board found that, although Mathis satisfied the first element, he failed to establish that the second was met. Although the Board acknowledged that Mathis and his friends and family were competent and credible to report that he experienced fatigue and shortness of breath during and since his military service, it held that these laypersons were not competent to assert a causal link between these symptoms and the sarcoidosis. The Board then found that all of the other evidence in the claims file supported the VA's denial of service connection. The only medical opinion contained in the claims file, that of VA examiner Dr. Dudek, found no nexus between Mathis's service and sarcoidosis. And Mathis testified at the DRO hearing that he did not seek treatment and did not receive a diagnosis of sarcoidosis until 2009, seven years after his active service ended. The Board, therefore, denied Mathis's claim for service connection.

Mathis then appealed to the Veterans Court. Mathis argued to the court that: (1) the Board erred in relying on an inadequate VA examiner opinion; and (2) the VA failed to establish that the examiner was competent to provide an opinion in this case. The Veterans Court dispensed with Mathis's first argument, holding that the Board's finding that the VA examiner's opinion was adequate was not clearly erroneous. It further

agreed with the Board that Mathis and his fellow service members were not competent to draw a conclusion as to the cause of his sarcoidosis.

As for Mathis's second argument, the Veterans Court noted that Mathis recognized legal authority that placed the burden on the claimant to challenge the competency of VA medical examiners. Nevertheless, Mathis argued that the VA failed to establish that Dr. Dudek, who specialized in family practice, was qualified to offer an expert opinion in the field of pulmonology. The court held that though the presumption of competency is rebuttable, objecting to the examiner's competence was the first step to overcoming the presumption. Mathis conceded he had not objected before the Board, but stated that he "wishes to preserve for Federal Circuit appeal a challenge to the correctness of" the case law on this issue. *Mathis*, 2015 U.S. App. Vet. Claims LEXIS 654, at *9. The Veterans Court held that the mere fact that the VA examiner was not a pulmonologist did not, by itself, render the opinion inadequate. Therefore, it affirmed.

Mathis timely appealed. This court has jurisdiction under 38 U.S.C. § 7292.

DISCUSSION

In an appeal from the Veterans Court, we review all questions of law de novo. 38 U.S.C. § 7292(d)(1); *see Beraud v. McDonald*, 766 F.3d 1402, 1405 (Fed. Cir. 2014) (citing *Rodriguez v. Peake*, 511 F.3d 1147, 1152

(Fed. Cir. 2008)). Absent a constitutional issue, however, we lack jurisdiction to review factual determinations or the application of law to the particular facts of an appeal from the Veterans Court. 38 U.S.C. § 7292(d)(2); *see Guillory v. Shinseki*, 603 F.3d 981, 986 (Fed. Cir. 2010); *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004).

The only issue on appeal is a legal one: whether this court should disavow the presumption of competency as it applies to VA medical examiners. Recently, and over only a short span of time, this court has developed a line of authority applying the presumption of competency to VA medical examiners and their medical opinions in veteran's benefits cases.

Rizzo was the first case. There, a veteran appealed a denial of service-connection for an eye disability that he alleged resulted from his exposure to ionizing radiation during his service in the Air Force. The testimony of a Ph.D. in radiation physics offered by the veteran and that of a VA department expert were in conflict. *Rizzo v. Shinseki*, 580 F.3d 1288, 1290 (Fed. Cir. 2009). The veteran argued that the Veterans Court incorrectly held that the Board could assume the qualifications of the VA expert. We adopted the reasoning of the Veterans Court in *Cox v. Nicholson*, 20 Vet. App. 563, 568 (2007), which held that "the Board is entitled to assume the competence of a VA examiner" based on the presumption of regularity. *Rizzo*, 580 F.3d at 1290. Thus, we held that, "where as here, the veteran does not challenge a VA medical expert's competence or qualifications before the Board, this court holds that

VA need not affirmatively establish that expert's competency." *Id.*

A year later, we expanded on *Rizzo* in *Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010), finding that case "controlling" on the issue of whether the Board improperly relied on the department's medical witness without establishing his qualifications. We further clarified that, in order to challenge a VA medical examiner's qualifications, a veteran must do more than merely request them. This is because "[a] request for information about an expert's qualifications . . . is not the same as a challenge to those qualifications. Indeed, one may assume that litigants who are told an expert witness' qualifications frequently may conclude that there is no reasonable basis for challenging those qualifications." *Id.* at 1306. We stated, moreover, that, in order to give the trier of fact the ability to determine the validity of a challenge to the expertise of a VA expert, a challenge "must set forth the specific reasons why the litigant concludes that the expert is not qualified to give an opinion." *Id.* at 1307.

These variations on a theme continued the following year when we issued *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011). 38 U.S.C. § 7104(d)(1) requires the Board's decisions to include a written statement of the reasons or bases for its findings and conclusions. In *Sickels*, the veteran argued that the Board violated § 7104(d)(1) by not providing a written explanation for its implicit conclusion that a VA medical opinion was sufficiently informed. We held that, "[w]hile we did not explicitly state so in *Rizzo*, it should be clear from our

logic that the Board is similarly not mandated by section 7104(d) to give reasons and bases for concluding that a medical examiner is competent unless the issue is raised by the veteran. To hold otherwise would fault the Board for failing to explain its reasoning on unraised issues." *Sickels*, 643 F.3d at 1366.

Finally, and most recently, we applied the presumption of competency in *Parks v. Shinseki*, 716 F.3d 581, 584 (Fed. Cir. 2013). There, the VA selected an advanced registered nurse practitioner (ARNP) to determine whether there was a relationship between a veteran's service and several health conditions, including diabetes. We found that the VA was required to rely only on "competent medical evidence," which is defined by VA regulations as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1). We then stated, however, that, "[i]n the case of competent medical evidence, the VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Parks*, 716 F.3d at 585 (citing *Sickels*, 643 F.3d at 1366). We explained that the presumption furthered the policy of preventing "[r]epeated unnecessary remands for additional evidence [that may] complicate many cases and lead to system-wide backlogs and delays." *Id.* We addressed, moreover, the veteran's argument that under *Comer v. Peake*, 552 F.3d 1362, 1363, 1369 (Fed. Cir. 2009), the record must be construed sympathetically in favor of *pro se* veterans. We held that, because the veteran

failed to raise an objection before the Board that anything was improper with the VA's selection of an ARNP or the particular ARNP on his case, *Comer* did not apply. Thus, we held that the Board was not required to read into the record an argument that was never made.

Turning to the case at bar, Mathis recognizes that we have endorsed the presumption of competency, but, nevertheless, "asks th[is court] to disapprove *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009) and its progeny." Appellant Br. 6 (citing Fed. Cir. R. 35(a)(1)). He says that *Rizzo* came as a blow to *pro se* claimants and that applying the presumption "shift[s] the VA disability benefits program towards an adversarial adjudicatory model and . . . degrade[s] the disability evaluation process [by] hav[ing] unqualified medical personnel provide expert medical opinions." Appellant Br. 3.

Mathis raises several arguments against the application of the presumption of competency. He argues that the presumption of regularity, which underlies the presumption of competency, should only apply to routine, non-discretionary, and ministerial procedures. As such, he maintains, it is improper to apply the presumption to VA medical examiners where the procedures for their selection and assignment are discretionary and have not been shown to bear indicia of reliability. He contends that the presumption of competency lies in contradiction to Congress's articulated desire to create a nonadversarial adjudicatory system for veterans. *See Vanerson v. West*, 12 Vet. App. 254, 260 (1999) ("[T]he legislative history of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105

(1988), indicates that adversarial concepts of adjudication were not to be adopted into the VA adjudication system."). According to Mathis, the presumption of competency also unfairly puts the burden on the veteran – an unsophisticated party who cannot readily access the relevant information – to raise a specific objection to an expert's testimony. Finally, he argues that it would not be unduly burdensome for the government to establish the qualifications of its examiners affirmatively.

Mathis's presumption of regularity argument in particular presents some legitimate concerns. *Rizzo* invoked three cases in support of its holding: *Cox*, 20 Vet. App. at 568, *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004), and *Butler v. Principi*, 244 F.3d 1337, 1338 (Fed. Cir. 2001). None of these cases, however, provides a solid foundation for the broad application of the presumption of regularity to medical examiners. *Cox* relied on *Hilkert v. West*, 12 Vet. App. 145, 151 (1999), a Veterans Court case that merely briefly noted that the Board in that case implicitly accepted the VA physician's competency and the claimant had failed to show that such reliance was in error.

Miley was concerned with whether the VA RO timely mailed the veteran a notice of its decision, thus triggering the veteran's time to file an appeal. We stated that the presumption of regularity could be employed, "in the absence of evidence to the contrary, [to establish] that certain *ministerial* steps were taken in accordance with the requirements of law." *Miley*, 366

F.3d at 1347 (emphasis added). We held that the presumption of regularity applies where "the Board finds that [a] decision notice was designated to be mailed along with other documents that were in fact [timely] mailed. . . . *In that setting*, the presumption of regularity may properly be invoked. . . ." *Id.* at 1347 (emphasis added). Thus, the holding of that case was limited to certain ministerial steps, and there was no discussion of whether it would be appropriate to apply the presumption to VA medical examiners.

Finally, *Butler* stated that, the "'presumption of regularity' supports official acts of public officers" and holds that, "[i]n the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties." 244 F.3d at 1340. It, too, however, pertained only to the presumption of regularity as it applied to the VA's mailing of notices to veterans under 38 U.S.C. § 5104.

The presumption of regularity, like the hearsay exception for business records in the Federal Rules of Evidence, has "at [its] root a showing that the [result] was the product of a consistent, reliable procedure." *Posey v. Shinseki*, 23 Vet. App. 406, 410 (2010). Thus, the presumption should be predicated on evidence that gives us confidence that a particular procedure is carried out properly and yields reliable results in the ordinary course. As the Third Circuit has recognized, "[m]ost 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." *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 749 (3d Cir. 2010) (quoting *McCormick on Evidence* § 343 (John W. Strong ed. 5th ed. 1999)).

It is no wonder, therefore, that the presumption of regularity has been applied repeatedly to the government's mailing of certain types of notices. *See e.g.*, *Crain v. Principi*, 17 Vet. App. 182, 186 (2003) ("the law presumes the regularity of the administrative process"); *Davis v. Principi*, 17 Vet. App. 29, 37 (2003) (applying a "presumption of regularity of mailing"); *Schoolman v. West*, 12 Vet. App. 307, 310 (1999) ("'clear evidence to the contrary' is required to rebut the presumption of regularity, i.e., the presumption that notice was sent in the regular course of government action"). In such cases, the acts at issue are typically ministerial, routine, and non-discretionary.[2]

The Veterans Court has displayed caution and hesitance towards expanding the presumption of regularity to new contexts. In *Kyhn v. Shinseki*, 26 Vet. App. 371, 374 (2013), for example, the Veterans Court remanded a case to the Board for it to assess, in the first instance, whether (1) the VA's duty to notify a veteran

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[2] *See Latif v. Obama*, 677 F.3d 1175, 1207 (D.C. Cir. 2012) (Tatel, J., dissenting) (finding that "every case applying the presumption of regularity" has "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.").

of his upcoming medical examination was actually fulfilled, or (2) the VA is entitled to a presumption of regularity in its mailing of notices of scheduled VA examinations. *Id.* Thus, though *Rizzo* already had established the presumption of competency and the presumption of regularity had long been applied to certain VA mailing procedures, the court still saw a need for a separate evaluation of whether the presumption was proper with respect to the mailing of notices to veterans regarding their VA examinations. 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.

In fact, Mathis argues that the VA's procedure for selecting qualified examiners is inherently unreliable because the VA broadly recommends assigning generalists except in unusual, ill-defined cases. The VA Adjudication Procedures (M21-Manual) states that examinations routinely performed by specialists include hearing, vision, dental, and psychiatric examinations, but otherwise instructs its staff to "[r]equest a specialist examination only if it is considered essential for rating purposes," for example "if an issue is unusually complex[,] if there are conflicting opinions or diagnoses that must be reconciled, or [] based on a BVA remand." VA Adjudication Procedures Manual, M21-1MR, Part III, Subpart iv, ch. 3, § A(6) (change date July 30, 2015). Furthermore, a VA fast letter directed to "All VA Regional Offices and Centers," states:

"[p]lease note that a specialist is only required in limited situations. . . . For all other types of examinations, a generalist clinician may perform the examination. For example, an office may order a cardiac examination, but it should not generally request that a cardiologist (a specialist) conduct it." Veterans Benefits Administration Fast Letter 10-32 (September 1, 2010). Mathis argues that this guidance fails to ensure to a high degree of certainty that the VA examiner assigned to a given case is able to provide a "competent medical opinion" in accordance with 38 C.F.R. § 3.159(a)(1). In his view, a generalist is not competent to provide an expert opinion on a condition like sarcoidosis absent a showing of education, training, or experience relevant to such a condition.

The government attempts to reassure us that the veteran may obtain a specialist's opinion where the government determines that such an opinion is "necessary to make a decision on the claim," 38 U.S.C. § 5103A(d). But the process by which the VA appoints examiners for a particular case remains unclear. Without this information, we cannot tell whether the procedures in question are, in fact, regular, reliable, and consistent.

We need not – and cannot – resolve this debate. We lack jurisdiction to make factual findings on appeal regarding the competency of the particular examiner employed by the VA in this case and are bound by clear precedent to presume that Dr. Dudek was competent to render the opinion he did. We note, however, that, though there may be a fair basis to criticize the *Rizzo*

line of cases, there exists a practical need for an administrable rule, given the volume of claims the VA is charged with processing. Replacing the presumption established by *Rizzo* would require a concrete, clear standard for determining the sufficiency of an examiner's qualifications to conduct an examination or provide a medical opinion.

CONCLUSION

The Veterans Court did not err in its interpretation of our precedent. We, therefore, affirm.

AFFIRMED.

NOTE: This disposition is nonprecedential

United States Court of Appeals for the Federal Circuit

FREDDIE H. MATHIS,
Claimant-Appellant

v.

ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

2015-7094

Appeal from the United States Court of Appeals for Veterans Claims in No. 13-3410, Judge Alan G. Lance, Sr.

REYNA, *Circuit Judge*, concurring.

I write separately to state my view that experience has shown that presuming the competence of individuals who write medical opinions in veterans cases has produced results inconsistent with the statute. My conclusion is that the entire court should review the case law concerning the presumption of competence with the objective of eliminating it.

The presumption of competence has delegitimized the process of adjudicating veterans' entitlement to disability benefits. Under the presumption, no Board or judicial review of a VA examiner's qualifications occurs unless the veteran makes a specific objection to the examiner's qualifications while the case is before the Board. The veteran is hobbled in making a specific objection because the VA does not by default disclose any information about the examiner's qualifications other than his or her credentials, such as "MD." If a veteran asks for an examiner's qualifications, the VA will not provide them unless it is ordered to do so. The Board has at times refused to order the VA to do so because the veteran has not raised a specific objection to the examiner's competence. This creates a catch-22 situation in which the veteran must have grounds to object to an examiner's competence before the veteran can learn the examiner's qualifications.

The presumption of competence was created based on the presumption of regularity, and it was unprecedented to apply the presumption of regularity to a process such as determining whether a nurse is qualified to provide an opinion on a particular issue. This court has held that the Veterans Court lacks jurisdiction to create such presumptions, and so this court should not have upheld the Veterans Court's creation of a presumption in *Rizzo*. Applying the presumption of regularity requires evidence that a process is regular, and such evidence has not been presented. Even if the VA's process for selecting examiners was "regular" when the presumption was established in *Rizzo*, the process has continued to evolve, and the VA does not always successfully follow its own guidelines for selecting examiners. The circumstances when this court established the presumption suggest that these negative consequences were unanticipated.

Eliminating the presumption will require the VA to provide the Board with evidence that an examiner "is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions" on the issue that the examiner is testifying about. The VA could meet this requirement by attaching an examiner's curriculum vitae (CV) to her report, and, if necessary, having her state in her report why she is qualified.

The Panel Opinion implies that in order to overturn *Rizzo*, there must first be established a clear standard for determining whether an examiner is competent. Op. at 13. It is not clear that this is the case.

Assuming that such a standard would be necessary, its development would be the responsibility of the Board or the Veterans Court, and not this court.

DISCUSSION

The VA's adjudicatory process for disability benefits "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (citation omitted). The "system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus." *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, C.J., dissenting) (majority overruled by statute). "The purpose is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case." *Id.*

The VA must assist veterans in obtaining evidence needed to support disability benefits claims. 38 U.S.C. § 5103A(a)(1). At times this includes providing a medical examination or obtaining a medical opinion. *Id.* at § 5103A(d).

