2018-2136

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ERNEST L. FRANCWAY, JR.,
Claimant-Appellant,

v.

ROBERT WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in case No. 16-3738, Judge Amanda L. Meredith

RESPONSE TO PETITION FOR HEARING *EN BANC*

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November 7, 2018

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RESPONSE TO PETITION FOR HEARING *EN BANC*

Pursuant to this Court's October 10, 2018 letter and Rule 35 of the Federal Rules of Appellate Procedure and of the Rules of this Court, respondent-appellee Robert L. Wilkie, Secretary of Veterans Affairs, respectfully responds to claimant-appellant Ernest L. Francway, Jr.'s petition for hearing *en banc*. *En banc* consideration is not required because this claim is an inadequate vehicle for revisiting the presumption of competency and *Rizzo v. Shinseki*,[1] the presumption does not conflict with a decision of the United States Supreme Court or this Court, and because Mr. Francway has failed to establish that the case presents a question of exceptional importance.

BACKGROUND

Mr. Francway served in the United States Navy from August 1968 to May 1970. Appx1. In April 2003, Mr. Francway filed multiple claims for VA benefits, including entitlement to disability compensation for a back injury sustained in 1969. Appx2. After a Department of Veterans Affairs (VA) regional office denied his claim in January 2004, Mr. Francway appealed. *Id*.

Mr. Francway received medical opinions from three different medical professionals during the processing of his claim – an orthopedist, an internist, and a physician's assistant. A VA orthopedist examined Mr. Francway in May 2006,

[1] 580 F.3d 1288 (Fed. Cir. 2009).

providing medical opinions in May 2006, July 2007, and December 2011, and ultimately diagnosing him with spinal stenosis that was less likely than not related to service, but rather due to his age. Appx3. In January 2012, a different examiner, a VA internist, reviewed the record and interviewed Mr. Francway, diagnosing him with degenerative disk disease. Appx3-4. The internist concluded that the back disabilities spinal stenosis and degenerative disk disease are less likely than not related to an acute back strain that occurred 30 years prior. Appx4. In April 2012, Mr. Francway received a VA examination from a physician's assistant, who also concluded that the spinal stenosis was likely due to his age. *Id*. Following receipt of lay testimony related to Mr. Francway's back pain, the Board of Veterans' Appeals (board) remanded the claim for further development, including a directive that the claims file be reviewed by an "appropriate medical specialist" who could, among other things, reconcile any medical opinion with the lay testimony. *Id*. Thus, the orthopedist again examined Mr. Francway in September 2014, diagnosing him with lumbosacral strain and spinal stenosis and concluding that it was less likely that the spinal stenosis was due to an event in service, rather than natural age progression. Appx5. Subsequent to that examination, in March 2015, the VA internist opined that the lay testimony was insufficient to establish the existence of an initial in-service condition that would cause the post-service symptoms and findings. *Id*.

On October 13, 2016, the board issued a decision denying disability compensation for a lower back disability. *Id*. Mr. Francway appealed to the United States Court of Appeals for Veterans Claims (Veterans Court).

In a February 6, 2018 decision, the Veterans Court affirmed the board's decision. Appx12. Before the Veterans Court, Mr. Francway alleged that the VA failed to substantially comply with the board's remand order because, in his opinion, an internist, unlike an orthopedist, was not an "appropriate medical specialist" to opine on a back disorder. Appx9. The Veterans Court disagreed. The court first recognized that the VA benefits from a presumption that it has properly chosen a person qualified to provide a medical opinion. *Id*. The court continued that Mr. Francway "does not argue, nor does the record reflect, that he raised this issue below." *Id*. Nor did the record itself reasonably raise some irregularity in VA's selection of the internist in response to the board's remand order. Appx9-10.

In the alternative, the Veterans Court found that, even assuming he did not waive his argument, Mr. Francway failed to demonstrate prejudicial error because he did not explain why an internist may not qualify as an "appropriate medical specialist" under the board's remand order. *Id*. The Veterans Court thus found that Mr. Francway failed to explain how or why the March 2015 opinion does not substantially comply with the board's remand order. *Id*.

Mr. Francway appealed to this Court and moved for hearing *en banc*.

