No. 16-677

IN THE

Supreme Court of the United States

FREDDIE H. MATHIS,

Petitioner,

v.

ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF AMICUS CURIAE PARALYZED VETERANS OF AMERICA IN SUPPORT OF PETITIONER

JENNIFER A. ZAJAC
Counsel of Record
LEONARD J. SELFON
LINDA E. BLAUHUT
PARALYZED VETERANS OF AMERICA
801 18th Street, NW
Washington, DC 20006
(760) 639-0765
jenniferz@pva.org

Counsel for Amicus Curiae

December 2016

270116

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

INTEREST OF *AMICUS CURIAE*[1]

Paralyzed Veterans of America is a non-profit veterans service organization founded in 1946 and chartered by the Congress of the United States. *See* 36 U.S.C. §§ 170101-170111 (2012). The organization has more than 17,000 members; each is a veteran of the Armed Forces of the United States who suffers from an injury or disease of the spinal cord. Paralyzed Veterans of America's statutory purposes include: acquainting the public with the needs and problems of those with spinal cord disease or dysfunction; promoting medical research in the several fields connected with injuries and diseases of the spinal cord; and advocating and fostering complete and effective reconditioning programs for those with spinal cord injuries or disease. *Id.*

Paralyzed Veterans of America carries out its statutory purposes by operating various beneficial programs, such as providing free representation before the U.S. Department of Veterans Affairs (VA or agency) to its members and other veterans, dependents, and survivors who have filed claims with the agency seeking benefits authorized by Congress. Paralyzed Veterans of America also provides free legal services to members and other veterans, dependents, and survivors seeking judicial review of agency benefit decisions at the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit.

---

1. No party other than Paralyzed Veterans of America and its counsel participated in the writing of this brief or made a financial contribution to the brief. Counsel of record for the Secretary received timely notice of the intent to file this brief pursuant to Rule 37(2)(a). Consent was granted. Counsel of record for Mr. Mathis provided blanket consent to the Court, pursuant to Rule 37(2)(a).

Paralyzed Veterans of America has a strong interest in having this Court hear the case of *Mathis v. McDonald*. Paralyzed Veterans of America's members and clients often require VA medical examinations or opinions in their claims and are therefore affected – and hindered – by the line of cases that judicially created a presumption of competency in the agency's choice of expert examiner; these cases began with the Federal Circuit's decision in *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009), and the presumption was most recently reaffirmed by *Mathis v. McDonald*, 643 Fed. Appx. 968 (Fed. Cir. Apr. 1, 2016), *en banc review denied*, 843 F.3d 1347 (Fed. Cir. 2016). Our veterans service representatives are thwarted because there is no opportunity to participate in VA's choice of an examiner – whose opinion will affect the claim decision – prior to selection and it is impractical and difficult to challenge the choice after the fact. Deficiencies in examinations and opinions are a significant contributor to remands and delays in the VA system. Overturning this line of cases would not burden VA but would help ensure that veterans' procedural rights are protected as they pursue their claims.

SUMMARY OF ARGUMENT

For the reasons argued below and discussed in the Federal Circuit's decision, *see Mathis*, 643 Fed. Appx. at 973-75; Judge Reyna's concurrence to the decision, *see id.* at 975-86; and Judge Reyna's dissent to the denial for rehearing *en banc*, *see Mathis*, 834 F.3d at 1353-60; Paralyzed Veterans of America (PVA) believes that *Mathis* and the line of decisions beginning with *Rizzo*, creating a presumption of competency in the agency's choice of medical professionals to offer an "expert" opinion, should be reviewed and overturned. The presumption was derived

from the presumption of regularity, the application of which should be limited to *ministerial* acts of an agency: that an examination was scheduled, that notice to appear for the exam was sent, and that an examination actually took place, if one is so noted in the files. The extension of the presumption to the process of selecting the right doctor or other practitioner to perform a VA examination or opine on a claim was not appropriate. The selection process requires distinct medical knowledge and an understanding of complex issues and is anything but ministerial; it is fact-specific and differs from case to case, and it should not be afforded any sort of presumption.