The presumption of competence applies both to VA examiners who conduct an examination of a veteran before preparing a report and to VA examiners who only examine medical records or other evidence before preparing a report.[1] The presumption also applies to

[1] *See, e.g.*, *Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009) (examiners who prepared opinions without examining veteran were presumed competent); *Parks v. Shinseki*, 716 F.3d 581, 583 (Fed. Cir. 2013) (same); *Sickels v. Shinseki*, 643 F.3d 1362,

the reports themselves. *Sickels*, 643 F.3d at 1366 ("The argument that a VA medical examiner's opinion is inadequate is sufficiently close to the argument raised in *Rizzo* that it should be treated the same.")[2]

Under the presumption, a veteran must set forth *specific reasons* why the veteran believes an examiner is not qualified before the VA has to provide any evidence regarding the examiner's qualifications. *Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010). If a veteran fails specifically object to an examiner's competence while his case is before the Board, any such challenge is waived. *Parks*, 716 F.3d at 586; *see also*, *e.g.*, *Nohr v. McDonald*, 27 Vet. App. 124, 132 (2014).

1366 (Fed. Cir. 2011) (same); *Johnson v. Shinseki*, 440 F. App'x 919, 922 (Fed. Cir. 2011) (examiner who examined veteran was presumed competent).

[2] Exactly how the presumption of competence applies to examiners' reports has not been fully established. *See, e.g.*, *Whitehead v. Shinseki*, No. 10-4166, 2012 WL 2054875, at *5 (Vet. App. June 8, 2012) ("*Sickels* does not, as the Secretary argues, 'entitle[ ] [the Board] to presume the adequacy of the VA medical examiner's opinion.' Secretary's Br. at 17-18. The Board is decidedly *not* entitled to presume the adequacy of a VA examination – that is a question of fact to be determined in each case where a VA medical examination was provided."); *but see, e.g.*, *Woods-Calhoun v. McDonald*, No. 13-3507, 2015 WL 5449888, at *5 (Vet. App. Sept. 17, 2015) (applying the presumption of competence in analysis determining whether a report is adequate); *Brown v. McDonald*, No. 14-0464, 2015 WL 691200, at *5 (Vet. App. Feb. 19, 2015) (same); *Felix v. Gibson*, No. 13-2977, 2014 WL 3609630, at *1 (Vet. App. July 23, 2014) (same); *Irish v. Shinseki*, No. 11-1426, 2012 WL 1739712, at *2 (Vet. App. May 17, 2012) (same).

The VA Generally Presents No Evidence Regarding an Examiner's Qualifications

As the VA is not obligated to provide evidence regarding an examiner's qualifications, it does not do so. Under the Adjudication Manual of the Veterans Benefits Administration, M21-1MR ("M21-1MR" or "VA Manual"), an examiner who prepares a report includes only her name, address, credentials (*e.g.*, MD, PA, NP, MA, LCPG, or LCSW), and her phone, fax, and medical license numbers. M21-1MR § III.iv.3.D.2.b.[3] Her specialty is provided "if a specialist examination is required or requested."[4] *Id.*

If a veteran seeks information about an examiner's qualifications, the VA will not provide such information unless it is ordered to do so. In *Nohr v. McDonald*, 27 Vet. App. 124, 128 (2014), a veteran requested an examiner's CV. The Board denied the request, and the Secretary's counsel argued before the Veterans Court that the request was "a fishing expedition." *Id.* at 132.[5]

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[3] M21-1MR is available at Department of Veterans Affairs, *KnowVA Knowledge Base* (last visited Mar. 28, 2016), http://www.knowva.ebenefits.va.gov.

[4] This guideline is not always followed. *See, e.g.*, No. 1320853, 2013 WL 4450861, at *2 (Bd. Vet. App. June 27, 2013) (Board requested specialist but it was unclear whether examiner had a specialty). Under 38 C.F.R. § 20.1301, Board decisions such as this one are issued without titles, as personal identifiers are redacted.

[5] *See also*, *e.g.*, No. 1543733, 2015 WL 7875614, at *2 (Bd. Vet. App. Oct. 13, 2015); No. 1501503, 2015 WL 1194124, at *7-8 (Bd. Vet. App. Jan. 13, 2015); No. 1452787, 2014 WL 7740599, at *9 (Bd. Vet. App. Dec. 1, 2014).

The Veterans Court found that the Board erred in denying the veteran's request because the veteran had identified an ambiguous statement in the examiner's report that suggested "there may have been some irregularity in the process" of selecting the examiner. *Id.* at 132. The Veterans Court explained that, under those circumstances, the Board could not deny the veteran's request for a CV. *Id.* at 133.

In one case, the Board interpreted *Nohr* as meaning that a veteran must rebut the presumption of competence before the veteran is entitled to receive information about an examiner's qualifications. No. 1452787, 2014 WL 7740599 at *8 (Bd. Vet. App. Dec. 1, 2014). Distinguishing *Nohr*, the Board rejected a veteran's request for an examiner's CV because it was made before the examiner provided her opinion, so there was no evidence "sufficient . . . to rebut the presumption of administrative regularity." *Id.* at *8-9. Since *Nohr*, it appears that the Board has ordered the VA to provide a veteran with an examiner's CV in five cases.[6]

This court in *Bastien* stated that the VA provided an examiner's qualifications when a veteran's wife requested them. 599 F.3d at 1306. This seems to be a mistake, as both of the veteran's appeal briefs state that, despite requests, the VA did not provide the qualifications. Brief for Claimant-Appellant at 11, 2009 WL 2610099 and Reply Brief at 3, 10-11, 2009 WL 4829105. The VA's brief does not deny this, and it cites the same "public profile" the veteran's wife found for an examiner's qualifications. Brief of Respondent-Appellee at 6 n. 7 & 12-13, 2009 WL 4248807.

[6] *See* No. 1552016, 2015 WL 10004845 at *12 (Bd. Vet. App. Dec. 11, 2015); No. 1543733, 2015 WL 7875614 at *2 (Bd. Vet. App.

The VA Manual provides regional offices with guidelines for responding to veteran "requests for information about the examiner's qualifications." M21-1MR § III.iv.3.D.2.m. The Manual does not suggest that a regional office should respond to such a request by actually providing an examiner's qualifications. *Id.* If a veteran submits interrogatories to a regional office, it is instructed "do not complete and return the document" and "do not refer it to the examiner." *Id.*[7]

The Presumption Makes the Competence of VA Examiners Effectively Unreviewable

Since the presumption was created, Board or judicial review of examiner qualifications rarely occurs. Veterans regularly make "general" objections to an examiner's competence, but not "specific" objections, so the Board does not review the examiner's competence.[8]

Oct. 13, 2015); No. 1538484, 2015 WL 6939522 at *1-2 (Bd. Vet. App. Sept. 9, 2015); No. 1531027, 2015 WL 5212552 at *1 (Bd. Vet. App. July 21, 2015); No. 1501503, 2015 WL 1194124 at *7-8 (Bd. Vet. App. Jan. 13, 2015).

[7] Because of the presumption, the VA does not have records regarding examiners' qualifications. Appellee Br. at 17.

[8] *E.g.*, No. 1539156, 2015 WL 6940254 at *4 (Bd. Vet. App. Sept. 14, 2015); No. 1526395, 2015 WL 4690503, at *6-7 (Bd. Vet. App. June 22, 2015); No. 1451247, 2014 WL 7502140, at *5-6 (Bd. Vet. App. Nov. 19, 2014); No. 1446634, 2014 WL 6876771, at *5-6 (Bd. Vet. App. Oct. 21, 2014); No. 1444538, 2014 WL 6874328, at *4-5 (Bd. Vet. App. Oct. 7, 2014); No. 1428938, 2014 WL 3961243, at *3-4 (Bd. Vet. App. June 26, 2014).

Veterans likely fail to make "specific" objections because they have no information regarding an examiner's qualifications.

Even if a veteran sufficiently challenges an examiner's qualifications, the Board has often failed to consider whether the examiner was qualified.[9]

If a veteran does not sufficiently object, the Board only needs to consider an examiner's competence when the examiner unambiguously states in her report that she is not competent. This occurred in *Wise v. Shinseki*, 26 Vet. App. 517 (2014). In *Wise*, a veteran's wife sought to show that the veteran's service-connected post-traumatic stress disorder ("PTSD") had contributed to his heart disease. *Id.* at 521. Opposing the claim, the VA submitted the report of a cardiologist who stated in her report that she had no training in psychiatry other than a month-long rotation while in medical school over 25 years earlier, that she had little experience treating veterans, and that the majority of the

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[9] *See, e.g.*, *Temples v. McDonald*, No. 14-1604, 2015 WL 4169190, at *3 (Vet. App. July 10, 2015) (finding that a veteran had sufficiently challenged an examiner's qualifications to the Board and remanding for the Board to analyze the examiner's competence); *Learman v. McDonald*, No. 14-0148, 2015 WL 1622162, at *3-5 (Vet. App. Apr. 13, 2015) (same); *Acosta v. Shinseki*, No. 12-3433, 2014 WL 1577773, at *6 (Vet. App. Apr. 22, 2014) (same); *Kanuch v. Shinseki*, No. 11-3711, 2013 WL 1200607, at *4-5 (Vet. App. Mar. 26, 2013) (same). In these cases, although specific objections were raised, the VA argued before the Veterans Court that the veteran did not specifically object before the Board and had waived the issue. *Id.*

documents she had received for review were psychiatry-related. *Id.* at 522. She called herself "a relative lay person" with regard to psychiatry, but she opined that the veteran's PTSD symptoms were not very severe and were unlikely to have caused his heart disease. *Id.* at 522-23.

At the Veterans Court, the veteran challenged the Board's decision to rely on the cardiologist's opinion. *Id.* at 524. The Veterans Court found that the presumption of competence did not attach when "evidence of record creat[ed] the appearance of irregularity." *Id.* at 526-28.

In contrast, a merely ambiguous disclaimer of competence will not prevent challenges to an examiner's competence from being waived when they are not raised before the Board. *Johnson v. McDonald*, No. 14-1587, 2015 WL 4075155, *7 (Vet. App. July 6, 2015).

Under the Presumption, the Board Cannot Fairly Weigh the Probative Value of an Examiner's Report

That an examiner is qualified to provide a report should be a "threshold consideration" before her report is considered by the Board. *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008). While "most of the probative value of a medical opinion comes from its reasoning," *id.*, an examiner's qualifications should not be disregarded.

The weight accorded to an examiner's report should depend in part on the examiner's knowledge

and experience, including whether the examiner has "specific expertise in the relevant specialty." *Itliong v. Shinseki*, No. 09-0886, 2011 WL 4485886, at *2 (Vet. App. Sept. 29, 2011); *see also*, *e.g.*, *Black v. Brown*, 10 Vet. App. 279, 284 (1997); No. 1452787, 2014 WL 7740599, at *12 (Bd. Vet. App. Dec. 1, 2014).

When *private examiners* provide opinions *on behalf of* veterans, the Board is "unable to assess [their] experience or qualifications to render an opinion" when they do not include information regarding their specialty or a CV. No. 1512074, 2015 WL 2161715, at *16 (Bd. Vet. App. Mar. 20, 2015). *See also*, *e.g.*, No. 9919708, 1999 WL 33869596, at *1 (Bd. Vet. App. July 19, 1999) (noting that, without a CV or other evidence showing a veteran's physician's qualifications, "the Board is unable to determine the degree of weight or probative value that may be attached to [her] opinion.").

VA guidelines for responding to complaints that an examiner was unqualified state that "where an examiner is basically competent, matters like specialty, Board certification, experience and other related considerations will merely be considerations in determining probative value of the examination or opinion." M21-1MR § III.iv.3.D.2.m. In reality, these factors will *almost never* be considered in determining the probative value of a VA examiner's opinion.

Determining whether an opinion is adequate and weighing its probative value solely on its analysis without knowledge of its author's qualifications can

lead to absurd results. Because the analysis turns on an author's skill in opinion-writing rather than her skill in medicine, a skilled opinion-writer could write persuasive opinions about issues she is entirely unqualified to opine about.

Veterans have no opportunity to confront VA examiners, such as through cross-examination, so "in many cases the most effective way of countering a questionable opinion [is] to offer a contrary opinion with more support in the medical literature or from other medical experts." *Gambill v. Shinseki*, 576 F.3d 1307, 1318-19 (Fed. Cir. 2009) (Bryson, J., concurring). A veteran's ability to advance a contrary opinion is fettered when the experience, educational background, and training of the examiner are unknown. Even if a veteran finds *the* preeminent expert on her specific disability to provide an opinion supporting her claim, because the record is silent as to the VA examiner's qualifications, the Board or any court rarely has the ability to weigh their relative qualifications in evaluating their competing opinions.

For example, in *D'Auria v. McDonald*, a veteran argued that the Board erred in according more weight to a VA examiner's opinion than the veteran's physician's opinion. No. 14-3224, 2015 WL 5307462, at *2 (Vet. App. Sept. 11, 2015). At the Veterans Court, the *pro se* veteran's appeal brief said "[the veteran's physician's] credentials are impeccable. What credentials and specialty does your VA examiner hold?" *Id.* The Court explained that VA examiners are presumed competent, the veteran had not challenged the examiner's

qualifications at the Board, and so the Board did not have to evaluate his or her qualifications before relying on his or her report. *Id.*

Occasionally, the Board still weighs the probative value of competing reports on the basis of credentials. In one recent case, the Board afforded more probative value to the veteran's physician's opinion, explaining that "a relevant difference in the level of expertise and professional credentials of the two examiners [existed], as the VA examiner was a nurse practitioner and the private examiner was a licensed physician with an extensive CV showing years of experience in occupational and environmental medicine, [including] the types of workplace injuries from which the Veteran alleged his in-service right knee trauma originated." No. 1504782, 2015 WL 1600923, at *5 (Bd. Vet. App. Feb. 2, 2015). But the presumption of competence discourages the Board from finding a VA examiner anything less than perfectly competent. *Parks*, 716 F.3d at 585 (the presumption applies to nurse practitioners); *see also*, *e.g.*, No. 1549456, 2015 WL 9698285 at *1 (Bd. Vet. App. Nov. 23, 2015).

The Board eschews wrongly awarding benefits by assigning undue weight to *favorable* medical opinions. No. 1452787, 2014 WL 7740599, at *5 (Bd. Vet. App. Dec. 1, 2014). It should not assign undue weight to *unfavorable* opinions either. It cannot fairly weigh an opinion while knowing almost nothing about its author's qualifications.

The Presumption Creates a Due Process Problem

The VA's duty to assist veterans includes providing an examination or report by a competent examiner, when needed. 38 U.S.C. § 5103A. As a result of the presumption of competence, the burden to object to an examiner's competence is placed on the veteran, but the veteran is hindered in doing so.

A veteran's interest in disability benefits is protected by the Due Process Clause. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). The presumption of competence increases the risk of an erroneous deprivation of that interest. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Removing the presumption would help safeguard a veteran's right to an opinion or examination prepared or performed by a *qualified* examiner, and create only a minimal burden on the VA to provide evidence regarding the qualifications of its examiners.

"In the veterans' uniquely claimant friendly system of awarding compensation, breaches of the duty to assist are at the heart of due process analysis." *Cook v. Principi*, 318 F.3d 1334, 1354 (Fed. Cir. 2002) (Dyk, J., concurring). "If the Constitution provides no protection against the occurrence of such breaches, then the paternalistic interest in protecting the veteran is an illusory and meaningless assurance." *Id.*

The Interests the Presumption Serves Do Not Outweigh Its Disadvantages

The presumption serves to eliminate the VA's burden to produce evidence and reduce remands. *Parks*, 716 F.3d at 585. Without a presumption, the VA would need to provide the Board with evidence that an examiner satisfies the 38 C.F.R. § 3.159 requirement of being "qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." Yet, simply attaching an examiner's CV to his report would reveal the examiner's education, training, and experience. Attaching a CV to his report is a task an examiner can easily handle.

Because the VA usually selects generalist examiners, an examiner's CV usually will not show that the examiner has any expertise in the subject of her report.[10] If a CV reveals that an examiner lacks such expertise, she can also explain in her report why she is qualified. Including such a statement would not be difficult for examiners. If an examiner prepares a statement describing why she is qualified to opine on

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[10] At argument, the Secretary's attorney stated "[i]n this case, [the VA examiner] was a general practitioner. Providing a CV would demonstrate that. . . . What Mr. Mathis [seeks] is something tailored to every single case, saying [the examiner's] exact experience with lung conditions, for instance, or heart conditions, or whatever it is. A CV is not going to cut the muster in this situation." Recording at 22:16, *available at* http://www.cafc.uscourts.gov/oral-argument-recordings/search/audio.html.

For discussion on the VA's use of generalist examiners, see infra at page 17.

cardiac issues, for example, she can likely reuse it the next time she opines on cardiac issues.

It appears that this court's *Rizzo* decision led the VA to change a practice of usually attaching an examiner's CV to his report. Before *Rizzo*, which issued in September 2009, it appears that Board orders remanding cases for medical examinations had instructed an examiner to append a CV to his report only about four times.[11] But after *Rizzo*, between March 2010 and September 2011, the Board included such an instruction in over two hundred decisions.[12] This significant increase suggests both that a change had occurred in the frequency with which the VA attached CVs to examiners' reports and that the Board *preferred* having examiners' CVs. A requirement that examiners attach their CVs to their reports would not create an undue administrative burden, particularly if examiners typically attached CVs to their reports before the presumption was created.