ARGUMENT

Hearing *en banc* is unwarranted because Mr. Francway's claim presents an inadequate vehicle to revisit the presumption of competency. Moreover, an *en banc* hearing "is not favored" and will ordinarily not be ordered unless it is "necessary to secure or maintain uniformity of the court's decisions" or when the case "involves a question of exceptional importance." Fed. R. App. P. 35(a). Mr. Francway's request meets neither condition.

I. This Appeal Presents An Inadequate Vehicle To Revisit The Presumption Of Competency

An *en banc* hearing is unwarranted because Mr. Francway's claim presents an inadequate vehicle to revisit the presumption of competency.

First, Mr. Francway's claim below was not a challenge to the competency of a medical examiner, but rather an allegation that the board failed to ensure substantial compliance with its remand order because an internist does not qualify as "an appropriate medical specialist" under that order. Appx9. Although the Veterans Court "note[d]" the presumption of competency in response to this argument, *see id*., the court's holding was not premised on a presumption that the internist was competent. Rather, the court denied Mr. Francway's challenge to the board's determination regarding substantial compliance. The Veterans Court explained that the board found substantial compliance with its remand order, and

although the board did not specifically address whether the examiner was an "appropriate medical specialist," it was not required to do so in light of Mr. Francway's failure to raise the issue below. *Id.* The Court noted that he did not assert that the record reasonably raised an irregularity in the VA's selection process. *Id.*

In the alternative, the Veterans Court found that, even assuming Mr. Francway was not precluded from raising the issue for the first time on appeal, he failed in his burden of demonstrating that the VA did not substantially comply with the remand order. Appx10. The court found that Mr. Francway provided no explanation for the assertion that "an internal medicine specialist may not qualify as 'an appropriate medical specialist[.]'" *Id.*

Thus, the Veterans Court's decision is not dependent upon the presumption of competency, but rather Mr. Francway's failure to raise the substantial compliance issue before the board, and his failure to meet his burden of demonstrating VA's lack of substantial compliance before the Veterans Court.[2]

[2] Had Mr. Francway raised a competency issue below, the record evidence was overwhelming against him as an orthopedist examined him and produced numerous consistent opinions regarding his claim, including a post-remand examination. Appx3-5. Curiously, he does not focus upon the orthopedist's opinions, which one would expect had he really intended to challenge the medical opinion evidence before the board and Veterans Court.

Second, as in *Mathis v. McDonald*, Mr. Francway did not raise a challenge to the competency of the examiner before the board, and thus waived the issue. 834 F.3d 1347, 1350 (Fed. Cir. 2016) (Hughes, J., concurring). Mr. Francway does not assert that he asked VA to provide information regarding the examiners' qualifications, and, despite being aware of the identity of the examiner who provided the March 2015 opinion, he did not raise his argument that an internist was not "an appropriate medical specialist" under the board's remand until his appeal to the Veterans Court. *See* Appx9. Therefore, this case, like *Mathis*, would not provide an appropriate vehicle for revisiting the presumption of competency. *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Sotomayor, J.) (noting that full review of VA's practice and the presumption would require a petition arising from a case in which VA denied benefits after declining to provide a medical examiner's credentials); *Mathis*, 834 F.3d at 1353 (Hughes, J., concurring) (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.").

Accordingly, even if this Court is inclined to revisit *Rizzo* and the presumption of competency, this appeal does not directly implicate the presumption, rendering it an inappropriate vehicle for such revisitation.

II. Hearing *En Banc* Is Unwarranted Because This Court's Precedents Are Uniform

This Court's precedents are uniform in explaining and applying the presumption that VA has properly chosen a person who is qualified to provide a medical opinion in a particular case. *E.g.*, *Mathis v. McDonald*, 643 F. App'x 968 (Fed. Cir. 2016), *en banc denied* 834 F.3d 1347, *cert. denied sub nom.*, *Mathis*, 137 S. Ct. 1994; *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 2661 (2014); *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011), *reh'g en banc denied*, 2010 WL 2637830; *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010); *Rizzo*, 580 F.3d 1288. Accordingly, there is no intra-circuit conflict for this Court to resolve. Indeed, this Court has already denied *en banc* consideration of this issue in *Mathis* and *Sickels*, and the Supreme Court denied certiorari in *Mathis* and *Parks*.

III. Hearing *En Banc* Is Unwarranted Because The Appeal Does Not Raise An Issue Of Exceptional Importance

A. The Presumption Is Not Inconsistent With This Court's Limited Jurisdiction

Mr. Francway contends that this Court exceeded its jurisdiction in *Rizzo* by creating a presumption that is not "[]tethered to any applicable statute or regulation," but rather created "out of whole cloth." Pet. 8, 9.