Moreover, PVA's experience demonstrates that the examination request system is inconsistently administered and that any opportunity for the veteran or representative to learn about the examiner, in order to assure competency or attempt to rebut the judicially-imposed presumption, is almost nonexistent.

Therefore, PVA urges the Court to grant Mr. Mathis's petition and review and reverse the Federal Circuit's line of cases that apply a presumption of competency to VA's choice of examiners offering expert opinions.

ARGUMENT

Throughout the Federal Circuit's decision, and Judge Hughes's concurrence to the denial of the petition for *en banc* hearing, the Federal Circuit simply accepted as true a set of bureaucratic and administrative assumptions – citing to *VA Adjudication Manual* provisions and case law – to explain why the current system is regular and adequately allows for veterans to rebut the presumption of competency.

PVA disagrees. Decades of practical experience reveal that the underlying assumptions are not accurate. This experience puts PVA in a position to illustrate for the Court the systemic irregularities that raise the question of whether the Federal Circuit's presumption is appropriate and of the practical effects that the irregularities have on a veteran going through the system.

I. THE VA PROCESS IS NOT REGULAR AND *RIZZO* AND ITS PROGENY PUT A THUMB ON THE SCALE IN VA'S FAVOR WHEN THE AGENCY ALREADY HAS EVERY ADVANTAGE.

The Federal Circuit created the "presumption of competency" in *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009):

> [a]bsent 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.

Rizzo, 580 F.3d at 1290.

The question before this Court, however, is whether sufficient evidence exists to reject the idea that the process invoked by the VA to choose the doctor or other practitioner to perform an examination is, in fact, "regular," *cf. id.* at 1292,

such that it is wholly inappropriate for VA *not* to "present affirmative evidence of a physician's qualifications in every case as a precondition for the Board[of Veterans' Appeal's] reliance upon that physician's opinion." *Cf. id.* at 1290; FED. R. EVID. 702.

Based on PVA's decades of experience representing veterans with complex medical conditions, we offer several examples to the Court to show that the process is not regular, and therefore, the Federal Circuit's line of decisions creating and upholding this presumption is not based on the agency's actual practices and should be overturned.

A. The Process in Plain English

When the agency's adjudicator determines that an examination or a medical opinion is necessary, the adjudicator prepares an electronic request form, which is then sent to a VA Medical Center or to a contract examination provider[2] to arrange for the examination or opinion. While a copy of this request can be found associated with the veteran's claim in VA's Veterans Benefits Management System (VBMS), VBMS operates solely for the agency's convenience. A veteran does not have access to this system, and the system does not notify a veteran's representatives of action in a claim.[3]

---

2. The VA Adjudication Manual notes the "Regional offices (ROs) have the flexibility to request an examination from the VA medical center (VAMC) or designated contract provider closest to where the claimant lives or receives regular medical treatment." VA ADJUDICATION MANUAL, M21-1, Part III (iv), Ch. 3(A)(1)(b).

3. While veteran service organizations representatives such as PVA's National Service Officers have access to the

If an in-person examination is necessary, the VA Medical Center informs the veteran that he or she has been scheduled for an examination, but the full name of the examiner is not provided nor is a description of the examiner's specialty. *See* Attachment. If the VA adjudicator determines that only an opinion is necessary, the veteran is not told that a request was made, much less when it might be fulfilled or who might perform the review.

Once the examination has occurred or the review of the record is completed, the report/opinion is uploaded into VBMS for the VA adjudicator to review.[4] If the veteran is

---

Veterans Benefits Management System (VBMS), the system is not comparable to an e-filing system such as those used by the federal courts. The system does not automatically generate any notice or copy to a representative of any action taken in a client's case. So, while an internal request may exist in VBMS, it may be serendipitous for a representative to timely discover it and challenge whether the examiner has the requisite expertise to perform the examination before the examination occurs or before a decision is made relying on the examiner's report.