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[11] No 0802829, 2008 WL 4320116, at *2 (Bd. Vet. App. Jan. 25, 2008); No. 0432514, 2004 WL 3311593, at *1 (Bd. Vet. App. Dec. 8, 2004); No. 0108160, 2001 WL 34585997, at *6 (Bd. Vet. App. Mar. 20, 2001); No. 0105152, 2001 WL 34582992, at *3 (Bd. Vet. App. Feb. 20, 2001).

[12] *E.g.*, No. 1133177, 2011 WL 5316250, at *5 (Bd. Vet. App. Sept. 8, 2011); No. 1132969, 2011 WL 5316041, at *12 (Bd. Vet. App. Sept. 7, 2011); No. 1101423, 2011 WL 751267, at *4 (Bd. Vet. App. Jan. 12, 2011); No. 1107166, 2011 WL 1355701, at *5 (Bd. Vet. App. Feb. 23, 2011); No. 1037779, 2010 WL 5378203, at *2 (Bd. Vet. App. Oct. 6, 2010); No. 1014091, 2010 WL 2478922, at *7 (Bd. Vet. App. Apr. 14, 2010); No. 1017678, 2010 WL 2807490, at *7 (Bd. Vet. App. May 12, 2010); No. 1009397, 2010 WL 1941350, at *9 (Bd. Vet. App. Mar. 12, 2010).

Since September 8, 2011, it appears that the Board has requested in a remand order that an examiner include her CV only once, in No. 1222819, 2012 WL 3271702, at *3 (Bd. Vet. App. June 29, 2012). It appears that the Board stopped trying to order the VA to provide examiners' CVs because doing so was futile. Numerous Board decisions state that no CV was attached to an examination report, even though the Board had requested one.[13]

Removing the presumption of competence will assist veterans in challenging the competence of examiners and reduce the risk of unqualified examiners providing opinions. Unqualified examiners are less likely to provide accurate opinions. Veterans are harmed when their claims are improperly rejected, and the public fisc is harmed when veterans' claims are improperly granted.

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[13] *E.g.*, No. 1443791, 2014 WL 6873578, at *9 (Bd. Vet. App. Oct. 1, 2014); No. 1336907, 2013 WL 6991931, at *2 (Bd. Vet. App. Nov. 13, 2013); No. 1320853, 2013 WL 4450861, at *2 (Bd. Vet. App. June 27, 2013); No. 1243635, 2012 WL 7016213, at *6 (Bd. Vet. App. Dec. 20, 2012); No. 1217374, 2012 WL 2881745, at *2 (Bd. Vet. App. May 15, 2012); No. 1137554, 2011 WL 6043315, at *2 (Bd. Vet. App. Oct. 5, 2011); No. 1137348, 2011 WL 5325231, at *2 (Bd. Vet. Vet. App. Sept. 15, 2011); No. 1134415, 2011 WL 5322094, at *2 (Bd. Vet. App. Sept. 14, 2011); No. 1129400, 2011 WL 4890482, at *2 (Bd. Vet. App. Aug. 9, 2011); No. 1122079, 2011 WL 3507772, at *1 (Bd. Vet. App. June 7, 2011). *But see* No. 1300336, 2013 WL 1093814, at *2 (Bd. Vet. App. Jan. 4, 2013) (noting that a CV was added to a report to comply with remand instructions).

Establishing Competency Is Not a Ministerial Act

This court in *Rizzo* should not have applied the presumption of regularity to the VA's process of selecting examiners. The presumption of regularity is usually applied to ministerial acts such as mailing notices. *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004). Mailing a notice is very different from selecting an examiner: mailing is administrative but determining whether a specific nurse is qualified to provide an opinion on a particular issue is not. As the Panel Opinion states, "Mathis's presumption of regularity argument in particular presents some legitimate concerns." Op. at 972. No case *Rizzo* cited when applying the presumption of regularity to medical examiners provides "a solid foundation" for *Rizzo's* holding. *Id.*

Before a presumption of regularity was applied to the VA's process for selecting examiners, there should have been "a showing, by affidavit or otherwise," that the VA's process for selecting examiners was "regular." *Kyhn v. Shinseki*, 716 F.3d 572, 579 (Fed. Cir. 2013) (Lourie, J., dissenting); *see also*, *e.g.*, *Echevarria-North v. Shinseki*, 437 F. App'x 941, 946 (Fed. Cir. 2011). In *Rizzo*, neither this court's decision nor the Veterans Court's decision cited evidence about the VA's process. 580 F.3d 1288 at 1292; *Rizzo v. Peake*, No. 07-0123, 2008 WL 4140421, at *2 (Vet. App. Aug. 26, 2008).

Further, it appears that creating a presumption of competence for VA examiners was outside the Veterans Courts' jurisdiction, and so this court should not have upheld the Veterans Court's creation of one in *Rizzo*.

In *Kyhn*, this court held that the Veterans Court lacked jurisdiction to create a presumption of regularity for certain notices, as this required factfinding outside the record to determine that a process was regular. 716 F.3d at 578. Here, the presumption was apparently established based on an implicit factfinding of regularity.

The Process by Which the VA Chooses Examiners is Largely Unknown

Apparently only the VA and its outside contractors know how they select examiners. The VA Manual says very little about how examiners are chosen to provide examinations or deemed qualified. One section states that "[t]he choice of examiners is up to the VA medical facility conducting the examination," unless it is necessary that a specialist be used. M21-1MR § III.iv.3.A.6.d.

A section on "Ensuring Examiners Are Qualified" states that "VA medical facilities (or the medical examination contractor) are responsible for ensuring that examiners are adequately qualified." *Id.* at § III.iv.3.D.2.b. It states that "Veterans Service Center (VSC) employees are *not* expected to routinely review the credentials of clinical personnel to determine the acceptability of their reports, unless there is contradictory evidence of record." *Id.* (Emphasis original). It appears that, currently and when the *Rizzo* decision issued, the choice of examiners and review of

their qualifications is often performed by outside contractors, such as QTC Medical Services.[14] To the extent aspects of the VA's process for selecting examiners are known, those aspects do not suggest that it is a regular process.

Since the Presumption was Created, the VA Has Emphasized the Use of Non-Specialist Examiners

VA usually selects non-specialist examiners to perform examinations. M21-1MR §§ III.iv.3.A.1.g, h. Except for vision, hearing, dental, and psychiatric examinations, specialists perform medical exams only in "in unusual cases, or as requested by a Board of Veterans' Appeals (BVA) remand." *Id.* Also, an initial diagnosis of traumatic brain injury must be made by one of the following specialists: physiatrists, psychiatrists, neurosurgeons, or neurologists. *Id.* at § III.iv.3.D.2.h.

While certain actors in the disability claim adjudication process may *request* a specialist examiner, the choice of examiners is "up to the VA medical facility conducting the examination," unless a remand from the Board specifically states that the examiner must be a "Board-certified specialist in . . . " or a "specialist

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[14] *Department of Veterans Affairs Audit of VA's Efforts to Provide Timely Compensation and Pension Medical Examinations*, VA Office of Inspector General (Mar. 17, 2010), http://www.va.gov/oig/52/reports/2010/VAOIG-09-02135-107.pdf; Wesley Brown, *Local veteran says VA contractor examinations not thorough enough*, Augusta Chron., (Aug. 17, 2014), http://chronicle.augusta.com/latest-news/2014-08-17/local-veteran-says-va-contractor-examinations-not-thorough-enough.

who is Board qualified." *Id.* at § III.iv.3.A(6)(d). "In the absence of a [Board] remand, [regional offices] may not designate qualification requirements for a specialist examination." *Id.*[15]

As the Panel Opinion notes, in September 2010, one year after *Rizzo*, the VA issued a Fast Letter emphasizing the distinction between "specialist" and "specialty" examinations.[16] Op. at 12. The letter explained that, while a regional office could request a "specialty examination" it should generally not even *request* a "specialist examination."

The VA's emphasis on using generalist examiners is concerning. While a generalist healthcare provider may have experience treating patients with a wide variety of ailments, and may be similarly qualified to treat patients as a specialist is, the opinions examiners are asked to provide are often more complicated than

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[15] The VA has different guidelines for requesting opinions to be prepared without examining the veteran. M21-1MR § III.iv.3.A.7.a.

[16] A *specialty examination* focuses on the disabilities that are specifically at issue in a veteran's claim, as compared to a *general medical examination* which involves screening all body systems. A *specialist examination* is any examination that is conducted by a clinician who specializes in a particular field. M21-1MR §§ III.iv.3.A.1.f, g, h.

The VA Manual does not indicate that someone can ever request that an opinion be prepared by a specialist, when the opinion is prepared without an examination of the veteran. The VA Manual distinguishes between examinations and opinions, and there is no discussion of requesting specialist medical opinions.

mere diagnosis or treatment. For example, the questions the examiner needed to answer in this case included whether Mr. Mathis's sarcoidosis occurred as a result of his military service, if it began while he was in service, or if symptoms of it had occurred within one year of his service.[17]

Particularly when an examiner is presented with issues such as what caused a disease or when it began, the examiner's opinions are necessarily somewhat speculative, even when the examiner is an expert on that disease. Specialist doctors exist because the body of medical knowledge is larger than any individual doctor can learn, and it continues to grow as new research is conducted. No doctor can read every journal in every specialty.

In some circumstances, specialist examiners are preferable. A specialist doctor has years of additional training in her specialty beyond that of a generalist doctor, and will often also have more experience in her specialty. The Board sometimes requests examiners

[17] *See also*, *e.g.*, *Rizzo*, 580 F.3d at 1289 (whether a veteran's radiation exposure during military service caused his eye conditions); *Parks*, 716 F.3d at 583 (whether a veteran's exposure to three chemical warfare agents as part of a classified project were related to his diseases); *Bastien*, 599 F.3d at 1303-04 (whether a veteran's participation in military experiments involving radiation caused his diseases); *D'Auria*, 2015 WL 5307462 at *1 (whether a veteran's exposure to asbestos and smoke as an Air Force fire inspector caused his diseases); *Temples*, 2015 WL 4169190, at *3 (whether a veteran's exposure to Agent Orange caused his diseases); *Johnson*, 2015 WL 4075155, at *2-3 (whether a veteran's service-connected hip disabilities made him unable to find gainful employment).

with specific expertise, although the VA considers itself free to disregard such requests unless they specifically require a board-certified or "board qualified" examiner.[18]

Medicine is like law. While a generalist lawyer may be qualified to take on a wide variety of cases, if someone has a narrow question about a certain area of the law and it is important that she receives a good answer, it may be preferable for her to ask a lawyer specialized in that area with at least a few years of experience. No lawyer can be an expert in every area of the law.

In the first cases establishing the presumption of competence, this court appears to have found it important that the examiners had expertise in the area they testified about. In *Rizzo*, this court observed that the VA examiner, who had been asked to opine on radiation, was "a medical doctor[,] serves as VA's Chief Officer of Public Health and Environmental Hazards[, and] represented VA's Under Secretary for Health, whose opinion the Board must consider in claims based on exposure to ionizing radiation" under a regulation. 580 F.3d at 1291. In *Bastien*, where the issue was whether radiation exposure caused blood cancer and lymphoma, the VA submitted reports from "Dr. Mather,

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[18] *See supra*, p. 976. Examples of cases where the Board requested a specialist but the request was apparently disregarded by the VA include *Kanuch v. Shinseki*, No. 11-3711, 2013 WL 1200607, at *2 (Vet. App. Mar. 26, 2013); No. 1336907, 2013 WL 6991931, at *2 (Bd. Vet. App. Nov. 13, 2013); and No. 1320853, 2013 WL 4450861 at *2 (Bd. Vet. App. June 27, 2013).

[the VA's] Chief Public Health and Environmental Hazards Officer," and "Dr. Pasquale, a hematologist, who was also an associate professor of medicine at Albany Medical College." 599 F.3d at 1304. It seems that the presumption as applied in those cases was a presumption that a doctor with expertise in a certain topic was qualified to opine on that topic. This court has stated that "one part of the presumption of regularity is that the person selected by the VA is qualified by training, education, or experience *in the particular field.*" *Parks*, 716 F.3d at 585 (emphasis added).

As the presumption has been interpreted and applied, however, it has come to mean that any healthcare professional is competent to opine on any disease or condition, unless it is a vision, hearing, dental, or psychiatric problem, or is an initial examination for traumatic brain injury. As VA examiners usually do not have expertise in the field they opine about, a presumption of competence should not apply.

Since the Presumption was Created, the VA Removed Its Requirement that All Reports Needed to be Signed by a Doctor

When the presumption was created, the VA Manual stated that "[a]ll original examination reports *must* be signed by a physician, unless the examination was performed by a clinical or counseling psychologist, dentist, audiologist, or optometrist." M21-1MR § III.iv.3.D.19.a (2007). Reports of examinations conducted by "qualified medical examiners other than

physicians" were only acceptable if they were signed by a physician. *Id.*

Now, the corresponding provision states that "[a]ll examination reports *must* be signed by the examining health care provider." M21-1MR § III.iv.3.D.2.a. No doctor's signature is required. It appears that the only time that a doctor's co-signature is required for examinations performed by non-doctors is when, for initial mental disorder examinations, certain specified examiners perform an examination under the supervision of a board-certified or board-eligible psychiatrist or licensed doctorate-level psychologist. *Id.* at § III.iv.3.D.2.f. This change was announced in September 2010 in Fast Letter 10-32.

Doctors undergo significantly more education, training, and experience before they are licensed to practice than most other healthcare professionals. As a result, this change represents a significant decrease in the minimum qualifications needed for the examiner who ultimately approves an examination report after *Rizzo*.

A Recent Incident Demonstrates that the VA's Process for Selecting Examiners is Not Regular

The VA's process for determining which examiners conduct examinations does not always result in a competent examiner being selected.[19] Initial examinations for traumatic brain injury are treated differently than most other diseases, and must be performed by only certain types of doctors. M21-1MR § III.iv.3.D.2.h. The Minneapolis VA admitted in the fall of 2015, however, that since 2010 many examinations for traumatic brain injury had been conducted by unqualified examiners.[20] The VA has denied Freedom of Information Act requests seeking the qualifications of examiners who performed traumatic brain injury exams.[21]

To receive disability benefits, a veteran generally must show that he has been diagnosed with a current disability, that he suffered an in-service incurrence or aggravation of a disease or injury, and that there is a causal link, or nexus, between his present disability

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[19] *See, e.g.*, *Minnesota lawmaker calls for inquiry into VA brain exam*, Wash. Times (Sept. 10, 2015), http://www.washingtontimes.com/news/2015/sep/10/minnesota-lawmaker-calls-for-inquiry-into-va-brain/; A.J. Lagoe & Steve Eckert, *VA fighting release of names tied to brain injury exams*, KARE 11 (Minn.), (Sept. 8, 2015), http://legacy.kare11.com/story/news/investigations/2015/09/08/va-fighting-release – names-tied – brain-injury-exams/71900484/; Steve Eckert and A.J. Lagoe, *Unqualified doctors performed brain injury exams at Mpls VA Medical Center*, Kare 11 (Minn.), http://legacy.kare11.com/story/news/investigations/2015/08/05/unqualified-medical-personnel-performing-exams-mpls-va-medical-center-traumatic-brain-injury/31168581/.

[20] *Id.*

[21] *Id.*

and the disease or injury incurred or aggravated during military service. *Leonhardt v. Shinseki*, 463 F. App'x 942, 945 (Fed. Cir. 2012). VA examiners perform examinations that may be directed to any or all of these factors.

The cited news articles describe veterans who suffered head injuries during service. The VA examiners were tasked with determining whether a diagnosis of traumatic brain injury was appropriate. As noted, the VA Manual requires certain specialized doctors to have performed these diagnosis examinations, but such doctors were not used. The VA failed to ensure that the examinations were performed by qualified doctors starting in 2010, after *Rizzo* issued in 2009. This suggests that requiring the VA to present the qualifications of its examiners for Board review is appropriate, to ensure that the VA is selecting qualified examiners for all examinations.

CONCLUSION

Reversing precedent requires justification beyond a belief that the precedent was wrongly decided. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). A court may overrule its own decisions "when they are 'unworkable or are badly reasoned,' when 'the theoretical underpinnings of those decisions are called into serious question,' when the decisions have become 'irreconcilable' with intervening developments in 'competing legal doctrines or policies,' or when they are otherwise 'a positive detriment to coherence and

consistency in the law.'" *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2425 (2014) (Thomas, J., concurring) (citations omitted).

Overruling precedent is "particularly appropriate" when "the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings," and where "subsequent legal developments have unmoored the case from its doctrinal anchors." *In re One2One Commc'ns, LLC*, 805 F.3d 428, 449 (3d Cir. 2015) (citations omitted).

These circumstances are met in this case. Having taken full advantage of the presumption, the VA no longer provides any information about its examiners' qualifications. A veteran must convince the Board or the Veterans Court to order the VA to produce such information. Before the Board will consider whether an examiner was qualified, the veteran must sufficiently object to the examiner's qualifications. But a veteran has difficulty objecting without knowledge of an examiner's qualifications.