Mr. Francway is mistaken.

First, the *Rizzo* Court did not create the presumption "out of whole cloth," but rather affirmed the Veterans Court's reliance upon a prior Veterans Court decision that found no error in the board's implicit presumption of competency. *Rizzo*, 580 F.3d at 1290-91 (citing *Cox v. Nicholson*, 20 Vet. App. 563 (2007)). The Court "adopt[ed] the reasoning of the Veterans Court in *Cox*[,]" when holding that VA need not affirmatively establish a medical examiner's competency as a precondition for relying upon the examiner's opinion. *Id*. at 1291.

Second, *Rizzo* and the presumption of competency do not represent a sea change in the law as Mr. Francway implies. Although Mr. Francway is correct that the presumption is not explicitly stated in a statute, he ignores that this Court explicitly declined to create a new, non-statutory requirement for VA to establish the competency of medical examiners in *Rizzo*. This Court based its holding in *Rizzo* upon its determination that there is "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." 580 F.3d at 1291. As the Court explained, Mr. Rizzo asked the Court to "impose a new standard requiring VA to affirmatively establish on the record the qualifications of an expert witness before the Board may rely upon the opinion of that witness . . . ." *Id.* at 1290.

In fact, the Court found that its holding was consistent with the preexisting statutory scheme. For instance, the Court found that it was not inconsistent with 38 U.S.C. § 5103A(a)(1) "because VA does not require a claimant such as Mr. Rizzo to provide any evidence that would establish the competence of a VA examiner in order to substantiate a claim for benefits[.]" 580 F.3d at 1292. Nor does section 5103A specify that VA must associate records related to an examiner's qualifications with the claims file in every case. Rather, Congress has delegated to VA the authority to establish evidentiary rules, including "regulations with respect to the nature and extent of proof and evidence" and "the methods of making investigations and medical examinations." 38 U.S.C. § 501(a). VA has not promulgated a regulation requiring an examiner's qualifications to be documented in the claims file.

In addition to finding no statutory authority for Mr. Rizzo's claim, this Court also found its affirmance of the use of the presumption of competency to be "support[ed]" by the presumption of regularity. *Rizzo*, 580 F.3d at 1292. The Court explained that the presumption of regularity permitted courts to presume that what appears to be regular is regular, and shift the burden to demonstrate otherwise. *Id*. (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)). While the precise question of whether the competence of a VA examiner may be presumed has not been squarely addressed outside this circuit (and due to this

Court's exclusive jurisdiction, likely never could be), Supreme Court authority strongly suggests *Rizzo* is well inside the outer bounds of the scope of the presumption. *See United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (review accorded to a particular employee may be presumed fair if Merit Systems Protection Board's procedures are themselves fair because presumption attaches "to the actions of Government agencies"); *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (presumption of regularity generally accorded to prosecutorial decisions implies "the presumption that a prosecutor has not violated equal protection").

Third, the decision upon which Mr. Francway relies, *O'Melveny & Myers v. F.D.I.C.*, supports *Rizzo* rather than undermines it. Pet. 9-10 (citing 512 U.S. 79 (1994)). Specifically, Mr. Francway contends that, in *O'Melveny*, the Supreme Court found that a Federal statute's enumeration of specific rights related to receivership precluded the creation of common-law receivership rights. *Id*. (citing 512 U.S. at 86-87). Thus, because the VA benefits system includes presumptions, albeit ones unrelated to the competency of medical examiners, courts are prohibited from creating new presumptions. *Id*. Mr. Francway is mistaken. The appellant in *Rizzo* and Mr. Francway are the parties advocating the creation of new law by amending the VA statutory system to add a new requirement – VA's presentation of "affirmative evidence of a physician's qualifications in every case

as a precondition for the Board's reliance upon that physician's opinion." 580 F.3d at 1291. Moreover, the presumption of competency was not created-anew, but rather is rooted in part in the presumption of regularity, a presumption that applies universally to Federal officials and predates the present VA benefits system. In fact, the Veterans Court has applied the presumption of regularity to all manner of VA processes and procedure. *E.g.*, *Woods v. Gober*, 14 Vet. App. 214, 220 (2000) (collecting cases applying presumption of regularity to issues such as the examination and consideration of service medical records).