4. As decided by the U.S. Court of Appeals for Veterans Claims (CAVC) in one of its earliest decisions, examiners are obligated to review the veteran's claims file to help inform their findings. *See Proscelle v. Derwinski*, 2 Vet.App. 629, 632 (1992); VA Adjudication Manual, M21-1, Part III (iv), Ch. 3(A)(15)(a). It is PVA's experience, though, that even this long-established requirement goes unenforced by VA. For example, in a case recently decided by the CAVC, the VA requested an exam from a VA doctor. The doctor performed an in-person examination, but did not review the veteran's claims file. Instead, the doctor, who was not a specialist, noted that she had only reviewed the veteran's VA medical records. By only reviewing the veteran's VA medical records, the examiner failed to review other information that could inform her opinion, such as the veteran's statements

represented, the veteran's representative can review the report/opinion in VBMS, if the representative is closely monitoring the system and becomes aware of it being uploaded. A veteran is not automatically provided with a copy of the examination report or the opinion.[5] And while VA can request a specialist, there typically is nothing on the examination report to reflect that the requested specialist actually performed the examination.[6]

B. Irregularities Noted in the System

While the Federal Circuit has noted that the U.S. Court of Appeals for Veterans Claims' (CAVC's) case law

---

relating what his treating physician, an endocrinologist, had told him about his condition. *See Romoser v. McDonald*, No. 15-1303 (Vet.App. Oct. 7, 2016).

5. VA's regulations do not require that an opinion obtained by one of its own doctors be provided to the claimant. *See* 38 C.F.R. § 3.159(c)(4) (2016). Only in a special subcategory of requests, when the Secretary requests an independent medical opinion, must a copy be provided. *See* 38 U.S.C. §§ 5109, 7109 (2012).

6. The concurrence to the denial of the motion for reconsideration at the Federal Circuit focused on the fact that *VA Adjudication Manual* provisions require that a doctor note his or her specialty. *See Mathis v. Shinseki*, 834 F.3d 1347, 1351-52 (Fed. Cir. 2016) (citing *VA Adjudication Manual*, M21-1MR § III.iv.3.D.2.b for the proposition that an examination report is required to include a doctor's "specialty, if a specialist examination is required") (Hughes, J., concurring). As is discussed *infra*, it is PVA's experience that this does not occur regularly. Of the dozen or so opinions discussed *infra*, only one provided any specialty in the signature line, and even then, it was an uncommon abbreviation which the veteran would have needed to look up in order to learn whether the specialty was the appropriate one.

and the *VA Adjudication Manual* provide for procedures to be followed for obtaining the proper practitioner to provide an opinion, PVA's experiences within the system show that those procedures are not consistently followed and, therefore, that it is anything but regular to warrant the application of a presumption.

1. Luis Guerra[7]

In 2000, PVA member Luis Guerra brought a claim for benefits under 38 U.S.C. § 1151 and simultaneously sued the VA under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674.[8] The § 1151 claim was denied; however, after the Secretary settled Mr. Guerra's FTCA suit, the Board of Veterans' Appeals (Board) agreed to reopen the § 1151 claim in 2010. The only question remaining was whether VA's negligence resulted in additional disability, entitling Mr. Guerra to VA benefits and monthly compensation.

In March 2012, May 2012, and May 2013, the VA provided Mr. Guerra with several examinations. The question presented never changed – did the PVA member have additional disability resulting from VA treatment?

---

7. *Guerra v. McDonald*, No. 14-3462 (Vet.App. July 23, 2015).

8. Mr. Guerra was in a serious car accident, leaving him a quadriplegic. In 1999, he went to the VA for a spinal fusion surgery. During his recovery, a VA employee attempted to move Mr. Guerra using his "halo" head frame. This upset the spinal fusion that had just taken place and required Mr. Guerra to have a second surgery. Mr. Guerra argues that, but for the VA employee's negligence, he would never have needed the second surgery, he still would have use of his upper extremities, and he would not need the higher level of aid and assistance from others for his daily care that he now requires.

Yet, each of these examinations was found inadequate because the examiners did not have the requisite knowledge to render a decision.

In 2013, the Board gave the Appeals Management Center[9] *specific instructions* to obtain an opinion from a "spinal cord injury specialist or a neurosurgeon" at a VA Medical Center. Until that point, the Regional Office had not requested, and the VA Medical Centers involved had not selected, personnel who had the requisite knowledge to answer the question.