This outcome is absurd. "The government's interest in veterans cases is not that it shall win, but rather that justice shall be done." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). The presumption makes the choice of examiners and their qualifications effectively unreviewable, and bars consideration of an examiner's qualifications in weighing the persuasive value of her testimony. The burden on the VA would be

minimal if we restore the status quo before the presumption of competence was established. A veteran's need for a CV certainly outweighs the burden of routinely attaching it.

A presumption based on no evidence is an assumption. Assuming that every examiner is competent stacks the deck against a veteran seeking to challenge an adverse medical opinion. We should overturn the "assumption of competence." The VA should provide evidence regarding the qualifications of the examiners on whose opinions it relies when denying veterans benefits.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 13-3410

FREDDIE H. MATHIS, APPELLANT,

v.

ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge.*

MEMORANDUM DECISION

(Filed May 21, 2015)

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

LANCE, *Judge*: The appellant, Freddie H. Mathis, served in the U.S. Air Force from August 1980 to August 2002. Record (R.) at 214. He appeals, through counsel, a June 21, 2013, Board of Veterans' Appeals (Board) decision that denied his claim for entitlement to service connection for sarcoidosis. R. at 2-16. Single judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the June 21, 2013, decision.

On appeal, the appellant presents two principal arguments. First, he contends that the Board erred in relying on a February 2012 VA medical opinion that is

inadequate. Appellant's Brief (Br.) at 5-12; Reply Br. at 1-5. Second, he asserts that VA erred by failing to establish that the February 2012 examiner was competent to provide an opinion in this case. Appellant's Br. at 12-13. In response, the Secretary argues that the February 2012 medical opinion is adequate for rating purposes and that, as the appellant never challenged the February 2012 examiner's competency, he "has not met his burden of proof on th[at] issue." Secretary's Br. at 8-16. The Secretary asks the Court to affirm the Board's decision. *Id.* at 18.

Initially, the Court notes that the Board found that "all relevant facts have been properly developed, and that all evidence necessary for equitable resolution of the issue has been obtained." R. at 6. The Board "acknowledge[d] that the [regional office (RO)] made several attempts to secure a copy of [the appellant's] [Service Treatment Records (STRs)]" and "[a]fter several searches, the RO determined that the records were unavailable in a Formal Finding of Unavailability dated in January 2010." *Id.* The Board noted that "[t]he [appellant] was informed of the unavailability of these records in a letter from the RO," also in January 2010, and that he "was afforded the opportunity to submit his own copies of the STRs or alternate documentation" but that the appellant maintains that he "does not have copies of the STRs." *Id.* (citing *Cuevas v. Principi*, 3 Vet.App. 542, 548 (1992) (recognizing that VA has a "heightened" duty to assist where service medical records are presumed destroyed)).

Turning to the appellant's first argument, in the decision on appeal, the Board found that "[t]he [appellant]'s sarcoidosis was not manifested during his active military service, is not shown to be causally or etiologically related to his active military service, and is not shown to have manifested to a degree of 10[%] or more within one year from the date of separation from the military."[1] R. at 4. In so finding, the Board relied on, inter alia, the February 2012 VA medical opinion which it found to be adequate for rating purposes. R. at 7; *see* R. at 7-14.

In February 2012, VA requested a medical opinion to answer the following question: "Ms [the appellant']s Sarcoidosis due to military service, or did it have its onset in service?" R. at 52. VA obtained an opinion the same month. R. at 51-55. The Board noted that, after reviewing the appellant's claims file, the examiner opined that the appellant's "sarcoidosis is less likely than not . . . incurred in or caused by the claimed in-service injury, event, or illness." R. at 11; *see* R. at 53. The Board noted the examiner's explanation that "while the [appellant] claims to have had some pulmonary symptoms while in service, there is nothing to support that the pulmonary symptoms were related to sarcoidosis." R. at 11; *see* R. at 53. Moreover, the Board stated that the examiner reviewed the statements submitted by the appellant's fellow service members, "which described the [appellant]'s breathing problems in service" and the examiner's acknowledgment that

[1] The Court notes that sarcoidosis is one of the chronic diseases listed in 38 C.F.R. § 3.309(a).

"the [appellant] may well have had such issues." R. at 11; *see* R. at 53. However, the Board noted that the examiner explained "that the [appellant']s sarcoidosis was diagnosed seven years after his active military service" and that "there is nothing to indicate that the sarcoidosis existed within one year of service." R. at 11; *see* R. at 53. The Board further noted the examiner's indication that "if the [appellant] had significant breathing issues post-service, one can assume he would have sought medical care." R. at 11; *see* R. at 53. Ultimately, Board explained that the examiner opined that "as the present lack of documentation exists . . . it would be an extreme stretch and unreasonable to opine that the [appellant]'s sarcoidosis existed within one year of service." R. at 11; *see* R. at 53.

Although the appellant asserts that the examiner's rejection of the lay testimony regarding his in- and post-service breathing problems "contradicts the Board's affirmative finding on the same factual issue," the appellant's argument is misplaced. Appellant's Br. at 8, 5-9. The Board found that "the [appellant], and his friends and family, are competent and credible to report that the [appellant] experienced fatigue and shortness of breath both during and since his active military service." R. at 13. However, the Board also found that "[a]lthough the [appellant] and his service comrades are competent and credible to relate[ ] *the physical symptoms* he experienced while still on active duty, as lay men they are not competent to assert a *causal link between these symptoms and the sarcoidosis* which became manifest several years post

service." *Id.* (emphasis added). The Court cannot conclude that the Board erred in finding that the appellant and his fellow service members are not competent to provide an opinion as to the causation of his sarcoidosis. *Id.*; *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) ("Whether lay evidence is competent and sufficient in a particular case is a fact issue to be addressed by the Board."); *see also Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009) ("The Court reviews factual findings under the 'clearly erroneous' standard.").

Further, contrary to the appellant's assertions otherwise and as the Board correctly noted, the February 2012 examiner considered the appellant's and his fellow service members' submitted lay statements regarding his breathing problems in-service. R. at 11; *see* R. at 53. Indeed, rather than rejecting the lay statements, the examiner explicitly noted the appellant's reports of "pulmonary symptoms while in service" and his fellow service members' statements "that [the appellant] had some breathing issues while in service." R. at 53. The examiner further explained that he "[did] not doubt the validity of the letters" submitted by the appellant's fellow service members' and acknowledged that the appellant "may very well have had" breathing issues in service. R. at 53. Thus, the Court cannot conclude that the Board clearly erred in its characterization of the February 2012 examiner's consideration of the lay testimony. *See Hood*, 23 Vet.App. at 299. Accordingly, the Court holds that the appellant has not demonstrated that the February 2012 opinion was based on an inaccurate factual premise. *See Hilkert v.*

West, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *see also Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) (holding that a medical opinion must be based on an accurate factual premise).

Additionally, although the appellant asserts that the examiner "does not provide any analysis or support for his opinion that [the] appellant would have sought medical care if he had suffered symptoms of sarcoidosis (such as significant breathing problems) within one-year of discharge," Appellant's Br. at 10, the Court notes that "there is no reasons or bases requirement imposed on examiner." *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012); *see also Kahana v. Shinseki*, 24 Vet.App. 428, 439 (2011) (Lance, J., concurring) (noting that medical evidence may be required to determine whether a particular disability would have manifested observable symptoms that would have been reported and recorded).

Similarly, the appellant faults the examiner for "'"fail[ing] to explain, (or to cite a medical publication which does), how or why all types of sarcoidosis necessarily have a quick and rapid onset of severe symptomatology," as "there are types of sarcoidosis characterized by a slow and gradual development of symptoms." Appellant's Br. at 11-12. To the extent that the appellant contends that examiners must explicitly note their review of relevant medical literature in support of their opinion, he is incorrect. The presumption that VA medical examiners are competent "includes

a presumption that physicians remain up-to-date on medical knowledge and current medical studies." *Monzingo v. Shinseki*, 26 Vet.App. 97, 106-07 (2012) (holding that the mere fact that an "examiner did not cite any studies is not evidence that" he is unaware of such studies and is not a basis for finding an examination report inadequate). Moreover, neither the appellant nor his counsel has demonstrated that he possesses any medical expertise, and the Court cannot accept the appellant's counsel's lay assertions regarding the possible onset of the appellant's sarcoidosis. *Hyder v. Derwinski*, 1 Vet.App. 221, 2525 [sic] (1991) ("Lay hypothesizing . . . serves no constructive purpose and cannot be considered by the Court"); *see also Acevedo*, 25 Vet.App. at 293.

Based on the arguments presented, the Court is not persuaded that the Board clearly erred when it determined that the February 2012 medical opinion was adequate. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) ("Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard."); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (Board finding " 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " (*quoting United States v. US. Gypsum Co.*, 333 U.S. 364, 395 (1948))).

Turning to the appellant's second argument, he contends that "VA erred by failing to establish that [the February 2012 examiner], who specializes in

family practice, was qualified to offer an expert opinion on a medical issue requiring specialized knowledge, training or experience in the field of pulmonology." Appellant's Br. at 12. The appellant acknowledges the legal "authority which places the burden on a claimant to challenge the competency of VA medical health practitioners." *Id.* Indeed, "VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) (citing *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011)). Moreover, while the presumption is a rebuttable one, "[t]he first step to overcoming the presumption is to object." *Id.* Here, the appellant points to no evidence that relates to an objection to the February 2012 examiner on the basis of competence. In fact, the appellant appears to concede that he did not object at the Board and further states that he "wishes to preserve for Federal Circuit appeal a challenge to the correctness of the case law on this issue. Appellant's Br. at 13. Accordingly, although the appellant is free to raise an objection as to the competency of the examiner below, the Court holds that the mere fact that the examiner who provided the February 2012 medical opinion was not a pulmonologist does not, by itself, render the opinion inadequate. *See Parks* and *Sickels*, both *supra*.

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's June 21, 2013, decision is AFFIRMED.

DATED: May 21, 2015

Copies to:

Mark R. Lippman, Esq.

VA General Counsel (027)

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

IN THE APPEAL OF
FREDDIE H. MATHIS [redacted]

DOCKET NO. 11-03 104) DATE ***June 21, 2013***
) ***TDV***
)

On appeal from the
Department of Veterans Affairs
Regional Office in Boise, Idaho

THE ISSUE

Entitlement to service connection for sarcoidosis.

REPRESENTATION

Veteran represented by: Veterans of Foreign Wars of the United States

ATTORNEY FOR THE BOARD

Shauna M. Watkins, Associate Counsel

INTRODUCTION

The Veteran served on active duty from August 1980 to August 2002.

The Veteran's claim comes before the Board of Veterans' Appeals (Board) on appeal from a March 2010 rating decision of the U.S. Department of Veterans Affairs (VA) Regional Office (RO) in Boise, Idaho, which denied the benefit sought on appeal. The Veteran then perfected a timely appeal of this issue.

In March 2011, the Veteran was afforded his requested hearing before a Decision Review Officer (DRO). A copy of the hearing transcript has been associated with the claims file.

The RO certified this appeal to the Board in March 2012. Subsequently, additional lay evidence was added to the record. However, the Veteran waived his right to have the RO initially consider this evidence in a statement dated in August 2012. 38 C.F.R. §§ 20.800, 20.1304 (2012).

The Veteran's Virtual VA paperless claims file was also reviewed and considered in preparing this decision, along with the Veteran's paper claims file.

FINDING OF FACT

The Veteran's sarcoidosis was not manifested during his active military service, is not shown to be causally or etiologically related to his active military service, and is not shown to have manifested to a degree of 10 percent or more within one year from the date of separation from the military.

CONCLUSION OF LAW

Service connection for sarcoidosis is not established. 38 U.S.C.A. §§ 1110, 1112, 1113, 1131, 1137 (West 2002 & Supp. 2012); 38 C.F.R. §§ 3.303, 3.304, 3.307, 3.309 (2012).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Board has thoroughly reviewed all the evidence in the Veteran's claims file. Although the Board has an obligation to provide reasons and bases supporting this decision, there is no need to discuss, in detail, the evidence submitted by the Veteran or on his behalf. *See Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (the Board must review the entire record, but does not have to discuss each piece of evidence). The analysis below focuses on the most salient and relevant evidence and on what this evidence shows, or fails to show, on the claim. The Veteran must not assume that the Board has overlooked pieces of evidence that are not explicitly discussed herein. *See Timberlake v. Gober*, 14 Vet. App. 122 (2000) (the law requires only that the Board address its reasons for rejecting evidence favorable to the Veteran).

I. VA's Duties to Notify and Assist

Under applicable law, VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126

(West 2002 & Supp. 2012); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2012).

Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and his or her representative, if any, of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002). Proper notice from VA must inform the claimant of any information and evidence not of record: (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; and, (3) that the claimant is expected to provide. This notice must be provided prior to an initial unfavorable decision on a claim by the Agency of Original Jurisdiction (AOJ). *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Pelegrini v. Principi*, 18 Vet. App. 112 (2004).

The Board finds that the content requirements of a duty to assist notice letter have been fully satisfied. *See* 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b). A letter from the RO dated in November 2009 provided the Veteran with an explanation of the type of evidence necessary to substantiate his claim, as well as an explanation of what evidence was to be provided by him and what evidence the VA would attempt to obtain on his behalf. The letter also provided the Veteran with information concerning the evaluation and effective date that could be assigned should service connection be granted, pursuant to *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). The letter was provided prior to the initial RO adjudication of his claim in the March

2010 rating decision. Accordingly, VA has no outstanding duty to inform the Veteran that any additional information or evidence is needed.

VA also has a duty to assist the Veteran in the development of the claim. This duty includes assisting the Veteran in the procurement of service treatment records (STRs) and pertinent treatment records and providing an examination when necessary. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159.

Here, the Board finds that all relevant facts have been properly developed, and that all evidence necessary for equitable resolution of the issue has been obtained. His post-service VA treatment records and his military enlistment examination have been obtained. The claims file does not present evidence that the Veteran is currently receiving disability benefits from the Social Security Administration (SSA) for the disorder currently on appeal. Therefore, the Board does not need to make an attempt to obtain these records. The Board does not have notice of any additional relevant evidence that is available but has not been obtained.

The Board acknowledges that the RO made several attempts to secure a copy of his STRs. After several searches, the RO determined that the records were unavailable in a Formal Finding of Unavailability dated in January 2010. The Veteran was informed of the unavailability of these records in a letter from the RO dated that same month. In this letter, the Veteran was afforded the opportunity to submit his own copies of the STRs or alternate documentation. The Veteran has

stated throughout his appeal that he does not have copies of the STRs. Under these circumstances, the United States Court of Appeals for Veterans Claims (Court) has held that VA has a heightened duty "to consider the applicability of the benefit of the doubt rule, to assist the claimant in developing the claim, and to explain its decision when the Veteran's medical records have been destroyed." *Cromer v. Nicholson*, 19 Vet. App. 215, 217-18 (2005) citing *Russo v. Brown*, 9 Vet. App. 46, 51 (1996); *see Cuevas v. Principi*, 3 Vet. App. 542, 548 (1992); *O'Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991). However, missing STRs, while indeed unfortunate, do not obviate the need for the Veteran to have some other evidence of a link between his current disorder and his active military service. *See Milostan v. Brown*, 4 Vet. App. 250, 252 (1993) (citing *Moore v. Derwinski*, 1 Vet. App. 401, 406 (1991) and *O'Hare v. Derwinski,* 1 Vet. App. 365, 367 (1991)); *see, too, Russo v. Brown*, 9 Vet. App. 46 (1996). *Cf. Collette v. Brown*, 82 F.3d 389, 392-93 (Fed. Cir. 1996); *Arms v. West*, 12 Vet. App. 188, 194-95 (1999).

The duty to assist also includes providing a medical examination or obtaining a medical opinion when such is necessary to make a decision on a claim, as defined by law. The record indicates that the Veteran was afforded a VA medical opinion in February 2012, the results of which have been included in the claims file for review. The medical opinion involved a review of the claims file, and an opinion that was supported by sufficient rationale. Therefore, the Board finds that the VA medical opinion is adequate for rating purposes.

See Barr v. Nicholson, 21 Vet. App. 303, 311 (2007) (affirming that a medical opinion is adequate if it provides sufficient detail so that the Board can perform a fully informed evaluation of the claim).

The Board notes that while a VA medical opinion has been afforded to the Veteran, a VA examination of the Veteran has not been obtained. However, the Board finds that the evidence, which does not reflect competent evidence showing a nexus between service and the disorder at issue, warrants the conclusion that a remand for an examination is not necessary to decide the claim. *See* 38 C.F.R. § 3.159(c)(4). As post-service treatment records provide no basis to grant this claim, and in fact provide evidence against this claim, the Board finds no basis for a VA examination to be obtained.

Under *McLendon v. Nicholson*, 20 Vet. App. 79 (2006), in disability compensation claims, VA must provide a VA medical examination when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the Veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the VA Secretary to make a decision on the claim. Simply stated, the standards of *McLendon* are not met in this case.

For the foregoing reasons, the Board concludes that all reasonable efforts were made by the VA to obtain evidence necessary to substantiate the Veteran's claim. Therefore, no further assistance to the Veteran with the development of evidence is required.