Fourth, Mr. Francway contends that the presumption of competency is inconsistent with the jurisdictional limitations of this Court and the Veterans Court because the presumption requires a finding of a factual predicate of consistent procedures, and neither court possesses jurisdiction to make factual findings in the first instance. Pet. 11. Mr. Francway does not identify improper fact finding by any court. Nor was fact finding necessary for the application of the presumption of competency. Rather, as we explain above, the presumption is based upon the absence of the legal requirement for VA to present affirmative evidence of a physician's qualifications prior to relying upon the opinion.

Moreover, although the Veterans Court has at times found it necessary to inquire as to the details of VA procedures before applying the presumption of

regularity,[3] and this Court has held that the Veterans Court cannot rely on extra-record evidence to make a finding of fact in the first instance,[4] such an inquiry is not always required by this or other courts. *See Latif v. Obama*, 677 F.3d 1175, 1182 (D.C. Cir. 2012) ("Courts regularly apply the presumption to government actions and documents that result from processes that are anything but 'transparent,' 'accessible,' and 'familiar.'"). Notably, it does not appear that this Court or the Veterans Court in *Miley* or *Butler* required a factual inquiry into the details of VA's mailing procedures. *See Miley v. Principi*, 18 Vet. App. 411 (table) (2003), *aff'd*, 366 F.3d 1343; *Butler v. West*, 17 Vet. App. 244 (table) (1999), *aff'd*, 244 F.3d 1337. Rather as this Court recognized in *Kyhn*, the presumption of regularity can also be premised upon independent legal authority. 716 F.3d at 577 (citing *Miley*, 366 F.3d at 1346-47 (presuming that VA officials acted consistently with their duty under 38 U.S.C. § 7105(b)(1) to mail the veteran notification of a rating decision); *Butler*, 244 F.3d at 1340-41 (presuming VA officials acted consistently with their duty under 38 U.S.C. § 5104(a) to mail the veteran notice of appeal rights)). Similarly, it was permissible for this Court in *Rizzo* to presume that VA officials acted consistently with their duty under 38

[3] *E.g.*, *Kyhn v. Shinseki*, 24 Vet. App. 228, 233 (2011).

[4] *Kyhn v. Shinseki*, 716 F.3d 572, 577 (Fed. Cir. 2013).

U.S.C. § 5103A(d)(1) to select an appropriate examiner to provide a medical examination or opinion.

B. The Presumption Of Competency Is Consistent With The Pro-Claimant Nature Of The VA Adjudicatory System

Mr. Francway asserts that the presumption is inconsistent with the VA benefits system because it conflicts with (1) the duty to assist pursuant to 38 U.S.C. § 5103A(a); (2) the benefit-of-the-doubt rule pursuant to 38 U.S.C. § 5107(b); and (3) the pro-veteran canon of construction. Pet. 15-16. Contrary to this assertion, the presumption is not inconsistent with the pro-claimant nature of the VA benefits system, but rather works within the system, which requires the VA to assist claimants, both represented and *pro se*, with the development of their claims.

The benefit-of-the-doubt rule is not implicated by the presumption of competency – the presumption does not involve the approximate balance of positive and negative evidence, but rather the competency of medical examiners. 38 U.S.C. § 5107(b). Nor does the presumption of competency implicate the pro-veteran canon of statutory construction. Mr. Francway does not identify a statute requiring VA to present affirmative evidence of an examiner's qualifications in every claim to which the canon should be applied.

Regarding the duty to assist, Mr. Francway ignores that the presumption eases the administrative burden related to the over one million yearly disability evaluations, and does not conflict with the VA's obligation to assist veterans in the

development of their claims. As Judge Hughes recognized in his concurrence in *Mathis*, there is "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." 834 F.3d at 1353.

Specifically, the presumption of competency generally means that VA is not required to present evidence relating to the medical expert's competence in every case because such competence is presumed. *Parks*, 716 F.3d at 585. But once a claimant raises the competency of a medical expert, such records could become relevant and the board would have an obligation, at a minimum, to address whether VA was required to obtain such records. *See Mathis*, 834 F.3d at 1350 (Hughes, J., concurring); *Nohr v. McDonald*, 27 Vet. App. 124, 133-34 (2014) (directing the board to address a claimant's request for information on an examiner).