The assigned VA Medical Center did not have a specialist who could complete the review, but a director at a different VA Medical Center, who was assisting the AMC, stated that a regular VA physician could perform the review so long as a staff neurosurgeon concurred. The AMC stated this process would be acceptable, *as long as the neurosurgeon agreed* with the physician's opinion and signed off.

Despite this agreed-upon internal procedure, the procedure was not followed. The report was provided

---

9. The Appeals Management Center (AMC) was created in response to a Federal Circuit decision that the Board of Veterans' Appeals could not decide appeals in "cases in which it had developed evidence." *Report of the Chairman FY 2003* at 3, Board of Veterans' Appeals, Dep't of Veterans Affairs, *available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2003AR.pdf* (last visited November 29, 2016); *see also Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1341-42 (Fed. Cir. 2003). The AMC serves as a centralized location for development and adjudication on remand from the Board of Veterans' Appeals. *See Report of Chairman FY 2003* at 3.

by someone that the agency had already conceded did not have the requisite knowledge to render an adequate opinion, and no one bothered to obtain the concurrence of a staff neurosurgeon. The Board then relied upon this information to deny the claim even though the record demonstrated that the opinion was not compliant with the Board's request.

On every level, this illustrates irregularities in the process. Here, the VA medical staff did not, on its own, obtain an opinion by a doctor qualified to provide an opinion. Even after being specifically instructed to, the VA medical staff obtained an opinion by a doctor who was not qualified to give it. The VA medical staff then did not enforce its own agreement to obtain a concurring opinion from a qualified doctor and the Board did not enforce its own remand instructions. The only one to suffer is Mr. Guerra, who must wait yet again for the Board to, hopefully, obtain an opinion by a qualified practitioner and then render a new decision.

It is now late 2016, and Mr. Guerra still has not received a new Board decision.[10] The effect on the veteran cannot be emphasized enough – Mr. Guerra is severely

10. Ironically, in the Federal Circuit's decision in *Mathis*, the circuit court explained that it had previously held 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.' " *Mathis*, 643 Fed. Appx. at 972 (quoting *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013)). Mr. Guerra's case suggests that VA's own practices lead to "repeated unnecessary remands."

disabled and in need of aid and attendance[11]; he cannot live without the help of others. Being awarded § 1151 benefits would completely change Mr. Guerra's life, as he would begin to receive a monthly benefit "as if" his condition were service connected.[12] *See* 38 U.S.C. § 1151 (2012). And while it is true that Mr. Guerra would be entitled to a retroactive award if he was granted § 1151 benefits, this does nothing for making his daily life more tolerable now, while he waits and waits and waits for the VA to get the appropriate doctor to review his claim.

As this case demonstrates, the process has no timely internal checks to ensure correctness, nor is it certain VA will enforce its own requirements. Under the current state of the law and the current VA system, the veteran cannot participate in or influence the process and is helpless to challenge any aspect of it until well after the fact, resulting in lengthy litigation and adding to the perception that the VA is simply waiting for veterans to die or give up.

---

11. The Secretary has defined the "need for aid and attendance" at 38 C.F.R. § 3.352.

12. If it is determined that Mr. Guerra's loss of use of his upper extremities was due to VA's negligence, Mr. Guerra would be assigned a 100% rating and be eligible for special monthly compensation. *See* 38 C.F.R. § 4.71a, Diagnostic Code 5109 (2016). This could entitle Mr. Guerra to a current monthly benefit of up to $7,247.39, if it is determined that he is eligible for the maximum rating. *See* Special Monthly Compensation (SMC) Rate Table – Effective 12/1/16, Compensation, Veterans Benefits Admin., Dep't of Veterans Affairs, *available at http://www.benefits.va.gov/COMPENSATION/resources_comp02.asp* (last visited December 2, 2016). This would have a monumental effect on his daily life and allow him access to additional caregivers, better transportation, and better treatment.