II. Service Connection

The Veteran seeks service connection for sarcoidosis.

To establish direct service connection, the record must contain: (1) medical evidence of a current disorder; (2) medical evidence, or in certain circumstances, lay testimony, of in-service incurrence or aggravation of an injury or disease; and, (3) evidence of a nexus between the current disorder and the in-service disease or injury. In other words, entitlement to service connection for a particular disorder requires evidence of the existence of a current disorder and evidence that the disorder resulted from a disease or injury incurred in or aggravated during service. 38 U.S.C.A. §§ 1110, 1131.

Service connection may also be granted for any disease diagnosed after the military discharge, when all the evidence, including that pertinent to the period of military service, establishes that the disease was incurred during the active military service. 38 U.S.C.A. § 1113(b) (West 2002); 38 C.F.R. § 3.303(d).

Service connection for certain chronic diseases, including sarcoidosis, will be presumed if they manifest to a compensable degree within one year following the active military service. This presumption, however, is

rebuttable by probative evidence to the contrary. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and VA regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid. 38 C.F.R. § 3.303(d).

For the showing of a chronic disease in service, there must be a combination of manifestations sufficient to identify the disease entity and sufficient observation to establish chronicity at the time. If chronicity in service is not established, evidence of continuity of symptoms after discharge is required to support the claim. 38 C.F.R. § 3.303(b). However, the use of continuity of symptoms to establish service connection is limited only to those diseases listed at 38 C.F.R. § 3.309(a) and does not apply to other disabilities which might be considered chronic from a medical standpoint. *See Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. Feb. 21, 2013).

The determination as to whether the requirements for service connection are met is based on an analysis of all the evidence of record and the evaluation of its credibility and probative value. 38 U.S.C.A. § 7104(a) (West 2002); *Baldwin v. West*, 13 Vet. App. 1 (1999); *see* 38 C.F.R. § 3.303(a).

When there is an approximate balance of positive and negative evidence regarding a material issue, the benefit of the doubt in resolving each such issue shall be

given to the claimant. 38 U.S.C.A. § 5107(b); *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001); *see* 38 C.F.R. §§ 3.102. If the Board determines that the preponderance of the evidence is against the claim, it has necessarily found that the evidence is not in approximate balance, and the benefit of the doubt rule is not applicable. *Ortiz*, 274 F.3d at 1365.

As noted above, the first element of service connection requires medical evidence of a current disorder. Here, a current diagnosis has been established. In private treatment records dated in September 2009, just prior to the Veteran filing his claim in October 2009, the Veteran was diagnosed with sarcoidosis. Thus, the Veteran has satisfied the first element of service connection.

As stated above, the second element of service connection requires medical evidence, or in certain circumstances, lay testimony, of in-service incurrence or aggravation of an injury or disease. In this regard, the Veteran's June 1980 military enlistment examination is of record, and does not document any problems related to sarcoidosis. At his DRO hearing, the Veteran testified that his sarcoidosis began during the late 1990s (*i.e.*, the last few years of his active duty). The Veteran testified that during this time, he was stationed in Italy. The Veteran testified that he believed his sarcoidosis may be due to environmental exposures from Italy. The Veteran's DD -214 form does not document a Military Occupational Specialty (MOS) or locations in which the Veteran would have been exposed to hazardous environmental dangers during his active military service. The Board notes that the Veteran's

remaining STRs are not of record. The RO made several attempts to obtain the Veteran's STRs. After several searches, the RO determined that the records were unavailable. Under these circumstances, the Court has held that VA has a heightened duty "to consider the applicability of the benefit of the doubt rule, to assist the claimant in developing the claim, and to explain its decision. . . ." *Cromer*, 19 Vet. App. at 217-18, *citing Russo*, 9 Vet. App. at 51; *see Cuevas*, 3 Vet. App. at 548; *O'Hare*, 1 Vet. App. at 367.

In order to compensate for his missing STRs, the Veteran testified at a DRO hearing in March 2011. At the hearing, the Veteran indicated that during his active military service, he experienced weakness, fatigue, and shortness of breath. The Veteran stated that he was treated for these symptoms during his active military service. The Veteran also testified that he experienced these symptoms following his military discharge, but he did not seek formal treatment until 2009. The Veteran's ex-wife also testified at the DRO hearing that the Veteran's health declined during their marriage, while he was on active duty. The Veteran also submitted two buddy statements from Veterans who were in the U.S. Air Force with the Veteran and described the Veteran's shortness of breath during his active military service and since that time. The Veteran also submitted two family statements dated in 2012, which described the Veteran's declining health in the "past few years."

Based on these lay assertions, VA obtained a VA medical opinion in February 2012. The VA examiner, following a review of the claims file to include the hearing transcript and lay statements, concluded that the Veteran's current sarcoidosis is less likely than not (less than 50 percent probability) incurred in or caused by the claimed in-service injury, event, or illness. The examiner reasoned that while the Veteran claims to have had some pulmonary symptoms while in service, there is nothing to support that the pulmonary symptoms were related to sarcoidosis. The examiner stated that he was not doubting the validity of the lay statements, which described the Veteran's breathing problems in service. The examiner indicated that the Veteran may well have had such issues. However, the examiner pointed out that the Veteran's sarcoidosis was diagnosed seven years after his active military service. The examiner stated that there is nothing to indicate that the sarcoidosis existed within one year of service. The examiner indicated that if the Veteran had significant breathing issues post-service, one can assume that he would have sought medical care, and a simple Chest X-ray (CXR) would have been ordered. However, as the present lack of documentation exists, the examiner found that it would be an extreme stretch and unreasonable to opine that the Veteran's sarcoidosis existed within one year of service.

The claims file, including the post-service treatment records, does not contain any objective medical information that would refute this medical opinion. Thus, the Veteran's contentions notwithstanding, none of the

physicians who have had occasion to evaluate or examine him or anyone else for that matter, have attributed his current sarcoidosis to his active military service.

Additionally, as described by the VA examiner, the first post-service relevant complaint of sarcoidosis was in private treatment records dated in September 2009. Again, the Veteran's active duty ended in August 2002. This lengthy seven-year period without treatment for the disorder weighs heavily against the claim. *See Maxson v. West*, 12 Vet. App. 453 (1999), *aff'd*, 230 F.3d 1330 (Fed. Cir. 2000) (holding that service incurrence may be rebutted by the absence of medical treatment of the claimed disorder for many years after the military discharge).

The Board notes that the Veteran reports continuous symptomatology since his active military service. However, the Veteran's contentions are not supported by the medical evidence of record. As stated above, the earliest pertinent post-service medical evidence associated with the claims file is dated from 2009, seven years after the Veteran's military separation in 2002. At his DRO hearing, the Veteran testified that he did not seek treatment until 2009. This does not establish continuity of symptomatology during and since the Veteran's active military service. Thus, the Board finds that the medical evidence does not establish a "chronic disorder." 38 C.F.R. § 3.303; *see Walker*, 708 F.3d at 1331. The Veteran's service connection claim cannot be granted on this theory of entitlement.

Additionally, the Board finds that the Veteran is not entitled to presumptive service connection for sarcoidosis. As stated above, the earliest post-service medical treatment records are dated from 2009, and the Veteran was separated from the active duty in 2002. Sarcoidosis was not manifested within one year of the Veteran's military discharge. Thus, the presumption for service connection for chronic diseases does not apply. 38 U.S.C.A. §§ 1112, 1113, 1137; 38 C.F.R. §§ 3.307(a), 3.309(a).

In reaching this decision, the Board has considered the lay statements support of the Veteran's claim. The Board acknowledges that the Veteran, and his friends and family, are competent, even as laypersons, to attest to factual matters of which they have first-hand knowledge, *e.g.*, an injury or observable symptoms. *See Washington v. Nicholson*, 19 Vet. App. 362, 368 (2005). The United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that lay evidence is one type of evidence that must be considered, and that competent lay evidence can be sufficient in and of itself. *Buchanan v. Nicholson*, 451 F.3d 1331, 1335 (Fed. Cir. 2006). In *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009), and in *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007), the Federal Circuit determined that lay evidence can be competent and sufficient to establish a diagnosis of a disorder when: (1) a layperson is competent to identify the medical disorder (noting that sometimes the layperson will be competent to identify the disorder where the disorder is simple, for example a broken leg, and sometimes not, for example, a form

of cancer), (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. The relevance of lay evidence is not limited to the third situation, but extends to the first two as well. Whether lay evidence is competent and sufficient in a particular case is a fact issue. *Id.*

Here, the Veteran, and his friends and family, are competent and credible to report that the Veteran experienced fatigue and shortness of breath both during and since his active military service. However, the Board must still weigh his lay statements against the medical evidence of record. *See Layno v. Brown*, 6 Vet. App. 465 (1994) (distinguishing between competency ("a legal concept determining whether testimony may be heard and considered") and credibility ("a factual determination going to the probative value of the evidence to be made after the evidence has been admitted")). Additionally, the claims file only contains one medical opinion, in which the VA examiner reviewed the claims file, including the lay statements, and provided a negative medical nexus opinion. *See Caluza v. Brown*, 7 Vet. App. 498, 511-12 (1995), *aff'd per curiam*, 78 F.3d. 604 (Fed. Cir. 1996); *see also Macarubbo v. Gober*, 10 Vet. App. 388 (1997) The Board notes that the only contrary opinion of record comes from the Veteran himself, who believes there is a link between his current sarcoidosis and his military service. Although the Veteran and his service comrades are competent and credible to related the physical symptoms he experienced while still on active duty, as laymen they are not

competent to assert a causal link between these symptoms and the sarcoidosis which became manifest several years post service.

For the reasons set forth above, the Board finds that the lay statements contending that the Veteran's sarcoidosis symptoms have been present since his active military service lack significant probative value. All other evidence of record is unfavorable to the claim for service connection for sarcoidosis.

The Board notes that under the provisions of 38 U.S.C.A. § 5107(b), the benefit of the doubt is to be resolved in the claimant's favor in cases where there is an approximate balance of positive and negative evidence in regard to a material issue. The preponderance of the evidence, however, is against the Veteran's claim, and thus that doctrine is not applicable. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). The Veteran's claim of entitlement to service connection for sarcoidosis is not warranted.

ORDER

The claim for service connection for sarcoidosis is denied.

WAYNE M. BRAEUER
Veterans Law Judge,
Board of Veterans' Appeals

United States Court of Appeals
for the Federal Circuit

FREDDIE H. MATHIS,
Claimant-Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2015-7094

Appeal from the United States Court of Appeals for Veterans Claims in No. 13-3410, Judge Alan G. Lance, Sr.

ON PETITION FOR REHEARING EN BANC

(Filed Aug. 19, 2016)

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

DYK, *Circuit Judge*, concurs in the denial of the petition for rehearing en banc.

HUGHES, *Circuit Judge*, with whom PROST, *Chief Judge*, LOURIE, O'MALLEY, TARANTO, and CHEN, *Circuit Judges*, join, concurs in the denial of the petition for rehearing en banc.

REYNA, *Circuit Judge*, with whom NEWMAN and WALLACH, *Circuit Judges*, join, dissents from the denial of the petition for rehearing en banc.

STOLL, *Circuit Judge*, with whom NEWMAN, MOORE, and WALLACH, *Circuit Judges*, join, dissents from the denial of the petition for rehearing en banc.

PER CURIAM.

ORDER

A petition for rehearing en banc was filed by claimant-appellant Freddie H. Mathis. A response to the petition was invited by the court and filed by the respondent-appellee Robert A. McDonald. Two motions for leave to file amici curiae briefs were also filed and granted by the court.

The petition, response, and briefs of amici curiae were referred to the panel that heard the appeal, and thereafter were referred to the circuit judges who are in regular active service. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for rehearing en banc is denied.

The mandate of the court will be issued on August 26, 2016.

FOR THE COURT

August 19, 2016	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner Clerk of Court

DYK, *Circuit Judge*, concurring in the denial of the petition for rehearing en banc.

To me both sides here are partly right and partly wrong or at least partly unclear. I agree with Judge Hughes 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. At the same time I also agree with Judge Reyna that the veteran should be able to secure information about the examiner's qualifications from the Department of Veterans Affairs ("VA") upon request without securing a Board of Veterans' Appeals or court order. Judge Hughes declines to opine as to when the VA's duty to assist requires it to supply qualifications information and suggests that the veteran may need to provide a "reason" to suspect an examiner is incompetent. In my view, imposing such an obligation on the VA to routinely provide qualifications information to the veteran in response to a request (as part of the duty to assist) should not place an undue burden on the VA. This case involves no such request. But one might hope that the VA would adopt that approach for the future

so that the veteran on request will have the information necessary to mount a challenge to the medical examiner's qualifications.

HUGHES, *Circuit Judge*, with whom PROST, *Chief Judge*, LOURIE, O'MALLEY, TARANTO, and CHEN, *Circuit Judges*, join, concurring in the denial of the petition for rehearing en banc.

I concur in the denial of the petition for rehearing en banc but write separately to note the limited nature of the rebuttable presumption and emphasize the VA's obligations to develop the record and to assist the veteran. Those duties ensure that a veteran will have access to information regarding a medical examiner's credentials when appropriate. And if the VA fails to properly fulfill these obligations, its decisions are subject to case-specific review and reversal by both the Board of Veterans Appeals and the Court of Appeals for Veterans Claims, and to review in this court for improper legal restrictions and any constitutional violations. The limited, rebuttable presumption of competency simply permits the VA to assume that a chosen medical examiner is competent to conduct examinations. It does not provide a presumption that the examination report and the information contained therein is correct – the probative weight of the report still must be determined by the regional office and the Board. And despite this presumption, a veteran may always request information to challenge an examiner's competency from the regional office or the Board. I see no

legal reason to object to the limited, rebuttable presumption of competency as long as the Secretary's other legal obligations, including the duty to assist and to develop the record, are fulfilled.

In fact, the Board has frequently justified providing veterans with information regarding examiners' qualifications based on its duty to assist. *See* No. 1501503, 2015 WL 1194124, at *8 (Bd. Vet. App. Jan. 13, 2015) ("Although the RO directed the Veteran to contact the doctor directly for such, the Board finds that ensuring receipt of the CV is, in this instance, subject to the duty to assist the Veteran in substantiating his claim."); No. 1543733, 2015 WL 7875614, at *2 (Bd. Vet. App. Oct. 13, 2015) ("Although the Board's Privacy Act Officer directed the attorney to contact the facilities where the examinations were held for such information, ensuring receipt of the CVs is, in this instance, subject to the duty to assist the Veteran in substantiating his claims."). Likewise, in *Nohr v. McDonald*, the Veterans Court explicitly recognized that the VA's duty to assist and its duty to obtain records obligated the Secretary to assist the veteran in developing the record regarding an examiner's competency. As the court said, "the Board cannot hide behind the presumption of regularity and ignore Mr. Nohr's request for assistance in obtaining documents necessary to rebut the presumption." 27 Vet. App. 124, 133 (2014). Thus, the Veterans Court has recognized that it would be improper for the VA to both refuse assistance and invoke the presumption.

It is true that the VA will sometimes deny such requests when, for example, a request is made before an examination and there is no reason to suspect that an examiner is incompetent. *See* No. 1452787, 2014 WL 7740599, at *9 (Bd. Vet. App. Dec. 1, 2014). However, that does not prevent this information from being provided at a more appropriate time. Indeed, in at least five different cases where the veteran has requested the CV of his examiner, the VA has been directed to comply with this request. *Nohr*, 27 Vet. App. at 128; No. 1552016, 2015 WL 10004845, at *12 (Bd. Vet. App. Dec. 11, 2015); No. 1543733, 2015 WL 7875614, at *2 (Bd. Vet. App. Oct. 13, 2015); No. 1538484, 2015 WL 6939522, at *1-2 (Bd. Vet. App. Sept. 9, 2015); No. 1501503, 2015 WL 1194124, at *7-8 (Bd. Vet. App. Jan. 13, 2015). More importantly, the VA's duty to assist requires it to consider a claimant's request for further information, including information about an examiner's competency. The scope of that duty, and including the circumstances and timing of when such information should be provided, is not before us in this case and I offer no view on when that duty requires the VA to supply an examiner's CV when requested. It suffices to say that the duty to assist requires the VA "to make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim," 38 U.S.C. § 5103A(a)(1), and, thus, it should not routinely require an order from the Board or the Veterans Court before such necessary information is provided.

In this case, it does not appear that Mr. Mathis ever requested information regarding the examiner's qualifications. *See Mathis v. McDonald*, No. 2015-7094, 2016 WL 1274457, at *1-2 (Fed. Cir. Apr. 1, 2016); *see also Mathis v. McDonald*, No. 2013-3410, 2015 WL 2415067, at *3 (Vet. App. May 21, 2015) ("Here, [Mr. Mathis] points to no evidence that relates to an objection to the February 2012 examiner on the basis of competence."). In fact, he did not raise the issue of competency until his case was on appeal to the Veterans Court. *Mathis*, 2016 WL 1274457, at *2. Even in the absence of the presumption of competency, it would still be inappropriate for the Veterans Court or this court to adjudicate the factual question of an examiner's competency in the first instance.