This is so because the presumption does not operate in a vacuum, but rather within the existing system, which requires the VA to assist veterans with their claims. Specifically, pursuant to 38 U.S.C. § 5103A(a), VA possesses a duty to assist, in that it must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit. . . ." This duty to assist directly addresses medical examinations and opinions, requiring VA to "provid[e] a medical examination or obtain[] a medical opinion when such an examination or opinion is necessary to make a decision on the claim." *Id*.

§ 5103A(d)(1). When a veteran requests information on an examiner's qualifications, "the VA's duty to assist requires it to consider a claimant's request for further information, including information about an examiner's competency." *Mathis*, 834 F.3d at 1350 (Hughes, J., concurring). As Judge Hughes's concurrence in *Mathis* emphasized, the board "has frequently justified providing veterans with information regarding examiners' qualifications based on its duty to assist." *Id*. at 1349 (citations omitted).

If the VA declines to provide qualification information, the Veterans Court or the board may direct compliance, and this Court could review for improper legal restrictions and any constitutional violations. *Id*. (citations omitted). Here, as in *Mathis*, Mr. Francway does not assert that he requested and was denied information regarding the examiner's qualifications, nor did he raise the issue of the examiner's competence before the board; therefore, the scope of VA's duty to assist is not before the Court in this case.

Moreover, in addition to the duty to assist, the presumption is consistent with the VA benefits system's nature because the presumption will not attach when, regardless of whether the veteran raises a competency objection, the record independently demonstrates an irregularity in the process for selecting the examiner. The Veterans Court addressed precisely this situation in *Wise v. Shinseki*, 26 Vet. App. 517 (2014), where the board requested an advisory medical

opinion from the VHA, which was prepared by a VA staff cardiologist who "expressly disclaimed any expertise in psychiatry." *Id*. at 522, 525. The Veterans Court explained that the "presumption [of competency] does not attach when VA's process of selecting a medical professional appears irregular." *Id*. at 525 (citations omitted). The Veterans Court continued that where an examiner admits to a lack of necessary expertise to form an opinion, the resulting "appearance of irregularity in the process . . . prevents the presumption of competence from attaching, and the Board must therefore address the medical professional's competence before relying on his or her opinion." *Id*. at 527. Here, the Veterans Court noted that Mr. Francway did not assert that the record itself reasonably raised some irregularity in VA's selection process. Appx9-10.

Although Mr. Francway contends that the presumption impairs a veteran's efforts to obtain disability compensation because "VA usually refuses to supply information that might allow a veteran to challenge the presumption without an order" from the board, there is no support for the conclusion that VA "usually" acts in this manner. *See* Pet. 15-16 (citing *Mathis*, 137 S. Ct. at 1995 (J. Gorsuch, dissenting)). Rather, as Judge Hughes noted in his concurrence in *Mathis*, the Veterans Benefits Administration Manual includes a section on "Questions About Competency and/or Validity of Examinations" and directs adjudicators to *Nohr* for "more information on a claimant's request for information, or complaints, about a

VA examination or opinion." 834 F.3d at 1352. Moreover, VA is in the process of considering additional procedures on this topic. The Court should deny *en banc* review in order to permit the VA to fully consider the matter in accordance with its administrative authority. This is especially so given that, as we detail above, Mr. Francway did not raise his argument that an internist was not "an appropriate medical specialist" until his appeal to the Veterans Court. *See* section I.

Accordingly, the presumption of competency operates within the benefits system, which includes a duty to assist veterans on the part of the VA as well as an obligation to entertain all issues reasonably raised by the record. The presumption is also consistent with the pro-claimant nature of the VA benefits system. In fact, adoption of Mr. Francway's approach would jeopardize veterans' ability to secure benefits. Any rule requiring a demonstration of competency prior to the board's reliance upon a medical opinion would logically apply to opinions that support claims as well as those that cast doubt upon them.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny Mr. Francway's *en banc* petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 27(d)(2)(A)

Pursuant to Rule 35(b)(2)(A) of the Federal Rules of Appellate Procedure, respondent-appellee's counsel certifies that this response complies with the Court's type-volume limitation rules. According to the word-count calculated by the word processing system with which this motion was prepared, the response contains a total of 3,900 words

/s/William J. Grimaldi

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 7th day of November, 2018, a copy of the foregoing "RESPONSE TO PETITION FOR HEARING *EN BANC*" was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/William J. Grimaldi