The *Rizzo* presumption serves only to protect VA's inconsistency and should be reconsidered and overturned.

2. Dennis Pariseau[13]

Mr. Pariseau sought service connection for Non-Hodgkin's Lymphoma (NHL) beginning in November 1990. The Board eventually granted Mr. Pariseau service connection for his NHL in August 2002.

Mr. Pariseau then sought service connection for several other conditions, claiming they were secondary to his service-connected NHL. Several VA medical opinions were provided; however, in a 2006 remand order, the Board specifically requested that an "examiner with the relevant expertise in hemic and lymphatic system disorders" review the case and offer an opinion. Instead, an advanced registered nurse practitioner performed this examination. After reviewing the nurse's opinion, and despite favorable opinions offered by experts in the field, the Board continued to deny Mr. Pariseau's claims in an October 2009 decision.

---

13. *Pariseau v. Shinseki*, No. 09-4124 (Vet.App. Dec. 17, 2010).

Mr. Pariseau is not a member of PVA, but was referred to PVA by the Veterans Consortium Pro Bono Program ("The Consortium"). The Consortium "was created in 1992, with a dual mission: to provide assistance to unrepresented veterans or their family members who have filed appeals at the U.S. Court of Appeals for Veterans Claims (Court); and to recruit and train attorneys in the then fledgling field of veterans' law." Our Services, About Us, The Veterans Consortium Pro Bono Program, *available at http://www.vetsprobono.org/about-us/* (last visited Nov. 29, 2016).

On appeal to the CAVC, PVA argued that the Board had not complied with its prior remand order, as there was nothing to indicate that the nurse practitioner had the "relevant expertise in hemic and lymphatic system disorders" to be able to provide the requested opinion. The Secretary agreed that the nurse practitioner did not have the relevant expertise and that the case should be remanded to obtain an opinion from a qualified examiner. The CAVC granted the Joint Motion to Remand in August 2010.[14]

Again, this case demonstrates the irregularities in the system: even with clear and concise instructions on what type of expert opinion should be obtained, the VA failed to adhere to its own policies. The result is a continued cycle of remands, the very result the presumption was supposed to prevent, and veterans are the only ones harmed. *Cf. Mathis*, 643 Fed. Appx. at 972.

C. Inability to Obtain Information to Rebut

As the concurrence to the decision noted, *see id.* at 976-78, and contrary to Judge Hughes's concurrence in the denial of the petition, *cf. Mathis*, 834 F.3d at 1349; it is *not* easy for veterans to find information about the examiner performing his or her examination to rebut the presumption at a meaningful time and ensure that an examiner with the appropriate expertise is providing an opinion.

---

14. Mr. Pariseau died during the pendency of the appeal to the CAVC. Thus, after fighting with the VA for almost ten years on this particular issue, and after several inadequate medical opinions were obtained, he was not alive to see the outcome.

The VA permitted Mr. Pariseau's wife, Rhonda, to be substituted as appellant and the Joint Motion to Remand was carried out. On remand, Mr. Pariseau's claims remained denied.

As noted above, a veteran does not receive any helpful information about the doctor or other practitioner prior to an examination. *See* Attachment. Moreover, if VA has requested a medical records review and an opinion, the veteran will not know when this is taking place, much less who is performing the review. Thus, it is impossible – as a practical matter – to raise any issue regarding the examiner's qualifications prior to an examination taking place or an opinion being provided.

And it is PVA's experience that it is no easier afterward. While the examination report should be signed by the examiner and any specialty noted, *see* VA ADJUDICATION MANUAL, M21-1, Part III(iv), Ch. 3, §D(2)(b), it has been PVA's further experience that often the signature line will state the examiner's name and title or that he or she is a VA examiner, *not whether the doctor is a specialist (if one was requested)*. *See, e.g.*, *Goodwin v. McDonald*, No. 14-4049 (Vet. App. May 18, 2015). There is no indication of the specialty or any board certifications to establish that the doctor or other practitioner has the requisite knowledge, or conversely, to flag for a claimant that the doctor may not have the requisite knowledge, such that the claimant would want to challenge the doctor's qualifications. *See, e.g.*, *Flack v. McDonald*, No. 15-3561 (Vet. App. May 6, 2016). There is also no central database to research VA doctors, so the information available to veterans and their representatives is limited.[15]