Similar procedural deficiencies existed in the cases that this petition calls into consideration. In *Rizzo v. Shinseki*, 580 F.3d 1288, 1290-91 (Fed. Cir. 2009), there is no mention of an attempt to procure information about the examiner's qualifications; instead, the veteran simply challenged the VA's failure to introduce affirmative evidence of his qualification. In *Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010), the veteran requested information about the examiner's qualifications and it was provided, but the veteran failed to challenge the examiner's competency. In *Sickels v. Shinseki*, 643 F.3d 1362, 1365 (Fed. Cir. 2011), and *Parks v. Shinseki*, 716 F.3d 581, 586 (Fed. Cir. 2013), the veterans failed to request information about the VA examiners' qualifications. Indeed, in *Parks*, we specifically declined to offer an "opinion on

whether an ARNP experienced only in family medicine may be qualified to opine on causes of diabetes." 716 F.3d at 586. We have approved a (rebuttable) presumption of competency, but we have not had occasion – and do not here have occasion – to address how the VA must fulfill its duty to assist, or other legal duties, when questions of competency arise. We have not upheld a denial of a claimant's request for competency information where there was reason to question competency and the information was needed to answer the question. Meanwhile, as noted above, the Veterans Court and the Board have recognized such informational duties where competency is genuinely placed in issue.

It is also important to put the presumption of competency in context in other ways.

First, the dissent appears to conflate an examiner's competence with the adequacy of the exam he performs. *See* Reyna Dissent at 4, 8 n.6. The dissent relies on *Sickels* to support its conclusion that "[t]his court has extended the presumption of competence to apply not only to examiners, but also to their reports." *Id.* at 8 n.6. But *Sickels* does not reach so far. Rather, *Sickels* simply concludes that the presumption of competency includes the presumption that an examiner was "sufficiently informed." *Sickels*, 643 F.3d at 1365. Moreover, like the situation here, *Sickels* relied on the fact that the argument that the examiner was insufficiently informed was not raised before the Board. *Id.* at 1366. Accordingly, the Board was not required to

"state reasons and bases demonstrating why the medical examiners' reports were competent and sufficiently informed." *Id.* Nowhere does *Sickels* hold that the presumption of competency extends to the examination report.

Therefore, apart from challenging an examiner's qualifications, the veteran may hold the examiner to the separate standards that demand adequacy of the examiner's opinion and examination. The law is clear that when the Board seeks the opinion of a medical expert, "that opinion must be adequate to allow judicial review." *D'Aries v. Peake*, 22 Vet. App. 97, 104 (2008). Moreover, the opinion must rest on an examination, whether of the veteran or of medical records, adequate to support the opinion offered. *See Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007) ("[O]nce the Secretary undertakes the effort to provide an examination when developing a service-connection claim, even if not statutorily obligated to do so, he must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided."). "A medical opinion is adequate when it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Id.* at 310 (quoting *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994)).

The VA Manual also sets forth internal procedures aimed at producing adequate examination reports. The VA Manual provides that "[a] VA examination report submitted to the rating activity must be as complete

as possible," and specifically calls out that "[a] medical opinion [that] is not properly supported by a valid rationale and/or the evidence of record" is an example of a "deficienc[y] that would render an examination insufficient." M21-1MR § III.iv.3.D.3.a. It then directs that if an examination is insufficient, it should be returned to the VA examiner or the contracted provider. *Id.* § III.iv.3.D.3.e.

As this law and guidance makes clear, whether an examiner is competent and whether he has rendered an adequate exam are two separate inquiries. Therefore, simply because an examiner has been presumed competent does not relieve him of his duty to provide an adequate report.

Second, the dissent suggests that the VA periodically engages unqualified examiners, and that the presumption insulates these examiners from any review. *See, e.g.*, Reyna Dissent at 7 ("In reviewing their reports, the Board has indicated that not every doctor is qualified to testify about every issue, and that some issues require special knowledge."); *id.* at 9-10 ("[The presumption] permits the Board to rely on opinions when it knows almost nothing about the person who prepared them. It almost entirely insulates the VA's choice of medical examiners from review."). However, VA regulations require that "competent medical evidence" be "provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1). Examinations provided by the VA are generally conducted "by VA medical staff, VA contract

providers, or non-VA care providers." VHA Directive 1046 at 1 (Apr. 23, 2014). The VA Manual provides that "VA medical facilities (or the medical examination contractor) are responsible for ensuring that the examiners are adequately qualified." M21-1MR § III.iv.3.D.2.b. Every examination report or Disability Benefits Questionnaire (DBQ) must contain the "signature, printed name and credentials, phone number and preferably a fax number, medical license number, and address" of the examiner, as well as his or her specialty, if a specialist examination is required. *Id.* Although Veterans Service Center employees are "not expected to routinely review the credentials of clinical personnel to determine the acceptability of their reports," they must do so if "there is contradictory evidence of record." *Id.*

Regardless, even if the VA sometimes selects "unqualified" examiners – an assertion not supported by any evidence[1] – the dissent overlooks the fact that a veteran can get access to information about his examiner's qualifications. As noted above, in at least five different cases where the veteran has requested

[1] The dissent's sole support for this assertion is *Krugman v. Dep't of Veterans Affairs*, a whistleblower case from the Merit Systems Protection Board in which the employee was fired from the VA because, among other things, he refused to perform compensation and pension examinations. Reyna Dissent at 5 n.3 (citing No. 2015-3156, 2016 WL 1426256, at *1 (Fed. Cir. Apr. 12, 2016)). As a defense to the agency's removal action, the employee asserted that he refused to conduct examinations because he thought that he was not competent to perform examinations. However, the VA never found him incompetent, nor did any claimants ever challenge his competency. Therefore, this case does not demonstrate that the VA hires unqualified examiners.

the CV of his examiner, the VA has been directed to comply with this request. *See supra* at 3. Further, the VA Manual includes a section on "Questions About Competency and/or Validity of Examinations" and directs the VA to *Nohr* for "more information on a claimant's request for information, or complaints, about a VA examination or opinion." M21-1MR § III.iv.3.D.2.o.

The dissent emphasizes, however, that "[i]f a veteran asks for an examiner's qualifications, the VA will not provide them unless it is ordered to do so by the Board, the Veterans Court, or this court." Reyna Dissent at 10. I do not believe that is correct, nor do I believe the dissent's single citation to a Veterans Court decision proves this point. This case involves only one instance where an order was required to release examiner qualifications, and it demonstrates nothing about whether the VA has willingly provided this information in the majority of other cases. In fact, it at most suggests that when the VA denies requests for examiner qualifications, the system is equipped to remedy these denials.

Finally, the dissent fails to appreciate the nature of the medical evidence used by the VA. Specifically, the VA may order a medical examination, but the agency is not required to provide a medical examination or opinion if the record already contains sufficient medical evidence for the VA to make a decision on the claim. *See* 38 U.S.C. § 5103A(d)(1). By the dissent's account, the competency of the doctors that performed any examinations contained in this "sufficient medical evidence," which may be decades old in any given case,

would need to be established before the VA may rely on it to make a decision on the claim.

The VA provides over 1 million disability evaluations yearly and in 2015 alone, the Veterans Health Administration completed 2,899,593 individual disability benefits questionnaires and/or disability examination templates. Resp. Br. at 8. The dissent has provided no guidance as to how the elimination of this limited presumption would work with regard to the millions of disability evaluations that have already been provided and form the basis for the continuing evaluation of the millions of pending claims for benefits. Would the Secretary be required to provide an affidavit or some other supporting evidence of the examiner's competence before the Regional Office or the Board could rely on that examination report? Would the Secretary have to appoint a specialist for each particular ailment a veteran alleges, as Mathis implies would be necessary? If so, that will create an incredible burden and may impair the operations of the VA, a result that will negatively impact veterans. Consequently, this court should not revise a procedure that is one small piece of a very complicated and long process, especially in a case that does not demonstrate a problem with the use of that procedure.

I am certainly sympathetic to the concerns raised regarding the presumption of competency, and its potential for misuse by the VA. The Secretary should be mindful of its obligations and not reflexively rely on a presumption of competency. But our review is limited

and I see no legal impediment to a rebuttable presumption of competency as long as it is properly confined and consistent with the Secretary's other legal obligations. Thus, I respectfully concur in the denial of rehearing en banc.

REYNA, *Circuit Judge*, with whom NEWMAN and WALLACH, *Circuit Judges*, join, dissenting from denial of rehearing en banc.

In declining to undertake an *en banc* review, the court leaves in place a judicially created evidentiary presumption that in application denies due process to veterans seeking disability benefits. The presumption, that the Veterans Administration ordinarily and routinely selects competent medical examiners as a matter of due course, was created void of any evidentiary basis. Its application has resulted in a process that is inconsistent with the Congressional imperative that the veterans' disability process be non-adversarial, and that the VA bears an affirmative duty to assist the veteran. In the face of these circumstances, the government's cries concerning its administrative burdens do not resonate. I dissent, therefore, from my colleagues' decision not to undertake an *en banc* review of these considerations.

I. VETERANS AND EXAMINERS

Mr. Mathis served in the U.S. Air Force from August 1980 to August 2002. J.A. 1. In 2009 he applied for

disability benefits through the Veterans Administration for his pulmonary sarcoidosis, shortly after being diagnosed with the condition. J.A. 56. In March 2011, Mr. Mathis had a hearing before a Decision Review Officer. J.A. 51. At the hearing, he and his ex-wife testified that his breathing difficulties began while he was in the military. J.A. 57. He also submitted statements from two of his fellow service members that described Mr. Mathis's shortness of breath during active military service and since that time. *Id.*

In February 2012, the VA requested a medical opinion on whether Mr. Mathis's sarcoidosis was due to military service or began while he was in service. J.A. 2, 46.[1]

An examiner reviewed Mr. Mathis's claims file and provided the VA with an opinion indicating that Mr.

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[1] When a veteran applies for disability benefits, the VA is at times required to provide a medical examination or opinion. 38 U.S.C. § 5103A(d). The medical professionals providing such examinations and opinions are called examiners or "compensation and pension" examiners. *Cf.* J.A. 45. Examiners are employed by the VA or are outside contractors.

VA regional offices use the opinions prepared by examiners in determining whether to award a veteran disability benefits. The decision whether to award benefits often turns on whether the disability is shown to be connected to the veteran's military service. *See, e.g.*, *McClain v. Nicholson*, 21 Vet. App. 319, 320-21 (2007). In other words, as in this case, the service connection issue is often dispositive. If a VA regional office denies a veteran benefits, the veteran may appeal to the Board of Veterans' Appeals (the "Board"), and then the United States Court of Appeals for Veterans Claims (the "Veterans Court"), this court, and the U.S. Supreme Court.

Mathis's sarcoidosis was "less likely than not (less than 50 percent probability) incurred in or caused by the claimed in-service injury, event, or illness." J.A. 47. The following two paragraphs comprise the examiner's analysis:

> While veteran claims to have had some pulmonary symptoms while in service, there is nothing to support that they were related to sarcoidosis. I am not doubting the validity of the letters written by [Mr. Mathis's fellow service members] Mr. Jackson and Mr. Adams stating that the veteran had some breathing issues while in service. He may very well have had such issues. But the Sarcoidosis was doagnosed [sic] 7 years after service. There is nothing to indicate that it existed within one year of service. Had veteran 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.
>
> As the present lack of documentation exists, it would have been an extreme stretch, and unreasonable, to opine that veteran's sarcoidosis existed within one year of service.

J.A. 47.

The VA denied Mr. Mathis's claim for benefits after reviewing the examiner's opinion and the Board affirmed, explicitly relying on the examiner's opinion in its analysis. J.A. 57-61. Mr. Mathis timely appealed to the Veterans Court. J.A. 1. At the Veterans Court,

Mr. Mathis challenged the Board's reliance on the examiner's opinion. *Mathis v. McDonald*, No. 13-3410, 2015 WL 2415067, at *2-3 (Vet. App. May 21, 2015). He asserted that "there are types of sarcoidosis characterized by a slow and gradual development of symptoms," and that the examiner's analysis was inconsistent with this, seeming to implicitly indicate that "all types of sarcoidosis necessarily have a quick and rapid onset of severe symptomatology." *Id.* at *3.

Mr. Mathis argued that the report contained inadequate analysis, but the Veterans Court explained that "there is no reasons or bases requirement imposed on [an] examiner." *Id.* at *2 (quoting *Acevedo v. Shinseki*, 25 Vet. App. 286, 293 (2012)). Similarly, while Mr. Mathis complained that the examiner cited no medical authorities, the Veterans Court explained that an examiner is presumed to know about medical authorities under the presumption of competence:

> The presumption that VA medical examiners are competent "includes a presumption that physicians remain up-to-date on medical knowledge and current medical studies." *Monzingo v. Shinseki*, 26 Vet. App. 97, 106-07 (2012) (holding that the mere fact that an "examiner did not cite any studies is not evidence that" he is unaware of such studies and is not a basis for finding an examination report inadequate).

Id. at *3.

Mr. Mathis also objected to the VA's failure to establish that the examiner was "qualified to offer an expert opinion" on the issue, which he argued required "specialized knowledge, training or experience in the field of pulmonology." *Id.* at *3. The record indicated merely that the examiner was a "staff physician."[2] J.A. 49. The Veterans Court explained that the "VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Id.* at *3 (quoting *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013)). It explained that a veteran's "first step" in overcoming the presumption is to object at the Board to an examiner's competence, and Mr. Mathis had not done so. *Id.*

On appeal to this court, Mr. Mathis argued that the presumption of competence is inconsistent with the non-adversarial nature and pro-claimant procedures established by Congress for veterans. He argued that the presumption of regularity should not have been applied to the VA and its outside contractors' processes of selecting examiners.[3] He argued that the

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[2] The briefing in this case indicates that Mr. Mathis believes that the examiner was a family practice doctor, *see, e.g.*, Appellant's Br. 30, but support for this is not in the record.

[3] In *Krugman v. Dep't of Veterans Affairs*, No. 2015-3156, 2016 WL 1426256, at *1 (Fed. Cir. Apr. 12, 2016), a whistleblower case, this court was afforded a rare view of how the VA selects examiners and the grounds it relies on to establish competency. In that case, the VA hired Dr. Krugman, an anesthesiologist, to be an Associate Chief of Staff for Primary Care in September 2010. J.A. 5, 12. He was hired to perform a variety of responsibilities, including having "oversight responsibilities" for several outpatient clinics in the south Texas area and being the examiner for

presumption of regularity should only apply to routine, non-discretionary, and ministerial procedures, not the competency of medical examiners and their opinions.

II. *Rizzo* Was Wrongly Decided

In *Rizzo*, this court affirmed the Veterans Court's application of the presumption of regularity to the VA's choice of examiners. *Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009). In *Rizzo*, neither this court's decision nor the Veterans Court's decision cited evidence about the VA's – or its contractors' – processes for selecting examiners. *Id.* at 1292; *Rizzo v. Peake*, No. 07-0123, 2008 WL 4140421, at *2 (Vet. App. Aug. 26, 2008). The presumption, therefore, was created without any evidentiary basis that the VA's process for selecting examiners regularly yielded competent examiners. This

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compensation and pension examinations in that area. J.A. 12, 125, 158-59. The record shows that when he was hired by the VA, Dr. Krugman had not treated a patient in almost ten years. J.A. 25-26, 43. The VA wanted him to prepare to conduct examinations by taking an online course and training for a week with an experienced examiner. J.A. 158-60, 303. He took the online course in October 2010 but did not undertake the in-person training. J.A. 160, 303. The VA granted him privileges to perform examinations on September 8, 2010 for one facility and on May 5, 2011 for a different facility. J.A. 134-35; Oral Arg. 15:04-16:38.

When asked to perform compensation and pension examinations, Dr. Krugman refused on grounds that he was not qualified. J.A. 161-62, 210, 303. The refusal formed one of the complaints against him when the VA fired him. J.A. 303; Resp. Br. 4. He argued on appeal that his refusal to perform examinations could not have supported his firing because he did not believe he was qualified to perform them, and that a week of in-person training would not have made him qualified. Pet'r Br. 30-31.

was improper. A "presumption should be predicated on evidence that gives us confidence that a particular procedure is carried out properly and yields reliable results in the ordinary course." *Mathis v. McDonald*, No. 2015-7094, 2016 WL 1274457, at *5 (Fed. Cir. Apr. 1, 2016) ("*Mathis II*") (citing *Posey v. Shinseki*, 23 Vet. App. 406, 410 (2010) and *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 749 (3d Cir. 2010)).

Additionally, the presumption of regularity has typically been only applied to routine, non-discretionary, and ministerial procedures. *Mathis II* at *5 (citing, for example, *Davis v. Principi*, 17 Vet. App. 29, 37 (2003)). In *Rizzo*, this court affirmed the presumption's application to something far from a routine, ministerial procedure, a process by which medical examiners are selected to provide expert opinions on medical issues.