15. VA's website has a feature called "Our Doctors," which allows for searching based on the VA Medical Center with which the practitioner is associated. *See* Our Doctors, Health Care, DEP'T OF VETERANS AFFAIRS, *available at http://www.va.gov/providerinfo/index.asp* (last visited Dec. 2, 2016). The website does not allow a general search by name and does not require up-to-date information on board certification. *See id.*; *see also* About Our Directory, Our Doctors, Health Care, DEP'T OF VETERANS AFFAIRS, *available at http://www.va.gov/providerinfo/Our_Doctors_About_Our_Directory.asp* (last visited Dec. 2, 2016).

The following cases illustrate this systemic problem.

1. Crystal Flack[16]

PVA member Crystal Flack is currently seeking service connection for a medically complicated back condition. The VA Regional Office denied her claim, and Ms. Flack appealed to the Board. The Board obtained a medical opinion to determine whether her condition was related to, or aggravated by, her time in service. After the examination took place, Ms. Flack challenged the examiner's qualifications, noting that the doctor was a general practitioner, not an orthopedist. Ms. Flack also requested a copy of the doctor's curriculum vitae (CV), but this request was ignored.

Following Ms. Flack's challenge, the Board requested an opinion from "an appropriately qualified clinician." A doctor at the VA Outpatient Center in El Paso, Texas, provided an opinion, without an examination, and signed the report "Joseph Floresca, MD." Thus, not only was there no indication as to what type of doctor Dr. Floresca might be, but the requesting documents were so vague that there would be no way of knowing whether Dr. Floresca would be an "appropriate clinician," even if his credentials had been provided.

Moreover, the VA admits that the information is not regularly updated and encourages veterans to go to a website called "DocInfo," offered by the Federation of State Medical Boards. *See* Our Doctors, Veterans Health Admin., Dep't of Veterans Affairs, *available at http://www.va.gov/health/OurDoctors.asp* (last visited Dec. 5, 2016) (directing veterans to the "DocInfo" portal offered by the Federation of State Medical Boards, found at *http://www.docinfo.org*).

16. *Flack v. McDonald*, No. 15-3561 (Vet.App. May 6, 2016).

Nonetheless, Ms. Flack challenged the doctor's credentials as not being an orthopedist. After reviewing the VA Medical Center's website, which simply showed Dr. Floresca's field as "medicine" and listed no medical board certifications,[17] Ms. Flack "Googled" Dr. Floresca and determined that his specialty was either nuclear medicine or radiology, but definitely not orthopaedia. The Board ignored these challenges and continued to deny Ms. Flack's claim, leading Ms. Flack to appeal to the CAVC.

This case, which the CAVC recently remanded because of the unanswered challenges to the medical opinions, demonstrates the many hurdles veterans face. The VA's unclear instructions make it difficult to ascertain what specialty may be appropriate, and VA's own employee records may not be complete or indicate the specialties of their doctors. With publicly available information about doctors' credentials being limited in general, only a particularly driven veteran or representative might find the information necessary to successfully challenge an examiner's credentials under the *Rizzo* presumption. VA, however, serves all veterans, and a fair claims adjudication system should be available to all veterans, not just the tenacious.[18]

---

17. A search on the "DocInfo" website that the VA's website directs veterans to search shows no relevant information either. *See* Joseph Mauricio Floresca, MD, docInfo, Fed'n of State Med. Bds., *available at http://www.docinfo.org/#/search/details/C349D322-2427-4E79-923C-2AFEBD5171B2/* (last visited Dec. 2, 2016).

18. In Judge Hughes's concurrence to the denial of the petition for rehearing *en banc*, he noted that in "at least five difference cases," "the VA *has been directed* to comply with [the] request" to provide the CV of the examiner. *Mathis*, 834 F.3d at

2. Raymond Goodwin III[19]

PVA member Raymond Goodwin is service connected for several conditions. Beginning in 2007, Mr. Goodwin sought service connection for residuals of a stroke and seizure, which he claimed were secondary to the medications that he takes for his other service-connected conditions. A VA doctor in Florida provided an opinion in 2011. PVA questioned the doctor's rationale, leading the Board to remand for a specialist's opinion in the field of neurology. This was provided on October 15, 2013, with the doctor noting on his signature block that he was an F.A.A.N.S.[20]

Several months later, the Board remanded again, with instructions to obtain an opinion from an expert in neurology. A different doctor offered the third opinion; however, this time, there was nothing to indicate whether the doctor had the requisite expertise. PVA challenged the use of the second doctor's opinion at the Board, stating

---

1349-50 (emphasis added). This misses the point. The fact that the Secretary can be directed to provide the information once the veteran contests the competency of the doctor still puts the onus on the veteran *to ask* for the information, on the whim that there is something amiss with the doctor's qualifications that could potentially have the case remanded. The fact that the information can be provided is not a substitute for whether *it should* be provided to aid in a veteran's decision on challenging VA's choice of examiner to provide an opinion.

19. *Goodwin v. McDonald*, No. 14-4049 (Vet.App. May 18, 2015).

20. F.A.A.N.S. is an acronym for a Fellow of the American Association of Neurological Surgeons.

there was no information provided to establish that the doctor was an expert in neurology. The Board held that the doctor was presumed to be qualified, absent evidence to the contrary.

Mr. Goodwin appealed to the CAVC, and PVA was able to secure a Joint Motion to Remand in May 2015.[21]

Again, this example illustrates the irregularities in the VA system. The Board requested a specialist, but there was no information provided to confirm that a specialist reviewed the case. Moreover, a quick Google search for the VA doctor provides little information. One website lists a doctor with her name as practicing in internal medicine; however there is another doctor in the VA system with the same name who is board certified in Radiology. The local VA's website simply shows the doctor as board certified in Internal Medicine. *There is no indication that the doctor has any expertise in neurology, the area of medicine upon which the Board specifically noted that the expert opinion should be based.*

Nonetheless, the Board relied on this opinion to deny Mr. Goodwin his benefits, based on the *Rizzo* presumption that the doctor was competent.

As these examples illustrate, while the system currently allows a veteran to challenge a doctor's or other practitioner's qualifications after an opinion has been provided, there is often insufficient information

21. As of the date of this filing, Mr. Goodwin still has not received a new Board decision on his claims for secondary service connection.

available to the veteran on which to base a challenge, and successfully doing so is often based on blind luck. *Cf. Bastien v. Shineski*, 599 F.3d 1301, 1307 (Fed. Cir. 2010) (holding that a veteran must provide specific reasons why the veteran believes that an examiner is not qualified before the VA will provide the examiner's qualifications). This is a grievous injustice to veterans, for it is veterans alone who bear the burdens of delayed benefit decisions when VA fails, sometimes repeatedly, to ensure medical evidence is fairly and accurately developed.

The Court should therefore grant certiorari to address these inconsistencies, review Mr. Mathis's appeal, and overturn the Federal Circuit's line of cases creating this poorly conceived presumption.

II. THERE ARE ADEQUATE ALTERNATIVES TO THE PRESUMPTION THAT WOULD PROTECT BOTH VETERANS AND THE VA.

As the cases above illustrate, the current system puts the claimant in the untenable position of attempting to challenge the competency of the doctor or practitioner with no real tools with which to make the challenge.

It does not need to be this way.

Rather, guidance can be found in the Federal Rule of Evidence and the Federal Rules of Civil Procedure as to what information the VA should provide to veterans to establish that the doctor or other practitioner providing an opinion is competent to do so and allow the veteran to ensure that the doctor or other practitioner providing the opinion is the type of medical expert that was requested.

See FED. R. EVID. 702 ("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. CIV. PROC. 26(a)(2).