The presumption of competence does not apply to private physicians providing reports on behalf of veterans. In reviewing their reports, the Board has indicated that not every doctor is qualified to testify about every issue, and that some issues require special knowledge. *See, e.g.*, No. 1512074, 2015 WL 2161715, at *16 (Bd. Vet. App. Mar. 20, 2015). This means that, under the presumption, the VA is deemed to have chosen a doctor, nurse, or other examiner who is competent to speak on the specific issue in each case. It is unclear why this court or the Veterans Court would assume that the VA's process for adjudicating benefits yields reliable results in the ordinary course, given that the Board remands almost half (47% in 2015) of disability

compensation appeals back to the regional offices.[4] Specifically, because the presumption of competence was created on a basis that is devoid of evidence showing that the VA's process for selecting examiners is a regular process that always results in a qualified examiner being selected, this court in *Rizzo* was wrong to affirm the Veterans Court's creation of the presumption of competence.[5, 6]

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[4] U.S. Dep't of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2015* 26 (2016), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf.

[5] As my concurring opinion noted, the VA had recently admitted that it used unqualified examiners for some traumatic brain injury (TBI) examinations. *Mathis II* at *15 (Reyna, J., concurring). According to VA guidelines, initial examinations for TBI must be performed by only certain types of doctors, unlike most other diseases and conditions, for which there are no such limiting guidelines. *Id.* at 13, 15. The VA recently admitted further that more than 24,000 veterans received initial examinations for TBI conducted by unqualified examiners. U.S. Dep't of Veterans Affairs, VA Secretary Provides Relief for Veterans with Traumatic Brain Injuries (June 1, 2016), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2795.

[6] This court has extended the presumption of competence to apply not only to examiners, but also to their reports. *See Mathis II* at *8, n. 2 (citing *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) ("The argument that a VA medical examiner's opinion is inadequate is sufficiently close to the argument raised in *Rizzo* that it should be treated the same.")). The Board has indicated that *Sickels* means that "in the absence of a challenge to a VA medical opinion, it is presumed to be adequate." No. 1235436, 2012 WL 6556998, at *11 (Bd. Vet. App. Oct. 12, 2012).

III. Due Process

This court has held that a veteran's entitlement to disability benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009); *Sprinkle v. Shinseki*, 733 F.3d 1180, 1185 (Fed. Cir. 2013). Since the presumption of competence leaves veterans with no way to effectively challenge the nexus between the VA examiners' qualifications and their opinions, due process afforded other individuals in other legal disciplines is not extended to veterans. There is no reasoned justification or evidentiary support for treating veterans differently with respect to medical opinions.

A veteran's claim to disability benefits often will rise or fall based on whether the Board believes an examiner's testimony. *Gambill v. Shinseki*, 576 F.3d 1307, 1322-23 (Fed. Cir. 2009) (Bryson, J., concurring); *id.* at 1324 (Moore, J., concurring). Yet, a veteran's ability to challenge an examiner's competency is limited because the VA does not by default disclose any information about the examiner's qualifications. *Mathis II* at *8 (Reyna, J., concurring).[7] Veterans are unable to confront examiners through voir dire, cross-examination, or interrogatories. *See, e.g.*, VA Manual M21-1MR § III.iv.3.D.2.o ("VA's C&P claim adjudication system does not have a procedure for completion of interrogatories by VA personnel."); No. 1340011, 2013 WL

[7] The VA does not even obtain information about an examiner's qualifications in every case. Appellee Br. 17.

7220329, at *6 (Bd. Vet. App. Dec. 4, 2013) ("There is no provision for interrogatories to the specialist."); 38 C.F.R. §§ 20.700(c), 20.706 (no cross-examination is permitted at Board hearings); *Gambill*, 576 F.3d at 1324 (Moore, J., concurring) (arguing that a veteran ought to be "provided with the opportunity to confront the doctors whose opinions [the VA] relies upon to decide whether veterans are entitled to benefits").

The presumption allows the VA to rely on examiners' opinions to deny veterans benefits without disclosing anything about their qualifications to the veteran or to the Board. It permits the Board to rely on opinions when it knows almost nothing about the person who prepared them. It almost entirely insulates the VA's choice of medical examiners from review. On the other hand, individuals providing examinations *on behalf of veterans* have their qualifications and credentials carefully reviewed by the Board before their opinions are given weight.[8] *See, e.g.*, No. 1512074, 2015 WL 2161715, at *16 (Bd. Vet. App. Mar. 20, 2015). The presumption severely limits veterans' ability to effectively challenge adverse examiner opinions.

Even if a veteran objects to an examiner's competence before the Board, a veteran must make a "specific" objection to an examiner's competence – not merely a "general" one – before the Board will review the examiner's competence. *Mathis II* at *9, n. 8

[8] "Congress expressly permits veterans seeking service-connected disability benefits to submit reports from private physicians." *Gardin v. Shinseki*, 613 F.3d 1374, 1378 (Fed. Cir. 2010) (citing 38 U.S.C. § 5125).

(Reyna, J., concurring) (citing cases). Presumably, a specific objection entails pointing to a specific aspect of an examiner's qualifications. But with no information available on the examiner's qualifications, a veteran is hindered in, if not entirely precluded from, making such a specific objection before the Board.

If a veteran asks for an examiner's qualifications, the VA will not provide them unless it is ordered to do so by the Board, the Veterans Court, or this court. *See, e.g.*, *Nohr v. McDonald*, 27 Vet. App. 124, 128 (2014) (finding that the Board erred in denying a veteran's request for an examiner's CV when the veteran had identified an ambiguous statement in the examiner's report that suggested irregularity in the process of selecting the examiner); *see also Mathis II* at 975-77, n. 5 (Reyna, J., concurring). The Board may refuse to order the VA to do so when the veteran has not already raised a specific objection to the examiner's competence. No. 1452787, 2014 WL 7740599 at *8 (Bd. Vet. App. Dec. 1, 2014). This can create a situation in which the veteran must make a specific objection to an examiner's competence before she can learn the examiner's qualifications; otherwise, the Veterans Court and this court will deny a veteran's challenge to the competency of the examiner. The veteran is rendered hapless, caught in a classic Joseph Heller catch-22-like circumstance.

As it does in cases involving medical opinions provided by professionals hired by the veteran, the Board should be able to examine a VA examiner's qualifications and weigh them in determining the persuasive

value of an examiner's reports rather than being instructed by this court to presume that the examiner is competent. The VA's incentive to not provide evidence about the examiner's qualifications will be strongest when an examiner is not qualified or is barely qualified, the very circumstances where the veteran, the Board, and the Veterans Court ought to know an examiner's qualifications.

Ordinarily, before an expert opinion may be relied upon, the expert's competence must be established. *See, e.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93, n. 10 (1993); Fed. R. Evid. 104. This court has explained that "competency requires some nexus between [an examiner's] qualification[s] and opinion." *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013). Similarly, the Supreme Court has explained that an expert witness is permitted to testify on matters outside his firsthand knowledge because of "an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert*, 509 U.S. at 592. VA medical examiners are "'nothing more or less than expert witnesses' who provide opinions on medical matters." *Townsend v. Shinseki*, No. 12-0507, 2013 WL 2152126, at *5 (Vet. App. May 20, 2013) (quoting *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302 (2008)).

The regulation applicable here – 38 C.F.R. § 3.159(a)(1) – is analogous to Federal Rule of Evidence 702. Under Rule 702, district courts first determine if an expert witness is competent to testify on a subject

before relying on the expert's testimony. *See, e.g.*, *Carlson v. Bioremedi Therapeutic Sys., Inc.*, 822 F.3d 194, 199 (5th Cir. 2016). In patent cases, "[t]estimony proffered by a witness lacking the relevant technical expertise fails the standard of admissibility under Fed. R. Evid. 702." *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1363 (Fed. Cir. 2008). The Veterans Court has explained that the "rules on expert witness testimony" in the Federal Rules of Evidence "provide useful guidance" for the Veterans Court. *Nieves-Rodriguez*, 22 Vet. App. at 302.

The Supreme Court's decision in *Richardson v. Perales* supports a finding that, under the presumption of competence, veterans lack due process. 402 U.S. 389 (1971). In *Perales*, the Supreme Court concluded that procedural due process did not preclude five physicians' written reports from being admitted into a social security disability claim hearing without cross-examination based on several specific factors that would "assure underlying reliability and probative value." *Id.* at 402-03. Several of those factors are not met here. First, the claimant in *Perales*, unlike the veterans here, had a right to subpoena the reporting physicians. Second, the physicians in *Perales* were all practicing physicians, unlike some career examiners at the VA. Third, the examinations in *Perales* were all clearly "in the writer's field of specialized training." *Id.* at 404. In contrast, the VA "broadly recommends assigning generalists except in unusual, ill-defined cases." *Mathis II* at *6.

Several circuit courts have found that social security claimants have an absolute right to cross-examine a reporting physician. This stems from the Supreme Court's reference in *Richardson v. Perales* to a claimant's "right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician." 402 U.S. at 402; *see, e.g.*, *Lidy v. Sullivan*, 911 F.2d 1075, 1077 (5th Cir. 1990).

"In the veterans' uniquely claimant friendly system of awarding compensation, breaches of the duty to assist are at the heart of due process analysis." *Cook v. Principi*, 318 F.3d 1334, 1354 (Fed. Cir. 2002) (Gajarsa, J., dissenting). "If the Constitution provides no protection against the occurrence of such breaches, then the paternalistic interest in protecting the veteran is an illusory and meaningless assurance." *Id.* The presumption of competence is inconsistent with the VA's duty to assist veterans and the non-adversarial nature of the proceedings. *See Hayre v. W.*, 188 F.3d 1327, 1331-32 (Fed. Cir. 1999); 38 U.S.C. § 5103A. "Congressional mandate requires that the VA operate a unique system of processing and adjudicating claims for benefits that is both claimant friendly and non-adversarial." *Hayre*, 188 F.3d at 1331. "An integral part of this system is embodied in the VA's duty to assist the veteran in developing facts pertinent to his or her claim." *Id.*

The duty to assist has been found to require the VA to provide the veteran with his service medical records, upon request, and to inform the veteran of that right. *Watai v. Brown*, 9 Vet. App. 441, 444 (1996)

("[T]he Secretary had a duty to inform the [veteran] that the Secretary, upon proper authorization as required by VA regulations, would furnish copies of relevant service medical records to [his private physician] to enable him to render a less speculative opinion."). Denying veterans information about the qualifications of their examiners denies them both the assistance necessary to make their claims and their due process rights in making those claims.

IV. Administrative Burden

The VA makes two arguments why the presumption should not be removed. First, the VA argues that "in the absence of the presumption established by *Rizzo*, 'a concrete, clear standard for determining the sufficiency of an examiner's qualifications to conduct a medical examination' would be needed." Resp. to Pet. for Reh'g En Banc 12 (quoting *Mathis II* at *7). As support, the VA states that the "VA provides an enormous volume of compensation examinations annually." *Id.*

The VA is correct. Overturning *Rizzo* would require the VA to apply a standard for selecting competent examiners. The VA, however, overlooks that it has already promulgated a clear standard for the VA and the Board to apply when deciding whether a medical examiner is competent:

> (1) Competent medical evidence means 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 mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

38 C.F.R. § 3.159(a)(1) (emphasis added).

The Board can assess whether an examiner meets this regulation upon review of her education, training, or experience.[9] Indeed, this is the standard the Board applies when it reviews the credentials of private physicians providing opinions and examinations on behalf of veterans, for whom there is no presumption. *See, e.g.*, No. 1100100, 2011 WL 749935, at *8 (Bd. Vet. App. Jan. 3, 2011) ("The Board finds that the private physician is qualified through education, training, and experience to offer a diagnosis and an opinion in this case.") (citing 38 C.F.R. § 3.159).

Second, the VA defends the presumption of competence on the basis that removing it "would impair the

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[9] To be clear, the Board – not this court – should decide what qualifications are needed to satisfy 38 C.F.R. § 3.159(a)(1) in application. Whether an examiner has the necessary training and experience is a factual determination. *See, e.g.*, *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005); *Mass. Mut. Life Ins. Co. v. Brei*, 311 F.2d 463, 472 (2d Cir. 1962). Removing the presumption will not mean that the VA always has to have specialists perform examinations. *See, e.g.*, No. 0838133, 2008 WL 5511667 at *7 (Bd. Vet. App. Nov. 5, 2008).

efficiency of" the VA's "provision of medical examinations and opinions." Resp. to Pet. for Reh'g En Banc 13. It is not clear that the substantive content, the quality of the opinion, would be affected if the presumption of competence were removed. It is clear that removing the presumption would result in an administrative record upon which the Board could properly review an examiner's qualifications when weighing the persuasiveness of her reports. In addition, having an examiner's CV would permit a veteran to determine whether or not to challenge the examiner's competence.

But in the long run, removing the presumption of competence could improve the efficiency of the judicial review process in VA cases. As a veteran's "first step" in overcoming the presumption of competence is to object at the Board, if the record contains no evidence about an examiner's competence, the Board will have to remand to the VA for such evidence whenever a veteran sufficiently objects. *Cf. Mathis II* at *9, n. 6 (Reyna, J., concurring) (citing cases where the Board remanded for the VA to provide a curriculum vitae). And the Veterans Court has already repeatedly needed to remand cases to the Board when a veteran had sufficiently challenged an examiner's qualifications to the Board but the Board failed to analyze the examiner's competence. *See id.* at *9, n. 9.

For the foregoing reasons, I respectfully dissent.

STOLL, *Circuit Judge*, with whom NEWMAN, MOORE, and WALLACH, *Circuit Judges*, join, dissenting from denial of rehearing en banc.

I believe the court should hear this case en banc to reevaluate the presumption of competence afforded to VA medical examiners and their opinions under our current law. I question the propriety of such a presumption in a uniquely pro-claimant and non-adversarial system.

I am also troubled by the idea that the VA itself might apply the presumption when a veteran challenges, at the agency level, the competence of the examiner or the conclusions of the medical opinion. Even if we keep the presumption of competence, like the presumption of regularity from which it stems, it should apply to judicial review of agency action. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009) ("The presumption of regularity provides that, in the absence of clear evidence to the contrary, the *court* will presume that public officers have properly discharged their official duties." (emphasis added) (internal citation omitted)). The agency itself should not rely on the presumption that it followed its rules when evaluating the application of those very rules. The VA's Adjudication Procedures Manual suggests, however, that the VA considers the presumption of competence established by this court in *Rizzo*. Specifically, where the agency determines that a veteran has raised a concern regarding the medical examiner's competence, the procedures instruct that, among other seemingly appropriate considerations, the agency should note that "[t]here is a

presumption that a selected medical examiner is competent." VA Adjudication Procedures Manual, M21-1MR, Part III, Subpart iv, ch. 3, § D(2)(o) (change date April 28, 2016).

I believe this is an important issue, and it warrants en banc review. For these reasons, I respectfully dissent from the denial of the petition for rehearing en banc.

38 U.S.C. § 5103A(d) Medical examinations for compensation claims.

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.

(2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant) –

(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and

(B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but

(C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

38 C.F.R. § 3.159(c)(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in § 3.309, § 3.313, § 3.316, and § 3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(i) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(ii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured.

M21-1MR, Part Ill, Subpart iv. Chapter 3, Section A

Section A. Examination Requests

[3-A-1] Overview

In this Section

This section contains the following topics:

[3-A-2] 1. General Information on Examination Requests

Introduction

This topic contains general information on examination requests, including

- who may request an examination
- requesting Department of Veterans Affairs (VA) examinations
- when to request an examination
- description of terms: ***general medical examination, specialty examination,*** and ***specialist examination***
- when to send the claims folders with an examination request
- a veteran's legal rights
- jurisdiction for examination requests for foreign beneficiaries, and
- handling field investigations and examination requests for foreign beneficiaries.

Change Date

August 3, 2009

a. Who May Request an Examination

Veterans Service Representatives (VSRs) in the Predetermination Team have primary responsibility for requesting the examination of claimants.

A Rating Veterans Service Representative (RVSR) may provide guidance as necessary. RVSRs also have authority to request examinations.

The Veterans Service Center Manager (VSCM) may authorize an examination in any case in which he/she believes it is warranted.

b. Requesting VA Examinations

Request Department of Veterans Affairs (VA) examinations from the

- VA Medical Center (VAMC) in whose primary service area the veteran resides
- VA Medical Center that is able to conduct the type of examination requested, or
- designated contracted provider.

A listing of the counties and zip codes each VAMC serves *must* be maintained at each regional office (RO).

Note: Because not all VA Medical Centers are able to conduct certain types of specialist examinations, it may be necessary to schedule the examination outside the primary service area in which the veteran resides.

[3-A-3] c. When to Request an Examination

Reference: For more information on when to request an examination, see M21-1MR, Part I, 1.C.7.b.

d. Description of Terms: General Medical Examination, Specialty Examination, and Specialist Examination

Three terms are commonly used to distinguish basic categories of compensation and pension (C&P) examinations:

- general medical examination
- specialty examination, and
- specialist examination.

General Medical Examination

The main purpose of a general medical examination is to screen all body systems and either

- document normal findings, or
- identify disabilities that are found or suspected.

Note: The examiner must fully evaluate any disability that is found or suspected according to the applicable worksheet for each disorder.