For example, in Mr. Goodwin's case, had the VA not been afforded the presumption of competency, but rather required to critically look at whether the opinion provided met the standards for expert testimony, the case never would have made its way to the CAVC and now be languishing in the land of "expeditiously treated remands."[22] Rather, the Board would have realized no information had been provided to substantiate that the doctor could offer an expert opinion in neurology, as was requested, and either immediately remanded for information to substantiate that the doctor was, in fact, an expert in neurology or to obtain an opinion by a doctor who was.

Such a requirement would not burden an over-worked system but would ensure that our veterans receive opinions from doctors or other practitioners who are qualified to answer the specific inquiry. *See Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994) (explaining the "issue with regard to expert testimony is not the

22. The Secretary "shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims." 38 U.S.C. § 7112 (2012). There is, however, no rules or guidelines for what this means. Mr. Goodwin's claim was remanded on May 18, 2015 – more than 570 days ago. Mr. Guerra's claim was remanded on July 23, 2015 – more than 500 days ago. Both of these cases were supposed to be handled "expeditiously."

qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question"). Moreover, this is information that the VA is in the best position to supply, as VA is either the employer of the medical expert or has contracted with him or her, and thus presumably has reviewed the expert's credentials. *See*, *e.g.*, Physician Credentialing Process, VA Careers, Health Care, DEP'T OF VETERANS AFFAIRS, *available at http://www.vacareers.va.gov/careers/physicians/credentialing.asp* (providing a link to a Guide for VA's nationwide online credentialing system (VetPro), *available at http://www.vacareers.va.gov/assets/common/print/VetProGuide.pdf*) (last visited Dec. 12, 2016).

These cases clearly demonstrate that VA's methods are not regular, that the veteran's ability to rebut the presumption is almost non-existent, and that the presumption does not actually serve the purpose of alleviating remands. The Supreme Court should grant Mr. Mathis's petition, consider the case, and reverse the Federal Circuit's inequitably created presumption of competency.

CONCLUSION

For the foregoing reasons, in addition to those stated in Mr. Mathis's petition, the Court should grant the petition.

Respectfully submitted,

JENNIFER A. ZAJAC
Counsel of Record
LEONARD J. SELFON
LINDA E. BLAUHUT
PARALYZED VETERANS OF AMERICA
801 18th Street, NW
Washington, DC 20006
(760) 639-0765
jenniferz@pva.org

Counsel for Amicus Curiae

December 2016

ATTACHMENT

ATTACHMENT — LETTER FROM THE COMPENSATION AND PENSION OFFICE

RAYMOND J. GOODWIN
5092 E. SPENCER FIELD RD.
PACE, FL 32571-9088

Dear Mr. Raymond J. Goodwin,

The following Compensation and Pension appointment(s) have been scheduled at the request of the VA Regional Office. It is very important that you appear for this examination. In accordance with 38 CFR 2.655, "when a claimant, WITHOUT GOOD CAUSE (bad health, death, or weather), fails to report for such examination, the exam request shall be returned to the Regional Office." Please do not let this happen to you.

THURSDAY AUG. 11, 2011 8:00 AM C&P MED JACC
DR. VILLORANTE Clinic

Please report 30 minutes prior to your appointment time at: Joint Ambulatory Care Center, 790 Veterans Way, Pensacola, Florida, is located one block east of Pensacola Junior College Warrington Campus, 5555 W. Hwy. 98. Check in at "DELTA" reception which is located on the first floor, at the end of the hallway on the left side.

Please bring the completed "history form" (enclosed with this letter) to your "medical" (MED) exam. This information may be needed for rating purposes. Eat as you would normally and please take your medications as prescribed. If you are eligible to receive travel reimbursement apply at "ALPHA" section.

Based upon what you are claiming some examinations can take several hours. Children are not permitted in exam rooms, please make your plans accordingly. VA regulations only allow a veteran to reschedule one time within 30 days. Upon receipt of this letter if you cannot make this appointment, please call IMMEDIATELY so other veterans can have this appointment opportunity. If you can not keep this appointment or if you have any questions, (850) 912-2353, (850) 912-2428, (850) 912-2144 or 1-866-927-1420 ext. 2353/2428/2144, Monday thru Friday, 8:00 am to 4:00 pm.

Compensation and Pension Office