References: For more information on

- general medical examinations, see M21-1MR Part III Subpart iv 3.A.3, and

- examination worksheets, see "*Index to Disability Examination Worksheets.*"

Specialty Examination

A specialty examination focuses on the disabilities that are specifically at issue in the veteran's claim. For example, if a veteran claims that service-connected arthritis in the left knee and hypertension have worsened, joint and hypertension examination worksheets should be requested.

Notes:

- Specialty examinations generally do not address disorders that are not at issue in the claim, even if the disorders are found or suspected during the examination.
- Specialty examinations may be (and usually are) performed by non-specialist clinicians
- In unusual cases, or as requested by a Board of Veterans' Appeals (BVA) remand, it may be necessary for the specialty examination to be performed by a clinician who specializes in the field of study specific to the worksheet.

[3-A-4] ***Specialist Examination***

A specialist examination is any examination that is conducted by a clinician who specializes in a particular field.

Notes:

- All vision, hearing, dental, and psychiatric examinations *must* be conducted by a specialist. On rare occasions, it may be necessary to request a specialist examination for other types of disabilities.
- When requesting a mental disorders examination, specify that if possible, the veteran's treating mental health professional should not perform the examination.

Reference: For more information on specialist examinations, see M21-1MR, Part III Subpart iv, 3.A.8.

e. When to Send the Claims Folder With an Examination Request

Send the claims folders to examining facilities with the examination requests only in circumstances that may require claims folder review by the examiner.

In general, the claims folder should be sent for the examiner's review in any case involving a

- request for a mental disorders examination
- request for a traumatic brain injury examination
- request for a formal medical opinion, or
- Board of Veterans' Appeals remand.

References: For more information on

- requests for medical opinions, see M21-1MR Part III Subpart iv, 3.A.9, and

- handling examinations in claims for service connection for PTSD, see M21-1MR Part III Subpart iv, 4.H.31.

f. Veteran's Legal Rights

A veteran has no legal right to

- be accompanied by counsel during an examination, or
- record an examination.

* * *

M21-1MR, Part Ill, Subpart iv, Chapter 3, Section D

Section D. Examination Reports

[3-D-1] Overview

In this Section

This section contains the topic "Reviewing Department of Veterans Affairs (VA) Examination Reports."

[3-D-2] 18. Reviewing Department of Veterans Affairs (VA) Examination Reports

Introduction

This topic contains information about determining the adequacy of Department of Veterans Affairs (VA) examination reports, including

- who must sign examination reports
- ensuring examiners are qualified
- who must sign VA medical center (VAMC) reports
- qualification requirements of examiners for
- initial mental disorder examinations, and
- review or increased evaluation mental disorder examinations
- requirements for examination reports
- returning examination reports as insufficient for rating purposes
- returning examination reports for clarification

- evaluating disability diagnoses
- resolving inconsistencies
- handling unusual cases, and
- accepting a fee-based examiner's report.

Change Date

July 14, 2010

a. Who Must Sign Examination Reports

All original examination reports *must* be signed by a physician, unless the examination was performed by a

- mid-level Veterans Health Administration (VHA) clinician, either a
- physician's assistant or nurse practitioner, when the examination does not require a specialist
- clinical or counseling psychologist
- dentist
- audiologist, or
- optometrist.

Note: Examination reports transmitted by Compensation and Pension Record Interchange (CAPRI) (Department of Veterans Affairs (VA) medical center examinations) or EXAMTRAK (contract examinations) without signatures are acceptable since signed copies are maintained by the Veterans Health Administration (VHA) or contract examining facility.

[3-D-3] b. Ensuring Examiners Are Qualified

VA medical facilities (or the medical examination contractor) are responsible for ensuring that examiners are adequately qualified.

Veterans Service Center (VSC) employees are *not* expected to routinely review the credentials of clinical personnel to determine the acceptability of their reports.

Note: The signature block of the examination report should contain the examiner's credentials.

c. Who Must Sign VAMC Reports

If an unsigned or improperly signed examination report is received, the report must be returned as incomplete for rating purposes before undertaking any adjudicative action.

The physician in charge of the case must sign the original hospital summary from a VA medical center (VAMC).

Note: The Veterans Service Center Manager (VSCM) should contact the Registrar of the medical facility concerned to prevent the frequent submission of unsigned summaries.

* * *

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420
September 1, 2010

Director (00/21)
All VA Regional Offices and Centers
In Reply Refer to: 211
Fast Letter 10-32

SUBJ: Removal of Certain Co-Signature Requirements and Ordering Specialist Examinations

Purpose

A joint workgroup of the Veterans Benefits Administration (VBA) and the Veterans Health Administration (VHA) identified several initiatives to expedite compensation and pension (C&P) examinations. This fast letter implements one of these initiatives by liberalizing signature requirements for VHA clinicians performing C&P examinations.

Examination Report Signature Requirements

Effective immediately, regional office and center staff may accept examination reports signed by a nurse practitioner or physician's assistant that are not co-signed by a physician. This change in signature requirements does not apply to examinations conducted by specialists, such as mental health, dental, audiology and optometry.

The M21-1 Manual Rewrite (MR) requires that a physician signs all original examination reports (see M21-1MR Part III, Subpart iv, Chapter 3, Section D, Topic

18, Block a, or *M21-1MR III.iv.3.D.18.a*). Law does not mandate this policy, and it can unduly delay processing C&P examinations. In VHA, an individual physician accepts legal responsibility for the unsigned work of a mid-level practitioner, such as a nurse practitioner or physician's assistant. As a result, a physician's co-signature is no longer required for a C&P examination performed by a mid-level practitioner.

We will update the MR to reflect this change.

Specialist Versus Specialty Examinations

Please note that a specialist is only required in limited situations such as dental, vision, hearing, and psychiatric examinations, as indicated by *M21-1MR* III.iv.3.A.8. For all other types of examinations, a generalist clinician may perform the examination. For example, an office may order a cardiac examination, but it should not generally request that a cardiologist (a specialist) conduct it.

Questions

E-mail questions concerning this letter to *VAVBAWAS/CO/21Q&A*.

/S/
Thomas J. Murphy
Director
Compensation and Pension Service

Department of Veterans Affairs
Veterans Health Administration
Washington, DC 20420

VHA DIRECTIVE 1046
Transmittal Sheet
April 23, 2014

DISABILITY EXAMINATIONS

1. REASON FOR ISSUE: This Veterans Health Administration (VHA) Directive defines VHA policy for administering the Disability Examination Program.

2. SUMMARY OF CONTENTS: This VHA Directive defines VHA policy for facilitating disability examinations or opinions for Veterans and Servicemembers as part of adjudication of a claim for Department of Veterans Affairs (VA) disability benefits, if an examination or opinion is necessary to decide the claim.

3. RELATED ISSUES: None.

4. RESPONSIBLE OFFICE: The Office of Disability and Medical Assessment (10NC8) is responsible for the contents of this VHA Directive. Questions may be referred to the Director, Clinical Programs and Administrative Operations at 202-461-6699.

5. RESCISSIONS: VHA Handbook 1601E.01, dated October 13, 2009, is rescinded.

6. RECERTIFICATION: This VHA Directive is scheduled for recertification on or before the last working day of April, 2019.

Robert A. Petzel, M.D.
Under Secretary for Health

DISTRIBUTION: E-mailed to the VHA Publications Distribution List on 4/28/2014.

DISABILITY EXAMINATIONS

1. PURPOSE: This Veterans Health Administration (VHA) Directive defines VHA policy for administering the Disability Examination Program. **AUTHORITY:** 38 United States Code (U.S.C.) 5103A, and 38 Code of Federal Regulations (CFR) 3.159 and 3.326.

2. BACKGROUND: Veterans may submit claims to the Veterans Benefits Administration (VBA) for service-connected compensation or nonservice-connected pension benefits. A disability examination may be provided, if necessary, to adjudicate a claim for Department of Veterans Affairs (VA) benefits pursuant to the duty to assist provisions of 38 U.S.C. 5103A and 38 CFR 3.159. Generally, the examinations are provided by VA medical staff, VA contract providers, or non-VA care providers. Reports submitted by a private non-VA care provider may also be accepted in lieu of disability examinations performed by VA.

a. A comprehensive general medical or psychiatric examination usually provides both the diagnosis

and symptomatology sufficient to identify a condition and to allow VBA to determine eligibility for VA benefits. With regard to examinations provided as part of the Integrated Disability Evaluation System (IDES), examiners are not to make determinations of fitness for duty of Servicemembers (Active Duty and Reserve Component). ***NOTE:*** *Determinations of fitness for duty are a Department of Defense (DoD) function.*

b. A compensation and pension (C&P) disability examination may be requested for determining whether a current diagnosed disability is related to an event, injury, or disease incurred or aggravated in military service or to provide other medical evidence necessary for VBA to render a decision concerning entitlement to VA benefits. When a disability examination is requested for VA benefits claim adjudication purposes, the examination is provided in accordance with 38 CFR 3.326.

c. ***Disability Examinations May be Requested for:***

(1) **Servicemembers.** Servicemembers, both Active Duty and the Reserve Component.

(2) **Veterans.** Veterans to include:

(a) *Incarcerated Veterans.* The duty to assist provisions of 38 U.S.C. 5103A and 38 CFR 3.159 applies equally to incarcerated Veterans and non-incarcerated Veterans. Incarcerated Veterans must, however, comply with prison security requirements. VA examiners must comply with VA security requirements when

examining incarcerated Veterans in VA medical facilities.

(b) *Veterans Residing Outside the United States.* VA's options to examine Veterans residing outside the United States may be limited by the absence of VA medical facilities or examination contracts in most foreign countries. In the absence of VA medical facilities or contracts, examinations may be managed through United States Embassies.

(c) *Veteran Employees of VA.* Veterans who are VA employees should have their examinations performed at an alternate VA medical facility location from the location of their employment.

(3) **Pensioners and Veterans of Certain Nations Allied with the United States.** Pensioners and Veterans of certain nations allied with the United States in World War I and World War II (except any nation which was an enemy of the United States during World War II), upon authorization from accredited officials of the respective governments. ***NOTE:*** *Allied beneficiaries are managed manually outside of the Compensation and Pension Record Interchange (CAPRI) software within the Veterans Information Systems and Technology Architecture (VistA) software. For more information on allied beneficiaries, see the Non-Veteran Beneficiaries Procedure Guide at: http://vaww1.va.gov/cbo/apps/policyguides/index.asp. This is an internal VA Web site that is not available to the public.*

(4) **Non-Veterans and Veterans' Beneficiaries.**

3. POLICY: It is VHA policy that a disability examination or medical opinion must be provided when VBA determines it is necessary to make a decision on a claim for VA disability benefits under the duty to assist provisions of 38 U.S.C. 5103A, and 38 CFR 3.159 and 3.326.

4. RESPONSIBILITIES:

a. ***Under Secretary for Health.*** The Under Secretary for Health is responsible for:

(1) Ensuring the quality and timelines of the VHA disability examination process.

(2) Ensuring that resources are allocated in support of the process.

b. ***Office of Disability and Medical Assessment.*** The Office of Disability and Medical Assessment (10NC8) is responsible for:

(1) Providing guidance on the disability examination process.

(2) Ensuring VHA performance measures regarding timeliness and quality are met through a quality review program and directing assistance as needed.

(3) Providing a certification program for disability examiners.

(4) Creating and maintaining information technology programs and applications to gather data in support of the disability examination process.

(5) Assisting with disability examination request surges and underserved areas through examination contracting programs and providing oversight of VHA contracts for supplemental examination capacity, including contracted examinations overseas.

(6) Ensuring close collaboration with VBA to promote efficiency and enhance communication.

(7) Supporting collaborative initiatives with DoD to provide a seamless transition between military service and VA.

(8) Serving as VHA's primary liaison to VBA and the Board of Veterans' Appeals (BVA) for consultative services that require specialized medical and nexus opinions.

c. ***Veterans Integrated Service Network Director.*** Each Veterans Integrated Service Network (VISN) Director is responsible for:

(1) Ensuring that a Veteran-centric and Service-member-centric, and forward-looking approach to disability examinations, is established.

(2) Ensuring that VA medical facility leadership provides adequate resources in support of the disability examination process.

(3) Ensuring implementation of, and compliance with, this Directive.

d. ***Medical Facility Director.*** The medical facility Director is responsible for:

(1) Ensuring that disability examinations are a high-priority workload, and are processed within the guidelines in this Directive, the Disability Examination Procedure Guide, and additional clinical guidelines found at http://vaww.demo.va.gov/. ***NOTE:*** *This is an internal VA Web site and is not available to the public.*

(2) Ensuring disability examinations are conducted in accordance with the format on Disability Benefits Questionnaires (DBQs) and applicable VHA and VBA guidelines, including mandatory examiner certification guidelines. In limited circumstances, including pending development of new DBQs, the examination may be conducted using CAPRI disability examination worksheets. ***NOTE:*** *Disability examination worksheets, DBQs, and other references are available at http://vaww.demo.va.gov/*. This *is an internal VA Web site that is not available to the public.*

(3) Ensuring processes are in place for conducting disability examinations requested in connection with the adjudication of claims for VA benefits within the timeframes required.

(a) VHA has specified time standards to complete disability examinations and required tests after receipt of the examination request. The completion standards are measured from the day the properly-completed request for examination(s) is received by

VHA through the day when all the components, including laboratory and ancillary test results, are released or returned to VBA.

(b) The appropriate program office responsible for the day-to-day oversight of the disability examination program must ensure a follow-up system is established for the examinations conducted by non-VA medical care providers and VA contract providers in order to ensure they are completed within the established timeframe, meets VHA standards, and that payments for services are made promptly.

(4) Addressing disability examination requests as follows:

(a) Ensuring disability examinations are requested using the CAPRI disability examination request option that electronically transmits the request to the VA medical facility of jurisdiction. This includes requests for observation and examination (O&E). Disability examination requests must specify the types of examination(s) needed and any special reports or studies required.

(b) The VA medical facility staff receiving the examination request determines the actionable items of the request in terms of clarity and completeness. The VA medical facility staff addresses insufficient or incomplete examination requests with VBA.

(c) If the request is sufficient, the VA medical facility staff determines as soon as possible after the receipt of the request who, in accordance with VBA

guidance, may perform an examination and where and how to conduct the examination. An examination may be completed through various methods including the Acceptable Clinical Evidence (ACE) process, in-person, or by telehealth modalities.

(d) If an in-person examination is to be conducted, the VA medical facility staff is responsible for scheduling the examination in a manner most accommodating, when feasible, to the examinee.

(e) The VA medical facility staff may refer special cases to another VA medical facility.

(f) VBA may specifically request specialist examinations on the CAPRI disability examination requests.

(g) The examiner has the authority and responsibility to request a specialist examination in individual cases when deemed necessary. ***NOTE:*** *The Associate Chief of Staff for Ambulatory Care or the Clinical Director, or designee, may be required to approve the request for a specialist examination.*

(5) Ensuring disability examination reports are completed as required and reported electronically on a DBQ or a CAPRI disability examination worksheet. Disability examination worksheets and DBQs contain specific instructions on elements that must be addressed during the examination. The examination report must contain:

(a) A diagnosis or notation that a chronic disease or disability was ruled out for each disability, complaint, or symptom listed on the examination request.

(b) Answers to any questions specifically requested in the examination request.

(c) All opinions specifically requested in the examination request, including specific evidence reviewed and considered in formulating the opinion, and a thorough rationale for the opinion rendered and expressed using legally-recognized phrases.

(6) Ensuring disability examiners understand they are to avoid addressing matters related to the claim for disability benefits outside the disability examination request. The examiner should not express an opinion regarding the merits of any claim or the percentage evaluation that should be assigned for a disability. Determination of service connection and disability ratings for VA benefits is exclusively a function of VBA. Any concerns or observations regarding the claimant's symptoms or presentation should be described on the examination report for VBA to address.

(7) Ensuring reimbursement to Veterans for travel as outlined in Beneficiary Travel in VHA Handbook 1601B.05 on VA's VHA Publications website: http://vaww1.va.gov/vhapublications/publications.cfm?Pub=2. ***NOTE:*** *This is an internal VA website and is not available to the public.*

(8) Supporting the "No Wrong Door" philosophy by developing a plan for VA medical facility C&P clinics to assist Veterans in support of Veterans' requests to have DBQs completed. The plan should include coordinating with VHA treating providers in ensuring the Veteran receives a "warm hand-off" to the local VHA C&P clinic or other resources when the VHA treating provider is unable to complete a DBQ when requested by a Veteran.

5. REFERENCES:

a. 38 U.S.C. 5103A.

b. 38 CFR 3.159.

c. 38 CFR 3.326.

d. VHA Handbook 1601B.05.

6. DEFINITIONS:

a. ***Disability Examination.*** For purposes of this directive, a disability examination is a medical professional's opinion, personal observation, and/or evaluation of a claimant. It can be conducted in person, via the ACE process, or by means of telehealth.

b. ***Opinion.*** For purposes of this directive, an opinion refers to a medical professional's statement of findings and views, which may be based on review of the claimant's medical records or personal examination of the claimant, or both.